

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 Sarasota County of its obligations  
under the Lease herein described,  
or to be affected thereby,

Defendant/Appellant,

v.

Case No. 74,979

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

Plaintiff/Appellee.

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ON APPEAL FROM THE  
CIRCUIT COURT  
OF SARASOTA COUNTY, FLORIDA

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AMENDED BRIEF OF APPELLANT

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TWELFTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE (S)</u>
Table of Contents .....	i
Table of Citations.....	ii
Preliminary Statement .....	1
Statement of the Case.....	2
Statement of the Facts.....	2
Summary of Argument .....	6
Argument - Points on Appeal:	
I.        THE TRIAL COURT ERRED BY VALIDATING BONDS PAYABLE IN PART FROM AD VALOREM TAXATION WITHOUT REFERENDUM APPROVAL.....	8
II.       THE BOND VALIDATION CREATES A IMPERMISSIBLE MORTGAGE ON PUBLIC PROPERTY.....	13
Conclusion.....	14
Certificate of Service.....	15

TABLE OF CITATIONS

	<u>Page(s)</u>
<u>State v Brevard County</u> , 539 So.2d 461 (1989).....	9 & 14
<u>County of Volusia v State</u> , 417 So.2d 968 (Fla 1982)..	11
<u>Nohrr v. Brevard County Educational Facilities Authority</u> , 247 So.2d 304 (Fla. 1971).....	13
<u>Boykin v. Town of River Junction</u> , 121 Fla. 902, 164 So. 558 (1935).....	13
Rule 9.030(a)(1)(B)(i), Florida Rules of Appellate Procedure.....	1
Article VII, Section 12, Constitution of the State of Florida.....	throughout
Chapter 75, Florida Statutes.....	throughout
Chapter 617, Florida Statutes.....	4
§212.055(3), Florida Statutes.....	4
§236.25, Florida Statutes.....	4
§235.056, Florida Statutes.....	11
5230.23, Florida Statutes.....	11
§230.23(9)(b)5, Florida Statutes.....	12

**PREFACE**

Appellant, State of Florida, will be referred to as "Appellant". Appellee, the School Board of Sarasota County, Florida, will be referred to as the "Board". Citations to Appellant's Appendix will be stated as a "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 bonds of indebtedness.

### STATEMENT OF THE CASE

This is an appeal from a Final Judgment of the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County validating certain bonded indebtedness of The School Board of Sarasota County ("the Board") pursuant to Chapter 75, Florida Statutes (1987).

The suit was initiated when the School Board of Sarasota County filed a Complaint for bond validation pursuant to Chapter 75, Florida Statutes seeking validation of the bonds not in excess of \$135,000.00. The State of Florida by and through its State Attorney, Earl Moreland, objected to the bonds because the School Board failed to obtain referendum approval. The Complaint was heard before the Honorable Stephen Dakan, Circuit Judge of the Twelfth Judicial Circuit in and for Sarasota County on October 6, 1989. At the conclusion of the trial, Judge Dakan validated the bonds. The State of Florida filed a timely Notice of Appeal on November 3, 1989.

### STATEMENT OF THE FACTS

Pursuant to Resolution adopted September 5, 1989, the Board authorized a Lease-Purchase transaction with a single purpose not-for-profit corporation (the "Corporation"). The Lease-Purchase transaction would allow the Board to lease from the Corporation schools and educational facilities on an annual basis. The Corporation will issue tax exempt bonds, the proceeds

of which will be used to pay the cost of the schools and educational facilities. The payment of debt service on the bonds will be secured by lease payments to be made by the School Board under the lease. Title to the schools and educational facilities will vest in the Corporation and be leased to the Board. The Lease-Purchase Agreement requires the Board to make lease payments sufficient to pay the debt service on the bonds during each year the Lease-Purchase Agreement is in effect. The lease term is for one year and may be renewed annually until the bonds are retired. At the end of the scheduled lease term and upon the payment of all amounts due under the Lease-Purchase Agreement, title to the facilities will then vest to the Board.

The Board's obligation under the Agreement to make lease payments during any year is limited to legally available revenues specifically appropriated by the Board. If, for any fiscal year, the School Board does not make an appropriation for this purpose, the Lease-Purchase Agreement terminates at the end of the fiscal year. In the event the lease terminates because of non-appropriation the School Board will not incur any additional penalties or liabilities under the Lease-Purchase Agreement. The Corporation cannot compel the Board to appropriate funds pursuant to the Lease-Purchase Agreement.

Most of the land on which the schools and educational facilities are to be located are currently owned by the Board and will be leased to the Corporation pursuant to a ground lease. These lands will then be subleased back to the Board pursuant to

the Lease-Purchase Agreement. As long as the Board is not in default under the Lease-Purchase Agreement, the School Board is entitled to exclusive use of said property. The Corporation may re-enter the educational facility in the event of default or non-appropriation and the Corporation or its assignee will then have exclusive use of the property and the improvements until the bonds are retired and debts paid. So long as the Board is in possession, the rent under the ground lease is nominal. If the Corporation takes possession of the facilities as a result of default or non-appropriation, the rent will be fair market value payable to the School Board by the Corporation or its assignee. Payments to the Board are required only after payment of all debt service on the bonds. If there are insufficient funds to pay all the debt service on the bonds, the Board receives nothing and this is not considered a default under the Ground Lease Agreement.

In the event of default or non-appropriation, the School Board will have the right to purchase the facilities by paying off the bonds. If it does not exercise this right, the Corporation may reenter and relet or sell its interest in the ground lease and the facilities in order to generate sufficient revenues to pay off the bonds. The facilities can be used for noneducational purposes in this event. If the Corporation from reletting or selling its interest in the ground lease facilities receives an amount in excess of the amount necessary to pay off the bonds, any excess would be returned to the Board as equity.

The Corporation will be created pursuant to Chapter 617, Florida Statutes for the sole purpose of issuing bonds to pay for the construction of schools and educational facilities which will be leased by the Board. The Board of Directors will consist of the School Administrator, and members of the School Board. The Corporation will serve merely as a conduit of funds and will transfer all of its rights and obligations to a Trustee bank through a separate trust agreement.

The Board's obligation to pay annual rents under the Lease Agreement must be made from available revenues. The available revenues are comprised from four sources - - 1) Monies derived from the Florida Education Finance Program (FEFP); 2) Monies derived from the Public Education Capital Outlay and Debt Service Trust Fund (PECO); 3) the local government interest structure of sales surtax levied pursuant to F.S. **212.055(3)**; and 4) One-half of the revenues received by the Board from a levy not exceeding 2.0 mills on all real property in Sarasota County pursuant to F.S. **236.25**. The first three sources are non-ad valorem sources, but the fourth pledged source of revenue is from ad valorem taxes.

### SUMMARY OF ARGUMENT

The Circuit Court erred by validating the bonds in this case because the bond issue violates Article VII, Section 12 of the Constitution of the State of Florida and the cases decided thereunder. The Florida Constitution prohibits any bond issuance payable from ad valorem tax revenues when the obligation is more than one year without holding a referendum. The instant bonds were issued without a referendum, and ad valorem tax revenues are pledged to redeem the bonds.

The School Board has devised an elaborate scheme in an attempt to make these bonds appear as if they are a one year obligation and thus avoid the referendum requirement. The Lease-Purchase arrangement in this case is clearly for more than one year because the School Board will be under a moral compulsion to renew the Lease-Purchase Option year after year. The School Board owns the land on which these schools are to be built, and if they fail to renew the Lease-Purchase year after year, they would lose the use of public lands until all the bonds are paid off. In addition, if the School Board determines that one school is no longer necessary, they cannot stop funding one school without endangering all the other schools purchased under this Lease-Purchase arrangement.

The Lower Court erred by validating these bonds because it creates an impermissible mortgage on public property. The School Board will be compelled to annually appropriate sufficient funds to pay the rent specified in the Lease-Agreement or the School

Board will lose its right to possession of the school buildings and real property essential to its operation. The seller (the corporation) has retained the right to repossess the properties that is the subject of the lease and to have exclusive use of the lands which are currently owned by the School Board until all the bonds are paid off. Consequently, the School Board will be compelled to levy taxes sufficient to make the rent payments in order to avoid foreclosure and the loss of public lands.

The failure to obtain a referendum approval is a fatal defect and a condition precedent to validating the bonds in this case. The School Board is attempting to do indirectly what it cannot do directly. This Court should reverse and set aside the Trial Court's validation of said bonds until such time as the School Board complies with the Florida Constitution and gives the voters of Sarasota County a chance to be heard.

## ARGUMENT

### I.

#### POINT ON APPEAL

#### **THE TRIAL COURT ERRED BY VALIDATING BONDS PAYABLE IN PART FROM AD VALOREM TAXATION WITHOUT REFERENDUM APPROVAL**

The Florida Constitution, Article VII, 512, prohibits governmental units within the State of Florida from issuing bonds, any portion of which will be paid from ad valorem tax revenues unless approved at referendum. The language of Article VII, 512 is well worth quoting:

**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 (emphasis supplied)

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

It is beyond dispute that one source of redeeming the bonds in the instant case is ad valorem tax revenues received by the School Board of Sarasota County from a levy on all real property in Sarasota County.

The School Board carefully tailored its Complaint, Resolutions and Exhibits attached thereto to comply with the

recent decision in State v. Brevard County, 539 So.2d 461 (1989).

In Brevard County, the Supreme Court, speaking through Justice Grimes, held that Brevard County's Lease-Purchase arrangement for equipment, whereby the County established a not-for-profit corporation to purchase the equipment to lease back to the county, did not violate the state constitutional provision prohibiting counties from issuing, without voter approval, certificates of indebtedness payable from ad valorem taxation and maturing more than twelve months after issuance. The Supreme Court in Brevard County, reasoned that since the County's obligation was secured solely by non-ad valorem revenues and the county preserved its right to terminate the lease without further obligation, it was not inevitable that the arrangement would lead to higher ad valorem taxes.

The Lease-Purchase agreement devised by the School Board of Sarasota County fails for three reasons: The School Board intends to redeem the Bonds in part with ad valorem tax revenues. By contrast, in Brevard County, the County's obligation to make payments under the lease was secured solely by non-ad valorem revenues. Second, in Brevard County, the Lease-Purchase Agreement involved leasing items of equipment. If Brevard County chose not to renew the yearly lease, the bondholders would be entitled to claim the equipment. Moreover, in Brevard County, the County could easily find another vendor to lease similar items of telephone equipment if it chose not to renew the yearly lease. In the instant case, this involves a lease of buildings

and a ground lease for the property underneath the buildings. The School Board currently owns the real property and intends to lease it to the corporation for a nominal sum. If the School Board declines to renew the yearly option, the bond holders are entitled to possession of the buildings and exclusive use of the public land until the bonds are paid off. If the bondholders re-take the buildings and real property they have absolutely no obligation to pay the Board anything unless sufficient revenues are raised to service the bond debt. In simple language, this means the Board would never decline to renew its yearly option because they would lose the use of public lands for **up** to thirty (30) years. Furthermore, the Board's "discretion" not to renew the lease yearly is illusory, because alternative school buildings are extremely unlikely to be available and the use of the real property on which to build alternate schools has been lost. School buildings also have particular characteristics requiring large amounts of land and very particular design features such as cafeteria and gymnasium facilities. Moreover, if the School Board decided not to renew the annual lease in the instant case, it is extremely unlikely another lessee for the real property and buildings could be found. It is doubtful any lessee would be willing to go to the expense to convert a school building to another use and have the right of possession terminate at the end of the ground lease knowing their improvements would thereafter belong to the Board. Thus, if the School Board did not renew the annual lease, the bondholders

would re-take the schools and public lands, and would be unable to generate sufficient income to service the debt and the Board would lose the use of public lands without any compensation.

The Board and Corporation intends to build approximately ten (10) new schools with the revenue from these bonds. Under the terms of the Ground Lease and Lease Purchase Agreements the Board cannot default on one school without defaulting on the entire bond issue. In other words, if at some future date the Board determines that one particular school is no longer needed, they cannot close down that school and default on the Lease-Purchase agreement without losing their possessory interest in all the other schools built and leased under these agreements.

Consequently, the School Board is compelled and morally obligated to renew the Lease Agreement every year. As the Supreme Court held in County of Volusia v. State, 417 So.2d 968 (Fla. 1982) Volusia County's pledge of all available non-ad valorem revenue together with its promise do to all things necessary to continue to receive the various revenues would inevitably lead to higher ad valorem taxes during the life of the bond. It is important to note that the Supreme Court in Volusia reasoned that "that which may not be done directly may not be done indirectly" and denied the proposed bond validation because they failed to obtain referendum approval.

The Board relies on Florida Statutes §235.056 and §230.23 as statutory authority to enter into this Lease-Purchase method of financing new schools. At first blush, it would appear the

School Board is statutorily permitted to enter into this Lease Agreement. However, Florida Statute §230.23(9)(b)5 states in pertinent part:

\* \* \*

**Notwithstanding any other statutes, if the rental is to be paid from ad valorem taxation and the agreement is for a period greater than 12 months, an approving referendum must be held.**

\* \* \*

Consequently, the above statute codifies the constitutional referendum requirement for Lease-Purchase arrangements. Appellee admits these bonds are redeemable from ad valorem taxation. The sole issue is whether or not the agreement is for a period greater than 12 months. This Lease-Purchase is clearly for a period greater than 12 months because if the Board fails to appropriate money in any given year, they lose the use of all schools built from these funds and all possessory rights to their lands leased to the Corporation under the Ground Lease until the indebtedness is paid off. This clearly creates a moral compulsion upon the Board to renew the Lease-Purchase Agreement year after year.

In summary, for the above reasons, the bond in the instant case should not be validated without referenda approval.

## II.

### THE BOND VALIDATION CREATES A IMPERMISSIBLE MORTGAGE ON PUBLIC PROPERTY.

The School Board of Sarasota County's bonding plan violates Article VI, §12 of the Florida Constitution in a second way; it creates a mortgage against public property with the possibility of foreclosure. The Supreme Court has held several times that governmental units are constitutionally forbidden from granting such mortgages without referendum approval. Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971) and Boykin v. Town of River Junction, 121 Fla. 902, 164 SO. 558 (1935) The rationale for these decisions is that the governmental unit granting such a mortgage would feel compelled to levy ad valorem taxes sufficient to prevent the foreclosure of public property.

In the case at bar, the School Board will suffer the same compulsion as that described in Nohrr and Boykin. The School Board will be compelled to annually appropriate sufficient funds to pay the rents specified in the Lease-Purchase Agreement or the School Board will loose its right to possession of several school buildings and real property essential to its operations. Based on these events, it seems clear that the School Board will renew the lease each and every year.

The arrangement in the instant case is not a true lease. A true lease would require the School Board to pay to the lessor

the fair market value of the leased property at the end of lease term in order to purchase the lessors reversionary interest in the property. More importantly, the seller (the corporation) has retained the right to repossess and foreclose upon the property that is the subject of the lease (the school buildings and real property) and to repossess for the remainder of the term of the ground lease the leased land. Consequently, the School Board will be under a compulsion to levy taxes sufficient to make the rent payments in order to avoid foreclosure.

In sum, the proposed bond issue in the instant case creates a mortgage against public property with the possibility of foreclosure and should not be permitted without referenda approval.

#### CONCLUSION

The School Board of Sarasota County drafted an elaborate plan to validate bonds and circumvent voter approval. The heart of the School Board's argument is that the Complaint, Resolution and Exhibits are virtually identical to the Lease-Purchase arrangement approved by the Supreme Court in Brevard County. However, there are three dispositive distinctions: In Brevard, all payments under the lease were secured solely by non-ad valorem revenues. In the instant case, ad valorem revenues are being pledged to make the lease payments. Likewise, in Brevard, the lease involved a purchase agreement for equipment. In the case at bar, the lease involves real property and school buildings. Finally, in the case sub judice, the School Board is

clearly under a morally compulsion to renew the lease on a yearly basis to avoid foreclosure of public property and to avoid defaulting on the bond issue.

This Court should reverse and set aside the Trial Court's validation of said bonds until such time as the School Board of Sarasota County complies with the Florida Constitution and obtains referenda approval on the bond issue.

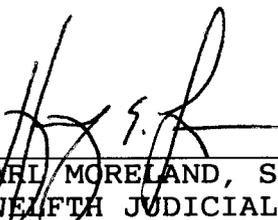
Respectfully submitted,



Henry E. Lee  
Chief Assistant State Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to A. Lamar Matthews, Williams, Parker, Harrison, Dietz & Getzen, 1550 Ringling Boulevard, Sarasota, Florida 34236 this 28 day of November, 1989.



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