IN THE SUPREME COURT OF FLORIDA

Sup. Ct. Case No. 93,952
3d DCA Case No. 97-3414

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Petitioner,

v.

INVESTMENT CORPORATION OF PALM BEACH, et al. ,

Respondents.
_____/

On Review of a Petition to Invoke the Discretionary Jurisdiction of the Florida Supreme Court to Review a Decision of the Third District Court of Appeal Upon Asserted Express and Direct Conflict

---

ANSWER BRIEF OF RESPONDENTS, CALDER RACE COURSE, INC., TROPICAL PARK, INC., AND GULFSTREAM PARK RACING ASSOCIATION

Wilbur E. Brewton, Esquire
Kelly B. Plante, Esquire
Fla. Bar No.'s: 110408, 866441
Gray Harris & Robinson, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
and
David S. Romanik, Esquire
Romanik, Huss, Paoli & Ivers
1901 Harrison Street
Hollywood, FL 33020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CASES **PAGE**

FLORIDA STATUTES **PAGE**

OTHER AUTHORITY **PAGE**

.

PRELIMINARY STATEMENT

In the proceeding below, Calder Race Course, Inc., Tropical Park, Inc. and Gulfstream Park Racing Association, Inc., all holders of thoroughbred horseracing permits, were the Petitioners, and the Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation was the Respondent.

In this brief, Calder Race Course, Inc. will be referred to as "Calder;" Tropical Park, Inc. will be referred to as "Tropical;" and Gulfstream Park Racing Association, Inc. will be referred to as "Gulfstream." Collectively, Calder, Tropical and Gulfstream will be referred to as the "Thoroughbred Permitholders."

The Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation will be referred to as the "Division."

The symbol [A-] followed by the appropriate page number will be used to refer to the appendix to this appeal.

All references to the Florida Statutes refer to the 1997 codification.

All emphasis has been supplied unless otherwise is indicated.

STATEMENT OF THE FACTS AND THE CASE

Respondents, Calder Race Course, Inc., Tropical Park, Inc. and Gulfstream Park Racing Association, Inc. (hereinafter the "Thoroughbred Permitholders") are three (3) of the five (5) holders of thoroughbred pari-mutuel permits and annual licenses issued by the Division of Pari-Mutuel Wagering pursuant to Chapter 550, Florida Statutes, to conduct thoroughbred horseracing in Florida.

In addition to conducting live thoroughbred horseracing at their facilities, each of the Thoroughbred Permitholders conducts intertrack wagering. The term "intertrack wager" is defined by Section 550.002(17), Florida Statutes, as:

> "Intertrack wager" means a particular form of pari-mutuel wagering in which wagers are accepted at a permitted, in-state track, fronton, or pari-mutuel facility on a race or game transmitted from and performed live at, or simulcast signal rebroadcast from, another in-state pari-mutuel facility.

"Simulcasting" is defined by Section 550.002(32), Florida Statutes, as:

> "Simulcasting" means broadcasting events occurring live at an in-state location to an out-of-state location, or receiving at an in-state location events occurring live at an out-of-state location, by the transmittal, retransmittal, reception, and rebroadcast of television or radio signals by wire, cable, satellite, microwave, or other electrical or electronic means for receiving or rebroadcasting the events.

Therefore, the definition of intertrack wagering includes and incorporates the following options: (1) accepting wagers on a race or game transmitted from and performed live at a Florida pari-mutuel facility; (2) accepting wagers on a race or game transmitted from and performed live at an in-state pari-mutuel facility and rebroadcast to an out-of-state location; and (3) accepting wagers on a race performed live at an out-of-state pari-mutuel facility and transmitted to an in-state thoroughbred pari-mutuel facility conducting live racing, and rebroadcast to other in-state pari-mutuel facilities,[1] also called interstate simulcasting.[2]

When conducting intertrack wagering as described in option (3) above, the Thoroughbred Permitholders are each considered a "host track" under the provisions of Section 550.002(16), Florida Statutes, which defines "host track" as "a track or fronton conducting a live or simulcast race or game that is the subject of an intertrack wager." Section 550.6325, Florida Statutes, provides: "[u]ncashed tickets and breakage tax [breaks] on intertrack wagers shall be retained by the permitholder conducting the live racing or games." Because the

---

[1]Pursuant to Section 550.3551(3), Florida Statutes, only thoroughbred permitholders may accept a race from out of state to rebroadcast it to in-state pari-mutuel facilities, and such thoroughbred track can only do so during its race meet when it is conducting live racing.

[2] For clarification, option 3 is the only area where there is a dispute relating to what entity retains the uncashed tickets and breaks.

term "intertrack wager" includes interstate simulcasting under Section 550.002(17), Florida Statutes, and the Thoroughbred Permitholders must be conducting live racing in order to engage in interstate simulcasting, the Thoroughbred Permitholders believe they are entitled, as a matter of law, to the uncashed tickets and breaks on all forms of intertrack wagering pursuant to Section 550.6325, Florida Statutes.[3]

However, numerous disputes over the Thoroughbred Permitholders' entitlement to the uncashed tickets and breaks generated by intertrack wagering on simulcast events as provided in Section 550.6325, Florida Statutes, arose between the Thoroughbred Permitholders as the host tracks and several guest tracks, including: Palm Beach Investment Corporation of South Florida, d/b/a Palm Beach Kennel Club ("Palm Beach"), West Flagler Associates, d/b/a/ Flagler Greyhound Track ("Flagler"), The Aragon Group, Inc., d/b/a Dania Jai Alai ("Dania"), Investment Corporation of South Florida d/b/a Hollywood Greyhound Track ("Hollywood"), and Daytona Beach Kennel Club, Inc. ("Daytona Beach").

A dispute also arose between Gulfstream, as the host track, and Investment Corporation of South Florida d/b/a Hollywood Greyhound Track ("Hollywood").

---

[3] Prior to 1996, Thoroughbred tracks routinely rebroadcasted two (2) races per day from out-of-state tracks, and always retained the uncashed tickets and breaks for their own account.

Two of the guest tracks, Palm Beach and Daytona Beach, have taken the position that they are entitled, by law, to retain, and have in fact retained, for their own account, forty-five percent (45%) of the uncashed tickets and breaks on intertrack wagering of simulcast events under Section 550.6305(9)(d), Florida Statutes.

Other guest tracks have taken the position that they are entitled by law to retain, for their own account, thirty-three and one-third percent (33-1/3%) of the uncashed tickets and breaks on intertrack wagering on simulcast events pursuant to Section 550.6305(9)(b), Florida Statutes, which provides:

> (b) Notwithstanding the provisions of subsection (1) and s.550.625(1) and (2)(a), the distribution of the net proceeds that are retained by a thoroughbred host track from the takeout on an out-of-state race rebroadcast under this subsection shall be as follows:
>
> 1. One-third of the remainder of such proceeds shall be paid to the guest track; . . .

Dania has taken the position that it is entitled, by law, to retain, for its own account, all of the uncashed tickets and breaks on intertrack wagering of simulcast events.

On June 24, 1997, as a result of the numerous disputes with various guest tracks in Florida over who is entitled to the uncashed tickets and breaks, the

Thoroughbred Permitholders, at the express request of the Division, filed a Joint Petition for Declaratory Statement pursuant to Section 120.565, Florida Statutes, to determine whether, pursuant to Section 550.6325, Florida Statutes, the permitholder conducting live racing, i.e., the thoroughbred host track, is entitled to retain the uncashed tickets and the breaks generated by intertrack wagering on the out-of-state races they rebroadcast to in-state pari-mutuel facilities. [A-1 through A-6] The Petition was not limited to Palm Beach, but specifically addressed to all guest tracks.

Palm Beach had previously filed a Petition for Declaratory Statement with the Division on June 20, 1997, requesting an interpretation of Sections 550.3551(3)(c), and 550.6305(9), Florida Statutes, as those sections may apply to Palm Beach, as a guest track, and to declare that the takeout[4] on interstate simulcast races received by any Florida horsetrack are increased by the breaks and uncashed tickets and that Palm Beach is entitled, pursuant to Section 550.6305(9), Florida Statutes, to its statutorily defined percentage of takeout (as increased by the uncashed tickets and the breaks). Palm Beach's Petition did not refer

[4]The term "takeout" is defined in Section 550.002(34), Florida Statutes, as "the percentage of the pari-mutuel pools deducted by the permitholder prior to the distribution of the pool." "Take-out" does not include the breakage or the uncashed tickets.

exclusively to the Thoroughbred Permitholders, but rather to all potential host tracks. On July 3, 1998, the notices of the Petitions for Declaratory Statement were published in Volume 23, Number 27 of the Florida Administrative Weekly. [A-7]

The Division's response was issued on September 17, 1997. In drafting the Declaratory Statement, the Division, on it own initiative, consolidated the two Petitions, created a hybrid question, and issued a single Declaratory Statement which determined that Sections 550.6325, 550.6305(9), and 550.3551(3)(c), Florida Statutes, have no application to who receives the uncashed tickets and breaks on intertrack wagering on simulcast events, and that the uncashed tickets and breaks escheat to the state. [A-8 through A-23] Such statement of the law applies to all host tracks and all guest tracks engaged in intertrack wagering on simulcast events in the pari-mutuel industry.

On October 8, 1997, the Thoroughbred Permitholders timely filed a Notice of Appeal with the Third District Court of Appeal, Case No. 97-2926, and on October 13, 1997, Palm Beach also timely filed a Notice of Appeal with the Third District Court of Appeal, Case 97-3414.

On December 11, 1997, the Third District Court consolidated Palm Beach's appeal with the Thoroughbred Permitholders' appeal under Case No. 97-3414.

Briefs were submitted by the Division, Palm Beach and the Thoroughbred Permitholders on procedural, as well as the substantive issues in the case. Oral argument was presented on May 28, 1998.

On July 8, 1998, the Third District Court issued its opinion which held:

> Our review of the declaratory statement reveals that it construes various statutory provisions of general applicability to all pari-mutuel permitholders who conduct intertrack wagering on simulcast rebroadcasts of horse races. As we have already noted, the Division itself recognized the need for rulemaking and initiated it. Its instincts in this regard were excellent, except for those which led to the issuance of the declaratory statement in this situation wherein rulemaking is the proper procedure.
>
> The declaratory statement is set aside.

As the decision of the Third District Court on the procedural issues was dispositive, the Court did not address the substantive issues raised by the parties. However, the Thoroughbred Permitholders continue to assert that the opinion set forth in the Division's Declaratory Statement is erroneous.

Upon Petition of the Division of Pari-Mutuel Wagering, this Court accepted jurisdiction of this case on the basis that the opinion issued by the Third District Court of Appeal in the instant case, Investment Corp. of Palm Beach et al. v. Division of Pari-Mutuel Wagering, 714 So. 2d 589 (Fla. 3d DCA 1998), is in

conflict with the opinion issued by the First District Court of Appeal in Chiles v. Department of State, Division of Elections, 711 So.2d 151 (Fla. 1st DCA 1998).

ISSUE PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN SETTING ASIDE THE DIVISION'S DECLARATORY STATEMENT IN INVESTMENT CORP. OF PALM BEACH ET AL. V. DIVISION OF PARI-MUTUEL WAGERING, 714 SO. 2D 589 (FLA. 3D DCA 1998).

SUMMARY OF THE ARGUMENT

The Third District Court correctly set aside the Division Declaratory Statement in Investment Corp. of Palm Beach et al. v. Division of Pari-Mutuel Wagering, 714 So. 2d 589 (Fla. 3d DCA 1998). Based on the plain meaning of Section 120.565, Florida Statutes, and on the holdings in Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928 (Fla. 1st DCA 1990); and Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158 (Fla.1st DCA 1994), the Third District Court correctly held that once the Division determined that the question posed by the Petitions for Declaratory Statement required responses that were be applicable to the entire pari-mutuel industry, that the Division should have declined to issue the Declaratory Statement. This is especially true given the fact the Division did not answer the question posed by the Thoroughbred Permitholders' in their Petition for Declaratory Statement.

Contrary to the Division's contention, the ruling by the First District Court in the Chiles case, interpreting the legislature's 1996 deletion of the term "only" from Section 120.565, Florida Statutes, does not mandate a different outcome in this case. The decision in the Chiles case did not overrule the decisions in Regal

Kitchens and Florida Optometric Association relied on by the Third District Court in support of its opinion.

In the event Division prevails in its procedural argument, this Court should either remand the case to the Third District Court to consider the merits of the Thoroughbred Permitholders' argument that the Division's Declaratory Statement should be set aside because the opinion expressed by the Division is an erroneous statement of the law, or this Court should set aside the Division's Declaratory Statement based on the merits. The plain language of Section 550.6325, Florida Statutes, dictates that the uncashed tickets and breaks on intertrack wagering, including intertrack wagering on simulcast events, be retained by the host tracks; i.e., the Thoroughbred Permitholders.

ARGUMENT

POINT I

THE THIRD DISTRICT COURT CORRECTLY HELD THAT THE DIVISION SHOULD NOT HAVE ISSUED A DECLARATORY STATEMENT ONCE THE DIVISION DETERMINED THAT THE QUESTION APPLIED GENERALLY TO THE ENTIRE PARI-MUTUEL INDUSTRY

A. The Division Exceeded its Statutory Authority in Issuing the Declaratory Statement

Section 120.565, Florida Statutes, provides, in pertinent part:

> Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

The Thoroughbred Permitholders' Petition for Declaratory Statement stated that:

> A dispute has arisen between Calder and Tropical as the host tracks and Palm Beach Kennel Club ("Palm Beach"), West Flagler Associates d/b/a Flagler Greyhound Track ("Flagler"), the Aragon Group, Inc. d/b/a/ Dania Jai Alai ("Dania") and Daytona Beach Kennel Club ("Daytona Beach"), as guest tracks, over the [sic] Calder and Tropical's entitlement to all of the breaks and outs [uncashed tickets] generated by ISW [interstate wagering] as provided in §550.6325. [A-4]
>
> * * *
>
> A dispute has arisen between Gulfstream as the host track and Palm Beach Investment Corporation of South Florida d/b/a Hollywood Greyhound Track

> ("Hollywood"), West Flagler Associates d/b/a Flagler Greyhound Track ("Flagler"), the Aragon Group, Inc. d/b/a/ Dania Jai Alai ("Dania") and Daytona Beach Kennel Club ("Daytona Beach"), as guest tracks, over the [sic] Gulfstream's entitlement to all of the breaks and outs [uncashed tickets] generated by ISW [interstate wagering] as provided in §550.6325. [A-4 and A-5]

The Thoroughbred Permitholders listed at least five (5) pari-mutuel permitholders (one jai alai fronton and four (4) greyhound dog tracks) with whom the Thoroughbred Permitholders were having a dispute that would be immediately affected by the Division's interpretation of Section 550.6325, Florida Statutes, and thus, the Division's Declaratory Statement.

In Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928, 937 (Fla. 1st DCA 1990), the Court held:

> When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of Section 120.54, governing rulemaking.

In its review of the Petition for Declaratory Statement, the Division specifically found:

> The Division is cognizant that a similar fact pattern may exist between other tracks in Florida and that the same

> dispute may reoccur between one of these Petitioners [Calder, Tropical, Gulfstream and Palm Beach] and a non-Petitioner. Therefore, the Division will initiate rulemaking to establish an agency statement of general applicability.

Having determined that 1) the same situation may exist, and in fact did exist with permitholders other than the Petitioners, as evidenced by the Thoroughbred Permitholders' Petition; and 2) that its was appropriate to initiate rulemaking in this matter, the Division was required, as a matter of law, to deny the Thoroughbred Permitholders' Petition for Declaratory Statement and proceed to rulemaking.

B. The Division's Declaratory Statement is of General Applicability

The Courts have consistently interpreted the language of Section 120.565, Florida Statutes, as limiting an agency's power to issue broad statements of policy under the guise of a declaratory statement. Mental Health Dist. Bd., II-B v. Department of Health and Rehabilitative Servs., 425 So. 2d 160 (Fla. 1st DCA 1983) (holding that a declaratory statement cannot be used for matters of general applicability) See also, Agency for Health Care Administration. v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA 1997).

Consistent with the decisions in Mental Health Dist. Bd. and Florida

Optometric Association, the Court in Regal Kitchens specifically held that:

> . . . an administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad policy or to provide statutory or rule interpretations that apply to an entire class of persons.

Regal Kitchens, Inc. v. Florida Departmentof Revenue, 641 So. 2d 158, 162 (Fla.1st

DCA 1994).

The Court in Florida Optometric Association, supra, recognized the distinction made in Chapter 120, Florida Statutes, between statements of general applicability and declaratory statements. as follows:

> Section 120.52(16), Florida Statutes, provides that a "rule," subject to certain exceptions not applicable here, is "each agency statement of *general applicability* that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of any agency . . ." (Emphasis supplied). Conversely, Section 120.565, Florida Statutes, provides that a declaratory statement is merely intended to "set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency *as it applies to the petitioner in his particular set of circumstances only.*" (Emphasis supplied). In reliance upon such definitions and the general scheme of Chapter 120, we have held that declaratory statements may not be used as a shortcut method of announcing a rule, thereby avoiding the rule adoption procedures of Section 120.54, Florida Statutes.

Florida Optometric Association, at 936.

There is nothing in the facts raised in the Thoroughbred Permitholders' Petition for Declaratory Statement which distinguish the Thoroughbred Permitholders from other thoroughbred permitholders in Florida or which indicates that the Thoroughbred Permitholders' question only related to a situation involving Palm Beach, as opposed to the other permitholders listed in their Petition (i.e., dog tracks and jai alai frontons) which also engage in intertrack wagering on simulcast events they receive from the Thoroughbred Permitholders. Thus, the Division's Declaratory Statement applies not only to three (3) separate thoroughbred permitholders, Calder, Tropical and Gulfstream, but also applies to the two (2) other thoroughbred permitholder host tracks in Florida, Tampa Bay Downs and Hialeah, Inc., when such thoroughbred permitholders are sending signals of races received from out-of-state permitholders, to any pari-mutuel permitholder who operates as a guest track.

Even though the Division specifically stated that its Declaratory Statement is "limited to the Petitioners [Calder, Tropical, Gulfstream and Palm Beach] and their relationship with each other when uncashed tickets and breaks are generated from wagering at Palm Beach on out-of-state thoroughbred races that are rebroadcast through Calder, Tropical, and Gulfstream," given the nature of the Division's ultimate interpretation of Sections 550.6325 and 550.6305(9), Florida

Statutes, the Division's Declaratory Statement effectively interprets such statutory provisions as it relates to an entire class of people; i.e., all pari-mutuel permitholders.

Although the Division clearly recognized that the issues raised in both the Thoroughbred Permitholders' Petition for Declaratory Statement, and Palm Beach's Petition for Declaratory Statement could have (and does have) general applicability to all permitholders who engage in intertrack wagering of simulcast events, and that the issues raised in both Petitions were ripe for rulemaking, the Division did not decline to issue a declaratory statement or comply with the provisions of Section 120.54, Florida Statutes, but rather issued its Declaratory Statement. Such Declaratory Statement is a broad interpretation of statutes which impacts the entire pari-mutuel industry in contravention of the governing language of Section 120.565, Florida Statutes, and the holdings in Regal Kitchens, supra, Florida Optometric Association, supra, and Mental Health Dist. Bd., II-B, supra, and, as such, the Declaratory Statement should be set aside. See also, Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928, 937 (Fla. 1st DCA 1990)(setting aside a Declaratory Statement which was a broad interpretation and remanding it to the agency to comply with Section 120.54, Florida Statutes, regarding rulemaking.); Chiles v. Department of State, Division

of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998) (acknowledging that "[i]f an agency is presented with a petition for a declaratory statement requiring a response that amounts to a rule, the agency should decline to issue the statement and initiate rulemaking).

C. The Third District Court's decision in the instant case is consistent with the holding in Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998).

The Division argues that the 1996 Amendments to Section 120.565, Florida Statutes, coupled with the subsequent holding of the First District Court in Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998), signifies a less restrictive access requirement for petitions under Section 120.565, Florida Statutes, and somehow renders invalid the decisions relied on by the Third District Court in reaching its opinion that the Division should not have issued the Declaratory Statement in the instant case. Both of the Department's arguments are without merit.

The legislative history of the amendments to Section 120.565, Florida Statutes, provides:

> **Declaratory Statements**
>
> The provisions concerning declaratory statements are revised for clarity. The bill provides in section 120.565,

> Florida Statutes, that an agency shall issue a declaratory statement or deny the petition for declaratory statement within 60 days of the filing of the petition.

House of Representatives Committee on Streamlining Governmental Regulations Final Bill Analysis and Economic Impact Statement, CS/SB's 2290 and 2288, Chapter 96-159, Laws of Florida, p. 40. Thus, there is no indication that it was the legislature's intent was to change the substance of Section 120.565, Florida Statutes, to alter the existing status of the law which requires a that a declaratory statement be applicable to the particular petitioner and his particular circumstances, rather than generally to an entire class of persons.

The Court in Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998), states:

> The deletion of the word "only" signifies that a petition for declaratory statement need not raise an issue that is unique. While the issue must apply in petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner.

This holding provides that persons seeking declaratory statements need not present a question that is so unique that it will never apply to anyone else, thus expanding the access such individuals have to seek a declaratory statement. However, the holding in Chiles does not alter the agency's responsibility in issuing or not issuing a declaratory statement.

The Court in Chiles, supra, provides:

> A declaratory statement may not be employed in place of a rule to require compliance with general agency policy. See Regal Kitchens Inc. v. Florida Department of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994); Tampa Electric Company v. Florida Department of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995). If an agency is presented with a petition for a declaratory statement requiring a response that amounts to a rule, the agency should decline to issue the statement and initiate rulemaking. See Florida Optometric Association; Agency for Health Care Administration v. Wingo, 607 So. 2d 1231 (Fla. 1st DCA 1997).

Chiles at 154. Thus, the Court in Chiles, expressly affirmed the decisions in Regal Kitchens, supra, Tampa Electric Company, supra, Florida Optometric, supra, and Wingo, supra, and expressly adopted the rule of law adopted by the Third District Court of Appeal in the instant case, that is, once an agency determines that a petition for a declaratory statement requires a response that amounts to a rule, the agency should decline to issue the statement and initiate rulemaking.

The threshold question in the instant proceeding, therefore, is not whether the petition raised an issue that is unique to petitioner, or "a matter of interest to more than one person" Chiles at 154, but rather, whether the statutory or rule

interpretation applies "to an entire class of persons." As the court noted in Regal Kitchens,

> . . . an administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad policy to provide statutory or rule interpretations that apply to an entire class of persons.

Regal Kitchens at 162. The pari-mutuel industry is, by definition, a "class of persons." Both the Third District Court of Appeal and the Division recognized that a response to either the Thoroughbred Permitholders' petition or Palm Beach's petition, or both, was applicable to the entire pari-mutuel industry. Having acknowledged that the matter had general applicability, the Division should have declined to issue a declaratory statement and proceeded to rulemaking. Chiles at 154. Thus, the Third District Court's decision to set aside the declaratory statement in this case was appropriate and should be upheld.

POINT II

THE ISSUE BEFORE THE THIRD DISTRICT COURT WAS PROPERLY RAISED ON APPEAL, AND THE COURT DID NOT ERR IN DECIDING IT

The Division offers no valid authority for its argument that the Third District Court erred in deciding an issue not properly preserved for review.

A. Section 120.565, Florida Statutes, dictates when it is appropriate to issue a Declaratory Statement.

The Division argues that "a party is limited to the position taken before the lower tribunal" comparing the issuance of a Declaratory Statement by an administrative agency to a judicial proceeding. This comparison is without merit.

Administrative agencies are creatures of statute and may exercise only those powers which are legally conferred upon them by statute. State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), cert. denied, 300 So. 2d 900 (Fla.). An administrative agency is not a judicial body or a court. Canney v. Board of Public Instruction, 278 So. 2d 260 (Fla. 1973). The characterization of a decision making process by an agency as "quasi-judicial" does not make the body into a judicial body. Canney at 163. Questions of legality, validity, and reasonableness of administrative action are open to judicial review if properly brought before the court. Schrimsher v. School Bd. of Palm

Beach County, 694 So. 2d 856 (4th DCA 1997), review denied, 703 So. 2d 477 (Fla.). The Thoroughbred Permitholders' challenge to the legality and validity of the Division's action was properly brought before the District Court of Appeal, and thus, it was open to judicial review.

Section 120.68(7), Florida Statutes, specifically provides that the District Court of Appeal shall set aside agency action when it finds that:

> (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or the failure to follow a prescribed procedure;
>
> * * *
>
> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or
>
> (e) The agency's exercise of discretion was:
>
> 1. Outside the range if discretion delegated to the agency by law;
>
> * * *
>
> 4. Otherwise in violation of a constitutional or statutory provision.

Thus, the Third District Court in the instant case was obligated to set aside the Division's Declaratory Statement when it determined, as a matter of law, that the Division failed to follow the proper procedure in issuing a Declaratory Statement and that issuance of the Declaratory Statement was contrary to Section 120.565, Florida Statutes. Schrimsher v. School Bd. of Palm Beach County, 694 So. 2d 856

(Fla. 4th DCA 1997), review denied, 703 So. 2d 477 (Fla.); B.D.M. Financial Court v. Department of Business and Professional Regulation, Div. of Florida Land Sales, Condominiums and Mobile Homes, 698 So. 2d 1359 (Fla. 1st DCA 1997).

Therefore, contrary to the Division's assertions, the issue is not whether the Thoroughbred Permitholders asked for the agency to issue a Declaratory Statement, but rather whether the Division had the authority to issue the Declaratory Statement based on Chapter 120, Florida Statutes. Section 120.565, Florida Statutes, provides guidance as to whether the Thoroughbred Permitholders asked an appropriate question or whether the Division gave an appropriate Declaratory Statement. The mere fact that the Thoroughbred Permitholders asked for a Declaratory Statement does not abrogate any rights on appeal.

Section 120.565, Florida Statutes, provides, in pertinent part:

> Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

The Courts have consistently interpreted this language as limiting an agency's power to issue broad statements of policy in the guise of a declaratory statement. Mental Health Dist. Bd., II-B v. Department of Health and Rehabilitative Servs.,

425 So. 2d 160 (Fla. 1st DCA 1983) (holding that a declaratory statement cannot be used for matters of general applicability) See also, Agency for Health Care Administration v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA 1997).

In a case similar to the instant case where the party requesting the Declaratory Statement challenged on appeal the agency's ability to issue the Declaratory Statement because it had general applicability, the Court in Regal Kitchens[5] specifically held that:

> . . . an administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad policy or to provide statutory or rule interpretations that apply to an entire class of persons.

Regal Kitchens, at 162. This statement of the law was expressly readopted by the First District Court in the Chiles decision. Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998). Thus, the onus is on the agency to determine whether it should issue a Declaratory Statement, if a response, would, as in the instant case, constitute a broad policy or provide statutory interpretations that apply to an entire class of persons. There is no prerequisite that a party seeking a Declaratory Statement perform such analysis prior to requesting a Declaratory Statement

---

[5] The Division expressly relied on, although erroneously interpreted, the Regal Kitchens decision in its Declaratory Statement.

The Court in Florida Optometric Association, supra, recognized the distinction made in Chapter 120, Florida Statutes, between statements of general applicability and declaratory statements as follows:

> Section 120.52(16), Florida Statutes, provides that a "rule," subject to certain exceptions not applicable here, is "each agency statement of *general applicability* that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of any agency . . ." (Emphasis supplied). Conversely, Section 120.565, Florida Statutes, provides that a declaratory statement is merely intended to "set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency *as it applies to the petitioner in his particular set of circumstances only*." (Emphasis supplied). In reliance upon such definitions and the general scheme of Chapter 120, we have held that declaratory statements may not be used as a shortcut method of announcing a rule, thereby avoiding the rule adoption procedures of Section 120.54, Florida Statutes.

Florida Optometric Association, at 936. Chapter 120, Florida Statutes, and the 1996 amendments thereto, distinguish between "agency statements of general applicability" or rules and "agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances" or declaratory statements, and prescribes one set of standards and procedures for promulgating rules and another set of standards and procedures for the issuance of declaratory statements.

Since administrative agencies are creatures of statute and may exercise only those powers which are legally conferred upon them by statute. There must be some basis in a statute for the exercise of jurisdiction and power involved in the making of an order by an administrative agency. State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), cert. denied, 300 So. 2d 900 (Fla.). Any reasonable doubt as to the lawful existence of a particular power that is being exercised by an administrative agency must be resolved against the exercise thereof, and any further exercise of the power should be arrested. Egerton v. International Co., 89 So. 2d 488 (Fla. 1956). When the legislature provides that an administrative power shall be exercised in a certain way, such prescription precludes the doing of it in another way. Kirk v. Publix Super Markets, 185 So. 2d 161, 164 (Fla. 1966). Therefore, Chapter 120, Florida Statutes, dictates which course of action the agency must take when requested to issue a Declaratory Statement, not the fact that a party, in this case the Thoroughbred Permitholders, asked for one.

B. The Thoroughbred Permitholders timely raised the issue that the Division erred in issuing the Declaratory Statement

The Division argues that, because a majority, but not all, of the appellate decisions which address the issue of whether or not an agency should have issued

a Declaratory Statement involve third party challenges, that this fact somehow prohibits the party requesting the Declaratory Statement from raising the issue on appeal. Sections 120.565 or 120.68, Florida Statutes, contain no such prohibition.

In addition, until an agency issues a Declaratory Statement, the Petitioner is not placed on notice as to how the agency will respond or whether the response is of general applicability or applies to the petitioner's particular set of circumstances as required by Section 120.565, Florida Statutes. In the instant case, this is particularly true given the notice published by the Division in the Florida Administrative Weekly and the fact that the Division ultimately answered a question not posed by either Petition and not noticed in the Florida Administrative Weekly, but rather answered a question created by the Division.

1. The Division's Declaratory Statement improperly combined two Petitions

Section 120.565, Florida Statutes, provides, in pertinent part:

> Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

Thus, a Declaratory Statement is based on the set of circumstances set forth by the petitioner(s) in its Petition for Declaratory Statement. The set of circumstance set

forth by the Thoroughbred Permitholders in their Petition for Declaratory Statement was not limited to situations involving Palm Beach as a guest track. The Thoroughbred Permitholders specifically alleged in their Petition for Declaratory Statement that:

> A dispute arose between Calder and Tropical as the host tracks and Palm Beach, Investment Corporation of South Florida d/b/a/ Palm Beach Kennel Club ("Palm Beach"), West Flagler Associates, d/b/a Flagler Greyhound Track ("Flagler"), The Aragon Group, Inc. d/b/a Dania Jai Alai ("Dania"), and Daytona Beach Kennel Club, Inc., a Florida corporation ("Daytona Beach"), as guest tracks, over the [sic] Calder and Tropical's entitlement to all of the uncashed tickets and breaks generated by intertrack wagering on simulcast events as provided in Section 550.6325, Florida Statutes.
>
> * * *
>
> A dispute also arose between Gulfstream as the host track and Palm Beach, Investment Corporation of South Florida d/b/a/ Hollywood Greyhound Track ("Hollywood"), West Flagler Associates, d/b/a Flagler Greyhound Track ("Flagler"), The Aragon Group, Inc. d/b/a Dania Jai Alai ("Dania"), and Daytona Beach Kennel Club, Inc., a Florida corporation ("Daytona Beach"), as guest tracks, over the Gulfstream's entitlement to all of the uncashed tickets and breaks generated by intertrack wagering on simulcast events as provided in Section 550.6325, Florida Statutes.
>
> * * *
>
> Two permitholders, Palm Beach and Daytona Beach have taken the position that they are entitled by law to retain, and have in fact retained, for their own account 45% of the uncashed tickets and breaks on intertrack

> wagering of simulcast events under Section 550.6305(9)(d), Florida Statutes.
>
> * * *
>
> Hollywood and Flagler have taken the position that they are entitled by law to retain for their own account 33-1/3% of the uncashed tickets and breaks on intertrack wagering on simulcast events pursuant to Section 550.6305(9)(b), Florida Statutes.
>
> * * *
>
> Dania has taken the position that it is entitled by law to retain for its own account all of the uncashed tickets and breaks on intertrack wagering of simulcast events.
>
> * * *
>
> Other permitholders have also taken the position that they are entitled by law and intend to retain for their own account 33-1/3% of the uncashed tickets and breaks on intertrack wagering of simulcast events under Section 550.6305(9)(b), Florida Statutes.

[A-1 through A-6] As a result of the numerous disputes with various guest tracks in Florida over who is entitled to the uncashed tickets and breaks as alleged above, and upon the express request of the Division, Calder, Tropical and Gulfstream filed a Petition for Declaratory Statement pursuant to Section 120.565, Florida Statutes.

The specific relief requested by the Thoroughbred Permitholders was as follows:

> . . . CALDER, TROPICAL and GULFSTREAM respectfully request that the Division issue a declaratory statement determining that these permitholders, as host tracks, are entitled to retain all breaks and outs generated by ITW, including ISW, pursuant to Section 550.6325, Florida Statutes. [A-5]

The answer the Division gave to the Thoroughbred Permitholders' Petition, however, was:

> . . . the uncashed tickets and breaks generated on wagering at Palm Beach on out-of-state thoroughbred races that are rebroadcast through Calder, Tropical, and Gulfstream escheat to the state pursuant to Section 550.1645(1) and Chapter 717, Florida Statutes.

The Thoroughbred Permitholders' Petition clearly did not limit their inquiry to situations involving Palm Beach. Thus, the Division's Declaratory Statement was not responsive to the Thoroughbred Permitholders' question or the specific set of circumstances as set forth in their Petition as required pursuant to Section 120.565, Florida Statutes.

Instead of responding to the facts and circumstances as set forth in Thoroughbred Permitholders' Petition for Declaratory Statement, the Division excised specific facts out of the Thoroughbred Permitholders' Petition, while completely ignoring other facts alleged, and combined such facts with some of the facts and circumstances alleged in Palm Beach's Petition for Declaratory Statement. Thus, the Division improperly consolidated the Petitions, and responded to a question created by the Division, not by the Thoroughbred Permitholders, or Palm Beach, based on facts and circumstances the Division elected to consider, rather than the facts and circumstances presented by the

Thoroughbred Permitholders or Palm Beach.[6] East Central Regional Wastewater Facilities Operation Board v. City of West Palm Beach, 659 So. 2d 402 (Fla. 4th DCA 1995) (reversing and remanding a Declaratory Statement issued by the Department of Community Affairs which went beyond the scope of the petition by making further findings on issues not presented to it and potentially affecting entities not before it).

2. Division's Notice in the Florida Administrative Weekly

The Division's notice published on July 3, 1997, in the Florida Administrative Weekly set forth the Thoroughbred Permitholders' question as follows:

> NOTICE IS HEREBY GIVEN, pursuant to Section 120.565, Florida Statutes, that the Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation (Division), has received the Petition for Declaratory Statement in the matter of

---

[6] The relief requested by Palm Beach in its Petition for Declaratory Statement was,

> . . .that the Division issue a declaratory statement which interprets F.S. 550.3551(3)(c) and 550.6305(9) (1996 Supp.) as it applies to Palm Beach and declare that the takeout on interstate simulcast races received by a Florida horsetrack are increased by the breaks and uncashed tickets and that Palm Beach is entitled, pursuant to F.S. 550.6305(9) (1996 Supp.), to its statutorily defined percentage of takeout as increased by the breaks and the outs.

> Calder race Course, Inc., Tropical Park, Inc., and Gulfstream Park Racing Association, Inc., Petitioners. The Petitioners seek the Division's interpretation of the interplay between Sections 550.3551(3), 550.6305(9) and Section 550.6325, Florida Statutes, to determine whether the breakage tax and uncashed tickets:
>
> 1) Belong to Calder Race Course, Inc. (Calder), Tropical Park, Inc. (Tropical), and Gulfstream Park Racing Association, Inc. (Gulfstream), conducting intertrack wagering on interstate wagering <u>with guest tracks</u>; or
>
> 2) Are part of the profit sharing split Calder, Tropical, and Gulfstream are required to share <u>with guest tracks</u> when conducting intertrack wagering on interstate wagering.

[A-7] Therefore, the Division's own notice did not properly disclose the question it ultimately intended to answer, thereby making it impossible for the Thoroughbred permitholders' to know, prior to the issuance of the Declaratory Statement, what issues the Division intended to answer or that the Declaratory Statement would be of general application and would fail to address the particular circumstances set forth in the petition filed by the Thoroughbred Permitholders.

POINT III

THE DIVISION ERRONEOUSLY ASSERTS THAT IF IT PREVAILS ON THE PROCEDURAL ARGUMENT BEFORE THIS COURT, THAT IT PREVAILS IN THE ENTIRE CASE

In the appeal before the Third District Court, the Thoroughbred Permitholders' argued two (2) primary points: that the Declaratory Statement should be set aside, because: 1) procedurally, it was improper in that it applied to the entire pari-mutuel industry; and 2) it was an erroneous interpretation of the law. Because the Court elected to limit its decision to the procedural issue, and that issue was dispositive of the case, the Third District Court never addressed the merits of the Thoroughbred Permitholders' second argument that the Declaratory Statement should be set aside because it was an erroneous interpretation of the law. Consequently, if this Court elects to overturn the Third District Court's decision as to the procedural aspects, the case should be remanded to the Third District Court for review of the merits of the case.

In the event this Court elects to address the merits of this case along with the procedural issues before it, the Thoroughbred permitholders' assert that the interpretation of the law set forth in the Division's Declaratory Statement is erroneous, and should be overturned.

A. The Division erred in its Interpretation of Section 550.6325, Florida Statutes.

The Declaratory Statement, the Division erroneously concluded, as a matter of law, that:

> Section 550.6325, Florida Statutes, only applies to a Florida permitholder who broadcasts its live racing to a guest track in Florida. . . . This provision of the Florida Statutes only requires the uncashed tickets and breaks to be retained by the host track in a pure intertrack wagering scenario. . . . Consequently, section 550.6325, Florida Statutes, is not applicable in determining the distribution of uncashed tickets and breaks generated at Palm Beach on ITW of ISW [intertrack wagering of interstate simulcast wagering] which is rebroadcast to Palm Beach through Calder, Tropical, and Gulfstream.

Section 550.3551(3), Florida Statutes, provides:

> (3) Any horse track licensed under this Chapter may receive broadcasts of horseraces conducted at other horse racetracks located outside this state at the racetrack enclosure of the licensee during its racing meet.

This section authorizes horse tracks to engage in simulcast wagering. Section 550.3551(3), Florida Statutes, only authorizes a horse track to receive a simulcast signal during its racing meet. Section 550.002(20), Florida Statutes, defines "meet" as "the conduct of live racing . . . for any stake, purse, prize or premium." Thus, permitholders may only receive simulcast broadcasts when the permitholder is conducting live racing. Similarly, a permitholder may only rebroadcast

simulcast broadcast when it is authorized to conduct live racing. Therefore, a permitholder can only conduct simulcasting when it is conducting live racing.

A permitholder is authorized to broadcast live racing conducted at the facility as well as any simulcast signal it receives pursuant to Section 550.3551(3), Florida Statutes, to in-state permitholders. The in-state permitholders receiving broadcasts of live races or simulcast races from a host track are authorized to accept wagers on such broadcasts. Section 550.002(17), Florida Statutes, defines the above described activities as "intertrack wagering."

Specifically, Section 550.002(17), Florida Statutes, provides:

> (17) "Intertrack wager" means a particular form of pari-mutuel wagering in which wagers are accepted at a permitted, in-state track, fronton, or pari-mutuel facility on a race or game transmitted from and performed live at, or simulcast signal rebroadcast from, another in-state pari-mutuel facility.

Thus, the term "intertrack wagering" includes both 1) an in-state permitholder broadcasting its live performances to another in-state permitholder, i.e., what the Division referred to a "pure intertrack wagering,"[7] and 2) an in-state permitholder receiving and rebroadcasting an out-of-state live racing performance to another

[7] The term "pure intertrack wagering" does not exist in Chapter 550, Florida Statutes.

permitholder located in this state (a dog track or jai alai fronton); i.e. what the Division refers to as an "intertrack wager of inter-state wagering (ITW of ISW)."[8]

Section 550.6325, Florida Statutes, provides:

> Uncashed tickets or breakage tax on intertrack wagers shall be retained by the permitholder conducting the live racing or games.

Contrary to the Division's argument set forth in part (a) of the Declaratory Statement, that this provision is limited to a "Florida permitholder who broadcasts its live racing to a guest track in Florida," Section 550.6325, Florida Statutes, contains no such limitation.

In fact, the phrase "broadcasts its live races" likewise does not appear in Section 550.6325, Florida Statutes. Further, Section 550.6325, Florida Statutes, makes no distinction between the two types of intertrack wagering, i.e., pure intertrack wagering (which does not exist under the Florida Statutes) or simulcast wagering. Section 550.6325, Florida Statutes, therefore, applies to intertrack wagering as that term is defined in Section 550.002(17), Florida Statutes.

One of the cardinal rules of statutory construction is the axiom where the language of a statute is so plain and unambiguous as to fix the legislative intent and leave no room for construction, admitting of but one meaning, courts in

[8] See page 6 of the Declaratory Statement.

construing it may not depart from the plain and natural language employed by the legislature. State v. State Racing Commission, 112 So. 2d 825, 828 (Fla. 1959). See also, Brooks v. Anastasia Mosquito Control District, 148 So. 2d 64, 66 (Fla. 1st DCA 1963) ("In statutory construction it has been consistently held that statutes must be given their plain and obvious meaning. It must be assumed that the Legislature of this state must know the plain and ordinary meaning of words. . . ."); Talcott, Inc. v. Bank of Miami Beach, 143 So. 2d 657, 659 (Fla. 3d DCA 1962), (where a statute is clear and unambiguous, the Court [and likewise, an agency] is not free to add words to steer it to a meaning and limitation which its plain wording does not supply.)

Since a permitholder must be conducting a live meet in order to receive and rebroadcast a simulcast performance to in-state guest tracks, a permitholder that performs such act will always be "conducting live races or games."

Section 550.6325, Florida Statutes, merely designates which of the Florida permitholders involved in intertrack wagering retains the uncashed tickets and breakage tax on intertrack wagers -- the permitholder conducting a live meet; i.e., the host track, rather than the permitholder that is not conducting its live meet, i.e., the guest track. Thus, under the plain meaning of Section 550.6325, Florida Statutes, uncashed tickets or breakage taxes on intertrack wagers, including

intertrack wagers on simulcast events, are retained by the host track, and the Division's conclusion to the contrary is erroneous.

B. The Division Erred in its Determination That Section 550.1645(1), Florida Statutes, and Chapter 717, Florida Statutes, Require That Uncashed Tickets and Breakage Escheat to the State

Since the Division interpreted Section 550.6325, Florida Statutes, as applying only to what its terms "pure intertrack wagering," rather than what the statutes define as "intertrack wagering," the Division then determined that there was no statute governing uncashed tickets or breaks on pari-mutuel pools resulting from simulcast wagering. In making this determination, the Division looked at the pari-mutuel statute governing abandoned interests in pari-mutuel pools generally, Section 550.1645, Florida Statutes, as well as the statutes generally governing all abandoned property in Florida, Chapter 717, Florida Statutes.

Section 717.103, Florida Statutes, provides, in pertinent part:

> Unless otherwise provided in this chapter or by other statute of this state, intangible property is subject to the custody of the department [of banking and finance] as unclaimed property . . . .

Chapter 717, Florida Statutes, governs abandoned property generally in the State of Florida in the absence of a specific statute governing specific property.

Section 550.1645(1), Florida Statutes, provides:

> (1) It is the public policy of the state, while protecting the interest of the owners, to possess all unclaimed and abandoned interest in or contribution to any pari-mutuel pool conducted in this state under this chapter, for the benefit of all the people of the state; and this law shall be liberally construed to accomplish such purpose.
>
> (2) All money or other property represented by any unclaimed, uncashed, or abandoned pari-mutuel ticket which has remained in the custody of or under the control of any licensee authorized to conduct pari-mutuel pools in this state for a period of 1 year after the date the pari-mutuel ticket was issued, if the rightful owner or owners thereof have made no claim or demand for such money or other property within the aforesaid period of time, is hereby declared to have escheated to or to escheat to, and to have become the property of, the state.

Since Section 550.1645, Florida Statutes, specifically governs most abandoned interests in or contributions to pari-mutuel pools (although it does not apply to horseracing), Chapter 717, Florida Statutes, by its own language does not apply, and therefore, the Division's reliance on Chapter 717, Florida Statutes, is clearly misplaced.

1. Section 550.1645, Florida Statutes, does not apply to Thoroughbred Permitholders

The general provision regarding the disposition of uncashed tickets, Section 550.1645, Florida Statutes, is not applicable to uncashed tickets on thoroughbred horseracing. A closer look at Chapter 550, Florida Statutes, reveals another

section which addresses abandoned interests in, or contributions to pari-mutuel pools specifically as it relates to live horseracing. -- Section 550.2633, Florida Statutes.

Section 550.2633, Florida Statutes, provides that any unclaimed, uncashed, or abandoned pari-mutuel tickets from live horseracing escheat to the state with certain exceptions. Section 550.2633 (2), Florida Statutes, goes on to provide a method for distribution of the property escheated to the state from (a) harness horse races; (b) quarter horse races; and (c) Arabian horse races, but not for thoroughbred races. However, Section 550.2633(5), Florida Statutes, further provides:

> (5) Uncashed tickets and breaks on live racing conducted by thoroughbred permitholders shall be retained by the permitholder conducting the live race.

Thus, under Section 550.2633(5), Florida Statutes, moneys and abandoned property in the form of uncashed tickets and breaks on live thoroughbred horse races are retained by the thoroughbred permitholder conducting the live race, and do not escheat to the state.

Since Section 550.2633, Florida Statutes, is the more specific statute governing uncashed tickets and breaks on live racing for a horse racing permitholder, and Section 550.6325, Florida Statutes, is the more specific statute

governing uncashed tickets and breaks on intertrack wagering, the Division erred in applying the more general statute; i.e., Section 550.1645, Florida Statutes, rather that the specific statutes, when addressing the issues raised in the Thoroughbred Permitholders' Petition for Declaratory Statement. Kiesal v. Graham, 388 So. 2d 594 (Fla. 1st DCA 1980); Adams v. Culver, 111 So. 2d 665 (Fla. 1959).

CONCLUSION

Both the Chiles decision and Investment Corporation decision properly adopt the holdings in Regal Kitchens and Florida Optometric Association that once an agency determines that a question posed in a Petition for Declaratory Statement requires a response that is of general applicability and applies to an entire class of persons, the agency should decline to answer the Petition and initiate rulemaking pursuant to the provisions Section 120.54, Florida Statutes.

WHEREFORE, Respondents, Calder, Tropical and Gulfstream respectfully request that this Court:

1. Affirm the Third District Court's ruling in Investment Corp. of Palm Beach et al. v. Division of Pari-Mutuel Wagering, 714 So. 2d 589 (Fla. 3d DCA 1998), setting aside the Division's Declaratory Statement as the subject matter was not proper for consideration by the Division pursuant to Section 120.565, Florida Statutes; or

2. Remand the case to the Third District Court to review the merits of the Declaratory Statement, or, in the alternative, reverse the Division's Declaratory Statement and hold that Section 550.6325, Florida Statutes (1997), requires that the uncashed tickets and the breaks for simulcast races are to be retained by the permitholder conducting live races or games.

Respectfully submitted,

Wilbur E. Brewton, Esquire
Kelly B. Plante, Esquire
Fla. Bar No.'s: 110408, 866441
Gray Harris & Robinson, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
and
David S. Romanik, Esquire
Florida Bar No.: 212199
Romanik, Huss, Paoli & Ivers
1901 Harrison Street
Hollywood, FL 33020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this ___ day of February, 1999, to the following parties:

For the Petitioner, Department of Business and Professional Regulation
Lisa Nelson, Esquire
Deputy General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0750

For the Respondent, Investment Corporation of Palm Beach et al.
Harold F.X. Purnell, Esquire
Gary R. Rutledge, Esquire
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302

_____
Wilbur E. Brewton, Esquire

CALDER\BREAKS\SUPREME\BRIEF-B.DOC