IN THE SUPREME COURT OF THE
STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Petitioners,

S. C. CASE NO: 93, 952
DCA CASE NO: 97-3414
97-2926

v.

INVESTMENT CORP. OF PALM BEACH d/b/a PALM BEACH KENNEL CLUB, et al.
Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

For the Respondent, Palm Beach Kennel Club
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For the Respondent, Calder Race Course, Inc. and Tropical Park, Inc.
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STATEMENT OF THE CASE AND FACTS

The Department has set forth matters not within the majority opinion in Investment Corporation of Palm Beach v. Division of Pari-Mutual Wagering, Department of Business and Professional Regulation, 23 Fla. L. weekly D1621 (Fla. 3d DCA July 1998) and has misstated or omitted relevant facts. The Department, while citing Reaves v. State, 485 So.2d 829, 830 (Fla. 1986), ignores its directives by citing matters from the dissenting opinion. See p.2-3 of the Department's brief. This Court in Reaves held:

> "Conflict between decisions must be express and direct, i.e. it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *(supra* at 830)

The Department asserts it was the Third District, in its opinion below, that "indicated that rule making, rather than a declaratory statement was the appropriate action by the agency" (see p. 2 of the Department's brief). To the contrary, as the majority opinion below noted, it was the Department itself which recognized that rule making was the appropriate action:

> "As we have already noted, the Division itself recognized the need for rule making and initiated it." (*supra* at 1622)

Finally, the Division has omitted any reference to the fact that the Third District's majority opinion cited the decision in Chiles v. Department of State, Division of Elections, 23 Fla. L. Weekly D1225 (Fla. 1DCA May 12, 1998):

> "As observed by the First District Court of Appeals in Chiles v. Department of State, 1998 WL 233507(Fla. 1st DCA May 12, 1998) (no. 97-3854) the 1996 deletion of 'only' means that the issue raised by a petition for a declaratory statement need not apply solely to petitioner. This has not, however, authorized the use of a declaratory statement in lieu of a rule. Chiles, 1998 WL 233507, at 2-3. (Supra at 1623-footnote 3)

SUMMARY OF ARGUMENT

Conflict does not exist between the decision of the Third District Court of Appeals in Investment Corporation of Palm Beach v. Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation, *supra*, and Chiles v. Department of State, Division of Elections, *supra*. The First District Court of Appeal in its decision in Chiles v. Department of State, Division of Election, *supra at 1226,* expressly re-affirmed the principle that:

> "A declaratory statement may not be employed in the 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. 1DCA 1994); Tampa Electric Company v. Florida Department of Community Affairs, 654 So.2d 998 (Fla. 1DCA 1995). If an agency is presented with a petition for declaratory statement requiring a response that amounts to a rule, the agency should decline to issue the statement and initiate rule making. See Florida Opthometric Association; Agency for Health Care Administration v. Wingo, 697 So.2d 1231 (Fla. 1DCA 1997)."

This principle derives not from s. 120.565, Florida Statutes, which provides for declaratory statements, but from the definition of the term "rule" in s. 120.52(15), Florida Statutes, (1997) and the requirement for agency utilization of the rule making and adoption procedures in s. 120.54, Florida Statutes (1997). See PriceWise Buying Group v. Nuzum, 343 So.2d 115, 116 (Fla. 1DCA 1977).

The Third District Court of Appeal in the opinion below noted that the Division of Pari-Mutuel Wagering itself recognized that its declaratory statement had the effect of a rule and, indeed, initiated rule making proceedings:

> "As we have already noted, the Division itself recognized the need for rule making and initiated it." (*supra* at 1622)

The Third District further expressly noted that the decision in Chiles v. Department of State, Division of Elections, *supra*, held that the deletion of the term "only" from F. S. 120.565

(1997) has not "authorized the use of a declaratory statement in lieu of a rule." (*supra* at 1623-footnote 3)

The decisions of the First District in Chiles and the Third District in Investment Corporation of Palm Beach are patently not in conflict since both stand for the same principle that a declaratory statement may not be used in lieu of a rule.

ARGUMENT

I.

The decision of the Third District Court of Appeal does not expressly nor directly conflict with the decision of another district court of appeal on the same question of law.

The Department asserts that the Third District's decision conflicts with the decision of the First District Court of Appeal in Chiles v. Department of State, Division of Elections, *supra*. This is quite simply incorrect as even a cursory review of the opinions will disclose. Conflict is premised on the Department's assertion that the rule of law articulated by the First District in Chiles is in express and direct conflict with the decision of the Third District below.

The Department premises this conflict on the fact that the First District in the Chiles decision noted that the 1996 amendment to F. S. 120.565, which provides for declaratory statements, deleted the term "only" thereby signifying that a petition for declaratory statement need not raise an issue that is unique to the petitioner only.

The Department fails to recognize that the First District added the following caveat to its ruling:

> "A declaratory statement may not be employed in place of a rule to require compliance with general agency policy [cases omitted]. If an agency is presented with a petition for declaratory statement requiring a response that amounts to a rule, the agency should decline to issue the statement and initiate rule making [cases omitted]." (*supra* at 1225) [1]

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[1] The origin of this general principle derives not from the provisions of s. 120.565, Florida Statutes, concerning declaratory statements by agencies, but rather from the definition of the term "rule" as found in s.120.52(15), Florida Statutes (1997), and the requirement for agency utilization of rule making procedures embodied in s. 120.54, Florida Statutes (1997). See PriceWise Buying Group v. Nuzum, *supra*.

The Third District expressly cited to the First District's ruling in Chiles:

> "As observed by the First District Court of Appeals in Chiles v. Department of State, 1998 WL 233507(Fla. 1st DCA May 12, 1998) (no. 97-3854) the 1996 deletion of 'only' means that the issue raised by a petition for a declaratory statement need not apply solely to petitioner. This has not, however, authorized the use of a declaratory statement in lieu of a rule. Chiles, 1998 WL 233507, at 2-3. (Supra at 1623-footnote 3)

The Third District further noted that the Division had conceded in its declaratory statement that the statement was of such general applicability as to require rule making which it initiated. Hence, there is clearly no conflict between the two decisions.

CONCLUSION

Based on the foregoing, it is respectfully submitted that conflict between the two cited decisions patently does not exist. Consequently, the Petition of the Department should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: Lisa Nelson, Esq., Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1007, this 6 day of October, 1998.

Harold F. X. Purnell

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