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IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA, and the taxpayers, property owners and citizens of Sarasota 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 : the School Board of Sarasota County, Florida of its obligations: under the Lease-Purchase Agreement: herein described, or to be affected thereby,

FILED
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CLERK, SUPREME COURT
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Case No. 74,979

Defendant/Appellant,

vs.

THE SCHOOL BOARD OF SARASOTA COUNTY, FLORIDA, a duly constituted school board under the laws of the State of Florida, :

Plaintiff/Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
SARASOTA COUNTY, FLORIDA

ANSWER BRIEF OF AMICUS CURAE
SCHOOL DISTRICT OF ST. LUCIE COUNTY
IN SUPPORT OF APPELLEE

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SUMMARY OF ARGUMENT

I.

THE BOARD'S LEASE OBLIGATION IS NOT A DEBT WHICH IS PAYABLE FROM AD VALOREM TAXATION WHICH MATURES MORE THAN TWELVE MONTHS AFTER ISSUANCE, AND, HENCE, DOES NOT REQUIRE REFERENDUM APPROVAL

Article VII, § 12, is inapplicable to the Board's obligations under the Lease because (i) the Board's obligation to pay rent for the use of property under the Lease does not constitute a debt; (ii) even if the Board's obligation to pay rent were deemed to constitute a debt, that obligation does not mature more than twelve (12) months after issuance; and (iii) the obligation does not pledge the ad valorem taxing power. The case is controlled by the Court's recent decision in State v. Brevard County, infra, involving a similar lease of equipment.

II.

THE LEASE DOES NOT CONSTITUTE AN IMPERMISSIBLE MORTGAGE ON PUBLIC PROPERTY

There can be no mortgage unless there is a debt to be secured. There is no debt, and therefore, the Lease is not a mortgage. The "impermissible mortgage doctrine" should not be extended to this transaction because there are substantial legal distinctions between a mortgage and the Lease obligation of the Board. The case is controlled by State v. Brevard County, infra.

ARGUMENT - POINTS ON APPEAL

I. THE BOARD'S LEASE OBLIGATION IS NOT A DEBT OBLIGATION WHICH IS "PAYABLE FROM AD VALOREM TAXATION" AND WHICH MATURES MORE THAN TWELVE MONTHS AFTER ISSUANCE AND, HENCE, DOES NOT REQUIRE REFERENDUM APPROVAL

The Lease in the instant case is a bilateral contract for a term of one year with provisions for annual renewal. A continuing bilateral contract under which one party pays money and the other party continues to provide services or goods does not create a debt on the part of the payor upon execution of the contract, because the payor's liability is contingent upon his receipt of the services or goods provided by the other party. At 103 A.L.R. 1160, it is stated at 1160-1161:

According to the weight of authority, a continuing contract for the furnishing of electric, water or other service to a municipality, for which the municipality agrees to pay in periodic installments as service is furnished, does not give rise to a present indebtedness for the agreed amount of all installments to become due thereafter throughout the term of the contract, within the meaning of a constitutional or statutory limitation of municipal indebtedness, and such a contract is not rendered invalid by the fact that the aggregate of the installments exceeds the debt limit.

This "continuing contract rule" prevails in Florida. See, e.g., Hathaway v. Munroe, 119 So. 149 (Fla. 1929). The "continuing contract rule" applies to leases, including leases containing purchase options, unless the lease is deemed, under the facts involved, to constitute an installment purchase

contract under which there is an unconditional obligation to pay. See, 71 A.L.R. 1318; 145 A.L.R. 1362. Leases imposing a legal obligation to pay annual rents for a number of years coupled with an option to purchase at fair market value are held not to create a debt: the rent obligation is governed by the "continuing contract rule" and does not constitute a debt; the exercise or non-exercise of the purchase option is elective on the part of the lessee and does not transform the lease-purchase agreement into a debt. See, e.g., Krenwinkle v. Los Angeles, 51 P.2d 1098 (Cal. 1098).¹

Where the lease or other agreement does not impose a fixed legal obligation to make payments over a number of years, the courts hold that amounts which may become payable in future years are not debt. For example, Davis v. Board of Education of the City of Newport, 83 S.W. 2d 34 (Ky. 1935) involved litigation to test the validity of two lease formats (hereinafter described as Plan A and Plan B) in order to determine which, if either,

1/ Leases imposing a legal obligation to pay annual rent for a multi-year term under which title will pass to the lessee upon the payment of all rent plus a nominal consideration or no additional consideration are sometimes held to create a debt for all rent to become due during the full term of the lease. See, e.g., State v. Volusia County School Building Authority, 60 So.2d 761 (Fla. 1952); Herbert v. Thursby, 151 So. 385 (Fla. 1933); Sholtz v. McCord, 150 So. 234 (Fla. 1933); Hively v. Nappanee, 169 N.E. 51, 171 N.E. 381 (Ind. 1930). Those cases which treat leases as creating a debt for the full amount of rent involve (i) a fixed obligation to pay rent over a term of multiple years, coupled with (ii) an automatic transfer of title at the end of the lease or an option to purchase for a nominal consideration. There is no annual option to terminate and no option to purchase as in the instant case.

form of lease could lawfully be entered into between the city and its Board of Education (the "school board"),

Under each leasing plan, the school board would deed a parcel of land to the city on which the city would erect a school building. Under Plan A, the city would lease the land and school building to the school board for a fixed term of thirty (30) years at an annual rental payable semi-annually; upon payment of all rentals for the full thirty (30) year term of the lease, the city would be required to convey the land and school building to the school board. Under Plan B, the initial term of the lease would be one (1) year and the annual rental would be payable semi-annually. The lease would give the school board the option to extend the lease for successive one (1) year terms for an aggregate period not in excess of thirty (30) years. The extension of the lease for an additional one-year term would be automatic if the school board failed affirmatively to give notice to the city that it would not renew the lease. Upon payment in full of all rentals for the thirty (30) consecutive one-year terms, the city would be required to convey the land and school building to the school board.

The issue in the case was whether either or both of the respective leases would create an indebtedness of the school board in an amount equal to the total rent which would be payable over a thirty (30) year period. If debt were incurred in an amount equal to thirty year's rent, it would have violated a provision of the Kentucky Constitution which prohibited the

school board from incurring obligations in excess of its revenue for the current year. The trial court held that both lease formats would be permissible.

On appeal, the Kentucky Supreme Court held that the lease described in Plan A would not be permissible because under Plan A, the school board would incur a present indebtedness equal to the rent for thirty (30) years, the aggregate amount of which would substantially exceed the school board's revenues for the current year. The court held that the lease described in Plan B, which had a fixed term of one (1) year with consecutive annual one-year renewal options up to thirty (30) years, created an obligation only for the initial year's rent. It had been stipulated that the initial one (1) year's rent and other current year obligations would be within the school board's revenues for the current year and, therefore, the incurring of that obligation would not violate the Kentucky Constitution. In reaching this decision the court stated at 83 S.W. 2d 37:

"By the specific terms of the 'B' lease, it is absolutely optional with the appellee whether or not it will renew the lease at the expiration of its one (1) year term or at the expiration of its extension for a like term, and that its extension of any term shall be automatic for the period of at least one (1) year, if the school board fails affirmatively to give notice that it will not renew the lease. The appellee has thus reserved by the lease the right or option to continue the lease by its extension, as provided for, if it so elects, but is under no obligation to do so. The city lessor can never, at any time after entering into this lease, claim the aggregate of all the annual rentals, because the school board has not assumed or become obligated

for such an amount, but under its terms,
has only become indebted as the rent
service of each year is performed."
(Emphasis supplied.)

The rule of law followed in Davis v. Board of Education of the City of Newport, supra, and in Kirk v. Union Graded School District, infra, has been followed by the courts in numerous other states [see Reply Brief of Appellee in this case] and was adopted by this Court in State v. Brevard County, 539 So.2d 461 (Fla. 1989).

In State v. Brevard County, supra, the county proposed to establish a not-for-profit corporation (lessor) to purchase certain equipment for lease to the county pursuant to a lease-purchase agreement. The county's obligation to make payments under the lease would be payable solely from non-ad valorem revenues actually budgeted for such purpose during any fiscal year. Lessor would assign to a fiduciary (trustee) the equipment, the Lease and its right to receive the rent payments from the county. The trustee would sell certificates of participation representing undivided interests in the equipment, the Lease and the rent payments. Proceeds from the sale of the certificates would be used to purchase the leased equipment. Title to the leased equipment would be in the trustee until transferred to the county after all scheduled lease payments have been made. The term of the lease would expire on the earlier of (a) the date on which all scheduled lease payments, or provision therefor, were 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 would have an option to prepay the lease payments and secure title to the leased equipment. If the lease should be terminated, the lessor would be entitled to sell or re-let the leased equipment. The proceeds received from such sale or lease would inure to the benefit of the certificate holders, provided any amounts received in excess of those which would otherwise have been payable by the county under the lease shall be paid to the county. The Court properly characterized the lease as a one (1) year lease with annual renewal options in favor of the county, finding that if the county should elect not to renew the lease it would have no further obligation to make scheduled lease payments and no further right to possession of the leased equipment. The Court found that the county would simply be renting the equipment under the lease. The rent obligation under a lease does not create a debt.

Similarly, an option to purchase will not transform a lease into a debt obligation. In Kirk v. Union Graded School Dist., 68 P.2d 769 (Okla. 1937), the school district entered into a contract with a teacher under which the teacher built and paid for a house on school grounds which was to be used for school purposes. Under the contract, the house was to remain the property of the teacher until the cost thereof was repaid by the school district. The contract created no obligation on the part

of the school district to pay for the building. The contract was held to constitute an option to purchase and did not create an indebtedness of the school district, within the meaning of the provision of the Oklahoma Constitution prohibiting the school district from becoming indebted, without the approval of the voters, in an amount exceeding income and revenue provided for the year.

Even if the rent obligation in the instant case were deemed to constitute a debt, the Board's liability is limited to a twelve-month period; each appropriation and renewal would constitute the issuance of a new obligation. That new obligation would mature and be paid within twelve months of its issuance and, therefore, would not be subject to the constitutional prohibition. See, Davis v. Board of Education of the City of Newport, supra, and State v. Brevard County, supra.

The Appellant seeks to distinguish State v. Brevard County, supra, from the case at bar on the grounds that (i) the subject matter of the Lease is real property rather than equipment and (ii) the Lease permits ad valorem taxes to be used to pay rent. The fact that real property, rather than equipment, is being leased is irrelevant, because the rules of law applicable to this case are the same irrespective of the subject matter of the Lease. As illustrated by Davis v. Board of Education of the City of Newport, supra, the rule this Court adopted in State v. Brevard County applies to real estate leases. Under the rule of Davis v. Board of Education of the City of

Newport, supra, and State v. Brevard County, supra, the rent obligation is not a debt which matures more than twelve (12) months after issuance and, therefore, the source of payment of that rent is irrelevant under Article VII, § 12.

Moreover, the Lease, by its express terms, does not pledge the Board's ad valorem taxing powers. The lessor can not compel the Board to renew the Lease, appropriate any funds or levy any taxes for the payment of rent.

It is lawful for the Board to apply ad valorem taxes to the payment of its rent obligation. See, Tucker v. Underdown, 356 So.2d 251 (Fla. 1978), in which the local government was permitted to levy ad valorem taxes and use ad valorem tax revenues to pay debt service on its outstanding revenue bonds which expressly stated that they were not payable from ad valorem taxes. Under the rule of Tucker v. Underdown, supra, Brevard County could levy ad valorem taxes within its normal millage limit and use tax revenues to pay rent for the equipment involved in State v. Brevard County, supra, notwithstanding that the lease in that case expressly disclaims that rent is payable from such taxes. Thus, State v. Brevard County, supra, is indistinguishable from the case at bar, and should be applied here.²

2/ The primary purpose of Article VII, § 12, is to protect the residents and taxpayers of local governmental taxing units against excessive taxation. Article VII, 512, would seek to accomplish that purpose by requiring the electors to approve any debt obligation which pledges the ad valorem taxing power for more than twelve (12) months.

States throughout the nation have included in their (Footnote continued to next page...)

The Board's obligation is not a debt payable from ad valorem taxation which matures more than twelve months after issuance and, hence, does not violate Article VII, § 12.

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constitutions various provisions to protect their residents and taxpayers from excessive taxation. Provisions limiting the taxing power takes various forms, including: millage limits, provisions establishing debt limits and provisions requiring voter approval. The Florida Constitution contains no debt limit, but, rather, imposes a millage limit (which can be exceeded for a two-year period if approved by the voters) and contains the provisions which require voter approval of certain debt obligations and give rise to an obligation on the part of the local government to levy ad valorem taxes without limitation as to rate or amount to pay such voter-approved debt. The millage limit does not apply to taxes levied to pay voter-approved debt.

In 1930, Article IX, § 6 of the Florida Constitution of 1885 (the precursor of current Article IX, § 12) was amended. That Section, as amended, contained the following referendum requirement for the issuance of local government bonds:

The Counties, Districts and Municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such Counties, Districts or Municipalities shall participate . . ."

It was under the foregoing provision that the "special fund doctrine" was created by the Court and expanded. Under that doctrine, in its present form, utility revenues, excise taxes and other non-ad valorem tax revenues can be pledged, without an election, to the payment of revenue bonds so long as the local government does not also pledge its ad valorem taxing power. The non-ad valorem revenue source pledged to such revenue bonds was deemed to constitute a "special fund" from which the bonds were payable. Bonds payable from a "special fund" do not pledge the full faith and credit or taxing power of the local government and are not considered to be "bonds" in the constitutional sense because they do not pledge the ad valorem taxing power. See e.g., State v. City of Miami, 152 So.6 (Fla. 1933); State v. City of Miami, 72 So.2d 655 (Fla. 1954); State v. City of Key West, 14 So.2d 707 (Fla. 1943); Flint v. Duval County, 120 So. 575 (Fla. 1936).

It was also under the foregoing constitutional provision (Footnote continued to next page...)

II. THE LEASE DOES NOT CONSTITUTE AN IMPERMISSIBLE MORTGAGE OF PUBLIC PROPERTY

The thrust of the impermissible mortgage doctrine is that the local government will be economically compelled to levy taxes in order to avoid the permanent loss of property through foreclosure. Before an instrument can be deemed to constitute a

(Footnote continued from previous page...)

that the "Tapers v. Pichard doctrine" was created and expanded by the Court. Under that doctrine, a local government could issue certificates of indebtedness in which it would agree to appropriate and use revenues derived from ad valorem taxes (which were subject to the millage limit), if and when collected, provided that: (i) the ad valorem taxing power must not be pledged to the payment of the certificates; (ii) the property to be financed must be used for essential governmental needs; and (iii) the annual revenues which would be available to the local government (including ad valorem taxes collected within the millage limit) would be sufficient to meet the issuer's annual expenses, including debt service to become due under the certificates. Certificates of indebtedness of the foregoing type which merely contained an obligation to appropriate tax revenues to be collected within the normal millage limit were held not to be "bonds" (in the constitutional sense), because the covenant to make such appropriations did not pledge the ad valorem taxing power. See Tapers v. Pichard, 169 So. 39 (1936) (financing of county building); Posey v. Wakulla County, 148 Fla. 115, 3 So.2d 799 (1941) (financing of county courthouse).

On the other hand, the "Tapers v. Pichard doctrine" did not permit local governments to issue certificates of indebtedness which, by their terms, pledged the ad valorem taxing power unless those certificates were voter-approved.

On January 7, 1969, the Florida Constitution of 1968 became effective. Article IX, § 6 of the 1885 Constitution was replaced by Article VII, § 12 of the 1968 Constitution, which states in pertinent part:

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:

(Footnote continued to next page...)

mortgage, however, there must be a debt to be secured by the mortgage. In Brumick v. Morris, 178 So. 564 (Fla. 1938) the Court stated at p. 567:

[I]f the conveyance satisfied and extinguished the obligation, so that no debt remained due from the grantor to the grantee, it cannot be held a mortgage, since there cannot be a mortgage without something to be secured by it.

* * *

A deed absolute on its face will not be construed as a mortgage where, after its

(Footnote continued from previous page...)

(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; * *

The "Commentary" by Talbot "Sandy" D'Alemberte (the Chairman of the Constitutional Revision Commission for the 1968 Constitution) which appears immediately under the aforesaid section in West's Florida Statutes Annotated, states in pertinent part:

This section was taken, with editorial amendments, from the Constitutional Revision Commission recommendation. * *

Except for the fact that the new Constitution limits local bonding to capital projects, the new Constitution offers the same basic provision as did the 1885 Constitution after 1930. (Emphasis supplied.)

In view of this "Commentary," one must conclude that the only intended change from the 1885 Constitution was to add the "capital projects" limitation. That intended change would have had no effect on either the "special fund doctrine" or the "Tapers v. Pichard doctrine". The words "payable from ad valorem taxation" (emphasis supplied) were used in the amendment. An amendment intended to reject Tapers v. Pichard would properly have read "payable in any manner from ad valorem tax revenues". Had such a major change been intended, it would have been noted in the (Footnote continued to next page...)

execution, there remains no indebtedness
from the grantor to the grantee

(Footnote continued from previous page...)

"Commentary".

Although the "special fund doctrine" remains intact to this day, the Court receded from the "Tapers v. Pichard doctrine" (until its recent partial resurrection in cases hereinafter discussed) in State v. County of Dade, 234 So.2d 651 (Fla. 1970) in a five (5) to two (2) decision written by then Justice Boyd. It is submitted that the majority opinion ignored the intended limited scope of the 1968 Constitutional change (as reflected in the "Commentary") and ignored the fact that, prior to the 1968 amendment, there were two types of certificates of indebtedness, i.e. those which required voter approval and those that did not require voter approval. His opinion was based on an assumption that the addition of the words "certificates of indebtedness" and "any form of tax anticipation certificates" to the referendum provision constituted a rejection of the "Tapers v. Pichard doctrine". The majority opinion, in effect, rewrote the Constitutional amendment to substitute "payable in any manner from ad valorem tax revenues" for the Constitution's own words "payable from ad valorem taxation" (this interpretation, which was first enunciated in State v. County of Dade, supra, is hereinafter called the "Dade doctrine").

It is submitted that there was no intention by the drafters of the 1968 Constitution to reject the "Tapers v. Pichard doctrine"; that doctrine required an election if the certificates of indebtedness pledged the power of ad valorem taxation. The term "payable from ad valorem taxation" connotes a pledge of the taxing power. Had a change in the referendum requirement been intended to be as sweeping as that assumed by the majority in Dade, surely the "Commentary" by the Chairman of the Constitutional Revision Commission would have so stated. To the contrary, the "Commentary" unequivocally states that except for the new "capital project" limitation, "the new Constitution offers the same basic provision as did the 1885 Constitution after 1930." (Emphasis supplied.)

The dissenting opinions of Chief Justice Ervin and Justice Roberts in Dade expressed the view that the 1968 revision of the Constitution was not intended to void the judicial doctrine of the Tapers v. Pichard line of cases. Chief Justice Ervin's dissent states that those cases

"should not be lightly thrust aside. The principles announced in those cases had their genesis in practical necessity and were molded out of hard factual experience under exigencies and emergencies arising during stringent periods in the growth of the state and

(Footnote continued to next page...)

If it is a debt which the grantor is bound to pay, which the grantee might

(Footnote continued from previous page...)

its communities." State v. County of Dade, supra, at 658.

Under the "Dade doctrine", no longer could local governments covenant to pay, out of their normal millage (which is subject to a constitutional millage limit), debt service on debt maturing more than twelve (12) months after issuance by annual budgetary appropriation; they were forced either to pledge only non-ad valorem tax revenues or to obtain voter approval of the debt (the result of which is that taxes may be levied without limitation as to rate or amount to pay the debt, said tax levy being in addition to the local government's normal millage). A referendum forces taxpayers to sacrifice the protection afforded by the Constitutional millage limit in order to obtain the benefits of needed new capital projects which, under the "Tapers v. Pichard doctrine," could have been financed with long-term certificates of indebtedness payable from annual appropriations of revenues to be obtained from taxes levied within the millage limit. The "Dade doctrine" cannot be legally justified in view of the "Commentary". In view of the above described increase in economic exposure to taxation inherent in voter-approved bonds, the "Dade doctrine" cannot be justified on economic grounds.

Fortunately, the Court has begun to abandon the "Dade doctrine" and to reconsider the correctness of the foundation upon which the "Tapers v. Pichard doctrine" rested. In Tucker v. Underdown, 356 So.2d 251 (Fla. 1978), the county had validated and issued bonds pledging user charges to finance a solid waste disposal system; the bonds gave the bondholders no power to compel the levy of ad valorem taxes for debt service or for operating expenses. However, after the bonds were issued, the county levied ad valorem taxes within its millage limits to pay debt service on those bonds. The issue in the case was whether the county had unlawfully levied ad valorem taxes and used the tax revenues to pay debt service on the bonds. The Court held that the Constitution does not prohibit the levy of ad valorem taxes or the use of ad valorem tax revenues to pay debt service on bonds which have not been approved by the voters; all that the Constitution dictates is that the bondholders may have no right to compel, by judicial action, the levy of ad valorem taxation (that is, the taxing power can not be pledged because a pledge can be judicially enforced). This was the first step toward the resurrection of the "Tapers v. Pichard doctrine".

In State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1981), the Court relied on Tucker v. Underdown, supra, in its decision validating tax increment bonds. In (Footnote continued to next page...)

collect by proper proceedings, and for which the deed of the land is to stand as

(Footnote continued from previous page...)

that case, the Miami Beach Redevelopment Agency (the "Agency") proposed to issue tax increment bonds to finance improvements in the South Beach area of the City of Miami Beach. The bonds were to be payable from and secured by amounts on hand from time to time in the Agency's redevelopment trust fund. The moneys in the trust fund were to be derived from two sources: (i) the money the Agency would receive from sales, leases and charges for use, of the redeveloped property; and (ii) money to be contributed each year by Dade County and the City of Miami Beach, as required by § 163.387(2), Florida Statutes, which provides that the city and county shall each annually appropriate to the redevelopment trust fund an amount not less than the amount of ad valorem tax increment revenues that accrue to such local government on account of increases in the assessed value of property in the development area.

The Court noted that the statute does not limit the source of the city's and county's contribution to any specific governmental revenue, stating:

That the statutory duty to make the annual contributions would become a contractual duty, part of the obligation of the bonds, does not mean, however, that these bonds are payable from ad valorem taxation, in the constitutional sense of the term.

The Agency notes that even though the money the county and city will use to make the contributions may come from ad valorem tax revenues, we have indicated this does not bring the bonds within the referendum requirement.

Tucker v. Underdown supports the argument that there is nothing in the Constitution to prevent a county or city from using ad valorem tax revenues where they are required to compute and set aside a prescribed amount, when available, for a discreet [sic] purpose. The purpose of the Constitutional limitation is unaffected by the legal commitment; the taxing power of the governmental units is unimpaired. What is critical to the constitutionality of the bonds is that, after the sale of the bonds, a bondholder would have no right,

(Footnote continued to next page...)

security, the transaction is a mortgage, but if it is entirely optional with the

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if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county and city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation. Under the statute authorizing this bond financing the governing bodies are not obligated nor can they be compelled to levy any ad valorem taxes in any year. The only obligation is to appropriate a sum equal to any tax increment generated in a particular year from the ordinary, general levy of ad valorem taxes otherwise made in the city and county that year. Issuance of those bonds without approval of the voters of Dade County and the City of Miami Beach, consequently, does not transgress Article VII, § 12. (Emphasis supplied.)

While it is true under the tax increment financing statute, cities and counties cannot be compelled by the bondholders to levy any taxes, it is as "certain as death and taxes" that cities and counties will levy taxes within their millage limits to pay their annual expenses. A city or county which can operate without levying any ad valorem taxes is as rare as a unicorn. If taxes are levied in any year (as they invariably must be), the amount (equal to any tax increment) which must be contributed to the trust fund will become an expense item in the annual budget for that year which will be taken into account in establishing the tax levy. The opinion expressly permits that contribution to be paid out of ad valorem tax revenues. The decision reached a correct result. It marks a further retreat from the "Dade doctrine" and the doctrine of County of Volusia v. State, supra.

The Lease in this case may be validated on the basis of this Court's recent decision in State v. Brevard County, 539 So.2d 461 (Fla. 1989), involving the lease-purchase of equipment in which the rent was payable "solely" from non-ad valorem revenues. However, under Tucker v. Underdown, supra, and State v. Miami Beach Redevelopment Agency, supra, Brevard County may legally levy taxes to pay that rent notwithstanding the express provisions to the contrary in the equipment lease.

The feature which distinguishes State v. Brevard County and the case at bar from the Tapers v. Pichard line of cases (Footnote continued to next page...)

grantor to pay the money and receive a reconveyance or not to do so, he has not

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is that here and in Brevard County, the local government annually can determine whether to renew the lease and appropriate current revenues (irrespective of source) to pay rent, whereas under Tapers v. Pichard a local government may covenant to make such annual appropriations and may agree to allocate ad valorem tax revenues collected within normal millage limits to pay debt. Under the "Dade doctrine" this is a very material distinction.

However, the distinction between State v. Miami Beach Redevelopment Agency, supra, and Tapers v. Pichard, supra, is much less substantial. In Miami Beach Redevelopment Agency the local government, by statute, was obligated to make a contribution from its general revenues (which include ad valorem tax revenues collected within normal millage limits) if it levied such taxes (and if there was an increment), which contribution could be paid out of ad valorem tax revenues. In Tapers v. Pichard the local government, by bond contract, was obligated to pay debt service from general revenues (including ad valorem tax revenues collected within normal millage limits) if its estimated ad valorem and non-ad valorem revenues are sufficient to pay estimated expenses, including such debt service. The basic distinction is that in Tapers the local government could agree in advance to allocate and appropriate collected ad valorem tax dollars to the payment of debt service. As taxes are inevitable and dollars are fungible, it is submitted that Miami Beach Redevelopment Agency constitutes a near total reinstatement of Tapers v. Pichard. Under both State v. Miami Beach Redevelopment Agency and Tapers v. Pichard the taxpayers are protected from excessive taxation by the local government's millage limit. Bonds or certificates of indebtedness issued in compliance with Tapers were deemed not to pledge the local government's power of taxation, whereas voter-approved bonds both pledge the taxing power and expose the taxpayers to taxes, above and beyond the millage limit, which may be levied without limitation as to rate or amount.

The millage limit, the rule permitting a two-year voter-approved levy in excess of the millage limit, and the referendum provisions of Article VII, § 12, should be interpreted as an integrated and symmetrical set of rules. Expenditures, be they for employees' salaries or to pay debt service on essential facilities, should be permitted to be funded within the millage limit; the purchaser of such debt would purchase subject to that millage limit and, under Tapers, would not be entitled to compel a tax levy by judicial action. The ability of a local government to exceed the millage limit for two years with voter approval is designed to deal with emergency situations. The referendum
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the right of a mortgagor, but only a privilege of repurchasing the property. And if it appears that the deed was accepted in payment and satisfaction of an existing debt, the agreement for a reconveyance on payment of a given sum, cannot convert it into a mortgage." 27 Cyc. 1003; Reed v. Bond, 96 Mich. 134, 55 N.W. 619; Gassett v. Bogk, 7 Mont. 585, 19 P. 281, 1 L.R.A. 240; Woods v. Jensen, 130 Cal. 200, 62 P. 473." (Emphasis supplied.)

In the case at bar, the payment in each year is entirely optional on the part of the Board. Therefore, as stated in Part I, there is no debt and, hence, no mortgage.

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requirement is designed to permit taxes to be levied in excess of the millage limit for more than two years, if taxes are needed to pay debt service on bonds which can not be paid with normal annual revenues. This integrated approach is entirely consistent with the "Tapers v. Pichard doctrine".

Chief Justice Ervin was correct in his dissent in State v. County of Dade when he stated that the Tapers v. Pichard line of cases "should not be lightly thrust aside." The infrastructure demands of a rapidly growing state during the period 1930 through 1970 created the practical necessity which molded the principles announced in those cases. The abandonment of those principles during the period 1970 through 1989 (as a result of the "Dade doctrine") has been a major factor in growth of the State's present infrastructure deficit.

In this case, it would be appropriate for the Court to complete the reinstatement of the "Tapers v. Pichard doctrine," which was begun in Tucker and Miami Beach, thereby conforming to the intention of the drafters of the 1968 Constitution (as reflected in the "Commentary"). The full restoration of the "Tapers v. Pichard doctrine" would allow local governments to debt-finance essential infrastructure with moneys derived from all current revenue sources including ad valorem tax revenues collected within the confines of the millage limit, so long as the ad valorem taxing power is not pledged. The restoration of the "Tapers v. Pichard doctrine" would be legally sound and is an economic necessity.

Moreover, the evil of a loss of the property is not not a feature of this transaction. Here, if there is a non-renewal and non-appropriation, the Board will: (i) return the property to the Trustee for lease or for sale by the Trustee of the Trustee's interest in the property (which is not a fee interest); (ii) be entitled to receive an increased "fair market rent" under the Ground Lease; and (iii) receive the Ground Leased land and buildings thereon upon the expiration of the Ground Lease whether or not the Corporation's Revenue Bonds have been fully paid. In addition, if the surrendered property is leased to a third party and the Corporation's Revenue Bonds are fully paid, the Board will also receive the additional bond-financed land and the buildings thereon. In addition, if, following a non-renewal, the subsequent leasing or sale of the Trustee's interest in the land and buildings results in a surplus, that surplus is to be paid to the Board.

The lease in State v. Brevard County, supra, was held to be a lease; it was not a chattel mortgage. The Lease in this case is not a mortgage and is not the economic equivalent of a mortgage. The "impermissible mortgage doctrine" is inapplicable to this case. ³

3/ The "impermissible mortgage doctrine" was first articulated by the Court in Boykin v. Town of River Junction, 164 So. 558 (Fla 1935). The Boykin case was decided under the 1930 amendment to the 1885 Constitution (which initially imposed the referendum requirement) shortly after the Court had first enunciated the "special fund doctrine" [in State v. City of Miami, 152 So. 6 (Fla. 1933)]. At that time, the "special fund doctrine" was limited to the financing of improvements or expansions of existing utilities where the (Footnote continued to next page...)

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sole revenue source which could be pledged to the payment of debt service was user fees of the utility. The "special fund doctrine" had not, at that time, been expanded to its present scope, which permits the financing of new facilities and permits the pledge of any non-ad valorem revenue sources.

In Boykin, the financing was for a new utility plant and the debt was secured by (i) revenues of both the old and new utility, (ii) by a mortgage on both the old and the new utility, and (iii) by an agreement to grant a utility franchise to the purchaser at foreclosure if the mortgage on the utility plants was foreclosed. The financing violated the then-existing scope of the "special fund doctrine" in every respect and was "therefore within the necessarily implied provision of Section 6 of Article 9 of the Constitution, as that Article and amended Section of it has heretofore been construed by this Court. . . ." The Court subsequently expanded the "special fund doctrine" to permit the financing of new facilities and the pledging of any non-ad valorem revenue sources. See e.g., discussion and cases appearing in State v. Miami Beach Redevelopment Agency, 392 So.2d 825 (Fla 1981) at pp. 895-898.

Had Boykin been decided after the expansion of the "special fund doctrine", it is possible that the outcome therein might have been different. In Boykin, the mortgage not only encumbered the new bond-financed utility plant, but also encumbered the town's existing utility plant. The "impermissible mortgage doctrine", as it exists in many other states, forbids a mortgage on property already owned by the local government, but allows purchase money mortgages and mortgages on new property to be bond-financed. See, 64 C.J.S., Municipal Corporations, § 1853 at p. 379 and cases collected in n. 8 and 11.

Unfortunately, when faced with cases involving mortgages on new debt-financed property, the distinction, made by other state's courts, between mortgages on existing property and mortgages on new projects either was not called to the Court's attention or was ignored by the Court. The Court has even applied the "impermissible mortgage doctrine" (i) to the purchase of property subject to a mortgage where no personal liability or deficiency judgment risk was involved [Hollywood, Inc. v. Broward County, 90 So.2d 47 (Fla. 1956)] and (ii) to a local government which had no taxing powers [Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971)]. Fortunately, in Wilson v. Palm Beach County Housing Authority, 503 So.2d 893 (1987) the Court ultimately rejected the "impermissible mortgage doctrine" in cases where the local government had no ad valorem taxing power and receded from Nohrr to that extent.

The "impermissible mortgage doctrine" of Boykin is based on the assumption that the local government will feel
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economically compelled to levy taxes to keep from losing the mortgaged property. The doctrine is based on economic compulsion, not legal compulsion. Where legal compulsion is involved (as is the case when bonds are voter-approved) the local government has no discretion (it must levy taxes). Where the compulsion is economic, the local government has discretion which it may exercise in whatever manner it deems appropriate under the facts and circumstances prevailing at the time a decision to levy taxes or surrender the mortgaged property needs to be made. Any taxes it might elect to levy would be within the local government's millage limit; it would not be able to levy taxes in excess of its constitutionally mandated millage limit without a vote of the electors, either under the two-year special levy provision or under Article VII, § 12.

It is submitted that the referendum requirement of Constitution prohibits only a pledge of the ad valorem taxing power which can be enforced by a court, i.e., legal compulsion. See Tucker v. Underdown, supra, and State v. Miami Beach Redevelopment Agency, supra. A non-recourse purchase money mortgage involves no legal compulsion and should be allowed so long as ad valorem taxes are not legally pledged.

It should be noted that the Court (without discussing the mortgage issue) approved a financing in City of Jacksonville v. Savannah Machine & Foundry Co., 47 So.2d 634 (Fla. 1950), in which certificates of indebtedness which did not pledge the power of taxation were issued (under the "Tapers v. Pichard doctrine") to finance the cost of converting a navy PT boat owned by the City into a city fire boat and were secured by a lien [presumably a ship mortgage] on the boat. That case was decided in 1950, fifteen years after the "impermissible mortgage doctrine" was first adopted by the Court in Boykin. In addition, the Court permitted a real estate mortgage that did not provide for foreclosure in State v. Inter-American Center Authority, 143 So.2d 1 (Fla. 1962).

The "impermissible mortgage doctrine", in its present form, is based on an economic assumption that is not necessarily valid. In validation cases, the Court has, properly and persistently, taken the position that it is the function of the Court to determine legal issues, but not economic issues. For example, in State of Florida v. Brevard County, supra, at 464, the Court stated:

In passing on bond validations, it is not the function of this court to decide whether the proposed financing is wise or even fiscally sound, State v. City of Panama City Beach, 529 So.2d 250 (Fla.

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1988).


If the drafters of Article IX, § 6 of the 1988 Constitution or Article VII, § 12 of the 1969 Constitution had intended to prohibit mortgages, they could have so stated in brief and unequivocal language. The "impermissible mortgage doctrine" is a judicial interpretation which is based on economic assumptions, the validity of which have never been proven by reported testimony or other evidence). The doctrine should be modified to permit the non-recourse mortgage financing of the property being financed.

CONCLUSION

This case is controlled by State v. Brevard County, supra. Under the rule of that case, the rent obligation does not constitute a debt. As the rent obligation does not constitute a debt, the Lease cannot constitute a mortgage. As the obligation to pay rent is not a debt and the Lease is not a mortgage, the source of payment of the rent is immaterial, because Article VII, § 12 only applies to debt obligations which pledge the ad valorem taxing power and which mature more than twelve (12) months after issuance.

The trial court correctly validated the Lease and accompanying documents, and its opinion should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Amicus Curae School District of St. Lucie County has been furnished by mail (1) to Earl Moreland, State Attorney and Henry E. Lee, Chief Assistant State Attorney, State Attorney's Office, P.O. Box 880, Sarasota, Florida 34230, Attorney for Defendant/Appellant and (2) to A. Lamar Matthews, Williams, Parker, Harreson, Dietz & Getzen, 1550 Ringling Boulevard, Sarasota, Florida 34236, Attorney for Plaintiff/Appellee, this 26th day of December, 1989.



ROBERT O. FREEMAN