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ORIGINAL

IN THE SUPREME COURT OF FLORIDA

Sup. Ct. Case No. 93,952
3rd DCA Case Nos. 97-3414
97-2926

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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

PETITIONER'S INITIAL BRIEF ON THE MERITS

Lisa S. Nelson
Deputy General Counsel
Florida Bar No. 0370657
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0750
(850) 488-3140 Suncom 278-3140
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

Case **Page**

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER

PRELIMINARY STATEMENT

This case is before the Court based upon express and direct conflict with Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998). Article V, section 3(b)(3), Florida Constitution. The petitioner, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (hereinafter "the Division"), was the appellee in the Third District Court of Appeal. The respondents, Investment Corp. of Palm Beach ("Investment Corp."), Gulfstream Racing Association, Inc. ("Gulfstream"), Calder Race Course ("Calder") and Tropical Park, Inc. ("Tropical Park")(collectively referred to as "the Tracks") were the appellants below. The Third District's decision is reported as Investment Corp. of Palm Beach v. Department of Business and Professional Regulation, 714 So. 2d 589 (Fla. 3d DCA 1998).

References to the record are identified by "R," volume and page number. The undersigned counsel certifies that this brief has been prepared and submitted using Times New Roman, 14-point typeface.

STATEMENT OF THE CASE AND FACTS

Investment Corp. of Palm Beach holds wagering permits granted by the Division to conduct pari-mutuel wagering at its greyhound facility and its jai alai facility in West Palm Beach, Florida. (R-I-1). Calder and Tropical Park hold pari-

mutuel permits for thoroughbred racing in Miami, while Gulfstream holds a pari-mutuel permit for thoroughbred racing in Hallendale, Florida. (R-I-6-7).

These permitholders are authorized by Chapter 550, Florida Statutes, to conduct pari-mutuel wagering on live races, or live jai alai games, held at their respective facilities. They are also permitted to conduct wagering on broadcasts of races or games occurring at other pari-mutuel facilities both within Florida and outside the state. See §§ 550.3551 and 550.615, Fla. Stat. (Supp. 1996) (R-I-18-19). A race or game broadcast transmitted directly from an out-of-state facility conducting the live event to a Florida pari-mutuel facility, e.g., a race broadcast from Belmont Park in New York to Gulfstream in Hallandale, is called a simulcast broadcast. § 550.002(32), Fla. Stat. (Supp. 1986). Florida permitholders can only receive "like kind" broadcasts from out-of-state facilities. Horserace permitholders may only directly receive simulcast broadcasts of horse races, greyhound permitholders may only directly receive simulcast broadcasts of greyhound races and jai alai permitholders may only directly receive simulcast broadcasts of jai alai games. § 550.3551(5), Fla. Stat. (Supp. 1996).

Florida permitholders may also conduct intertrack wagering as defined in section 550.002(17), Florida Statutes (Supp. 1996). Intertrack wagering includes both the acceptance of wagers on the televised broadcast of races or jai alai games conducted live at another Florida facility or the acceptance of wagers on a

simulcast race rebroadcast from another Florida permitholder. (R-I-19-20). A simulcast rebroadcast occurs, for example, when Belmont Park in New York broadcasts one of its races to Gulfstream and then Gulfstream rebroadcasts the race to Palm Beach. There is no "like-kind" restriction on the receipt of intertrack wagering broadcasts, including the rebroadcast of simulcast races. §550.615(2), Florida Statutes (Supp. 1996).

Horse tracks in Florida, including Calder, Tropical Park and Gulfstream, may receive and take wagers on the simulcast broadcasts of thoroughbred horse races conducted live at racetracks outside the state. §550.3551(3), Fla. Stat. They may instantaneously rebroadcast those simulcast races to other Florida pari-mutuel wagering permitholders, including Palm Beach, for intertrack wagering on simulcast broadcasts. § 550.6305(9), Fla. Stat. (Supp. 1996). Permitholders such as Calder, Tropical Park and Gulfstream who directly receive broadcasts from out-of-state tracks are called "host tracks." Permitholders such as Palm Beach receiving the instantaneous rebroadcast of the race from a host track are called "guest tracks." § 550.002(12) and (16), Fla. Stat. (Supp. 1996). (R-I-19).

Money from wagers placed on pari-mutuel races or games become part of a pari-mutuel pool. The pari-mutuel pool is distributed to winning bettors, the Division and to the permitholders after the race upon which the wager is placed is over. §550.002(22), Fla. Stat. (Supp. 1996). Subsections 550.155(4) and (5),

Florida Statutes, prohibit paying winnings to bettors in "odd cents," and require that winnings be rounded down to the next lowest multiple of ten. For example, if a winning ticket on a race should pay $3.17, the winnings would be rounded down to $3.10. The "breaks" are the portion of the pari-mutuel pool computed by rounding winnings down to the nearest multiple of ten cents. In our example, the breaks would be seven cents. Uncashed tickets are winning pari-mutuel tickets that the ticket holder does not cash. (R-I-20-21).

A dispute arose about the proper disposition of the breaks and uncashed tickets from wagers on simulcast thoroughbred horse races rebroadcast from Calder, Tropical Park and Gulfstream to Palm Beach. Palm Beach filed a petition for Declaratory Statement with the Division on June 20, 1997, seeking a declaration that Palm Beach was entitled to a percentage of the breaks and uncashed tickets on wagers taken at Palm Beach. (R-I-1-4). Calder, Tropical Park and Gulfstream collectively filed a Petition for Declaratory Statement four days later, requesting a determination that the host tracks were entitled to all of the breaks and uncashed tickets on the intertrack wagers taken at Palm Beach on the simulcast rebroadcasts. (R-I-6-11). On June 25, 1998, the Division provided notice of receiving both petitions to the Bureau of Administrative Code for publication. (R-I-12-14; R-II-12-14). No comments or requests to intervene were received by the Division.

On September 17, 1997, the Division issued a single Declaratory Statement in response to the two petitions filed. (R-I-15-30). The Declaratory Statement noted:

> 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 and a non-petitioner. Therefore, the Division will initiate rulemaking to establish an agency statement of general applicability. However, it is appropriate for the Division to give its opinion on the applicability of certain statutory provisions by Declaratory Statement when only the petitioners will be affected and where no statement of general applicability is made by the Division. Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994). Consequently, this Declaratory Statement is limited to the petitioners 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.

(R-I-15-16). The Declaratory Statement rejected the positions taken by Tracks in both petitions filed. Instead, the Division determined that whether uncashed tickets and breaks should belong to the host track or be split with Palm Beach or escheat to the state must be determined by statute. (R-I-21). The Division opined that the breaks and uncashed tickets escheat to the State to be deposited in the School Fund for the support and maintenance of public free schools, pursuant to section 550.1645(1), Florida Statutes. (R-I-26). The Division stated:

> Whether uncashed tickets and breaks should belong to the host track Petitioners, be split with Palm Beach, or escheat to the state must be determined by statute.

> For definitional purposes, the term intertrack wagering includes both pure intertrack wagering and ITW of ISW [intertrack wagering of inter-state simulcast wagering]. However, Chapter 550, Florida Statutes, treats the sub-categories differently under certain situations. How a plain reading of the law treats each intertrack wagering sub-category will determine the distribution of uncashed tickets and breaks within each sub-category. Where there is no distinction between intertrack wagering sub-categories in the law, each category will be treated the same, and the term "intertrack wagering" will encompass both categories. If there is a distinction between sub-categories, the distinction will control, and the term "intertrack wagering" will not be determinative of how differing substantive requirements are applied. If there is no specific statutory provision explaining how an ITW sub-category is to distribute uncashed tickets and breaks, the uncashed tickets generated 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, Florida Statutes. Moreover, the breaks generated at Palm Beach on ITW of ISW which is rebroadcast to Palm Beach through Calder, Tropical, and Gulfstream will also escheat to the state as abandoned property under Chapter 717, Florida Statutes, if the statutes are silent as the distribution of ITW of ISW breaks.

(R-I-21-22). The Tracks appealed, asserting for the first time that the Division should not have issued the Declaratory Statement because the Division's interpretation of Chapter 550 could be applicable to tracks other than the petitioners. The Third District agreed and reversed the declaratory statement, holding that it construes "various statutory provisions of general applicability to all pari-mutuel permitholders who conduct intertrack wagering on simulcast rebroadcasts of horse races." 714 So. 2d at 591. The court indicated that

rulemaking rather than a declaratory statement was the appropriate action by the agency. The Court reached no conclusion with respect to the substantive opinion of the Division expressed in the declaratory statement. 714 So. 2d at 591n.2.

Judge Cope dissented, asserting that the appropriateness of the declaratory statement was not preserved for review and that the majority had misapprehended section 120.565, Florida Statutes (1997). As stated by Judge Cope,

> Seeking to vacate the agency decision, the racetracks contend for the first time on appeal that the agency never should have issued a declaratory statement—even though the appellant racetracks were the very ones who requested the declaratory statement. This argument should be rejected out of hand because it is not preserved for appellate review. The racetracks asked for a declaratory statement. The racetracks got a declaratory statement. Assuming arguendo that the agency erred by issuing a declaratory statement in these circumstances, any error was invited by the racetracks themselves.

714 So. 2d at 591-592. Both the majority and Judge Cope cite to the First District Court of Appeal's decision in Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998), which held that "a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person." Judge Cope noted that the purpose of a declaratory statement is to provide to the public a vehicle for obtaining secure, definitive advice as to a particular set of facts. "It renders the statute nearly useless to say, as the majority does, that the agency cannot issue a declaratory statement if it will impact on

anyone other than the petitioner. '[A] declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person.'" 714 So. 2d at 593 (Cope, J., dissenting, quoting Chiles, 711 So. 2d at 154).

ISSUE PRESENTED

The issue before this Court is whether the Division erred in issuing a declaratory statement pursuant to section 120.565, Florida Statutes (Supp. 1996), because the factual situation presented in the petitions could be applied to persons other than the petitioners. A corollary issue is whether the Tracks can be permitted to attack the issuance of the Declaratory Statement they asked the Division to issue.

SUMMARY OF THE ARGUMENT

When the Administrative Procedure Act ("APA") was enacted in 1974, one of the major purposes of the APA was to broaden public access to the precedents and activities of governmental agencies. Accordingly, Florida courts have granted expansive standing for participation in administrative proceedings. This Court has rejected a restrictive "special injury" standing rule for associations seeking to challenge agency rules, expressing the view that such an approach would result in restricted public access to the administrative processes established in the Act. Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982). This expansive view regarding standing by

associations to participate has been applied to formal adjudicatory proceedings pursuant to section 120.57, Florida Statutes, and to declaratory statement proceedings pursuant to section 120.565, Florida Statutes.

The purpose of a declaratory statement is to provide a means for the public to obtain secure definitive advice from an agency concerning a particular set of facts and circumstances. Although binding only as to the petitioner, as an order of the agency the declaratory statement has precedential value. Nothing in section 120.565, Florida Statutes, restricts the issuance of a declaratory statement to a factual scenario that can never recur and the Third District erred in restricting the use of declaratory statements in this manner.

The agency's determination of when a declaratory statement should be issued should focus not on whether the factual circumstances described can recur. Instead, the determination should focus on whether the petitioner has stated "with particularity" its set of circumstances and has specified the statutory provision, rule or order that the petitioner believes applies to those circumstances. Section 120.565(2), Florida Statutes (Supp. 1996). This interpretation places the inquiry on the minimum access requirements described in section 120.565 and is consistent with the rationale in Chiles and Judge Cope's dissenting opinion in Investment Corp.

The decision to issue a declaratory statement should only be reversed where the circumstances alleged in the petition for declaratory statement are already the subject of litigation; the statement would determine the legal rights of others who have not filed a petition and who oppose the issuance of the petition; or where the agency attempts to use the declaratory statement as a means to circumvent the need for rulemaking proceedings. In this case, the Division did not circumvent the rulemaking process but instead announced its intention to engage in rulemaking to establish a statement of general applicability.

Finally, the Third District erred in addressing the issuance of the declaratory statement at all. The Tracks were the parties who invoked the provisions of section 120.565 by requesting a declaratory statement as a means to resolve their dispute. Where the judiciary has determined that a declaratory statement was issued in error, the issue has been raised by someone other than the party requesting the statement. The Tracks should have been limited to challenging the agency's interpretation of Chapter 550 articulated in the declaratory statement, as opposed to the decision to issue the statement itself. The decision of the Third District should be quashed with directions to affirm the Declaratory Statement of the Division.

ARGUMENT

I.

THE THIRD DISTRICT ERRED IN HOLDING THAT A DECLARATORY STATEMENT ISSUED PURSUANT TO SECTION 120.565, FLORIDA STATUTES (SUPP. 1996), MUST APPLY TO THE PETITIONER ALONE

A. THE HISTORY OF SECTION 120.565, FLORIDA STATUTES

In 1974, the Legislature enacted the Administrative Procedure Act. Chapter 74-310, Laws of Florida. Primary purposes for the adoption of the Act included remedying "massive definitional, procedural and substantive deficiencies in existing law. . . (iv) by expanding the opportunities for flexibility and informality in Florida Administrative processes [and] (v) by broadening public access to the precedents and activities of agencies." Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, March 9, 1974, at p.3, reprinted in 3 A. England & L. Levinson, Florida Administrative Practice Manual at 79.

Florida courts have granted expansive standing for participation in administrative proceedings. In Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), this Court held that professional and trade associations have standing to participate in rule challenges pursuant to section 120.56(1), Florida Statutes (1979).[1] The Court

[1]Renumbered as § 120.56(2), Fla. Stat. (Supp. 1996).

rejected application of a more restrictive "special injury" rule, stating that such a requirement would result in restricted public access to the administrative processes established in the APA, contrary to the stated legislative purpose of the Act. 412 So. 2d at 352.

This expansive view of standing has been embraced by the district courts as well.[2] In Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992), the First District again rejected the special injury standing rule as applied to a request for a section 120.57 hearing. The court noted that standing is conferred on those whose substantial interest will be affected by proposed agency action. To meet this requirement an association must only demonstrate that a substantial number of its members would have standing. Friends of the Everglades, 595 So. 2d at 188 (citing Homebuilders). To establish standing, or in Professor Dore's preferred terminology, to be afforded access to an administrative proceeding, a party must demonstrate that 1) he will suffer an injury in fact of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) his substantial interest is of the type or nature the proceeding is designed to protect. Id. at 188.

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[2]In fact, the late Professor Dore sought to eliminate the term standing and any use of traditional judicial standing tests in relation to the APA, preferring the term access. Dore, *Access to Florida Administrative Proceedings,* 13 Fl. St. U. L. Rev. 967, 967-968 (1986).

In Federation of Mobile Home Owners of Florida, Inc. v. Department of Business Regulation, 479 So. 2d 252, 254 (Fla. 2d DCA 1985), the Second District concluded that these same standing requirements apply to section 120.565 proceedings. Expansive access to the declaratory statement process is consistent with its limited legislative history.

The declaratory statement provision was not in the version of the APA recommended by the Law Revision Council. Staff comments to the House Committee on Governmental Operations explained,

> Section 120.56 . . . provides a remedy that is not available to a citizen at this time. It requires that each agency adopt by rule, a procedure for a declaratory judgment, so that a party can go before the agency and for a determination, of whether a rule affects his course of conduct, his business, or his interest. In other words, prior to any agency action that might affect that party, and he's worried about the applicability of the rule, he can to the agency and ask for a ruling: Is my conduct within the meaning of this rule or not? So then his rights are settled and he's allowed to proceed. There is no similar provision by statute at this time.

Fla. H.R., Comm. On Govtl. Ops., tape recording of proceedings (Apr. 11, 1974), quoted in Dore, *Access to Florida Administrative Proceedings,* 13 Fl. St. U. L. Rev. 967, 1049. Professor Dore asserted that because the original provision was modeled after the Revised Model Act, "the purposes and goals sought to be achieved by the drafters of the RMA provision should be considered when developing an appropriate access standard for the Florida provision." Dore, at

1050. The 1981 edition of the Revised Model Act makes the goal of enabling the public to obtain definitive binding advice as the applicability of agency-enforced law explicit.[3]

Florida courts echo this view. Federation of Mobile Home Owners; Chiles Department of State, Division of Elections, 711 So. 2d at 154-155. The Chiles court noted that one who obtains a statement of an agency's position may avoid costly administrative litigation by selecting the proper course of action in advance. Likewise, in his dissent below Judge Cope described the declaratory statement as

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[3]The Revised Model Act, 1981 edition, provides:

> 2-103 [Declaratory Orders]
> (a) Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency. An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order would be contrary to a rule adopted in accordance with section (b). However, an agency may not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by declaratory order proceeding.
> (b) Each agency shall issue rules that provide for (i) the form, contents, and filing of petitions for declaratory orders; (ii) the procedural rights of persons in relation to the petitions; and (iii) the disposition of the petitions. Those rules must describe the classes of circumstances in which the agency will not issue declaratory orders *and must be consistent with the public policy interest and with the general policy of this Act to facilitate and encourage agency issuance of reliable advice.*

Revised Model State Administrative Procedure Act of 1981, §2-103, 15 U.L.A. 26.

"an important tool to vindicate the individual rights of individual citizens." Investment Corp., 714 So. 2d 593.

Use of section 120.565 proceedings has been limited, however, by cases declaring that declaratory statements should not be issued where the answer given by an agency could be applied to someone other than the petitioner. In Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928, 936 (Fla. 1st DCA 1990), the First District observed in dictum that a declaratory statement, as section 120.565 existed at that time, "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 in original.) While the Court claimed not to decide whether the specific declaratory statement should be set aside because it was not limited to a specific petitioner or particular set of circumstances, the Court stated:

> We do observe, however, that declaratory statements and rules serve clearly distinct functions under the scheme of Chapter 120. Although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted which show that the question presented relates only to the petitioner and his particular set of circumstances. . . . 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 required 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.

567 So. 2d at 937 (first emphasis added, second in original). See also Tampa Electric Co. v. Florida Dep't of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995); Regal Kitchens, Inc. v. Florida Dep't of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994).

B. THE 1996 AMENDMENTS TO SECTION 120.565, FLORIDA STATUTES

Section 120.565 was revised in 1996 as part of the comprehensive amendments to the APA. Chapter 96-159, Laws of Florida. In its current form, section 120.565, Florida Statutes (Supp. 1996), provides:

> 120.565 Declaratory statement by agencies.—
>
> (1) 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.
>
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.
>
> (3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory

> statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action.

Subsequently, Education Commissioner Frank Brogan sought a declaratory statement to determine whether a 1997 amendment to section 215.3206(2), Florida Statutes precludes certification of candidates for public campaign financing. Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998). Governor Chiles and Comptroller Milligan intervened, asserting that the issue was not subject to resolution via section 120.565 because the declaration could be applied to any candidate running for statewide office. The court rejected this claim based upon the 1996 amendments to the APA. The First District held that deletion of the term "only" signifies a less restrictive access requirement for petitions under section 120.565. "While the issue must apply in the petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner." Rulemaking remains the vehicle for establishing agency policy of general applicability. However, the court stated that "a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person." Chiles, 711 So. 2d at 154.[4] The court reasoned

[4] Curiously, while acknowledging the directive in Florida Optometric Association the First District changed the directive in one important respect. Florida Optometric Association emphasized the choice given to agencies when presented with a question requiring a broad policy statement: the choice to decline to issue the statement or institute rulemaking. The Chiles opinion indicates for the first

that the elaborate notice requirements for receipt and disposition of petitions for declaratory statements "account for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties. Any substantially affected party can intervene in a declaratory statement proceeding before the agency, just as the Governor and Comptroller did in this case." Chiles, 711 So. 2d at 155. The substantive decision of the agency remains subject to judicial review, subject to a clearly erroneous standard. Grady v. Department of Professional Regulation, 402 So. 2d 438 (Fla. 3d DCA), appeal dismissed, 411 So. 2d 382 (Fla. 1981).

Two months later, the Third District issued the opinion in Investment Corp. While the court purported to reverse the declaratory statement because the questions asked were of general applicability to the pari-mutuel industry, the Third District never determined that the petitions filed with the agency did not present particular facts that were applicable to the petitioners themselves.

By focusing on whether the factual scenario presented by petitioners could apply to others, the Third District engrafted a restriction on the use of section 120.565 that does not appear in the law. Judge Cope recognized this departure from the statutory requirements, stating, "the statute says no such thing; indeed, the

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time that the agency should decline and initiate rulemaking. This change deprives the litigants of the right to the immediate answer that may be needed to resolve the issue prompting a petitioner to seek the advice in the first place.

statute says the opposite." Investment Corp., 714 So. 2d at 592 (Cope, J., dissenting). The dissent also referenced the elaborate noticing requirements discussed in Chiles, which existed well before the 1996 amendments, and stated:

> By providing for publication of notice when the petition is filed, the Legislature clearly understood that the answer to a petition for declaratory statement may very well have impact on others who are regulated by the agency. Notice is published so that "[a]ny substantially affected party can intervene in a declaratory statement proceeding before the agency . . . ." Equally clearly, the Legislature required publication of the resulting declaratory statement precisely because—assuming the agency is operating evenhandedly—the interpretation announced in the declaratory statement will be applied to others who are similarly situated

Id. at 593. Judge Cope agreed with the First District that a petition for declaratory statement need no longer present a question that is unique to the petitioner. He also agreed with Professor Dore that the Florida Optometric Ass'n line of cases misreads the statutory intent – "this language was intended to require simply that there be a live issue that affected the petitioner personally; 'the declaratory statement proceeding is not available to one who seeks an agency's opinion on a purely hypothetical situation.'" Id at 594n.7 (citing Dore, *supra,* at 1048). Judge Cope's dissenting opinion represents the correct interpretation of section 120.565.

In this case, the majority opinion found that the declaratory statement "construes various statutory provisions of general applicability to all pari-mutuel permitholders who conduct intertrack wagering on simulcast rebroadcasts of horse

races." 714 So. 2d at 591. Construction of statutory provisions, as opposed to setting general policy, has never been prohibited in a section 120.565 proceeding. Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So. 2d 289, 292 (Fla. 1978) ("Petitioner's assertion that respondent, by its statement, is establishing policy . . . and that such determination may only be made by rule is without merit since respondent did not make its decision based on uncodified policy."). Statutory provisions and rules are, by their very nature of general applicability. However,

> An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities would continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes.

The Environmental Trust v. Department of Environmental Protection, 1998 WL 283163 at 4 (Fla. 1st DCA 1998).

Moreover, in many instances the agency may not have rulemaking authority to address the issue presented in a petition for declaratory statement. This is especially so in light of the rulemaking restrictions enacted in the 1996 amendments. See section 120.536, Florida Statutes (Supp. 1996). The Third District's restrictive construction of section 120.565 coupled with the new

rulemaking standards would leave many without any ability to obtain guidance from an agency regarding the statutes it enforces.

The focus for the court's inquiry should be whether the petitioner has stated "with particularity" the petitioner's set of circumstances and the specific statutory provision, rule, or order the petitioner believes may apply to those circumstances. The declaratory statement should then be limited to addressing the particular set of circumstances alleged in the petition with an answer that comports with the agency's regulatory boundaries. Crow v. Agency for Health Care Administration, 669 So. 2d 1160, 1162 (Fla. 5th DCA 1996) (As long as the Board's findings are appropriately connected with the question posed, "the Board is justified in pointing out the pitfalls is sees."). The petition may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances, and not as a means for determining the conduct of another person. Rule 28-105.001, Florida Administrative Code.

Turning to the facts presented in this case, the Tracks asked for an agency interpretation of several provisions in Chapter 550 as they related to a specific set of facts involving the Tracks. The petitions clearly met the threshold for obtaining a Declaratory Statement pursuant to section 120.565. The petitions themselves stated those facts might also apply to other permitholders, and the Division acknowledged this possibility. However, the Division never sought to apply the

Declaratory Statement to any Track other than those requesting the Declaratory Statement and announced its intention to initiate rulemaking to establish a general policy. Therefore, there was no basis for determining that the Division was attempting to use the Declaratory Statement process to avoid the rigors of rulemaking under section 120.54, Florida Statutes. Accordingly, the Division asks the Court to quash the majority opinion and to hold that the Declaratory Statement was appropriately issued.

II.
THE THIRD DISTRICT ERRED IN DECIDING AN ISSUE NOT PROPERLY PRESERVED FOR REVIEW

This case is before the Court because of an express and direct conflict between the decisions of the Third District in Investment Corp. and the First District in Chiles v. Department of State, Division of Elections. Article V, section 3(b)(3), Fla. Constitution. The conflict between these cases never should have occurred because the Third District should not have considered the decision to issue a declaratory statement at all.

This case presents an astonishing reversal of position by the Tracks. As noted by Judge Cope,

> [The tracks] petitioned the appellee agency for a declaratory statement, anticipating that the agency would either tell the racetracks to divide the funds, or award the disputed funds to one of the two racetracks. The agency instead decided that the statutes relied upon by the racetracks were inapplicable. The agency rules that under a different provision of the pari-

> mutuel laws, the disputed funds escheat to the State School Fund. *See* § 550.1645, Fla. Stat. This ruling undoubtedly pleased the State School Fund, but displeased the racetracks.
>
> Seeking to vacate the agency decision, the racetracks contend for the first time on appeal that the agency never should issued a declaratory statement – even though the appellant racetracks were the very ones who requested the declaratory statement. This argument should be rejected out of hand because it is not preserved for appellate review. The racetracks asked for a declaratory statement. The racetracks got a declaratory statement. Assuming arguendo that the agency erred in issuing a declaratory statement in these circumstances, any error was invited by the racetracks themselves. See Commission on Ethics v. Barker, 677 So. 2d 254, 256 (Fla. 1996) ("A party 'cannot argue on appeal matters which were not properly excepted to or challenged before the [agency] and thus were not properly preserved for appellate review.'"); Kantor v. School Board of Monroe County, 648 So. 2d 1266, 1267 (Fla. 3d DCA 1995)(same); Couch v. Commission on Ethics, 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993)(same).

714 So. 2d at 591-592 (Cope, J., dissenting). Judge Cope noted that while the Tracks were arguing that the Declaratory Statement might be applied to third parties, no third party had objected to the issuance of the Declaratory Statement. Id. at 592n.5.

On appeal, a party is limited to the position taken before the lower tribunal. United Bank of Pinellas v. Farmers Bank of Malone, 511 So. 2d 1078, 1080 (Fla. 1st DCA 1987) ("Farmer's Bank is thus bound by the allegations of the pleading it framed, and will not be permitted to alter its theory of the stated cause of action at the appellate stage"); Wilson v. Milligan, 147 So. 2d 618, 622 (Fla. 2d DCA 1962)

("A movant may not . . . specifically ask for a summary judgment or decree and assert that there was no genuine issue of fact on a specific question and then on appeal take the contrary position that there was a material issue of fact on the same question.").

Generally, where the issuance of a declaratory statement has been challenged as too broad, someone other than the petitioner has challenged the statement. See Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998) (Education Commissioner petitioned Division of Elections; Governor and Comptroller intervened); Agency for Health Care Administration v. Wingo, 697 So. 2d 1231 (Fla. 1st DCA 1997) (Wingo petitioned the Board of Medicine; AHCA intervened); East Central Regional Wastewater Facilities Operation Board v. City of West Palm Beach, 659 So. 2d 402 (Fla. 4th DCA 1995) (City petitioned Department of Community Affairs; ECR challenged the resulting statement); Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928 (Fla. 1st DCA 1990) (Professional Opticians of Florida and Arnold petitioned the Board of Opticianry; Florida Optometric Association and Fisher sought to intervene); Mental Health District Board II-B v. Florida Dep't of HRS, 425 So. 2d 160 (Fla. 1st DCA 1983) (Apalachee Community Mental Health Services filed petition; Mental Health Board named as a respondent and moved to dismiss the petition). *Accord,* Tampa

Electric Co. Florida Department of Community Affairs, 654 So. 2d 998 (Fla. 1st DCA 1995) (opinion unclear but statement apparently sought by Polk County as opposed to Tampa Electric). Where the petitioner has also challenged the breadth of the declaratory statement, the challenge has focused on the agency going beyond the issue raised in the petition. Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 161-162 (Fla. 1st DCA 1994) ("those portions of the declaratory statement specifically addressing the transaction in this case are affirmed. . . . [however, t]his statute limits the use of a declaratory statement to an expression of the agency's position on an issue raised by an individual petitioner in a particular set of facts."); *but see* Crow v. Agency for Health Care Administration, 669 So. 2d 1160, 1162 (Fla. 5th DCA 1996) ("Although Crow and (Amicus herein). . . are concerned that the Board's declaratory statement exceeds the question raised in Crow's petition, the Board's finding is appropriately connected with the question. . . . the Board is justified in pointing out pitfalls that is sees.").

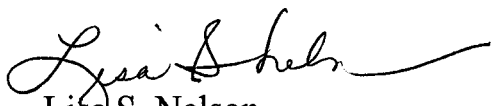
In Investment Corp., the Tracks asked the Division to issue a declaratory statement to determine the distribution of the breaks and uncashed tickets on simulcast intertrack wagers. (R-I-1-11). Receipt of an unfavorable answer does not allow the Tracks to challenge the decision to issue the Declaratory Statement requested. Sarasota County v. Department of Administration, 350 So. 2d 802, 805 (Fla. 2d DCA 1977). The Third District erred by allowing the Tracks to depart so

radically from their position before the agency. The Third District's decision should be set aside and the Declaratory Statement affirmed.

CONCLUSION

The Division respectfully requests that the Court quash the decision of the Third District Court of Appeal and approve the dissenting opinion authored by Judge Cope and the decision of the First District Court of Appeal in Chiles v. Department of State, Division of Elections. The Division also requests that the Court remand this case to the Third District with directions that the declaratory statement issued by the Division be approved.

Respectfully submitted,

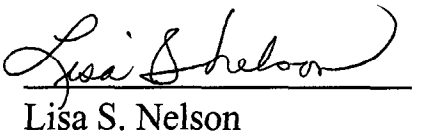


Lisa S. Nelson
Deputy General Counsel
Florida Bar No. 370657
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-0750
(850)488-3140/SUNCOM 278-3140

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Harold F. X. Purnell, Counsel for Respondent Investment Corp. of Palm Beach, at Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.O. Box 551, Tallahassee, FL 32302; to Wilbur Brewton and Kelly B.

Plante, Counsel for Respondents Calder Race Course, Inc. and Tropical Park, Inc., at Gray Harris & Robinson, P.A., 225 South Adams Street, Suite 250, Tallahassee, FL 32301; and to David S. Romanik, Esquire, Counsel for Respondent Gulfstream Park Racing Association, at Romanik, Huss, Paoli & Ivers, 1901 Harrison Street, Hollywood, FL 33020 this 19th day of January, 1999.



Lisa S. Nelson