

**From:** LWFPA <LWFPA@aol.com>

**To:** Johnpadget <Johnpadget@aol.com>; levinjay <levinjay@comcast.net>; marychamberskw <marychamberskw@aol.com>; lesley.salinero <lesley.salinero@keysschools.com>; nandecall <nandecall@aol.com>; stephenhammond1 <stephenhammond1@aol.com>; kovide <kovide@comcast.net>; chiggins <chiggins@horan-wallace.com>

**Cc:** jclfkhda <jclfkhda@aol.com>

**Subject:** HMA Lease Transaction

**Date:** Fri, Aug 5, 2016 5:18 pm

**Attachments:** Memo re HMA Lease Transaction.pdf (4833K)

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At the request and direction of the Chair, I have prepared and attach a Memorandum relative to the events surrounding the determination of the District Board, in 1998-99, to enter into negotiations and proceed with the lease to HMA.

Let me know if you have any questions.

Lew

Lewis W. Fishman  
*Florida Bar Board Certified in Health Law*

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LEWIS W. FISHMAN  
FLORIDA BAR BOARD CERTIFIED IN HEALTH LAW

TELEPHONE 305-670-2100

**MEMORANDUM**

**TO:** Board of Commissioners

**CC:** Jill Cranney-Gage,  
Administrator

**FROM:** Lewis W. Fishman, Esq. 

**SUBJECT:** HMA/CHS Lease Transaction Legality

**DATE:** August 5, 2016

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The Chair has received a suggestion that the Board, at its upcoming September meeting, consider seeking an outside second opinion, perhaps in conjunction with the Key West City Commission, as to the legality of the Lease Transaction between the District and HMA, in light of the numerous recent articles in the Key West Citizen newspaper questioning and challenging the propriety of the District's action in 1999 in entering into a lease with a for-profit entity. Subsequent thereto, the Chair has learned that a new thrust of the allegations against the propriety of the Lease Transaction revolves around a 1999 Declaratory Decree action against the Lower Florida Keys Health System and Health System's failure to comply with the Sunshine Law in entering into the Lease Transaction with HMA in August or September 1998, and the fact that any public discussions after that was a sham.

Separate and apart from that, I had conducted my own, independent review, at no expense to the District, of the entirety of the public and District records, in order to rebut the numerous defamatory, unsubstantiated and false allegations reported in the Key West Citizen and primarily attributable to Diane Covan, Esq., regarding my representation of the District and legal opinions rendered thereon relative to the legality of the HMA Lease Transaction.

At the Chair's direction, I have memorialized the results of my review for the benefit of the Board, and the records of the District reflect as follows:

In late 1998, after the then District Board determined to issue a Solicitation of Interest to explore the interest of outside entities in leasing the hospital, in conjunction with leasing the dePoo hospital facility, to replace the Lower Florida Keys Health System as the operator of the combined hospital system, the District Board sought my legal opinion as to its ability to enter into a potential Lease transaction with a for profit entity. After conducting legal research, including a review of the then effective Enabling Act, Florida Statutes, Attorney General

Opinions, and relevant case law, the undersigned concluded, as set forth in the District's Board of Commissioners minutes of December 1, 1998, as follows:

*Counsel said it is really an unclear issue and difficult for him to make a positive opinion. If there were no language in the enabling act addressing the creation of Health System, there is no doubt that the District could go forward with the lease with HMA based on the amendment to F.S. 155.40 permitting public hospitals to merge with for-profit entities. The problem is the specific directions given in the amendment permitting the merger with dePoo Hospital state that it had to be a not-for-profit entity. Where there is a conflict between general legislation, as in the enabling act, special legislation generally prevails.*

*The question is, was the language in the enabling act amendment intended to be specific to the Health System transaction, but not intended to preclude any other power originally given by the act which would permit the District to enter into other agreements, or does its specificity override the change to 155.40.*

*Mr. Fishman said that at this point his research has not turned up any definitive case that would permit him to make an unqualified opinion. The District's options are: 1) to seek declaratory decree action; or 3) assuming that HMA is able to convince a title insurance company to write the title policy and indemnify both HA and the District, to go forward with the transaction knowing that if a suit is brought, the titled company will step in to defend it.*

Based upon the foregoing, the District Board determined to seek an attorney general opinion, and, by letter dated January 4, 1999, Mr. Fishman sought an opinion of the Attorney General, inquiring as to:

*May the Lower Florida Keys Hospital District lease or sell its hospital facilities to a for-profit Florida corporation?*

citing the amended Enabling Act (Section 3B) and enclosing a copy thereof, and questioning whether Section 3B was limiting or merely permissive, and if amendment of Section 155.40, Florida Statutes, controls the District.

In response thereto, on January 25, 1999, the District received an opinion of the Attorney General's Office, from Joslyn Wilson, Assistant Attorney General, opining that:

*In Attorney General Opinion 98-70, this office concluded that a hospital authority created by special act clearly falls within section 155.40(1), Florida Statutes, which by its own terms applies to any county, municipal or district hospital "organized and existing under the laws of this state."*

The Opinion cited the referenced section 155.40(1), Florida Statutes, which provided that:

*In order that citizens and residents of the state may receive quality health care, any county, district, or municipal hospital organized and existing under the laws of this state,*

*acting by and through its governing board, shall have the authority to sell or lease such hospital to a for-profit or not-for-profit Florida corporation, and enter into leases or other contracts with a for-profit or -for-profit corporation for the purpose of operating and managing such hospital and any or all of its facilities of whatsoever kind and nature. The term of any such lease, contract, or agreement and the conditions, covenants, and agreements to be contained therein shall be determined by the governing board of such county, district or municipal hospital. The governing board of the hospital must find that the sale, lease or contract is in the best interests of the public and must state the basis of such finding. If the governing board of a county, district or municipal hospital decides to lease the hospital, it must give notice in accordance with paragraph (4) (b).*

The Opinion then went on after further analysis to conclude:

*Thus, this office concluded (in AGO 98-70) that while Section 155.40, Florida Statutes, authorizes the hospital authority, subject to the conditions specified in the statute, to lease or sell its facilities to a qualified private party, the authority should provide the affected public with the opportunity to make a reasonable evaluation of the proposed transfer through public notice hearings to ensure the disposition of facilities established and supported by public funds is in the best interests of the hospital district.*

*The analysis and conclusions contained in Attorney General Opinion 98-70 appear to be equally applicable to the Lower Florida Keys Hospital District. Whether the conditions imposed on such a sale or transfer of hospital facilities have been met, however, involves questions of fact this office cannot resolve.*

Based on the foregoing opinion of the Attorney General, the District Board proceeded to go forward with the contemplated Lease Transaction.

The District minutes reflect no less than twenty (20) regular and special meetings of the Board of Commissioners discussing the contemplated lease of District facilities to HMA, on July 21, 1998; August 11, 1998; August 25, 1998; September 15, 1998; October 27, 1998; November 4 1998; November 17, 1998; November 18, 1998; December 1, 1998; December 22, 1998; January 13, 1999; January 21, 1999; February 4, 1999; February 9, 1999; February 15, 1999; February 22, 1999; March 2, 1999; March 9, 1999; March 29, 1999; and April 26, 1999. The meetings of August 11, 1998, November 18, 1998, February 4, 1999 and April 26, 1999, were public hearings held in either the Harvey Government Center or Old City Hall to facilitate the public's attendance. Additionally, at the direction of the Attorney General and as required, the District placed the proposed final transaction documents on file in the Monroe County Public Library for a period of not less than twenty-one (21) days, prior to taking a final vote on the proposed Lease Transaction.

The minutes further reflect that Diane Covan, Esq. was in attendance and spoke in opposition to the contemplated Lease Transaction at no less than ten (10) regular and special District Board meetings, including the public hearings of August 11, 1998, February 4, 1999, and April 26, 1999.

Based upon the foregoing, it is the Chair's opinion and belief that it will be extremely costly and not necessary for the District to expend public funds, either on its own accord or in conjunction with the Key West City Commission, to seek a second opinion on the legality of the HMA Lease Transaction, both because the record and facts belie any impropriety as well as the fact that another opinion is just that, and the only dispositive resolution if any is needed is for an entity other than the District to seek a judicial determination on the matter. As fiduciaries of the District, the Board is charged with complying with the terms of the Lease Transaction as it has for the past seventeen (17) years. The Chair recognizes, however, that ultimately this is a decision of the entire Board of Commissioners should anyone wish to raise it at the forthcoming Board meeting in September.

The correspondence, minutes and opinions referenced herein are all public records of the District and are available for review.

**From:** Johnpadget <Johnpadget@aol.com>  
**To:** lwfpa <lwfpa@aol.com>  
**Cc:** jclfkhda <jclfkhda@aol.com>  
**Subject:** 2nd opinions  
**Date:** Wed, Aug 3, 2016 9:06 am

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Lew,

You confirmed that CHS is getting a 2nd opinion on the hospital deal with HMA. The press confirms that the City of Key West is likely to authorize another 2nd opinion.

Our board has--to my knowledge--never received a 2nd opinion and has relied solely on your opinion. Since our board and the City are the two public agencies interested in the outcome, my idea is that our board and the City should jointly select a qualified legal firm, and share the expense--this guarantees that our board and the City are on the same page, going forward.

Kindly contact the Chair for guidance, and perhaps circulate this idea in advance of our next board meeting, so that members can contemplate their positions--all without communicating with me.

John

**From:** Home <lesleysaliner@att.net>

**To:** Hospital District Board <Jclfkhd@aol.com>

**Cc:** Neil Call <nandecall@aol.com>; John Padget <johnpadget@aol.com>; Stephen Hammond <stephenhammond1@aol.com>; Jay <Levinjay@comcast.net>; Kathy Ovide <kovide@fkaa.com>; Cara A. Higgins <cara@hwhkeywest.com>; Mary Chambers <marychamberskw@aol.com>; Lew Fishman <LWFPA@aol.com>; Diane Shelby <kwshelby@bellsouth.net>

**Subject:** Re: Letter from Mr. Stephen Pennington, CEO (Interim) LKMC

**Date:** Thu, Jul 28, 2016 12:07 pm

So is the board attending all these community seasons?

Sent from Dr. Thompson

On Jul 28, 2016, at 11:55 AM, Hospital District Board <Jclfkhd@aol.com> wrote:

Board,

Please see attached letter Chairman Levin has asked me to distribute.

Thank you,  
Jill

Jill Cranney-Gage  
LFKHDB Administrator  
Sent from my iPhone

Begin forwarded message:

**From:** Jay <levinjay@comcast.net>  
**Date:** July 28, 2016 at 11:15:54 AM AST  
**To:** Hospital District Board <jclfkhd@aol.com>  
**Subject:** Fwd: Letter from Mr. Stephen Pennington, CEO (Interim) LKMC

Jill,

Please distribute to the Board.

Thanks,  
Jay

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**From:** LWFPFA <LWFPFA@aol.com>

**To:** Johnpadget <Johnpadget@aol.com>; lesleysalinerero <lesleysalinerero@att.net>; Jclfkhdha <Jclfkhdha@aol.com>

**Cc:** nandecall <nandecall@aol.com>; stephenhammond1 <stephenhammond1@aol.com>; Levinjay <Levinjay@comcast.net>; kovide <kovide@fkaa.com>; cara <cara@hwkeywest.com>; marychamberskw <marychamberskw@aol.com>; kwshelby <kwshelby@bellsouth.net>

**Subject:** Re: Letter from Mr. Stephen Pennington, CEO (Interim) LKMC

**Date:** Thu, Jul 28, 2016 10:27 pm

*Board of Commissioners:*

*As residents of the Key West community, any District Board member has the right to attend and if they choose to attend, would certainly have the right to speak in an **individual capacity, but not as a member or representative of, nor on behalf of, the District Board**, and if they do speak, they should clarify that they are **not speaking as a Board member or on behalf of it, nor is their response a Board adopted position.***

Lew

Lewis W. Fishman  
Florida Bar Board Certified in Health Law

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[lwfpfa@aol.com](mailto:lwfpfa@aol.com)

In a message dated 7/28/2016 5:54:06 P.M. Eastern Daylight Time, [Johnpadget@aol.com](mailto:Johnpadget@aol.com) writes:

Lew will advise, but I think District board members can attend, but not speak since we are subject to Sunshine Laws.

John

In a message dated 7/28/2016 12:01:51 P.M. Eastern Daylight Time, [lesleysalinerero@att.net](mailto:lesleysalinerero@att.net) writes:

So is the board attending all these community seasons?

Sent from Dr. Thompson

On Jul 28, 2016, at 11:55 AM, Hospital District Board <[Jclfkhdha@aol.com](mailto:Jclfkhdha@aol.com)> wrote:

Board,

Please see attached letter Chairman Levin has asked me to distribute.

Thank you,  
Jill

Jill Cranney-Gage  
LFKHDB Administrator  
Sent from my iPhone

Begin forwarded message:



**From:** Jay <[levinjay@comcast.net](mailto:levinjay@comcast.net)>  
**Date:** July 28, 2016 at 11:15:54 AM AST  
**To:** Hospital District Board <[jclfkhd@aol.com](mailto:jclfkhd@aol.com)>  
**Subject:** Fwd: Letter from Mr. Stephen Pennington, CEO (Interim) LKMC

Jill,

Please distribute to the Board.

Thanks,  
Jay

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<2016-07-28 (1).pdf>

ii