Health Care District, sovereign/antitrust immunity

Number: INFORMAL

Date: September 16, 2005

Ms. Andrea M. Ferrari
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Palm Beach County
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Boca Raton, Florida 33431

Dear Ms. Ferrari:

On behalf of the Health Care District of Palm Beach County, you ask whether:

The Health Care District of Palm Beach County is entitled to immunity against private suits and antitrust enforcement actions arising from its participation and/or leadership in an Emergency Department Management Group?

The participation of the Health Care District of Palm Beach County in the Emergency Department Management Group, by and through district representatives who have advisory responsibilities to and/or certain delegated authority from the Health Care District's Advisory Board, render the proceedings of the Emergency Department Group subject to Florida's Government in the Sunshine Law?

According to your letter, the Emergency Department Management Group (EDMG) is being formed for the purpose of addressing a crisis in specialty physician coverage in Palm Beach County's emergency rooms. You state that the stakeholders and participants include nine for-profit hospitals, three not-for-profit hospitals, one public hospital and a trauma agency operated by the Health Care District of Palm Beach County (District), and the physician membership of the Palm Beach County Medical Society Services, Inc. EDMG would serve as a vehicle to effectuate and facilitate participation and cooperation among the stakeholders. You further state that the recommended collaboration and function of the EDMG is to perform ongoing assessment and coordinate stakeholder activities with respect to: 1) the compensation for physicians providing call coverage in Palm Beach County, 2) the establishment and coordination of all patient referrals to "Regional Centers of Excellence" for certain types of specialty emergency care, and 3) the recruitment of new specialty physicians to the county.

Immunity

You state that the District recognizes that its participation in the coordinated efforts among the stakeholders may result in some interference with natural competition in the marketplace for healthcare service and this could expose the District and/or EDMG to scrutiny for economically injurious or illegally anti-competitive behaviors. The District considered seeking an Antitrust No-Action letter pursuant to section 408.18, Florida Statutes, prior to proceeding with the formation of the EDMG; however, because of the fact-specific nature of such analysis, the District

recognized that such a letter could not be granted until the organizational structure and operating procedures of the EDMG had been more conclusively decided.

Attorney General Opinions are based on a specific factual situation presented to this office. Resolution of your questions requires a specific statement of the facts. According to your letter, it does not appear the plans regarding the structure and operation of the EDMG have been finalized. In the absence of a specific statement of facts, this office cannot definitively comment on the question presented. The following general comments, however, are offered in an effort to be of assistance.

A. Sovereign Immunity

You inquire whether the district's decision to participate in the formation and operation of the EDMG, in whatever form is ultimately found to be legally and administratively viable, is a discretionary decision for purposes of sovereign immunity.

With the enactment of section 768.28, Florida Statutes, the Florida Legislature waived the state's immunity from tort liability to the extent provided therein.[1] Subsection (1) of the statute provides in part:

"Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. . . ."

The waiver of immunity is limited to $100,000 for any claim or judgment by one person or $200,000 for all claims arising out of the same judgment or occurrence, regardless of "whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974."[2]

"[S]tate agencies or subdivisions" are defined to include, among others, "the independent establishments of the state; . . . and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities[.]"[3] This office has previously stated that special districts created pursuant to law or ordinance fall within the purview of the above definition.[4] In *Eldred v. North Broward Hospital District,*[5] the Supreme Court of Florida considered whether a hospital district was a "state agency or subdivision" for purposes of section 768.28, Florida Statutes. Noting that the governmental status of special districts is recognized by law, the court concluded that the hospital district was an "independent establishment of the state" and thus covered by section 768.28. The Health Care District of Palm Beach County, created by special act as an independent establishment of the state, falls within the definition of "state agencies or subdivisions" contained in s. 768.28(2) and thus is covered by the provisions of that statute.[6]

The courts of this state have recognized that although section 768.28, Florida Statutes, evinces

the intent of the legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. In *Commercial Carrier Corp. v. Indian River County*,[7] the Court distinguished between "planning" and "operational" level activities, with only the former remaining immune from liability. Identifying these functions is done primarily by distinguishing, through a case by case analysis the "planning" and "operational" levels of decision making by governmental agencies.[8] For an act to be considered discretionary it must involve an exercise of executive or legislative power "such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning."[9] On the other hand, "an 'operational' function is one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented."[10]

The Court in *Commercial Carrier Corporation* approved the following test for differentiating discretionary from operational functions developed by the Washington Supreme Court in *Evangelical United Brethren Church v. State*:[11]

"(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would notchange the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? and (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?"

If these questions can be clearly and unequivocally answered in the affirmative, then the challenged act can be classified as a discretionary governmental process. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.[12]

In 2003, the Legislature enacted Chapter 03-326, Laws of Florida, codifying, amending, and reenacting the special acts relating to the Health Care District of Palm Beach County (District).[13] Section 3 of the special act recreates the District's charter. Section 6 of the charter provides that the governing board of the District is "vested with the authority and responsibility to provide for the comprehensive planning and delivery of adequate health care facilities, including, but not limited to, hospitals, and services for the citizens of the County, particularly medically needy citizens." To accomplish this, the board is authorized:

"(3) To provide health care services to residents of the County through the utilization of health care facilities not owned and operated by the District. The provision of said care is hereby found and declared to be a public purpose and necessary for the preservation of the public health and welfare of the residents of the County."[14]

Section 6(2) of the District's charter specifically provides that it is within the power of the board to "provide services and facilities *jointly* with other public or *private* health care providers, with appropriate provision to reduce the costs of providing service for all users thereof." (e.s.) Pursuant to section 6(28) of the charter, the District is authorized:

"To plan, set policy for, and fund from its revenue sources the establishment and implementation of cooperative agreements with other government authorities and public and *private* entities within and outside of Palm Beach County which promote the efficiencies of local and regional trauma agencies, rural health networks, and cooperative health care delivery systems . . . ." (e.s.)

You have stated that the EDMG would serve as a vehicle to effectuate and facilitate participation and cooperation among the stakeholders.

In light of the powers of the District, the actions of the District in deciding to participate in the formation of EDMG would appear to be within the scope of the authority and duties of the District. The functions and activities of the EDMG appear to fall within the parameters of the District's enabling legislation, thereby allowing the District to undertake formation and governance of EDMG.

The decision by the District Board to form the EDMG would be considered an exercise of discretionary power. However, the activities of the EDMG, once formed, in implementing strategies to provide emergency medical services to residents of the county may well fall into the "operational" function category of government activity. Such operational activities would not enjoy immunity from liability.

Accordingly, while the District's decision in forming EDMG would appear to constitute a discretionary decision immune from tort liability, actions taken by the District and its officials or the EDMG in implementing such a decision would require a factual analysis to determine if immunity would apply.

B. Antitrust Immunity

You also ask whether the protections of the Local Government Antitrust Act extend to the District in establishing and operating the EDMG.

The federal Local Government Antitrust Act,[15] forecloses the recovery of damages from local governments in federal antitrust suits. "Local government" is defined to include, among others, any "special function governmental unit established by State law in one or more States."[16] The District, created by special act of the Legislature to provide health care services to the residents of Palm Beach County, would appear to qualify as a "local government" for purposes of the federal act.[17]

The case law supports such a determination. In *Palm Springs Medical Clinic, Inc. v. Desert Hospital,*[18] the district court, citing the Act's legislative history, held that the language of the Act was inclusive of hospital districts as "local governments" and therefore they enjoyed the protections of the Act.[19] The court considered whether the federal Act conferred its protections upon local governments only for official conduct which the plaintiff defined as any conduct within the government's lawful regulatory authority. After analyzing the legislative history and grammatical construction of the statute, the court concluded that the limiting words "acting in an official capacity" applied only to the clause "official or employee thereof" and not "any local government." Thus, the court viewed local governments as having absolute immunity from

damage claims under the Act. Similarly, in *Crosby v. Hospital Authority of Valdosta*,[20] the 11th Circuit held that a hospital authority established under Georgia law fell within the scope of the term "local government" in the Local Government Antitrust Act.

The geographic jurisdiction of the Health Care District of Palm Beach is limited to Palm Beach County and it is not a private regulatory body. The Health Care District of Palm Beach County, created pursuant to special law to carry out the limited and special function of providing health care services to the residents of Palm Beach County, would appear to constitute a unit of local government entitled to enjoy the limited immunity from damages claims provided for by the federal Local Government Antitrust Act.

As to whether an officer or an employee of the District who votes or participates in the proceedings of the EDMG is acting in his or her "official capacity" for purposes of the federal act, this office would note that in *Crosby, supra,* the 11th Circuit applied a two-pronged test to determine whether employees or officials enjoyed immunity under the Local Government Antitrust Act for their actions. To enjoy immunity the official or employee must show that the challenged restraint is one clearly articulated and affirmatively expressed as entity policy and that the policy is actively supervised by the governmental entity.[21] Assuming the first prong is satisfied (see discussion in 1[C] below), the conditions of the second prong are satisfied if the governing board of the District exercises "ultimate control" and has the ability to disapprove the actions of its officials or employees.[22] Thus, depending on the extent of control and supervision that the board maintains over its officials and employees and their roles in the EDMG, they may be acting within their official capacity and therefore enjoy immunity.

You should be advised, however, that the prohibitions set forth in the Local Government Antitrust Act pertain only to suits seeking "damages, interest on damages, costs, or attorney’s fees [that] may be recovered under" the federal antitrust laws. The Act provides no express prohibition regarding either criminal antitrust actions brought under federal law or actions brought for injunctive relief. Only state law provides for such limitations of antitrust actions. Specifically, section 542.235, Florida Statutes, forecloses criminal antitrust actions from being brought against any local government or "any local government official or employee." It also provides that "[n]o injunctive or other equitable relief . . . shall be granted against a local government or its officials or employees acting within the scope of their lawful authority . . . ." However, this prohibition is not absolute. The official conduct which forms the basis of the suit must bear "a reasonable relationship to the health, safety, or welfare of the citizens of the local government, unless the court finds that the actual or potential anticompetitive effects outweigh the public benefits of the challenged action." Accordingly, under state law, it appears that, injunctive relief and other equitable remedies may still be obtained against the District, even where there is a reasonable relationship between the official conduct and the "health, safety and welfare of the citizens," if a court determines that the anticompetitive effects of the conduct in question outweigh its public benefits.

C. State Action Doctrine

You ask whether the District’s participation in the Emergency Department Management Group is part of a "clearly articulated state policy" as needed for the board’s actions to be protected by the State Action Doctrine.

In *Parker v. Brown*,[23] the United States Supreme Court, relying on principles of federalism and state sovereignty, refused to apply the Sherman Act to the anti-competitive conduct of a state acting through its legislature. Reasoning that the Act was to prohibit private restraints on trade, not state action of a local nature intended to benefit the state's citizens, the Court concluded that anti-competitive actions prescribed by the states "as an act of government" were not prohibited by the Sherman Act.

While the *Parker* doctrine protects the anti-competitive actions of the states from federal antitrust laws, it does not directly apply to a state's political subdivisions.[24] The United States Supreme Court, however, has applied the *Parker* doctrine to the anti-competitive actions of public entities when: (1) the entity is a political subdivision of the state; (2) the state, by statute, authorizes the political subdivision to perform the challenged action; and (3) the state, by statute, has clearly articulated a state policy authorizing anti-competitive conduct.[25]

The District, created by special act of the Legislature to perform the function of providing health care services to the residents of Palm Beach County, is a political subdivision of the state.[26] As discussed above, section 6(28) of the District's enabling legislation authorizes the District Board "to plan, set policy for, and fund from its revenue sources the establishment and implementation of cooperative agreements with other government authorities and public and private entities."[27] Section 6(18) authorizes the Board to "cooperate with, or contract with… private individuals or entities as may be necessary… in connection with any of the powers, duties, or purposes authorized by this act."[28] The Board is vested with the "responsibility to provide for comprehensive planning and delivery of adequate health facilities, including but limited to, hospitals, and services for the citizens of the County."[29] Thus the decision of the District to participate in the formation of EDMG would appear to be within the scope of the authority and duties of the District.

The dispositive issue is whether the state through the statute has clearly articulated a state policy authorizing conduct such as the market allocation plan contemplated by the description of functions of the EDMG. The District's enabling legislation does not expressly authorize such actions. The District's charter describes the functions and duties of the Board as "the authority and responsibility to provide for the comprehensive planning and delivery of adequate health care facilities. including but not limited to, hospitals, and services for the citizens of the County, particularly medically needy citizens."[30] To achieve these ends the Legislature vests the Board with some of the following powers: to lease land and facilities, to build a hospital in the Glades area, to provide services jointly, to borrow money and issue bonds, to employ administrators, attorneys, physicians, to plan and set policy for the establishment and implementation of cooperative agreements with private as well as other governmental entities and to establish and appoint members to boards or committees that the District Board deems appropriate.[31]

Given that the Board is not explicitly given the authority to undertake market allocation, the question arises as to whether it was reasonably foreseeable to the Legislature that such conduct would be the result of some of the powers granted to the Board. The 11th Circuit has concluded that the state policy authorizing anti-competitive conduct need not be express for it to be "clearly articulated" and that the anti-competitive conduct in question need only be a foreseeable result of the powers granted to the political subdivision. In *Federal Trade Commission v. Hospital Board of Directors of Lee County*,[32] the court deemed as foreseeable the anti-competitive

acquisition of a hospital by the Hospital Board of Directors where the Legislature had given the Board the authority to acquire other hospitals.

The determination as to whether the Legislature has clearly articulated a state policy authorizing anti-competitive conduct in any given instance is fact specific. While in the instance inquiry, the enabling legislation is similar to that considered by the court in *Federal Trade Commission v. Hospital Board of Directors of Lee County* as it gives the Board of the Health Care District of Palm Beach County the authority to acquire existing health care facilities,[33] the determination would depend on the District's enabling legislation and the specifics of the proposed plan. In addition, this office would note that the federal enforcing agency has traditionally carefully scrutinized the terms of the enabling legislation to ensure that the Legislature has "clearly articulated" such anti-competitive activity.

In light of the court's decision in *Federal Trade Commission v. Hospital Board of Directors of Lee County*, *supra,* the courts may well hold that the Legislature foresaw that certain conduct undertaken by the Board would be anti-competitive and that the enabling legislation articulates a state policy authorizing that conduct.

While the District itself may be immune for its role in the anti-competitive conduct of the EDMG, for-profit participants do not normally enjoy antitrust immunity. For a private party to be immune for anti-competitive conduct, the actions "must be actively supervised by the State itself,"[34] *i.e.*, it is necessary for the state to exercise ultimate control over the challenged anti-competitive conduct.[35] From the information provided to this office, it appears that the District Board will not exercise ultimate control over the activities of the EDMG. Rather it appears that the Board’s participation in the EDMG will only be that of one of several "stakeholders." This does not appear to be sufficient to satisfy the "ultimate control" required for antitrust immunity pursuant to the State Action doctrine. Therefore, the for-profit private stakeholders that participate in the EDMG would not, based upon the facts presented to this office, be immune from liability for the anti-competitive conduct of the EDMG.

Government in the Sunshine Law

Florida's Government in the Sunshine Law, section 286.011(1), Florida Statutes, provides:

"All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times[.]"

The basic requirements of the Government in the Sunshine Law are that meetings of a board or commission be open to the public, reasonable notice of such meetings be given, and minutes of the meeting be taken.

Florida courts repeatedly have stated that the entire decision making process is subject to the Sunshine Law, and not just the formal assemblage of a public body at which voting to ratify an official decision is carried out. The statute extends to discussions and deliberations as well as to formal action taken by a public body.[36]

Moreover, the statute has been held applicable to private organizations when the private entity has been created by a public agency, when there has been a delegation of the public agency's governmental functions, or when the private organization plays an integral part in the decision-making process of the public agency.[37] The courts, in considering the applicability of the open government laws to private entities, have also focused on whether the private entity is merely providing services to the public agency or is standing in the shoes of the public agency.[38]

As the court stated in *IDS Properties, Inc. v. Town of Palm Beach*,[39] the Sunshine Law does not provide for any "government by delegation" exception; a public body therefore cannot escape application of the Sunshine Law by delegating the conduct of public business through an alter ego. This office has considered a private entity that has been delegated a public function to be subject to the provisions of the open government laws. For example, in Attorney General Opinion 98-49, this office stated that an association designated by a county to carry on duties of a dissolved county fine arts council and receiving funding from specialty license plates is subject to the Sunshine Law.[40]

Your question involves the participation of District representatives who have been delegated authority by the District's governing board in meetings of the EDMG. Such meetings will include the discussion and narrowing of the options of the organizational structure of the EDMG, (whether District controlled or independent), the operational duties and procedures including roles for the EDMG and the various stakeholders inclusive of the District; and funding for the EDMG, including District funding. These functions would appear to be sufficient to bring the meetings of District representatives on the EDMG within the scope of the Sunshine Law.

In light of the above, it appears that the participation of the Health Care District of Palm Beach County in the Emergency Department Management Group, by and through district representatives who have advisory responsibilities to and/or certain delegated authority from the Health Care District's Advisory Board, renders the proceedings of the Emergency Department Group subject to Florida's Government in the Sunshine Law.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tfl

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[1] *See,* Art. X, s. 13, Fla. Const., stating that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."

[2] *See* s. 768.28(5), Fla. Stat.

[3] *See* s. 768.28(2), Fla. Stat.

[4] *See, e.g.*, Ops. Att'y Gen. Fla. 81-57 (1981) (Southwestern Palm Beach County Hospital

District is a corporation primarily acting as an instrumentality of the county within the definitional purview of s. 768.28); 78-127 (1978) (Tampa Port Authority, created by special act, is within definitional purview and enacting terms of s. 768.28); 78-113 (1978) (East Beach Water Control District, a public corporation, is within the definitional purview of s. 768.28).

[5] 498 So. 2d 911 (Fla. 1986).

[6] *Id.*; *Brown v. North Broward Hospital District*, 521 So. 2d 143 (Fla. 4th DCA 1988); *Lower Florida Keys Hospital District v. Littlejohn*, 520 So. 2d 56, 57 (Fla. 3rd DCA 1988); *see also Hillsborough County Hospital Board and Welfare Board v. Taylor*, 546 So. 2d 1055 (Fla. 1989).

[7] 371 So. 2d 1010, 1022 (Fla. 1979).

[8] *Department of Health and Rehabilitative Services v. B.J.M*, 656 So. 2d 906 (Fla. 1995) citing *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).

[9] *Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla.. 1989). *And see Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005) (government unit has discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question; however, once the unit decides to operate the swimming facility, it assumes the common law duty to operate the facility safely, just as a private individual is obligated under like circumstances); *Department of Health & Rehabilitative Services v. Whaley*, 574 So. 2d 100 (Fla. 1991) (operational level acts are not necessary to or inherent in policy or planning, but, rather, reflect only secondary decisions for implementing discretionary plans and policies).

[10] *Id.*

[11] 407 P.2d 440, 445 (Wash.1965) .

[12] *Id.*

[13] *See* ss. 1 and 2, Ch. 03-326, Laws of Fla., respectively stating that pursuant to s. 189.429, Fla. Stat., the act "constitutes the codification of all special acts relating to the Health Care District of Palm Beach County" into a single, comprehensive special act charter for the District, and codifying, reenacting, amending and repealing Chs. 87-450, 92-340, 93-382, 96-509, and 00-489, Laws of Fla., as provided therein. *And see* s. 4 of Ch. 03-326, Laws of Fla., stating that "Chapters 87-450, 92-340, 93-382, 96-509, and 2000-489, Laws of Florida, are repealed."

[14] Section 6(3) of the charter (s. 3[6][1], Ch. 03-326, Laws of Fla.).

[15] 15 U.S.C. ss. 34-36.

[16] 15 U.S.C. s. 34(1)(B).

[17] *Cf.* s. 189.403, Fla. Stat., defining "Special district" as "a local unit of special purpose, as opposed to general purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet."

[18] 628 F. Supp. 454 (C.D. Cal. 1986).

[19] The court's rationale for this determination was that the language of the act, "any other general function government unit established by state law", is inclusive rather than exclusive so that types of local government units not explicitly mentioned may also fall within the Act provided: 1) they "have a geographic jurisdiction that is not contiguous with, and is generally substantially smaller than, that of the State that established it," and 2) is not a private regulatory body that operates with the sanction of a local government. *Id*. at 457.

[20] 93 F.3d 1515 (11th Cir. 1996).

[21] *Id*. at 1536.

[22] *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital*, 853 F.2d 1139, 1143 (4th Cir. 1988).

[23] 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943).

[24] *Cf. City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 412, 98 S. Ct. 1123, 1136, 55 L. Ed. 2d 364 (1978) (political subdivisions "are not themselves sovereign; they do not receive all the federal deference of the States that create them").

[25] *Federal Trade Commission v. Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994), citing *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985).

[26] *See* s. 1.01(8), Fla. Stat., stating that the words "public body," "body politic," or "political subdivision" include "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and *all other districts in this state*." (e.s.)

[27] Section 6(28), of the charter [s. 3(6)(28), Ch. 03-326, Laws of Fla.].

[28] Section 6(18), of the charter [s. 3(6)(18), Ch. 03-326, Laws of Fla.].

[29] Section 6, of the charter [s. 3(6), Ch. 03-326, Laws of Fla.].

[30] *Id.*

[31] Section 6, of the charter [s. 3(6), Ch. 03-326, Laws of Fla.].

[32] 38 F.3d 1184 (11th Cir. 1994).

[33] *See* s. 6(8) of the charter [s. 3(6)(8), Ch. 03-326 Laws of Fla.], which provides that the District Board has the authority

"(8) To plan and fund the construction, acquisition, ownership, leasing, repair, maintenance, extension, expansion, improvement, rehabilitation, renovation, furnishing, and equipping of health care facilities and to pay all or any part of the costs thereof from the proceeds of operating

revenue, bonds, lease-purchase financing, or other obligations of indebtedness of the District or from any contribution, gift, or donation or other funds of the District for such purpose."

[34] *See California Retail Liquor Dealers Association v. Midcal*, 445 U.S. 97,105 (1980), in which the Court held that while the first standard for antitrust immunity under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), was satisfied, *i.e.*, that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy"; the second requirement – that the policy must be "actively supervised" by the State itself – was not:

"California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .' 317 U.S. at 351."

[35] *See Patrick v. Burget*, 486 U.S. 94, 101, 108 S. Ct. 1658, 1668, 100 L. Ed. 2d 83 (1988), in which the Court stated:

"The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."

[36] *See, Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969), in which the Court recognized the right of the public to be present and heard during all phases of enactments by public boards; *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3rd DCA 1979). *And see Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2nd DCA 1969), stating:

"Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act."

[37] *See, e.g.,* Ops. Att'y Gen. Fla. 92-53 (1992) (direct-support organization created for purpose of assisting public museum subject to s. 286.011, Fla. Stat.); 83-95 (1983) (where county accepted services of non-governmental committee to recodify and amend county's zoning laws, committee subject to Sunshine Law).

[38] *See, e.g., Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 729 So. 2d 373 (Fla. 1999); Ops. Att'y Gen. Fla. 99-53 (1999) (architectural review committees of

homeowners' association whose approval is required by county ordinance prior to obtaining county building permit subject to Sunshine Law); 85-55 (1985) (task force, although not appointed by the city, in effect stood in the place of the city commission when it analyzed information regarding the improvement of the downtown business district and thus was subject to Sunshine Law).

[39] 279 So. 2d 353, 359 (Fla. 4th DCA 1973), *certified question answered sub nom., Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). *See also News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546, 547-548 (Fla. 2nd DCA 1982).

[40] *And see* Ops. Att'y Gen. Fla. 99-53 (1999) (architectural review committees of homeowners' association whose approval is required by county ordinance prior to obtaining county building permit subject to Sunshine Law); 85-55 (1985) (task force, although not appointed by the city, in effect stood in the place of the city commission when it analyzed information regarding the improvement of the downtown business district and thus was subject to Sunshine Law); 83-95 (1983) (non-governmental advisory committee, which had been impliedly delegated the authority to act on behalf of the county commission in the examination and revision of the zoning code, subject to s. 286.011).