Hospital District, joint venture

Number: INFORMAL

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Mr. Samuel S. Goren
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3099 East Commercial Boulevard
Fort Lauderdale, Florida 33308

Dear Mr. Goren:

As Interim General Counsel for the North Broward Hospital District, you have asked this office for assistance in determining the constitutional validity of a proposed business arrangement between the district and a private limited liability company. More specifically, you have asked about the legality of the North Broward Hospital District entering into a joint venture with a private limited liability company to operate a radiation oncology center.

The North Broward Hospital District is a special taxing district legislatively created in 1951 and the laws relating to the district were recodified in Chapter 2006-347, Laws of Florida.[1] The district is governed by a seven-member board of commissioners.[2] Among the powers of the board of commissioners are the power to lease district real or personal property;[3] the power to "borrow money, incur indebtedness, and issue notes, revenue certificates, bonds, and other evidences of indebtedness of said district;"[4] and the power to "establish and support subsidiary or affiliate organizations to assist the district in fulfilling its declared public purpose of providing for the health care needs of the people of the district[.]"[5] The district is specifically authorized to

"establish and support subsidiary or affiliate organizations to assist the district in fulfilling its declared public purpose of providing for the health care needs of the people of the district and, *to the extent permitted by the State Constitution*, to support not-for-profit organizations that operate primarily within the district, as well as elsewhere, and that have as their purposes the health care needs of the people of the district by means of nominal interest loans of funds, nominal rent leases of real or personal property, gifts and grants of funds, or guaranties of indebtedness of such subsidiaries, affiliates, and not-for-profit organizations (any such support of a subsidiary or affiliate corporation or nonaffiliated, not-for-profit corporation is hereby found and declared to be a public purpose and necessary for the preservation of the public health and for public use and for the welfare of the district and inhabitants thereof)[.]"[6] (e.s.)

The district is also authorized

"*to the extent permitted by the State Constitution*, to participate as a shareholder in a corporation, or as a joint venture in a joint venture, which provides health care or engages in activities related thereto, to provide debt or equity financing for the activities of such corporations or joint ventures, and to utilize, for any lawful purpose, the assets and resources of the district to

the extent not needed for health care and related activities[.]"[7] (e.s.)

Thus, within the limits prescribed by the Florida Constitution, the North Broward Hospital District has broad authority to enter into business arrangements with other business entities and to provide support for other business entities which provide health care services. However, this broad authority may only be exercised within the scope of the provisions of the Florida Constitution.

Article VII, section 10, Florida Constitution, provides in part:

"Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or
person . . . ."

The Florida Supreme Court has recently applied the provisions of Article VII, section 10, Florida Constitution, to analyze a business arrangement in *Jackson-Shaw Company v. Jacksonville Aviation Authority*.[8] The Court noted that

"Although the 1968 Florida Constitution added limiting constructions and exceptions to the broad prohibition contained in the 1885 Florida Constitution, the general language in the prohibition against public entities becoming joint owners with or pledging their credit to private entities was not substantially altered. Thus, like the 1885 provision before it, the1968 prohibition 'acts to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefitted.'"[9]

In *Jackson-Shaw*, the Florida Supreme Court was presented with two certified questions by the Eleventh Circuit. The initial question to be addressed by the Court was whether a business agreement entered into by the Jacksonville Aviation Authority (JAA) for a private commercial development company's long-term use of vacant land owned by the authority would violate the constitutional prohibition against joint ownership. In determining that the arrangement did not constitute joint ownership, the Court returned to the specific language of the constitution to advise that "[t]he language does not explicitly prohibit joint ventures or partnerships."[10]

In determining whether the arrangement between the JAA and Majestic (the private commercial development company) violated the constitutional prohibition, the Court first looked to whether the JAA had incurred financial obligations as a result of the agreement so as to make the authority a joint owner with Majestic. Although the JAA had obligated itself to construct a road extension on the property, those expenditures had previously been planned and budgeted and the Court determined that the JAA was not using public funds so as to create a prohibited joint ownership: "[t]he Option is merely obligating the JAA to do something it already intended to do."[11] Wetlands mitigation was also contractually required of the JAA which had agreed to designate land it owned that could be designated as a conservation easement. Despite the fact that the JAA owned the land and the Court recognized that using these wetlands for mitigation could arguably be characterized as using public resources to assist in a private venture, the Court did not find that this provision rendered the JAA and Majestic joint owners.

The Court also looked to the nature of the relationship that would arise under the agreement between the JAA and Majestic in analyzing whether the arrangement violated the constitutional prohibition in Article VII, section 10 of the Florida Constitution. The Court reviewed the particular provisions of the agreement and determined that, "with the possible exceptions of the road construction and wetlands mitigation, the JAA does not have any financial responsibility under the agreement, and it has no responsibility for the financing, promotion, or development of the proposed project." The JAA's fee simple title to the real property was not encumbered by any loans to Majestic, and the JAA was not obligated to the creditors of the development company. Thus, "[o]n the whole, the agreement does not enable the JAA to become a joint owner with Majestic."[12]

Finally, the Court declined to rely exclusively on the test for establishing a joint venture to decide whether the arrangement violated the joint ownership prohibition. The Court noted, however, that the agreement failed the test for establishing a joint venture between the JAA and Majestic.

This office and the courts have delineated those factors which must be present to constitute a joint venture. In Attorney General Opinion 93-44 (cited by the Florida Supreme Court in the *Jackson-Shaw* case) this office stated that in order to have a joint venture, all of the following characteristics must be present:

"(1) a community of interest in the performance of the common purpose;
(2) joint control or right of control;
(3) a joint proprietary interest in the subject matter;
(4) a right to share in the profits; and
(5) a duty to share in any losses incurred in the venture."[13]

As noted above however, the Florida Supreme Court has determined that the test for determining joint venture status is not dispositive of the question of a violation of the constitutional prohibition against joint ownership.

Whether or not the business arrangement between the North Broward Hospital District and HealX Oncology, LLC (HealX), may violate the provisions of Article VII, section 10 of the Florida Constitution will be dependent upon an analysis of the specific terms of this project including whether the hospital district has incurred any financial obligations that would make the district a joint owner with HealX of the freestanding outpatient radiation oncology treatment center. Using the *Jackson-Shaw* case analysis, an examination must also be made of the nature of the relationship that would arise under the terms of any business agreement. This office has been provided no specific information relating to the financial arrangements for this project and whether it may involve the issuance of revenue bonds or another form of public financing. Nor have we been provided a copy of any lease agreement from which this office could determine the terms of the proposed joint ownership or stockholder status or whether the public entity is lending, obligating, or in any manner encumbering its credit.

As Interim General Counsel for the district, you may wish to utilize the tests outlined above and the cases and Attorney General Opinions cited herein in determining whether the business arrangement between the district and HealX would constitute joint ownership and violate the prohibition contained in Article VII, section 10, Florida Constitution.

I trust that these informal comments will assist you in advising your client.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* s. 2, Ch. 2006-347, Laws of Fla.

[2] Section 3, Ch. 2006-347, Laws of Fla.

[3] Section 4(1), Ch. 2006-347, Laws of Fla.

[4] *Id.*

[5] *Supra,* n.3.

[6] *Supra,* n.3.

[7] *Supra,* n.3.

[8] 8 So. 3d 1076 (Fla. 2008).

[9] *Jackson-Shaw, id.* at 1086, citing *Bannon v. Port of Palm Beach Dist.,* 246 So. 2d 737, 741 (Fla. 1971).

[10] *Jackson-Shaw, supra,* n.8 at 1091.

[11] 8 So. 3d 1076 at 1092.

[12] *Id.* at 1093

[13] *And see Jackson-Shaw, supra,* n.8 at 1089; and *Florida Tomato Packers, Inc. v. Wilson,* 296 So.2d 536, 539 (Fla. 3d DCA 1974).