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IN THE SUPREME COURT OF FLORIDA

Original

THE STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of Brevard County, Florida including nonresidents owning property or subject to taxation therein, and all others having or claiming any right, title or interest in property to be affected by the incurrence by Brevard County of its obligations under the Lease herein described, or to be affected thereby,

Appellants,

v.

BREVARD COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellee.
_____/

CASE NO. 72,525

ANSWER BRIEF OF APPELLEE BREVARD COUNTY

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ATTORNEYS FOR APPELLEE

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PREFACE

Appellant State of Florida will be referred to as "Appellant." Appellee Brevard County will be referred to as the "County" or as "Brevard County." Citations to Appellant's Appendix will be stated as "App ___."

JURISDICTIONAL STATEMENT

This is an appeal pursuant to Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure from a final order issued pursuant to Chapter 75, Florida Statutes, validating a proposed Lease obligation of the County.

STATEMENT OF THE CASE AND FACTS

Appellant's Statement of the Case and Facts omits the underlying public policies which justify the transaction sought to be validated.

A lease transaction coupled with the issuance of certificates of participation offers an alternative to either purchasing land or equipment through the issuance of traditional revenue bonds or leasing land or equipment through a commercial vendor. At page 2 of its Initial Brief, Appellant accurately characterizes the County's obligation as "a one-year lease with annual 'renewal options' in favor of the County." Public bodies elect to lease land or equipment for a variety of reasons. The decision to lease is most often made because (1) the public body is uncertain how long it will require use of the land or equipment or (2) its annual budget is inadequate to fund a purchase without increasing ad valorem taxes. In the first instance, the public body does not wish to make a purchase; in the second instance, it may desire to make a purchase but is financially unable to do so. In the second instance, the public body could finance acquisition of the land or equipment through the issuance of traditional bonds or notes. This latter alternative, however, would necessitate securing payment of the obligation with a revenue source over a number of budget years. An annual lease with renewal options provides a method to acquire the land or equipment while preserving the public body's budgetary discretion in future years.

The transaction sought to be validated in this cause offers three principal advantages over a traditional commercial lease with renewal options: first, the public body exercises significantly more control over the activities of the lessor, including matters related to acquisition, delivery and installation of equipment, and matters relating to insurance, maintenance and repair of either land or equipment; second, the "single client" nature of the lessor insulates the public body from financial or other difficulties which may result from transactions of the lessor with other lessees; and third, access to the tax-exempt capital market is likely to result in lower costs (App 126-128).

Brevard County accepts Appellant's Statement of the Case and Facts as supplemented above.

SUMMARY OF THE ARGUMENT

Brevard County's obligation to make Lease payments in the transaction sought to be validated in this cause is specifically restricted to its non-ad valorem revenues. The County has not covenanted to meet its obligations from revenues derived from any form of ad valorem taxation. Accordingly, the referendum requirements contained in Article VII, Section 12 of the Florida Constitution are not expressly applicable.

County of Volusia v. State, 417 So. 2d 968 (Fla. 1982) extends the express prohibition against pledging ad valorem taxes without referendum approval to encompass pledges of non-ad valorem revenues which inevitably lead to higher ad valorem taxes during the life of the bonds or create an actual compulsion to increase ad valorem taxes thus constituting an "implied pledge" of ad valorem tax revenues. Since the obligation sought to be validated in this cause completely preserves the County's discretion in adopting its budget on an annual basis, no "implied pledge" of ad valorem taxes has been created.

The trial court has made a specific finding that "any time you spend money it might have some reaction on the ad valorem taxes but I find that the compulsion to increase ad valorem taxes does not exist in the posture of this bond validation." (App 132)

The County's Lease obligation is clearly distinguishable from Nohrr v Brevard County Educational Facilities Authority, 247 So. 2d 304 (Fla. 1971) because its annual renewal feature fully

preserves the County's budgetary discretion for all future fiscal years. Moreover, there is no prohibited security interest created because there is no right of foreclosure against the leased equipment.

POINT I

THE COUNTY'S PROPOSED OBLIGATION TO MAKE LEASE PAYMENTS DOES NOT REQUIRE REFERENDUM APPROVAL UNDER ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION.

The financing contemplated by the County under the Lease and Certificates of Participation is a novel and innovative financing technique that preserves the County's annual budgetary discretion, creates a more effective and secure leasing vehicle and achieves savings in financing costs from those incurred in traditional commercial leases customarily entered into by governmental units. The County preserves its discretion to commit non-ad valorem revenues and to exercise its ad valorem taxing power in its future annual budgetary deliberations. No bondholder, vendor or outside party has the right to invade such discretion or to compel any budgetary decision. The budgetary discretion is unfettered by the financing transaction. There is no pledge of any non-ad valorem revenues in the event a decision not to renew the Lease is made each year during the annual adoption of the County budget.

The leased property is secure from adverse vendor activities during the period the County makes its annual decision to continue possession.

Savings in the annual Lease payments are realized under the contemplated financing structure from that available in a traditional commercial lease because of the availability of tax-exempt financing to local governments.

The County has not Pledged Ad Valorem Taxes to Secure Lease Payments.

Article VII, Section 12 of the Florida Constitution permits local governments with taxing powers to issue bonds payable from ad valorem taxation and maturing more than twelve months after issuance only: (1) to finance or refinance capital projects approved by vote of the electors; or (2) to refund outstanding bonds and interest and redemption premium at a lower net average interest cost rate. Local governments are not constitutionally prohibited from incurring an obligation payable only from non-ad valorem sources or from incurring an obligation payable from ad valorem taxes which does not extend beyond twelve months.

It is clear from Section 10 of Brevard County Ordinance 87-31 (the "Ordinance") and Section 406 of the proposed Lease Agreement (the "Lease") that the County's obligation to make Lease payments in the transaction sought to be validated in this cause is specifically restricted to its non-ad valorem revenues and that the County has not covenanted to meet its obligations from revenues derived from any form of ad valorem taxation (App 12, 25). Accordingly, the referendum requirements contained in Article VII, Section 12 of the Florida Constitution are not expressly applicable.

The Lease does not Create an "Implied Pledge" of Ad Valorem Taxes as Described in Volusia County v. State.

It is contended, however, that the rule initially announced in County of Volusia v. State, 417 So. 2d 968 (Fla. 1982) requires referendum approval as a condition precedent to the County's incurrence of its Lease obligation. In County of Volusia, this Court affirmed a judgment of the circuit court denying validation of Volusia County's proposed capital improvement bonds. The bonds were to be amortized over a period encompassing multiple budget years and secured by a pledge of all available, unencumbered sources of county revenue other than ad valorem taxation including regulatory fees and service charges. Volusia County also covenanted in the resolution authorizing issuance of the bonds to maintain all programs and services which generated such regulatory fees and service charges.

Based upon the express language of County of Volusia, the County's Lease obligation is distinguishable by virtue of the fact that the Lease does not include a covenant to maintain revenue-generating services. Perhaps more importantly, the County's Lease obligation in all respects preserves the County's discretion in adopting its budget on an annual basis; accordingly, no "implied pledge" of ad valorem taxes has been created within the framework of County of Volusia.

Prior to this Court's decision in County of Volusia, the leading case relating to a pledge of multiple non-ad valorem

revenue sources was Town of Medley v. State, 162 So.2d 257 (Fla. 1964), in which this Court approved the issuance, without a referendum, of bonds secured by the pledge of revenues derived from user charges to be generated by the city's water system and from cigarette taxes, franchise taxes, a utility tax and an occupancy tax. This Court noted that whenever a municipality has been using funds from particular non-ad valorem sources to meet its operating costs and then diverts the funds by pledging them to payment of a specific indebtedness, this would probably require an increase in ad valorem taxes to make up the deficiency in funds available for operating expenses. Nevertheless, this Court declined to rule that referendum approval was required for issuance of the bonds, reasoning:

> A contrary holding would mean that any pledging of non-ad valorem revenues previously used for the general operating expenses of a municipality would require approval by vote of the freeholders and such was never the purpose of the cited constitutional provision. Town of Medley (at page 258)

A similar result was reached in State v. Alachua County, 335 So.2d 554 (Fla. 1976).

In County of Volusia v. State, the Court distinguished its earlier decisions in Town of Medley and Alachua County on two bases: first, the bonds were secured by a pledge of all non-ad valorem revenue sources as compared to one or more specific sources; and second, the bond resolution included a covenant to maintain certain revenue generating programs. Unlike the County's renewable Lease obligation sought to be validated in the

instant case, Volusia County made a pledge and commitment, enforceable by bondholders, of all future non-ad valorem revenues for payment of future debt service. Since a legally enforceable future county budgetary commitment had been made to bondholders, the discretion of the board of county commissioners to exercise ad valorem taxing power in the adoption of future county budgets had been fundamentally restricted. As a consequence, this Court reasoned:

> To maintain all of the programs that produce the revenues, while devoting the revenues themselves to the retirement of the bonds, will inevitably require that ad valorem taxes be increased so that the county will have sufficient operating revenue to maintain the programs and services that generate the pledged revenues. County of Volusia at page 971.

This Court noted that ad valorem taxes were not directly pledged to payment of the bonds but held:

> That which may not be done directly may not be done indirectly. See, e.g., State v. Halifax Hospital District, 159 So.2d 231 (Fla. 1963). While the county has not directly pledged ad valorem taxes to the payment of the bonds, its pledge of all other available revenues, together with its promise to do all things necessary to continue to receive the various revenues, will inevitably lead to higher ad valorem taxes during the life of the bonds, which amounts to the same thing. We find in this case that the pledge of all available revenues, together with a promise to maintain the programs entitling the county to receive the various revenues, will have a substantial impact on the future exercise of ad valorem taxing power and brings this case within the rule of Halifax Hospital District. County of Volusia at page 972.

In State v. Halifax Hospital District, a special district with ad valorem taxing power attempted to pledge as security for bonds all of its available revenues. The District also covenanted to fully maintain its operations in order to ensure that it continued to receive the pledged revenues. The general operations of the district were funded through ad valorem taxes. The Court held that the district's pledge of all available non-ad valorem revenues, together with the promise to maintain all operations during the life of the bonds, would have more than mere incidental effects on the District's ad valorem taxing power.

Several cases have distinguished County of Volusia, the most important of which are Jacksonville Shipyards v. Jacksonville Electric Authority, 419 So.2d 1092 (Fla. 1982), State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983) and City of Palatka v. State, 440 So.2d 1271 (Fla. 1983).

In Jacksonville Shipyards v. Jacksonville Electric Authority, the Florida Supreme Court approved the issuance, without a referendum, of bonds secured by a pledge of revenues generated by the Jacksonville Electric Authority. The City of Jacksonville had previously received an annual revenue contribution from the Authority. Because the Authority's revenues were pledged to the payment of bonds, the city would probably lose its annual contribution. Opponents of the validation argued that if the city were deprived of this source

of revenue, it might be forced to levy additional ad valorem taxes. This Court stated:

> The possibility that the city will not receive an annual contribution . . . will have at the very most a merely incidental effect on the city's exercise of its ad valorem taxing power. The situation does not even begin to approach the actual compulsion to increase ad valorem taxes which we found in County of Volusia v. State. Jacksonville Shipyards at page 1094.

In State v. City of Daytona Beach, the city entered into an interlocal agreement containing a pledge of two specific revenue sources. The interlocal agreement also provided that:

> the city may pay from any legally available source of funds, other than ad valorem taxes, the amount pledged by this interlocal agreement (Emphasis by the court). City of Daytona Beach at page 983.

Opponents argued that the city had not established the sufficiency of the two specifically pledged revenues to meet future debt service and that the availability of other non-ad valorem funds under the above quoted covenant fell within the County of Volusia prohibition. This Court rejected such argument on the basis that the local discretion to commit and budget was preserved as to all non-ad valorem revenues except the two specifically pledged.

This Court found as to the above-quoted general non-ad valorem revenue covenant:

> The provision is permissive as to the city and is not enforceable against the city by the bondholders or by the county. The effect on ad valorem taxation under this construction of the agreement is incidental. (at page 983)

This Court then stated further:

> The fact that such an obligation may have an incidental effect on ad valorem taxation does not subject the indebtedness to the constitutional requirement of a referendum, see State v. Alachua County, 335 So.2d 554 (Fla. 1976); Town of Medley v. State, 162 So. 2d 257 (Fla. 1964). We have held such a pledge to be a promise to levy ad valorem taxes only when the record clearly reflects that all legally available non-ad valorem revenue sources have been pledged and the governmental body has agreed to do everything necessary to receive such revenue. County of Volusia v. State, 417 So.2d 968 (Fla. 1982). That circumstance is not present in the instant case. Only two specific revenue sources have been pledged in this case and this type of pledge has only an incidental effect on ad valorem taxes. (at page 983)

This Court in City of Daytona Beach recognized that since only two specific revenue sources had been pledged, the County of Volusia prohibition was inapplicable. By comparison, under Brevard County's Lease obligation there is no future pledge of any non-ad valorem revenue unless the annual budget decision is made by the board of county commissioners to renew the Lease. No bondholder or any outside party can intrude into the annual budgetary process and influence the County's decision on Lease renewals. Such decision is totally within the discretion of the board of county commissioners.

In City of Palatka v. State, the city sought to issue bonds to refund outstanding water and sewer bonds and to finance construction of a new plant. Payment of debt service on the refunding bonds was secured by a pledge of water and sewer

revenues and utilities taxes. The pledged revenues represented 49% of the city's revenues from non-ad valorem sources. This Court approved the issuance of the bonds without a referendum holding at page 1273:

> This situation does not fall within the purview of the County of Volusia, in which this Court reasoned that the only way Volusia County would be able to uphold its covenant to maintain the programs which generated all of its non-ad valorem revenues would be to raise ad valorem taxes to operate such programs. The mere possibility of a decrease in revenues accruing to the City of Palatka from one or two sources is not sufficient to invoke the constitutional requirement of a referendum. State v. Alachua County, 335 So.2d 554 (Fla. 1976); Town of Medley v. State, 162 So. 2d 257 (Fla. 1964).

Collectively, County of Volusia v. State, Jacksonville Shipyards v. Jacksonville Electric Authority, State v. City of Daytona Beach, and City of Palatka v. State extend the express prohibition against pledging ad valorem taxes without referendum approval to encompass pledges of non-ad valorem revenues which "inevitably lead to higher ad valorem taxes during the life of the bonds" (County of Volusia v. State at page 972) or create an "actual compulsion to increase ad valorem taxes" (Jacksonville Shipyards v. Jacksonville Electric Authority at page 1094) and thus create an "implied pledge" of ad valorem tax revenues or restrict the exercise of ad valorem taxing powers. Since the obligation sought to be validated in this cause completely preserves the County's discretion in adopting its budget on an annual basis, no "implied pledge" of ad valorem taxes has been created. The discretion to exercise the ad valorem taxing power

remains with the board of county commissioners and cannot be influenced by outside parties[1].

In the NINTH paragraph of the Final Judgment, the trial court found "that neither the Trustee, the 1988 Equipment-Lessor nor any holder or holders of any of the Certificates (the functional equivalent of bondholders) shall ever have the right to require or compel the exercise of the ad valorem taxing power of the Plaintiff . . . ." (App 110). In addition, at the conclusion of the testimony, the trial court expressly found:

> any time you spend money it might have some reaction on the ad valorem taxes but I find that the compulsion to increase ad valorem taxes does not exist in the posture of this bond validation (App 132).

As previously noted, the Lease will be executed by the County pursuant to the authority contained in the Ordinance. Section 4(c) of the Ordinance provides that the Lease may be terminated at the end of any fiscal year if the Board of County Commissioners elects not to appropriate sufficient funds for the

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[1]This Court addressed a similar issue in Tucker v. Underdown, 356 So.2d 251 (Fla. 1978) in which Brevard County established a municipal service taxing unit for provision of solid waste disposal services. A portion of the ad valorem taxes levied within the unit were applied to the payment of debt service on bonds issued prior to creation of the unit which were secured by non-ad valorem solid waste disposal fees. This Court distinguished a commitment of ad valorem revenues in a future budget year, which clearly requires referendum approval, from a discretionary application of ad valorem revenues within any budget year, which does not require referendum approval. The County's Lease obligation in the transaction currently before the Court preserves the County's discretion with respect to the adoption of its budget and levy of ad valorem taxes for future fiscal years and is analogous to the discretionary application of ad valorem taxes within a single budget year.

purpose of making debt service payments in the ensuing fiscal year (App 3). Section 4(d) further provides that failure to make an annual appropriation will not require payment of any penalty by the County nor limit the right of the County to purchase similar replacement equipment (App 4). Section 6 specifically provides that any Certificates of Participation issued shall not constitute a debt of the county nor a pledge of the full faith and credit of the County (App 5).

The Lease is consistent with the foregoing Ordinance provisions. Section 401 of the Lease provides that it shall terminate upon an Event of Non-Appropriation which is defined in Section 701 of the Lease as the election of the County not to appropriate sufficient funds in its annual budget to cover the payments under the Lease for the following fiscal year (App 23, 40). The form of the Certificate of Participation also clearly provides that payments under the Lease are subject to termination upon the election of the County not to appropriate funds (App 99). Additionally, Sections 704 and 710 of the Trust Agreement pursuant to which Certificates of Participation would be issued specifically provide that the County has no obligation to the Owners of such Certificates (the functional equivalent of bondholders) other than its obligation to make Lease payments (App 85, 86).

In the event the County elects not to fund the following year's Lease payment and the Lease terminates, the County is obligated to return the leased property within thirty days of the

end of the fiscal year for which moneys were last appropriated (App 40). This obligation to return leased equipment at the end of the lease term is no different than any other lease transaction, public or private. The County also retains the right in Section 407 of the Lease to prepay its obligation and acquire title to the leased property at any time (App 26). Section 406 of the Lease specifically provides that the obligation to make payments is not a general obligation for which the County is obligated to levy or pledge any form of taxation (App 25).

Appellant contends at page 7 of its Initial Brief that "the format proposed is merely a device to avoid the referendum requirements of Article VII, Section 12 of the Florida Constitution". This assertion is clearly not supported by the facts.

The Lease and the companion Certificates of Participation will afford the County an alternative for acquiring the subject equipment. At page 2 of its Initial Brief, Appellant accurately characterizes the County's obligation as "a one-year lease with annual 'renewal options' in favor of the County." The County desires to consider use of Certificates of Participation as an alternative to increasing its ad valorem tax levy (App 119) or borrowing the funds from a commercial bank at higher interest rates (App 119, 127). This latter alternative would require the County to secure the loan with a revenue source over a number of budget years and restrict its future borrowing capacity. The

Lease and Certificates of Participation would neither require an increase in ad valorem taxes to fund a purchase of the equipment nor impair the County's budgetary discretion in future years.

This transaction offers three principal advantages over a traditional commercial lease with renewal options: first, the County will exercise significantly more control over the activities of the Lessor, including matters related to acquisition, delivery and installation of equipment; second, the "single client" nature of the Lessor will insulate the County from financial or other difficulties which may result from transactions not involving the County; and third, access to the tax-exempt capital market is likely to result in lower costs (App 126-128).

POINT II

THE LEASE DOES NOT CREATE A SECURITY INTEREST PROHIBITED BY NOHRR V. BREVARD COUNTY EDUCATIONAL FACILITIES AUTHORITY, 247 So. 2d 304 (Fla. 1971).

Appellant also argues that County's proposed Lease obligation constitutes a mortgage of public property in violation of Nohrr v. Brevard County Educational Facilities Authority, 247 So. 2d 304 (Fla. 1971). The Nohrr decision cited as precedent Boykin v. Town of River Junction, 121 Fla. 902, 164 So. 558 (1935) and acknowledged the permissibility of a mortgage against public property without the right of foreclosure as decided in State v. Inter-American Center Authority, 143 So.2d 1 (Fla. 1962).

The County's Lease obligation is clearly distinguishable from both Nohrr and Boykin because its annual renewal feature fully preserves the County's budgetary discretion for all future fiscal years. Moreover, there is no prohibited security interest created because there is no right of foreclosure against the leased equipment.

In Boykin, the Town of River Junction sought validation of "mortgage revenue certificates" to construct water and sewer facilities. The revenue certificates were payable from and secured by a pledge of the gross revenues of the Town's water and sewer system. The certificates were "additionally secured" by a lien on the property of the water and sewer system. Said additional security was a franchise that would be granted to a

purchaser in the event of a foreclosure decree against the Town for failure to pay the indebtedness.

Boykin held that such an additional mortgage foreclosure pledge required referendum approval under Section 6, Article 9, Florida Constitution (1885) since it constituted

> . . . the creation of a conditional indebtedness on the municipality's part in the nature of a legal liability for a capital venture predicated upon the municipality's ordinary municipal credit, and constitutes an interest-bearing assumption of liability for the repayment of the money so borrowed that must be ultimately be discharged by taxation . . . (emphasis supplied) Boykin at page 561

This Court further held in Boykin that such additional pledge represented by the mortgage with the right to foreclosure was outside the exception to the referendum requirement of Section 6, Article 9, Florida Constitution (1885) for indebtedness "payable only from the revenues of an independent asset or utility."[2] This Court held that the mortgage with a right of foreclosure constituted a "contractual devise" requiring repayment with interest and was

> . . . therefore void as an indirect scheme designed to strike down the intended constitutional safeguard against municipal profligacy. Boykin at 561.

Otherwise stated, the Court concluded that the Town's obligation constituted an "implied pledge" of ad valorem taxes which was

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[2]The referendum requirements for bond issuance contained in the Florida Constitution of 1885 were in certain respects more restrictive than those contained in the current Florida Constitution.

prohibited by the Constitution in the absence of referendum approval.

This Court in Nohrr approved the issuance of long term bonds to finance college dormitory and dining facilities secured by revenues of the facilities themselves but deleted the proposed mortgage with right of foreclosure against the facilities. Although the Brevard County Educational Facilities Authority was acting strictly as a conduit issuer and did not have ad valorem taxing power, the Court found, at page 311, that its relationship with the county or the legislature could be such that those entities "would feel morally compelled to levy taxes or to appropriate public funds to prevent the loss of those properties through the process of foreclosure."

In contrast to Boykin and Nohrr is State v. Inter-American Center Authority, 143 So.2d 1 (Fla. 1962) in which this Court did approve the issuance of bonds secured by a mortgage on publicly owned property. Pursuant to its enabling legislation, the Inter-American Center Authority acquired certain property from the City of Miami for construction on an Inter-American Cultural and Trade Center. The development plan called for the Authority to improve and lease the property upon which exhibitors, concessionaires and others were to construct their own buildings. The plan of finance provided for securing the proposed bonds with a mortgage lien upon the property constituting the Inter-American Cultural and Trade Center which was to remain in the ownership of the Authority.

This Court found that any pledge or "mortgage" created by the trust indenture lacks the elements required to incur the constitutional prohibition, on two bases: (1) the trust indenture did not provide for foreclosure and (2) the bond form contained the following affirmative statement:

> The Authority is not obligated to pay this bond or the interest hereon except from the special funds of the Authority provided therefor under the Indenture, and neither the faith and credit nor the taxing power of the State of Florida or of any municipality or county in the State is pledged to the payment of the principal of or the interest on this bond. No holder of this bond shall ever have the right to compel any exercise of the taxing power on the part of the Authority or of any municipality or county or of any other agency possessing the taxing power to pay this bond or the interest hereon, nor to enforce payment against property of any municipality or county in the State. State v. Inter-American Center Authority at page 4.

This Court in Nohrr specifically recognized the circumstances present in Inter-American Center Authority as an exception to the requirement for referendum approval of a mortgage or security interest. Similarly, the County's Lease obligation in the instant case falls within that exception. Neither the Lease nor the Trust Agreement pursuant to which Certificates of Participation would be issued provide for foreclosure. Additionally, Section 6 of the Ordinance (App 5), Section 406 of the Lease (App 25), Section 710 of the Trust Agreement (App 86) and the Certificate of Participation form (App 99) each include language substantially identical to that incorporated into the bond form of the Inter-American Center

Authority. Although not expressly articulated by the Court in either Nohrr or Inter-American Center Authority, it could be concluded that the addition of a right of foreclosure, with the attendant prospect of a deficiency judgment, significantly increases the compulsion to levy ad valorem taxes.

In this respect, the Constitutional principles underlying Boykin, Nohrr and Inter-American Culture Center are virtually identical to those underlying this Court's decision in County of Volusia, i.e., a local government may not enter into a transaction that has the effect of forfeiting its future budgetary discretion and thus creating an "implied pledge" of ad valorem taxes. In each of these cases, the Court's implication of an ad valorem tax pledge was predicated upon its assumption that the local government would, by virtue of its lack of budgetary discretion, be compelled in a future budget year to raise ad valorem taxes either to meet its payment obligation or to avoid the remedy of foreclosure.

Incurrence of an obligation committing revenues for multiple budget years is the pivotal distinction between the instant case and the situations addressed in Boykin, Nohrr and County of Volusia. Since the Lease obligation is in all respects subject to the County's discretion in adopting its budget on an annual basis, no "implied pledge" of ad valorem taxes has been created. Moreover, since the transaction is, in effect, a lease with annual renewal options, the County is not exposed to the prospect of a foreclosure action.

Nothing contained in either Boykin or Nohrr suggests that a unit of local government cannot lease equipment without submitting the lease for voter approval. Indeed, counties and virtually all other public bodies lease various items every year, from copying machines to automobiles to office space. What is prohibited by Boykin, Nohrr and County of Volusia is not a lease or lease-purchase, but the incurrence of any obligation, encompassing multiple budget years, that results in a forfeiture of future budgetary discretion or creates an exposure to foreclosure, thus constituting an "implied pledge" of ad valorem taxes.

As previously noted, Appellant accurately characterizes the County's obligation, at page 2 of its brief, as "a one-year lease with annual 'renewal options' in favor of the County." This characterization is supported by Section 408 of the Lease (App 27), providing that title to the leased property remains with the Lessor and Section 401 of the Lease providing that it shall terminate upon an Event of Non-Appropriation which is defined in Section 701 of the Lease as the election of the County not to appropriate sufficient funds in its annual budget to cover the payments under the Lease for the following fiscal year (App 23, 40).

Appellant has suggested in its brief, at page 10, that the County is subject to loss of its "accumulating rights of ownership". The County assumes that Appellant makes reference to an "equity" interest to which the County may feel entitled as a

result of its payments. This view is not consistent with the County's rights under the Lease. In a general sense, there are three potential results from leasing any particular item of equipment. First, the County could elect to renew the Lease until the Lease payments for a particular item of equipment have been made in full and title transfers to the County (App 27). Second, the County may elect not to appropriate funds for the purpose of making Lease payments, in which event the Lease will terminate at the end of the last budget year for which funds were appropriated (App 23, 40). As in any other lease, the County would have a contractual commitment to return to the Lessor any leased equipment still owned by the Lessor within thirty days of the end of such budget year (App 40). Third, the County could appropriate funds for purposes of making the Lease payments for a given budget year, but fail to make such payments to the Lessor. In this latter circumstance, the Lessor is permitted to re-enter and take possession of the leased equipment (App 41).

If the Lessor has retaken possession of the leased equipment, either because of an election not to appropriate funds in a future budget year or because the County has failed to make payments within a budget year for which funds have been appropriated, the Lessor may sell or relet the equipment. In either event, if the moneys received by the Lessor exceed the amounts payable pursuant to the Lease, any surplus is payable to the County. Accordingly, if there is any "equity build-up" by

virtue of the annual lease payments, the County is entitled to the full benefit thereof.

The foregoing Lease provisions are entirely consistent with its characterization as a simple lease with annual 'renewal options' in favor of the County." The County is not exposed to a foreclosure action and has not lost any of its taxing or budgetary discretion for future fiscal years.

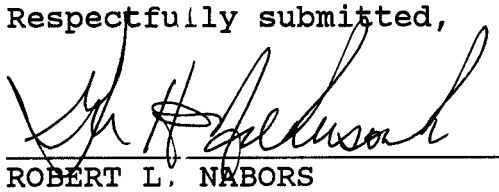
CONCLUSION

County of Volusia only requires referendum approval for obligations which inevitably lead to higher ad valorem taxes during the life of the bonds or create an actual compulsion to increase ad valorem taxes, thus constituting an "implied pledge" of ad valorem tax revenues. Since the County's Lease obligation preserves the County's discretion in adopting its budget on an annual basis, no "implied pledge" of ad valorem taxes has been created.

The County's Lease obligation is clearly distinguishable from Nohrr because its annual renewal feature fully preserves the County's budgetary discretion for all future fiscal years. Moreover, there is no prohibited security interest created against public property because there is no right of foreclosure against the leased equipment.

Therefore, the trial court correctly validated the Lease and accompanying documents. Should the Court disagree with the County's analysis of Nohrr and conclude that a prohibited security interest would be created, it would still be appropriate to affirm validation of the County's Lease obligation but delete references related to such prohibited security interest.

Respectfully submitted,



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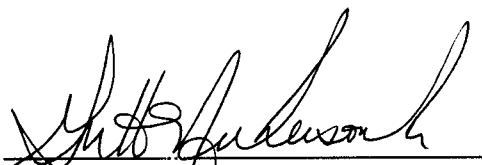
ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail to PHILIP ARCHER, ESQUIRE, Assistant State Attorney, 1832 Garden Street, Titusville, Florida 32780, this 15th day of August, 1988.



GEORGE H. NICKERSON, JR.