

IN THE SUPREME COURT OF FLORIDA

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,

CASE NO. 72,525

Appellants,

v.

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

Appellee.

...../

.....
INITIAL BRIEF OF APPELLANTS
.....

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PREFACE

Appellant State of Florida will be referred to as "Appellant." Appellee Brevard County, Florida 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 validating bonds or certificates of indebtedness.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a Final Judgment of the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County validating certain obligations of Brevard County (the "County") pursuant to Chapter 75, Florida Statutes (1987).

Pursuant to Ordinance No. 87-31, adopted December 15, 1987 (App 1), and Resolution No. 88-015, adopted January 19, 1988 (App 7), the County authorized a lease-purchase arrangement for certain equipment. To effectuate the lease-purchase arrangement, the County proposes to establish a not-for-profit corporation (the "Lessor") which will purchase certain equipment (the "Leased Equipment") for lease to the County pursuant to a lease agreement (the "Lease"). The County's obligation to make payments under the Lease will be secured solely by non-ad valorem revenues actually budgeted for such purpose during any fiscal year. The Lessor will assign to a fiduciary (the "Trustee") its right to receive Lease payments from the County. The Trustee will sell Certificates of Participation secured by the County's Lease payments. Proceeds from the sale of the Certificates will be used to purchase the Leased Equipment. The County will purchase the Leased Equipment on behalf of the Lessor pursuant to an Agency Agreement, with title to the Leased Equipment being vested in the Lessor. Title to specific items of Leased Equipment will be transferred to the County after all scheduled Lease payments for such items have been made.

The term of the Lease will expire on the earlier of (a) the date on which all scheduled Lease payments or provision therefor has been made, or (b) the first day of any fiscal year for which the County adopts an annual budget without appropriating sufficient funds to make the scheduled Lease payments. Prior to any termination of the Lease, the County will have an option to prepay the remaining Lease payments and secure title to the Leased Equipment.

If the County elects not to exercise its prepayment option and the Lease is terminated, the Lessor may sell or relet the Leased Equipment. The proceeds received from such sale or lease will inure to the benefit of the Lessor; provided that any amounts received in excess of the amounts which would otherwise have been payable by the County shall be paid to the Plaintiff.

Functionally, the County's obligation can most accurately be characterized as a one-year lease with annual "renewal options" in favor of the County. During its budget deliberations for each year, the County will have the option to "renew" the Lease for an additional year by appropriating sufficient funds to make the scheduled Lease payments. During any fiscal year for which funds are actually appropriated, the County will be obligated to make the scheduled Lease payments. This obligation will be secured by the County's non-ad valorem revenues, except to the extent such revenues are pledged to pay other obligations of the County. If the County elects not to "renew" the Lease, it has no further obligation to make scheduled Lease payments and no further right

to possession of the Leased Equipment. Upon termination of the Lease, the County is entitled to secure replacement equipment if it desires to do so.

The County filed a Complaint for Validation pursuant to Chapter 75, Florida Statutes, on March 28, 1988, seeking validation of the certificates of indebtedness represented by the Certificates of Participation to be issued by the Trustee. This complaint was heard before the Honorable Tom Waddell, Jr., Judge of the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida, on April 29, 1988. A Final Judgment validating these Certificates of Participation was rendered on April 29, 1988 (App 105). The Appellant filed a timely Notice of Appeal on May 26, 1988.

SUMMARY OF ARGUMENT

The County's obligation under the Lease constitutes an indebtedness maturing more than twelve months after issuance since all parties, in fact, anticipate that the Lease will be in effect for a number of years. Based on this Court's decision in County of Volusia v. State, 417 So.2d 968 (Fla. 1982), the financing arrangement proposed by the County whereby its appropriation for Lease payments will be secured by all of its non-ad valorem revenues amounts to a promise to levy ad valorem taxes which must be approved by the electors of Brevard County under Article VII, Section 12 of the Florida Constitution.

Since the County will secure title to specific items of Leased Equipment after all scheduled Lease payments for such items have been made, it will, over time, accumulate an ownership interest in such items which is subject to loss if funds are not appropriated for Lease payments. Pursuant to this Court's decision in Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971), this financing arrangement approved by the trial court amounts to a security interest or mortgage in County property and thus an implicit promise to levy ad valorem taxes which must be approved by the electors under Article VII, Section 12.

ARGUMENT

POINT I

THE COUNTY'S OBLIGATION UNDER THE LEASE IS IN VIOLATION OF ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION AS A CERTIFICATE OF INDEBTEDNESS PAYABLE FROM AD VALOREM TAXATION AND MATURING MORE THAN TWELVE MONTHS AFTER ISSUANCE NOT APPROVED BY THE VOTERS.

Article VII, Section 12 of the Florida Constitution provides as follows:

Section 12. Local bonds.--Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:

(a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or

(b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

It is undisputed that neither the County's obligation under the Lease nor the Certificates of Participation which are to be issued by the Trustee were approved by the electors of Brevard County. It is also clear that the Certificates of Participation are, in effect, being issued by the County since the Lessor is a non-profit corporation created by the County and the Trustee which issues the Certificates of Participation is appointed by the Lessor. Thus, if the Certificates of Participation mature

more than twelve months after issuance, they are invalid under Article VII, Section 12 of the Florida Constitution for failure to submit them to voter approval. In reviewing the proposed transaction, it is apparent that these Certificates will, in fact, be payable from ad valorem taxation and will mature more than twelve months after issuance.

While the County may argue that any obligation created by the Lease is limited to a fiscal year and does not extend beyond twelve months, an examination of the provisions of these agreements proves the contrary. Under Section 403 of the Lease (App 23), the County must make certain advance Lease payments upon entering into the Lease. These payments will be held in a Lease Payment Account to be maintained by the Trustee. While the County will receive a credit for such funds in the Lease Payment Account, the effect of such advance Lease payments may be to extend the obligation created by the Lease Agreement and Trust Agreement beyond twelve months. In addition, a Reserve Account is created under the Trust Agreement (App 67) pursuant to which the Certificates of Participation will be issued. The County receives credit for interest earned on both the Reserve Account and Lease Payment Account. However, these running accounts extend the maturity of the obligations beyond twelve months.

The overall financing scheme as provided in the Lease and Trust Agreement in reality creates an obligation maturing more than twelve months after issuance.

Under the Lease, the County will acquire use of certain equipment necessary for the provision of certain essential services related to the health, safety and welfare of the citizens of the County. These include fire engines, brush tankers, an ambulance and training equipment. Once leased and assigned to duty, the lease of these items of equipment will have to be maintained or substitute equipment will have to be acquired by other means. The Lease provides a specific lease term for each item each in excess of twelve months, after which, the County will acquire title to these items of equipment. Having entered into the Lease and Trust Agreement, the County will, in every real and practical sense, be compelled to continue the appropriation of funds to retain this equipment. Thus, the financing scheme provided in the Lease and Trust Agreement is, in fact, the issuance of a certificate of indebtedness which matures more than twelve months after the issuance. All parties clearly anticipate that this is a long term obligation and the format proposed is merely a device to void the referendum requirements of Article VII, Section 12 of the Florida Constitution.

Having demonstrated that the Lease and Trust Agreement provide for certificates of indebtedness maturing more than twelve months after issuance, the financing scheme proposed by Brevard County is in violation of Article VII, Section 12 of the Florida Constitution under County of Volusia v. State, 417 So.2d 968 (Fla. 1982), since it would have the effect of requiring increased ad valorem taxation.

In County of Volusia v. State, this Court held that the pledge of all non-ad valorem revenues "calls into play the referendum requirement of Article VII, Section 12, because in effect constitutes a promise to levy ad valorem taxes." Id. at 971. Therein, the Court distinguished its prior decisions in State v. Alachua County, 335 So.2d 554 (Fla. 1976), and in Town of Medley v. State, 162 So.2d 257 (Fla. 1964), where the constitutional referendum requirements were held inapplicable to certificates of indebtedness secured by non-ad valorem revenues. The Court distinguished Alachua and Medley because each of those cases involved the obligation of specified non-ad valorem revenue sources rather than a general obligation of non-ad valorem revenue. In the financing scheme proposed by Brevard County, the Lease payments are to be made from non-ad valorem revenues of the County but the sources of these non-ad valorem revenues are not specified. Clearly, the County's obligation under the Lease and the Certificates of Participation promise to levy ad valorem taxes by committing unspecified non-ad valorem revenue which revenue must then be made up from other sources. As criticized by this Court in State v. Halifax Hospital District, 159 So.2d 231 (Fla. 1963), this is "another proposal involving an apparent attempt to circumvent the organic requirements of freeholder approval of a funding operation which directly commits the exercise of the ad valorem taxing power."

POINT II

THE COUNTY'S OBLIGATION UNDER THE LEASE IS IN VIOLATION OF THE PRINCIPLES STATED IN NOHRR V. BREVARD COUNTY EDUCATIONAL FACILITIES AUTHORITY, 247 So.2d 304 (FLA. 1971) THAT A SECURITY INTEREST CANNOT BE GRANTED ON PUBLIC PROPERTY WITHOUT VOTER APPROVAL.

Under the Lease and Trust Agreement, the title to the items of Leased Equipment will be vested in the Lessor. Title to specific items of Leased Equipment will be transferred to the County after all scheduled Lease payments for such items have been made. Thus, the County will be building equity in the Leased Equipment as payments are made. At the completion of all scheduled payments for a particular item of Leased Equipment, the County obtains title.

Under Section 701 of the Lease, the lease term will terminate upon the nonappropriation of sufficient funds to make the scheduled Lease payments for any fiscal year. In this event, the County must return the Leased Equipment to the Lessor within 30 days. Similarly, in the event of nonpayment by the County of any scheduled Lease payments during a fiscal year for which sufficient funds have been appropriated, the County is considered in default of the Lease provisions under Section 702. In the event of default, the Lessor may also retake possession of the Leased Equipment. Thus, under the Lease provisions, the County is giving what is functionally equivalent to a mortgage or security interest in the Leased Equipment. Unless the Lease payments are maintained, the County will lose its right to possession and

will, thus, be forced to make sufficient appropriations to forestall such event. This financing situation is clearly in violation of the principles expressed in Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971).

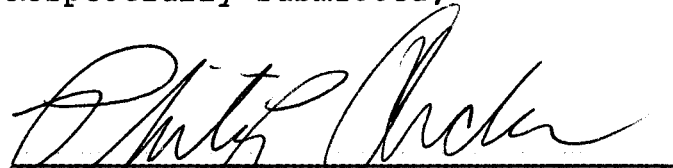
In Nohrr, certain revenue bonds were to be issued for the construction of college dormitories which were secured by a mortgage on the dormitory facilities. This Court in Nohrr noted that "the Court without exception has held that revenue bonds secured by a mortgage on the physical properties to be financed could not be issued by public bodies unless approved at an election." Id. at 310. The Court further noted the underlying constitutional basis for this objection being that the public body would be compelled to levy taxes to appropriate funds to prevent foreclosure, thus such a proposal must be submitted for voter approval. The Court concluded that any mortgage with the accompanying right of foreclosure is not constitutionally permissible without an election.

In the instant case, the County is placed in the same functional situation as was involved in Nohrr. It must annually appropriate sufficient funds to satisfy the required Lease payments or lose the possession of equipment which may be essential to its operations and the accumulating rights to full ownership. Thus, this financing transaction morally compels the County to levy taxes to meet these payments and, under Nohrr, is invalid without voter approval.

CONCLUSION

Whatever a particular transaction may be labelled, it is the substance of the transaction which determines its true nature. The County's obligations under the Lease as approved by the lower court look like a certificate of indebtedness maturing more than twelve months after issuance which amounts to a promise to levy ad valorem taxes. They also look like a mortgage or security interest in County property which would force the County to levy ad valorem taxes to prevent the taking of the property. Therefore, the protections afforded by Article VII, Section 12 of the Florida Constitution requiring voter approval should apply and should not be avoided based on the ingenious disguise worn by the financing method approved by the lower court.

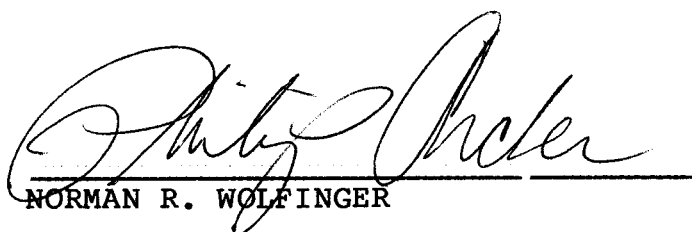
Respectfully submitted,



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to GEORGE H. NICKERSON, JR., ESQUIRE, Attorney for Appellee, Nabors, Giblin, Steffens & Nickerson, P.A., 106 South Monroe Street, Post Office Box 11008, Tallahassee, Florida 32302, this 28th day of June, 1988.


NORMAN R. WOLFINGER