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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT IN REPLY

I. THE AUTHORITY MISSTATES THREE KEY FINDINGS OF FACT.

In its answer brief, the Authority makes three representations of material fact that merit a brief rebuttal because they are misleading, if not outright inaccurate.

A. The trial court did not find that the Authority would receive any income from the agreement with Majestic.

First, the Authority claims that it is "undisputed" that it will "receive approximately $900 million over the life of the agreement." (Answer Brief at 5; *see also id.* at 17 (falsely representing that "even Jackson-Shaw admits that the JAA is going to gain hundreds of millions of dollars for the public coffers").) Not only was it disputed how much, if anything, the Authority will earn, the federal trial court made no finding that the Authority would receive any income at all. The Authority cites to pages 99-100 of the trial court's order, but those pages do not support its assertion.

Directly contrary to the Authority's representations, one of the key facts in this case is that that Authority is not guaranteed to receive **any money at all** and, in any event, will not receive market value for the property. As the court found, Majestic could tie the property up for several years and ultimately just "walk away from the deal, without liability for breach or damages to the Authority." (R:97:32.) The $900 million figure is the amount that Majestic projected the Authority would receive if Majestic exercised all of its options and developed the entire property

under the best case scenario. (R:97:39.) This best case scenario is $5 million less than the Authority would receive if it leased its property at market rent. (R:97:40.)

B. The trial court did find that the Authority agreed to provide wetlands credits to Majestic at a cost of millions of dollars.

Second, the Authority provides a misleading response to Jackson-Shaw's characterization of the wetlands mitigation credit the Authority has agreed to provide to Majestic. After correctly stating that the Authority will not be making a "cash payment," the Authority characterizes its obligation as merely agreeing "not to charge to the ground lease up to 50 acres that may be necessary to properly permit the property due to wetland issues." (Answer Brief at 5.) It then castigates Jackson-Shaw's "repeated attempts to recharacterize the JAA's inclusion of this acreage as a cash contribution" as "nowhere supported in the record." (*Id.*)

But it is the Authority that misapprehends the record. Jackson-Shaw has never claimed that there would be a cash payment, but the trial court expressly found that the Authority will "provide, at no cost to Majestic, up to 50 acres of wetlands mitigation that may be required by Majestic's development." (R:97:32.) The court further found that the cost to the Authority of providing these credits was between $47,500 and $62,500 per credit. (R:97:38.) As noted in Jackson-Shaw's initial brief, this translates to the Authority providing $2.375 million worth of credits. (Initial Brief at 13.) The record does not support the Authority's suggestion that it is some sort of environmental agency that can simply decline to

require a developer to mitigate the destruction of wetlands. Instead, the Authority is simply a landowner with sufficient undeveloped wetlands to provide valuable mitigation credits to sweeten the deal for Majestic. Because those credits will not be available to mitigate development on other property owned by the Authority, this was a costly concession.

C. The trial court did find that the Authority expressly authorized Majestic to pledge the leasehold estate to secure financing.

Third and finally, the Authority claims that Jackson-Shaw "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 trial court and undisputed record." (Answer Brief at 10.) In making this claim, the Authority both directly misstates Jackson-Shaw's argument and offers a misleading characterization of the record. Jackson-Shaw acknowledged in its brief that the lease prohibits Majestic from pledging fee title to the property to its creditors (which, of course, it could not do anyway as it did not obtain fee title). (Initial Brief at 15.) The trial court clearly did find, however, as Jackson-Shaw recites on pages 15 and 16 of its initial brief, that Majestic was authorized to pledge its leasehold interest in the property to creditors and that the creditors could foreclose and step into Majestic's shoes if Majestic defaults on its financing. (R:97:36.) Thus, while all of the Authority's interest in the property is not at risk, the very valuable right to possess and use the property during the term of the lease is.

II. THE STANDARD OF REVIEW IS DE NOVO.

Contrary to the Authority's argument regarding standard of review, Jackson-Shaw does not challenge any of the trial court's findings of fact, whether they be by inference or direct evidence. The only challenges are to the trial court's legal conclusions that those facts do not establish a constitutional violation. At this point the facts are undisputed and this proceeding poses only questions of pure constitutional law, so the standard is de novo. *Macola v. Gov't Employees Ins. Co.*, 953 So. 2d 451, 454 (Fla. 2006) ("The rephrased certified question involves a pure question of law that arises from undisputed facts and is therefore subject to de novo review.").

III. THIS COURT HAS NEVER APPROVED OF A PUBLIC BODY EITHER ENTERING INTO A PARTICIPATING LEASE OF PUBLIC PROPERTY OR UNDERTAKING FINANCIAL OBLIGATIONS AS PART OF A LEASE.

Throughout its answer brief, the Authority argues that this is a frivolous appeal (notwithstanding the fact that three federal appellate judges expressly concluded that there was no controlling authority in Florida on the two certified questions) because "[t]his Court has put questions such as these to rest some time ago." (Answer Brief at 15; *see also id.* at 1 (stating that "established Florida law holds" contrary to Jackson-Shaw's position), 7 ("The law at issue here has been long-since settled by this Court."), 20 (arguing that for the Court to find for Jackson-Shaw would require "rewriting years of Florida case law"), 21-22

("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."), 29 n.5 ("Indeed, the case law is established so clearly that this appeal may be deemed frivolous.").)

Yet, the Authority fails to identify a single Florida opinion upholding the constitutionality of a public body entering into a participating lease with a private entity. Whether a participating lease of public land violates the constitution is an issue of first impression.

The Authority similarly fails to point to a single case upholding the constitutionality of a public body agreeing to financial obligations as part of a lease of public property to a private entity. As argued in the initial brief, in *West Palm Beach v. Williams*, 291 So. 2d 573 (Fla. 1974), and *Bannon v. Port of Palm Beach District*, 246 So. 2d 737 (Fla. 1971), this Court upheld leases of public lands only after determining that the public lessor in those cases did not take on any financial responsibility. (Initial Brief at 28-29.) Thus, this Court has previously indicated that an agreement like the one in this case is unconstitutional.

IV. WHETHER THE AGREEMENT IS VIEWED UNDER THE "JOINT OWNER" PROHIBITION OR THE PROHIBITION ON USING "TAXING POWER OR CREDIT" IS IRRELEVANT BECAUSE THE AUTHORITY DOES NOT ARGUE THAT A PARAMOUNT PUBLIC PURPOSE IS AT ISSUE IN THIS CASE.

As did both the federal trial court and the Eleventh Circuit, Jackson-Shaw separated its arguments into two alternative components – first arguing that the agreement in this case is a form of prohibited joint ownership, and second arguing that it is a prohibited use of "taxing power or credit" to aid a private entity. The issues were separated this way because the first clause appears to be an absolute prohibition, while the second clause is subject to an exception if there is a paramount public purpose. *Linscott v. Orange County Indus. Dev. Auth.*, 443 So. 2d 97, 99-100 (Fla. 1983). Jackson-Shaw ended its initial brief by arguing that the paramount public purpose test cannot be met in this case. (Initial Brief at 43-45.)

The Authority did not dispute this in its answer brief, and instead, simply argued that the lesser public purpose test is met (a point conceded by Jackson-Shaw). (Answer Brief at 18-21.) This implicit concession that a paramount public purpose is not served makes this Court's analysis a bit simpler because, despite the intellectual appeal of analyzing the two clauses in article VII, section 10 independently, the case law on leasing public land (e.g., *West Palm Beach* and *Bannon*) seems to blend the two issues together. This is further reason for the

Court to rephrase the Eleventh Circuit's two questions as a single question. As suggested in the initial brief this single question might be phrased as:

> 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?

(Initial Brief at 27.)

V. THE AUTHORITY UNDERTOOK SIGNIFICANT RISK AND DID PLACE PUBLIC PROPERTY AT RISK IN THE AGREEMENT.

The thrust of the Authority's argument is that the agreement in this case was nothing more than a traditional lease and that it did not accept any liability. The Authority makes no attempt to address the detailed and substantial argument to the contrary in the initial brief. (Initial Brief at 31-32.) If Majestic chooses not to exercise its options, then the Authority will have lost on its investments of (a) the value of putting the property to other uses, (b) the wetlands credits it agreed to provide at a cost of millions of dollars, and (c) the $750,000 road.

Perhaps more importantly, if and when Majestic does exercise one or more options, it is expressly authorized to pledge its leasehold interest to its creditors. A leasehold estate is simply a lesser property right subsumed within the fee title. Thus, while it is true that the Authority is not at risk of having one of Majestic's lenders levy on all of the "bundle of sticks" inherent in its ownership of the

property, it clearly is at risk at having a lender seize the leasehold interest, and the concomitant, exclusive right to possess and use the property during the term of the lease. *See Fisher v. Va. Elec. & Power Co.*, 243 F. Supp. 2d 538, 553 (E.D. Va. 2003) (noting that "a leasehold interest is no less 'a stick in the bundle of rights' constituting fee ownership than an easement"); *see also Coastal Petroleum Co. v. American Cyanimid Co.*, 492 So. 2d 339, 348 (Fla. 1986) (Boyd, C.J., dissenting) ("As in many other areas of property law, the law recognizes various degrees of legal rights and interests in the same property and does not demand that one person hold the entire 'bundle of sticks.' "); *City of Orlando v. MSD-Mattie, L.L.C.*, 895 So. 2d 1127, 1130 (Fla. 5th DCA 2005) (recognizing the "fundamental tenet of the law of property ownership – that property is a bundle of rights analogous to a bundle of sticks"); *Spanish River Resort Corp. v. Walker*, 497 So. 2d 1299, 1392 (Fla. 4th DCA 1986) (describing this bundle of rights as including "the complete right to use (or not to use) the property during the period of ownership; the right to exclude others during that period, and the right to mortgage, lease, sell, bequeath or give away the ... estate"), *approved* 526 So. 2d 677 (Fla. 1988); *see generally Holland v. Hathaway*, 438 So. 2d 456, 464 (Fla. 5th DCA 1983) (describing the history and meaning of this theory of ownership in detail).

VI. THIS COURT HAS NEVER APPROVED A PUBLIC BODY "LEASING" ITS PROPERTY TO A PRIVATE ENTITY FOR FREE.

Relying on *Bannon*, the Authority repeatedly asserts that this Court has upheld a "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." (Answer Brief at 18; *see also id.* at 22 (stating that there is a "line of case law which recognizes that it may be leased without obtaining any revenue at all" and continuing, "That this has been put to rest by this Court in *Bannon* cannot be gainsaid."); *id.* at 23 ("*Bannon* also addressed whether by not charging for the lease, the District was lending credit ...").) It then argues that "it would require a 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." (*Id.* at 17-18; *see also id.* at 34-35 (""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.").)

Neither *Bannon* nor any other Florida opinion identified by the Authority or located by the undersigned counsel approves a "lease" of public lands without rent. While this Court made clear in *Bannon* that there was no expense to the public lessor in that case, it never indicated that the private tenant was not paying rent. 246 So. 2d at 740. Indeed, the word "lease" contemplates that the tenant will be

paying rent or other form of compensation. *See Webster's Ninth New Collegiate Dictionary* 681 (1983) (defining "lease" as "a contract by which one conveys real estate, equipment, or facilities for a specified term and *for a specified rent*" (emphasis added)). To give a private entity the exclusive possession and right to use public property during a term of years would clearly be a prohibited use of public property to aid a private entity, unless the benefit to the private entity was merely incidental to a paramount public purpose.

VII. A FINDING OF A JOINT VENTURE IS NOT REQUIRED TO PROVE PROHIBITED JOINT OWNERSHIP.

Finally, the Authority argues that the only way there cold be a prohibited joint ownership in this case is if the common-law test for a joint venture is satisfied. As argued extensively in the initial brief, there is no reason to apply joint venture law to this case. The Authority fails to point to a single case using this test for purposes of article VII, section 10. That may be because the concept of "joint venture" is not a concept of ownership, but a concept of holding one entity liable for the acts of another. There are many forms of joint ownership that could not meet the test for joint ventures. For example, a tenancy in common is the classic model of joint ownership, and it has nothing to do with the elements of a joint venture. Under the Authority's logic, it could constitutionally buy property with Majestic and title in both their names as long as it did not have sufficient control over the property for the joint ownership to become a joint venture.

The key in this case is that the Authority and Majestic both have property interests in the Woodwings East parcel (fee title for the Authority and a leasehold for Majestic) and they both have a direct economic stake in the success of the development. If the development does not go well, the Authority (and therefore the public) will suffer the consequences. As argued in the initial brief, this is precisely the evil that article VII, section 10 was designed to prevent. (Initial Brief at 24-25.)

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 24th day of March, 2008.

_____

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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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