SUPREME COURT
STATE OF FLORIDA

AMERICAN HEALTHCORP OF VERO BEACH, INC.,

Appellant/Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, et. al.,

Appellee/Respondent.
_____/

CASE NO: 67448
DCA CASE NO: AX-36

BRIEF OF AMICUS CURIAE
INDIAN RIVER COUNTY HOSPITAL DISTRICT

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PRELIMINARY STATEMENT

AMERICAN HEALTHCORP OF VERO BEACH, INC.; Appellee below and Petitioner before this Court shall be referred to as Petitioner or American Healthcorp. STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, ET. AL.; Appellants below and Respondents before this Court shall be referred to as HRS. INDIAN RIVER COUNTY HOSPITAL DISTRICT, appearing as Amicus Curiae below and as Amicus Curiae before this Court, hereinafter shall be referred to as Indian River. Indian River has filed this brief in support of HRS.

STATEMENT OF THE CASE AND FACTS

Indian River adopts the statement of the case and facts as filed by HRS with the following additions. Indian River is a non-profit public hospital district within the elected governing body created by Special Act of the Legislature. Indian River maintains and operates an existing public hospital in Vero Beach, Indian River County, Florida, known as Indian River Memorial Hospital. Indian River would be seriously damaged by the approval of the American Healthcorp application.

Indian River requested leave of the Circuit Judge to intervene as a party respondent which was denied. However, Indian River did appear as Amicus Curiae in the Circuit Court and in the First District Court of Appeal and filed Memoranda of Law in support of the position advanced by HRS.

SUMMARY OF ARGUMENT

The approval of a default certificate of need (CON), as requested by American Healthcorp, would destroy the due process rights of substantially affected persons. In this specific instance, Indian Rivers' due process rights will be denied if American Healthcorp is entitled to a CON. Indian River will lose all opportunity to contest the need for a 120 bed competing hospital in its hospital service district.

The rights of the public to have a regulated system of health care to contain costs and provide access to quality services will be denied if American Healthcorp is entitled to a CON by default.

The intent of the legislature to provide a carefully regulated system for the provision of health care in Florida will be seriously imparied. It has never been the intent of the legislature to provide for the issuance of a CON without a review of compliance with statutory criteria.

It is not an appropriate remedy to issue a Writ of Mandamus to force HRS to issue a CON by default. Section 381.494(8)(c), Fla. Stat., provides an adequate remedy for an applicant who is aggrieved by delay in the processing of a CON applicant. This remedy is to force the department to render a decision, not to issue a CON.

Issuing a default CON is contrary to federal law. Florida certificate of need law is carefully enacted to be in compliance with federal law. Federal law requires that an applicant who has suffered delay in the review of his application for a CON may take appropriate legal action to force the agency to approve or disapprove the application. Federal regulations enacted to implement this statute provide that a CON will not be issued merely because the agency failed to reach a decision.

AMERICAN HEALTHCORP IS NOT ENTITLED TO BE GRANTED A CERTIFICATE OF NEED BY DEFAULT, PURSUANT TO SECTION 120.60(2), FLA. STAT.

A. The granting of a certificate of need by default, would deprive substantially affect persons of their due process rights to initiate formal administrative proceedings pursuant to Section 120.57(1), Fla. Stat. (1983)

A certificate of need (CON) is a license, (Section 120.52(8), Fla. Stat.) which like any license granted by the state is preliminary in nature and can be challenged by substantially affected parties. Capelletti Bros., Inc. v. DOT, 362 So.2d 346 (Fla. 1st DCA 1978); Boca Raton Artificial Kidney Center, Inc. and Delray Artificial Kidney Center, Inc. v. Florida Department of Health & Rehabilitative Services and West Boca Raton Artificial Kidney Center, 10 FLW 1975, (Fla. 1st DCA, August 23, 1985). (Copy enclosed in Appendix as A-1).

Clearly and simply the granting of a default certificate of need deprives substantially affected parties of their right to a hearing.

Additionally, the deprivation of rights of substantially affected persons to challenge the preliminary agency decision deprives the agency of necessary input into its decision making process. Florida Department of Transportation v. J.W.C., 396 So.2d 778 (Fla. 1st DCA 1981).

In this specific instance, Indian River Hospital, as an existing hospital and as an applicant for a CON, is a substantially affected person entitled to a hearing on any application. Collier Medical Center, Inc. v. State, Department of Health and Rehabilitative Service, 462 So.2d 83 (Fla. 1st DCA 1985). American Healthcorp has voluntarily dismissed its administrative challenge to the agency's denial of its application and has relied solely upon this litigation.

Section 381.494(8), Fla. Stat. provides that:

> The Department is designated as the single state agency to issue, revoke, or deny certificates of need and to issue, revoke or deny exemptions from certificate of need review in accordance with the district plans and present and future federal and state statutes.

In reviewing certificate of need proposals, HRS is required to make such investigations and inquiries as are necessary to enable HRS to approve or deny a CON. HRS reviews individual applications in accordance with administrative procedures established by HRS and the Statewide Health Council. The authorizing statute requires that these procedures shall include, but not be limited to a public hearing, if requested by the applicant or an affected person, that allows applicants and other interested parties reasonable time to present their positions

and to present rebuttal information. (Section 381.494(6)(a) and (b)1, Fla. Stat. (1983). HRS is required to determine the reviewability of applications and shall review applications for a CON for health care facilities in context with the statutory criteria. (Section 381.494(6)-(c) 1-13. and Section 381.494(6)(d), Fla. Stat. (1983).) Department of Health and Rehabilitative Services v. Johnson & Johnson Home Health Care, 447 So.2d 361 (Fla. 1st DCA 1984).

Additionally, an applicant or a substantially affected person aggrieved by the issuance, revocation or denial of a CON, shall have the right, within not more than 30 days of the date of notice of the issuance, revocation or denial of such Certificate by the Department, to seek relief according to the provisions of the Administrative Procedure Act (including de novo review and a formal hearing) and to seek judicial review of decisions resulting from hearings of the Administrative Procedure Act. (Section 381.494(8)(e), Fla. Stat. (1983).)

The Act affords not only the applicant, but any substantially affected person who is aggrieved by an adverse decision of HRS, de novo review of an HRS decision and a comparative hearing in which the competing applications are considered simultaneously. See, Bio-Medical Applications of Clearwater, Inc. v. Dept. of HRS, Office of Community

Medical Facilities, 370 So. 2d 19 (Fla. 2nd DCA, 1979), and Ashbacker Radio Corp. v. F.C.C. 326 U.S. 327 (1945). To grant a certificate of need by default, to build a 120 bed hospital after HRS has comparatively reviewed the application with similarly situated applications and has chosen to deny the application, disregards the rights of those other existing facilities, applicants and the public, who are substantially affected by the issuance of this CON.

Indian River County Hospital is an existing hospital which is located in close proximity to the site of the proposed American Healthcorp hospital. Indian River was granted leave to intervene as a substantially affected party in the administrative proceeding in which American Healthcorp challenged the denial of its CON application. American Healthcorp then voluntarily dismissed this administrative case, denying Indian River the opportunity to present evidence contesting the need for the proposed hospital. (American Healthcorp v. DHRS, DOAH Case No. 84-0053).

Indian River was subsequently denied leave to intervene in the circuit court proceeding in this case.

If American Healthcorp had administratively forced HRS to review its application in the March review cycle, Indian River would have had standing to be a party in any administrative proceeding resulting from that decision.

By failing to exhaust its administrative remedies and improperly petitioning for a writ of mandamus in circuit court, American Healthcorp has frustrated the purposes of the certificate of need law to allow substantially affected parties an opportunity to protect their recognized rights.

If a certificate of need is granted by default, American Healthcorp will successfully have avoided the statutorily mandated review process, will have avoided the effect of public hearings, HRS review, and a fact finding determination pursuant to a formal administrative proceeding.

As noted above, the Health Facilities and Health Services Planning Act provides procedural protections affording existing institutions and interested parties a public hearing in which applicants and other interested parties are given reasonable notice and are allowed to present their respective positions, after which written findings and recommendations are filed as a public record. The process culminates in the issuance or denial of a CON. See Humana of Florida, Inc. v. Keller, 329 So.2d 420, 421 (Fla. 1st DCA 1976).

In Humana, supra, Humana sought a declaratory judgment and injunction complaining that the Bureau of Medical Facilities had issued a certificate of need by default, not allowing for hearing for substantially affected persons. The First District Court of Appeal applied the

1973 edition of the statute which required the approval of an application (by the area-wide council) within 90 days if it was not acted upon. No public hearing under the statutory framework was held on the application and the Court held that the statutory requirement for notice and hearing cannot be mooted by bureau delay or evasion. Humana at 421. As will be explained further below, the 1982 version of the Act requires notice and right to administrative hearing to substantially affected persons, all of which will be denied if American Healthcorp is granted a certificate of need. Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, supra, setting forth the comparative hearing doctrine.

In short, the Legislature has mandated that HRS review applications for CON and, in so doing, make a learned and thorough evaluation, after public hearing, as to whether or not a particular health care provider or providers should be granted a CON. HRS is also required to make a timely decision as to whether to grant or deny the CON application. If HRS fails to render a timely determination, the aggrieved health care provider has the statutory right to take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force HRS to render a determination, i.e., to force HRS to exercise its discretion for the denial

or granting of a CON. The agency's decision involves an exercise of discretion and is not a ministerial duty. General Care Corp. v. Forehand, 329 So.2d 49, 50 (Fla. 1st DCA 1976).

To allow American Healthcorp to obtain a CON by default would frustrate the declared public policy stated above and would also violate and be inconsistent with the express remedial provisions as set forth in Section 381.494(8)(c), Fla. Stat. This provision is the latest expression of the Legislature on this subject and should prevail. (Askew v. Schuster, 331 So.2d 297, 300 (Fla. 1976).)

B. Section 381.494(8)(c), Fla. Stat., provides a remedy to applicants to force HRS to grant or deny their CON applications; use of petition for writ of mandamus to compel issuance of a certificate of need is not a proper remedy.

In State, Department of Health and Rehabilitative Services v. Hartsfield, 399 So.2d 1019, 1020 (Fla. 1st DCA 1981), the Court stated in part as follows:

> In order to show entitlement to the extraordinary writ of mandamus, the petitioner must demonstrate a clear legal right on his part, an indisputable legal duty on the part of respondents, and that no other adequate remedy exists. State ex rel. Eichenbaum v. Cochran, 114 So.2d 797 (Fla. 1959). State ex rel.

> Blatt v. Panelfab International Corp., 314 So.2d 196 (Fla. 3d DCA 1975). Mandamus is available to enforce an established legal right but not to establish that right. Slaughter v. State ex rel. Harrell, 245 So.2d 126 (Fla. 1st DCA 1971). State v. Gamble, 339 So.2d 694 (Fla. 2d DCA 1976)." (Emphasis Supplied))

See also, Shevin ex rel. State v. Public Service Commission, 333 So.2d 9 (Fla. 1976) and Heath v. Bechtell, 327 So.2d 3 (Fla. 1976). Moreover, it has been said that "[I]f issuance of the Writ will not promote substantial justice or would lend aid to the effectuation of a probable injustice, the Court may properly decline to grant the Writ." State ex rel. Haft v. Adams, 238 So.2d 843, 844 (Fla. 1970) quoting from State v. Burns, 109 So. 195 (Fla. 1st DCA 1959).

First, it is clear that American Healthcorp does not have a legal right to the award of a CON by default and similarly, HRS has no indisputable legal duty to award American Healthcorp a CON by default. Second, the Legislature has afforded American Healthcorp, and other health care providers similarly situated, a viable and adequate remedy which can be used to "force the Department to render a determination" and to otherwise act on a particular health care provider's application for CON. (Section 381.494(8)(c), Fla. Stat.)

The First District Court of Appeal has clearly held that the remedy to applicants for certificates of

need who are aggrieved by a delay in determination of their applications, is to force the Department to make a determination, not to seek a writ of mandamus in the circuit court. In an unreported opinion in Johnson & Johnson Home Health Care, Inc. v. Department of Health and Rehabilitative Services, First District Court of Appeal, Case #AX-154, Feb. 27, 1984 (attached in Appendix as A-2) the court concluded as follows:

> Upon consideration of the petition for writ of mandamus, seeking an order requiring respondent to deem petitioner's certificate of need applications approved, we note that the remedy for CON applicants aggrieved by a delay in determination of their applications, established in §381.494(8)(c), Florida Statutes (1983), is "appropriate legal action, including relief pursuant to the Administrative Procedures Act, to force the department to render a determination." (emphasis supplied). The language of this statute does not appear to encompass the remedy set forth in §120.60(2), Florida Statutes (1983) (license applications not acted on within the prescribed time periods are deemed approved).
>
> Therefore, the relief sought by this petition was to force the department to render a determination of petitioner's applications. Both parties state that a determination has already been made of those applications. Therefore, the petition for writ of mandamus is denied, without prejudice to any administrative remedies which may be available to petitioners.

Likewise, in Balsam v. Department of Health and Rehabilitative Services, 452 So.2d 976 (Fla.1st DCA 1984), the petitioners had timely submitted an application for a certificate of need which was not acted upon by HRS because HRS had imposed a moratorium on the review of these applications. The Balsam petitioners properly instituted an administrative appeal challenging the validity of the moratorium. Although the First District Court of Appeal held that the moratorium was indeed an invalid rule, they held that the proper remedy was for HRS to make a decision on the Balsam application if they had not already done so.

> We note that the remedy for certificate of need applicants aggrieved by a delay in determination of their applications is established in §381.494(8)(c), Florida Statutes. If appellant's application is yet to be processed, HRS shall make its determination as soon as possible. (Balsam, supra, at p. 978.)

The cases cited by Petitioner in support of its entitlement to a writ of mandamus are not applicable to the present issues. American Healthcorp cites Solomon v. Sanitarian Registration Board, 155 So. 2d 353 (Fla. 1963) to support its position that a writ of mandamus is an appropriate remedy in the case before the Court. But that case concerned a licensing authority's ministerial duty to grant a license under a grandfather clause enacted

by the legislature. The legislature, in effect, granted no discretionary authority to the agency and provided that if an applicant met certain qualifications, he was entitled to registration without an examination.

By providing this statutory grandfathering clause the legislature was still enforcing the regulatory purposes of the licensing authority. Licenses could not be granted indiscriminately without regard to whether or not the licensee was qualified.

American Healthcorp urges that its application is similar to the licensee's application above, is now outside the scope of the regulatory agency and is not subject to satisfying any of the statutory criteria. This is contrary to the remedy provided in Section 381.494(8)(c), Fla. Stat., and there is no provision analogous to the grandfathering clause in Solomom, supra, which supports American Healthcorp's contention.

In Fasenmeyer v. Wainright, 230 So.2d 129 (Fla. 1969), also cited by American Healthcorp, this Court held that a writ of mandamus would not issue to force the Florida Division of Corrections to withdraw a detainer lodged against the inmate petitioner who had escaped the Florida authorities and subsequently has been incarcerated in California.

This Court held that there were clearly no equitable principles evident in the proceeding and that the petitioner had no clear legal right to the writ.

As in Fasenmeyer, supra there is no clear legal right of petitioner to have a writ of mandamus issue. When considering equitable principles it is clear that the issuance of a writ of mandamus to petitioner will result in substantial injustice to the public and other interested parties.

American Healthcorp had adequate administrative remedies to force a decision on its CON application. American Healthcorp could have petitioned for an administrative adjudication of HRS' decision to place its application in a subsequent batch cycle. The applicant could have petitioned for an administrative appeal of HRS' refusal to act with respect to its application. American Healthcorp could have petitioned for an administrative determination that the moratorium placed on applications in the March 15th batch cycle was an invalid rule as did the petitioners in Balsam, supra.

American Healthcorp has simply overlooked or intentionally avoided adequate and available legal remedies, has demonstrated no clear legal right to a default certificate of need and has demonstrated no indisputable legal duty on the part of the HRS.

Furthermore, issuance of this Writ promotes substantial injustice by denying substantially affected persons their due process rights to contest the issuance of this certificate of need.

It will promote substantial injustice to the community which will experience significant overbedding by the construction of unneeded facilities granted merely because of bureaucratic delay on the part of HRS. This will result in unnecessary duplication of services and increased health care costs.

C. It is contrary to the legislative intent expressed in the Health Facilities and Health Services Planning Act to grant a certificate of need by default when HRS fails to act upon a CON application within the specific time frames.

The use of the extraordinary remedy of a writ of mandamus to award CON's by default simply because of the delay of HRS when other adequate remedies are available is contrary to the intent of the Legislature. The Legislature envisions that the award of CONs be based on a careful and thorough examination of the health care services and needs in the community and the applicant's ability to satisfy those needs according to carefully specified statutory criteria.

The First District Court of Appeal has recently expressed concern that health care facilities might become operational prior to a final determination by the agency that the applicant can satisfy statutory criteria. In Boca Raton Artificial Kidney Center, Inc., supra, the court stated:

> That such a situation could exist, where patients are treated in a facility prior to a final determination that the facility provide quality care, is evidence to us that HRS has failed to properly implement the Health Facilities and Health Services Planning Act in accord with established principles of administrative law. . . . and that . . . to allow a health care facility to open prior to a final agency determination as to whether it can provide quality care gives rise to a possibility for 'irreparable injury' to the public. Boca Raton, at p. 1976.

Certainly the granting of a default CON to American Healthcare after HRS preliminarily denied the application will cause "irreparable injury" to the public and is repugnant to the purposes of the Health Facilities and Health Services Planning Act.

Section 381.494(8)(c), Fla. Stat., governs portions of the processing of certificate of need applications under the Health Facilities and Health Services Planning Act. Section 120.60(2), Fla. Stat., of the Administrative Procedures Act, governs, in general terms, the processing of license applications by an agency.

Section 381.494(8)(c), Fla. Stat., and Section 120.60(2), Fla. Stat., should be read in para materia. Doheny v. Grove Isle, Ltd., 442 So.2d 966, 974 (Fla. 1st DCA 1983).

Where possible, Courts are required to give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107, 1111 (Fla. 1980). "The courts presume the statutes are passed with knowledge of prior existing statutes and that the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so. Where possible, it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act." Woodgate Development v. Hamilton Investment Trust, 351 So.2d 14, 16 (Fla. 1977). It is an axiom of statutory construction that the legislature would not enact a purposeless and, therefore, useless piece of legislation. Sharer v. Hotel Corporation of America, 144 So.2d 813, 817 (Fla. 1962). It is the duty of this Court to uphold and give effect to all provisions of a legislative enactment, and to adopt a reasonable view that will do so. Tyson v. Lanier, 156 So.2d 833, 838 (Fla. 1963).

It is also a rule of statutory construction that a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms. Kiesel v. Graham, 388 So.2d 594, 595 (Fla. 1st DCA 1980). See also, Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959), quoting Stewart v. De Land - Lake Helen Special Road and Bridge District, 71 Fla. 158, 71 So.42, 47 (1916). As noted in Adams v. Culver, supra,

> The statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.

Culver at 667. Finally, it is also the duty of this Court to regard each act as embodying a solemn legislative purpose to permit both full reach and, when conflicting policy makes that impossible, to give effect to the latter, more specific expression of the legislative will. Marston v. Gainesville Sun Pub. Co., Inc., 341 So.2d 783, 786 (Fla. 1st DCA 1976).

In Kiesel v. Graham, supra, the issue presented was whether an action on the judgment of the United States District Court for the Southern District of Florida, was governed by a five-year statute of limitation or a twenty year statute of limitation. Section 95.11(1) provided

that: "an action upon a judgment or decree of a court of record in this state" shall commence within twenty years of said judgment or decree, while Section 95.11(2)(a) provided that "an action on a judgment or decree of ... any court of the United States" shall commence within five years of said judgment or decree. The Court stated that both statutory provisions appeared to govern the instant situation but noted the apparent conflict. In this situation, the Court noted the phrase "of a court of the United States" is more specific than "of a court of record in this state". The former clearly limited its scope to courts of the United States, while the latter could include both federal and state courts, as long as they are in Florida. The First District Court of Appeal concluded that Section 95.11(2)(a) operated as an exception to, or a qualification of, the more general terms of Section 95.11(1) following the precedent of Adams v. Culver, supra, and other cases.

The Court also noted this result was additionally supported by the corollary principle "that the last expression of legislative will is the law, and, therefore, that the last in point of time or order of arrangement prevails. This rule is applicable where the conflicting provisions appear in different statutes . . ., or in different provisions of the same statute (citations omitted)". Id. at 596 (E.S.

by Court). Hence, this Court concluded that the more specific statute, Section 95.11(2)(a), governed the facts of the case. See also, Florida Dept. of HRS v. Gross, 421 So.2d 44, 45 (Fla. 3d DCA 1982).

Section 120.60(2), Fla. Stat., sets forth principles of general application prescribing sanctions to be applied when license applications are not acted on within the prescribed time periods set forth in the statute. The particular language of Section 120.60(2), Fla. Stat., at issue here was enacted by the Legislature in 1976. Conversely, in 1977, the Legislature, in amending Section 381.494, Fla. Stat., specifically provided procedures and time limitation with regard to review and approval of CON applications and specifically provided that if HRS failed to render a determination within the time period set forth, "it shall be deemed that the application for a CON is denied." Chapter 77-400, Laws of Florida.

In 1980, the Legislature deleted this language from Section 381.494, Fla. Stat., and provided specific procedures which an applicant may employ in the event HRS fails to render a determination within the time period set forth in the statute. In particular, the Legislature has said that "the applicant may, within 30 days of the day the department should have rendered a determination,

take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the department to render a determination." Chapter 80-187, Laws of Florida, s.4 and 381.494(8)(c), Fla. Stat. (1983).

Section 381.494(8)(c), F.S. (1983), is a more specific statute governing a particular subject, i.e., CON review procedures and sanctions, and is controlling over Section 120.60(2), Fla. Stat. (1983), which is a statutory provision covering a similar but different subject, i.e. licensing, in more general terms. In addition, Section 381.494(8)(c), Fla. Stat. (1983), is the latest expression of legislative will as between conflicting provisions and should prevail in this case.

American Healthcorp claims that applying Section 120.60(2) Fla. Stat. to its application for a CON does not deprive Section 381.494(8)(c) from its "valid field of operation", the test cited in State v. Dunman, 427 So.2d 166 (Fla. 1983).

But Dunman specifically states that:

> an intent to repeal prior statutes or portions thereof may be made apparent when there is positive and irreconcilable repugnancy between the provisions of a later enactment and those of prior existing statutes. Dunman at p. 168.

Repugnancy and irreconcilability exist among these two statutes if applied as American Healthcorp contends they must be applied. Sections 381.493-499, Fla. Stat., prescribe a uniform method of processing applications by health care institutions desiring to expand health care facilities in a local community. The Act is carefully planned to promote the coordination of capital expenditure for health care facilities. The Act contemplates that every consideration be given to the elimination of unnecessary duplication of health services and the provision of health services which are not currently available or which are insufficiently provided within the community. (Section 381.493(2), Fla. Stat. The Act provides for a consistent and coordinated review process which allows the providers, consumers and public agencies to assist in achieving its goals.

If the provisions of 120.60(2) are applied to the grant of a CON by default, it will nullify the entire regulatory field of operation of Chapter 381 and will result in irreparable injury to the public. To allow an applicant to circumvent this highly regulated process is repugnant to the legislative intent expressed in Section 381.493(2), Fla. Stat. These two provisions cannot be reconciled. Section 381.494(8)(c), Fla. Stat., will be deprived of its valid

field of operation if Section 120.60(2), Fla. Stat., is applied in the manner urged by American Healthcorp.

Petitioner also relies heavily on World Bank v. Lewis, 406 So.2d 541 (Fla. 1st DCA 1981). In this case the First District Court of Appeal granted the application for a bank charter to the applicant when the comptroller failed to act on the bank charter within the prescribed period of time.

Unlike the case now before this Court, the default permit was issued pursuant to the express statutory provision in Section 120.60(4)(c), Fla. Stat. This provision relates to applications for a new bank and provides that:

> . . .an application for such a license . . .not approved or denied within the 180 day period or within 30 days after conclusion of a public hearing on the application, whichever is latest, shall be deemed approved subject to the satisfactory completion of conditions required by statute as a prerequisite to license and approval of insurance of accounts for a new bank, a new savings and loan association or a new credit union by the appropriate insurer. (Section 120.60(4)(c), Fla. Stat.)

In World Bank and the related appeal, World Bank v. Lewis, 425 So.2d 77 (Fla. 1st DCA 1982), the express statutory provision cited above was unquestionably controlling. In the present proceeding Section 381.494(8)(c) is controlling and provides adequate remedy to American Healthcorp to

contest the delay imposed by the DHRS moratorium. Balsam, supra.

Relying on the World Bank cases, supra, American Healthcorp argues that it has a legal right to a certificate of need and that this right has vested. American Healthcorp then proceeds to argue that HRS no longer has discretion to approve or disapprove the CON and that HRS' duty is merely a ministerial duty to issue the CON by default. American Healthcorp's argument is predicated upon its erroneous conclusion that despite all decisions to the contrary, Section 120.60(2), Fla. Stat., controls the issuance of its CON. The only clear legal right available to American Healthcorp was to force HRS to render a decision to approve or disapprove its application.

Furthermore, because the decision to grant a CON to American Healthcorp by default was pending on appeal to the First District Court of Appeal, at the time of the 1984 amendment to Section 381.494(8)(c), Fla. Stat., this procedural amendment applies to the present proceeding Rothermal v. Florida Parole and Probation Commission, 441 So.2d 663 (Fla. 1st DCA 1983).

D. Application of Section 120.60(2), Fla. Stat., (1983) to require an award of a certificate of need by default conflicts with federal law.

Section 381.494(8)(a), F.S. (1983), provides in part as follows:

> The department is designated as the single state agency to issue, revoke, or deny CON to issue, revoke or deny exemptions from Certificate-of-Need review in accordance with the district plans and present and future federal and state statutes. (Emphasis Supplied)

See Farmworkers' Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 430 So.2d 1, 3 (Fla. 1st DCA 1983) and Page v. Capital Medical Center, Inc., 371 So.2d 1087, 1089 (Fla. 1st DCA 1979). Moreover Section 381.494(6)(c), Fla. Stat. (1983), requires HRS to review CON applications against various plans "adopted pursuant to Title XV of the Health Services Act. . ."

In 1979, Congress amended the federal public health statutes to impose the following requirement for proceedings under state CON programs, see P.L. 96-79, §116, codified as 42 USC §300n-1(12)(c)(ii):

> If the state agency fails to approve or disapprove an application within the applicable period (established for the program), the applicant may, within a reasonable period of time following expiration of such period, bring an action in the appropriate state court to require the state agency to approve or disapprove the application. (Emphasis Supplied)

To implement the new amendments by P.L. 96-79, including the referenced provision, 42 CFR Part 123, Subpart E (certificate of need reviews) was promulgated in 1980. The new 42 CFR §123.410(17) required the State to adopt and use the above procedure in CON reviews and specifically clarified the provision's intent as follows:

> (17) Failure to act on application within the required time. Provision that if the State agency fails to approve or disapprove an application for certificate of need or an exemption . . .within the applicable period, the applicant may, within a reasoanble period, bring an action in the appropriate state court to require the state agency to approve or disapprove the application. A certificate of need or an exemption may not be issued or denied solely because the state agency failed to reach a decision. (Emphasis Supplied)

In short, Federal regulations require that the lack of action on the part of the State agency in review of certificate of need applications be remedied through a procedure which forces action, but does not require either the granting or denial of the certificate.

In addition, Congress, by enacting the National Health Planning and Development Act, clearly intended states to follow federal policy in the field of health planning. National Health Planning and Resources Development Act of 1974, § 62 U.S.C.A. §§3330, et seq., 300 K-1, 3001-2, 300m-2. Park East Corporation v. Califano, 435 F.Supp. 46 (D.C.N.Y., 1977). The Act establishes these goals:

. . . (3) restraining increases in the cost of . . . health services, (4) preventing unnecessary duplication of health resources and (5) "preserving and improving competition in the health service area." 42 U.S.C. § 3001-2(a) (1976 ed. Supp. III).

To accomplish these goals, the Act requires the Secretary of Health and Human Services to issue guidelines concerning the appropriate supply, distribution, and organization of health services. These guidelines are issued as regulations under the Federal Administrative Procedures Act and are published in the Federal Register. § 300k-1; see 42 CFR § 121.1 et seq. (1980). On the state level, the Act requires a participating state to have a designated health planning and development agency ("State Agency") whose duties are to "[c]onduct the health planning activities of the State and to "administer a state certificate of need program which applies to the obligation of capital expenditures within the State and the offering within the State of new institutional health services and the acquisition of major medical equipment." 42 U.S.C.A. §§ 300m, 300m-2 (as amended). The program is intended to reduce unnecessary duplication in health care facilities and thereby, it is hoped, reduce the cost of health care to consumers. Greater St. Louis Health Systems Agency v. Teasdale, 506 F. Supp. 26, 28 (U.S.D.C., E.D., Mo., 1980).

Accordingly, the Florida legislature in the recent CON legislation stated that the department is "to issue, revoke or deny certificates of need . . . in accordance with . . . present and future federal . . . statutes." Section 381.494(8)(a), Fla. Stat. The federal statute, in turn, requires the state "to issue or not to issue a certificate of need . . . based solely on the review of the State Agency conducted in accordance with procedures and criteria it has adopted in accordance with [the Act]. § 42 U.S.C. 300n-1(b)(12)(B).

It is therefore clear that the Florida and federal statutes, when read in concert, require the State Agency to review CON applications in accordance with the regulations published under the Act and contained in the National Guidelines for Health Planning. In fact, the First District Court of Appeal has expressly held that the Florida certificate of need program must conform to the federal legislation and regulations or be invalidated. Farmworkers Rights Organization, Inc. v. State Department of Health & Rehabilitative Services, supra.

Based upon the foregoing, and consistent with Section 381.494(8)(a), F.S. (1983), INDIAN RIVER submits that it is improper as a matter of federal law for FLORIDA AMERICAN HEALTHCORP, or any health care provider, to obtain a CON by default.

CONCLUSION

Based upon the foregoing argument, Indian River respectfully requests this Court to conclude that the issuance of a certificate of need by default, pursuant to Section 120.60(2), Fla. Stat., is an improper remedy in this proceeding and to enter an Order affirming the decision of the First District Court of Appeal.

Respectfully submitted,

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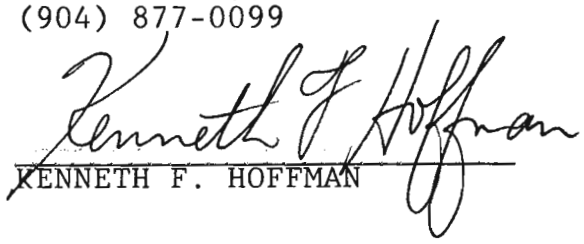

KENNETH F. HOFFMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished by ~~U. S. Mail~~ HAND DELIVERY, this 23 day of September, 1985, to M. STEPHEN TURNER, 300 East Park Avenue, Post Office Box 11300, Tallahassee, Florida 32302; MICHAEL J. CHERNIGA, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302 and JAMES C. HAUSER, P. O. Box 1876, Tallahassee, Florida 32302-1876.

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