IN THE SUPREME COURT OF FLORIDA

JACKSON-SHAW COMPANY,

Appellant,

v. Case No.: SC07-2235

JACKSONVILLE AVIATION AUTHORITY,

Appellee,

ON CERTIFICATION OF QUESTIONS BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANSWER BRIEF OF APPELLEE

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Statement Of The Case

This case was tried before the Honorable Timothy Corrigan, United States District Court, Middle District of Florida, Jacksonville Division, in a four-day bench trial. Thereafter, in an exhaustively-detailed factual and legal analysis totaling 100 pages, the Court ruled against Jackson Shaw on each and every one of the five counts presented for trial. Given the strength of that opinion, (R: 97), Jackson-Shaw appealed only on one count: Count II, a purported violation of Fla Const. Art. VII, §10.

In its novel appeal to the United States Court of Appeals for the Eleventh Circuit, Jackson-Shaw argued that a lessee in a participating ground lease, was in this one context of Florida constitutional law, not a lessee as is universally recognized, but instead a joint owner with the Jacksonville Aviation Authority ("JAA") of the real property or development that the entity was leasing. Jackson-Shaw's second theory in seeking to reverse the judgment against Count II, was that the construction of a public road benefiting the adjacent property being leased to the participating ground lessee or the decision to not charge for mitigating wetland impacts on its own property, is somehow a lending of public credit. Undaunted by the district court opinion clearly identifying that established Florida law holds otherwise, Jackson-Shaw continues to argue this point, and applies the wrong

standard of review, contending on appeal that the construction of a public road and mitigation of its own property not only comprise the lending of credit, but must meet a paramount public purpose contrary to established Florida law.

The Eleventh Circuit Court of Appeals identified the Florida constitutional issues as better addressed by the Florida Supreme Court, and certified the questions to this Court. In doing so, the court noted that the phraseology chosen may not aptly capture the issues presented. To that end, the questions more properly presented are:

1. IS A PARTICIPATING GROUND LESSEE AN OWNER UNDER ART. VII, §7 OF THE FLORIDA CONSTITUTION, EVEN THOUGH IT IS NOT RECOGNIZED AS SUCH UNDER ANY OTHER PROVISION OF LAW?

2. IS THE CONSTRUCTION OF A PUBLIC ROAD, AND THE INCLUSION OF WETLANDS FOR MITIGATION IN A PARTICIPATING GROUND LEASE WITHOUT CHARGE, A LENDING OF CREDIT IN VIOLATION OF ART. VII, §10 OF THE FLORIDA CONSTITUTION?

FACTS

The Jacksonville Aviation Authority owns thousands of acres of undeveloped land which have lain vacant for decades.[1] Included within this vacant acreage are 328 acres of property that the JAA has specifically tried to lease and market in the past ten years. Indeed, the district court below found that in 1999 the JAA sought proposals to develop the property, but could not find a developer willing to accept the level of risk sought by the JAA. (R:97, 11, 89). The value of the property is irrelevant under existing case law, as is the efforts taken to market it, and the district court opinion adequately addresses the facts necessary to obtain a background in this case. For a complete factual recitation see the JAA's Answer Brief, before the United States Court of Appeals for the Eleventh Circuit, pages 3-11.

The JAA entered into a participating ground lease ("PGL) with Majestic[2] in 2007. The terms of that ground lease, material to this appeal, are as follows:

1. The JAA is authorized by 2004 Fla. Laws 464 §§1(1); 3(1)(8)(19) and (20) to lease property. (R:97, 71)

[1] The reference in Appellant's brief to property having been taken by eminent domain is artful, but misleading. The JAA acquired some limited acreage at the international airport site in the 1960s, and has held that property since. It is retaining full ownership of the property, which is why it has entered into a participating ground lease and not a sale. (R:97, 13, 74, 80-81)

[2] The actual entity is a wholly-owned subsidiary of Majestic named Woodwings East LLC, but we will refer to them as Majestic to be consistent with Appellants.

2. The JAA retains fee title to the real property and does not subordinate its interest to any lender. To explain it differently, there is no legal right for any entity or person to foreclose on the JAA's real property. (R:97, 22, 81 n.39)

3. The JAA is not obligated to pay any money whatsoever into the development of the Woodwings East development (the "Project". (R:97, 79)

4. Majestic is the sole entity obligated to pay all costs to construct and market the Project. Should the Project not be profitable, the JAA will not be responsible for any of the financial losses. (R:97, 79)

5. The real property has not been generating any revenue during the approximately 40 years that it has been owned by the JAA. (R:97, 66, 89)

6. The JAA budgeted the construction of the public road in any event, prior to engaging in a participating ground lease with Majestic. (R:97, 87, 88, 99-100)

7. The alternative proffered during the litigation by Jackson-Shaw required JAA to spend substantial capital dollars on Jackson-Shaw's behalf <u>in addition to</u> the road it now contends would violate the Constitution, before receiving a payment per acre. (R:97,28)

8. The JAA determined, as a matter of policy, that it did not want to be required to expend any of its limited capital dollars for speculative real estate returns, but instead wanted a real estate transaction where the Lessee would be motivated to make a profit. (R:97, 11, 13, 89)

9. The undisputed facts are that the JAA would receive approximately $900 million over the life of the agreement, and Majestic, having had its capital at risk, would earn approximately $1 billion. (R:97, 99-100)

10. There is no cash payment for mitigation. The JAA has agreed to not charge to the ground lease up to 50 acres that may be necessary to properly permit the property due to wetland issues. (R:97,88). Appellant's repeated attempts to recharacterize the JAA's inclusion of this acreage as a cash contribution are nowhere supported in the record.

11. There is a public purpose in mitigating wetland damage on real property owned by JAA. (R:97,88)

12. If Majestic does not exercise its option to enter into a lease as provided under the Participating Lease Agreement, the sole expenditure by the JAA will be the construction of the previously-planned and budgeted public road. Thus, the only downside for the

JAA is that, having owned the property without making any profit from it for 40 years, it would hold it for another 5 years.

13. If Majestic does not exercise any option to enter into a ground lease, it would not make any money either; thus it is motivated to follow the market appropriately and construct a development when there is an actual market need for it. (R:97, 88).

SUMMARY OF THE ARGUMENT

The law at issue here has been long-since settled by this Court. Where a public entity, such as the JAA, has the legal authorization to lease property and it does so without lending public money, it neither violates Fla. Const. art. VII, §10's prohibition against joint ownership nor its prohibition against lending credit. That is the case here, as the undisputed facts show and the court below held.

The district court properly held that the JAA is not a joint owner of its own property with a private entity, where it found that: (1) the JAA retains ownership of its real property, which will not be subject to lien or sale; (2) the JAA will have no responsibility for any debts incurred in developing the property; and (3) Majestic is the Lessee and JAA the Lessor, and nothing in any of the documentation is, by Appellant's own admission, different from any other such lessor/lessee arrangement. In order to be a joint owner, the JAA would have to share losses and be responsible for lessee Majestic's debts and other obligations, which the JAA does not share. (R:97, 80-89)

No funds are being borrowed by the JAA and invested into this leasing site. The JAA specifically sought and obtained a developer to act as lessee who would carry all the risk and who would itself fund all of the necessary infrastructure without requiring JAA to expend any funds or dip into its bond funding capacity. (R:97:22-24)

The only actual expenditure by the JAA is a $750,000 public road, which the district court held had been planned and funded prior to entering into negotiations with Majestic. (R:97:13, 65-66). Moreover, the law has long held that the construction of a public road is a proper public expenditure, regardless of whether a private entity benefits, as such is usually the case.

The contention by Appellant that the JAA agreed to spend $2 million on wetlands mitigation is not supported by the findings of the district court or the record. The JAA made no financial commitment to Majestic, and Jackson-Shaw put nothing in the record to quantify the need for mitigation. (R:97:56-66) Instead, as determined to be in the best interest of the JAA by its Board, the JAA placed only vacant property, which had been unused for 40 years, into the agreement, and allowed Majestic to use up to 50 acres of that property as mitigation if needed for the development of JAA's property. (R:97:66) As held by the district court:

> The evidence at trial established that the Woodwings East property was marketed, albeit not extensively; that the marketing did attract an interested developer; that the JAA determined Majestic's proposal to be consistent with the Authority's goal to expand and diversify its sources of revenue; that JAA determined the transaction would be advantageous to the Authority and would raise significant revenue for the Authority's operations in the future; and that the proposed transaction would put to use and make productive property that had sat vacant for years. With the exception of committing the use of 328 acres of its land for up to 80 years, the Authority

> determined it will be exposed to no risk of loss or out of pocket expenses now or in the future other than spending $750,000 for a public road, which it had already approved and budgeted for, and providing up to 50 acres of wetlands mitigation for property in which it retains a fee ownership interest.

(R:97:65-66)

The district court's findings, that over the course of the transaction, Majestic would make approximately $1.1 billion dollars and the JAA $900 million dollars, does not support a finding that the JAA was a joint owner in violation of Fla. Const. art. VII, §10 or that there was no public purpose, but does quite the opposite. Appellant provided no present-day analysis of the difference between having the JAA borrow funds to add to the deal, as is typically the case with the lessor, in comparison with the JAA placing vacant land into the hands of a nationally-recognized developer to develop at its expense. Thus, even if it were appropriate for the district court to consider the relative merits of the deals, which (the court correctly recognized) it is not (R:97, 99-100), the record is devoid of any actual basis on which to do so.

Appellants have been unable to identify a single case in which a public agency lessor has violated the Fla. Const. art. VII, §10 by leasing vacant land. To the contrary, the cases are legion that developing vacant public land is for a public purpose and that, having been granted the authority by the legislature to do so, the

public agency may do so without violating Fla. Const. art. VII, §10 under terms it deems in the public's best interest. (R:97,89)

Appellant erroneously recites in its Statement of Facts that Majestic may pledge the property and recoup its loan balance; again, this is contrary to the direct findings of the district court and the undisputed record. What the district court held, accurately, is that the real property *cannot* be subordinated to a lender: that the lender has no right to foreclose on the property, only on the building, which will be built with private funds, not with any public funds. (R:97:65-66)

As held by the district court:

> Without dispute, the JAA has the *power* to lease its nonaeronautical land. 2004 Fla. Laws 464, §§ 1(1); 3(1)(8)(19) and (20). . . . [T]he Authority, by leasing the property in question, was exercising a power conferred on it by its Charter. *Bannon*, 246 So.2d 737, 740 (Fla. 1971). Where bonds are not issued, public funds are not spent, and the power of eminent domain is not exercised, a public entity, such as the JAA, may lease public land for private uses in accordance with its legislative authority. [*citing City of West Palm Beach*, 291 So.2d at 578] "Although the use may be for purely private purposes, the leasing of the property may nevertheless constitute a valid public purpose." [*citing Furnams*, 377 So.2d at 987].

(R:97, 71) (emphasis in original)

The district court, in considering the evidence offered regarding the construction of the previously-funded and planned public road, the inclusion of wetland mitigation, and the long-term nature of the lease, found following a

four-day trial, that these facts did not rise to the level required under *Bannon, City of West Palm Beach* or *Furnams* to constitute a lending of credit under Fla. Const. art. VII, §10. Jackson-Shaw's insistence that this is solely a matter of law belies the multiple key findings of fact made by the district court, not the least of which is that the participating ground lease is in fact a lease. (R:97, 63) (" . . . under both general law and the JAA Charter it is a lease . . . .") or a transfer of title equating to ownership. (R:97, 77), noting that the existence of a joint venture is a jury question, also holding as follows:

> "[O]wnership connotes the right of one or more persons to possess and use a thing to the exclusion of others. . . involving as an essential attribute the right to control, handle, *and dispose*. . . . ", (R:97,81) In any event, JAA and Majestic are not "joint owners" having a joint proprietary interest in anything together; *the JAA is fee simple owner of 328 acres of land* called Woodwings East, and *Majestic is owner of an option right to lease land,* and under the PGL, the owner of a leasehold interest with the right to use and occupy the property for a fixed term of years, as well as owner of the improvements which it will make on the land (which will revert to the JAA at the termination of the ground lease).

(R:97, 81-82, n.38) citations omitted; emphasis added. Moreover, Jackson-Shaw is unable to identify a single contrary case to those applied by the district court, nor has it identified any error in the court's application of the seminal case to the facts as found by it.

STANDARD OF REVIEW

Contrary to that set forth by Jackson-Shaw, the standard of review here is whether the decision below is clearly erroneous. "It is evident from *Holland v. Gross* [89 So.2d 255, 258 (Fla. 1956], that the less restrictive "clearly erroneous" standard applies to trial court findings that are essentially inferences drawn from undisputed facts." Philip J. Padovano, Appellate Practice, §9.6 (2007-2008). Appellant states that the standard of review on appeal is *de novo*, urging that the appeal presents a question of law. In support of its argument for a *de novo* approach, "Jackson-Shaw accepts the district court's findings of fact." (R:102:19). As stated above, however, the Florida Supreme Court applies the clearly erroneous standard in this instance, and the more deferential standard of competent substantial evidence if there are disputed facts resolved by the district court and addressed on appeal. *Id*.

Jackson-Shaw, moreover, fails to point out to this Court that the question of the existence *vel non* of a joint venture is a question of fact. *USA Independence Mobilehome Sales, Inc. v. City of Lake City*, 908 So.2d 1151, 1158 (Fla. 1st DCA 2005). Under Florida law, "[w]hether or not a group of persons constitute [sic] a joint venture is usually a question of fact, to be resolved by the jury." *Misco-United Supply Inc. v. Petroleum Corp.*, 462 F.2d 75, 79 (5th Cir. 1972) (citations omitted).

One of the important fact questions is the intent of the parties to create the joint venture. *Id.; accord, Kislak v. Kreedian*, 95 So.2d 510, 515-516 (Fla. 1957). "The question of whether the parties to a particular contract have created between themselves the relationship of joint venture is dependent upon their intentions, . . ." *Id., quoting from Tidewater Constr. Co. v. Monroe County*, 146 So. 209 (Fla. 1933). The district court squarely found, following testimony, that there was no intention to form a joint venture. (R:97:76). There is no basis on which to overturn this finding of fact.

The district court also held, after hearing testimony from JAA's executive director and Board members, among others, that the necessary elements to the creation of a joint venture were missing, holding that there was no: (1) community of interest in the performance of a common purpose, (2) joint control or right of control, (3) joint proprietary interest in the subject matter, (4) right to share in the profits, or (5) duty to share in the losses which may be sustained. (R:97:74) *USA Independence*, 908 So.2d at 1158.; *see also Williams v. Obstfeld*, 314 F.3d at 1275-76.

Jackson-Shaw agrees with these principles of law, and agrees that the district court correctly relies on them. (R:102:38) Jackson-Shaw fails to recognize from the cases it cites that "where any factor is missing" a court is preclude[d] from finding that a . . . joint venture exits. *Williams v. Obsfeld*, 314 F.3d at 1275-76. As

held recently by the Florida First District Court of Appeal, "the standard [for finding a joint venture] has been construed strictly, so that the absence of even one of the five elements has precluded the finding of a joint venture." *USA Independence*, 908 So.2d at 1158.

In short, all parties, including Jackson-Shaw, agree that the standard of review for a joint venture must be based on the factors identified above. As such, Jackson-Shaw has not raised a valid appellate issue relating to the finding of joint ventures in this appeal, but urges only that this court reject the indicia. In doing so, Jackson-Shaw fails to recognize that the questions are one of fact drawn from trial testimony and that the appropriate standard of review is "clearly erroneous".

ARGUMENT

I. THE CONSTRUCTION OF A PUBLIC ROAD AND THE INCLUSION OF WETLANDS FOR MITIGATION IN A PARTICIPATING GROUNDLEASE WITHOUT CHARGE IS NOT LENDING CREDIT IN VIOLATION OF ART. VII, §10 OF THE FLORIDA CONSTITUTION.

A. Introduction

These issues have been fully addressed by the district court in its opinion. (R:97,67-90), and briefed before the 11th Circuit. In both the foregoing, and as set forth below, it is apparent that there is no violation of Fla. Const. art. VII, §10.

Article VII, §10 of the Florida Constitution provides in pertinent part:

> Neither the state nor any county . . . .or agency of any of them, shall . . .give, lend, or use its taxing power or credit to aid any corporation, association, partnership or person. . . .

Fla. Const. art. VII, §10. It is undisputed that the JAA has no taxing authority, (R:97, 6) and the question therefore lies whether it has lent its credit to aid Majestic by entering into a long-term ground lease without a guaranteed income,[3] building a public road and not charging for some mitigation lands within the leased property. This Court has put questions such as these to rest some time ago.

In order for the JAA to have lent credit, a debt or "imposition of new financial liability" must be created for the benefit of a private enterprise at the

[3] Income is projected to approximate $900 million to the JAA. (R:97, 39)

expense of the JAA. *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304, 309 (Fla. 1971). There is here no undertaking by the JAA to pay the debt of another, no undertaking to use public funds or place them in jeopardy and no risk that the JAA's real property could be lost due to a default by Majestic. (R:97, 79-80) *See State v. Housing Finance Authority of Polk County*, 376 So.2d 1158 (Fla. 1979). Indeed, there is no obligation here to "either directly or contingently be liable to pay anything to anybody." *Linscott v. Orange County Industrial Dev. Authority*, 443 So.2d 97, 101 (Fla. 1983). (R:97,86)

As held by the district court, and found as a matter of fact: the JAA had budgeted and planned to build the public road, the provision of possible acreage to contribute towards wetland mitigation is merely a term of the lease and does not obligate the JAA to pay anything to anyone, and the JAA would be required to mitigate against wetland damage even if it developed the property itself:

> Here, as in *Bannon*, *supra*, JAA's participation in the transaction is limited to that of a lessor. It has no responsibility for financing, promotion, or development of Majestic's commercial project. The Authority bears no direct or indirect obligation to pay any debt and its fee interest in the 328 acre Woodwings East tract is not obligated, encumbered or in any way placed in jeopardy by any potential default by Majestic. . . .Jackson-Shaw incorrectly equates alleged 'public financial assistance' to Majestic to an unconstitutional lending of credit.

(R:97, 86) The participating ground lease was structured to preserve precious capital fund dollars for use at the Jacksonville International Airport. (R:97,11, 87,

89). The JAA did not want to expend funds to build an infrastructure, or otherwise pay a developer, to develop Woodwings East; in fact, it did not want to take *any* financial risk.[4]

The district court's findings are not clearly erroneous, where even Jackson-Shaw admits that the JAA is going to gain hundreds of millions of dollars for the public coffers. (R:97, 39). Indeed, in arguing for a novel interpretation of the Florida Constitution that ignores the key terms "joint owner" and "lending credit", Jackson-Shaw argues both that the JAA would put public capital at risk because there is no *guaranteed* return and, second, that the Participating Ground Lease is unconstitutional because Majestic and JAA will make so much money due to the structure of the lease that Jackson-Shaw would be forced to reduce its own unilateral charges to the market to compete. Of course, government participation in the market is not subject to an equity test under any provision of the Florida Constitution, including Fla. Const. art. VII, §10. Furthermore, it would require a

[4] It is ironic, to say the least, that in attempting to preserve taxpayer funds and not place them at risk whatsoever, the JAA is accused of violating a constitutional provision aimed at achieving that same goal. It is also ironic that the Jackson-Shaw deal, as proffered, required the JAA to expend public dollars to complete an infrastructure valued at $12 to $14 million dollars before it would lease any property from it. Accordingly, while the Appellant argues that it offered $28,000 per acre, it certainly put no ***net*** figure on the table, and has presented no evidence the public would ever come out ahead. In contrast, Appellant admits that the JAA will likely obtain $900 million from the Majestic Participating Ground Lease, while Majestic, having taken all of the risk, will obtain approximately $100 million more than that. (R: 97, 13, 14, 28)

departure from both case law and logic for the JAA to be able to lease property without charge, but not with a high probability of obtaining significant payments.

In any event, leasing property for economic development, as an alternative to profit, has long been held to meet a public purpose. *Bannon v. Port of Palm Beach District*, 246 So.2d 737 (Fla. 1971), [upholding the lease entered into by the parties without charge, thus granting the tenant the full use of the property, with no payment whatsoever to the government entity.] As held by the district court: "JAA's attempt with this transaction to transform a dormant piece of property into a viable and area-compatible revenue-producing industrial and office park sufficiently fulfills a public purpose". (R:97, 89 and n.39). *E.g., City of West Palm Beach*, 291 So.2d at 578 (Fla.1974). Compare *Poe v. City of Tampa*, 695 So.2d 672, 679 (Fla. 1997) (applying paramount purpose test due to sale of bonds, finding the actual granting to a private entity of the first $2 million of on-football event revenue did not negate the paramount public purpose of bringing the team to Tampa).

B. The Standard of Review Requires a Finding of Public Purpose, not Paramount Public Purpose.

The law is well-established by this Court that the paramount public purpose test is inapplicable, and "it is enough to show only that a public purpose is served" when there is no actual pledging of credit. *Northern Palm Beach County Water Control District v. State*, 604 So.2d 440, 442 (Fla. 1992) (citing *Linscott v. Orange*

County Industrial Development Authority, 443 So.2d 97 at 101 (Fla. 1983)). *See also* the discussion of *Bannon, supra,* which has been confirmed by this Court as recently as 2001. *See State v. JEA*, 789 So.2d 268, 272 (Fla. 2001) ("If the County has not exercised its taxing power or pledged its credit, the obligations must merely serve a public purpose.") *See also Northern Palm Beach County*, 604 So.2d at 442 ("This is so as the paramount public purpose test is applicable only where the entity has pledged its taxing power [JAA has none] or pledged its credit.") Compare *State v. Osceola County*, 752 So.2d 530, 535 (1999). In *Osceola County,* the county issued bonds for the acquisition of a convention center, the operation of which was being provided by a private company. *Id.* at 532. All profits from the operation of the convention center would be retained by the private company during the term of its twenty-year contract. The Florida Supreme Court upheld the agreement, and *pledge of the tax*, as fulfilling the paramount public purpose of promoting tourism and improving the lifestyle of the residents. *Id*. at 535-536. *See also Furnams v. Santa Rosa Island Authority,* 377 So.2d 983, 987 (Fla. 1st DCA 1980) ("Cases are legion which hold that the leasing of land or publicly owned facilities for the private or business purposes of the leaseholder serves a 'public purpose.' ")

The JAA has merely leased vacant property, confirmed its determination to build a previously budgeted public road (R:97:88), and agreed in computing its

share of profits to not deduct all of the acreage needed for wetland mitigation. (R:97:88). These actions never have been held to be a pledge of credit and cannot be done so without rewriting years of Florida case law and creating a new definition of pledging credit known nowhere else in the legal system.

Jackson-Shaw's contention that building a public road is lending credit is without any legal support and contradicts is own admission. (R:97, 86-87) The law could not be clearer that building a public road is not a pledge of credit, regardless of how much a particular entity expects to benefit from the road. *See City of St. Petersburg v. Meyers*, 55 F.2d 810 (5th Cir. 1932) (holding the improvement of City waterfront, and the construction of a waterfront road, even though benefiting private landowners, was on its face a public work.) *Nohrr v. Brevard County Educational Facilities Authority*, 246 So.2d 304 (Fla. 1971). Indeed, building a public road has been held to be a public purpose even where public funds are used to build a road within a private gated country club. *Northern Palm Beach County Water Control District v. State*, 604 So.2d 440, 443 (Fla. 1992) (holding that "public ownership" and a "declaration of public purpose" were sufficient for the Court to conclude that the road served a public purpose).

Absent the road which the district court found as a matter of fact had been budgeted and planned for in 2005 unrelated to the lease and option at issue, there are no funds whatsoever that the JAA is obligated to expend for this Project.

(R:97:32) A pledge of credit requires, and it is difficult to put this more simply, just that: public funds from the public, to be placed at risk for the benefit of the private entity. As with the District in *Bannon*, JAA's "interest and credit remain free from attachment and neither the spirit nor the letter of Article VII has been violated." *Bannon*, 246 So.2d at 741.

Not a single case cited by appellant applying the paramount public purpose standard of review was outside the bonding context. *E.g. Appellant's brief at p. 44-45,* (R:102:44-45) citing *Linscott v. Orange County Industrial Development Authority*, 443 So.2d 97 (Fla. 1983) (industrial bonds); *Raney v. Lakeland,* 88 So.2d 148, 149-150, (Fla. 1956) (on point for JAA, rejecting the argument that a 99-year lease for land violated Fla. Const. art. VII, §10; holding it was *not* a pledge of public credit to provide the land free of charge, and applying the public purpose test and holding "the decisions of municipal officials will not be disturbed absent a showing of fraud, bad faith or abuse of discretion," not applying the paramount public purpose test)*; Poe v. Hillsborough County,* 695 So.2d 672 (Fla. 1997) (combination of bonds pledged for the construction of Tampa stadium, with initial revenues earned by the agency on public events being pledged to the privately held sports team, upheld as meeting the paramount public purpose test).

Disingenuously, Appellant contends that its inability to identify a case in support of its position reflects an open issue, and not a reflection on the frivolous

nature of its appeal. In doing so, it fails to acknowledge the long line of cases, or to comprehend the holding in *Linscott*, among others. This Court in *Linscott* squarely rejected Appellant's argument, as the "exemption" it contends is inapplicable was passed in the 1968 Constitution and is not a limited exemption but a category. Accordingly, this Court held that industrial bonds, authorized by Fla. Const. art. VII, §10 after 1968, did not in fact create an exemption to the prohibition against lending public credit, but instead recognized that if there were no actual pledging of public funds, even if bonds were issued, there would be no constitutional violation. The Court analyzed the provision of industrial bonds, and found, in that instance, that the revenues pledged were generated by the project itself, and therefore, despite the actual issuance of bonds by the agency, the proper determination was not whether a paramount public purpose was served, but whether there is a reasonable and adequate public interest. *Id*. at 101. This question is put to rest with the legislative determination that the JAA can lease its property, and the line of case law which recognizes that it may be leased without obtaining any revenue at all. That this has been put to rest by this Court in *Bannon* cannot be gainsaid:

> We do not find it necessary to determine whether the purposes to be served by the development of the leased property are primarily public or private in nature. The District in leasing the property in question was exercising a power conferred on it by the 1959 Port Facilities Financing law.

Bannon, 246 So.2d 737, 740 (Fla. 1971). *Bannon* also addressed whether by not charging for the lease, the District was lending credit:

> We . . . consider the question of whether or not the Authority had the power to lease the land for a private development at no public expense.

Bannon, 246 So.2d at 740. Having identified the issues, this Court issued its holding in clear, concise language, applicable to the case herein:

> The District, by virtue of the lease agreement, did not become a joint owner or stockholder of the private tenant, nor did it land, obligate, or in any manner encumber its credit to the advantage of the appellants.

Bannon, 246 So.2d at 740-741 (holding also that if all failed for the corporate tenant, the District would not be responsible to the creditors for payment nor would the ownership of the land be committed). The plaintiff in *Nohrr* had challenged the issuance of revenue bonds for the construction of private facilities for higher education. *Nohrr v. Brevard County Educational Facilities Authority*, 246 So.2d 304 (Fla. 1971) Recognizing the narrowness of the prohibition in Fla. Const. art. VII, §10, the Court held that the word "credit" used in that section, to be applicable, requires that an actual financial liability be imposed which "creat[es]. . . a State or political subdivision debt for the benefit of private enterprises." *Id.* No financial liability herein has been imposed on the JAA: it is building a public road, as previously budgeted, and placing vacant property in service to be leased or used

as mitigation for the development of the vacant land to be leased, as held by the district court. (R:97:88). The *Linscott* court built upon the foundation created in *Nohrr*, 246 So.2d 304 at 247.

While appellant has attempted to divorce the issue of legislative authority from this appeal by appealing only Count II, it is notable and perhaps dispositive that the legislature granted to JAA, and the district court so found and held, the broadest powers available, including those under Chapters 315 and 159, Florida Statutes. (R:97:54:61-62); *2004 Florida Laws §464*. As such, where the legislature has found a public purpose in the leasing of land under any conditions by the JAA, the determination of a public purpose is subject to great deference. *Bannon, supra*, 246 So.2d at 740 (applying Chapter 315); *Linscott*, 443 So.2d at 101. In no instance has a Florida court found that an agency, and especially so with an airport agency, could not enter into a long-term, no-cost lease to obtain revenues for its public operation. *See Furnams v. Santa Rosa Island Authority* (Fla. 1st DCA 1980) ("It is not the function of the courts to determine whether in exercising [the agency's] discretionary powers the officials acted with wisdom, but simply to determine whether their actions fairly met the requirements of law by which they are governed."); *see also Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So.2d 970, (Fla. 2nd DCA 2002).

There is nothing unique or unsettling about the JAA action; it was taken by a public agency for the benefit of the public it serves and has no financial obligation to third parties. In so doing, the JAA has caused an unused asset to generate revenue at no cost to the public. Accordingly, where, as here, the JAA merely entered into a long-term lease with vacant property where it is not obligated to pay "something to somebody", there can be no determination that it has lent its credit in violation of Fla. Const. art. VII, §10, and the district court opinion should be affirmed. *Linscott*, 443 So.2d at 100.

II. JAA IS NOT A JOINT OWNER IN VIOLATION OF ART. VII, §10 OF THE FLORIDA CONSTITUTION, BUT IS MERELY A LESSOR OF REAL PROPERTY WITH NO RISK OF LOSS.

- Joint Ownership in Fla. Const. art. VII, §10, is a Legal Term of Art, With Standard Meaning, and Does Not Include a Unique Definition of Ownership Otherwise Not Recognized in Law.

Appellant argues that the JAA violated Fla. Const. art. VII, §10 by entering into a "joint venture." (R:102:38).

Article VII, §10 provides in pertinent part:

> Neither the state nor any county, . . .or agency of any of them, shall become a ***joint owner with, or stockholder of,*** any corporation, association, partnership or person . . . .

Fla. Const. art. VII, §10 (emphasis added). Undefined terms in legislation are to be given their plain and ordinary meaning. *Green v. State*, 604 So.2d 471, 473 (Fla.,

1992); *Southeastern Fisheries Ass'n. v. Florida Dept. of Natural Resources,* 453 So.2d 1351 (Fla.1984); *Florida Dept. of HRS v. McTigue,* 387 So.2d, 454 (Fla., 1st DCA, 1980). If necessary, such plain and ordinary meaning can be ascertained by reference to a dictionary. *Green, supra.*; *Gardner v. Johnson,* 451 So.2d 477 (Fla., 1984); *Barr v. State*, 731 So.2d 126 (Fla., 4th DCA, 1999); *Powell v. State*, 508 So.2d, 1307, 1310 (Fla., 1st DCA, 1987).

The canon of legislative construction, known as *expressio unius est exclusio alterius,* means that where legislation enumerates the things on which it is to operate, or forbids certain things, such legislation is ordinarily construed as excluding from its operation all things not expressly mentioned. *Thayer v. State*, 335 So.2d, 815, 817 (Fla., 1976). In this case, the scriveners of the constitutional amendment specifically banned joint ownership and becoming a stockholder; they did not preclude leases, regardless of how beneficial they may appear to a market competitor.

The purpose of Fla. Const. art. VII, §10 is to preclude a public agency from becoming a joint owner in a private venture, and to prevent the public agency from lending its credit to a private venture absent a paramount public purpose. *State v. Osceola County,* 752 So.2d 530, 536 (Fla. 1999); *Linscott v. Orange County Industrial Dev. Authority,* 443 So.2d 97, 100-101 (Fla. 1983). As amended in 1968, art. VII, §10 of the Florida Constitution reads in pertinent part as follows:

> 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 . . . .

Fla. Const. art. VII, §10 (emphasis added).

The purpose of the limitations in Fla. Const. art. VII, §10 has been held to be "to protect public funds and resources from being exploited in assisting or promoting private venturers when the public would be at most incidentally benefited." *Bannon,* 246 So.2d at 741. Jackson-Shaw contends, however, that the splitting of net profits transforms the lease arrangement into a "joint owner" within the definition of Fla. Const. art. VII, §10, relying on a non-binding and conclusory 2002 Florida Attorney General's opinion as the only legal support for such a position and the argument that it can find no evidence that common legal definitions of joint venture owner were meant to be applied in interpreting this clause. (R:102:36) The law, however, is clear and to the contrary – plain language is given its usual interpretation and "owner" means just that. (R:97:73). This has been held to be the case under art. VII, §10, even prior to the 1968 amendment to the Florida Constitution. *See Dade County Bod. Of Public Insr. v. Michigan Mutual Liability Co.*, 174 So.2d 3, 5, 6 (Fla. 1965) (distinguishing ownership of insurance policy from being a stockholder, despite use of terms such as "dividends" where Dade County bore no risk of sharing in liabilities).

The district court was correct in rejecting this position (R:97:73-81) for each of the reasons identified in its opinion below, which include the undisputed facts under the lease and option that the JAA is not liable for any of Majestic's losses, does not place any capital into the Project other than the raw land, assumes no liabilities as to creditors and takes no risk on the actual loss of the real property. (R:97:74, n.36, 79) As such, the district court properly found that there is no indicia of either a partnership or a joint venture. *See Williams v. Obstfeld*, 314 F.3d 1270, 1275, 1276 (11th Cir. 2002) (requiring a mutuality of profits and losses, and an agreement to share in the assets and liabilities of the business for there to be a partnership; noting that any one element, if missing precludes a finding of a partnership or joint venture). JAA owns no part of Majestic or the development, and merely receives ground lease rent. As such, it is not a joint venturer.

It is well-recognized in Florida that long term leases, without the sharing of losses or mutual control, cannot constitute a joint venture for any purpose, including that of Fla. Const. art. VII, §10. *See Concklin Shows, Inc.*, 684 So.2d 328 (Fla. 4th DCA 1996) (no joint venture for tax purposes where there was no sharing of losses or mutual control, rejecting the contention that the sharing of net profits created a joint venture). To be a joint venturer, one must share rights and liabilities indivisibly as to third parties. Such is not the case here. JAA is expressly not liable for any actions of Majestic. (R: 97:79-81) As such, it is not a

joint venturer. *See, e.g., S & W Air Vac Systems, Inc. v. Dep't of Revenue*, 697 So.2d 1313, 1315 (Fla. 5th DCA 1997) ("To share in losses means that each party is responsible or liable for the losses created by the venture and is exposed to liability, if any to creditors or third parties").

Bannon is the seminal case interpreting art. VII, §10 following the 1968 changes to the Florida Constitution and squarely upholds the JAA's entering into this long-term lease and option with Majestic.[5] *Bannon*, 246 So.3d 737-741. Taxpayers in *Bannon* contended that a long-term lease between the Port of Palm Beach District (the "District") and a private developer, Peanut Island Properties, Inc., ("Peanut") violated art. VII, §10 of the Florida Constitution by making the District a joint owner with Peanut and by lending the District's credit. *Id*. Citing Chapter 315 of Florida Statutes and identifying the District's authority to enter into leases, the *Bannon* court made short-shrift of the contention that the agreement made the District a joint owner. *Id*. at 741 ("The District, by virtue of the lease agreement, did not become a joint owner or stockholder of the private tenant . . . .")

Herein, the district court exhaustively considered and catalogued the factual and legal basis for determining that the JAA's lease and option did not constitute joint ownership. (R:97:70-81). In making its factual determinations, the district court found that the JAA's sole risk was that Majestic would not make a profit,

[5] Indeed, the case law is established so clearly that this appeal may be deemed frivolous.

such that there would be no or fewer net profits to divide (R:97:80), and that there was no sharing of losses whatsoever. *Id*. Without the indicia of a partnership or joint venture - mutual responsibility for debts and the ability to bind each other - there simply is no joint ownership as precluded by Fla. Const. art. VII, §10. Exclusive private use, for ultimate financial benefit to the JAA, does not and cannot create a joint owner under any of the principles held by the district court or any Florida court addressing this issue. Thus, the holding in *Bannon* is equally applicable to the present factual and legal issues regarding the JAA's long-term lease and option with Majestic:

> The District, by virtue of the lease agreement, did not become a joint owner or stockholder of the private tenant, nor did it lend, obligate, or in any manner encumber its credit to the advantage of the tenant. . . .The District's participation in the transaction is limited to that of a lessor and does not involve any responsibility for the financing, promotion or development of the proposed project.

Bannon, 246 So.2d at 740-41. Thus, Jackson-Shaw's contention that *Bannon* does not allow the JAA to include 50 acres of property to be used as wetland mitigation market-value payment by Majestic has no legal support: The provision of vacant land at no cost for development has been long-held to constitute a public purpose in generating jobs or revenue. *Furnams v. Santa Rosa Island Authority*, 377 So.2d 983 (Fla. 1st DCA 1980). Nothing within any of the cases cited by Jackson-Shaw

supports the conversion of this straight-forward participating ground lease and option into some type of joint ownership agreement.

In each case addressing the constitutionality of the actions of a state or county agency, this Court has applied, not surprisingly, the established legal principles applicable in cases throughout the state to define ownership. *Bannon v. Port of Palm Beach District*, 246 So.23d 737, 741 (Fla. 1971).

Appellants can identify no case of this Court or any other where other than the standard definitions of ownership and stockholder have been applied. Title to the real property remains with JAA and is not given as security by Majestic; there is no subordination of JAA's interest. (R.97) JAA is not responsible for any of the expenses, bills, invoices, actions, or liabilities of Majestic. (R:97) It is undisputed that the JAA, and thus the public, would not be liable for any expenses of Majestic whatsoever. (R:97) Further, the Participating Ground Lease makes clear that the parties cannot bind each other. (R:97) Hence, there is no ownership *inter se*, and no violation of Fla. Const. art. VII, §10. *See also Koubek v. Caufield*, 213 So.2d 417 (Fla. 1968).

As held by the district court: A partnership is created only where 'both parties contribute to the labor or capital of the enterprise, *have a mutuality of interest in both profits and losses*, and agree to share in the assets and liabilities of the business." *Williams v. Obstfeld*, 314 F.3d 1270, 1275 (11th Cir. 2002) (applying

Florida law) (emphasis added). There is no mutuality of interest in losses; those will be borne solely by Majestic. (R:97, 79) Further, as was detailed by the district court, both parties are not contributing to the enterprise; the JAA is leasing vacant land. (R:97, 79-80). This falls far short of creating a partnership.

Appellant has been unable to identify any case law of this Court that defines partnership differently than this well-established definition. Its attempt to misread the Attorney General Opinion, while not binding or correct even if read as requested by Jackson-Shaw, is simply wrong. The Attorney General recited the factual assumption that there was a partnership, and did not hold that the facts created it. (AGO 2002-07) ("The corporation has proposed a *partnership* whereby the city would share in net revenues.") (emphasis added). By identifying that there would be a partnership, and that the city would obtain a share of the net revenues, the Attorney General opinion assumed the existence of shared losses.

For this Court to define partnership differently from established law would be to inject a level of uncertainty into all participating ground leases, with litigation and the like to follow. *See Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536, 539 (Fla. 3d DCA 1974) (noting that if entities are partners, they are responsible for each other's torts, which is not the case in the JAA participating ground lease at issue here.)

In contrast, the participating ground lease specifically refutes any cross-control, and expressly states that Majestic cannot bind the JAA. (R:97, 80) As such, there is no mechanism for the JAA to become responsible for Majestic's debts. See *Williams v. Obstfeld*, 314 F.3d 1270, 1275(11th Cir. 2002) (applying Florida law). There is no law to the contrary. *S & W Air Vac Systems, Inc. v. Dept. of Revenue*, 697 So.2d 1313, 1316 (Fla. 5th DCA 1997) (for a joint venture, one must be entitle to bind the other venturer).

This Court addressed and rejected Jackson-Shaw's argument that a government entity cannot lease public property to a private corporation who then keeps the profits. *West Palm Beach v. Williams*, 291 So.2d 572 (Fla. 1974). The District Court of Appeal in *West Palm Beach* had interpreted art. VII, §10 to "forbid municipalities from engaging directly or indirectly in commercial enterprises for profit." Id. at 575-576. This Court squarely rejected such a standard, and held, instead, that where the entity is authorized by law to enter into leases, the only question is whether the lease is being coupled with the issuance of bonds or the acquisition of lands by purchase or eminent domain. *Id*. at 576. In this instance, the JAA owns all of the land, and has owned it for at least 40 years (R:85, Exh. 43-47 (showing title in JAA in 1996, 1968)) and there is no issuance of bonds. There is no question that the JAA is authorized to enter into leases; this

issue has not been appealed; *ergo*, there is not even a colorable constitutional issue to address.

> The [JAA] . . .by virtue of the lease agreement, did not become a joint owner or stockholder of the private tenant, nor did it lend, obligate or in any manner encumber its credit to the advantage of the tenant.

Id. at 578. There simply is no joint ownership to be created under this scenario. As stated by this Court in *Bannon v. Port of Palm Beach District*:

> In the case *sub judice*, the District has no financial responsibility and if all failed for the corporate tenant, the District would not bear any responsibility or obligation to the creditors nor would its ownership of the land be committed for such. Its interest and credit remain free from attachment and neither the spirit nor the letter of Article VII, Section 1[0], Florida Constitution of 1968 has been violated.

246 So.2d 737, 740-41(1971).

Thus, Jackson-Shaw's contention that the JAA, by providing a public asset (vacant land) and failing to guarantee a profit, is becoming a joint owner has been rejected by this Court in *Bannon* over 30 years ago. The sole distinction in the case *sub judice* is that, unlike the facts in Bannon and others, rather than leasing the property at no cost, which clearly the JAA could do, it has chosen to lease the property and obtain one-half of the net proceeds. Clearly, where Fla. Const. art. VII, §10 allows JAA to lease the property without any direct financial benefit to it, the division of profits in the future cannot violate the Constitution by allowing the

JAA to obtain funds for the public, with no risk of having to pay any creditors. Simply, the JAA is allowed to take a non-performing asset, vacant land, and lease it at no cost in exchange for either 1) nothing at all, per *Bannon*, or 2) a division of the profits.

CONCLUSION

To conclude, the existence of a joint venture *vel non* is a question of fact requiring the finding of the existence of all five different factors, including the intent of the parties. The district court correctly applied this settled law, and found as a matter of fact that a joint venture does not exist. (R:97:67-71). Even if Jackson-Shaw were to challenge these findings of fact, they are not clearly erroneous, and the Order and Judgment below must stand.

The district court opinion is neither clearly erroneous in its factual findings nor in error on the law.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John S. Mills, Esquire, 865 May Street, Jacksonville, Florida 32205, and to Michael G. Tanner, Esquire and Stuart F. Williams, Esquire, One Independent Drive, Suite 1700, Jacksonville, Florida 32202, Attorneys for Plaintiff/Appellant, by U.S. Mail, this 25th day of February, 2008.

_____
Attorney

CERTIFICATE OF COMPLIANCE

Counsel for Appellee certifies that this Answer Brief is presented in Times New Roman style, thereby complying with Rule 9.210(a), Florida Rules of Appellate Procedure.

_____
Attorney

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