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

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Florida Constitution forbids public bodies from becoming a "joint owner" with a private entity and from giving, lending, or using their "taxing power or credit to aid" a private entity. Fla. Const. art. VII, § 10. The United States Court of Appeals for the Eleventh Circuit has asked this Court to decide whether this provision prohibits a public body from investing public funds and other resources into a commercial development operated by a private company under a transaction in which the public body's return on its investment will depend on the profitability of the private company.

Course of Proceedings and Disposition Below

The Appellant Jackson-Shaw Company brought a declaratory action in federal court challenging an option and lease agreement between the Jacksonville Aviation Authority (the "Authority" or "JAA") and Majestic Realty, Inc. ("Majestic")[1] involving a 328-acre parcel of undeveloped public land near the Jacksonville International Airport. (R:65:2-3, 6.) Jackson-Shaw contended that the agreement violated article VII, section 10 of the Constitution of the State of

[1] Technically, the private party to the agreement at issue in this case is Woodwings East Development, LLC, a "single-purpose entity formed for the purpose of the Option." (Pl. Exh. 214 at 1.) Majestic is the managing partner of this entity. (Pl. Exh. 214 at 33.) For purposes of this appeal, there is no reason to distinguish between the entities because both are clearly private entities for purposes of the constitution. Accordingly, the federal trial court, the Eleventh Circuit, and this brief all refer to both parties simply as "Majestic."

Florida on two alternative grounds: (1) the agreement made the Authority a joint owner of the development project with Majestic, and (2) the Authority was lending its public credit and funds to Majestic. (R:65:6.)

Jackson-Shaw further alleged that it was a direct competitor of Majestic and that the agreement provided Majestic with an unfair competitive advantage because the Authority improperly subsidized Majestic's costs. (R:65:7.) As a result, Jackson-Shaw alleged that it would lose customers and profits. (R:65:7.) Accordingly, Jackson-Shaw sought a judgment declaring the agreement to be invalid, null, and void. (R:65:8.) The Authority asserted in its answer that the development agreement was merely a long-term lease that did not violate the Florida Constitution. (R:63:8.)

The federal trial court conducted a four-day bench trial in October 2006. (R:89-92.) In January 2007, the court entered a 100-page opinion setting forth detailed findings of fact and concluding that the transaction did not violate article VII, section 10. (R:97:71-90.) On appeal, the Eleventh Circuit concluded that resolution of this question raised important state law questions that had not been settled by Florida courts, and it certified the following two questions to this Court:

1. IS THE JAA A "JOINT OWNER" PROHIBITED BY ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION BY VIRTUE OF ITS OBLIGATIONS UNDER THE AGREEMENT?

2. IS THE JAA IMPERMISSIBLY PLEDGING ITS "CREDIT" UNDER ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION BY VIRTUE OF ITS OBLIGATIONS UNDER THE AGREEMENT?

(11th Circ. Opinion at 10.)

The Facts[2]

The property at issue, referred to as Woodwings East, is a 328-acre tract of unimproved public land southeast of Jacksonville International Airport along Interstate 295 and about a mile from Interstate 95. (R:97:8.) The property is owned by the Authority, which is a political subdivision of the State of Florida. (R:97:5 (citing 2004 Fla. Laws 464, § 14).) At least a portion of the property had been acquired by eminent domain.[3] (R:97:8.)

[2] The federal trial court made detailed findings of fact that were not challenged by the parties on appeal or rejected by the Eleventh Circuit. Accordingly, this statement of facts cites directly to the trial court's findings whenever possible. (R:97:3-41.)

[3] The parties' pretrial stipulation provides a color-coded map indicating the parcels acquired by eminent domain. (R:60:Exhibit D.) It shows five colored sub-parcels, which were acquired by eminent domain and account for a substantial majority of the entire parcel. A copy of the map itself is included in the attached appendix at **Tab 2**.

Events Leading Up to Negotiations with Majestic

In 1998, the Authority negotiated with The St. Joe Company about developing the property. (R:97:8.) When another developer objected, the Authority publicly solicited bids for the development rights. (R:97:8-9.) St. Joe and two other developers submitted bids, and the Authority selected St. Joe. (R:97:9.) The Authority and St. Joe, however, never consummated an agreement. (R:97:9.)

Thereafter, the Authority retained a consulting firm to determine the highest and best use for the property, and it concluded that it should be developed for light industrial and commercial use, including hotels, restaurants, and service stations. (R:97:9.) Among the options the Authority considered was "forming partnership with developer to build facilities," although its executive director later testified that they only meant this in the sense of "engender[ing] a sense of a business working relationship," such as with a tenant.[4] (R:97:10-11.) The Authority never had the property appraised, and guessed at its value based on its nearby negotiated purchase of a 36.5-acre parcel, half of which was in wetlands and all of which was zoned for single-family residences. (R:97:9.) Based on this transaction, the Authority believed in 2005 that the Woodwings East parcel was worth between $35,000 and $50,000 per acre. (R:97:10.) The trial court found that there was "a

[4] He testified that the Authority knew it was prohibited from forming partnerships with private entities. (R:97:11.)

substantial question" as to whether the Authority should have appraised the property and whether it undervalued the property. (R:97:10.)

The Authority never listed the property, nor did it retain an agent to market it. (R:97:12.) All it did was place a single "for lease" sign on the property and develop a one-page brochure stating that it was interested in developing the property for commercial and industrial purposes. (R:97:12.) The brochure did not indicate that the Authority would consider a long-term lease. (R:97:12.) It never considered soliciting bids to develop the property because of its mistaken belief that there had been only one party interested in the parcel in the past. (R:97:12-13.) In fact, in addition to St. Joe and the other two bidders from 1999, which the Authority's witnesses had forgotten about, another developer, Patillo Construction Company, had inquired about the land in 2004. (R:97:13.)

In 2004 and 2005, Jackson-Shaw and Majestic became interested in developing commercial property near the airport. (R:97:3-4, 8, 14.) The two companies are large-scale developers involved in the development of office and industrial properties throughout the nation. (R:97:3, 7-8.)

In 2004, Jackson-Shaw began investigating the market and by late summer of 2005, it made an offer on a privately-owned parcel of property, known as the Jacksonville International Tradeport (the "Tradeport"). (R:97:3-4.) Jackson-Shaw closed the sale in February 2006 for over $58 million, representing $109,000 per

acre. (R:97:4.) This property currently has just under a million square feet of industrial warehouse and office space, which was almost fully leased at the time of trial. (R:97:4.) Over the next five years, Jackson-Shaw has plans to build an additional million square feet in hotels, restaurants, office buildings, and warehouses. (R:97:4-5.) Meanwhile, between the time Jackson-Shaw went to contract and closed on the Tradeport, Majestic purchased a smaller tract for over $5 million, representing $108,900 per acre. (R:97:7-8.)

The southern boundary of Jackson-Shaw's Tradeport parcel borders the northern boundary of Woodwings East. (R:97:3; *see also* R:91:146-47; Pl. Exh. 209.)[5] It is separated from Interstate 295 by Woodwings East. (R:91:147-48; Pl. Exh. 209.) Majestic's parcel is west of the northern part of Jackson-Shaw's Tradeport parcel and borders it on the south. (R:89:85; R:90:22-23; Pl. Exh. 42, 209.)[6] In other words, Majestic's parcel is separated from the Woodwings East parcel by a substantial portion of Jackson-Shaw's parcel.

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[5] Plaintiff's Exhibit 209 is an aerial photograph depicting the locations of Woodwings East, the Tradeport, and the airport. (R:91:146-47.)

[6] Plaintiff's Exhibit 42 is a map of Jackson-Shaw's parcel. (R:89:60-61.) Majestic's parcel is the southern-most 46.8 acres of the parcel labeled "62.66 Acres Available" in the northwest corner of that map (R:89: 85; R:90:22-23.)

Copies of this exhibit and Exhibit 209 (the aerial photograph showing the relation of Woodwings East, the Tradeport, and the airport) are attached to this brief at **Tabs 3** and **4**, respectively. For comparison sake, it should be noted that the photograph is oriented with the top facing west, while the top of the map faces north.

Jackson-Shaw never saw the "for lease" sign at Woodwings East and had no idea that the Authority would consider a long-term lease of the property until it read in the newspaper that the Authority had approved a lease with Majestic. (R:97:24.) Jackson-Shaw mistakenly believed that the Authority was only interested in short-term leases, which would not be viable for Jackson-Shaw. (R:97:24.) Executives for Majestic, however, did see the sign and called the Authority to inquire about details in February 2005. (R:97:14.)

The Negotiations with Majestic

Majestic proposed "a preliminary overview of the real estate and partnership structure," by which Majestic would develop the property without subordinating the Authority's fee title to the required financing and the two parties would evenly split the net revenues from the development. (R:97:14-15.) They discussed a two-part transaction: The Authority would give Majestic a free five- to fifteen-year option to lease the property in sub-parcels, and if and when Majestic exercised its option, it would enter into 65-year "participating ground leases" for any sub-parcels it wanted. (R:97:16.) Rent would be one-half of the "net revenue" from the parcel, which would be the rent paid by subtenants to Majestic less Majestic's development, capital, and administrative expenses. (R:97:16.) Majestic described this arrangement as "a long-term partnership with" the Authority. (R:97:17.) It produced financial projections suggesting that the Authority could generate nearly

$900 million in revenue and, at the end of the leases, take possession of improved property worth over $700 million. (R:97:17.) Nobody for the Authority ever made any attempt to verify these projections or determine how much the Authority could realistically expect to earn. (R:97:18-20.)

Majestic prepared a binder and power point presentation about the proposed deal to present to the Authority's board. (R:89:76-77; Pl. Exh. 99.) In this presentation, they provided a graphical flowchart depicting an "overview" of the proposed transaction. (Pl. Exh. at 226JA00038.)[7] The chart shows the Authority and Majestic joining together into the participating ground lease arrangement – with the Authority providing "vacant land" and Majestic providing "entitlement, design, finance, construction, management, leasing and operation" – and then taking out equal shares of the net revenue. (Pl. Exh. at 226JA00038.)

In November 2005, staff members of the Authority and representatives of Majestic scheduled a series of individual meetings with each member of the Authority's board. (R:97:20.) They scheduled a separate meeting with each board member in the same room, one after another. (R:97:20.) They operated in this

[7] A copy of this chart is attached to this brief at **Tab 5**. It is a power point slide included as part of Plaintiff's Exhibit 99. Plaintiff's Exhibit 99 included the entirety of a presentation Majestic prepared for the Authority, dated November 15, 2005, which was submitted to the district court in a binder. (R:89:76-77.) The chart, bearing Bates Stamp number 26JAA00038, is the third page of a group of power point slides inserted in the front inside sleeve of the Plaintiff's Exhibit 99 binder.

fashion to avoid the requirements of the Florida government in the sunshine laws that require any meeting with multiple board members to be public. (R:97:20.) A board meeting was publicly noticed on December 13, and six days later the board met and unanimously approved the concept and authorized Authority staff to enter into and execute all necessary agreements. (R:97:20-24.)

Shortly after Jackson-Shaw officials saw the newspaper article reporting the board's approval, Jackson-Shaw filed suit to stop the transaction. (R:1; R:97:24.) By that time, however, officials for the Authority had concluded that they would not consider other proposals to lease and develop the property, even if more lucrative proposals were made. (R:97:25.) They did not think that would be fair to Majestic and would harm the Authority's reputation in negotiations on other parcels in the future. (R:97:25.) Accordingly, they continued to negotiate with Majestic throughout the pre-trial proceedings. (R:97:25-27.)

The Authority was advised by its counsel that the agreement might violate the Florida Constitution's prohibition against "entering into joint ventures and partnerships" unless the leases provided for a guaranteed minimum return. (R:97:25-26.) The Authority therefore advised Majestic that it had to have a " 'guaranteed return' or income on the venture." (R:97:25-26.) The Authority's vice president in charge of real estate proposed that Majestic agree to pay rent in the amount of the greater of $500 per acre or one-half the net revenue, and that the

Authority would in turn pay Majestic $600 per acre for infrastructure and related expenses. (R:97:26.) This proposal, which the trial court found to be an "ill-considered idea to try to circumvent the Florida Constitution," was abandoned. (R:97:26.) Instead, the parties negotiated a minimum rent amount of $1,380 per acre. (R:97:26.) The Authority came up with this number by calculating a seven-percent rate of return using the $16,000 per acre purchase price it had paid for nearby residential property.[8] (R:97:26.)

Around this same time, in May 2006, Jackson-Shaw made a formal offer to lease 25 acres of Woodwings East for fixed rent to begin at over $8,700 per acre per year to increase every five years by half of the increase in the appraised value. (R:97:27-28.) Jackson-Shaw's proposed initial rent figure represented an eight-percent return on the appraised fair market value of the property (R:97:27-28) and was more than six times greater than Majestic's guaranteed rent. Jackson-Shaw's offer provided for a rolling option for future leases, 25 acres at a time. (R:97:28.) Whenever a lease was executed, Jackson-Shaw would have the right to pay the Authority $25,000 for a five-year option on an additional 25 acres. (R:97:28.) At all times, the Authority would be free to do whatever it wanted with any land in Woodwings East not subject to a lease or option. (R:97:28.) Unlike the

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[8] This per acre value is about half the market value that the Authority believed the property was worth (R:97:10) and less than 15% of the per acre price that Jackson-Shaw and Majestic had paid for their neighboring parcels that year (R:97:4, 7-8).

Authority's deal with Majestic, Jackson-Shaw would not receive any free options, and there would be no sharing of revenue. (R:97:28-29.) In July 2006, the Authority's attorneys informed Jackson-Shaw that the Authority would not respond to the offer while the litigation was pending. (R:97:29.)

After further negotiations, Majestic eventually provided the Authority with an executed agreement, and on October 9, 2006, the day before the trial started, the Authority signed it. (R:97:27.) Thus, by the start of the trial, the Authority had entered into what purported to be a binding agreement. (R:97:27.)

The Agreement with Majestic

The agreement between Majestic and the Authority is titled "Option to Ground Lease Agreement." (R:97:29; Pl. Exh. 214.) As its title implies, the agreement contains both an option component and a lease component. While a detailed review of its provisions with citations to the record follows, the agreement can be summarized as follows:

The Authority must invest the following resources up front: (1) encumber the entire parcel for up to 15 years so that no other development may take place, (2) construct a road on the parcel at a cost of $750,000, and (3) provide up to $2.375 million worth of wetlands mitigation credit. The Authority receives no compensation or reimbursement for any of this, and Majestic has no obligation in return for receiving the benefit of these investments. If Majestic elects to develop

a parcel, then the Authority must invest a 65-year leasehold interest in the parcel in exchange for the greater of (a) fixed rent that is a fraction of the market rental value or (b) half of the project's "net revenue" after Majestic has been reimbursed for every penny it has invested in the project (including prior minimum fixed rent payments), been paid substantial development and management fees, and been paid interest after 2.5 points over prime for all of the foregoing. For purposes of this appeal, the key facts are that the Authority is investing public resources on the front end and its return on the back end, if any, will be dependent upon the degree of success of the project.

The option encumbers the Authority's title to the entire 328-acre parcel and contemplates that Majestic may elect to enter into separate leases on sub-parcels. (R:97:30-31.) The option has an initial term of five years, but for every 100,000 square feet of building area completed by Majestic during the option term, the term is extended by a year, which allows Majestic to extend the term to a total of fifteen years. (R:97:30-31.) The five-year term does not begin until this litigation is finalized, although even with extensions, the total term may not extend beyond fifteen years from the date the agreement was signed. (R:97:31.)

The Authority does not pay anything in return for the option. (R:97:30.) Even once it exercises the option as to a sub-parcel, Majestic has no obligation to enter into any lease until both the Authority approves Majestic's development plan

for the sub-parcel and Majestic achieves certain "performance benchmarks" over four years. (R:97:31-32.) These benchmarks set a timeline for site work, wetlands compliance, submission of the development plan to the City of Jacksonville, and applying for permits. (R:97:31.) The Authority's only remedy should Majestic not meet these benchmarks is to terminate the option as to the relevant sub-parcel. (R:97:31.)

While Majestic has no binding obligations under the option, the Authority does. In addition to encumbering property that otherwise could be rented out or used by the Authority, it must spend up to $750,000 to construct an extension of a road through the parcel[9] and give Majestic up to fifty acres of wetlands credit that Majestic may be required to acquire to develop the project.[10] (R:97:32.) These credits are worth between $47,500 and $62,500 each, which translates to at least $2.375 million for all fifty credits. (R:97:38.)

Should the option expire or terminate (other than due to breach by the Authority) as to a particular sub-parcel, Majestic is still entitled to recoup its costs on that sub-parcel from the revenue on any other sub-parcels that are under lease.

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[9] Though not previously obligated to build this extension, the Authority had previously planned and budgeted this part of the project. (R:97:32.)

[10] If Majestic requires additional wetlands credits after that, it will be reimbursed out of the gross revenue on the project before any revenue rent will be due the Authority under the leases. (R:97:33.)

(R:97:33.) If the Authority breaches the agreement, it must reimburse Majestic for all of these expenses. (R:97:33.)

The only way that Authority can realize any return on its investment is if Majestic exercises an option and enters into one or more of the sixty-five year leases provided in the agreement. The form of the leases is attached as Exhibit C to the agreement. (R:97:34.) As noted above, Majestic has five years to decide whether to exercise an option as to any parcels, and if it does so, it can extend the option as to the remaining parcels for up to a total of fifteen years. Once an option is exercised, Majestic has up to four years for construction and development before it is required to execute a lease. (R:97:32.) Even once a lease is executed, Majestic gets the first year rent-free. (R:97:32.) Thus, the Authority will go as long as ten years without realizing any income at all on the development and could go as long as twenty years with no revenue as to any parcel for which Majestic exercises an option at the very end of the option term. (R:97:32.)

If and when the Authority gains an entitlement to receiver rent, the amount is the greater of minimum fixed rent of $1,380 or half of the net revenues on the project. (R:97:34.) Net revenue for these purposes is gross rent less the following costs incurred by Majestic: debt service; all project costs for designing,

developing, financing, constructing,[11] owning, operating, maintaining, leasing, and managing the project; any reserve amounts required by Majestic's lenders for future project costs; interest on all of these at a 2.5 percent over the prime lending rate, "development fees" payable to Majestic in the amount of four percent of construction and improvement costs, and "management fees" payable to Majestic once construction is complete in the amount of between three and five percent of total revenue received from the subleases. (R:97:34-35.) Even once those expenses, fees, and interest are all paid, Majestic is still entitled to be reimbursed for all fixed rent payments it has made before any shared profits go to the Authority. (R:97:35.) Majestic's expenditures on the project were referred to as Majestic's "equity contribution" in the drafts of the agreement that were approved by the Authority's board, but the final version substituted the term "advances." (R:97:34 n.16.)

The lease prevents Majestic from encumbering the Authority's title to the land and requires Majestic to bond against liens. (R:97:35-36.) The cost of the bonds, however, is included in the project costs that are reimbursed to Majestic in the net revenue calculation. (R:97:36.) Majestic is permitted to secure financing with its leasehold estate, and if this interest is foreclosed by a lender, revenue rent

[11] Construction work will be performed by an affiliate of Majestic, Commerce Construction Co. (R:97:33-34.)

is abated. (R:97:36.) In that event, the lender may "step into Majestic's shoes, assuming a preferred position, with its debt being repaid prior to maintenance expenses, and prior to the determination of net revenue to be shared with the Authority. (R:97:36.)

Majestic is the owner of all improvements and buildings on the property until the expiration or termination of the lease, at which time title passes to the Authority. (R:97:36.) The present day value of these expected improvements, however, is zero. (R:97:40.) If Majestic defaults during the lease term, the Authority may pursue its legal and equitable rights, but with a few exceptions, any money judgment will be limited to the "fair market value of [Majestic's] interest in the Premises." (R:97:37.)

The Effect of the Agreement on Purely Private Competitors

Jackson-Shaw offered expert testimony by Heyward Cantrell on the value of the property, and his testimony was accepted by the trial court. (R:97:37.) The fair market value of the Woodwings East parcel was $113,256 per acre. (R:97:37.) Accounting only for the usable (i.e., non-wetlands) acreage, the total value was around $25 million. (R:97:37.) The fair market rent is between $10,000 and $10,900 per acre per year. (R:97:37.) Even in the best case scenario in which all of Majestic's projections over the term of the option and leases are met, Majestic

will end up paying approximately $5 million less in rent than if it were required to pay market value. (R:97:40.)

Mr. Cantrell opined that the agreement will afford Majestic an unfair advantage over its competitors. (R:97:38.) In addition to providing for minimum fixed rent that is less than one-seventh the fair market rate, the agreement provides Majestic with a number of other valuable benefits. (R:97:38.) As noted, Majestic gets at least $2.375 million worth of wetlands credit and a $750,000 road. (R:97:38.) These infrastructure costs are normally borne by the developer. (R:97:38 n.20.) Upon completion of Majestic's planned build-out, it will have received over $6.7 million in development fees, on top of reimbursement of all of its costs plus interest at prime plus a quarter percent. (R:97:39.) Over the life of the agreement, Majestic will receive over $68 million in management fees, on top of its share of the rent from the sub-tenants. (R:97:39.) It will also receive leasing commissions in excess of $64 million. (R:97:39.) Majestic's construction affiliate will receive construction fees of more than $13 million. (R:97:39.) Thus, before any rent can be paid out of net revenues, Majestic will receive over $153 million in fees plus repayment of all advances with interest at 2.5 points over prime. (R:97:39.) After that, Majestic and the Authority will each receive nearly $900 million in net revenue under Majestic's projections. (R:97:39.) Thus, Majestic stands to clear over $1 billion on the transaction. (R:97:39.) When the

improvements are turned over to the Authority at the end of the 65-year lease, they will be worth nothing in present dollars. (R:97:39-40.)

These benefits will allow Majestic a substantial competitive advantage. (R:97:40.) Due to not having any liability for land and construction costs, Majestic has a significant advantage over its local competition over tenants it because projects its rental rate at $4.00 per square foot, while Jackson-Shaw currently receives between $4.50 and $5.00, and another nearby competitor leases at between $4.25 and $4.50. (R:97:40-41.) The financial advantages of the lease translate to Majestic having the benefit of the property for approximately $14,000 per acre, compared to the per acre market value of more than $100,000 per acre. (R:97:41.)

As a result of Majestic's competitive advantage, Jackson-Shaw will suffer over $500,000 in valuation losses of its equity interest in the Tradeport property. (R:97:41-44.) Not only will Jackson-Shaw suffer financial losses due to the unfair competition, it will also lose the opportunity to lease and develop the Woodwings East property itself. (R:97:42.)

SUMMARY OF THE ARGUMENT

The Authority's agreement with Majestic violates article VII, section 10 of the Florida Constitution, which provides that a public body shall not "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. This provision has been in the Florida Constitution since the Nineteenth Century and has consistently been interpreted by this Court to prohibit public bodies from putting funds and resources at risk in private business affairs. Whether viewed under the "joint owner" clause or the "taxing power or credit" clause, the Authority's agreement violates this provision because it requires a public body to invest public resources in a private development exchange for revenue that depends largely on the financial success of the private company managing the development.

This Court has considered in the past whether traditional leases of public lands to private entities constitutes joint ownership in violation of article VII, section 10, and it has upheld such leases where the public lessor did not undertake any financial obligations and received rent in a fixed amount regardless of the success of the private lessee. While the Court has not yet confronted an agreement like the one in this case where the public lessor undertakes significant financial obligations and its rent is dependent on the success of the private lessee, those facts render the agreement in violation of the constitution because they put public resources at risk in a private venture. Specifically, the Authority is promising to invest a $750,000 road, provide at least $2.375 million in wetlands mitigation credits, and encumber valuable public property for no consideration. If the

development fails before rent comes due, which could be ten years out, it will receive nothing. If Majestic defaults on its private financing on the development, its lenders are entitled to foreclose on the leasehold interest and recoup all of their collections costs out of the projects revenue before the Authority gets any revenue rent. If Majestic defaults on the lease, the Authority's remedy is limited to the market value of Majestic's interest in the project, which would likely be worthless if Majestic failed. Even if all goes well, the amount of rent the Authority will receive depends entirely on the degree of success enjoyed by Majestic.

In addition to its structure, the history of the transaction demonstrates that when they were negotiating the deal, the parties clearly contemplated a public-private partnership where each side would make an investment in the project on the front end in exchange for sharing revenue on the back end.

The federal trial court erroneously rejected Jackson-Shaw's arguments because, instead of focusing on this Court's precedents under article VII, section 10, it strictly applied the common-law test for joint ventures. But this Court has made clear that common-law law concepts of ownership do not control the "joint owner" analysis under the constitution. For example, this Court has upheld the right of public bodies to become members of mutual company insurers, even though this means they are technically stockholders in a private company. The test under the constitution is whether public resources are put at risk in private

ventures, not whether technical elements of property law are present. To the extent the elements of a joint venture are relevant to the constitutional prohibition on joint ownership, moreover, those elements are met in this case. The Authority and Majestic clearly have a common purpose and common interests in the development at issue. They will also share in the profits and – to the extent of their investments – the losses in the development. The only element of a joint venture that is arguably not met in this case is the lack of control by the Authority over the development. But that is exactly the point of the constitutional prohibition – to prevent public resources from being put at risk where the public body has little or no control over the success of the venture.

The transaction in this case also violates the prohibition on using public funds to aid a private company. The option component constitutes a *de facto* loan to Majestic of the costs of building a road and mitigating wetlands on the property (both tasks that are normally the responsibility of the developer). It also is a pledge of the Authority's rights to develop the property, which precludes the Authority from leasing it to another party, selling the property outright, or using it for public purposes.

The lease component is also a pledge of public funds and credit because the Authority has agreed to reimburse Majestic for its development, financing, and operational costs out of the rent it would otherwise be entitled to. More than that,

the agreement expressly authorizes Majestic to pledge its rights to ultimately develop and manage the property as security for financing of the development. If Majestic defaults, its lenders may foreclose, take over the project, and recoup not only their loan balance, but also their collection costs before the Authority gets any revenue rent.

Both components of the transaction are nothing more than an attempt to do indirectly what the Authority clearly cannot do directly. The Authority cannot credibly argue that it could loan a private entity, like Majestic, public funds to acquire a parcel of land, make infrastructure improvements, and develop a purely private office and warehouse development. But the Authority has essentially done just that. Instead of directly giving Majestic cash, it has instead agreed to undertake the infrastructure improvements itself and to substantially defer and subsidize the rent payments so Majestic can collect all of its expenses with profit before sharing any revenue with the Authority.

Unlike the absolute ban on a public entity becoming a joint owner with a private company, the use of public funds or credit in a way that benefits a private company may still be constitutional if it serves a paramount public purpose and the benefits to the private party are only incidental to the public purpose. While the trial court did not reach this issue, the record admits of only one conclusion. There is no paramount public purpose, and any public benefit is far outweighed by the

tremendous benefits to Majestic. This is not a development of a public library or entertainment venue, which would benefit the public. Instead, it is a purely commercial development. Moreover, Majestic will earn far more than the Authority on the project.

For all of these reasons, the Authority's agreement with Majestic violates the Florida Constitution and is void. Both of the Eleventh Circuit's questions as to whether the transaction in this case violates article VII, section 10 should be answered in the affirmative.

ARGUMENT

Standard of Review. Because both questions certified by the Eleventh Circuit depend on an interpretation and application of the Florida Constitution to a set of undisputed facts, the standard of review is *de novo*. *Macola v. Gov't Emples. Ins. Co.*, 953 So. 2d 451, 454 (Fla. 2006).

The Authority's agreement in this case violates the Florida Constitution because, regardless of its specific structure or label, it provides for a public body to invest public funds and other resources into a private enterprise in exchange for a return that depends in large part on how profitably the enterprise is managed. Article VII, section 10 of the Florida Constitution provides that a public body[12]

[12] The provision applies to "the state [or] any county, school district, municipality, special district, or agency of any of them." Fla. Const. art. VII, § 10. The Authority does not dispute that it is a public body covered by this language.

shall not "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. While the plan language of this provision does not provide a clear answer, a review of its history and purpose reveals that it was designed to prohibit exactly the kind of transaction in which the Authority has entered.

The predecessor of this provision first appeared as an amendment to article XIII, section 7 of the Florida Constitution of 1868 and was carried over into the Florida Constitution of 1885. *Orange County Indus. Dev. Auth. v. State*, 427 So. 2d 174, 176 (Fla. 1983); *Bailey v. City of Tampa*, 111 So. 119, 120 (Fla. 1926). This Court has explained this provision's genesis as follows:

> The reason for this amendment was that during the years immediately preceding its adoption the State and many of its counties, cities and towns had by legislative enactment become stockholders or bondholders in and had in other ways loaned their credit to and had become interested in the organization and operation of railroads, banks and other commercial institutions. Many of these institutions were poorly managed and either failed or became heavily involved, and as a result the State, counties and cities interested in them became responsible for their debts and other obligations. These obligations fell ultimately on the taxpayers.

Bailey, 111 So. at 120.

In response to these concerns, the state constitution was amended to provide, in relevant part:

> The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

Fla. Const., art. IX, § 10 (1885), *quoted in Bailey*, 111 So. at 119. The "essence" of this resulting constitutional amendment was "to restrict the activities and functions of the State, county and municipality to that of government and forbid their engaging directly or indirectly in commercial enterprises for profit." *Bailey*, 111 So. at 120.

This general prohibition was continued in article VII, section 10 of the 1968 constitution, subject to four new exceptions that represent transactions that presumably would otherwise be prohibited. *State v. Inter-American Center Auth.*, 281 So. 2d 201, 203 (Fla. 1973) (citing *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 308-09 (Fla. 1971)). As amended, the complete text of article VII, section 10, which has not since been amended, is 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; but this shall not prohibit laws authorizing:
>
> (a) the investment of public trust funds;
>
> (b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;

> (c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.
>
> (d) a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person.

Fla. Const. art. VII, § 10 (1968). The Authority makes no argument that its agreement in this case falls into either the exception crafted specifically for projects at airports or any of the other exceptions.

Despite the addition of these exceptions, this Court has made clear that the underlying purpose of the provision is the same: "to protect public funds and resources from being exploited in assisting or promoting private ventures when the pubic would be at most only incidentally benefited." *Bannon v. Port of Palm Beach Dist.*, 246 So. 2d 737, 741 (Fla. 1971); *see also Dade County v. Board of*

Public Instruction, 174 So. 2d 3 (Fla. 1965) (noting that this provision "was designed to protect public monies").

The key facets of the transaction in this case are that a public body (the Authority) is agreeing to provide a private entity (Majesty) with public resources (in the form of paying for the construction of a road, providing wetlands mitigation, and encumbering public property during the option and lease periods at no cost to the developer) in return for future payment (in the form of shared profits) that will depend on the private entity's financial success. Thus, the Eleventh Circuit's case-specific questions might be rephrased as the following single, general question:

> DOES A PUBLIC BODY VIOLATE ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION WHEN IT PROVIDES PUBLIC RESOURCES TO A PRIVATE ENTITY IN EXCHANGE FOR FUTURE PAYMENTS THAT DEPEND ON THE FINANCIAL SUCCESS OF THE PRIVATE ENTITY?

Whether viewed under the rubric of the "joint owner" prohibition or the prohibition on using "taxing power or credit" to aid a private entity, the Court should answer this question affirmatively.

I. THE AUTHORITY IS A PROHIBITED JOINT OWNER WITH MAJESTIC IN THE DEVELOPMENT.

The transaction between the Authority and Majestic violates what the district court aptly termed the "absolute" prohibition against a public body becoming "a

joint owner with ... any corporation, association, partnership or person." (R:97:68.) This Court has held that when analyzing whether a particular arrangement violates this prohibition, the court should first "look to the character" of the transaction and the "relationship ... that would arise" between the public and private entities. *Dade County*, 174 So. 2d at 5. This examination must be undertaken in light of the constitutional prohibition's purpose, which is "to keep the State out of private business." *Id.* at 5-6.

This Court has twice before considered whether a lease of public lands to a private developer creates a prohibited joint ownership relationship. In *West Palm Beach v. Williams*, 291 So. 2d 573 (Fla. 1974), the Court considered a lease by a Florida city of a marina to a private corporation. Similarly, in *Bannon*, the Court considered a long-term lease of public land by a public port authority to a private developer who intended to create a private development. 246 So. 2d at 740. While the Court upheld both leases, it did so only after concluding that in neither case did the public body undertake any financial obligations to the lessees. *West Palm Beach*, 291 So. 2d at 578; *Bannon*, 246 So. 2d at 741. There was no prohibited entanglement with the private companies because the public lessor had

> no financial responsibility and if all failed for the corporate tenant, the [public lessor] would not bear any responsibility or obligation to the creditors nor would [the public lessor's] ownership of the land be committed for such.

Id.

The Court stated the reasoning and rule of law as follows:

> Because the constitution requires that bonds be issued, public funds be spent and the power of eminent domain be exercised for public uses only, any lease agreement which requires that one of the above powers be exercised for a private use would necessarily be void. However, when none of the above powers need be exercised in order to proceed to the complete execution of the lease agreement, municipalities, when holding the legislative authority to do so, can lease public land for private uses.

West Palm Beach, 291 So. 2d at 576 (citing *Bannon*). The key language for purposes of this case is that "any lease agreement which requires that one of the above powers [including the spending of public funds] for a private use would necessarily be void." *Id.*[13]

The Court emphasized that the public body'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 741. Because no public funds, bonds, or use of eminent domain were at

[13] Though not technically involving a traditional lease, the Court used similar analysis under the prior version of the constitutional provision to uphold a transaction between the City of Tampa and the Tampa Board of Trade. *Bailey*, 111 So. at 120. In that case, the city gave a piece of land to the board of trade so the board could construct an office building. *Id.* at 120. After the building was complete, the majority of the building was to be given back to the city for its own use and within 35 years the entire building was to revert to the city except an office for the board of trade. *Id.* As in *West Palm Beach* and *Bannon*, the key fact saving the transaction was that the city had no financial obligation and received a free building out of the deal. *Id.*

issue, the Court held that it was not "necessary to determine whether the purposes to be served by the development of the leased property are primarily public or private in nature." *Id.* at 740. The leases only had to generically have a public purpose, and generating revenue to reduce the need to tax citizens sufficed. *West Palm Beach*, 291 So. 2d at 578.

In this case, however, the Authority undertakes multiple obligations to spend public funds and resources. It must pay up to $750,000 in public funds for a road extension on the property and directly provide wetlands mitigation credit worth over $2.3 million, costs that are normally borne by the developer. (R:97:32, 38.) It must encumber public land that otherwise would be generating lease revenue for a number of years, even though it has at least one offer (from Jackson-Shaw) to lease portions of the property for more than $8,700 per acre per year. (R:97:27-28.) The Authority clearly provided public resources for the financing and development of this project.

The provision of public resources on the front end is not the only aspect of this transaction that creates a prohibited joint ownership with a private entity. Perhaps more important is the fact that the Authority is not investing its resources in exchange for a fixed return. Instead, the Authority is directly participating with Majestic in the financial risks of the project with the hope of ultimately making a high return on the back end of the deal.

The Authority is guaranteed nothing from Majestic. Even though Majestic is free to walk away from the entire deal at any time, the Authority has given up the right to do anything else with or earn any other return on all 328 acres until five years after this litigation ends. (R:97:30-31.) If and when Majestic exercises its option as to a particular sub-parcel, it will still have up to four years to enter into a lease with no rent due in the interim and with the ability to walk away without penalty at any time. (R:97:31-32.) If Majestic does develop one or more sub-parcels, it can encumber the rest of the acreage for up to fifteen years. (R:97:30-31.)

If and when Majestic does exercise its option and develop rentable buildings, the Authority continues to have financial obligations. Even if everything goes according to Majestic's optimistic plans, the projected rent on the project is still less than market value. (R:97:40.) More importantly, the Authority must in effect reimburse Majestic for all of its costs and pay additional profits to Majestic for developing and managing the property before it gets to share in the revenue from the project. While it is true that the Authority does not have to literally pay these amounts out of public funds, the effect is exactly the same. Instead of receiving what is projected to be at least close to market rent, the Authority has agreed to let Majestic keep all revenue from the project until it is fully reimbursed (with interest). That the Authority will receive minimum fixed

rent in an amount that is only a fraction of what it could receive on the market only affects the amount, not the fact of the Authority's financial liability on the project.

That is not all. Should Majestic default on its financing, the Agreement authorizes its lenders to foreclose on Majestic's interest, step into Majestic's shoes in operating the development under the lease, and recoup all of its collections costs on top of Majestic's development and management costs and fees. (R:97:36.) If Majestic defaults under the lease, moreover, the Authority's right to recover its damages is limited to the "fair market value of [Majestic's] interest in the Premise," which very well could be zero if it has mismanaged the development. For example, what would the fair market value of Majestic's interest be if its lenders have foreclosed?

Thus, unlike the public bodies in *West Palm Beach* and *Bannon*, the Authority very clearly has undertaken "financial responsibility" and will suffer serious losses – both in public funds expended on the road and wetlands credit and in the loss of revenue from being prevented from earning a market rental rate – if Majestic's private enterprise fails. This is exactly the kind of risk to public funds that the Florida Constitution's ban on joint ownership is intended to prevent.

Indeed, the very nature of a participating lease in which the public lessor receives a share of profits earned by the private lessee entangles the public body in the success of private business. Participating ground leases are commonly used in

the United States by public airports and local governments for "public/private partnerships" in states that allow public bodies to go into business with private entities. David Dale-Johnson, *Long Term Ground Leases, the Redevelopment Option and Contract Incentives* at 6 (January 2000), http://www.usc.edu/schools/sppd/lusk/research/pdf/wp_1999_115.pdf.[14]

The Florid Attorney General has issued an opinion directly finding that if a city agrees to share in the net profits of a private business (a natural gas supplier in that case), it becomes a joint owner of the venture in violation of article VII, section 10. Op. Att'y Gen. Fla. 2002-07, 2002 Fla. AG LEXIS 24 (2002). Similarly, albeit in dicta, Judge Altenbernd has noted that where a public entity rents public lands for private uses in return for a share of the profits, it "has

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[14] The cited paper appears on the website of the University of Southern California, and at the time of its writing, the author was a professor of finance and business economics at the university's Marshall School of Business. He describes the "key attribute" of a participating ground lease as providing that "the ground rent fluctuates with the revenues generated by the property or the sales of the occupants of the property." *Id.*

become a partner in [the] real estate development." *Weekly Planet, Inc. v. Hillsborough County Aviation Auth.*, 829 So. 2d 970, 973 (Fla. 2d DCA 2002).[15]

At least until the Authority's attorneys spoke up, both parties even referred to the arrangements as a joint project. (*See* R:97:10-11 (noting that the Authority considered from early on the option of "forming partnership with developer to build facilities"); R:97:14 (noting that in an early email Majestic provided what it called "a preliminary overview of the real estate and partnership structure we would propose creating"); R:97:17 (Majestic describing arrangement as "a long-term partnership").) The nature of the relationship between the parties is perhaps best illustrated by an "overview" flow chart Majestic prepared for the Authority, which depicts the Authority and Majestic joining together into the participating ground lease arrangement – with the Authority providing "vacant land" and Majestic providing "entitlement, design, finance, construction, management, leasing and operation" – and then taking out equal shares of the net revenue. (Pl. Exh. 99 (copy at Tab 4 of attached appendix).)

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[15] *Weekly Planet* did not involve a challenge to the constitutionality of a lease. Instead, it simply dealt with whether documents relating to a private party's lease of public land are public records. *Id.* at 971. In part because the public lessor in that case had not "involved itself in this project to transform [the private lessee's] business into a government function," the court held that the documents were not public records. *Id.* at 971-72.

Thus, Judge Altenbernd's observations were *dicta* with regard to the precise issue in this case, as the district court correctly observed below. (R:97:78.) Though not technically binding, his observation is on point and correct.

In sum, because the agreement in this case requires the Authority to directly invest substantial public resources in return for future income that is dependent on Majestic's financial success, it falls squarely under the prohibition of article VII, section 10, as interpreted by this Court in *West Palm Beach* and *Bannon*.

The federal trial court did not analyze these decisions in the course of its conclusion that the Authority was not a joint owner with Majestic. Instead, the court decided the joint ownership issue by analogizing to and then strictly applying Florida law on partnerships and joint ventures. (R:97:74-81.) It erred in rejecting Jackson-Shaw's argument that the constitutional concept of joint ownership in article VII, section 10 is not subject to the narrow contract law principles of partnerships and joint ventures. (R::97:81 n.38.) *West Palm Beach*, *Bannon*, *Bailey*, and *Dade County,* are the opinions analyzing joint ownership, and none of them even suggest that the constitutional command is subject to contract law definitions.

To the contrary, this Court emphasized in *Dade County* that the relevant inquiry should focus on the purpose of article VII, section 10 – "to keep the State out of private business" – and not on property law tests that apply in other contexts. 174 So. 2d at 5-6. For example, it recognized that it had held in the insurance context that a policyholder of a mutual company is "more than a mere policyholder; he also 'was a Stockholder.' " *Id.* at 5 (citing *N.Y. Life Ins. Co. v.*

Kincaid, 165 So. 553 (Fla. 1936)). While this holding would "at first glance" suggest that a public entity could not be a policyholder of a mutual company insurer, the court emphasized that there was "great disparity between the factual situations in the two cases." *Id.* In the insurance context, the determination of who is a stockholder affects issues of the rights of an insured with regard to lapses in coverage and misrepresentations on the policy application. *Id.* In the context of article VII, section 10, on the other hand, the purpose is "to protect public monies." *Id.* Thus, the Court held that while the public entity in that case was "stockholder" in one sense, it was not in the sense intended by the constitution, so the transaction in that case was valid. *Id.*

For the same reasons, case law determining when parties are partners or joint venturers should not control the constitutional question. As the district court recognized, the point of those cases is to determine when one party is liable for the debts or torts of another. (R:97:76-79.) This has little to do with preventing government from putting public money at risk. It is true that a true partnership or joint venture would violate the constitution because it would *per se* create vicarious financial liability of the public body for the actions of the private party, but there is no reason in policy, logic, or case law to suggest that the converse is true.

Moreover, an analysis of the common-law elements of a joint venture reveals that the Authority likely has entered into one and, if it has not, it is for reasons unrelated to putting public funds and property at risk. As the trial court recognized, the elements of the "contractual relationship creating a 'joint venture' " are "(1) a common purpose; (2) a joint proprietary interest in the subject matter; (3) the right to share profits and duty to share losses; and (4) joint control or right of control." (R:97:74 (citing *Williams v. Obstfeld*, 314 F.3d 1270, 1275-76 (11th Cir. 2002)).) These elements are substantially met in this case.

First, the Authority and Majestic have the common purpose of maximizing the profitability of the development – and the concomitant purpose of competing with neighboring projects, such as that of Jackson-Shaw. The more successful the business, the more money they make, and vice versa.

Second, they share a joint proprietary interest in the subject matter. The Authority owns the property in fee simple and accordingly possesses the present right to develop the property as it sees fit. It has delegated this right during the term of the option and the lease to the Authority.

Third, the two parties clearly have the right to share profits. The trial court concluded that the Authority will not share in the losses, but that conclusion conflicts with its own findings of fact. While the Authority's risk of loss is limited to some degree by the minimum fixed rent, it is still on the hook for substantial

losses if the development is not profitable. If Majestic fails to get the business up and running at an acceptable level by the time rent finally becomes due, the Authority will have received no return on its investment of land and capital. It will have lost the opportunity costs of leasing the land in the interim, as well as the direct costs of building the road and providing the mitigation credits. Again, Majestic can walk away without liability to the Authority at any time before a lease is actually executed, and even once a lease is executed, it can walk away and only be liable up to the "market value" of its interest. As noted, if the development fails or Majestic's creditors foreclose, then that market value will be worthless. Thus, the Authority is indeed sharing in a considerable degree of risk.

The closest element is the fourth and final element: Does the Authority retain any right of control? The district court acknowledged that it has the right to require compliance with specifications in the plan and the city's master plan for the area, but concluded that this was not enough. (R:97:80.) Even if the degree of control that the Authority has relinquished over the public property and funds in this case would be sufficient to prevent a finding of a common-law joint venture, it should have not cure the constitutional violation. After all, by relinquishing control of public property and funds to a private business, the Authority has committed precisely the sin that article VII, section 10 proscribes.

For all of these reasons, the transaction in this case makes the Authority a joint owner in the development project with Majestic in violation of article VII, section 10 of the Florida Constitution. The transaction is therefore void.

II. THE DEVELOPMENT AGREEMENT REQUIRES THE AUTHORITY TO USE PUBLIC CREDIT AND FUNDS FOR THE BENEFIT OF A PRIVATE ENTITY.

Alternatively, even if the trial court's conclusion as to joint ownership were correct, the agreement is still void because it involves using public credit and funds for the benefit of a private entity without serving a predominantly public purpose. Both aspects of the transaction (the option and the leases) constitute the use of public credit and funds for the benefit of a private company.

A. The option is a use of public resources because the Authority has lent its development rights on the property to Majestic.

While the Authority certainly has not entered into a traditional promissory note, the substance of this transaction is an extension of substantial credit to Majestic. Although it misapplied the principles to the facts of this case, the district court correctly recognized the definition of an extension of credit in this context:

> "The word 'credit,' as used in Fla. Const., art. VII, § 10 (1968), implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political debt for the benefit of private enterprises." *Nohrr v. Brevard County Educational Facilities Authority*, 247 So. 2d 304, 309 (Fla. 1971). "[T]he lending of credit means the assumption by the public

> body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit." *State v. Housing Finance Authority of Polk County*, 376 So. 2d 1158 (Fla. 1979). "In order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody." [*Linscott v. Orange County Indus. Dev. Auth.*, 443 So. 2d 97, 100 (Fla. 1983)].

(R:97:83.)

The district court erred because the option clearly imposes "some new financial liability" on the Authority, places "public property ... in jeopardy by a default of the third party," and requires it to "pay something to somebody." The Authority takes on both direct and indirect financial obligations.

First, it has to directly pay up to $750,000 to build a road and up to $1.8 million for wetlands credits.[16] In normal development agreements, these are obligations of the developer, not the landowner. (R:97:38 n.20.) While it naturally expects to eventually recoup these costs out of rent revenue if and when Majestic

[16] Jackson-Shaw does not intend to suggest that building roads or mitigating wetlands are not proper things for the Authority to do in the abstract. If it chose to do these things for a predominantly public purpose, it would be well within its rights.

However, under normal circumstances, a public body like the Authority does not have a legal obligation to build roads or remediate wetlands in a private development. Thus, the point is that the Authority has entered into a purportedly binding agreement requiring it to do these things for the benefit of the development.

closes on the contemplated leases, that only further demonstrates that the nature of the transaction is to provide financing for the development.

Second, the option is, by definition, a pledge not to use the property for other purposes during the term of the agreement. While fee title to the land is not in jeopardy, all of the Authority's other possessory rights clearly are. If Majestic ultimately decides not to exercise the option or is unable to complete the benchmarks required before it has to execute a binding lease, then the Authority will have forfeited the valuable right to (a) sell the property, (b) lease it as a market rate (e.g., to Jackson-Shaw), or (c) use it for public purposes during the term of the agreement.

Even the Authority would have to concede that article VII, section 10 would prohibit it from lending a million dollars in public funds to a private entity that needed the funds to secure an option on private property, build a road, and mitigate wetlands on the property. But its agreement with Majestic is no different in substance. Instead of loaning Majestic the funds to do these things on private land, the Authority is simply undertaking these tasks itself for Majestic's benefit. The Authority should not be permitted to do indirectly what it clearly cannot do directly. The option is therefore void.

B. The leases require the use of public resources because the Authority agrees to reimburse at least a portion of the financing and operational costs of the development out of the rent.

Even if there were no issues with the option, the contemplated leases that are the purpose of the option are themselves void. Under the leases, the Authority will grant Majestic a leasehold interest with the concomitant rights to possession and, more importantly, to develop and manage the property. If they were traditional leases that provided for a reasonable, market-based fixed rent, there might be no problem. However, the Authority has agreed to allow Majestic to recoup all of its expenses with interest (plus its own development and management fees) before it has to pay anything more than what is essentially nominal rent.

The rights the Authority has agreed to grant to Majestic are every bit as valuable as cash money. The agreement not only confers the Authority's right to develop and occupy the property to Majestic, it further gives Majestic the express authority to pledge those rights to its lenders. (R:97:36.) Thus, to secure financing, Majestic is authorized to pledge its right to develop and manage the property, and if it defaults on its financing arrangements, the lender may foreclose, take possession of the property, and recoup all of its debt and collection costs before the Authority can receive a penny in revenue. (R:97:36.)

Again, it should be clear that the Authority could not directly loan Majestic the funds necessary to develop and manage the property, nor could it pledge public

property to a lender to secure financing for those expenses. But that is just what the Authority has done in substance. Its counsel appears to have recognized exactly this when it directed the Authority that it must charge some minimum fixed rent. The Authority's first attempt, which would have involved the Authority actually reimbursing Majestic *more* than it will be paying out, was properly characterized by the district court as an "ill-considered idea to try to circumvent the Florida Constitution." (R:97:25-26.) Though slightly less brazen, the Authority's decision to provide a substantially below-market minimum fixed rent should fare no better.

C. The development project does not serve a paramount public purpose.

Admittedly, not all uses of public resources that benefit a private entity are prohibited. If the pledge is undertaken for a "paramount public purpose," as opposed to simply for a regular "public purpose," then it is not a prohibited pledge "to aid" a private entity. *E.g., Linscott v. Orange County Indus. Dev. Auth.*, 443 So. 2d 97, 99-100 (Fla. 1983). The trial court did not reach this issue because it concluded that there was no pledge of public credit.[17] (R:97:87-90.) There should be no need for the Eleventh Circuit to remand for findings on this issue, however,

[17] Jackson-Shaw does not dispute the finding that the lesser public purpose test is satisfied by the fact that even the below-market revenue the Authority hopes to receive can be used to reduce the public tax burden. *E.g., West Palm Beach*, 291 So. 2d at 578.

because there is no evidence in the record to support a finding that this transaction serves a predominately public purpose.

The primary purpose of the transaction is clearly to develop commercial property. No Florida decision has ever found this to be a paramount public purpose. On the other hand, this Court has found the paramount public purpose test met where a garden club leased public land for one dollar a year, but established a non-profit public library, *Rainey v. Lakeland*, 88 So. 2d 148 (Fla. 1956). It has also found that assisting private entities in constructing venues for public entertainment serves a paramount public purpose, even where private entities will profit from the venue. *See generally Poe v. Hillsborough County*, 695 So. 2d 672, 675-79 (Fla. 1997) (canvassing case law on recreational facilities).

Thus, for example, the Court validated revenue bonds for the construction of a stadium for the Tampa Bay Buccaneers where the team would pay $3.5 million a year to use the facility, a $1.94 million annual surcharge on tickets to Buccaneer games, and half the revenue beyond the first $2 million for other events at the stadium. *Id.* at 674, 678-79. Additionally, the construction of the stadium was necessary to keep the team in Tampa, would generate between $83 and $183 million in "annual economic benefit to the Tampa Bay economy," and would attract a Super Bowl, which would generate over $300 million in economic benefits. *Id.* at 674, 678-79.

There is no evidence in this record that Majestic's development will serve a similar public purpose[18] or generate similar amounts for the economy. Majestic does not develop recreational properties, it focuses on office and industrial purposes. (R:97:7-8.)

Had there been evidence that the only way to generate jobs and business near the airport were to offer substantial incentives, then perhaps the Authority might have a more colorable claim to paramount public purpose. As any member of this Court who has flown into Jacksonville International Airport can readily attest, however, there is no shortage of commercial and retail development in the area. Indeed, the Authority refused to even consider Jackson-Shaw's lucrative, market-based offer to develop the property with no investment by or risk to the Authority. (R:97:27-29.)

In sum, the transaction in this case is nothing more than a public body's decision to heavily invest in and subsidize a private entity at the expense of its competitors in the hope of one day realizing a substantial (though below-market) return. Because the Florida Constitution has long prohibited public bodies from putting public funds at risk by engaging in private business, the transaction should be declared void.

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[18] Ironically, the agreement prohibits many otherwise allowable recreational uses, such as bowling alleys, discos, night clubs, game rooms, and the like. (Pl. Exh. 214 at 2 ¶ 2.2.)

CONCLUSION

For the foregoing reasons, the Court should answer at least one of the certified questions in the affirmative and declare that a public body violates article VII, section 10 of the Florida Constitution when it provides public resources to a private development in exchange for future payments that depend on the financial success of the development.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. mail to **Cindy A. Laquidara**, Assistant General Counsel, Office of General Counsel – City of Jacksonville, 117 West Duval Street, Ste. 480, Jacksonville, FL 32202-3700, this 6th day of February, 2008.

____
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney

APPENDIX TO INITIAL BRIEF

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