IN THE SUPREME COURT OF FLORIDA

THE **STATE OF FLORIDA,** and the Taxpayers, Property Owners and Citizens of Collier County, including non-residents owning property or subject to taxation therein, et. al.,

Appellant,

CASE NO. 75,009

vs.

SCHOOL BOARD OF COLLIER COUNTY, FLORIDA, acting as the Governing Body of the School District of Collier County, Florida,

Appellee,

ANSWER BRIEF OF APPELLEE

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PREFACE

Appellant, State of Florida, will be referred to as "State".

Appellee, the School Board of Collier County, Florida, will be referred to as "School Board".

STATEMENT OF THE CASE

The School Board accepts the State's Statement of the Case.

STATEMENT OF THE FACTS

The School Board accepts the State's Statement of the Facts.

SUMMARY OF ARGUMENT

Approval by voter referendum of the School Board's payment obligations under its Lease Purchase Agreement is only required when both of the following conditions are met: (1) the obligations mature more than 12 months after issuance, and (2) the obligations are payable from the compelled levy of ad valorem taxes. Neither condition is met in this case, and therefore no referendum approval is required.

The Lease Purchase Agreement permits the School Board to terminate its obligations at the end of each fiscal year by not appropriating funds for payment. Whether the School Board's need for the leased facilities will be so strong in the future as to make illusory the School Board's annual right to terminate the Lease Purchase Agreement is a question of future policy for the School Board, not a legal question to be decided by a court in a validation proceeding.

No referendum approval of the Lease Purchase Agreement is required under Section 230.23(9)(b)(5), Florida Statutes (Supplement 1988), when construed in pari materia with Section 235.056(3), Florida Statutes (Supplement 1988), as amended by Chapter 89-226, Section 4, Laws of Florida. The 1989 amendment referring to multiple-year leases was enacted for the purpose of requiring prior approval by the State Department of Education, not the purpose of requiring referendum approval of such leases. The statute does not extend the obligations under such leases beyond one year, or vary the express terms of the leases.

No referendum approval of the Lease Purchase Agreement is required under Article VII, Section 12 of the Florida Constitution. The Lease Purchase Agreement contains the same relevant terms as the lease which was validated against the same

challenge in State v. Brevard County, 539 So. 2d 461 (Fla. 1989), except that the School Board may use either ad valorem tax revenues or non-ad valorem revenues as the source of its annual appropriation for annual rent payments. Because the determination to levy a tax and to appropriate its revenues for rent payment cannot be compelled, and is made on an annual basis and extends for no longer than a single budget year, Article VII, Section 12 is not violated. An annual levy of ad valorem taxes, on a voluntary basis, which cannot be compelled by the obligation holder, is permitted to pay annual obligations, and also to retire long term revenue bonds. Tucker v. Underdown, 356 So. 2d 251 (Fla. 1978).

Jurisdiction lies under Chapter 75, Florida Statutes (1987) to validate the School Board's obligations to pay rent under the Lease Purchase Agreement. State v. Brevard County, 539 So. 2d 461 (Fla. 1989). The substance of the transaction is controlling, not the name given to the indebtedness. The substance of this transaction is that the School Board incurs an obligation in the nature of indebtedness, limited in maturity at any given moment to one year or less. It is the School Board's obligation which is the subject of the proceedings to validate, and the School Board is clearly a "taxing district" or other political district or subdivision entitled to proceed under Chapter 75.

ARGUMENT

POINT I

THE SCHOOL BOARD IS NOT REQUIRED TO OBTAIN VOTER APPROVAL BY REFERENDUM WHEN ENTERING INTO THE LEASE-AGREEMENT.

The State argues that Section 230.23(9)(b)(5), Florida Statutes (Supplement 1988), and Section 235.056(3), Florida Statutes (Supplement 1988), as amended by Chapter 89-226, Section 4, Laws of Florida, require that the Lease Purchase Agreement must be approved at a referendum. Although Section 230.23(9)(b)(5) only requires a referendum if the lease is for a period greater than 12 months, and Section 235.056(3) only provides for annual leases (subject to annual renewal), the State argues that the lease term in the Lease Purchase Agreement is really for a longer period because the School Board's continuing need for the school buildings will compel the School Board to renew the Lease Purchase Agreement each year for the life of the buildings.

This Court has recently approved a similar lease-purchase arrangement to be entered into by Brevard County, without requiring a referendum, in State v. Brevard County, 539 So. 2d 461 (Fla. 1989). The County's lease, like the Lease Purchase Agreement here, was for a term which expired at the end of each fiscal year unless the County renewed the lease by appropriating funds in its next annual budget for payment of another year's rent. The lease was challenged on the ground that it violated Article VII, Section 12 of the Florida Constitution, which prohibits counties from issuing certificates of indebtedness payable from ad valorem taxation and maturing more than 12 months after issuance. The court agreed with the trial court's finding that compulsion to increase ad valorem taxes did not exist and that, at page 463:

> the county, in adopting its budget on an annual basis, preserves its right to terminate the lease without further obligation.

The State argues, first, that the holding in Brevard does not control because Brevard County's need for continuing use of its office equipment in Brevard was less compelling than the School Board's need for continuing use of its school buildings in this case. This is precisely the kind of internal policy question that the Court has repeatedly held will remain in the sound political judgment of the local governmental body incurring the obligation. Town of Medley v. State, 162 So. 2d 257 (Fla. 1964); State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978); DeShea v. City of Waldo, 444 So. 2d 16 (Fla. 1984). In Waldo, validation of water and sewer revenue bonds was challenged on the grounds (1) that no mandatory water and sewer connection ordinance was in effect, (2) that such an ordinance was required by the City's agreement with the U.S. Farmer's Home Administration and (3) that such an ordinance would in any event be needed to assure generation of sufficient revenues to retire the bonds. The Court held, at p. 17, that this argument:

> pertains to a matter to be resolved by future decision-making on the part of the City in operating and governing its expanded water and sewer system. As such it is a collateral matter beyond the scope of judicial scrutiny in bond validation proceedings.

The School Board's future need for its school buildings being financed under the Lease Purchase Agreement is in the same category.

What is to be decided in a bond validation is the legal authority and the nature of the legal obligation of the School Board. In Brevard, this Court noted the legal right of the County to terminate the lease at the end of any year by non-appropriation of funds for the next year's rent, and held that the referendum requirement did not, therefore, apply. The Court did not weigh the likelihood that the County would continue to desire or need the equipment leased, leaving that decision to the sound future judgment of the County. Instead, the Court rejected the argument that the county would be compelled to keep the

lease current in order to protect its "equity" built up in the equipment and found, at page 464:

> with its "annual renewal option" under the lease, the county maintains its full budgeting flexibility.

Section 235.056(3), Florida Statutes (Supplement 1988), as amended by Chapter 89-226, Section 4, Laws of Florida, even when read in pari materia with Section 230.23(9)(b)(5), Florida Statutes (Supplement 1988), as the State argues, does not lead to the conclusion that the Lease Purchase Agreement must be approved at a referendum. The legislative history of Chapter 89-226 shows an entirely different purpose for the amendment to Section 235.056(3). The Senate Staff Analysis and Economic Impact Statement for Bill No. CSSB 543, dated May 21, 1989, states, under "B. Effect of Proposed Changes" as follows with respect to this amendment:

> Section 235.056, Florida Statutes, provides that boards renting or leasing facilities for one year or less do not have to have such transactions approved by the Office of Educational Facilities. Apparently, some boards have been leasing facilities on a long term basis through a series of one year leases, thereby, circumventing the intent of the law. The changes proposed in Section 4. of the bill would correct this situation by making all leases extended or renewed beyond one year subject to office approval.

The sponsors of CSSB 543, the Education Committee and Senator Johnson, made no mention of any local referendum requirement. Moreover, a review of Section 235.056(2) and (3), as in effect both before and after the 1989 amendment, clearly shows that these subsections are carefully structured to provide for agreements which do not fall within the terms of Article VII, Section 12 of the Florida Constitution, the referendum requirement. The only "circumvention" to be cured by the amendment was prior approval of the transaction by the State Office of Educational Facilities, and such approval is the only purpose of the amendment.

Even without the clarifying legislative history, the statutory language itself demonstrates this obvious intent. The very choice of the term "multiple-year lease" in the 1989 amendment is purposeful: it avoids converting obligations for one year or less into obligations maturing more than one year after issuance (the type of obligation requiring referendum approval) yet effectively makes annual leases which are subject to renewal also subject to prior approval by the State Office of Educational Facilities. Moreover, the amendment does not purport to amend the very terms of all such leases contrary to the expressed intent of the contracting parties. Therefore, the Lease Purchase Agreement should continue to be tested under Article VII, Section 12, and under Section 230.23(9)(b)(5), by reference to the actual terms of the Lease Purchase Agreement itself.

The State also argues that the Lease Purchase Agreement must be approved by a referendum pursuant to the requirements of Article VII, Section 12 of the Florida Constitution. Although the lease in Brevard was also validated against a challenge under this constitutional requirement, the State argues that the Lease Purchase Agreement is different from the lease validated in Brevard because the rent in Brevard was payable only from non-ad valorem tax revenues, whereas the rent payments under the Lease Purchase Agreement will be derived directly or indirectly from ad valorem taxes.

The Court's opinion in Brevard indicated that the County's obligation to pay rent would be secured solely by non-ad valorem revenues actually budgeted for such purpose during any fiscal year, but then held that Article VII, Section 12, of the Florida Constitution was not violated, and County of Volusia v. State, 417 So. 2d 968 (Fla. 1982) was easily distinquished, because:

> (N)ot only is there no covenant to maintain revenue-generating services, the county, in adopting its budget on an annual basis, preserves its right to decide to terminate the lease without further obligation.

As provided in Section 2.5(a) of the Lease Purchase Agreement (App. 26), the rent is payable:

> only from the School Board's legally appropriated funds on an annual basis,

and the School Board is not:

> obligated to pay any sums due hereunder from the compelled levy of ad valorem or other taxes (except, with respect to the School Board, those included in the School Board's legally appropriated funds on an annual basis).

Article VII, Section 12 requires a referendum only if both conditions are present: (1)the obligation is payable from compelled levy of ad valorem taxes, and (2) the obligation matures beyond one year after issuance.

The most common local debt structure in use is the issuance of revenue bonds which mature beyond one year after issuance, but do not meet the first condition because no ad valorem tax levy can be compelled for their payment.

In this case, neither condition has been met. As has been noted, the School Board's obligations do not extend beyond one year. Within a one year period, the School Board, by its annual budgetary process, may appropriate any funds for the rent payment from any source which is not otherwise legally restricted to being expended for other specified purposes. While the School Board, within its annual budgetary flexibility, *may* make an annual levy of certain taxes to meet its annual rent payments, the language in the Lease Purchase Agreement clearly states that the School Board cannot be compelled to do so (App. 26).

Indeed, this Court has held in Tucker v. Underdown, 356 So. 2d 251 (Fla. 1978), that a county has the authority to levy ad valorem taxes to be used to pay bond debt service even on revenue bonds (which mature after one year) issued without referendum approval, so long as the bondholders do not have the right to compel the

County to levy the taxes for those purposes. The county had decided as a matter of its own fiscal policy, after issuance of revenue bonds not payable from compelled ad valorem taxes, to raise tax revenues in its annual budget to apply them during any given year to bond debt service and, thereby, to reduce for that year the user charges which were pledged to pay debt service. The Court held that this plan was a permissible financing scheme, and that the bond covenants only prohibited the bondholders from compelling the County to levy taxes in all future years.

In this case, as in Tucker v. Underdown, the voluntary appropriation of ad valorem tax revenues, on an annual basis, does not violate Article VII, Section 12.

The pertinent language from Section 2.5(a) of the Lease Purchase Agreement is that the School Board is not:

> obligated to pay any sums due hereunder from the compelled levy of ad valorem or other taxes (except ...those included in the School Board's legally appropriated funds on an annual basis).

This language was carefully crafted to comply with Article VII, Section 12, and the annual tax levy doctrine of Tucker v. Underdown.

The Lease Purchase Agreement provides the School Board with three options:

1. If the School Board decides not to appropriate any funds for rent payments, the Board's obligation terminates at the end of the one year period.

2. If the School Board decides to appropriate funds for rent payments from non-ad valorem tax revenue sources which it expects to receive in the next budget year and which are legally available for such purpose, the Board then becomes obligated to make payments for another one year period, but no tax levy, even for one year, can be compelled by the Lessor (or certificate holders).

3. If the School Board decides to levy an ad valorem tax under a state law which permits its use to pay annual rent on the Lease Purchase Agreement (as is currently

authorized under Section 236.25(2)(e), Florida Statutes (1988 Supplement), as amended by Chapter 89-244, Section 1, Laws of Florida), the Board then also becomes obligated to make payments for a one year period, but, again, no tax levy can be compelled by the Lessor (or certificate holders). If the School Board levies a tax and appropriates its revenues to make the rent payments, it will be doing so on a voluntary basis as permitted by the annual tax levy doctrine of Tucker v. Underdown.

All three of these options comply with Article VII, Section 12. As the Court noted in Brevard, the one year maturity provision of Article VII, Section 12 is not violated because the School Board has preserved its right to decide on an annual basis whether to make an appropriation in its budget or to terminate the Lease Purchase Agreement with no further obligation. As permitted by Tucker v. Underdown, the School Board has also preserved its option to voluntarily fund its rent payments in any year from either ad valorem tax revenues, if then currently authorized by law, or from other revenue then currently authorized by law. Thus, the School Board has not met either of the two conditions in Article VII, Section 12 (both must be met before a referendum is required), because its obligations do not extend beyond a one year period, and because the Lessor (and certificate holders) do not have the right to compel the levy of ad valorem taxes.

POINT II

THE CIRCUIT COURT HAD JURISDICTION OF THIS CAUSE UNDER CHAPTER 75, FLORIDA STATUTES (1987).

The State has argued that the Circuit Court did not have jurisdiction under Chapter 75, Florida Statutes (1987), because the School Board will not issue any bonds or incur any indebtedness.

The Supreme Court of Florida held in Brevard that jurisdiction lies in the Circuit Courts and the Supreme Court, pursuant to Article V, Section 3(b)(2) of the Florida Constitution and Chapter 75, Florida Statutes (1987), to validate a County's obligations to pay rent under a lease-purchase agreement which had essentially the same terms as the School Board's obligations under the Lease Purchase Agreement which was validated in the Final Judgment under appeal in this cause. Thus, this issue has already been resolved by this Court. The State has not demonstrated any cogent basis for reversal of the Brevard decision.

As in Brevard, the validity of the indebtedness in this appeal is challenged on the ground that the indebtedness violates, directly or indirectly, Article VII, Section 12 of the Florida Constitution, which prohibits governmental units from issuing

> bonds, certificates of indebtedness or any form of tax anticipation certificates payable from ad valorem taxation and maturing more than twelve months after issuance,

except as provided therein. As in Brevard, the indebtedness does not mature more than twelve months after issuance, because the lease rental payments are only incurred on an annual basis, subject to appropriation of funds in each fiscal year's budget. The short annual maturity does not, however, divest the indebtedness of its essential character as

indebtedness. Even indebtedness which matures in less than one year may be validated under the Florida Constitution and Chapter 75, Florida Statutes (1987). The Constitution itself recognizes this, because Article VII, Section 12 regulates and restricts only such indebtedness which matures more than twelve months after issuance, clearly implying that indebtedness which matures within a shorter period is not so regulated and restricted.

The Florida Constitution refers to validation of "bonds" and "certificates of indebtedness." Chapter 75, Florida Statutes (1987) refers, variously, to "bonds" and "bonded debt", and to "certificates of indebtedness" and "certificates of debt" or merely "certificates." The Court in Brevard noted its earlier holding in State v. City of Daytona Beach, 431 *So.* 2d 981 (Fla. 1983), which held that jurisdiction lay to validate the City's obligations to make certain payments to Volusia County under an interlocal agreement. The Court stated, at p. 982:

> [W]e find that this type of interlocal agreement may be validated under Chapter 75 because it is evidence of an indebtedness.

In neither Brevard nor Daytona Beach was the instrument called a "bond" or a "certificate of indebtedness." In both, the substance of the transaction was that an indebtedness was being incurred; therefore, the governmental unit's authority to incur it could be the subject of a validation proceeding. As this Court held in State v. City of Key West, 153 Fla. 226, 14 *So.* 2d 707 (1943), cited with approval in Klein v. City of New Smyrna Beach, 152 *So.* 2d 466 (Fla. 1963):

> Whether the bonds so issued are designated as revenue bonds or revenue certificates is not material. Their import will be controlled by their legal effect rather than by the name given them in the ordinance.

In urging that jurisdiction lies to validate the School Board's lease obligations, the School Board is not unmindful of State v. Downtown Development Authority of the City of Miami, 190 *So.* 2d 756 (Fla. 1966), in which the Court held that the purported

obligations of the Authority were fictional and not obligations at all. Justice Drew, writing for a divided 4-3 Court majority, described the Authority's notes as payable only from moneys derived from an authorized 1/2 mill ad valorem tax if and when the additional tax is actually levied and collected, and as subject to the condition that the:

> holders of this note shall not have the right to resort to legal or equitable action to require or compel the City of Miami to levy and collect an additional tax or to keep an additional tax in force

until the notes were paid. The Court construed the Authority's resolution to provide that even if the tax levy were made and the proceeds spent - albeit wrongfully - for other purposes, the note holders would have no legal remedy to enforce payment.

In contrast, the School Board's lease obligations are not illusory or fictional. During each one year lease term, the School Board is unconditionally obligated to pay the stipulated rent once funds have been appropriated in the annual budget (Section 2.5(b) of the Lease Purchase Agreement, App. 27). It is an event of default if the School Board defaults in the payment of rent which has actually been appropriated (Section 12(b) of the Lease Purchase Agreement, App. 38), and in such event the Lessor (i.e., the trustee or the certificate holders) has the right to seek a judgment against the School Board for the annual rent plus interest (Section 13.1(a) of the Lease Purchase Agreement, App. 39). In this case, it is only if the School Board elects not to appropriate funds to pay the rent in a given year that the School Board's obligations terminate. If an appropriation is made, the School Board is obligated for a one year term. The rights of the Lessor are not dependent upon whether (1) taxes are levied in the future, or (2) funds are collected in the future, or (3) the School Board wrongfully misapplies its appropriated funds for other purposes.

The State also argues that the Circuit Court lacked jurisdiction because the School Board was not the issuer of the debt. The Certificates of Participation - Lease

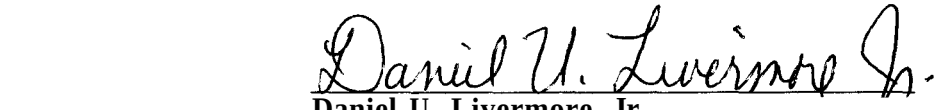
Rentals evidence fractional interests in payments to be made by the School Board pursuant to the Lease Purchase Agreement **(App. 14,56).** The School Board, for convenience, has caused its Foundation, to whom it is obligated to pay the lease rental payments under the Lease Purchase Agreement, to assign the Foundation's interests to a trustee (App. **18-21,** Appendix of State), and the School Board will, together with its Foundation, cause the trustee to sign and deliver certificates to small investors evidencing fractional ownership interests in the School Board's obligation to pay rent for each year that an appropriation has been made for such purpose (App. **58).** The Certificate holders have a direct right to receive the School Board's lease rental payments The function of the trustee here is the same as the function of the trustee in traditional bond financing - to provide a central focus for marketing to small investors the obligor's payment obligations, to ensure compliance by the obligor with its undertakings, including payment **of** all payment obligations in accordance with their terms, and to serve as a paying agent for the School Board with respect to its payment obligations.

It is the School Board which is obligated under the Lease Purchase Agreement, and it is this obligation of the School Board which was validated below.

CONCLUSION

The Final Judgment rendered by the Circuit Court below should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer Brief of Appellee, with Appendix of Appellee, has been furnished to Michael J. Provost, Assistant State Attorney, P.O. Drawer 2007, Naples, Florida 33939, to Joseph L. Shields, General Counsel, Florida School Boards Association, Inc., 203 South Monroe Street, Tallahassee, Florida 32301, and to Dale S. Recinella, Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., Monroe Park Tower, Suite 1010, 101 N. Monroe Street, Tallahassee, Florida 32301, by U.S. Mail, postage prepaid, this 22nd day of December, 1989.

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