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December 12, 2016

Board of Commissioners
The Lower Florida Keys Hospital District
619 Ashe Street
Key West, Florida 33040

Re: Analysis of Lease Agreement between the District and Key West HMA, Inc. ("HMA") dated May 1, 1999 ("Lease") to operate the District Hospital, formerly known as Florida Keys Memorial Hospital ("Hospital").

Dear Commissioners:

We have been asked to answer the specific questions set forth below in connection with the Lease referenced above. In rendering our opinion we have reviewed the following transaction documents: (1) Resolution of the Board of Commissioners dated March 2, 1999; (2) Lease Agreement dated as of May 1, 1999 between The Lower Florida Keys Hospital District and Key West HMA, Inc., as amended by Lease Agreement Amendment dated April 15, 2002, and Second Lease Agreement Amendment dated October 1, 2003; (3) Agreement for Indigent Care between The Lower Florida Keys Hospital District and Key West HMA, Inc.; and (4) Definitive Agreement by and among The Lower Florida Keys Hospital District, Key West HMA, Inc. and Health Management Associates, Inc.

***Question #1**: When the District leased the Hospital to HMA, a for-profit corporation, did it have the statutory power to delegate some or all of the following Hospital operating decisions: (a) determining pricing, (b) granting staff privileges to physicians, and (c) the range of services to be provided (collectively, referred to as the "Hospital Operations Decisions")?*

***Answer**.* Yes, the District was statutorily authorized to enter into the Lease and to delegate all of the Hospital Operating Decisions to HMA.

***Overview of Applicable Laws**.*

In order to determine whether the District was statutorily authorized to delegate some or all of the Hospital Operating Decisions to HMA pursuant to the Lease, it is necessary to analyze the District's authority to enter into the Lease itself, under the applicable laws at the time the Lease was entered into in 1999. There are two laws governing the District's

authority in this regard: (1) the Enabling Act which created the District[1] and (2) Section 155.40, Florida Statutes, which governs the transfer of public hospital operations to private entities.

The Enabling Act expressly authorizes the Board of Commissioners of the District to lease a hospital[2] in order to carry out the provisions of the Enabling Act. It also authorizes the District to lease its hospital facilities to a not-for-profit Florida corporation, which is wholly-owned by the District.[3] The Enabling Act is silent as to the District's authority to lease the Hospital to a for-profit Florida corporation.

The Florida Legislature expressly permitted and encouraged leases through the adoption of Section 155.40, which sets out the process for the sale or lease of a county, district or municipal hospital to a private entity. When first enacted in 1982, Section 155.40 initially authorized the leasing of public hospitals to non-profit entities only. Then in 1996, the Florida Legislature also approved leasing public hospitals to for-profit corporations.[4] Therefore, when the Lease was entered into in 1999 it was clear that Section 155.40 authorized all public hospitals, to lease their facilities to Florida for-profit corporations and set out the standard for doing so.[5] Section 155.40(1) provides:

> 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 through its governing board, shall have the authority to sell or lease such hospital to a for-profit or not-for-profit corporation, and enter into leases or other contracts with a for-profit or not-for-profit Florida 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

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[1] Hospital districts are created under statutory authority provided in Section 189.404, F.S. and specials acts. *See*, s. 1, Ch. 67-1724, Laws of Florida, as amended, established The Florida Keys Hospital District in 1967. Chapter 2003-307, Laws of Florida, is the law that re-codified the creation of the Lower Florida Keys Hospital District, and is commonly referred to as the 'Enabling Act'.

[2] Section 6 of the Enabling Act (Chapter 2003-307, Laws of Florida.

[3] Section 3(2) of the Enabling Act (Chapter 2003-307, Laws of Florida.

[4] See House Bill 965 and Chapter 96-304 Laws of Florida, amending 155.40 to authorize the sale or lease of public hospitals to for-profit corporations.

[5] Section 155.40 sets forth the standard that must be met for the conversion of public hospital facilities to private operation by lease as a means to provide public entities with the necessary flexibility to use these public assets in a manner that best serves the interests of the public. The statutory process was intended to relieve the drain on public tax revenues which resulted from public operation of a hospital. *See*, *Memorial Hospital-West Volusia v New-Journal Corporation*, 729 So.2d 373 (1999).

> 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.

The Enabling Act and Section 155.40 are not in conflict.

Both the Enabling Act and 155.40 govern the authority of hospital taxing districts to lease their facilities to private corporations. The Florida Legislature did not confine itself to a single statute to address such authority. Instead, it chose to address the subject in enabling acts that created the hospital districts and then in 1982 through 155.40.[6] On its face, 155.40 directly and unmistakably authorizes hospital districts to lease their facilities to for-profit corporations. The Enabling Act expressly permits the District to lease its Hospital facilities to a not-for-profit corporation which is wholly-owned by the District – but is silent as to a for-profit lease transfer. Moreover, the Enabling Act contains no limiting language that would otherwise prohibit the District from leasing its facilities to a for-profit corporation. Finally, the Enabling Act does not purport to be the exclusive source of the District's authority. Section 1 of the Enabling Act states that it is "the intent of this act to preserve all District authority *in addition to any authority contained in the Florida Statutes, as amended from time to time."*

At the time the District entered into the Lease in 1999, it was clear that the District had the authority under Section 155.40 to enter into a lease with a for-profit entity. But because the Enabling Act only addressed the District's authority to lease its facilities to a not-for-profit entity owned by the District, we must determine how a Florida court would interpret what appear to be two statutes that are contradictory. Specifically, whether the Enabling Act must be read to trump 155.40.

It is well settled that Florida courts disfavor construing a statutory enactment as repealed by implication.[7] It is also well settled that statutes should not be interpreted in isolation and must be read within the context of other statutory enactments on the same topic.[8] Florida courts require that two statutes which are apparently contradictory enactments but that govern the same subject matter be interpreted so that both can co-exist, instead of defeating one of them. Only if there is a hopeless inconsistency between the two statutes will a court apply the rules of construction to defeat the plain language of one of

[6] The Florida Legislature enacted 155.40 which authorized the leasing of public hospitals to nonprofit hospitals initially to allow them to compete with for-profit hospitals while providing residents with good health care. *Indian River County Hospital District v. Indian River Memorial Hospital*, 766 So.2d 233 (2002).
[7] *Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987); *Cannella v. Auto-Owners Insurance Co.*, 801 So.2d 94 (Fla. 2001).

[8] *School Board of Martin County v. Department of Education*, 317 So.2d 68 (Fla. 1975).

them.[9] Therefore, the first step in the analysis is to determine whether there is a hopeless inconsistency between the Enabling Act and 155.40.

In making such a determination a Florida court would require that these two apparently contradictory statutory enactments, both of which govern district hospitals, be construed together in harmony – by any fair, strict, or liberal construction - so that both statutes have a reasonable field of operation or path forward without destroying their intent and meaning.[10] The Florida Legislature clearly intended to allow the District to lease the Hospital to a not-for-profit corporation and expressly enumerated such authority in the Enabling Act. The Florida Legislature also clearly intended for public hospitals to have a path to privatization, which included transfers not only to not-for-profit lessees but also to for-profit lessees.[11]

By applying the proper statutory construction test as required by Florida courts, the Enabling Act and 155.40 must be harmonized through reasonable interpretation of each when considered together, so as to give effect to each and avoid defeating one over the other. Accordingly, the only reasonable interpretation of the express powers set forth in the Enabling Act is that they are meant to be permissive powers and not limiting or restrictive powers. In other words, the lack of an express power in the Enabling Act authorizing the District to lease the Hospital to a for-profit does not mean that such a transfer is not permitted. Neither is there any limiting language in the Enabling Act that would prohibit the District from leasing to a for-profit company.

By construing the powers in the Enabling Act to be permissive rather than restrictive, the clear language in 155.40 which provides the District a general grant of authority to lease to a for-profit entity is not impliedly repealed. Stated another way, the Enabling Act should be interpreted as setting forth certain permissive enumerated powers (i.e., can lease to non-profit) and 155.40 then providing the District with additional powers (i.e., can also lease to for-profit). Any other interpretation would not be supported by law.

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[9] *School Board of Martin County v. Department of Education*, 317 So.2d 68 (Fla. 1975); *Knowles v. Beverly Enters.-Fla., Inc.* 898 So.2d 1 (2004); *Department of Education v. Educational Charter Foundation of Florida, Inc.* 177 So.3d 1036 (2015).

[10] *Department of Education v. Educational Charter Foundation of Florida, Inc.* 177 So.3d 1036 (2015).

[11] See, *Memorial Hospital-West Volusia v New-Journal Corporation*, 729 So.2d 373 (1999). The Florida Legislature found that it was necessary to allow public entities to privatize the operation of their public hospitals in order to alleviate three problems that posed a significant threat to the continued existence of Florida's public hospitals, the: (1) financial drain on the facilities from their forced participation in the Florida Retirement System, (2) competitive disadvantage placed on these facilities vis a vis their private competitors resulting from their required compliance with the State's public records and public meeting laws, and (3) Florida constitutional restrictions on public facility participation in partnerships with private corporations.

We believe that a Florida court would conclude that the plain language of 155.40 is not trumped or otherwise defeated by the Enabling Act and that such interpretation is consistent with legislative intent. One can presume that the Florida Legislature was aware when it enacted 155.40 that there were numerous district hospital enabling acts that were not consistent with 155.40. It is unlikely that the Florida Legislature intended to create contradictory statutory frameworks governing public hospitals or to effect the repeal of these enabling acts or of 155.40. Based on the foregoing, the only plausible conclusion is that 155.40 and the Enabling Act with regard to the Lease are not hopelessly inconsistent and can easily be harmonized.

Even if the Enabling Act and 155.40 were deemed to be hopelessly inconsistent, a special act may be impliedly repealed or modified by a general act where the general act is a general revision of the whole subject matter, which clearly demonstrates a legislative intent to repeal the special act.[12] The Florida Legislature intended for 155.40 to be a general revision of public hospitals, by creating a legislative leasing scheme allowing public hospitals to delegate and transfer hospital operations to private companies. Therefore, if 155.40 were found to be inconsistent with a special enabling act, then a Florida court would find 155.40 trumps the special act. In 2012, the Florida Legislature made its intent clear by amending 155.40 and adding Section 155.4011 in Chapter 2012-66, Laws of Florida, which provides:

> To the extent that any general or special law is inconsistent with or otherwise in conflict with Chapter 2012-66, Laws of Florida, such conflicting provisions are specifically superseded by Chapter 2012-66, Laws of Florida. A special tax district, public hospital or municipal hospital is not exempt from Chapter 2012-66, Laws of Florida.

Therefore after 2012, even if an enabling act expressly prohibited a district from leasing its public hospital to a for-profit corporation, 155.40 would trump or override such an express restriction.

It is also an established tenet that when two statutes – whether general or specific – are hopelessly inconsistent, Florida courts will find that the more recent statute prevails.[13] Therefore, 155.40 would control even if the Enabling Act and 155.40 could not be harmonized.

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[12] *Alvarez v. Board of Trustees of the City Pension Fund for Firefighters and Police,* 580 So.2d 151 (1991).

[13] *Sharer v. Hotel Corporation of America*, 144 So.2d 813 (Fla. 1962); *State of Florida v. Parsons*, 569 So.2d 437 (1990).

For all of the foregoing reasons, the District was statutorily authorized to lease its Hospital to a for-profit corporation such as HMA in 1999, subject to compliance with the requirements in 155.40.[14]

The District Lease meets the requirements of 155.40.

While allowing public hospital districts to lease their facilities, the version of the statute in 1999 at Section 155.40(2) also required that hospital districts retain some control over the private entity operating the hospital. Specifically, the lessee's articles of incorporation must be subject to the approval of the district's governing board; any not-for-profit lessee must become qualified as exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code; there must be an orderly transition of the operation and management of the facilities; provide for the return of such facility to the county, municipality or district upon the termination of the lease; and provide for continued treatment of indigent patients.

The Lease with HMA meets all of the requirements of 155.40:

(1) The District found that the Lease was in the best interests of the public and stated the basis of such finding as required by Section 155.40 (*See* "Resolution", adopted March 2, 1999 (Whereas Clause of Lease);

(2) The District reviewed and approved the Articles of Incorporation of Key West HMA, Inc., the lessee, as required by Section 155.40(2)(a), Florida Statutes. (*See* Resolution adopted March 2, 1999 by the Board of Commissioners);

(3) The Definitive Agreement entered into simultaneously with the Lease provides for the orderly transition of the operation and management of the Hospital as required by Section 155.40(2)(c), Florida Statutes. (*See* Definitive Agreement, Paragraph 6.1);

(4) The Lease provides for the return of the Hospital facilities to the District upon the termination of the Lease as required by Section 155.40(2)(d), Florida Statutes (*See* Lease, Paragraphs 3.2, 10.2 and 15.11); and

(5) The Lease provides for the continued treatment of indigent patients as required by Section 155.40(2)(e), Florida Statutes (*See* Lease, Paragraphs 4.1.c. and Exhibit B – 'Agreement for Indigent Care').

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[14] Prior to entering into the Lease, the District requested and received an Informal Attorney General Opinions dated January 25, 1999, and March 30, 1999, concluding that 155.40 authorized the District to enter into the Lease with HMA, and that the District had complied with the requirements for such lease as set forth in 155.40.

The District is statutorily required to delegate the Hospital Operations Decisions to HMA.

The District may transfer such duties and responsibilities related to the management and operation of the Hospital as authorized by 155.40. When initially enacted, the Enabling Act contemplated the operation of a hospital by the District, and not the lease of the hospital to a third party. As such, several parts of the Enabling Act discuss staff privileges and credentialing obligations[15] of the District's Board of Commissioners, when it initially was contemplated that the District would be the licensed owner and operator of the Hospital.[16]

Nothing in the Enabling Act precludes the District from transferring the Hospital Operations Decisions and 155.40 does not require the District to retain such obligations when it leases the facilities to a third party. In fact, because the lessee must be the licensed operator of the hospital pursuant to Chapter 395, Florida Statutes, the District is precluded from retaining authority over the Hospital Operations Decisions. Any such retention would violate Florida hospital licensure laws and preclude AHCA's licensure of a lessee operator that is not responsible for the Hospital Operations Decisions.[17]

Finally, the Florida Legislature in enacting 155.40 did not intend for any district to retain any control or authority over the operations of a public hospital that is leased to a private entity. Not only would such a requirement have created an issue under Florida's hospital licensing laws, but also as a practical matter if the Florida Legislature had included any such requirement, its statutory scheme for allowing public hospitals to privatize their operations would have been unsuccessful. Private entities would not have been willing to take on the liability for operating a public hospital without the ability to control such decisions. Along the same vein, the legislature clarified that private entities that leased and operated a public hospital would not be subject to the public Sunshine Law or the Open Records law.[18] Requiring the private lessee corporation to provide public records access and meeting access, or to cede control of hospital operations to the district would have frustrated the legislative purpose of 155.40.

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[15] Section 3, Section 7(2) and Section 35 therein, of Chapter 2003-307.

[16] Florida's Agency for Healthcare Administration (AHCA) is responsible for licensure of hospitals pursuant to Chapter 395, Florida Statutes.

[17] Sections 395.0191 and 395.0193, Fla. Stat. obligates a hospital to grant or deny staff privileges and provide peer review as a condition of continuing licensure.

[18] Section 395.3036, Fla. Stat. provides that the records of a private corporation that leases a public hospital or other public healthcare facility are confidential and exempt from the provisions of Chapter 119, Fla. Stat. and Article I, Section 24(a) of the Florida Constitution; and that the meetings of the governing board of the private corporation are exempt from Chapter 286, Florida Statues, and Article I, Section 24(b) of the Florida Constitution.

***Question #2**: Are there any residual responsibilities left with the District with respect to some or all of these Hospital Operations Decisions since the Lease is silent in this regard and Section 155.40(6), Florida Statutes, provides that the Lease shall not be construed to be a transfer of governmental functions to a lessee or private party?*

Answer #2: No, the District is not required to retain any responsibility for Hospital Operations Decisions.

As discussed above, Florida's hospital licensure laws actually preclude the District from retaining responsibility for any one or more of the Hospital Operations Decisions. As contemplated under 155.40, the leasing of a public hospital assumes the transfer of all operational control to the lessee, making the private company the licensed operator of the facility. Nothing in the Enabling Act requires the District to retain any responsibility for Hospital Operations Decisions when the District is not the licensed operator of the Hospital.

With respect to Section (6) of 155.40, the Florida Legislature amended 155.40 and added subsection (6) specifically in response to the Florida Supreme Court's decision in *Memorial Hospital-West Volusia.*[19] In 1999, the Court decided in Memorial Hospital – *West Volusia* that the private lessee of a public hospital was subject to the Sunshine Law and the Public Records Act. In reaching its decision, the Court concluded that when a private company operates a hospital for a hospital taxing authority pursuant to a lease agreement, that it was 'acting on behalf of' the public authority and thus was subject to public access laws. In a broad sense, the Court reasoned that such private entity was continuing to fulfill the authority's responsibility to provide hospital services to the community residents. The Court reasoned that the legal effect of this total transfer of the authority's function to operate and maintain the hospital was a delegation of the authorized function to the private lessee. Therefore, the Court concluded that because the lease transferred the authorized functions of the public entity the private lessee was acting on behalf of the authority. In reaching its decision, the Court also noted that the request for records and access to meetings in *West-Volusia* were made prior to the effective date of Section 395.3036 of Florida's hospital licensing laws, which clarified that the Florida Legislature's intent, consistent with its intent in 155.40, was that a private lessee operating a public hospital not be subject to such public access laws. Clearly, this Florida Supreme Court decision created much uncertainty relating to the legislative leasing scheme for public hospitals.

In its continuing efforts to encourage and support privatization to ensure continued viability of public hospitals, the Florida Legislature acted and again clarified it intent by

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[19] *Memorial-West Volusia Inc. v. News-Journal Corp*, 729 So.2d 373 (Fla. 1999). The Board of West Volusia Authority decided to enter into a lease and operating agreement as authorized by section 155.40 with Memorial Health Systems, Inc., a private, not-for-profit corporation that took operation control of the hospital.

amending 155.40. It added subsection (6) clarifying that any lease of a public hospital pursuant to 155.40 shall *not* be deemed to be a transfer of government function to the private lessee corporation and also added subsection (7) clarifying that the management and operation of such hospital by a private lessee shall not be construed as 'acting on behalf' of the hospital district. Therefore, the transfer of all Hospital Operations Decisions to HMA pursuant to the Lease is in compliance with 155.40. The fact that the District has not retained any one or more of the Hospital Operations Decisions does not result in a finding that the Lease is a transfer of the District's governmental functions, or that HMA as lessee is deemed to be acting on behalf of the District. Nothing in the Lease expressly states otherwise to the contrary. Accordingly, as intended by 155.40(6) HMA is not subject to public records or access laws.

Question #3*: Has the District retained sufficient control over the Hospital such that the Lease is not void under 155.40 and cases such as Palm Beach County Health Care District v. Everglades Memorial*[20] *and Indian River County v. Indian River Memorial*[21]*?*

Answer #3*.* Yes, the District has retained sufficient control of the Hospital and the Lease is legally valid under 155.40, *Everglades Memorial* and *Indian River Memorial.*

As discussed above, the Lease meets all of the requirements of 155.40. The Lease is also valid because the District retains sufficient control over the Hospital under both *Everglades Memorial and Indian River Memorial.*

Decided in 1995, the court in *Everglades Memorial* invalidated a lease and financial support agreement finding that the district had pledged public funds to a non-government private body, without provision for insuring operations and expenditures in the public interest.[22] The court was concerned that the district remained obligated to pay the hospital from ad valorem taxes based upon rates charged and expenses incurred by the hospital over which the district had no ultimate influence. Under the financial support agreement, the district agreed to provide, contribute, reimburse, and pay for various services, facilities, and expenses, as well as paying extensive financial obligations of reimbursement. In effect, public funds from ad valorem taxation were used to make up any hospital deficits without any control by the district. Based on these facts, the

[20] 658 So.2d 577 (1995).

[21] 766 So.2d 233 (2000).

[22] Pursuant to Section 155.40, Northwestern Palm Beach County Hospital Board ("Northwestern District") reorganized the Everglades Hospital. The Northwestern District directors independently formed, EMH, a not-for-profit corporation, and immediately thereafter entered into a lease agreement and a "financial support agreement" with the district, in which the Northwestern District agreed to extensive financial obligations of reimbursement. In 1987, the Florida Legislature created the Palm Beach County Health Care District, which in 1991 determined that the operation of the Everglades Hospital was inefficient. The Pam Beach County Health Care District took steps to invalidate the previous transfer of the hospital to EMH and declare the transfer void.

Everglades Memorial court held that the lease and financial support agreement constituted an unconstitutional application of 155.40, because it resulted in the district serving as a mere funding mechanism for the private lessee.

The Lease with HMA as well as the Agreement for Indigent Care comply with *Everglades Memorial*. None of the concerns noted in *Everglades Memorial* exist with the HMA Lease. The District has no obligations to fund any operating deficits of the Hospital and no obligation to levy ad valorem taxation upon the residents to pay for any Hospital operations. HMA assumed the indigent care obligations of the District, without limitation,[23] and to fulfill the health care needs of the District Residents. This eliminated the need for the District to levy ad valorem taxes on the District's residents over the 30 year term of the Lease.

The court in *Indian River Memorial* which was decided in 2000 after *Everglades Memorial*, found that the Indian River County Hospital District retained sufficient control over the leased hospital. The court noted several factors that were relevant in its determination: (1) the district was required to approve the articles of incorporation and bylaws of the lessee and any amendments (2) it appointed three of the thirteen members of a board of directors and one District board member served on the finance committee; (3) the district was also allowed to remove a hospital board member who repeatedly acted in a manner inconsistent with the public purpose for which the district was established; (4) any expenditures for improvements or alterations over $500,000 had to be approved by the district; (5) the lessee was also prohibited from transferring any of its rights in the leasehold interest without the district's approval; (6) the district independently determined how much it would pay each year to the lessee for indigent care services and appropriated only a certain amount without regard to how much the lessee operator charged for services; and (7) since the private lessee was required to operate a full-service hospital providing the same level and variety of services at least equal to those offered at the time of the lease, it would need permission from the district to discontinue any such service. Based on these controls, the court in *Indian River Memorial* found that the lease complied with 155.40 and *Everglades Memorial*.

Although the HMA Lease does not contain the controls described in (3), (4) and (7) which were part of the *Indian River Memorial* lease, it contains all others and importantly the HMA Lease goes even further to protect the public funds by essentially taking the Hospital off of the tax rolls of the District. By HMA assuming the indigent care obligations of the District, without limitation, there is no need for the District to levy ad valorem taxes on the District's residents over the entire 30 year term of the Lease. This was not the case in *Indian River Memorial*.

[23] The District agreed to reimburse HMA up to $1.5M annually as an annual indigent care subsidy for the first 10 years of the Lease. *See* Article II 2.1.i.

Based on the foregoing, we believe a Florida court would find the District has retained sufficient control to uphold the HMA Lease in accordance with the holdings in *Everglades Memorial* and *Indian River Memorial*.

Question #4: *Seventeen years into the Lease, is there a legal route for the District to have any influence over some or all of the Hospital Operating Decisions without the consent of HMA?*

Answer #4. No, absent a mutual agreement with HMA to modify the terms and conditions of the Lease, it is our opinion that there is no legal basis to invalidate the Lease or to require HMA to cede any operational control of the Hospital to the District.

Question #5: *If the District is unable to exert influence over some or all of the Hospital Operating decisions, can the existing Lease be terminated without financial risk to the District?*

Answer #5: No, there would be financial risk to the District. It is our opinion that the Lease is valid under the Enabling Act, 155.40, *Everglades Memorial* and *Indian River Memorial.* Therefore, there is no legal basis for invalidating the Lease. Absent an event of default under the Lease as set forth in Article X, which would entitle the District to seek a writ of eviction in the appropriate court in Monroe County, the existing Lease is not terminable without financial risk to the District.

We appreciate your confidence in our firm and the opportunity to answer the specific questions requested by this Board on behalf of The Lower Florida Keys Hospital District. Please note that our analysis is based on current law and we assume no obligation to provide any supplemental analyses based upon any future changes of law.

Sincerely,

Holland & Knight, LLP

Maria Currier
Partner

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