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.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Certified Appeal From The District Court Of Appeal
For The First District Of Florida

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INTRODUCTION

Petitioner, American Healthcorp of Vero Beach, Inc. (hereinafter "Healthcorp") hereby submits its Brief on the Merits. Respondents, State of Florida, Department of Health & Rehabilitative Services, et. al., will be referred to hereinafter as "HRS".

If an immediately preceding reference to the Record also applies in whole to subsequent recited facts or other matters, the reference for the subsequent fact or other matter will be designated [Id.]

STATEMENT OF THE CASE AND FACTS

On March 4, 1983, Healthcorp filed with HRS a Certificate of Need application which proposed the construction of a new 120-bed general acute care hospital to be located in Vero Beach, Indian River County, Florida, at a total project cost of sixteen million, two hundred fifteen thousand and no one hundredth dollars ($16,215,000.00). [R 27-29, 68] American Healthcorp, in a timely manner, took all steps necessary (required under the provisions of §381.494(4); (5); (8)(h), Florida Statutes (1982) and Florida Administrative Code Rule 10-5.08), including the filing of a proper fee, in order to have its application entered into the "ALL HOSPITAL PROJECTS" batch review cycle triggered by an application deadline filing date of March 15, 1983. [Id., 195, 196].

Section 381.494(5) required HRS to review and act upon Healthcorp's application within specific time frames after the beginning of the March 15, 1983, batch review cycle. HRS had 15 working days to determine whether American Healthcorp's application was complete and a subsequent 45 calendar days in which to review and issue or deny Petitioner's application. HRS failed to issue or deny the requested certificate within this time period. After the expiration of this proper time period in which HRS had to issue or deny Healthcorp's requested Certificate of Need, upon demand by Healthcorp that it was entitled to the Certificate by default pursuant to the provisions of §120.60(2), Florida Statutes (1981), HRS failed and refused to issue the Certificate of Need to which Healthcorp was then entitled. Furthermore, HRS has never acted upon, by issuance or denial, the specific application submitted for the March 15, 1983 cycle. [R 196-199, 202]

Healthcorp instituted proceedings in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, for a Writ of Mandamus compelling HRS to issue the Certificate of Need. Upon consideration of Healthcorp's Motion for Summary Judgment, final Judgment was entered for Healthcorp ordering HRS to issue the Certificate of Need. A copy of the Final Judgment is attached hereto as Appendix A.

HRS took an appeal of the Final Judgment to the District Court of Appeal of the First District. The District Court of Appeal reversed the Final Judgment and dissolved the Writ of Mandamus. A copy of that Opinion is attached hereto as Appendix B. By Order dated July 25, 1985, the District Court of Appeal denied Healthcorp's Motion for Rehearing, but certified the following question to this Court as one of great public importance:

> Is the Department of Health and Rehabilitative Services, by reason of the language in Section 381.494(8)(c), Florida Statutes (Supp. 1982), providing that if the Department fails to take certain action within the time specified therein, that the applicant "may take appropriate legal action, including relief pursuant to the Administrative Procedure Act," exempted from the general language of Section 120.60(2), Florida Statutes (1981), requiring issuance of a license if an agency fails to act within the time specified therein?

A copy of that Order is attached hereto as Appendix C. Healthcorp respectfully notes that the District Court of Appeal appears to have unintentionally failed to provide the complete quotation from the applicable part of §381.494(8)(c) which is:

> . . .may take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the department to render a determination.

The missing language is emphasized. This omitted language must be considered for purposes of reviewing the certified question in its proper context (e.g., whether that provision operates to exempt HRS and the Certificate of Need process from the consequences of licensure issue by default for failure to act within a timely manner as required by law).

SUMMARY OF ARGUMENT

Healthcorp filed a Certificate of Need Application with HRS, and HRS failed to render a timely decision on that application as required by law. Because of that failure, §120.60(2), Fla. Stat. (1981) imposed a positive obligation upon HRS and its officials to perform the ministerial duty of issuing Healthcorp a Certificate of Need by default. HRS refused to do so. The District Court of Appeal reversed the Trial Court's Judgment compelling HRS to do so on the basis that §381.494(8)(c), Fla. Stat. (1982) is exclusively controlling and allegedly provides a specific exemption from the requirements of §120.60(2). Section 120.60(2) requires the issuance of a license (a Certificate of Need is a license pursuant to §120.52(7), Fla. Stat.) by default for failure to render a decision within the time frames provided by law.

However, §381.494(8)(c) can be and must be construed in pari materia with §120.60(2). There is no clear conflict between the two provisions and they are not irreconcilable so as to preclude the relief afforded Healthcorp by the Trial Court. Both provisions can be construed in harmony with each other giving effect to §381.494(8)(c) as a statute of limitations under which Healthcorp could compel the issuance of the Certificate of Need by default as provided in §120.60(2).

The foregoing manner of interpretation is overwhelmingly supported by legislative intent behind the Administrative Procedures Act, as well as the specific language contained within §120.60(2). Both the Act and the particular provision, require that Chapter 120 is to control the actions of agencies unless express, clearly articulated exemptions appear in the law. HRS did not receive any such clearly articulated exemption from §120.60(2) until a legislative amendment to §381.494(8)(c) was passed well after the expiration of the review period for Healthcorp's application, and after the entry of Final Judgment for Healthcorp in the Trial Court. In fact and as a matter of law, this statutory amendment serves to demonstrate that HRS had not enjoyed an exemption to §120.60(2) as applied to the review of Healthcorp's application.

The Amendment cannot be applied retrospectively to Healthcorp's situation because it would alter a vested right - Healthcorp's entitlement to a Certificate of Need. The Amendment, because it would alter substantive, vested rights, cannot be deemed "procedural" or "remedial" in nature so as to automatically deserve retroactive application. Retrospective application requires the express direction of the Legislature, the Amendment lacks this direction.

The District Court of Appeal found that, because of its rejection of §120.60(2), Healthcorp was required to exhaust any available administrative remedies for the purpose of forcing HRS to take discretionary action upon Healthcorp's application. If this Court finds that Healthcorp was indeed entitled to the Certificate of Need by default, then Healthcorp was not required to exhaust any such administrative remedies. By the very definition of the relief sought by Healthcorp herein, such remedies would necessarily not have been adequate as a matter of law or fact, and, in any event, Healthcorp was not bound to pursue them.

ARGUMENT

WHETHER THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, BY REASON OF THE LANGUAGE IN SECTION 381.494(8)(c), FLORIDA STATUTES (SUPP. 1982), PROVIDING THAT IF THE DEPARTMENT FAILS TO TAKE CERTAIN ACTION WITHIN THE TIME SPECIFIED THEREIN, THAT THE APPLICANT "MAY TAKE APPROPRIATE LEGAL ACTION, INCLUDING RELIEF PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT, TO FORCE THE DEPARTMENT TO RENDER A DETERMINATION," IS EXEMPTED FROM THE GENERAL LANGUAGE OF SECTION 120.60(2), FLORIDA STATUTES (1981), REQUIRING ISSUANCE OF A LICENSE IF AN AGENCY FAILS TO ACT WITHIN THE TIME SPECIFIED THEREIN.

A. Section 120.60(2), Florida Statutes (1982) Entitled Healthcorp To A Certificate Of Need By Default Because Of An HRS Failure To Act Upon The Certificate Of Need Application Within The Required Time Frames.

The District Court of Appeal found that Healthcorp did not have a clear right to the Certificate of Need and that HRS did not have an indisputable legal duty to issue the Certificate of Need; therefore, the District Court of Appeal held that mandamus was not an appropriate remedy because no "ministerial" duty was involved. This ruling is necessarily predicated upon the District Court's disposition of the certified question. The District Court of Appeal erred in reversing the Trial Court; under all relevant tenets of statutory construction, the Certificate of Need review process is not exempt from the standards pertaining to license application review as contained in Chapter 120, Florida Statutes, and particularly from the requirements of §120.60(2), Fla. Stat. (1981) (the version of that provision of law as it existed at the time Healthcorp filed its application and thereafter sought an issuance of the Certificate by default because of failure to render a timely determination).

HRS admitted [R 68], and the Trial Court correctly determined, that Healthcorp had satisfied all requirements for timely filing of its Certificate of Need application, and that HRS had accepted and then failed to render a timely decision on that application:

> On March 4, 1983, Petitioner filed with HRS a certificate of need application which proposes the construction of a new 120-bed general actue care hospital to be located in Vero Beach, Indian River County, Florida, at a total project cost of Sixteen Million Two Hundred Fifteen Thousand and no/100 Dollars ($16,215,000.00). Petitioner, in a timely manner, took all steps necessary (required under the provisions of §§381.494(4), (5), (8)(h), Fla. Stat. (1982) and Fla. Admin. Code Rule 10-5.08), including the filing of a proper fee, in order to have its application entered into the 'ALL HOSPITAL PROJECTS' batch review cycle. This cycle was triggered by the application deadline filing date of March 15, 1983, as provided for in Fla. Admin. Code Rule 10-5.08(1).
>
> * * *
>
> Section 381.494(5), Fla. Stat. (1982), required HRS to review and act upon Petitioner's application within specific time frames after the beginning of the applicable batch review cycle. This provision allows time periods of 15 working days in which HRS had to determine whether Petitioner's application was complete and a subsequent 45 days in which HRS had to review and issue or deny Petitioner's application. HRS failed to either issue or deny Petitioner's application within this proper total time period.

[R 28 (paragraphs 7, 8)]

For purposes of applying the §120.60(2) "default" provision, the statutes and rules establish specific procedures to qualify an application for timely review within a particular review cycle. See, §§381.494(4); (5) and (8)(h); Florida Administrative Code Rule 10-5.08. Healthcorp did everything necessary to fulfill these legal requirements and was entitled to a timely decision. By admitting paragraph seven and eight of the amended Petition for Writ of Mandamus, HRS clearly and unequivocally admitted that Healthcorp's application was properly qualified for review in a cycle triggered by the March 15, 1983, deadling filing date, and that HRS failed to issue or deny the application within the proper time frames provided for by law. [R 27-29, 68].

It is not even disputed by HRS that a Certificate of Need is a "license" pursuant to §120.52(7), Florida Statutes. Because a Certificate of Need is a license, the review of Healthcorp's application for a Certificate of Need was governed by §120.60(2).

Section 120.60(2) immediately became applicable at the point in time when Healthcorp had satisfied all legal requirements for entry into in the March 15, 1983 cycle. Section 120.60(2) reveals Legislative intent that a license applicant's right to a timely decision is of paramount importance:

> Every application for license shall be approved or denied within 90 days after receipt of the original application or receipt of the timely requested additional information or correction of errors or omissions unless a shorter period of time for agency action is provided by law.
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> * * *
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> Any application for a license not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after the Recommended Order is submitted to the agency and the parties, whichever is latest, shall be deemed approved and, subject to the satisfactory completion of an examination, required as a prerequisite to licensure, the license shall be issued.

Section 381.494(5), Florida Statutes (1982) establishes a "shorter time period" as referenced above, and it required HRS to act upon Healthcorp's application within a specific time frame after the beginning of the March 15, 1983 batch review cycle. Because the Healthcorp application had been properly filed in relation to the March 15, 1983, batch cycle, the §120.60(2) mandate that a decision be made upon the application within a specific time period or a default issuance would occur was automatically triggered. Accordingly, because Healthcorp did everything required by law to entitle it to a decision within the "shorter time period" recognized in §120.60(2), HRS had to either have made a timely, discretionary decision upon the Healthcorp application or, upon the expiration of the time limits, approve the application as a ministerial act.

Healthcorp readily recognizes that the issuance or denial of a Certificate of Need application, <u>if completed within the statutorily mandated time period</u>, is a discretionary function of HRS and its officers. However, once a statutory time period for agency action expires, HRS and its officers lose their discretionary function and the law automatically imposes a ministerial duty to issue the Certificate by default.

It must be noted that it would defy logic for HRS to argue that the issuance or denial of a Certificate of Need is only a discretionary act. A parallel can be drawn to World Bank v. Lewis, 406 So.2d 541 (Fla. 1st DCA 1981), wherein the Court held that a license for a new bank must issue by default because the State Comptroller failed to issue or deny the license request within the statutory time period provided for by law. The Comptroller was ordered to issue the license notwithstanding the fact that, after the expiration of the statutory review period, the Comptroller denied the license on the merits. Thus, a license may issue by default as a ministerial duty, even when agency action upon the license, if taken in a timely manner within the proper statutory review period, is discretionary.

In a related appeal, World Bank v. Lewis, 425 So.2d 77 (Fla. 1st DCA 1982), wherein World Bank appealed an Order by the Department of Banking and Finance entered subsequent to the original Opinion recited at 406 So.2d 541, the District Court of Appeal re-affirmed and clarified its earlier decision. The Department of Banking and Finance, in issuing the license as earlier ordered by the District Court of Appeal, placed certain conditions upon approval of the application. World Bank, 425 So.2d at 78. The District Court rejected these conditions finding that, because of the default provisions of §120.60, the Department of Banking and Finance did not have any more discretion in the matter:

> In the statute we construe, the legislature has made its intent as to the consequence of a violation abundantly clear: the application "shall be deemed approved. . . ." Approval by default has the same affect of placing the applicants in the same position they would have enjoyed had the Department granted approval on the merits within the 180-day period.

Id. at 79.

Accordingly, the prospect of an agency's discretionary authority suddenly dissolving into a ministerial duty is no stranger to Florida law.

HRS itself has recognized the applicability of §120.60(2) to the Certificate of Need review process. HRS has thereby recognized that its discretionary role is

converted into a ministerial duty upon the expiration of the applicable time limits. See, Provincial House, Inc. v. HRS, 3 F.A.L.R., 752-A (March 20, 1981). In Provincial House, HRS acted (by denial) upon the Certificate of Need application within the proper time period for initial agency review, and the applicant thereafter requested formal administrative proceedings on that discretionary denial. Accordingly, HRS' discretionary role had not yet terminated because of HRS' timely action during the application review period and the subsequent administrative proceeding which still required HRS to take discretionary final agency action. The Hearing Officer entered a Recommended Order denying the application. In violation of §120.60(2), 45 days expired from the rendition of the Recommended Order without HRS entering a Final Order upon the merits of the application. HRS thereafter agreed that the applicant, by operation of §120.60(2), was endowed with a clear legal right to the issuance of the Certificate of Need by default because of the HRS failure to timely enter a Final Order on the merits as a matter of discretion.

In the case at hand, Healthcorp alleged and demonstrated that HRS failed to approve or deny Healthcorp's application within the proper time period for initial application review, a situation also addressed by §120.60(2). It defies logic for HRS to now argue that the issuance or denial of a Certificate of Need is only a discretionary act while at the same time having recognized in Provincial House that the law can and does nevertheless operate to dissolve any discretionary function.

A Writ of Mandamus is the appropriate remedy to enforce a clear, legal right to the performance of a ministerial duty established by operation of law. State v. Gamble, 399 So.2d 694 (Fla. 2nd DCA 1976); Fasenmeyer v. Wainwright, 230 So.2d 129 (Fla. 1969); Solomon v. Sanitarians Registration Board, 155 So.2d 353 (Fla. 1963). In Solomon, the Court defined the type of official actions that are to be "ministerial" in nature:

> It is arrived at as a result of the performance of a specific duty arising from legislatively designated facts. A ministerial duty is one which is positively imposed by law to be performed

> at a time and in a manner or upon conditions which are specifically designated by the law itself absent any authorization of discretion to the agency.

Id. at 356.

In the instant case, by operation of §120.60(2) the Legislature has mandated that HRS perform a specific duty (the issuance of a Certificate of Need) arising from legislatively designated facts (the expiration of the time period in which HRS had to issue or deny the Certificate after the beginning of the applicable review cycle). Healthcorp alleged below, and the Trial Court found, that §120.60(2) imposes a positive obligation upon HRS officers to perform their ministerial duty at a time, in a manner, and upon conditions which are specifically addressed in the applicable law.

Yet, the District Court of Appeal disagreed, relying wholly upon §381.494(8)(c), Fla. Stat. (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 from 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.

The District Court construed §381.494(8)(c) as exclusively controlling, not permitting the issuance of a Certificate of Need by default, and only giving Healthcorp the ability to force an untimely agency decision on Healthcorp's application.

Assuming arguendo that §381.494(8)(c) qualifies as a "specific" statute in comparison to §120.60(2) as an alleged "general" provision, there is no conflict between §381.494(8)(c) and §120.60(2), (1981), so as to preclude the relief requested by Healthcorp. Section 381.494(8)(c) simply serves as a statute of limitations establishing the time period in which an applicant may take appropriate action to compel HRS to "make a determination". In view of §120.60(2), that "determination" must necessarily be the issuance of a Certificate of Need as a ministerial act.

In Mann v. Goodyear Tire & Rubber Company, 300 So.2d 666, 668 (Fla. 1974), the this Court stated that it is a:

> . . .well-settled rule that, where two statutes operate on the same subject without positive inconsistency or repugnancy, the courts must construe them so as to preserve the force of both without destroying their evident intent, if possible. It is an accepted maxim of statutory construction that a law should be construed with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statute were [sic] not enacted at the same time. Of course, repeal by implication is not favored.

Thus, only where two statutes clearly conflict will a statute that deals with a specific subject be given preference over a statute that is more general in nature. It is presumed that later statutes are passed the knowledge of prior existing law, and the Courts will favor a construction that "gives a field of operation to both rather than construe one statute as being meaningless or repealed by implication unless such a result is inevitable". Littman v. Commercial Bank and Trust Company, 425 So.2d 636, 638 (Fla. 3rd DCA 1983). It is only when statutory provisions are irreconcilable that specific statutes on a subject take precedence over another statute covering the same subject in general terms. Id. at 639. This Court has held that, whenever possible, the judicial interpreter "must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." Villery v. Florida Parole & Probation Commission, 396 So.2d 1107, 1111 (Fla. 1980). Moreover, simply because a later statute relates to matters covered in whole or in part by a prior statute does not automatically cause a repeal of the former statute. State v. Dunmann, 427 So.2d 166, 168 (Fla. 1983).

The two provisions at issue are not irreconcilable so as to preclude the relief afforded Healthcorp by §120.60(2). Irreconcilability, repugnancy, and disharmony do not exist. Section 120.60(2) and §381.494(8)(c) deal with the same subject matter - failure of a State agency to act in a timely manner in the review of a license application. It cannot be said that the two statutes clearly and directly conflict or that there is any positive repugnancy or inconsistency between them. Both provisions can be construed in harmony

with each other. The force of both statutes and their "field of operation" are preserved by the correct construction that §381.494(8)(c) established a statute of limitation in which Healthcorp had to take action to compel the issuance of the Certificate of Need pursuant to §120.60(2). By no means does this construction leave §381.494(8)(c) "with no valid field of operation," a proper test to be applied. State v. Dunmann at 168.

In essence, by any contrary claim, HRS would be urging that this Court find an implied repeal of §120.60(2) applicability to Certificate of Need licensure, thus giving HRS an exemption to default requirements therein. Such a repeal by implication is not favored by the courts of this State. Mann at 688; Carcaise v. Durden, 382 So.2d 1236, 1238 (Fla. 5th DCA 1980); City of Punta Gorda v. McSmith, Inc., 294 So.2d 27, 29 (Fla. 2nd DCA 1974); State v. Nourse, 340 So.2d 966, 969 (Fla. 3rd DCA 1976); Carlile v. Game and Freshwater Fish Commission, 354 So.2d 362, 364 (Fla. 1978). Such an implied repeal will not be upheld in doubtful cases. State v. J.R.M., 388 So.2d 1227, 1229 (Fla. 1980). To the contrary, "it is presumed that all laws are consistent with each other in that the Legislature would not effect a repeal of a statute without expressing an intention to do so". Littman at 638.

Moreover, an alleged "exception" or "exemption statute" should be construed in a manner that restricts the use of the exception. Nourse at 969. Unless the exception is clearly, expressly and readily apparent from a reading of the statutory provision, the person invoking the exception can not be successful in establishing the existence of the exception under the law. Id. At the very least, under the circumstances §381.494(8)(c) is ambiguous, and any such ambiguity in a statute presented as an "exception" must be construed in a manner which restricts the use of the exception. Id.

Thus, any alleged "exception" is simply not clear enough to demonstrate the validity of HRS' theory. This lack of clarity is readily apparent for the same reasons which allow the two provisions at issue to be construed in harmony to preserve the force and effect of each provision's field of operation.

The Legislature itself has clearly indicated that the language of §381.494(8)(c) is not sufficient to except Certificate of Need review from possible §120.60(2) default. Section 120.60(2) applies to any agency unless "specifically exempted by law. . . ." (emphasis added). It strains imagination to view §381.494(8)(c) to be "specific" enough to satisfy the exemption requirement found in §120.60(2). The type of language required to provide an exception to §120.60(2) can be illustrated by reference to language in §120.60(2) itself which specifically states that the Public Service Commission "shall be exempt". Subsections (3) and (4) of §120.60 provide longer review periods and certain conditions to the issuance of licenses for licensing matters handled by the Department of Insurance and the Department of Banking and Finance. These provisions likewise express that the requirements set forth therein are applicable notwithstanding the provisions of §120.60(2). Section 403.722(10) provides for tolling of the review time period for permits for hazardous waste disposal, storage and treatment facilities, and begins with the phrase: "Notwithstanding §120.60(2). . . ."

If the specific, clearly articulated exemptions do not exist in the statutory scheme, §120.60(a) nevertheless will enable the agency to receive an exemption from any provision contained in §120.60(2) by application to the Administration Commission under procedures contained in §120.63. Again, by providing for an exemption process that HRS could have utilized in the case at hand, Legislative intent is revealed that Healthcorp's right to a timely decision was of paramount importance. No specific, clearly articulated exemption from §120.60(2) appears in §381.494(8)(c) as that statute existed prior to, and at the time of, summary judgment. Likewise, HRS did not raise any affirmative defenses that, in the processing of Healthcorp's application, HRS had received an exemption as provided for in §120.63. Accordingly, §120.60(2) must control.

It must be noted that the concept of a Certificate of Need "default", whether that default results in the automatic approval or denial of an application because of failure to render a decision in a timely manner, is no stranger to current Certificate of Need laws in

other states. Three states, Connecticut (1976 Conn. Acts 83-215(a); Conn. Agency's Regs Sec. 19-73(a)-70(d), Georgia (Ga. Code §31-6-43(h); Ga. Admin. Comp. ch. 272-2.06(2)(s) (1982), and Indiana (Ind. Admin. R. §410 IAC 20-2-3(4) (Burns 1983), have provisions which provide for the automatic approval of Certificate of Need applications in the event that the reviewing body does not make a decision within the applicable time requirements. Six states, Alabama (Ala. Code §22-21-275(3); Ala. Regulations §410-1-4-.01(5), Iowa (Iowa Code §135.69 (1979); Iowa Admin. Code §202.7(4), Mississippi (Miss. Code Ann. §41-7-197(2), New Hampshire (NH Rev. Stat. Ann. §151-c: A(1), South Carolina (Regulations R61-15 §306), and Tennessee (Tenn. Code Ann. §68-11-106(6) have provisions which call for the automatic denial of a Certificate of Need application if a decision is not rendered within a timely manner.

The "straw that breaks the camel's back" in refuting any argument that §120.60(2) is inapplicable to the case at hand is a 1984 amendment to §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 Section 120.60(2).

[Emphasis added.][1]

Assuming that the amendment specifically addresses licensure by default (a proposition called into doubt by the District Court) within that Legislative Act lies the very specific express exemption from §120.60(2) not enjoyed by HRS when Healthcorp filed its application in March, 1983.

A later amendment may be taken into consideration for purposes of determining Legislative intent behind, or for purposes of interpreting, a prior statute. Gay v. Canada Dry Bottling Company of Florida, Inc., 59 So.2d 788, 790 (Fla. 1952); Foremost Insurance

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1 Ch. 84-35, Laws of Florida (eff. 5/18/84). This amendment to §381.494(8)(c) was contained in the Committee Substitute for the Committee Substitute (CS/CS) for House Bills 506 and 965, and the CS/CS for Senate Bills 176 and 697. Ultimately, CS/CS/SB 176 and 697 became law as a substitute for CS/CS House Bills 506 and 965.

Company v. Medders, 399 So.2d 128, 130 (Fla. 5th DCA 1981). Even HRS admitted below that the 1984 Amendment to §381.494(8)(c) should influence this Court's interpretation of the provision prior to the Amendment. However, HRS has argued that the 1984 Amendment simply clarified, but did not change, the previous version of §381.494(8)(c). This theory violates the general rule that, when a statute is amended, the Legislature is presumed to have intended a meaning different from that interpretation accorded to the statute before the amendment. Arnold v. Shumpert, 217 So.2d 116, 119 (Fla. 1968); Special Disability Trust Fund, Dept. of Labor and Employment Security v. Motor and Compressor Company, 446 So.2d 224, 227 (Fla. 1st DCA 1984); Capella v. City of Gainesville, 377 So.2d 658, 660 (Fla. 1979). The proper rule of construction is to presume that the Legislature, by the amendment, intended it to serve a useful purpose and to have a different meaning. Id.; Reino v. State, 352 So.2d 853, 861 (Fla. 1977); State Department of Commerce, et al. v. Hart, 372 So.2d 174, 176 (Fla. 2nd DCA 1979).

In view of the foregoing rules of construction, the 1984 Amendment is indicative of a Legislative effort to change the prior, nonexempt status of Certificate of Need review from §120.60(2) requirements. There is no justification for overcoming that presumption. Not only is this intent to "clarify" completely absent from the legislation itself, but the written documentation which accompanied the amendment on its journey through the Legislature unambiguously reveals that an entirely new exemption was being afforded the Certificate of Need review process for the first time. It is appropriate to consider various staff analyses pertaining to amendment legislation to determine the intent behind such amendments. See, Ivey v. Chicago Insurance Company, 410 So.2d 494, 497 (Fla. 1982). In Ivey, the Florida Supreme Court reviewed a Senate staff analysis and economic statement pertaining to an amendment and arrived at the conclusion that the legislation intended to clarify legislative intent behind a prior statute. The staff analysis stated that the amendment "[c]larifies Legislative intent that underinsured motorists protection follows the car rather than the person". Id. at 497. Accordingly, the staff document reviewed and

relied upon by the Court therein expressly stated the purpose of the amendment as being an intent to clarify the meaning of the prior statute.

In the instant case, the relevant documentation concerning the legislation which ultimately became the 1984 amendment makes no mention of an intent to clarify existing law. To the contrary, the Senate staff analysis (see Appendix D) and the staff analysis from the Committee on Health and Rehabilitative Services (see Appendix E) state that the 1984 amendment "[e]xempts HRS from the time limitations provided in s. 120.60(2), F.S., when making a determination on an application for a certificate of need." Likewise, the House of Representatives "Fiscal Note" (see Appendix F) says nothing about "clarification" and instead states that an exemption was being provided.[2]

After utilizing (albeit erroneously) the 1984 Amendment to §381.494(8)(c) as a tool of statutory construction relative to the meaning of the former version of §381.494(8)(c), the District Court of Appeal then held that the statute, as amended, should nevertheless apply retroactively on the basis that the amendment is allegedly "procedural" or "remedial" in nature. Statutes which alter vested rights are presumed to apply prospectively and are interpreted under the general rule against retrospective operation. Id. See, Rothermel v. Fla. Parole and Probation Commission, 441 So.2d 663-665 (Fla. 1st DCA 1983); City of Lakeland v. Catinella, 129 So.2d 133, 136 (Fla. 1961); Dover v. State, 335 So.2d 815 (Fla. 1976). In Dover, the Court quoted the following language in support of the general rule of statutory construction relating to whether a statute should be applied retrospectively or prospectively:

> A statute operates prospectively unless the intent that it operate retrospectively is clearly expressed. Indeed, an act should never be construed retrospectively unless this was cleary the intention of the legislature. This is especially so where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right,

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2 The District Court of Appeal took judicial notice of these documents by Order dated November 5, 1984.

> or create a new liability in connection with a past transaction. The presumption is that it was intended to operate prospectively, unless its language requires that it be given a retroactive operation. The basis for retrospective interpretation must be unequivocal and leave no doubt as to the legislative intent.

(Emphasis added). Id. at 818. See also, Century Village, Inc. v. Wellington, et. al., 361 So.2d 128, 131 (Fla. 1978). The 1984 amendment to §381.494(8)(c) does not contain any expression, let alone an "unequivocal" expression, of Legislative intent that the provision was to apply retrospectively.

By definitional test, the Amendment cannot be considered remedial or procedural as applied to the instant case because it would deprive Healthcorp of a vested property right - the Certificate of Need. If applied, the amendment would take away a substantive, vested right which existed not only at the time Healthcorp's application was filed but also when the Trial Court entered Judgment for Healthcorp.

A substantive, vested right has been defined as "an immediate right of present enjoyment, or a present, fixed right of future enjoyment." Division of Worker's Compensation, Bureau of Crimes Compensation v. Brevda, 420 So.2d 887, 891 (Fla. 1st DCA 1982). Furthermore, "[t]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must become a title, legal or equitable, to the present or future enforcement of a demand, ..." Id. In Division of Worker's Compensation, the subject was the applicability of a repealed statute, in effect at the time of Judgment, which authorized the award of attorneys fees. Id. at 890. The Court held that until judgment had been entered properly awarding the fees, any right under such a fee statute constituted an "expectable interest," and did not qualify as a "vested" right. In the instant case, the foregoing test is satisfied so as to require a conclusion that, at least at the time of judgment, Healthcorp obtained a vested right to the Certificate of Need by operation of law. The 1984 Amendment became law on May 18, 1984, well after the institution of the action in the Trial Court and

subsequent Final Judgment entered on December 9, 1983, with a denial of a Motion for Rehearing entered on January 6, 1984.

The second World Bank, decision, as recited earlier herein, describes the status of a license which has been approved by default. Healthcorp is in the same position it would have enjoyed had HRS granted approval on the merits of the application. See, World Bank, at 79; quote at page 9 herein. Certainly, if Healthcorp had received its Certificate of Need on the merits, a law could not be subsequently passed, without affording Healthcorp due process of law, which would retroactively serve to automatically eliminate that approval.

The case of Department of Health and Rehabilitative Services v. Petty Eifert, 443 So.2d 266 (Fla. 1st DCA 1983) is also relevant to this issue. That case involved an application for a mid-wifery license. The Petitioner/applicant met the criteria under the statute in effect at the time of application but admittedly did not meet subsequently adopted statutory criteria. Id. at 267. Because the choice of law determined whether or not the license would be issued, a substantive right was affected, and therefore, due process required that the law at the time of the application be applied. Id. at 267, 268. Healthcorp finds itself in the same position; §120.60(2) certainly contains one of the provisions which directly speaks to the question of whether or not an applicant is qualified for application approval.

Likewise, in Atwood v. State, 53 So.2d 101 (Fla. 1951), the Court found that because a subsequently law abrogated a right which the applicants enjoyed when they applied for a license, to apply that law at the time of the agency decision would work to illegally, retroactively deny the applicant a right vested by law. See also, Goldstein v. Sweeny, 42 So.2d 367. Accordingly, by the very nature of the relief granted Healthcorp below, a right established by §120.60(2), the subsequent Amendment cannot be applied retrospectively.

The record in this case reveals that Healthcorp met all the requirements to have HRS review its application in the March 15, 1983 review cycle. HRS admits this fact.

The record also reveals that HRS not only failed, but refused, to grant Healthcorp the timely review which was its right. HRS admits this fact.

The record further reveals that HRS recognizes that the default provisions of §120.60(2) apply to the Certificate of Need process in the State of Florida and, in fact, that HRS has issued a Certificate of Need to an applicant pursuant to those provisions. HRS admits these facts.

In reality, the only matter in this case that HRS will not admit to is that the provisions of §120.60(2) apply to Healthcorp as a result of illegal HRS action. The Trial Court would not allow HRS this selective reading of the law so as to evade the consequences mandated by the Legislature. No "obstacles" of statutory construction or application of the current statutory provisions exist so as to preclude reinstatement of the Trial Court's Judgment.

B. Given The Applicability Of Section 120.60(2), Florida Statutes, Which Entitled Healthcorp To A Certificate Of Need By Default, Healthcorp Was Not Required To Exhaust Any Alleged Administrative Remedies.

In rejecting Healthcorp's entitlement to a certificate by default under its interpretation of §381.494(8)(c), it appears that the District Court of Appeal found that, under those circumstances, Healthcorp was required to exhaust its administrative remedies as allegedly mandated by §381.494(8)(c). Thus, §381.494(8)(c) was the sole, controlling provision which, in turn, allegedly permitted HRS to maintain its review discretion. Given the type of question certified to this Court by the District Court of Appeal, the foregoing assessment, in view of the language contained within the Opinion itself, is certainly appropriate. However, because it is not entirely clear as to the purpose of the District Court's reliance upon the alleged "exhaustion doctrine," if this

Court were to agree with Healthcorp's position as to the proper statutory interpretation, then Healthcorp respectfully requests this Court to address this additional "exhaustion" issue to the extent necessary to provide ultimate, final appellate disposition of the case.

The Trial Court's wisdom in making a policy decision that its original jurisdiction was properly invoked by Healthcorp cannot be disturbed. By the very definition of the purpose of a mandamus action, by the very definition of the remedy sought, and under the issues of law as framed by the pleadings, the mandamus action was appropriate for the Circuit Court.

As recognized by the Florida Supreme Court in Ridaught v. Division of Florida Highway Patrol, 314 So.2d 140, 143 (Fla. 1975), a Petition for Writ of Mandamus is an original action as distinguished from an appellate action. See also, Degroot v. Sheffield, 95 So.2d 912 (Fla. 1957). Article V, Section 5(b), the Florida Constitution gives circuit courts the original jurisdiction to issue writs of mandamus. See also, Fla. R. App. P. 9.030(c)(3).

HRS below alleged that only the district courts of appeal have the power of direct review of administrative action. However, this "direct review" refers to appellate review. Article V, Section 4(b)(2) of the Florida Constitution grants the district courts of appeal power of direct review of administrative action "as prescribed by general law." Likewise, Fla. R. App. P. 9.030(b)(1) outlines the appeal jurisdiction of the district courts of appeal, and subsection (c) gives the district courts of appeal appellate jurisdiction over "administrative action when provided by general law". Section 120.68, Fla. Stat. (1981), of the Administrative Procedure Act is the existing "general law" and it grants the district courts of appeal the direct appellate review jurisdiction over agency action formulated as a result of proceedings instigated under Chapter 120, Florida Statutes. The Circuit Court still has original jurisdiction to issue writs of mandamus when appropriate, even when an agency is involved. See, State ex. rel. Dept. General Services v. Willis, 344 So.2d, 580, 589 (Fla. 1st DCA 1977). Thus, there is no doubt that the Trial Court had original jurisdiction over Healthcorp's cause of action.

Section 381.494(8)(c) provides applicants a choice of legal action. The Legislature did not limit the legal action to administrative remedies. Given the ministerial nature of the duty involved after HRS' failure to render a timely decision, mandamus was an appropriate avenue to compel issuance of the Certificate of Need. Section 381.494(8)(c) reserves such a remedy, "in lieu" of exclusive relief under the Administrative Procedure Act. See, §120.73, Fla. Stat. (1981); Willis at 588.

Therefore, by Legislative declaration, Healthcorp was not required to exhaust any alleged administrative remedies, assuming arguendo that such adequate remedies existed for the type of action and issues involved. As a matter of agency interpretation of law, HRS considers its refusal to issue a Certificate of Need to Healthcorp to be an irrevocable decision. It is evident from the pleadings that pursuing alleged administrative remedies would have been futile and would only serve to forestall Healthcorp's immediate need and right to judicial review and relief. [R 12-29; 68-71; 72-76].

The HRS Answer reveals that Healthcorp properly filed its application and that the proper statutory review period (after the beginning of the applicable batch review cycle) expired without agency action. Healthcorp should not be required to undergo the additional time and expense of administrative review by the same agency which has already expressly refused to recognize that it has a ministerial duty under the law to issue the Certificate of Need.

After its refusal to issue a Certificate of Need to Healthcorp by default, the only means provided by HRS for Healthcorp to protect its right to a decision was to file another application into the review cycle triggered by a June 15, 1983, deadline filing date. The filing of this second application was the only administrative "remedy" expressly offered by HRS in response to Healthcorp's demand for the Certificate. In order to fully protect its rights, Healthcorp did file a second application but expressly notified HRS that Healthcorp was not waiving and was specifically reserving its claim in

this mandamus action. [R 77-78]. By agency action, Healthcorp was forced to accept the further expense, injury, and delay of having to enter a second application into a second review cycle and to do everything necessary to protect its status in that cycle. HRS' failure to render a decision on Healthcorp's first application, HRS' failure to issue a Certificate of Need by default to Healthcorp, and the resulting "remedy" whereby Healthcorp was required to file a second application, constituted conduct that is outside the scope of delegated legislative authority, illegal and unconstitutional.

This proceeding below involved the type of dispute in which the administrative remedies found in Chapter 120, Florida Statutes, were not, as a matter of law and fact, as equally convenient, beneficial, effectual, timely, or complete as a mandamus proceeding. (See, Laundry Public Health Committee of Florida v. Board of Business Regulation, 235 So.2d 346, 348 (Fla. 1st DCA 1970). This conclusion is required given the type of ministerial duty at issue, the underlying facts which lead to that duty, and the corresponding lack of any discretion on the part of HRS to refuse to issue the Certificate of Need. Likewise, the actions of HRS, especially the requirement that Healthcorp file a second application in a completely new review cycle, were necessarily so devastating that the promised administrative remedy would have been too little or too late. See, State ex rel. Department of General Services v. Willis, 344 So.2d 580, 590 (Fla. 1st DCA 1977).

Moreoever, by the very nature of the basis of and the facts underlying this mandamus proceeding, if this Court affirms the finding of the Trial Court that the Certificate of Need should be issued as a ministerial act, then the alleged administrative remedies are necessarily inadequate as a matter of law. The statement of the Florida Supreme Court in Solomon v. Sanitarians' Registration Board, 155 So.2d 253, 256 (Fla. 1963), must be noted:

> [W]here an administrative agency is authorized to exercise a purely administrative function as was the situation presented to the trial court, this action may be compelled by mandamus.

In City of Miami Beach v. Sunset Island Three and Four P.O. Association, 216 So.2d 509, 511 (Fla. 3rd DCA 1969), the Court ruled:

> There is no requirement that a relator exhaust his administrative remedies prior to seeking the issuance of an alternative writ of mandamus, when it is apparent that such a gesture would be a futile one or there is no discretion to be exercised by the official involved under the clear wording of either a statute or an ordinance designating him as the authoritative person to respond thereunder. (Emphasis added.)

The foregoing case was relied upon by the Third District Court of Appeal in City of Miami Beach v. Johnathan Corporation, 238 So.2d 516 (Florida 3rd DCA 1970), where the Court recognized that the exhaustion of administrative remedies doctrine "has no application if the facts before the court make it clear that any further action or appeal by the person seeking performance of an administrative duty would be unnecessary or useless. . . ." Id. at 518. In that case, the Court found that the officer was not entitled to exercise any discretion in the issuance of a disputed building permit. Id. Furthermore, the record affirmatively revealed that the involved officer refused to issue the permit because he was told not to by his supervisor, and not because there was any question as to whether or not the applicant had complied with the proper requirements of law in reference to filing and processing the application. Id. The Johnathan case is comparable to the instant case because Healthcorp did everything to have its application entered into the "ALL HOSPITAL PROJECTS" application review cycle triggered by an application deadline filing date of March 15, 1983. As is evident from the deposition of Co-Appellant, Mr. Konrad, the only reason the Certificate of Need was not issued by him (upon demand by Healthcorp) in his capacity as director of the HRS Office of Community Medical Facilities is because he was ordered not to do so by supervisors. [R 197, 198]

In the case of Mountaineer Disposal Service, Inc. v. Dyer, 197 SE2d 111, 115 (Supreme Court of Appeals of West Virginia, 1973), the Court refuted the respondent's contention that the petitioner had to exhaust administrative remedies in seeking the issuance of a permit to operate a sanitary landfill:

> Mandamus will lie to compel performance of a nondiscretionary duty of an administrative officer though another remedy exists, where it appears that the official, under misapprehension of law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not to do the thing demanded of him.

In the instant case, HRS alleges that it still had the discretion to issue or deny the Certificate of Need. This position is simply a misapprehension of law. HRS has no choice but to do the thing demanded of them.

Moreover, in view of the controlling facts and issues of law, HRS failed to allege any sound policy reason as to why the administrative forum was more appropriate than a mandamus proceeding in the Trial Court. The administrative forum would have been appropriate if HRS had any discretion to deny the permit. However, the policies underlying a preference for administrative review, prior to judicial intervention, would not be served in the instant case and would only result in an unnecessary delay of Healthcorp's right to judicial review. It is illogical for HRS to argue that Healthcorp should have pursued a §120.57 administrative proceeding which would have culminated with the entry of a Final Order by the Secretary (a Co-Appellant in this case). The agency's Final Order in §120.57 proceedings must "describe its 'policy within the agency's exercise of delegated discretion' sufficiently for judicial review". McDonald v. Department of Banking and Finance, 336 So.2d 569, 582 (Fla. lst DCA 1977). The instant case deals with a question of nondiscretionary duty, no "policy" is even relevant. No special expertise by HRS is required in the disposition of this case; nor are there any other cogent reasons to require Healthcorp to go through the administrative process prior to finally receiving judicial review. In essence, Chapter 120 does not contain any remedy expressly geared for compelling performance of a ministerial act. It is germane to note that the District Court of Appeal itself did not even address the question of whether administrative remedies would necessarily be "adequate" under the controlling circumstances of this case.

Healthcorp had satisfied all requirements for compelling the issuance of the Certificate by default. The Trial Court wisely recognized that it had original jursidiction over the cause of action, and that it was sound judicial policy to exercise its jurisdiction. This case is the very type of dispute which the Willis, Id. case recognized to be appropriate for immediate judicial consideration in the Circuit Court forum.

CONCLUSION

WHEREFORE, American Healthcorp respectfully requests this Court to reverse the District Court of Appeal and affirm the Final Judgment of the Trial Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail, this 27th day of August, 1984 to M. STEPHEN TURNER, 300 East Park Avenue, Post Office Box 11300, Tallahassee, Florida 32302.

Michael J. Cherniga
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