IN THE SUPREME COURT 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 REPLY BRIEF ON THE MERITS

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

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PRELIMINARY STATEMENT

The same party and record designations referred to in Petitioner's initial Brief are used herein.

INTRODUCTION

To any extent that this Reply does not address certain matters raised within the Answer Brief, no waiver or admission as to the correctness of these matters is is intended, and Healthcorp nevertheless also relies upon its initial Brief.

ARGUMENT

A. HRS STATEMENT OF THE CASE AND FACTS

The HRS attempt to recast Healthcorp's Statement of the Case and Facts should be rejected as unduly redundant and not relevant. In particular, all statements which allege or relate to a "moratorium" on the review of applications and a failure to "accept" Healthcorp's application are not relevant and are not supported by the pleadings.

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 Healthcorp's application and then failed to render a timely decision on that application. See recitation of admitted pleadings at page 7 of Healthcorp's initial Brief. HRS now untimely and erroneously suggests it was somehow legally "excused" from having to act upon Healthcorp's application on or before the date a decision was due. This alleged "excuse" wholly relies upon an erroneous allegation that Healthcorp's application, as a matter of law, was never actually accepted and acted upon because of a "moratorium" on the review of applications.

However, HRS's allegations pertaining to acceptance of the application and the moratorium must be ignored. None of the affirmative defenses raised by HRS in its Answer before the Trial Court allege that HRS did not accept the application for filing

and review in the March 15, 1983 cycle, or that a legally valid "moratorium" had been imposed so as to preclude such acceptance and review. [R 68-71]. The relevant facts, as they pertain to the issues of law framed by the pleadings, require a conclusion that the application satisfied all legal requirements for review. Healthcorp was entitled to a decision within the proper time frame associated with the March 15, 1983 cycle.

In essence, the "facts" now urged upon the Court by HRS relate to affirmative defenses not cognizable by the Trial Court upon consideration of Healthcorp's Motion for Summary Judgment; HRS is now precluded from raising these affirmative defenses on appeal. Dover vs. Worrell, 401 So.2d 1322, 1323 (Fla. 1981). Hood vs. Hood, 392 So.2d 924, 925 (Fla. 2d DCA 1980). The question of whether HRS has any right to claim that it did not, as a matter of law, accept the application is necessarily based upon the relevancy, force and effect of the alleged "moratorium", and these allegations constitute matters which HRS failed to timely plead as affirmative defenses. They were waived by HRS's failure to present them in its Answer before the Trial Court. Fla. R. Civ. P.1.140; Sottile vs. Gaines Construction Company, 281 So.2d 558, 560 (Fla. 3rd DCA 1973); Bradford Buildings vs. Department of Water & Sewers, 142 So.2d 137, 138 (Fla. 1962).

HRS first attempted to assert the "moratorium" as a defense was in an Affidavit in Opposition to the Motion for Summary Judgment. (R83,84)[1] Affidavits in Opposition to Summary Judgment may not, for the first time, raise allegations constituting affirmative defenses that should have been plead beforehand. Liberman vs. Rhyne 248 So.2d 242, 244 (Fla. 3rd DCA 1971); Wingreen Company vs. Montgomery Ward & Company, 171 So.2d 408, 410 (Fla. 3rd DCA 1965). As revealed by the Final Judgment, the Trial Court did not consider the HRS Affidavit in Opposition to Motion for Summary Judgment to be relevant to the issues. [R87, 88]. Likewise, the Trial Court did not

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[1] American Healthcorp's counsel did not learn of the Affidavit until the Summary Judgment Hearing. A copy of the Affidavit was received by American Healthcorp's counsel by U.S. mail (3) days after the Hearing wherein Summary Judgment was granted. (R85-88).

consider alleged facts contained in additional affidavits filed in support of the HRS Motion for Rehearing. [R185,186]. Healthcorp respectfully urges this Court to also ignore any alleged "facts" raised in the HRS Answer Brief which are based upon affidavit assertions related to alleged defenses not timely raised in the pleadings. These "facts" are clearly repugnant to the very admissions made by HRS during the proper pleading process.

Even if the alleged "moratorium" had been raised in a timely manner, it would not have been an adequate defense because HRS had no legal authority to impose the moratorium. In Balsam, et al. vs. HRS, 452 So.2d 976 (Fla. 1st DCA 1984), the "moratorium" relied upon by HRS herein was declared illegal.

HRS also refers to the irrelevant fact of Healthcorp having submitted another application for processing in a subsequent June 15, 1983 cycle. After HRS's refusal to issue, by default, a Certificate of Need to Healthcorp, the only means provided by HRS for Healthcorp to receive a decision was not action upon its application filed for the March 15, 1983 cycle, but instead a requirement that Healthcorp file a second application for review in the review cycle triggered by a June 15, 1983 deadline filing date. In filing the new application, HRS was expressly notified that Healthcorp was not waiving, and was specifically reserving, its claim in the mandamus action below. [R77,78,80,201,202,205].

B. HRS ISSUE I - APPROPRIATENESS OF THIS DISCRETIONARY REVIEW

HRS urges that this Court should exercise its discretionary power to decline to review the District Court decision. HRS's argument is entirely predicated upon a claim that the certified question does not concern an issue of "great public importance".

The very foundation of the HRS argument on this Issue is that a 1984 amendment to § 381.494(8)(c), Fla. Stat., will cause this Court's decision to "have very limited applicability", In Duggan vs. Tomlinson, 174 So.2d 393, 394 (Fla. 1965), a case cited by HRS, this Court recognized that "the ultimate decision of whether the decision

does pass upon a question of great public interest is one which the Constitution vests exclusively in the District Courts...." See also Zirin vs. Charles Pfizer & Co., 128 So.2d 594,597, Fla. 1961; Art. IV, § 3(b)(4) Fla. Const. In Zirin, Id. the Court expressly rejected a contention that it is part of this Court's discretionary jurisdiction to make a threshold determination as to whether or not the District Court was correct in classifying the question as being, (under the language of the Constitution at that time), "of great public interest". Zirin at 595,596. Of course, Healthcorp readily recognizes that, as stated in Zirin at 596, the certification only serves to satisfy jurisdictional requirements, and that the vesting of jurisdiction in this Court does not remove the discretionary power to decline to render a decision. However, HRS has not provided any cogent or persuasive arguments as to why this Court should proceed in that manner; the sole basis of the HRS argument under Issue I necessarily evolves around the question of whether the issue is of "great public importance", and as demonstrated above, such grounds are entirely inappropriate as a basis to reject this review.

The futility of HRS's argument is further accentuated by the fact that, in certifying the question, the District Court was well aware of the 1984 amendment and the limited applicability of a decision based upon the 1982 statute. If HRS wishes to "second guess" the District Court, then it is just as appropriate to opine that the very limited applicability and effect of a decision in Healthcorp's favor stands as a very important reason to ask this Court to consider the matter. This review necessarily involves the resolution of a substantially significant question as to the level of deference to be afforded provisions of Florida's Administrative Procedure Act in the absence of very specific, clearly articulated exemptions. With the limited effect of a decision based upon the 1982 statute, the District Court could certainly have felt that justice could best be served by having the Supreme Court provide an ultimate resolution of the tensions of statutory construction underlying the dispute. Certainly, this viewpoint is supported by balancing the limited consequences against the potential for causing an erosion of the all-encompassing nature of the Administrative Procedures Act, (with the resulting

uncertainty as to its application in controlling the conduct of agencies).

C. ISSUE II - THE EFFECT OF A 1984 AMENDMENT TO §381.494(8)(c), FLA. STAT.

HRS contends that the 1984 amendment to §381.494(8)(c), which expressly exempts the Certificate of Need review process from "time limitations" found in §120.60(2) Fla. Stat., applies rectroactively so as to preclude the issuance of a Certificate of Need to Healthcorp. Healthcorp contends that such an interpretation would illegally alter Healthcorp's vested, substantive right to the Certificate and, therefore, the amendment can only be applied prospectively. See pages 17-19 of Healthcorp's initial Brief.

At two different points in its Brief, HRS has deemed it necessary to note that the Amendment "does not specifically address remedies". See pages 11,13 of Answer Brief. Even the District Court recognized the inherent doubtfulness as to the amendment's impact upon available remedies, "including licensure by default", thus characterizing it as having retroactive effect (as a remedial or procedural provision) on an assumption that the 1984 amendment is applicable to available remedies. Thus, the presence itself of this ambiguity is a restraint against classifying the amendment as remedial or procedural, with retrospective application, to defeat Healthcorp's claim.

In any event, a crucial qualification to the rule concerning retroactive application of remedial or procedural amendments is that no such application can occur if the result would be a deprivation of substantive rights. See Rothermel vs. Florida Parole and Probation Commission, 441 So.2d 663, 664 (Fla. 1st DCA 1983); City of Lakeland vs. Catinella, 129 So.2d 133, 136, (Fla. 1961); Village of El Portal vs. City of Miami Shores, 362 So.2d 275, 278, (Fla. 1978). The mere label as "remedial" or "procedural" does not end the inquiry; the impact of retroactive application must also be examined. Yet, in analyzing this impact, HRS argues that §120.60(2) does not speak to the question of being "qualified for application approval", and, therefore, Healthcorp's

claim to a Certificate by default is not a substantive right. HRS contends that such qualification, and therefore classification as a substantive right, can only vest if approval is received pursuant to application review criteria contained in § 381.494(6)(c), Fla. Stat..

In making a contention that §120.60(2) does not offer "qualification" for a Certificate, HRS relies upon World Bank vs. Lewis, 406 So.2d 541 (Fla. 1st DCA 1981). However, reliance upon that case is misplaced; the Court therein did not distinguish approval by failure to act within a specific time period as being any different than discretionary approval within the proper time frame. The practical effect of the law is the same - certain events "qualify" an applicant to receive the license. Moreover, HRS has ignored the related appeal, World Bank vs. Lewis, 425 So.2d 77 (Fla. 1st DCA 1982), (see pages 9, 19 of Healthcorp's initial Brief), wherein the District Court stated:

> Approval by default has the same effect 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.

Thus, in substance there is no difference to be afforded the treatment of a license issued Healthcorp by default than if Healthcorp had received approval after review on the merits. Healthcorp is in the same position it would have enjoyed had HRS granted approval on the merits.

Certainly, if Healthcorp had received its Certificate on the merits, a law could not subsequently be passed which would retroactively serve to automatically eliminate that approval. Yet, in its strained attempt to argue that Healthcorp does not enjoy any substantive right, HRS implicitly urges that such a possibility certainly exists. In essence, HRS also presents a position which would reward an agency for going to the Legislature and seeking the type of amendment at issue herein in an attempt to evade the consequences of its failure to properly carry out its statutory duties.

D. ISSUE III - THE APPLICABILITY OF THE 1982 VERSION OF §381.494(8)(c), FLA. STAT. CONSIDERED WITH § 120.60(2), FLA. STAT.

HRS contends that if the 1984 amendment to §381.494(8)(c) were deemed inapplicable, the 1982 version of §381.494(8)(c) would nevertheless control so as to defeat Healthcorp's claim. HRS ignores the express requirement that §120.60(2) applies to any agency unless a clearly articulated exemption is provided for by law. Because §381.494(8)(c) does not provide this specificity so as to avoid the controlling Administrative Procedure Act provision, it is rather benign and illogical for HRS to belittle Healthcorp's demonstration that §381.494(8)(c) and §120.60(2), at the very least, can be construed in harmony with each other so as to preserve the force and effect of the §120.60(2) default requirement. In any event, HRS ignores the clear requirement that, at the very most, in the absence of a specific exemption (articulated in a manner consistently utilized by the Legislature to do so), §120.60(2) must control.

HRS fails to explain why, even if there are inconsistencies apparent between the two provisions, this Court should avoid the rule of construction that "[i]f possible, [a Court] must construe the inconsistencies so as to reconcile them." Peterson vs. State of Florida Environmental Regulation, 350 So.2d 544, 545 (Fla. 1st DCA 1977). See also Askew vs. Schuster, 331 So.2d 297, 298 (Fla. 1976). Healthcorp has clearly demonstrated that such a reconciliation is possible. HRS must fail in its attempt to urge an implied repeal of §120.60(2) applicability to Certificate of Need licensure.

HRS relies upon two principles of statutory construction mandating that inconsistencies must be resolved "in favor of the last expression of legislative will" and that a more specific statute must control over a general statute. However, it is obvious (even from the very case law cited by HRS) that these principles may only apply when reconcilability is not possible and where the provisions being construed remain repugnant or incongruous. See Peterson, Id., at 545; Askew, Id. at 298, 300; Adams vs. Culver, 111 So.2d 665, 667 (Fla. 1959); Tallahassee Democrat, Inc. vs. Florida Board of Regents, 314 So.2d 164, 166 (Fla. 1st DCA 1975); Littman vs. Commercial Bank & Trust Co., 425 So.2d

636, 638, 639 (Fla. 3rd DCA 1983).

HRS misunderstands why Healthcorp referred this Court to the provisions of §§120.60(3)(4) and 403.722(10), Fla. Stat. As clearly explained in Healthcorp's initial Brief, (at page 14) these provisions serve as examples of the manner in which the Legislature has chosen to provide specific, express exemptions to agencies from the operation of §120.60(2). These reference points reveal that such exemptions must be articulated by use of the language "shall be exempt" or "notwithstanding the provisions of §120.60(2)". The language of the 1982 version of §381.494(8)(c) fails this test.

HRS contends that the issuance by default of a Certificate of Need runs contrary to the Legislative intent and purpose behind the existence of the Certificate of Need program, the "Health Facilities and Health Services Planning Act", §§381.493-499, Fla. Stat. Pointing to purposes including cost containment and the elimination of unnecessary duplication of services, HRS attempts to intimidate this Court by claiming that support for Healthcorp's position would allegedly result in the "purely capricious addition of unwarranted and unneeded health care facilities". Not only does this assertion erroneously conceive and condone blatant agency ignorance of Healthcorp's rights, but it also is a moot argument given the 1984 amendment which now specifically exempts Certificate of Need review from the threat of §120.60(2) default provisions. Furthermore, the record does not provide any support for such an assertion. It also deserves recognition that, if the §120.60(2) provision still applied, these alleged consequences would result from a failure of HRS to properly carry out its responsibilities under the law.

Moreover, HRS registers no such "worse case scenario" complaints over the consequences of the default issuance of a bank charter as occurred in the World Bank, Id., decision. In fact, the "Florida Banking Code", Chapters 658, 660-663, Fla. Stat., also has an express Legislative purpose to protect the interests of the public and to insure sound financial practices which would not injure the public. The Legislature has gone to great lengths to delineate these purposes in the Banking Code. (See §§658.14, and

658.15, Fla. Stat.) In reviewing bank charter applications, the Department of Banking and Finance is required to look at the "need" for such facilities within a particular service area, as well as the impact those facilities will have upon competitors and the public. Id.; §658.20, Fla. Stat. The Legislature has nevertheless recognized that such applications can be granted by default, and it must be assumed that this possibility is a risk duly considered by the Legislature. For that matter, all licenses are intended to provide some measure of protection against some type consequence; yet, §120.60(2) reveals Legislative intent that timely decisions are of paramount importance. Thus, the "purpose" of Florida's Certificate of Need review is not an impediment to the issuance of a Certificate by default; and HRS simply questions the wisdom of the Legislature.

HRS also expressed confusion as to why Healthcorp, at pages 14 and 15 of its initial Brief, demonstrated that other States have default provisions. The purpose of this demonstration is to reveal that the default concept is no stranger to the Certificate of Need process and is not necessarily contrary to public policy. Furthermore, the fact that other States have default requirements supports the contention that Federal law relied upon by HRS herein does not preempt State law and forbid disposition of Certificate of Need applications by default.

HRS has attempted to demonstrate that Legislative intent as to the interpretation of §381.494(9)(c), Fla. Stat. (Supp. 1982), must be construed in HRS's favor because of Federal law on the subject and as Federal law relates to the history of the Florida provision. Given the overwhelming Legislative mandate that clearly articulated exemptions must be established in order to avoid §120.60(2), Healthcorp respectfully submits it is not even necessary to resort to an analysis of Legislative history behind §389.494(8)(c). Nevertheless, HRS's contentions concerning Federal law must fail.

HRS implies that the Federal statute, 42 USC §300n-1(12)(c)(ii), somehow inspired the 1980 amendment to §381.494(8)(c). To the contrary, that Federal statute in no manner prohibits the issuance of a Certificate of Need by default; it simply provides an opportunity for applicants not receiving a timely decision to bring an action in State

court to obtain an approval or disapproval. The statute is not inconsistent with the concept of a Certificate of Need by default. In fact, at the very least the Federal statute is ambiguous, as confirmed by HRS's statement that the subsequently adopted Federal regulation, 42 C.F.R. §123.410(17), "specifically clarified" the statute's intent. No citation of authority is necessary for the proposition that an agency, by susequently adopted regulation, cannot be deemed to have "clarified" the intent of a statute promulgated by the Congress.

HRS then goes on to develop an erroneous impression that the Florida Legislature directly "responded to" both the Federal regulation and the ambiguous Federal law it "specifically clarified", by passing the 1980 amendment to §381.494(8)(c). However, HRS has failed to recognize that the amendment to §381.494(8)(c) was signed into law on June 25, 1980; the cited Federal regulation, 42 C.F.R. §123.410(17), was not promulgated until October 21, 1980, four months after §381.494(8)(c) was amended. It is clear that the cited Federal regulation itself could not have been an influence upon the §381.494(8)(c) 1980 amendment.

HRS also implies that State law should be totally ignored in favor of Federal law pertaining to Certificate of Need programs. This argument can be disposed of simply by noting that such allegations should have been raised as an affirmative defense by in HRS. Because this defense was not raised in the HRS Answer, it has been waived.

Even if HRS had timely raised this alleged "defense", its reliance upon Page vs. Capital Medical Center, 371 So.2d 874 (1st DCA 1979), and Farmworkers' Rights vs. HRS, 430 So.2d 1 (Fla. 1st DCA 1983) is misplaced. Neither case addresses the applicability of the Administrative Procedure Act licensing provisions to Certificate of Need review. The thrust of the holding in Page concerned an examination of the HRS role for Certificate of Need review in relation to the role played by "an advisory comprehensive health planning council." The only reference to the applicability of Federal law is in dicta wherein the Court observed that there are applicable Federal, State and agency rules and regulations. Page, at 1089. The Court then went on to observe that HRS is

bound by State policies, statutes and rules which may apply to Certificate of Need review. The Farmworkers' case involved a challenge against Florida Administrative Code Rule 10-5.11 which contained the substantive review criteria under which Certificate of Need applications are to be evaluated. This Court found that because Rule 10-5.11 did not include any criteria which addressed the access of a proposed facility or service for medically underserved persons, and because this access criterion is contained in the Federal review criteria scheme, Rule 10-5.11 was invalid. The Farmworker's decision did not in any manner address the question of whether the Certificate of Need review process is exempt from §120.60(2).

Furthermore, the Federal "National Health Planning Resources Development Act," (Titles XV and XVI of the "Public Health Service Act"), does not preempt State law on the same subject. In North Carolina ex. rel. Morrow vs. Califano, 445 Fed.Supp. 532 (E.D.N.C. 1977), aff'd 435 U.S. 962, 98 Sp.Ct. 197, 55 L.Ed.2d 54 (1978), the Court specifically stated:

> It must be remembered that this Act [National Health Planning Sources Development Act] is not compulsory upon the State. Unlike the Legislation faulted in State of Maryland vs. Environmental Protection, Ag. supra, 530 Fed.2d 215 [4th Cir.), it does not impose a mandatory requirement to enact legislation on the State; it gives to the state an option to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of Federal grants to the States and is not "coercive" in the constitutional sense.

Id. at 535-36.

In the case of Village of Herkimer vs. Axelrod, 451 N.Y. Supp.2d 303 (Sup. Ct. App. Div. 1982), the Court stated that the Federal National Health Planning and Resource Development Act "itself, however, negates any congressional attempt totally to preempt th field of health planning from the States, see, U.S. Code Tit.42 §300K(b)...."

In view of HRS's arguments pertaining to the alleged "controlling" nature of Federal law, HRS amazingly attempts to distinguish its earlier action, by Final Order, in Provincial House, Inc. vs. HRS, 3 FALR 752-A(Mar. 20, 1981). That HRS final agency

action is summarized at page 10 of Healthcorp's initial Brief. HRS cannot escape the fact that in Provincial House, HRS applied §120.60(2) to grant a Certificate of Need application, denied by Recommended Order, because of a failure to render a Final Order in a timely manner. The Final Order in Provincial House was entered March 21, 1981 well after the Federal statute and regulation relied upon herein by HRS became law. In granting proper relief to the applicant in Provincial House, HRS obviously did not feel constrained by what it now perceives to be a prohibition in the Federal scheme, even though that alleged "constraint" existed in 1981. It is germane to note that HRS does not assert that it erred in Provincial House. Instead, HRS argues that Provincial House is not applicable because it only applies after the entry of a Recommended Order "in which all substantially affected parties have participated". HRS erroneously implies that the Recommended Order in Provincial House was a recommendation that the disputed application be granted, and therefore, no real harm occurred. It is readily apparent from reading the Provincial House opinion that the application was denied by Recommended Order after the participation of substantially affected parties in a hearing. Therefore, the applicant therein did exactly what HRS now claims Federal law says an applicant in Florida cannot do, it walked "away with a CON by default, never having to demonstrate its entitlement on the merits". See page 31 of Answer Brief. Accordingly, this distinction by HRS of the Provincial House decision defies logic. The ultimate result was still a non-discretionary, ministerial approval of the Certificate solely because HRS failed to reach a final decision in a timely manner-exactly what HRS now claims Federal law prohibits. HRS must fail in its efforts to conveniently "pick and choose" that portion of §120.60(2) which should control.

Assuming arguendo that HRS is correct in its position as to the applicability of Federal law, Florida's Administrative Procedure Act placed an affirmative obligation upon HRS to seek an exemption from the conflicting Chapter 120 requirement. When such a situation arises, the Legislature has intended that the Chapter 120 provision is not automatically discarded in favor of the Federal law; it is incumbent upon the agency to

seek an exemption from the Administrative Commission pursuant to §120.63. Clearly, §120.63(1)(a) recognizes the possibility of the exact situation which HRS relies upon herein for its claim that the default requirements of §120.60(2) should not prevail by permitting exemption "[w]hen the agency head has certified that the requirement would conflict with any provision of federal law or rules with which the agency must comply . . . ." Yet, HRS did not avail itself of an opportunity opportunity to receive an exemption. HRS waited until the 1984 Legislative session for an amendment to §381.494(8)(c) which provides the specific exemption HRS belatedly claims should have applied to review of Healthcorp's application.

The Record does not support a finding that the Legislature intended the 1984 amendment to "clarify" what HRS perceives to be the prior meaning of §381.494(8)(c) so as to preclude default. If anything, the Legislative documentation contained in the appendix to Healthcorp's initial Brief clearly reveals an intent to change the law by providing an exemption. Contrary to being neutral on the subject, these materials give ample reason to suggest that Healthcorp is correct in its view that the Legislature should be presumed to have intended a meaning different from the interpretation afforded to the statute before the amendment. See pages 15,16 of Healthcorp's initial Brief.

E. ISSUE IV - THE APPROPRIATENESS OF MANDAMUS

HRS claims that Healthcorp was not entitled to resort to a Mandamus action because of an alleged failure to exhaust administrative remedies. It must be noted that this argument is predicated upon irrelevant matters pertaining to the "moratorium" and to an alleged failure to accept Healthcorp's application, both of which are not only completely unsupported by the pleadings, but also which constitute affirmative defenses not raised below in a timely fashion. See pages 1-3 herein.

HRS did not even attempt to address the cases cited in Healthcorp's initial Brief which reveal that mandamus is certainly appropriate when there is no discretion to be exercised by the agency. See pages 23-25 of Healthcorp's initial Brief.

It must also be noted that the District Court's observations as to Healthcorp not exhausting administrative remedies was predicated upon the District Court's determination that §120.60(2) did not apply so as to entitle Healthcorp to the issuance of a Certificate as a non-discretionary, ministerial duty. The very fact that the District Court certified the particular question at issue herein indicates implicit District Court recognition that the exhaustaion doctrine would not apply under Florida law if Healthcorp ultimately prevails on its claim that §120.60(2) mandates the issuance of a Certificate by default.

HRS erroneously infers that the Amicus Curiae had "competing" applications filed which would have been reviewed within the same batch cycle as the Healthcorp application. This inference is totally unsupported by the record; the Amici Curiae in fact did not have existing applications filed for review with the Healthcorp application in the cycle triggered by a deadline filing date of March 15, 1983.

F. BRIEFS OF AMICI CURIAE

Amicus curiae Indian River County Hospital District characterizes itself as "an applicant for a CON". For clarification purposes, the Hospital District application being referred to was filed in a review cycle subsequent to the cycle entered by the Healthcorp application at issue in this case, and it constituted a proposal to add 70 beds at the District hospital as well as to undertake a very substantial renovation and expansion of diagnosis, treatment, and support services, for a total proposed capital expenditure of approximately $24,500,000.00 (as compared as to the $16,215,000.00 proposed by Healthcorp for an entirely new hospital).

The Hospital District alleged in its Statement of the Case and Facts that it would be seriously damaged by approval of the Healthcorp application. This allegation is not supported by the Record.

Otherwise, the foregoing Reply, as well as Healthcorp's initial brief, also serve in response and rebuttal to the arguments raised by the Amici Curiae.

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 Reply Brief has been furnished by U.S. Mail this 18th day of October, 1985 to M. Stephen Turner and William L. Hyde, 300 East Park Avenue, P. O. Drawer 11300, Tallahassee, Florida 32302, Kenneth F. Hoffman, Oertel & Hoffman, P.A., 2700 Blair Stone Road, Suite C, Tallahassee, Florida 32301, and James C. Hauser, Messer, Vickers, Caparello, French & Madsen, P. O. Box 1876, Tallahassee, Florida 32302-1876.

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