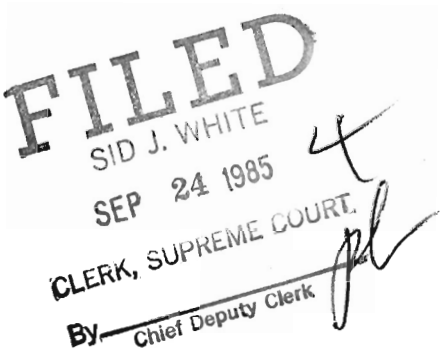
SUPREME COURT
STATE OF FLORIDA



AMERICAN HEALTHCORP OF
VERO BEACH, INC.,

Petitioner,

vs.

CASE NO. 67448
DCA CASE NO. AX 36

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

Respondent.

RESPONDENT'S ANSWER BRIEF

On Certified Appeal from The District Court of Appeal
For The First District of Floria

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STATEMENT OF THE CASE AND FACTS

The statement of the case and facts prepared by Petitioner American Healthcorp of Vero Beach, Inc. ("American Healthcorp") fails to apprise this Court of relevant matters and events, knowledge of which is necessary to fully comprehend the issues raised by this petition. Respondent Department of Health and Rehabilitative Services ("HRS") will therefore supplement American Healthcorp's statement with the following.

American Healthcorp petitions this Court to review a decision of the First District Court of Appeal, 471 So.2d 1312, which reversed a peremptory writ of mandamus originally granted to it by the Leon County Circuit Court, Judge Ben Willis presiding. The writ had compelled HRS to issue a certificate of need ("CON") to American Healthcorp for construction of a 120-bed general acute care bed hospital to be located in Vero Beach, Florida. [R:87]

HRS is the state agency designated by the Legislature to administer Florida's certificate of need law. See Florida Statutes §381.493-.499 (1983). The batching cycle for which American Healthcorp sought review of its application would require that an application be filed by March 15, 1983 so that HRS would render a determination by June 15, 1983. Fla. Admin. Code Rule §10-5.08(1); §381.494(5) Fla. Stat. (1983). In addition, a letter of intent to file the proposal was required at least 30 days

prior to filing an application. Fla. Admin. Code Rule §10-5.08(1)(b).

On February 14, 1983, American Healthcorp submitted a letter of intent to file an application by March 15. [R:15]. On February 25, however, HRS published a notice in the Florida Administrative Weekly of the implementation of an administrative moratorium, effective February 11, on all applications for new hospitals or additional hospital beds scheduled for the March 15 review cycle. [R:123-124].

Notwithstanding the moratorium, American Healthcorp on March 4, 1983 attempted to submit its CON application and a $4,000 filing fee check. With these submittals was a paper providing for a signature by someone to acknowledge receipt; this paper was signed by one Kathy Wright, apparently a secretary at HRS. [R:104].

On March 7, 1983, Thomas Porter, the HRS application review supervisor for CONs, sent a letter to American Healthcorp advising that because of the moratorium, applications would not be considered effective until the next hospital review cycle; that the moratorium had been imposed to allow HRS some breathing room to promulgate rules regarding bed need methodologies and to permit local health councils to adopt the facilities portion of their local health plans; and that American Healthcorp's application would be considered for the next available batching cycle, which had an application deadline of June 15. [R:93, 96, 121].

At the time the March 7 letter was sent, Mr. Porter was unaware that American Healthcorp had left its application at the HRS office on March 4. [R:93]. Therefore, on March 18, 1983, Mr. Porter again wrote that applications could not be considered until the next cycle beginning June 15, and that American Healthcorp's application and filing fee were not accepted and were being returned, but that its letter of intent would be retained by HRS for consideration in the next cycle. [R:93-94, 98].

On March 26, American Healthcorp wrote HRS stating that its application should be considered in the batching cycle first applied for. [R:99]. On April 8, American Healthcorp received the returned application and filing fee check from the HRS. [R:102].

On April 14, representatives of HRS met with representatives of American Healthcorp. At the meeting, American Healthcorp re-returned the application and filing fee check and stated that the application should be considered for the March 15 cycle. [R:102]. HRS refused to accept the application and maintained the position that consideration of all applications had been postponed for one batching cycle by administrative moratorium uniformly imposed by the Department Secretary on February 11. [R:122]. American Healthcorp took no action to compel HRS to accept the application for a March 15 cycle. [R:94].

On June 14, American Healthcorp resubmitted an identical application to HRS for processing in the

subsequent June 15 cycle, and this application was accepted for filing. [R:122]. The filing fee check from the original application was endorsed and cashed on June 15, 1983 [R:127], obviously in conjunction with acceptance of the refiled application. [R:122]. After consideration by HRS, the resubmitted application was denied. [R:94]. Notice of the denial was published in the Florida Administrative Weekly on November 1, 1983. [R:84].

Thereafter, American Healthcorp sought a writ of mandamus from the Circuit Court for Leon County. American Healthcorp's "Motion for Summary Judgment" was granted, and HRS was commanded to issue a CON for construction of a hospital in Vero Beach. This order was entered on December 9, 1983. [R:87]. A timely Motion for Rehearing was denied by Order of January 6, 1984.

A notice of appeal was timely filed with the First District Court of Appeal, which by opinion rendered June 18, 1985, reversed the circuit court and dissolved the writ of mandamus. 471 So.2d at 1316.

SUMMARY OF ARGUMENT

Preliminarily, HRS would observe that Section 381.494(8)(c), Florida Statutes (Supp. 1984), was amended by the 1984 Legislature to clearly proscribe any applicant for a certificate of need ("CON") from obtaining a default permit pursuant to Section 120.60(2), Florida Statutes. Since the operative statute has been so amended, HRS would suggest to the Court that any decision on the certified question would have extremely limited applicability and is thus not an appropriate candidate for this Court's review as an issue of "great public interest" pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). See Zirin v. Charles Pfizer & Co., 128 So.2d 594, 597 (Fla. 1961). [Issue I]

On the merits, HRS first contends that any argument that American Healthcorp might be entitled to a default permit was thoroughly extinguished by the 1984 Florida Legislature's addition of the following sentence to Section 381.494(8)(c):

> When making a determination on an application for a certificate of need, the department is specifically exempt from the time limitations provided in s. 120.60(2).

Ch. 84-35, §12, Laws of Fla.

Even though American Healthcorp's case of action was instituted prior to the effective date of this 1984 statutory amendment, the amendment is nonetheless applicable to this action because it is both a remedial and procedural

provision which applies even to cases pending on appeal at the time of the amendment's enactment. See, e.g., Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663 (Fla. 1st DCA 1983); Tel Service Co. v. General Capital Corporation, 227 So.2d 667 (Fla. 1969). Neither Section 120.60(2) or Section 381.494(8)(c) constitute substantive criteria as to whether an applicant is qualified for approval of its CON application. Rather, both statutes simply provide a remedy for agency inaction. See World Bank v. Lewis, 407 So.2d 541 (Fla. 1st DCA 1981). [Issue II].

HRS further argues that even if one were to conclude that the 1984 amendment to Section 381.494(8)(c) does not govern and thoroughly dispose of this case during pendency of the appeal to the First District Court of Appeal, American Healthcorp is still not entitled to a default CON because Section 381.494(8)(c), Florida Statutes (Supp. 1982), provides the exclusive remedy for HRS inaction on a CON application. That statute provides:

> If the department fails to render a determination within 45 days, or within an otherwise extended period, from the day the application is declared to be complete, the applicant, within 30 days of the date the department should have rendered a determination, may take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the department to render a decision. (e.s.)

The intent of this statute is manifest: HRS must either act on a CON application within the stated period or

be compelled to act; however, this statute plainly proscribes a default permit.

Contrary to American Healthcorp's arguments, both Section 120.60(2) and the 1982 version of Section 381.494(8)(c) are mutually irreconcilable, as they plainly provide two different types of remedies for the same problem--agency inaction. American Healthcorp's corollary position that Section 381.494(8)(c) simply acts as a "statute of limitations" is absurd, for it renders meaningless the legislature's inclusion of the language "to force the department to render a determination" in Section 381.494(8)(c). See, e.g., State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979).

American Healthcorp's construction of the statute further conflicts with the legislative history of the statute in Florida, as well as with the federal statutes which mandated the CON program in the first place. See 42 U.S.C. §300n-1(12)(c)(ii); 42 C.F.R. §123.410(17). Since HRS is required to follow federal laws, rules, regulations and policies in the administration of its CON program, Page v. Capital Medical Center, 371 So.2d 1087 (Fla. 1st DCA 1979), neither HRS nor this Court can adopt the construction of Section 381.494(8)(c) advanced by American Healthcorp.

This conclusion is further buttressed by the 1984 Florida Legislature's adoption of Chapter 84-35, §12, Laws of Fla., which specifically provided that HRS is exempt from the time limitations provided by Section 120.60(2). This

amendment merely clarified that the preexisting statute provided the exclusive remedy for HRS inaction on a CON application. As such, it did not constitute a significant modification or change in that preexisting statute. State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529, 531 (Fla. 1973).

Therefore, since both Section 120.60(2) and Section 381.494(8)(c) are mutually irreconcilable on their face, the last expression of legislative will governs, in this case, Section 381.494(8)(c). Askew v. Schuster, 331 So.2d 297 (Fla. 1976). Section 381.494(8)(c) also governs because a more specific statute controls over a more general statute. Kiesel v. Graham, 388 So. 2d 594 (Fla. 1st DCA 1980). [Issue III].

Finally, even if HRS' CON review process were governed by the default permit provisions of Section 120.60(2), American Healthcorp is still not entitled to a default permit because it failed to exhaust its available and meaningful administrative remedies. In fact, Florida Administrative Code Rule 10-2.44 provides to a specific remedy to compel HRS to review its application. The Administrative Procedure Act also provides other available, meaningful and adequate remedies for American Healthcorp's claim, see §120.68(1), 120.57(1)(b)(9), and 120.68(13), Fla. Stat. (1983). Indeed, its claim that any administrative remedies are inadequate is belied by one of the cases upon which American Healthcorp places primary reliance. World Bank v. Lewis, 407 So.2d 541 (Fla 1st DCA 1981). [Issue IV].

ISSUE I:

THE COURT SHOULD DECLINE TO REVIEW THE MERITS OF THIS PETITION IN THE EXERCISE OF ITS DISCRETIONARY POWERS PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(v).

While the Court has jurisdiction to entertain this petition, that jurisdiction is discretionary only, as evidenced by the use of the permissive word "may" in Rule 9.030(a)(2)(A)(v). Hence, this Court need not render an opinion where no useful purpose would be served. See Zirin v. Charles Pfizer & Co., 128 So.2d 594, 597 (Fla. 1961). This is just such a case where no useful purpose would be served.

American Healthcorp's complaint sought the issuance of a writ of mandamus by the circuit court on the grounds that since HRS had failed to issue or deny the requested certificate of need ("CON") within the appropriate time period set forth in Section 381.494(5), Fla. Stat. (Supp. 1982), American Healthcorp was entitled to a default CON pursuant to Section 120.60(2), Fla. Stat. (1981). The primary issue in the circuit court proceeding, as well as in the First District Court of Appeal, involved the construction and applicability of Section 381.494(8)(c), Fla. Stat. (Supp. 1982):

> Upon review of the application for a certificate of need . . . the department shall issue or deny the certificate of need in its entirety or for identifiable

> portions of the total project. The department shall makes its determination within not more than 45 days from the date the application is declared to be complete . . . If the department fails to render a determination within 45 days, or within an otherwise extended period, from the day the application is declared to be complete, the applicant, within 30 days of the date the department should have rendered a determination, may take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the department to render a decision. (e.s.)

The First District Court of Appeal construed this statute, particularly the underscored passage, to supply an exclusive remedy for delay in processing a CON application and thus to allow the aggrieved applicant only to institute an "appropriate legal action . . . to force the department to render a determination." Department of Health and Rehabilitative Services v. American Healthcorp of Vero Beach, Inc., 471 So.2d 1312, 1315 (Fla. 1st DCA 1985). It therefor concluded that the circuit court erred in issuing a writ of mandamus compelling the issuance of a CON by default under Section 120.60(2) which is generally applicable where no specific remedy for agency inaction is provided. Id.

American Healthcorp's primary argument before the First District, as well as before this Court, is that Section 381.494(8)(c)(1982) does not act as an exception or exemption to the default provisions of Section 120.60(2). However, in the 1984 legislative session the Florida Legislature eliminated any reason to belabor this issue by adding the following sentence to Section 381.494(8)(c):

> When making a determination on an application for a certificate of need, the department is specifically exempt from the time limitations provided in s. 120.60(2). (e.s.)

Ch. 84-35, §12, Laws of Fla.

While, as the First District noted, the amendment does not specifically address remedies, the legislative intent to exempt HRS in its CON review process from the default provisions of Section 120.60(2) is manifest and indisputable: since HRS is exempted from Section 120.60(2)'s "time limitations," whether expressed or otherwise incorporated therein, HRS simply cannot violate that statute and thereby be in default in its CON review process. Thus, this 1984 amendment plainly proscribes the very type of relief which American Healthcorp now seeks or any other similarly situated party may seek in the future.

Therefore, even if one assumes that the 1984 amendment is prospective in effect only and this appeal is instead governed solely by Section 381.494(8)(c) as it existed prior to that amendment, a decision based on the 1982 statute will have very limited applicability.

Accordingly, while this Court's review of certified questions of "great public interest" is particularly applicable to cases of first impression, Duggan v. Tomlinson, 174 So.2d 393 (Fla. 1965), this is a case of first and last impression. The statute has been amended, and the issue is no longer viable.

The First District's certification notwithstanding, this is not a case dealing with matters of concern beyond

the immediate litigants. Consequently, it does not concern an issue of "great public importance." The Court should therefore dispose of this petition by summarily affirming the First District's decision.

ISSUE II:

THE AMENDMENT TO SECTION 381.494(8)(c), FLA. STAT., EFFECTED BY CH. 84-35, SECTION 12, LAWS OF FLA., APPLIES TO THIS CASE AND CLEARLY DENIES TO AMERICAN HEALTHCORP THE RELIEF IT SEEKS.

In Issue III of this brief HRS will show that Section 381.494(8)(c), Fla. Stat. (Supp. 1982), provides the exclusive remedy for agency inaction in processing an application. Any lingering doubt, however, has been extinguished by the 1984 Florida Legislature's addition of the following sentence to Section 381.494(8)(c):

> When making a determination on an application for a certificate of need, the department is specifically exempt from the time limitations provided in s. 120.60(2). (e.s.)

Ch. 84-35, §12, Laws of Fla. Therefore, American Healthcorp is plainly not entitled to the default CON it sought by its petition for writ of mandamus.

While, as the First District noted, this 1984 amendment relates only to "time limitations" and does not specifically address remedies, the conclusion that the Florida Legislature intended to exempt HRS in its CON application review process is self-evident: Section 120.60(2) provides for the default issuance of a permit if its time limitations or those otherwise incorporated therein are not met by the agency; HRS has been specifically exempted from these time limitations; ergo, HRS's failure to comply with these time

limitations does not and cannot conceivably subject it to the default issuance of a permit. To argue otherwise is to deny the obvious import of the language used by the legislature in crafting this amendment.

Even though this cause was instituted prior to the effective date of this 1984 statutory amendment, May 18, 1984, the amendment is nonetheless applicable to this action because it is both a remedial and procedural provision which applies even to cases pending on appeal at the time of the amendment's enactment. See Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663, 664-65 (Fla. 1st DCA 1983). It is remedial because it clarifies the legislature's original intent in enacting Section 381.494(8)(c) and thus eliminates any possible assertion that CON applications do not have their own remedy for delayed review. It is procedural, just as is Section 120.60(2), because it deals with the procedure for enforcing the right to receive review of a CON application. See §120.72, Fla. Stat. (1983), which holds that the provisions of Chapter 120 relate to "licensing procedures."

Regardless of whether the amendment is remedial or procedural, the rule is the same in Florida: the legislature may immediately take away any particular remedy or mode of procedure which has been granted. See, e.g., Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978); City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961). Even if the statute were not deemed strictly

procedural, this rule would still apply to pending cases if the statute is predominantly procedural or remedial. See, e.g., U.S. v. Blue Sea Line, 553 F.2d 445 (5th Cir. Ct. 1977).

Citing cases such as Divisions of Workers Compensation, Bureau of Crimes Compensation v. Brevda, 420 So.2d 887 (Fla. 1st DCA 1982), American Healthcorp argues that this 1984 amendment cannot be considered remedial or procedural because it would deprive Healthcorp of a substantive, vested right which existed not only at the time of Healthcorp's application but also when the circuit court entered judgment. [Petitioner's Brief, p. 18]. Attorney's fees statutes as were at issue in Brevda, however, have long been recognized by the Florida Courts to be substantive in nature i.e. a recoverable element of the cause of action. See Mathews v. Pohlman, _____ So.2d _____ (Fla. May 2, 1985) [10 F.L.W. 252, 253]. What we are dealing with here, however, are not the substantive criteria for the issuance of a CON, which are found in Section 381.494(6)(c), but instead the remedy, procedure or (if you will) the penalty for agency inaction upon a requested permit.

As such, the situation presented by this case is far more akin to that discussed by this Court in Tel Service Company v. General Capital Corp., 227 So.2d 667 (Fla. 1969). In Tel Service Company, the trial court entered a final decree in favor of the plaintiff, holding that certain transactions between the parties were criminally usurious

loans in violation of Section 687.07, Fla. Stat. (1967). It therefore directed that plaintiff recover from defendant the aggregate principal amount of the loans and interest charged thereon pursuant to that statute. While the appeal was pending, the Florida Legislature amended that statute to allow a corporate borrower to recover only interest and not principal on the usurious loan. Ch. 65-299, Laws of Fla. To the contention that this amendment could not apply during the pendency of the appeal, this Court stated:

> [A]uthority is legion to the effect that an action predicated on remedies provided by the usury statutes creates no vested substantive right but only an enforceable penalty. Accordingly, such penalty or forfeiture possess no immunity against statutory repeal or modification and the enactment of legislation to this effect abates such remedy or forfeiture pro tanto even during the pendency of an appeal from a final judgment predicated on such statutory penalties or forfeiture.(e.s.)

227 So.2d at 673. Therefore, even though there was no indication that the amendment was to apply retrospectively, this Court expressly stated that "the enactment of this kind of act is retrospectively applicable to the appellate proceedings in this court." Id. Similarly, the 1984 amendment to Section 381.494 (8)(c), which effectively operates as the enforcement remedy for agency's duty to act (eliminating any possible penalty for agency inaction), must be construed as applicable during the pendency of the appeal to the First District.

Despite the fact that Section 381.494 (8)(c) and 120.60(2) almost self-evidently speak to procedures or

remedies for agency inaction, American Healthcorp argues that Section 120.60(2) "directly speaks to the question of whether or not an applicant is qualified for application approval" and thus constitutes a substantive right. [Petitioner's Brief, p. 19]. Obviously, the criteria by which HRS determines whether a CON applicant is qualified for approval are contained in Section 381.494(6)(c). By no stretch of the imagination does Section 120.60(2) address the issue of whether the applicant is qualified for a CON. It, just as Section 381.494(8)(c), is simply a remedy for agency inaction. See World Bank v. Lewis, 406 So.2d 541(Fla. 1st DCA 1981). And since neither Section 120.60(2) or Section 381.494(8)(c) are substantive in nature, American Healthcorp's reliance on such cases as Department of Health and Rehabilitative Services v. Eifert, 433 So.2d 266 (Fla. 1st DCA 1983) and Atwood v. State, 53 So.2d 101 (Fla. 1951) is misplaced.

Accordingly, not only does the amendment effected by Ch. 84-35, Laws of Fla. patently and incontrovertibly exempt HRS in its CON application review process from the strictures of Section 120.60(2), it also is clearly both procedural and remedial in nature. It therefore governs the appeal and itself dictates that American Healthcorp is not entitled to a default CON.

ISSUE III:

SECTION 381.494(8)(c), FLA. STAT. (SUPP.1982) ALSO DENIES A DEFAULT CON.

Even if one were to conclude that the 1984 amendment to Section 381.494(8)(c) did not govern and thoroughly dispose of this case, nevertheless, the pre-amendment statute, §381.494(8)(c), Fla. Stat. (Supp. 1982), specifically denies to American Healthcorp a default CON. This is manifest by reference to the plain wording and legislative history of that statute and well-accepted rules of statutory construction.

Obviously, this dispute centers upon two statutes. The first, §120.60(2), says that license applications not approved or denied within the time period required by law are "deemed approved and . . . the license shall be issued." Relying upon that statute, and that statute alone, American Healthcorp contends that HRS's failure to timely act upon its CON application means that HRS must issue a default permit to it.

There is, however, a later, more specific statute which specifically governs when HRS fails to make a timely determination: §381.494(8)(c) Fla. Stat. (Supp. 1982):

> If the department fails to render a determination within 45 days, or within an otherwise extended period, from the day the application is declared to be complete, the applicant, within 30 days of the date the department should have rendered a determination, may take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the department to render a determination. (e.s.)

The intent of this statute is facially obvious: if HRS should fail to make a decision on a CON application within the time prescribed, the applicant "may take appropriate legal action . . . to force (HRS) to render a determination." The self-evident purpose of this statute is to make sure that HRS does not "pocket veto" an application. HRS must either act on the application within the stated period or be compelled to act. That remedy however, is all that is specified, and plainly a default permit is not authorized. Accordingly, this statute is facially irreconcilable with the provisions of Section 120.60(2) and must operate separately.

American Healthcorp, however, argues that these two statutes are not so irreconcilable that they cannot be harmonized by giving each a field of operation. Rather, American Healthcorp contends that the statutes are harmonized by construing them together so that Section 381.494(8)(c) "simply serves as a statute of limitations" for an applicant to secure a default permit as appropriate action to compel a determination in its favor. [Petitioner's Brief, p. 11].

First, it is clear that the two statutes deal with the same general subject matter: the remedy or procedure for relief from agency inaction on a license application. Indeed, even American Healthcorp concedes as much. [Petitioner's Brief, p. 12]. The remedy provided by the general statute for such agency inaction is to force the

agency to issue a default permit. This is the generally applicable remedy to all administrative agencies governed by the Administrative Procedure Act. §120.72, Fla. Stat. (1983). The remedy provided by the statute specifically applicable to HRS inaction on a CON application, however, is to force that agency to make a decision, not to issue a default permit. That remedy is specifically applicable only to HRS, which has been "designated as the single state agent 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." §381.494(8)(a), Fla. Stat.

Since these two statutes plainly provide two different types of remedies for the same problem--agency inaction--it is impossible to conclude that they are not mutually repugnant and irreconcilable on their face. After all, why would the legislature have provided a remedy to force HRS to render a decision on a CON application if it intended also to provide the aggrieved applicant with another remedy-default-for the same agency inaction? And why would anyone resort to this remedy to compel an agency determination when, under the same factual scenario, they could get a default permit instead?

American Healthcorp's contention that Section 381.494(8)(c) simply serves as a statue of limitations for Section 120.60(2) borders the absurd, as both the plain wording and legislative history of this statute reveal.

Indeed, if Section 381.494(8)(c) were simply a statute of limitation, the legislature's inclusion of the language "to force the department to render a determination" would be rendered meaningless. In the interpretation of a statute, the legislature presumably intends every part for a purpose, and effect should be given to each of its provisions: ut res magis valeat quam perat. See e.g. State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979); Forehand v. Board of Public Instruction, 166 So.2d 668 (Fla. 1st DCA 1964). This Court should not adopt a construction of this statute whereby this very important constituent element thereof would be rendered purposeless. See Alexander v. Booth, 56 So.2d 716 (Fla. 1952). American Healthcorp's attempt to characterize the agency's "determination" as necessarily being the issuance of a CON [Petitioner's Brief, p.11] is circular reasoning to cram a square peg into a round hole.

Furthermore, if a CON were deemed granted by default and the applicant entitled to be issued a permit, it would make no sense to have a 30-day limitation on gaining the entitlement. Why would it make any difference if an applicant were entitled to a permit by default whether the applicant filed to secure his entitlement 30 days or 31 days after time had run to act. On the other hand, if the true remedy is an action to compel decision by the agency, as the statutes sets forth, then seasonal action is important; otherwise the presumption is that an applicant waives the right to insist on timely processing.

The very fact that the alternative harmonization of the statutes offered by American Healthcorp is unjustified and meaningless in itself establishes the correctness of the construction given by the First District.

American Healthcorp's reference to the provisions of Sections 120.60(3) and (4) and 403.722(10), Fla. Stat., adds nothing to its argument, as those statutes are patently distinguishable from Section 381.494(8)(c). Section 403.722(10) simply provides that the time periods for action by the Department of Environmental Regulation on a hazardous waste permit can be tolled by certain events. The cited A.P.A. provisions likewise provide for longer permit application review periods for the Departments of Insurance and Banking and Finance. Otherwise, they make no mention of a different remedy for agency inaction. Section 381.494(8)(c), on the other hand, does: the applicant may take appropriate legal action "to force (HRS) to render a determination," that is, to make the agency decide.

Since, obviously, there is an inconsistency between these two statutory remedies for agency inaction on permit applications, this inconsistency must be resolved "in favor of the last expression of legislative will." Johnson v. Bathey, 350 So.2d 545, 546 (Fla. 2nd DCA 1977); Askew v. Schuster, 331 So.2d 297, 300 (Fla. 1976). Since Section 381.494(8)(c)(1982) was enacted at a later date, it, and not Section 120.60(2), governs the disposition of this case.

It is an equally well-established rule of statutory construction that a more specific statute must control over a general statute. Kiesel v. Graham, 388 So.2d 594, 595 (Fla. 1st DCA 1980). Stated differently, "a statute dealing specifically with a subject takes precedence over another statute governing the same subject in general terms." State v. Young, 357 So.2d 416, 417 (Fla. 2nd DCA 1978). Section 120.60(2) is generally applicable to all cases of agency enaction. Section 381.494(8)(c), however, is specifically applicable only to HRS's CON application review process. §381.494(8)(a), Fla. Stat. (Supp. 1982). Hence, it governs. Accord: Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959); Department of Health and Rehabilitative Services v. Gross, 421 So.2d 44 (Fla. 3rd DCA 1982).

American Healthcorp's ingenuous attempt to characterize Section 381.494(8)(c) as simply a statute of limitations for Section 120.60(2) and thus not in conflict with that provision is further belied by the express legislative intent and legislative history of the "Health Facilities and Health Services Planning Act," §381.493-.499, Fla. Stat.

The purpose of the Act is "to contain the high and rising of cost care." Bio-Medical Applications of Clearwater, Florida, Inc. v. Department of Health and Rehabilitative Services, 370 So.2d 19, 20(Fla. 2nd DCA 1979). Thus, the Act bespeaks an express legislative intent to provide health services and eliminate duplication of those services by careful planning. §381.493(2), Fla. Stat.

To accept American Healthcorp's construction of the statute, however, would mean that an applicant could obtain a CON for a large hospital, for example, without a careful public need determination by professional state planners. Thus, the overall program would suffer from the purely capricious addition of unwarranted and unneeded health care facilities.

Moreover, the legislative history (which Florida courts have long regarded as a material aid in determining legislature intent, e.g., Ideals Farms Drainage District v. Certain Hands, 154 Fla. 554, 19 So.2d 234 (1944)) confirms that the manifest legislative intent of this statute was that CON applicants who were genuinely concerned over delay in the review of their applications should force HRS to render a prompt determination on the merits by taking a legal action in a timely manner. Hence, default licensure was necessarily excluded for CON applications.

The original CON statutes contained no reference to what would happen in the event HRS failed to act on an application within the prescribed period. Compare §381.494(6)(c) Fla. Stat. (1975). However, the statute was amended in 1977 to provide: "If the department fails to render a determination within (the prescribed period), it shall be deemed that the application for certificate of need is denied. (e.s.) Ch. 77-400, §2 Laws of Fla.

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." (e.s.)

To implement the new amendments by P.L. 96-79, including the referenced provision, new federal regulations, 42 C.F.R. Part 123, Subpart E (certificate of need reviews) were promulgated. The new 42 C.F.R. §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 reasonable period of time following the expiration of that 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." (e.s.)

In the 1980 session the Florida Legislature responded to the federal law amendment by enacting Ch. 80-187, §4, Laws of Florida, amending the Florida CON statute to include the above required provision. Likewise, the provision was incorporated into HRS' regulations governing CON applications. See Fla. Admin. Code Rule §10-5.10(6).

After subsequent amendments renumbered the subsection and shortened the review time period from 90 to 45 days, the 1982 version of the statute read:

> "The department shall make its determination within not more than 45 days from the date the application is declared to be complete . . . If the department fails to render a determination within 45 days, or within an otherwise extended period, from the day the application is declared to be complete, the applicant, within 30 days of the date the department should have rendered a determination, may take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the department to render a determination." (e.s.)

The Legislature clearly intended that this subsection control CON applications. The statute was initially amended in 1977 to provide that failure to act timely constituted denial of an application, contrary to the general rule under §120.60(2) that would deem an application granted. The statute was again amended in 1980 to provide that an applicant could force the Department to render a determination. This was a middle position. Because denial did not automatically occur, the need to reapply and pay another $4,000 filing fee upon non-action by the agency was obviated. But the intent remained that failure of the state agency to timely act on an application would not constitute issuance of a CON.

This is unequivocally expressed by the Code of Federal Regulations as the intent of the federal provision required to be adopted by the state. The result is that an

application remains pending even though not timely acted upon, and the applicant can either wait for a delayed decision or force a determination through appropriate legal action.

Still further, this construction is supported by the need to conform to federally mandated requirements in the certificate of need program. The states are mandated to set up certificate of need laws to control health care costs by preventing overbuilding that floods the market and causes facilities to increase their charges to maintain a profit. HRS is required to follow federal laws, rules, regulations, and policies in the administration of the CON program. Page v. Capital Medical Center, 371 So.2d 1087, 1979 (Fla. 1st DCA 1979). In fact, if HRS' implementing rule were not consistent with these federal regulations, including the presently effective 42 C.F.R. §123.410(17) prohibiting issuance of a default CON, the State rule would probably be found an invalid exercise of delegated legislative authority. Farmworker Rights Organization, Inc. v. State Dept. of HRS, 430 So.2d 1 (Fla. 1st DCA 1983).

This interpretation of the statute is further buttressed by the 1984 Florida Legislature's addition of the following sentence to Section 381.494(8)(c):

> When making a determination on an application for a certificate of need, the department is specifically exempt from the time limitations provided by s.120.60(2).

Ch. 84-35, Laws of Fla.

When an amendment is passed and its intent is not to change, but to clarify, the previous statute, "the matter in the amendatory act may be looked to in order to determine what rights existed under the original acts." 1A Sutherland, Statutory Construction §22.30(1972). As has been argued in both Issues I and II of this brief, this 1984 amendment removes any doubt that the Legislature intended Section 381.494(8)(c) to provide the exclusive remedy for untimely action on a CON application.

American Healthcorp responds by contending that an amendment must substantively change the law; therefore, the 1982 statute could not mean what the amended statute means. This contention is patently wrong:

> The mere change of language does not necessarily indicate an intent to change the law, for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law. The language of the amendment in 1971 was intended to make the statute correspond to what had previously been supposed or assumed to be the law. The circumstances here are such that the Legislature merely intended to clarify its original intention rather than to change the law.

State Ex Rel Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529, 531 (Fla. 1973); Accord Florida Patients Compensation Fund v. Mercy Hospital, 419 So.2d 348, 350-351 (Fla. 3rd DCA 1982). Given the legislative history of Section 381.494(8)(c), one can hardly conclude that the Florida Legislature intended anything more than to clarify the intent of the 1982 statute in light of the erroneous

construction by the circuit court in this very case. See Ivey v. Chicago Ins. Co., 410 So.2d 494, 497 (Fla. 1982) ("It is proper to consider . . . acts passed at prior or subsequent sessions, even those which have been repealed.")

American Healthcorp contends that documentation concerning the 1984 amendment [i.e., a Senate staff analysis and the staff analysis of Committee on Health and Rehabilitative Services] make no mention of an intent to clarify the meaning of Section 381.494(8)(c). [Petitioner's Brief, p.17] That is true, but neither does that documentation suggest in the slightest that the Legislature intended a major change by so amending the statute. It is, at best, neutral on the subject. Staff comment is not an exclusive means to discern the intent of an amendment to clarify or reaffirm original legislative intent. Timing and circumstances surrounding the amendment may be considered. See Florida Patients Comp. Fd. v. Mercy Hosp., supra, 419 So.2d at 350-51 (amendment provided persuasive evidence of original legislative intent applicable to original statute; changing law may be to clarify what was doubtful or to safeguard against misapprehension as to existing law or to make statute correspond to what had previously been supposed or assumed was the law).

American Healthcorp notes that three other states have certificate of need laws containing provisions requiring the automatic approval of CON applications in the event a timely decision is not made, whereas six other states have

provisions which call for the automatic denial of a certificate of need application if a decision is not so rendered in a timely manner. These other statutes are not even phrased similarly to §381.494(8)(c) as even a cursory review of those statutes will reveal. [Petitioner's Brief, p. 15]. What this observation is suppose to signify escapes HRS. At best, it suggests that a few states have not yet chosen to comply with applicable federal law and regulation and currently approach the issue on either side of Florida's middle ground for CONs which is consistent with the implementing federal rule, 42 C.F.R. §123.410 (17):

> [T]he applicant may, within a reasonable 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 has failed to reach a decision. (e.s.)

Finally, HRS would note American Healthcorp's reliance below upon Samson v. Bureau of Community Medical Facilities Planning, 363 So.2d 412 (Fla. 1st DCA 1978) and Provential House, Inc. v. Department of Health and Rehabilitative Services, 3 F.A.L.R. 752-A. Lest the former come back to haunt HRS in American Healthcorp's Reply Brief, HRS will simply note that it was based upon the CON statute in effect at that time which deemed the application granted if not timely processed. The Samson case even notes that the Legislature had already changed the statute to deem such application denied. 363 So.2d at 415.

Provential House, Inc. v. HRS, supra, is equally inapplicable to this cause, for it referred only to a situation where the agency fails to act on a hearing officer's recommended order after an application has been reviewed and a Section 120.57(1) hearing held on the merits. In such event, the recommended order, in which all substantially affected parties have participated, would become final agency action. This has no relevance to Section 381.494(8)(c), which applies when HRS does not timely act to render an initial determination on a CON application. The applicant cannot walk away with a CON by default, never having to demonstrate its entitlement on the merits.

Reference to the plain and unequivocal wording of Section 381.494(8)(c)(Supp. 1982), well-established rules of statutory construction, as well as the incontrovertible legislative history of that statute clearly reveals that the opinion of the First District on this issue was well-reasoned and should be affirmed.

ISSUE IV

MANDAMUS WAS AN INAPPROPRIATE REMEDY FOR HRS'S ALLEGED INACTION ON AMERICAN HEALTHCORP'S CON APPLICATION.

If American Healthcorp's arguments in opposition to Issues I, II or III above fail, its arguments to justify a writ of mandamus must also necessarily fail. Its argument in support of a writ of mandamus also fails, however, because American Healthcorp failed to exhaust its available and adequate administrative remedies. To understand this issue one must first examine the factual context in which the dispute arose.

HRS announced a batching-cycle moratorium on February 11, 1983. This moratorium applied uniformly across the board to all applications for new hospitals or additional hospital beds. However, on March 4, 1983, American Healthcorp attempted to submit its CON application for consideration as if the moratorium had not been declared.

On March 7, HRS's application review supervisor wrote American Healthcorp and informed it that an application could not be considered in the March 15, 1983, batching cycle because of the moratorium, and then again on March 18, 1983, he wrote that the discovered application was being returned because of the moratorium.

Not to be deterred, American Healthcorp then returned the application and left it at HRS and refused to accept it back, knowing full well that HRS did not intend to review or process it until the next review cycle after the moratorium

was lifted. It never attempted to compel HRS, by administrative complaint or otherwise, to accept and review its application. It never asked for an administrative hearing, as was its right. Instead, it simply waited until the 45 day statutory review period expired from the date of the first attempted filing and then asked the circuit court to compel approval of the CON.[1]

While mandamus is a legal remedy, State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508 (1933), it is governed by equitable principles and generally does not lie where another course of action is available. See, e.g. Leatherman v. Schwab, 98 Fla. 885, 124 So. 459 (1929). More particularly, an application for mandamus will generally not be entertained until the parties seeking the writ have exhausted their available administrative remedies. Bryant v. State Board of Medical Examiners, 292 So.2d 36 (Fla. 1st DCA 1974).

Here, there was such an available administrative remedy, for Florida Administrative Code Rule 10-2.44 provides that "[a]ny applicant/recipient dissatisfied with

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[1]On June 14 American Healthcorp resubmitted an identical application to HRS for processing in the subsequent June 15 cycle, and this application was accepted for filing. [R:122]. The filing fee check from the original application was endorsed and cashed on June 15, 1983 [R:127], obviously in conjunction with acceptance of the refiled application. [R:122]. After consideration by HRS, the resubmitted application was denied. [R:94]. Notice of the denial was published in the Florida Administrative Weekly on November 1, 1983. [R:84].

the Department's action or failure to act has a right to request a hearing. He/she may do so when it is believed that: . . . (1) opportunity to make the application has been denied."

Hence, if American Healthcorp believed that the Department should have accepted its application for review, it could have and should have invoked this remedy within 30 days of the HRS' refusal to accept the application because of the one-cycle moratorium; otherwise, the agency decision must be upheld. Having failed to insist upon this clear right, American Healthcorp cannot equitably be heard to lie and wait and ambush the agency which clearly believed that the application should not be accepted for an earlier review cycle. See State, Department of Health and Rehabilitative Services v. Hartsfield, 399 So.2d 1019, 1020 (Fla. 1981).

American Healthcorp, however, argues that it need not exhaust any administrative remedies because, in this case at least, such efforts would be futile or useless. [Petitioner's Brief, p. 25] HRS does concede that such grounds are applicable where the available administrative remedies are too little or too late. See, e.g., School Board of Leon County v. Mitchell, 346 So.2d 562 (Fla. 1st DCA 1977). That same decision recognized, however, that while the passage of the Administrative Procedure Act did not mean "that the power of circuit court's has been lessened, nor that their historic writs have been surrendered," still, "the occasions for their intervention

have been lessened." Id. Therefore, while the circuit court continues to have the power to act as a court of equity, which would include issuing writs of mandamus, this general power "continues subject to judicial restrictions upon its use which require prior resort to and exhaustion of administrative remedies when they are available and adequate." State ex rel. Department of General Services v. Willis, 344 So.2d 580, 589 (Fla. 1st DCA 1977). Thus, a circuit court should not "employ an extraordinary remedy to assist a litigant who is foregone an ordinary one which would have served adequately." Id. at 592-93.

In Willis, the First District set forth certain criteria which, if met, would invoke the jurisdiction of the circuit court in such cases:

> --The complaint must demonstrate some compelling reason why the Administrative Procedure Act does not avail the complainants in their grievance against the agency;
>
> --The complaint must allege a lack of general authority in the agency and if it is shown, that the act has no remedy for it;
>
> --Illegal conduct by the agency must be shown and, if it is shown, that the Act cannot remedy the illegalities;
>
> --Agency ignorance of the law, the facts, or the public good must be shown and, if of that is the case, that the Act provides no remedy for it; and
>
> --A claim must be made that the agency ignores or refuses to recognize related or substantial interest or refuses to afford a hearing or otherwise refuses to recognize that the

> complainant's grievance is cognizable administratively.

344 So.2d at 591.

None of the listed criteria have been met in this case. The complaint does not allege that HRS has failed to afford an administrative hearing pursuant to Section 120.57(1). In fact, HRS' own Rule 10-2.44 specifically guaranteed to American Healthcorp a hearing if it contested HRS's refusal to accept and process the permit application.

Further, the "proper way" for American Healthcorp to obtain a determination on any claimed entitlement, where no compelling circumstances exist, is "simplicity itself": ask the agency for a hearing, Willis, 344 So.2d at 592, not a circuit court for a writ of mandamus.

As to American Healthcorp's insinuations that HRS cannot be expected to render a fair final order, it should suffice to note that the Administrative Procedure Act affords an eminently suitable remedy: an appeal from a Section 120.57(1) or (2) order pursuant to Section 120.68(1), Fla. Stat. (Supp. 1984). Further, should the reviewing court find "that the agency action which precipitated the appeal was a gross abuse of the agency's discretion," it could in its discretion award reasonable attorney's fees and costs to American Healthcorp. §120.57(1)(b)9, Fla. Stat. (Supp. 1984). The reviewing court is also empowered to order such other "ancillary relief as the court finds necessary to redress the effects of an official action wrongfully taken or withheld."

§120.68(13)(a)(2), Fla. Stat. (Supp. 1984). Thus, the Administrative Procedure Act contains numerous, meaningful, and available administrative remedies by which American Healthcorp could pursue its claims of entitlement.[2]

Finally, it should not go unobserved that where applications for a CON are "mutually exclusive," HRS is required to conduct a comparative hearing at which the competing applications are considered simultaneously. Bio-Medical Applications of Ocala, Inc. v. Office of Community Medical Facilities, 374 So.2d 88 (Fla. 1st DCA 1979); Bio-medical Applications of Clearwater v. Department of Health and Rehabilitative Services, 370 So.2d 19 (Fla. 2nd DCA 1979); also see §381.494(5), Fla. Stat. (1983); Fla. Admin. Code Rule 10-5.08(1). As the briefs of amici curiae demonstrate, competing providers or applicants for the same services in the same service district object to this CON. To grant to American Healthcorp a CON by default would unmistakably deny to these providers the right to have their

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[2]In fact, that such remedies are available, adequate and meaningful is amply demonstrated by one of the cases upon which American Healthcorp relies in contending that it is entitled to a default permit under Section 120.60(2). World Bank v. Lewis, 406 So.2d 541 (Fla. 1st DCA 1981), after remand, 425 So.2d 77 (Fla. 1st DCA 1982), itself involved an administrative appeal pursuant to Section 120.68 from an agency determination that an applicant for a bank license was not entitled to a default permit. Thus, American Healthcorp's contention that there is no meaningful administrative remedy is belied by the very case it cites as primary support for its argument for entitlement to a default permit!

applications comparatively reviewed with that of American Healthcorp or to contest the need for the proposed facility, regardless of HRS' position. It would be fundamentally unfair, not only to the public but also to other substantially affected parties, if HRS could effectively grant a CON and avoid any challenge to its decision simply by failing to timely act on the application. See Bio-Medical Services of Clearwater v. DHRS, supra.

Accordingly, the District Court's decision should also be affirmed because American Healthcorp failed to exhaust available and meaningful administrative remedies to correct HRS' decision not to accept and process its CON application due to the existence of a moratorium or to correct any other perceived wrong.

REQUEST FOR RELIEF

HRS hereby requests this Court to discharge the petition for review or to affirm the well-reasoned decision of the First District.

* * *

I HEREBY CERTIFY that a copy of the foregoing has been furnished to MICHAEL J. CHERNIGA, Esquire, and FRED W. BAGGETT, Esquire, Roberts, Baggett, Laface, & Richard, Post Office Drawer 1838, Tallahassee, Florida 32302; PAUL H. AMUNDSEN, Esquire, Peeples, Earl, Reynolds & Blank, 3636 One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131; WILLIAM B. WILEY, Esquire, McFarlain, Bobo, Sternstein, Wiley & Cassedy, P.A., Post Office Box 2174, Tallahassee, Florida 32316; BYRON B. MATHEWS, JR., Esquire, McDermott, Will 7 Emery, 700 Brickell Avenue, Miami, Florida 33131; and JAMES C. HAUSER, Esquire, Messer, Rhodes & Vickers, Post Office Box 1876, Tallahassee, Florida 32302; by U.S. Mail this 23rd day of September, 1985.

Respectfully submitted,

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