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IN THE SUPREME COURT OF FLORIDA

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THE STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of Collier 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 Collier County of its obligations under the Lease herein described, or to be affected thereby,

Defendant/Appellant,

v. Case No. **75,009**

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

Plaintiff/Appellee.

ON APPEAL FROM THE
CIRCUIT COURT
OF COLLIER COUNTY, FLORIDA

BRIEF OF AMICUS CURIAE

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PREFACE

Appellant, State of Florida, will be referred to as "Appellant". The School Board of Collier County, Florida, will be referred to as the "Board". Amicus Curiae, Florida School Boards Association, Inc., will be referred to as the "Association." The lease agreement before this Court in this case is referred to as the "Lease Agreement." The not-for-profit corporation created by the Board to be the nominal lessor will be referred to as the "Corporation." Citations to Amicus Curiae's Appendix will be stated as "App. ____," followed by the appropriate page numbers. Citations to the Lease Agreement will be stated as "LA. __," followed by the appropriate page numbers.

Association calls this Court's attention to the fact that two other validation cases on appeal to this Court have the same or similar issues, State of Florida v. School Board of Sarasota County, Florida, Case No. 74,979 (referred to herein as Sarasota County School Board) and State of Florida v. Florida School Boards Association, Inc., Acting on Behalf of The School District of Oranse County, Florida, Case No. 75,154 (referred to herein as Oranse County School Board).

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida School Boards Association, Inc. (the "Association") is a Florida not-for-profit corporation organized in 1961. The members of the Association are the 350 qualified members of Florida's 67 County Boards of Public Instruction (now known as "School Boards") as they shall serve from time to time. The Association was organized to provide an agency through which individual School Boards can engage in joint action in attacking problems of concern to school districts and to provide services to School Boards.

Pursuant to Section 235.056(3), Florida Statutes (Supp. 1988), as amended by Ch. 89-226, Section 4 and Ch. 89-278, Section 14, Laws of Florida, (the "Act"), School Boards are authorized to lease or lease-purchase educational facilities and sites, as defined in Section 235.011, Florida Statutes (Supp. 1988), as amended by Ch. 89-226, Section 1 and Ch. 89-278, Section 11, Laws of Florida, from a non-profit educational organization and are further authorized to make the rent payments under such lease or lease-purchase agreements from certain non-ad valorem revenues and from not more than one-half of the local capital outlay millage (the "Capital Outlay Millage") which may be imposed pursuant to Section 236.25(2)(e), Florida Statutes (Supp. 1988), as amended by Ch. 89-244, Section 1, Laws of Florida.

The Association is a non-profit educational organization which has successfully completed over $100,000,000 in publicly offered lease financings of educational facilities and sites for the School Boards of Collier County, Escambia County, Okaloosa County, Osceola County, Highlands County, Polk County, Santa Rosa County and Brevard County (App. 10, 68, 124). The Association, through its members, is aware of over $70,000,000 of publicly offered lease financings of educational facilities and sites which have been completed by the School Boards of Dade County and Broward County (App. 168, 207). The Association is in the process of completing in excess of $300,000,000 of publicly offered lease financings of educational facilities and sites for other School Boards in the state and, through its members, is aware of approximately $300,000,000 of publicly offered lease financings of educational facilities and sites which are in process for other Florida School Boards. In both the completed and pending lease financing transactions, all or a major portion of the rent payments are to be made from the Capital Outlay Millage.

This Court's ultimate decision in the instant case has broad and critical consequences for each of the School Boards involved in the closed and pending transactions and for all other School Boards in Florida. If this Court were to determine that, absent an approving referendum, the

Capital Outlay Millage is not available to make rent payments under an annual lease, the School Boards which have already closed lease financings would be faced with the unplanned for disruption of terminating their existing leases and all School Boards would be crippled by the loss of the major source of capital finance provided to them by the Legislature, the lease-purchase of educational facilities and sites utilizing the Capital Outlay Millage. With the substantial need for educational facilities, the continuation of lease-purchase financing is vital to the School Boards of Florida.

Unlike municipal bond financing in Florida, the development of which can be traced through the reported cases of the lower courts and this Court as a result of the validation process, lease financing in Florida has developed and matured outside the purview of the courts. The purpose of this Amicus Curiae Brief is:

(a) to familiarize this Court with the legal theory and distinct financing structures which have been used in Florida as lease-purchase financings;

(b) to provide this Court with a concise and detailed history of the transactional and legal development of lease-purchase in Florida;

(c) to show that application of the decision reached by this Court in State v. Brevard County, **539 So.2d 461** (Fla. **1989)** to the instant case is consistent with substantive law

as to real property and within the limitations set forth by this Court in Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971); and

(d) to further show that the consistent application of the Brevard decision to the instant case results in the conclusion that the Lease Agreement issued by the Board does not mature more than 12 months after issuance and, consequently, no debt is created and the payment of rent thereunder may be made from both non-ad valorem and ad valorem sources.

STATEMENT OF THE CASE

The Association accepts the Appellant's Statement of the Case.

STATEMENT OF THE FACTS

The Association accepts the Appellant's Statement of the Facts.

SUMMARY OF ARGUMENT

The financing arrangement before this Court is not new in Florida and has been used by the State and all levels of local government to finance hundreds of millions of dollars of equipment, land and buildings (App. **1, 3, 60, 117, 167, 168, 206, 207, 253, 254, 301, 303, 322, 411, 412).** The validation should be affirmed because the only obligation issued by the Board is the Lease Agreement and the Lease Agreement is an annual lease. The Board's obligations thereunder are created, if at all, at the commencement of

each fiscal year (through the act of appropriation). No such obligation ever matures more than 12 months after the creation thereof because the Lease Agreement is always terminated at the end of the fiscal year unless renewed by the Board through subsequent appropriation. The economic risk in this and such similar transactions is on the lessor, not the taxpayers. The Lease Agreement must be subjected to the budgetary process each and every year and must terminate unless the Board, after taking public input through that process, elects to renew it for another year.

In Brevard, the Court distinguished an annual lease with a declining price purchase option from a security agreement. That distinction, when applied to this case, is consistent with substantive law concerning real property Uvesco, Incorporated v. Petersen, 295 So.2d 353 (Fla. 4th DCA 1974) and results in distinguishing the Lease Agreement from a mortgage. Consequently, affirming the validity of the Lease Agreement is consistent with Nohrr.

The fact that the ground is owned by the Board and subject to a lease, lease-back does not create a moral compulsion to renew the Lease Agreement. A recent major non-appropriation in Florida was with respect to a building built for a State agency on a ground lease from the State (App. 444). The circuit court for the Second Judicial Circuit, citing Brevard, held that there was no obligation on the Legislature to appropriate under the lease (App. 458).

The proper issue is a factual question: "Can the Board terminate the Lease Agreement and still perform its essential duties as a unit of government?" There are many options available to the Board for a properly planned termination of the Lease Agreement which fall far short of levying taxes, such as having several schools share facilities, programming multiple sessions or year round sessions, and, in the extreme, resort to the powers of eminent domain against the Corporation's leasehold estate on some of the buildings.

Because the Lease Agreement is an annual lease and there is no prohibited mortgage and no coercion to renew, the obligation of the Board can never mature more than 12 months after it is created and ad valorem monies may be used to make rent payments without a referendum.

ARGUMENT

In order to facilitate the Court's understanding of the issues in this case, the first two sections of the Argument present an analysis of the legal and historical aspects of lease-purchase which affect all the issues raised on appeal. The final two sections of the Argument specifically address the points raised by Appellant

BACKGROUND NO. I.

THE NATURE OF LEASE PURCHASE FINANCING IS DIFFERENT THAN MUNICIPAL BONDS WHICH HAVE BEEN REVIEWED BY THE FLORIDA COURTS

A. TYPES OF LEASES

There are basically two types of leases. A "true lease" and a "lease-purchase."

1. True Lease

A true lease, sometimes referred to as an "operating lease," is a lease of use and possession of real or personal property. The lessor remains the true owner and the lessee does not receive any accrual of equity in the asset being leased. In re Structural Specialties, Inc., Bkrtcy, 18 B.R. 399 (1981).

2. Lease Purchase

A full-payout lease-purchase agreement, sometimes referred to as a "conditional sales contract," is a lease arrangement whereby the lessee is acquiring the leased asset over time. The lessee has the right to acquire title to the leased asset with a credit for all or a portion of the rent payments that have been paid during the lease term. U.C. Leasing, Inc. v. Barnett Bank of West Florida, 443 So.2d 384 (Fla. 1st DCA 1983), cause dismissed 447 So.2d 888 (Fla. 1984). Also, if the lessee is a state or a political subdivision of a state, the interest portion of the rent may be exempt from federal income taxes even if the lease agreement is an annual lease and is subject to appropriation by

the governing body of the lessee.' Such an agreement is a tax exempt lease-purchase but is not a security agreement under Florida law. Brevard at 464. Consequently, a government lessee can obtain very favorable rent payments and substantial savings through a tax exempt lease-purchase which is an annual lease and is subject to appropriation.

B. ANNUAL VERSUS "FULL-PAYOUT"

A lease, whether a true lease or a lease-purchase, can be either annual or full-payout.

1. Annual

A lease which is annual is subject to termination at the option of the lessee on an annual basis. The lease which was presented to this Court in the Brevard decision was an annual lease. The Lease Agreement before this Court in this case is an annual lease. An annual lease with a government lessee usually provides that the lease will be terminated at the end of the current fiscal year unless the legislative body of the lessee appropriates (in the budget for the ensuing fiscal year) an amount sufficient to make the rent payments under such lease in such ensuing fiscal year (App. 16, 74, 129, 194, 224, 288, 388, 418, 439-440). Consequently, at any point in time the obligation of the lessee is an obligation in contract that exists only for the current fiscal year and will always be an obligation of 12 months or less.

2. School Board Leases Must Be Annual

The Act requires that School Board lease-purchase agreements must be annual leases subject to appropriation by providing at Section 235.056 (3)(b)2, Florida Statutes (Supp. 1988), as follows:

> The initial term or any renewal term of any lease-purchase agreement shall expire on June 30 of each fiscal year, but may be automatically renewed annually, subject to a board making sufficient annual appropriations therefor....

As indicated below, the right to terminate annually is also critical with respect to analyzing the nature of a lease entered into by a School Board under Article VII, Section 12, Florida Constitution.

3. Full-Payout

Under a full-payout lease, there is a fixed lease term which returns to the investor (through rental payments) the initial investment in the leased asset plus the agreed rate of return on that investment. The lessee does not have the option to terminate the lease prior to its originally established termination date and any attempt to do so will result in default and damages.

The Act only authorizes annual leases so the balance of the discussion in this Amicus Curiae Brief will be limited to annual leases.

C. NON-SUBSTITUTION

A technique sometimes used by lessors and investors to minimize the ability of a lessee under an annual lease to

terminate the lease at the end of the lessee's fiscal year is referred to as a "non-substitution" covenant.[2] Such a covenant prohibits the government lessee from replacing the leased asset under the terminated lease with a substitute asset (by acquisition, lease or services contract) for some period of time. The inclusion of such a covenant in an annual lease may raise legal issues as to whether the lease is really an annual lease or has been converted, in fact, into a full-payout lease. This concern is especially pertinent in lease agreements with government lessees in Florida under Article VII, Section 12, Florida Constitution. Section 235.056(3)(b)2, Florida Statutes (Supp. 1988), prohibits the inclusion of any non-substitution covenant in a lease-purchase agreement for educational facilities under the Act and provides as follows:

> Under no circumstances shall the failure of a board to renew a lease-purchase agreement constitute a default or require payment of any penalty, nor in any way limit the right of a board to purchase or utilize educational facilities and sites similar in function to the educational facilities and sites which are the subject of the said lease-purchase agreement.

No such covenant appears in the Lease Agreement before this Court.

D. LESSOR AND LESSOR'S INTEREST

1. Nominal Lessor

In transactions where a project will consist of components which are being acquired from multiple vendors,

developers or contractors, it is not uncommon to use a nominal lessor. The Act specifically contemplates the use of nominal lessors. Section 235.056(3)(a), Florida Statutes, as amended by Ch. 89-226, Section 4, Laws of Florida provides as follows:

> A district school board, by itself, or through a direct-support organization formed pursuant to s. 237.40 or nonprofit educational organization or a consortium of district school boards, may, in developing a lease-purchase of educational facilities and sites provide for separately advertising for and receiving competitive bids or proposals on the construction of facilities and the selection of financing to provide the lowest cost funding available, so long as the board determines that such process would best serve the public interest ...

A direct-support organization does not have statutory authority to issue debt but can be the nominal lessor in a certificate of participation lease financing because no debt of the lessor is issued. Section 237.40, Florida Statutes (Supp. 1988). In this case and the Dade County School Board and Broward County School Board financings (App. 168, 207), a direct-support organization is used as nominal lessor. In the Oranse County School Board case and the lease financings for the School Boards of Collier County, Escambia County, Okaloosa County, Osceola County, Highlands County, Polk County, Santa Rosa County and Brevard County (App. 3, 60, 117) the Association, as a non-profit educational organization that has continuous corporate existence and educational functions, serves as nominal lessor and issues

its own corporate debt to fund the leases. In the Sarasota School Board case, a not-for-profit corporation has been created by the School Board solely for the purposes of serving as lessor and issuing its debt to fund the Lease Agreement.

2. Lessor's Interest

The "lessor's interest" in the assets which are the subject of a lease-purchase agreement may be either (1) outright title or (2) leasehold title. In this case, the lessor's interest is leasehold title. The Board holds fee-simple title to the land and grants a ground lease to the Corporation, the nominal lessor, for a term significantly in excess of the maximum term of the lease-purchase agreement. The Corporation, the nominal lessor, then leases back to the Board, under an annual lease subject to appropriation, the Corporation's interest in the ground and the improvements and grants to the Board an option to purchase such interest. A lease, lease-back with option to purchase may also be structured for equipment.

Whether the lessor's interest constitutes outright title or leasehold title should not be material in applying the Brevard decision. It is the lessor's interest in the leased asset which is the subject of the lease with option to purchase. Where the lessee holds reversionary fee title and can not be dispossessed of such title and the lessee is lease purchasing the leasehold estate of the nominal lessor,

the Brevard decision should operate to allow the nominal lessor to recover use, possession and enjoyment of the leased asset during the balance of its leasehold estate following a non-appropriation or default by the lessee. Upon expiration of the leasehold estate, the reversionary title of the lessee would ripen into possession and the ground, together with all improvements thereon, would revert to the lessee.

E. LEASES COMPARED TO DEBT OBLIGATIONS

While the Florida courts have an extensive case law history of the development of municipal bonds there is no such case law development with respect to lease-purchase agreements. The following is a brief comparison of lease financing obligations to various bond financing obligations which have been passed upon by the Florida courts.

1. General Obligation

The most basic form of debt is constitutional debt through a pledge of the full faith and credit and the taxing power of a unit of government. It is possible for a full-payout lease to be secured by the full faith and credit and taxing power of a unit of government. Such a lease would be a constitutional debt and would require the same legal formalities as any other general obligation constitutional debt, including a successful referendum. The Lease Agreement before this Court is not full-payout and is not secured by a pledge of the full faith and credit or taxing

power of the Board. Furthermore, annual leases disclaim such security (App. 12, 70, 125, 181, 221, 268, 316, 337, 364-365, 417, 432-433, 439) and the Lease Agreement specifically disclaims any such security (LA. 3).

School Board leases under the Act must be annual and subject to appropriation. Also, Section 235.056(3)(b)3, Florida Statutes (Supp. 1988), provides:

> No lease-purchase agreement entered into pursuant to this subsection shall constitute a debt, liability, or obligation of the state or a local school board or shall be a pledge of the faith and credit of the state or a local school board.

Consequently, the Lease Agreement is not in the nature of a general obligation bond.

2. Revenue Bonds

A revenue bond may be secured by a pledge of non-ad valorem revenues. City of Palatka v. State, 440 So.2d 1271 (Fla. 1983); State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983). Similarly, a full-payout lease may be secured by a pledge of non-ad valorem revenues. However, an annual lease is typically not secured by a pledge and, therefore, is not considered a revenue bond. An annual lease may identify the source from which the payments are to be made and, in unusual situations, may state that upon an appropriation being made for the ensuing fiscal year the legislative body shall thereby be deemed to have pledged a specific source for the making of those rent payments but only during the ensuing fiscal year.

Generally, annual leases subject to appropriation are not revenue leases (and therefore not treated as revenue bonds) because at the end of any fiscal year, the lessee can terminate the lease and use the very same monies that were identified for rent payments to acquire or lease substitute facilities or for any other lawful purpose. Consequently, the terminology "pledge" with respect to annual lease is a misnomer. The Lease Agreement is an annual lease (LA. 2.

3. "Subject to Annual Appropriation" is different than Covenant to Budget and Appropriate

Some non-ad valorem revenue debt obligations create a pledge on unspecified non-ad valorem revenues of the borrower by providing that, each year, the unit of government will budget and appropriate monies to make the debt service payments from unspecified non-ad valorem revenues. City of Daytona Beach at 983. Annual leases subject to appropriation do not contain a covenant to budget and appropriate and, more particularly, the Lease Agreement before this Court does not contain such a promise. To avoid unintended non-appropriation, an annual lease contains the covenant that the finance officer will request an appropriation through the proposed budget (LA. 7; App. 11, 69, 125, 195, 225, 391, 418). The legislative body of the lessee, however, has absolute discretion to determine whether or not to make such an appropriation (LA. 4; App. 16, 74, 129, 194, 224, 288, 388, 418, 439-440). This feature, which makes the

lease an annual lease and not an agreement which goes beyond the current fiscal year, protects the integrity of the agreement under Article VII, Section 12, Florida Constitution, because the "obligation" of the lessee is always created at the beginning of a fiscal year and never continues beyond the end of the same fiscal year. Without a non-substitution covenant, an annual lease subject to appropriation is a current contractual obligation of the lessee (LA. 3) and does not have any component which matures more than 12 months from the date of issuance because the obligation for each fiscal year is created by the act of appropriating monies to renew or continue the lease during that fiscal year. Absolute discretion to terminate or continue the lease is given to the legislative body.

F. THE FOUR TECHNIQUES FOR FUNDING A LEASE

There are basically four techniques for funding a lease: (i) the lessor may simply retain ownership of the lease; (ii) the lessor may assign the lease to a single investor; (iii) the lessor may use a certificate of participation structure to assign shares in the lease to multiple investors; or (iv) the lessor may issue its own debt secured specifically by the rental payments to be made under the lease. In this case, a certificate of participation issue is used to fund the lease. In the Sarasota Countv School Board case the lessor which has been created by the Board and is under the Board's control, is issuing its own debt

secured by the rental payments under an annual lease. In the Orange County School Board case, the Association, which is not created or controlled by the Orange County School Board, is issuing its own corporate debt to finance the facilities.

In a lease financing for a unit of government, the critical inquiry for purposes of legal analysis is: (a) is the lease obligation annual or full-payout; and (b) does the structure used to fund the lease change the nature of that obligation.

1. Lessor Retains Ownership of Lease

In the simplest lease transaction the lessor is providing an asset under a lease arrangement to the lessee. The lessor may be a vendor, with respect to equipment, or a contractor or developer, with respect to land and buildings.

Assuming that the lessee is a unit of government that is a state or a political subdivision of a state, the lease-purchase arrangement may be structured as a tax exempt lease-purchase which is subject to annual appropriation and is an annual lease.

2. Whole Lease Assignment.

The lessor may desire to receive the present cash value of the stream of rent payments under the lease. In that case the lessor may assign, by outright conveyance, all its right, title and interest as lessor under the lease to a third party investor for a specified dollar amount. When

the annual lease is a tax exempt lease-purchase agreement subject to appropriation, the assignee of the lessor receives the same tax exempt interest benefit. This method of funding a lease is called a "whole lease assignment."[3]

3. Certificates of Participation

When a lease transaction is of considerable size and is structured as an annual tax exempt lease-purchase subject to appropriation, it may be desirable or necessary to assign the lease to multiple investors. This is accomplished by assigning the lease, by outright conveyance, to a trustee (App. 180, 216, 268, 405-407, 429-430) and having the trustee register shares or participations in the lease. Owners of the shares of participations become partners in the lessor's rights under the lease. Most everyone is familiar with the fact that when a bank makes a loan, the bank may keep only a portion of the loan for its own account and may participate the balance of the loan to other banks. Such participations are noted in the records of the bank that owns the loan and in the records of the banks buying the participation. A lease-purchase agreement can be participated in exactly the same way except that in order for the shares or participations to be sold and transferred in the capital markets, a piece of paper or certificate must exist which evidences the ownership of that share or participation. When a bank participates a loan the obligations of the borrower are completely unaffected and unchanged by the

actions of the bank. Similarly, in a certificate of participation issue, the lease-purchase agreement and the obligations of the government lessee are unchanged and unaffected by the participation of the lease to multiple investors.

The piece of paper which evidences an ownership of a share or a participation in a lease is commonly referred to as a "certificate of participation" or a "COP." Typically, there is a nominal lessor which assigns its interest to a trustee under a trust agreement to which the trustee, the nominal lessor and the lessee are parties. The trustee holds the lessor's right, title and interest under the lease for the benefit of the multiple owners of shares or participations in the lease. The trustee is responsible to execute and deliver the certificates of participation which evidence such ownership of shares or participations, to keep a register of the owners of the certificates of participation and to collect the rent payments and forward to each certificate of participation owner its respective portion of the rent.

In a certificate of participation financing, the certificates of participation are not separate securities or obligations. Consequently no separate obligation has been issued and the certificates of participation are not independent obligations. The certificates of participation are merely pieces of paper which evidence the right to receive a

portion or share of the rent under the lease. They are not obligations of the lessor. For federal securities law purposes, the certificates of participation are exempt from registration because they are not separate securities and the only obligation that exists is the obligation of the government lessee under the lease. For federal tax law purposes, the certificate of participation owners are no different than an owner who purchased the entire lease as a single investor and, consequently, the certificate of participation owners receive tax exempt interest to the extent of their participation in the tax exempt rent payments under the lease.

Where the underlying lease is a tax exempt lease-purchase agreement, which is an annual lease and is subject to appropriation, no obligation is created that goes beyond the then current fiscal year. In the event that at the end of the current fiscal year the lease-purchase agreement is not renewed, the owners of the certificates of participation have no rights against the lessee beyond the termination of the lease, and must simply share pro rata in the proceeds of the liquidation or the reletting of the asset which was leased.

Although this Court's analysis of the annual tax exempt lease-purchase agreement presented in the Brevard decision is clear, the documents submitted to the Court to fund the lease presented a certificate of participation financing.

The discussion in the decision characterizes the certificates of participation as certificates of indebtedness which are obligations of the nominal lessor. That is not correct. Certificates of indebtedness are obligations in and of themselves and, if issued by a nominal lessor with lease security, would constitute lease revenue bonds. Certificates of participation, however, are not separate obligations but rather are written evidence of ownership of a portion or share of an underlying obligation. In the Brevard case, the underlying lease is the only obligation. This problem does not affect the Court's findings in the Brevard decision concerning the lease itself and those findings are applicable to the Lease Agreement before this Court in this case as well as the leases presented in the Sarasota County School Board and the Oranse County School Board cases.

4. Lease Revenue Bonds

Under the federal income tax laws it is possible for a non-profit corporation to issue debt, the interest on which is exempt from federal income taxes. The essential federal income tax analysis is that the bonds are being issued for the benefit of a unit of government and the accrual of equity in the project as the debt is amortized is for the benefit of the unit of government. With a non-profit corporation as nominal lessor, the nominal lessor can issue its own tax exempt lease revenue bonds and covenant to make

payment on those bonds from rental payments received under a lease to a unit of government. Where the underlying lease is an annual lease which is subject to appropriation, the unit of government has merely entered into an annual contract to pay rent for property that is owned by the nominal lessor. In the event that the underlying lease should be terminated for non-appropriation, the bonds would continue to be outstanding as separate obligations of the nominal lessor. Unlike certificates of participation, lease revenue bonds continue as outstanding separate obligations of the lessor, and do mature more than **12** months after issuance.

BACKGROUND NO. II

THE EGA AND TRANSACTIONAL DEVELOPMENT OF LEASE PURCHASE FINANCING IN FLORIDA STRONGLY SUPPORTS THE VALIDITY OF THE LEASE AGREEMENT

A. THE ACT

In **1987** the Legislature enacted the Act for the purpose of making available to School Boards the ability to lease-purchase educational facilities and sites through annual leases which are subject to appropriation. The Act as originally passed created an implication that the lease or lease-purchase must be done with the vendor or developer of the facility being leased. Such a requirement would preclude nominal lessors and would be inconsistent with the experience of the state on both buildings and equipment where the most cost effective acquisition and financings

were achieved by pursuing each separately. Consequently, in the special session in February of 1988, Ch. 88-4, Laws of Florida, was passed amending the Act to clarify the Legislature's intent that School Boards be permitted to lease or lease-purchase educational facilities and sites in a financing lease separate from the award of the contracts for acquisition of such facilities. This qualification was essential in order to structure lease-purchase financings for School Boards using nominal lessors. The Lease Agreement before this Court and the leases in the Sarasota County School Board and the Orange County School Board cases all use nominal lessors.

1. School Board Lease-Purchases Pursuant to the Act

The major publicly offered financings concluded pursuant to the Act are identified in the Appendix including the certificate of participation annual leases by Dade County School Board and Broward County School Board (App. 168, 207) (totalling over $70,000,000) and the lease revenue bonds secured by annual leases offered by the Association (App. 3, 60, 117) for the School Boards of Escambia, Okaloosa, Osceola, Collier, Highlands, Polk, Santa Rosa and Brevard Counties (totalling over $100,000,000.)

2. Summary of Prior and Proposed School Board Lease Transaction Structures.

To date there have been two varieties of publicly offered lease-purchase transactions by School Boards under

the Act. One form is the use of a not-for-profit corporation created by the School Board to serve as nominal lessor under a lease-purchase agreement which is offered in shares to multiple investors by the execution and delivery of certificates of participation. That approach was used in the Dade County School Board and Broward County School Board transactions (App. 168, 207) and is being used in this case. Such a structure does not create any debt whatsoever on the part of the nominal lessor or the lessee and the only obligation created is the lease-purchase agreement itself.

The other approach has been the use of the Association as an on-going corporate entity to issue its non-recourse debt as lease revenue bonds which are secured by rental payments to be made by School Boards under subleases which are annual leases subject to appropriation (App. 3, 60, 117). Such an approach is also being used in the Orange County School Board case. The non-recourse debt of the Association is a separate debt obligation but is an obligation solely of the Association and is not a debt obligation of the School Boards. In the event that the underlying lease is terminated, the debt of the Association remains outstanding but the School Board has no responsibility or obligation with respect to same.

B. LEGAL BACKGROUND

The most significant event that has shaped lease-purchase financing in Florida is the decision of this Court

in Nohrr. In that decision this Court found the creation of a mortgage on public property to secure revenue bonds issued by a public authority could cause related governmental entities such as the county or the Legislature to "feel morally compelled to levy taxes or to appropriate funds to prevent the loss of those properties through the process of foreclosure." Nohrr at 311.

In January of 1980, the Attorney General applied the analysis of Nohrr to personal property in a 1980 opinion to the City of Boca Raton, 1980 Op. Att'y. Gen. Fla. 080-9 (January 31, 1980) . In that opinion the Attorney General indicated that there was no legal basis for distinguishing between the treatment of real property and personal property for purposes of the coercive effect of a secured lien which would allow a third party to involuntarily dispossess a government unit of its property and to forfeit its equity in such property.

The combination of the Nohrr decision and the Attorney General's opinion to the City of Boca Raton, together with a belief by municipal finance attorneys that jurisdiction was not available for an annual lease under the bond validation procedure, resulted in development of lease-purchase agreements which would not create a foreclosable lien but were not reviewed by the courts.

Such annual lease-purchase agreements have the following pertinent provisions: (a) it is acknowledged explicitly that

title to the leased asset is vested in the lessee upon acceptance, (b) the lessor affirmatively states that it has no security interest in or mortgage or foreclosable lien upon the leased asset, (c) the lessee agrees that in the event of termination for non-appropriation or default the lessee will voluntarily return the leased assets to the lessor, and (d) the lessor agrees that if the lessee fails to so voluntarily return the leased assets to the lessor or to dispose of them for the lessor's account, the lessor has no right to specifically enforce such covenant and its remedies are limited to an action in contract for the unpaid balance of the lease-purchase price of the leased assets. Such an agreement usually provides that a judgment in such an action can only be collected against legally available monies of the lessee which may lawfully be applied for such purpose.

Because of (i) the ability of the lessee to terminate the relationship at the end of each fiscal year and "put" the leased asset back to the lessor and (ii) the fact that the lessor is obligated to accept the asset and title to it following an event of non-appropriation or default: if the lessee returned the asset, both parties were in the same place they would have been under a normal annual lease-purchase; and if the lessee did not return the asset, the lessor would be in the position of a vendor suing for the unpaid balance of the purchase price.

In 1988, the Attorney General of Florida was asked to address the constitutionality of such leases under Article VII, Section 12 of the Florida Constitution and approved such a lease by a School Board for equipment (See Informal Opinion May 23, 1988 to Mr. Lloyd Soughers, Superintendent of the School Board of Brevard County, Florida (App. 432) and by a water management district for real property. 1988 Op. Att'y Gen. Fla. 088-53 (November 29, 1988) (App. 439).

The Lease Agreement before this Court is similar to the one presented to the Attorney General in the latter case. The payments will be made from ad valorem monies, title to the property is in the lessee, the leased assets constitute buildings, and the lease is annual subject to appropriation. The only difference is the lessor's remedies which were approved by this Court in Brevard, as to personal property, and which have been recognized as distinct contractual remedies which do not create a mortgage under a sale-lease back of real estate in Uvesco.

Although the Brevard decision addressed the use of non-ad valorem revenues to make the rent payments, if it wasn't for the security interest issue, the lease agreement could have been "full-payout" and there would have been no need to incorporate an annual termination feature in order to sustain the validity of the lease. (See City of Palatka; City of Daytona Beach.) Based upon the analysis used in

Brevard, the Lease Agreement before this Court, which is an annual lease-purchase subject to appropriation with respect to real property, is not a prohibited mortgage.

C. USE OF ANNUAL LEASES IN FLORIDA

Almost a billion dollars in annual leases with certificates of participation and annual leases with lease revenue bonds (in each case, subject to appropriation) have been issued by the State of Florida and its cities, counties and districts in the last seven years. Attached are offering documents with respect to some of the pivotal transactions which have been closed in Florida on an annual lease basis, including the first publicly offered Certificate of Participation annual lease (Dade County, 1982) (App. 412), the first State of Florida transaction (Board of Regents, 1984) (App. 357) and the $475,000,000 State of Florida Equipment Lease (State Comptroller, 1986) (App. 254).

Lease revenue bonds payable from underlying annual leases subject to appropriation have also been used. As an example, offering documents with respect to the half billion dollar State of Florida Capital Outlay Program (which is being financed through lease revenue bonds secured solely by annual leases subject to appropriation) are also attached (App. 303, 322).

ARGUMENT NO. I.

BY CONSISTENT APPLICATION OF BREVARD, THE LEASE AGREEMENT IS NOT *AN* OBLIGATION THAT MATURES MORE THAN TWELVE MONTHS AFTER ISSUANCE AND AD VALOREM MONIES MAY BE USED TO MAKE THE RENT PAYMENTS

When the analysis in the Brevard decision is applied to the instant case it is clear that the Lease Agreement is an annual lease-purchase agreement subject to appropriation. The Board has maintained its full budgetary flexibility. In the event that the Board should fail to renew the Lease Agreement for an ensuing fiscal year, the Capital Outlay Millage could be used to provide substitute facilities. At the time a binding obligation is created under the Lease Agreement (which is the commencement of each fiscal year for which the Board appropriates monies to make the rent payments) there is no obligation under the Lease Agreement which matures more than 12 months from such commencement. Under Brevard, no other conclusion is possible. The lease in that case had to be either annual or full-payout. If it was full-payout it would have created a prohibited security interest. The lease was determined to be annual for purposes of the security interest test, which is a constitutional concern under Article VII, Section 12, Florida Constitution, and Nohrr. It must also be annual for purposes of Article VII, Section 12, Florida Constitution, as to payments from ad valorem monies. It can not be

treated as annual for one purpose and full-payout for another purpose under the same Article VII, Section 12, of the Florida Constitution.

Accordingly, the provisions of Article VII, Section 12, Florida Constitution, as applied to the Lease Agreement do not create a constitutional prohibition upon the use of ad valorem monies by the Board to make rent payments under the Lease Agreement.

The fact that the lease in Brevard dealt with equipment and the Lease Agreement in this case deals with real property is not a basis for distinction. First of all, the analysis for creation of security interest or mortgage is the same. See U.C. Leasing, Inc. (with respect to equipment); Cook v. Merrifield, 335 So.2d 297 (Fla. 1st DCA 1976) (with respect to fee title); and Cinque v. Buschlen, 442 So.2d 1034 (Fla. 3rd DCA 1983) (with respect to installment sale of a leasehold). The Lease Agreement in this case falls under Brevard and Attorney General Opinion 088-53 because there is no full pay-out obligation created, there is no deficiency liability on the Board, there is no acceleration of rent beyond the end of the then current fiscal year and there is no agreement on the part of the Board under the Lease Agreement to make payments beyond the end of the then current fiscal year.

Secondly, legions of office administrators and staff directors who have endured changes of high technology systems (including telephone switches) would take issue with Appellant's assertion that substituting equipment is easier than substituting buildings.

Thirdly, the fact that the ground is owned by the Board does not preclude non-appropriation. A recent major non-appropriation in Florida is of a building on land owned by the lessee (App. **446).**

On April **22, 1987,** the State of Florida Department of Professional Regulation **("DPR")** entered into an annual lease agreement, subject to appropriation, with the Leon County Research and Development Authority **("LCRDA")** for a **171,500** square foot building (App. **448-449).** The LCRDA issued over **$15,000,000** in lease revenue bonds to finance the building (App. **450).** The building was designed to DPR's specifications, for its use, and DPR executed certificates approving the plans and specifications to induce investors to purchase participations in the lease revenue bonds (App. **449-450).**

When the building was ***70%*** complete, the Legislature non-appropriated and appropriated funds for DPR to move to a refurbished shopping mall instead (App. **451).** The LCRDA sued DPR on behalf of itself and the investors for breach of contract and bad faith. On motion for summary judgment, the circuit court in the second circuit held, as a matter of law, that the Legislature had a right to non-appropriate,

they did non-appropriate and there was no equitable basis for compelling them to appropriate (App. **455, 461, 466, 468-470).** Appellant's contention that ownership of the ground by the lessee and a present intent to use the facility indefinitely precludes non-appropriation just isn't true. The fee interest in the DPR situation was owned by the State and the State lost use of the ground and the building when it non-appropriated. While that may have weighed in the decision to non-appropriate, it certainly didn't make anyone feel compelled to appropriate.

In this case, the Board's ability to non-appropriate is not illusory. If the Board built buildings on its property for cash and later found it didn't need or want them, the cash is gone and the buildings are empty. If the Board issued general obligation bonds to do so, the bonds must be paid and the buildings are empty. Under the Lease Agreement, the Board has the right to vacate the buildings having only paid rent for the time it actually used the buildings and at the end of the ground lease the land and the buildings still belong to the Board. During the period prior to the end of the ground lease and subsequent to a non-appropriation by the Board, the buildings are held by the trustee and the Board has no liability to the certificate of participation owners. If property generates funds in excess of the amount that would have been necessary to exercise the purchase option, the excess funds are remitted

to the Board. Regardless, at the end of the ground lease term, the land and the buildings revert to the Board as owner of the reversionary fee. In this case, the issue is whether the Board has addressed its ability to provide education meeting State requirements if it has to terminate the Lease Agreement. The scenario under which the Board would walk away from facilities costing over $40,000,000 is not a pretty one. But, if given such extreme circumstances, the Board could perform its essential function without those facilities (for example, by having schools share facilities, or programming staggered sessions of classes, or cutting discretionary programs back to the minimum and using the space for essential curriculum) then the ad valorem taxing power of the Board has not been impaired and there is no moral compulsion to renew the Lease Agreement.

A decision by this Court that the Lease Agreement does not create constitutional debt would be consistent with the overwhelming majority of recent supreme court decisions in other states. The issues decided by this Court in Brevard and under consideration in the instant case are not uncommon in the jurisdiction of other states. Local governments throughout the nation are searching for low-cost techniques to finance capital facilities without the incurrence of constitutional debt. Like Florida, most states have similar constitutional prohibitions on the issuance of debt without

a successful referendum. Therefore, the use of annual lease-purchase agreements subject to appropriation is becoming more common throughout the nation.

For example, the Supreme Court of Georgia recently was faced with this issue in Barklev v. City of Rome, 381 S.E.2d 34 (Ga. 1989) (App. 528). In 1988, the Georgia legislature enacted OCGA, s.36-60-13, which allowed counties and municipalities in Georgia to enter into lease-purchase contracts of all kinds for the acquisition of goods, materials, real and personal property, services and supplies and set forth the guidelines that each would have to follow. Basically, the statute envisioned a lease-purchase agreement subject to annual appropriation with the standard non-appropriation clause. The court in Barkley had to determine the constitu- tionality of that provision and whether the execution of a lease which could continue for five years if appropriated by the City of Rome was the incurrence of unconstitutional debt. In upholding the validity of the statute, the court emphasized that a lease-purchase contract subject to renewal is valid as long as it absolutely terminates without further obligation of the municipality at the close of the calendar year in which it was executed and at the close of each succeeding year for which it may be renewed. The court clearly pointed out that such an arrangement would not constitute a "debt" within the meaning of the Georgia constitution or any prior case law.

The Supreme Court of South Carolina faced similar issues in Caddell V. Lexington County School District No. 1, 373 S.E.2d 598 (S.C. 1988) (App. 471). In Caddell, the court addressed a certificate of participation lease-purchase financing which had been employed by the School District after three failed bond referendums. The school district sought to enter into the lease-purchase transaction to finance the construction and renovation of public school buildings. The court held that the certificate of participation annual lease (subject to appropriation) did not create debt of the school district under Article X, Section 15, of the South Carolina Constitution and found that such a result was in accordance with the overwhelming majority of jurisdictions.

In Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D. 1988) (App. 477), the North Dakota Supreme Court considered the legality of a three-step 15 year sale-leaseback-purchase financing arrangement by the City of Bismarck. The City sought to fund $17,000,000 in capital improvements, using a "non-appropriation mechanism" to avoid obligating the general taxing powers of the City. The funds would be used to construct a civic center, memorial library and a water main. The financing arrangement was challenged by interested taxpayers who claimed that it created an unconstitutional debt.

In concluding that the City was within its statutory powers to consummate the contemplated lease-purchase transaction, the court stated that the use of the non-appropriation mechanism in the lease made it clear that the City's general taxing powers are not obligated. In validating the proposed lease agreement, the court further concluded:

> "The lease-purchase agreement specifically says that it does not constitute a general obligation of the City, that its taxing powers are not pledged for payment of the lease payments, that the City may terminate the agreement by not appropriating funds to make lease payments, and that the City is only liable for lease payments for the current fiscal year for which it has appropriated funds."

Such restrictions appear in the Lease Agreement in this case (LA. 3)

On December 4, 1989, the Supreme Court of Oregon filed its decision in State ex rel. Kane V. Goldschmidt, No. SC S36443 (Or. S.C. Dec. 4, 1989) (en banc), which upheld annual lease subject to appropriation financing by the State of Oregon (App. 496).

Article XI, Section 7 of the Oregon Constitution prohibits the state legislature from creating debt or liabilities in excess of $50,000 without voter approval. 1989 Or. Laws Ch. 1032 authorized lease-purchase agreements to finance real or personal property which will be owned or operated by the state or any of its agencies. The statute provides that payments are to be made solely from funds

appropriated or otherwise made available by the legislature to pay amounts due under a financing agreement for the fiscal period in which the payments are due. For real property financings, the statute only anticipates lease lease-back transactions with the underlying real property lease exceeding the lease-purchase agreement by a maximum of 10 years. Pursuant to 1989 Or. Laws Ch. 731 the legislature authorized financings of $172,000,000 under Chapter 1032.

The court reviewed the non-appropriation language found in Chapter 1032 and the proposed agreement (similar to the language in the Lease Agreement). In holding that an annual lease subject to appropriation does not constitute debt, the court noted that the statute "does not create 'a fixed charge against future revenues,' nor does it 'impair the flexibility of planning and the ability of future legislatures to avoid a tax increase." Kane, slip op. at 17.

The court took the same approach as this Court in Brevard with respect to the concern that the lessee stands to lose substantial "equity" or value should it fail to appropriate under the agreement and required that the lessor remit any excess recovery from liquidation of the project to the lessee.

An arrangement which was quite different than the case before this Court resulted in the only recent Supreme Court

decision to reach the conclusion that an annual lease-purchase agreement subject to appropriation created constitutional debt. In Montano v. Gabaldon, 766 P.2d 1328 (N.M. 1989) (App. 522), the county owned land in fee-simple and entered into a ground lease and lease-purchase back of a jail facility. Unlike the case before this Court, in Montano, if the County terminated the annual lease-purchase by non-appropriation, it forfeited both its equity in the building and the fee title to the land. Not surprisingly, the New Mexico Supreme Court concluded that the coercive effect of losing fee title to land which the county already owned and losing any equity in the building created constitutional debt.

In the case before this Court the Board can never lose its reversionary fee and any equity of the Board under the lease-purchase agreement must be remitted to the Board as required by the Brevard decision.

ARGUMENT NO. 11.

FLORIDA STATUTE SECTION 230.23 (9)(b)(5) DOES NOT REQUIRE AN APPROVING REFERENDUM WHEN ENTERING INTO THE LEASE AGREEMENT.

The language which Appellant quotes from Section 230.23(9)(b)(5), Florida Statutes (Supp. 1988), is savings language to incorporate the provisions of Article VII, Section 12 of the Florida Constitution into the statutory authority for School Boards to enter into lease purchase of educational facilities and sites. The statute does not

increase or add to the requirements of Article VII, Section 12 of the Florida Constitution and Appellant does not make any contention that it does. Consequently, since no referendum is required under Article VII, Section 12 of the Florida Constitution, the statute does not require one either.

Appellant then refers to the language added to Section 235.056(3)(a), Florida Statutes (Supp. 1988), by Ch. 89-278, Section 14, Laws of Florida, concerning multi-year leases, which section provides as follows:

> Educational facilities and sites rented or leased for 1 year or less are not required to be approved by the office and must be funded through the operations budget, except that the lease-purchase of educational facilities and sites shall be approved by the office as required by s. 235.26 ... Prior to educational facilities and sites being leased, rented, or lease-purchased for a period of more than 1 year, such facilities and sites shall be approved by the office. A lease contract for 1 year or less, when extended or renewed beyond a year, becomes a multiple-year lease, and shall also be approved by the office .... (Underline added).

The purpose of the one-year versus multi-year distinction in this statute is the authority of the Department of Education ("DOE") to review a proposed lease. The statute provides that leases of one year or less are not required to be approved except that lease-purchase agreements must be approved. Clearly the Legislature is deeming annual lease-purchase agreements to be for one year or less otherwise the "except" provision would not be necessary.

The new language added in 1989 is intended to cover a different situation. As shown in the Senate Staff Analysis (App. 525) some School Boards had been leasing facilities for one-year at a time but avoiding DOE review. The language added to the statute closes that loophole but has absolutely nothing to do with the Lease Agreement in this case which is already required to be reviewed by the former language.

Appellant also makes much of the term "multi-year." The generic term "multi-year" in a statute is not dispositive or even relevant to whether a lease or contract creates a binding obligation that exists for more than 12 months.

In Barkley, the statute in question, O.C.G.A. s. 36-60-13, provided for "multi-year" leases so long as the obligation was terminable at the end of each year. Barkley at 35. The Court noted that if the contract created an obligation that went beyond the year, it would be debt and held that a "multi-year" contract that can be terminated at the end of each year is not debt.

It is undisputed that the lessee under an annual lease-purchase agreement, subject to appropriation, can elect to continue the lease for several years. But that is not the issue. The issue is whether the lessee is obligated beyond the end of the year. Clearly, in this case, the lessee is not so obligated.

Appellant refers to statements concerning the Board's current intentions (intention to appropriate, expectation of

continuing to need the facility) and statements that the Board has reviewed its projected revenues as indications that the ability to terminate is illusary. Such representations merely certify that the School Board has properly addressed its need for the project and its ability to afford it. We find nothing in the Lease Agreement that indicates that such statements obligate the Board to continue the Lease Agreement beyond the end of the current fiscal year.

Also, as mentioned above, the covenant that the superintendent will request an appropriation in the proposed budget is a customary provision to avoid inadvertent non-appropriation. The Board maintains its absolute budgetory flexibility as to whether or not to appropriate.

CONCLUSION

The decision of the lower court should be affirmed.

Footnotes

1. Section 103(c)(1), Internal Revenue Code of 1986, as amended.

2. An example of a non-substitution covenant would be:

> Notwithstanding the foregoing, Lessee agrees that it will not cancel this Lease under the provisions of this Section if any funds are appropriated to it, or by it, for the acquisition, retention or operation of other equipment performing functions similar to the Equipment for the fiscal period in which such termination occurs or the next succeeding fiscal period thereafter.

3. A Guide To Municipal Leasing, Municipal Finance Officers Association, 1983, pg. 50, footnote 14.

Respectfully submitted,

Joseph L. Shields

JOSEPH L. SHIELDS

DALE S. RECINELLA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail, postage prepaid, this 14th day of December, 1989, to: Joseph P. D'Alessandro, State Attorney and Michael J. Provost,, at Post Office Drawer 2007, Naples, Florida 33939, James H. Siesky, 700 - 11th Street South, Suite 203, Naples, Florida 33940, and Donald U. Livermore, Jr., at 1750 Gulf Life Tower, Jacksonville, Florida 32207.

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