IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of Orange 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 issuance of the bonds hereinafter more particularly described or to be affected in any way thereby,

Defendant/Appellant,

vs.

FLORIDA SCHOOL BOARDS ASSOCIATION, INC., a Florida not-for-profit corporation, acting on behalf of the School District of Orange County, Florida,

Plaintiff/Appellee.

Appeal Case #75,154

ON APPEAL FROM THE CIRCUIT COURT
OF ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AU

Florida Constitution

Florida Statutes

STATEMENT OF THE CASE AND FACTS

The Florida School Boards Association, Inc., acting on beha o the School District of Orange County, filed a Complaint for Validation of Florida School Boards Association, Inc. Lease Revenue Bonds (Orange County School Board Project), Series 1989 not exceeding $230,000,000. All appropriate notices were published, and the Trial Court issued an Order to Show Cause why these lease revenue bonds should not be validated. (App.1, p.1). No one from the public appeared at the final hearing to be heard on the issue. (App.3, p.5). The State Attorney for Orange County appeared at the hearing and made a brief argument expressing the state's sole concern that the use of ad valorem taxes or the Capital Outlay millage to fund the subject Lease Agreement requires an electorate vote if ad valorem taxes are pledged. (App.3, p.65).

After hearing at which the School District introduced the testimony of several witnesses knowledgeable in this area of financing and at which the State presented no witnesses, (App.3, pp.1-68), the Trial Court entered final Judgment of Validation. (App.1). No dispute is taken by the State with regard to the findings contained in the Trial Court's Order. The only issue raised by the State on appeal is whether the Trial Court erred in holding that a referendum was not required under the circumstances of this case as a prerequisite to validation.

Lease-Purchase Program

Simply stated, the Lease-Purchase Program utilized by the School Board of Orange County works as follows.

Pursuant to a "Ground Lease," the School Board leases to the Florida School Boards Association, Inc., a non-profit educational organization, certain lands for nominal

rent upon which new facilities will be built.' (App.4). The Association, in turn, issues tax-exempt lease revenue bonds, not exceeding $230 million, appoints the School Board as its agent for the purposes of constructing the needed facilities, and leases the completed facilities back to the School Board on a year-to-year basis under a "Lease-Purchase Agreement." (App.5). The Association repays the lease-revenue bonds from lease payments it receives from the School Board which are subject to appropriation each year as a part of the School Board's operating budget. (App.5). If the School Board chooses to renew its yearly lease options for a period of fifteen years or until the bonds are repaid, whichever is sooner, title to the leased facilities vests free and clear in the School Board and the ground lease terminates? (App.5).

If appropriations are duly and timely made, rents for each fiscal year of the School District are payable from its Capital Improvement Fund and any other legally available funds including available monies paid to it from Florida's Educational Finance Program, monies derived from the Public Education Capital Outlay and Debt Service Trust Fund, and, to the extent not paid from the foregoing sources, up to one-half (1/2) of the School Board's receipts from the levy of up to two (2) mills of Capital Outlay millage in accordance with Section 236.25(2), Florida Statutes, as amended by Ch. 89-244, Section 1, Laws of Florida (1989). (App.5, p.17; App.3, p.41). One-half (1/2) of the Capital Outlay millage is permitted by the terms of such statute to be used to pay lease-purchase obligations.

'The Association could also purchase additional lands for the construction of new facilities. That facet of the lease-purchase program is not challenged by the state and presents no issue for this appeal.

[2]The School Board retains title to the subject real property at all times. The Association will have leasehold title to the improvements only.

Under the program, the School Board *can* make lease payments only from current available revenues. If, for any given fiscal year, the School Board fails to budget available revenues sufficient to make the lease payments due in such fiscal year, all of the School Board's obligations under the Lease-Purchase Agreement automatically terminate without penalty to the School Board.

Regardless of the reason for termination, neither the Association nor the Bondholders have the right to compel the School Board to make lease payments except from revenues actually budgeted and appropriated for such purpose. In addition, the School Board is under no obligation to budget and appropriate any such revenues and neither the Association nor the Bondholders can compel it to do so. Even though revenues generated from the Capital Outlay millage levy might be used to make lease payments, the revenues are not pledged for such purpose, and no person or entity can compel their use in the event the School Board does not appropriate and budget revenues for such purpose.

Finally, if the School Board chooses in any year not to renew the Lease-Purchase Agreement, the School Board has the option of either purchasing the subject facilities and terminating the ground lease (at the then current cost of redeeming the lease-revenue bonds) or of using its funds in another manner, including the leasing, construction or acquisition of other educational facilities. If the School Board chooses not to purchase the subject facilities, they would be used for the benefit of the Bondholders for the remainder of the underlying ground lease term. Any amounts received in excess of amounts required to redeem the lease-revenue bonds must be paid to the School Board. (App.5). When the underlying ground lease expires, the educational facilities will become the property of the School Board at no additional cost.

Final Judgment of Validation

The Trial Court's Judgment of Validation comes to this Court clothed with a presumption of correctness. Its judgment succinctly sets forth the relevant facts of this lease revenue bond issuance. The Trial Court in its Judgment of Validation found that Chapters 230 and 235, Florida Statutes, as amended (the relevant statutes authorizing the subject Lease-Purchase Agreement between the Florida School Boards Association, Inc. (hereinafter the Association or FSBA), a non-profit educational organization which can issue tax-exempt bonds pursuant to IRS Revenue Ruling 63-20 as lessor and the School District of Orange County as lessee) (App.3, pp.11-12), are in all respects constitutionally valid statutes enacted in accordance with the Constitution of Florida, and that the School District of Orange County, Florida, is authorized to enter into lease purchase agreements relating to acquisition of educational facilities as defined by Chapters 230 and 235 (App.1, p.3). The School District can appropriate on an annual basis without referendum up to one-half of the Capital Outlay millage (Section 236.25(2)(e)), Public Education Capital Outlay (PECO) funds, Florida Educational Finance Program (FEFP) funds, and such other funds as may be legally available to make rent payments under the Lease Agreement and any renewals thereof. Pursuant to Internal Revenue Ruling 63-20, which authorizes not-for-profit corporations to issue tax-exempt bonds on behalf of political subdivisions, the School Board of Orange County, as the governing body of the School District, adopted a Resolution which designated the Florida School Boards Association, Inc. to act on behalf of the School District in issuing bonds. (App.1, p.3).

Plaintiff adopted its Resolution providing for issuance of Florida School Boards Association, Inc. Lease Revenue Bonds, Series 1989, not exceeding $230,000,000, to

finance the cost of educational facilities as defined in the above statutes which Project will be leased by the Florida School Boards Association, Inc. to the School Board pursuant to a Lease Agreement with Option to Purchase (hereinafter referred to as Lease Agreement or Lease-Purchase Agreement). (App. 1, pp.3-4). The Project consists solely of educational facilities set forth in the most recent educational plant survey approved for the School District by the State Department of Education. (App.1, pp.1-4). The Educational Plant Survey gives a detailed report of the conditions of the school districts throughout the state and describes what improvements are needed and where new schools are required. (App.3, p.24).

The Trial Court found that the Lease Agreement provides for an initial term terminating at the end of the current fiscal year of the School District on June 30, 1990, with fifteen successive annual Renewal Terms of one year each provided that the School Board lawfully elects to appropriate the revenues necessary to fund each annual renewal of the Lease Agreement. (App.1, p.4; App.5, pp.4-8). The Lease Agreement further provides in the event that the requisite appropriations are duly and timely made in an approved budget, rent for such fiscal year of the School District shall be payable by the School Board from its Capital Improvement Fund and any other legally available funds which include but are not limited to one-half of the Capital Outlay millage, available PECO funds, FEFP funds and other Capital Outlay and debt service monies to the extent budgeted and appropriated. (App. 1, pp.4-5; App.3, pp.39-41; App.5). The Lease Agreement will be submitted to and approved by the State Department of Education before the sale of bonds. (App.1, pp.4-5).

The Trial Court adjudged that the Bonds are the non-recourse obligation of the Florida School Boards Association, Inc. payable solely by the Association from the rent

paid by the School Board to the Association, assigned by the Association to the Trustee (herein Sun Bank National Association) and held as part of the Trust Estate and from the Funds held by the Trustee representing the proceeds of the issuance of the Bonds (App.1, p.5; App.3, p.16; App.8, pp.3-5); and that the interests of the Association in the Project, which have been acquired by the Association from the proceeds of the lease revenue bonds, are to be mortgaged by the Association to the Trustee. (App.1, p.6). The School District has no direct obligations to the Bondholders; no Bondholder has the right to compel the exercise of the taxing power of the School District, Orange County, the State of Florida, or any political subdivision thereof to pay the Bonds or interest thereon. (App.1, p.6; App.2, p.2; App.3, pp.16, 51-2; App.5, p.6). These Bonds do not constitute a general obligation or a pledge of the faith and credit of the Association, the School District, Orange County, the State or any political subdivision thereof nor shall the Bonds be payable out of any funds except the Trust Estate. (App.1, p.6; App.5, pp.4-7; App.2, pp.1-3; App.8). There is no evidence of any obligations, legal or moral, which would render the subject rent payments described herein a pledge of long-term debt on the part of the School District. (App.1, p.8). The leasing of the Project from the Association to the School Board pursuant to the Lease Agreement complies with Sections 230 and 235, Florida Statutes, and the obligation of the School Board to make rent payments under the Lease Agreement does not constitute a general obligation nor a pledge of the faith and credit or taxing power of the School Board, Orange County, the State of Florida or any political subdivision thereof. (App.1, pp.5-6).

The Lease Agreement and mortgage documents specifically provide that only the interest of the Florida School Boards Association, Inc. is being mortgaged and the mortgage is subordinate to the fee simple title interest of the School Board in the land

and the buildings, and that no interest of the School Board is being encumbered. (App.3, p.44-45). The School Boards interest in the Lease Agreement and its fee title interest in the land and buildings are at all times superior to the rights of the bondholders and FSBA. (App.3, p.45). When the bonds are paid off, all interests of the Association in the property immediately transfer to the School Board of Orange County, and the ground lease terminates. (App.3, p.45).

In rejecting the State's very general argument that a referendum was required, the Trial Court stated that it was influenced by the Legislature's actions in providing capital financing through the use of Capital Outlay millage revenues, the fact that the risk of non-appropriation has been assumed by the Bond Insurer and by an unaffiliated non-profit entity, and by the fact that the School District can elect not to appropriate in any given year and could substitute property for or delete the Project property from the District's assets in conjunction with such non-appropriation. (App. 1, pp.6-7). The Trial Court determined that the Lease Agreement may be terminated annually at the discretion of the School Board; that in the event of termination or election not to appropriate, all obligations of the School District will terminate without any further liability to any entity and the Lease Agreement automatically expires; and that as long as the Lease Agreement remains in full force and effect, the rights and interests of the School District are paramount to the rights and interests of the Association, Trustee, and the Bondholders. (App.1, pp.6-7).

The State Attorney in and for the Ninth Judicial Circuit has appealed the Judgment of Validation raising additional sub-issues to the very general issue it had raised in the Trial Court. The entire argument made to the Trial Court by the State at the

validation hearing can be found in the last paragraph of p.65 of the Transcript of the hearing found at Appendix 3.

SUMMARY OF THE ARGUMENT

Article VII, Section 12.

The sole issue raised by the State Attorney in and for the Ninth Judicial Circuit in appeal of the Final Judgment of the Trial Court validating the up to $230,000,000 tax exempt lease revenue bonds is whether voter referendum is required by Article VII, Section 12, Florida Constitution, because of the Orange County School District's payment obligation under its Lease-Purchase Agreement. No voter approval referendum is required of the subject lease revenue bond proposal, and the validation of these bonds by the Trial Court should be affirmed because the only obligation issued by the School District of Orange County is the Lease Agreement, and this Lease Agreement creates an annual lease, subject to appropriation.

Annual Lease.

The School District's obligations under the Lease Agreement are created, if agreed to be created at all, at the commencement of each fiscal year through appropriation by the School Board of funds to pay rent for such fiscal year period. The obligations in this case do not mature more than twelve months after issuance since the Lease Agreement terminates at the end of the fiscal year unless renewed by the School District through subsequent appropriation. Further, the obligations are not payable from the compelled levy of ad valorem taxes.

Whatever economic risk exists is on the lessor, in this case the Florida School Boards Association, Inc., and not on the taxpayers. The Lease Agreement is subject to the annual scrutiny of the budget process and is terminated unless the School Board affirmatively chooses to renew it for another year. Public hearings are held as a normal

part of the budgetary process of the School Board and the public is invited to all sessions of the budget process to give input.

No **Pledge** of **Revenues to Bond Repayment.**

In order for the State to prevail on its argument that the lease revenue bonds are invalid because no referendum was held, it must have demonstrated that ad valorem tax revenues are pledged to the repayment of the bonds and that such revenues are pledged for more than twelve months. This Court has expressly held that under Article VII, section 12, Florida Constitution, ad valorem taxes are not pledged for the repayment of a debt unless the bondholders can compel the use of such funds. State v. Miami Beach Redevelopment Agency, 392 So.2d 875, 898 (Fla. 1980). Under the present lease revenue bonds, the Bondholders do not have that right. Although ad valorem monies may be appropriated in any given year to make payments under the Lease-Purchase Agreement, no Bondholder can compel their use. The School District of Orange County has therefore preserved its annual budgetary discretion.

Right of School **Board to Choose Not to Renew.**

The State presently posits that the School District's assertion that the Lease Agreement only involves a one year commitment is unrealistic. In light of the record before this Court, the State's contention is unsupportable. Its further argument that the School District's option to terminate is "illusory" is likewise unfounded in light of the record. The record evidences that should the School District decide not to renew the Lease Agreement at the end of any given year, the very same funds available for payment of the lease rental amounts may be used for other purposes, including the acquisition or construction of other educational facilities. Furthermore, the Bondholders are required to pay the School District any excess monies they receive from subletting the

facilities which exceed the cost of servicing the bonds. The State offered no witness to support its position. All witnesses testifying on behalf of the School District of Orange County were in agreement on the nature of the Lease-Purchase Agreement and the obligations or lack of obligations which were imposed by the Lease-Purchase Agreement.

Master Lease.

Contrary to the State's assertion, the Lease Agreement is not changed from an annual lease into a full-payout lease because it covers more than one building. It is not uncommon for lease-purchase agreements to cover more than one building, and, in fact, this Court has previously approved the use of a master lease-purchase agreement with multiple buildings. There is no record support for the State's suggestion that this arrangement creates a compulsion to appropriate.

Mortgage by **Florida School Boards Association, Inc.**

The State's further argument that, because the Florida School Boards Association, Inc., Lessor, intends to mortgage its leasehold interests in the educational facilities as security for the bonds, an election is required is likewise without merit. Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971), upon which the State primarily relies for its position in this regard, has been specifically receded from by this Court. The School District will not be mortgaging its property. The Lease-Purchase Agreement does not constitute a mortgage. The record clearly shows that no mortgage will be created on the property of the School District and that no foreclosure remedy is available against any School District property. In Uvesco. Inc. v. Petersen, 295 So.2d 353 (Fla. 4th DCA 1974), the District Court explicitly held that the underlying lease agreement could be treated as a lease with landlord remedies only even though there was an outstanding sum of money which the lease secured. Specifically, this Court

in State v. Brevard County, 539 So.2d 461 (Fla. 1989) distinguished an annual lease with a declining price purchase option from a security agreement. That distinction applied to this case is consistent with substantive law concerning real property and results in the conclusion that the Lease Agreement does not constitute a mortgage. Furthermore, the School District has been provided the protections required by Brevard County as the School District's rights are explicitly made superior to any right or interest of the Association or any mortgagee of the Association. The Association's encumbrance of its leasehold interest has not encroached in any way upon the constitutionally protected property interests of the School District, as Lessee.

The Trial Court properly held no referendum approval was necessary as a predicate to validation because the Lease Agreement is an annual lease, because there is no prohibited mortgage of public property, because there is no coercion to renew the lease, because the obligation of the School Board can therefore never mature more than twelve months after it is created, and because bondholders cannot compel use of ad valorem taxes to make payments under the Lease-Purchase Agreement.

The Judgment of Validation should be affirmed.

ARGUMENT

VALIDATION OF THE NOT TO EXCEED $230,000,000 LEASE REVENUE BONDS WITHOUT AN APPROVING REFERENDUM DOES NOT VIOLATE ARTICLE VII, SECTION 12, FLORIDA CONSTITUTION, AND THE TRIAL COURT'S FINAL JUDGMENT OF VALIDATION SHOULD BE AFFIRMED.

The State incorrectly contends that the present lease revenue bonds should not be validated without an approving referendum by the voters of Orange County and cites to Article VII, Section 12, Florida Constitution, as authority. After having considered the Answer of the State Attorney to the Complaint for Validation and, the testimony at hearing, as well as the exhibits describing the transactions, the Trial Court correctly concluded that under these circumstances there was no need for a referendum. In rejecting the State Attorney's argument that a referendum was required, the Trial Court announced that it was influenced by the Legislature's actions to provide capital financing through the use of Capital Outlay millage revenues, the fact that the risk of non-appropriation has been assumed by the Bond Insurer and by an unaffiliated non-profit entity, and by the fact that the School District of Orange County can elect not to appropriate in any given year and could substitute property for or delete the Project property from the School District's assets in conjunction with such non-appropriation. Among other things, completely supported by the uncontroverted record, the Trial Court found that the Lease Agreement may be terminated annually at the discretion of the School Board, and that in the event of termination or the election not to appropriate, all of the obligations of the School District will terminate without further liability to any entity and the Lease Agreement will expire.

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 (1989), School Boards

in this state are authorized to lease or lease-purchase educational facilities and sites as defined in section 235.011, Florida Statutes (Supp. 1988), amended by Ch. 89-226, section 1 and Ch. 89-278, section 11, Laws of Florida (1989), 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 which may be imposed pursuant to section 236.25(2)(e), Florida Statutes (Supp. 1988), amended by Ch. 89-244, section 1, Laws of Florida (1989). Section 235.056(3)(a), Florida Statutes, amended by Ch. 89-226, section 4, Laws of Florida (1989), expressly permits the use of nominal lessors and in relevant part provides:

> 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.

In this case the Florida School Boards Association, Inc., a non-profit educational organization that has continuous independent corporate existence, serves as the nominal lessor and will issue its own corporate debt to fund the leases and finance the facilities. The interest on such debt is exempt from federal income taxes because the bonds are being issued for the benefit of a unit of government and the accrual of equity in the project accrues to the benefit of the governmental unit as the debt is amortized. Revenue Ruling 63-20 and Revenue Procedure 82-26.

The Lease-Purchase Agreement involved in the present case is an annual lease subject to termination at the option of the Lessee, the Orange County School District,

on an annual basis. The Lease Agreement provides that the lease term will be terminated at the end of the current fiscal year unless the legislative body of the lessee appropriates for the next fiscal year a sufficient amount to make the rent payments under the Lease Agreement. The obligation by contract of the Orange County School District created by the lease only exists, if at all, for the current fiscal year and will never be an obligation of more than twelve months. In fact, Florida law requires that the School Board's lease-purchase agreements be annual subject to annual appropriation. Section 235.056(3)(b)2, Florida Statutes (Supp. 1988), provides that "[t]he 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." (Emphasis supplied). The present Lease-Purchase Agreement is not a full-payout lease (by statute it cannot be) and is not secured by a pledge of the full faith and credit or taxing power of the School Board nor can it be in light of section 235.056(3)(b)3, Florida Statutes (Supp. 1988) which specifically provides that "[n]o 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."

The subject Lease-Purchase Agreement does not contain a covenant to budget or appropriate. Merely to avoid unintended non-appropriation, the annual Lease Agreement contains a covenant under the section entitled "Availability of Funds" that the School Board's Financial Officer will request an appropriation through the proposed budget process. (App.3, p.17). The School Board, however, as the legislative body of the Lessee, the School District of Orange County, possesses absolute discretion to appropriate or not to appropriate these funds. Significant to the real ability of the

School Board to choose not to renew the Lease Agreement is the fact that the Lease-Purchase Agreement does not contain a non-substitution covenant. By statute, section 235.056(3)(b)2, Florida Statutes (Supp. 1988), prohibits non-substitution clauses and expressly states that "[u]nder 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." The record herein demonstrates that the School District can terminate the Lease Agreement at the end of any fiscal year and use the very same monies that were identified in prior year's budgets for rent payments to acquire or lease substitute facilities or for any other lawful purpose. Where as here the Lease Agreement is an annual lease subject to annual appropriation, the School Board of Orange County has merely entered into an annual agreement to pay rent for property that is owned by the nominal lessor, Florida School Boards Association, Inc.

Should the underlying Lease Agreement be terminated due to non-appropriation, the bonds would continue to be outstanding as separate obligations of the Lessor, in the instant case FSBA, and would continue to be secured by rent payments received by the nominal Lessor from reletting the Project or the proceeds of liquidation of the Project. Most important to this case is an understanding that the lease revenue bonds to be issued are being issued by the Lessor, FSBA, and continue to be the obligations of the FSBA, and are not being issued as obligations of the Orange County School Board. The Bonds to be issued are not and cannot be treated as the bonds of the School Board of Orange County. The debt obligation is solely the obligation of FSBA.

A. A Referendum is not required by Article VII, section 12, Florida Constitution for validation of these bonds where these bonds are not secured by a pledge of ad valorem revenues.

The State erroneously contends that because ad valorem taxes may be used to pay rent under the Lease Agreement to the FSBA, ad valorem taxes will be pledged as security for the FSBA's obligations under the bonds, and therefore a referendum is required by Article VII, section 12 which provides:

> 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 freehold therein not wholly exempt from taxation. ...

The State is effectually urging an interpretation of the phrase "payable from ad valorem taxation" to mean "capable of being paid from ad valorem taxation." This interpretation has been consistently rejected by this Court. Rather this Court has interpreted the clause "payable from ad valorem taxation" to mean a "pledge" of ad valorem taxes under a contractual obligation which gives a right to an outside party to compel the levy of ad valorem taxes. This Court in State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980), addressed the issue of what is meant by the clause "payable from ad valorem taxation" in the context of the state's argument that the Miami Beach redevelopment bonds violated Article VII, section 12, for lack of a referendum because those bonds were "payable from ad valorem taxation." Id. at 893. The redevelopment bonds were secured by the rents paid for use of the redeveloped property and from ad valorem monies paid to the redevelopment agency from local taxing authorities. Just as is the

case before this Court under the terms of the subject Lease-Purchase Agreement and the other pertinent documents, the Bondholders' rights in Miami Beach Redevelopment Agency were expressly limited in that they could not compel levy of ad valorem taxes. The holders of the bonds therein could not require the imposition of any tax or the establishment of any rate of taxation in order to obtain the amounts necessary to pay and retire their bonds. The authorizing legislation in Miami Beach Redevelopment Agency contained language similar to the language contained in the School District's Lease-Purchase Agreement. It provided: "Revenue bonds issued under the provisions of this part shall not be deemed to constitute a debt, liability, or obligation of the local governing body or the state or any political subdivision thereof, or a pledge of the faith and credit of the local governing body or the state or any political subdivision thereof, . . ." Id. at 882. This Court agreed with the position of the Redevelopment Agency that even though ad valorem taxes would be used to make payment or even though the bonds were "payable from ad valorem taxation," there was no direct pledge of ad valorem taxes because the funds would be appropriated annually from "available funds." Id. at 898. Thus, this Court held the referendum provision of Article VII, section 12 was not involved and that issuance of the bonds without approval of the voters of Dade County and the City of Miami Beach did not transgress Article VII, section 12. Id. at 898. Likewise, the referendum requirement of Article VII, section 12, is not involved in the present case. Critical in that case was the fact that after the sale of bonds, "a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation." Id. at 898. (Emphasis supplied).

In order for the State to succeed in its argument that a referendum is required, it must demonstrate that ad valorem taxes are pledged to the repayment of the debt and that the ad valorem taxes are pledged for more than twelve months. As is made clear from the record before this Court and in particular the express language of the Lease-Purchase Agreement, the State failed to make this showing.

The subject annual Lease-Purchase Agreement contained in Appendix 5, p.6, provides among other things in Paragraph 2.5:

> "[T]HE PAYMENTS DUE HEREUNDER ARE TO BE MADE ONLY AFTER AN APPROPRIATION BY THE SCHOOL BOARD IS LAWFULLY MADE THEREFOR FROM THE SCHOOLBOARDS AVAILABLE REVENUES AND NEITHER THE SCHOOL BOARD, THE DISTRICT, THE STATE OF FLORIDA, ORANGE COUNTY NOR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF SHALL BE OBLIGATED TO MAKE ANY APPROPRIATION FOR ANY SUMS DUE TO THE ASSOCIATION, THE TRUSTEE OR THE INSURER HEREUNDER FROM AD VALOREM OR OTHER TAXES AND NEITHER THE FULL FAITH AND CREDIT OF THE SCHOOL BOARD, THE DISTRICT OR THE STATE OF FLORIDA, OR ORANGE COUNTY, OR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF IS PLEDGED FOR PAYMENT OF SUCH SUMS DUE HEREUNDER AND THE CONTRACTUAL OBLIGATION HEREUNDER TO REQUEST AN APPROPRIATION TO PAY SAME DOES NOT CONSTITUTE AN INDEBTEDNESS OF THE SCHOOL BOARD, THE DISTRICT OR THE STATE OF FLORIDA, OR ORANGE COUNTY, OR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF WITH THE MEANING OF ANY CONSTITUTIONAL, STATUTORY OR CHARTER PROVISION OR LIMITATION. . .

In Miami Beach Redevelopment Agency, this Court cited to its earlier decision in Tucker v. Underdown, 356 So.2d 251 (Fla. 1978), for the proposition that there is nothing in the Florida constitution to prevent a county or city from using ad valorem tax revenues where they are required to compute and set aside a prescribed amount, when

available, for a discrete purpose. Miami Beach Redevelopment Agency, 392 So.2d at 898. It stated that in that case the purpose of the constitutional limitation of Article VII, section 12, is unaffected by the legal commitment and that the taxing power of the governmental units is unimpaired. Id. The lease covenants in the present case clearly preserve the School Boards annual budgetary discretion.

The subject bonds are not secured by a "pledge of ad valorem revenues." The School District can meet its rent payment obligation under the Lease Agreement from various revenue sources and within its sole discretion can choose to use Capital Outlay millage revenue. Section 236.25, Florida Statutes (Supp. 1988), as amended by Ch. 89-244, section 1, Laws of Florida (1989) provides a prescribed amount for a discrete purpose:

> (2) In addition to the maximum millage levy as provided in subsection (1), each school board may levy not more than 2 mills against the non exempt assessed valuation for school purposes to fund:
>
> (e) Payments for educational facilities and sites due under lease-purchase agreement entered into by a school board pursuant to s. 230.23(9)(b)5 or s. 235.056(3), not exceeding, in the aggregate, an amount equal to one-half of the proceeds from the millage levied by a school board pursuant to this subsection.

Under Tucker and Miami Beach Redevelopment Agency, there is nothing to prevent the School Board from using the Capital Outlay millage where it is required to compute and set aside by way of annual appropriation a prescribed amount when available, for a discrete purpose, in this case payments for educational facilities under an annual lease-purchase agreement. If this Capital Outlay millage is deemed to be an ad valorem revenue source, the record before this Court shows that no person or Bondholder can

compel the levy of ad valorem taxation for any purpose incident to the present bond transaction.

The State further relies on County of Volusia v. State, 417 2d 968 (Fla. 1982), but, appropriately applicable to the present case, this Court in State v. Brevard County, 539 So.2d 461 (Fla. 1989), distinguished County of Volusia and stated that in Brevard County "[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." Id. at 463. The facts of County of Volusia are completely inapposite to the present case. In that case the County sought to issue capital improvement bonds to finance construction of a jail. County of Volusia, 417 So.2d at 969. The payment of the bonds was to be secured by all legally available, unencumbered sources of county revenue including all money derived from regulatory fees and user charges by the County. The County further covenanted to do all things necessary to continue receiving the various revenues pledged. The Court held that the pledge of all legally available, unencumbered revenues of the County other than ad valorem taxation, along with a covenant to do all things necessary to continue receiving the revenues, as security for the bonds, will have the effect of requiring increased ad valorem taxation so that a referendum was required. Id. at 972.

Contrary to the State's contention, the School Board here is not attempting to circumvent the referendum requirement, but rather is utilizing a legislatively approved mechanism for the financing of county school facilities.

The Legislature acknowledged existing Florida case law recognizing that such lease-purchase agreements were constitutionally permissible when it stated in section 235.056(3)(b)3 that "[n]o lease-purchase agreement entered into pursuant to this sub-

section shall constitute a debt, liability, or obligation of . . . a local school board or shall be a pledge of the faith and credit of . . . a local school board." This Court has repeatedly held particularly in the area of bond finance that great deference is to be given to the findings of the Legislature and they are to be presumed correct. See: Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267 (Fla. 1988); State v. Housing Finance Authority of Pinellas County, 506 So.2d 397 (Fla. 1987); [illegible] rial Devel [illegible] n A h ri [illegible], 424 So.2d 739 (Fla. 1982).

B. A referendum is not required where ad valorem revenues are not pledged in excess of twelve months.

Not only are ad valorem revenues not pledged within the contemplation of Article VII, section 12, but also for the reasons explained above, the obligation of the School Board does not extend beyond twelve months. Contrary to the State's argument, the record amply supports that the School Board can realistically elect not to renew the Lease Agreement. In fact, there is no record support for the State's contrary contention. Merely to say that the Lease Agreement covers several educational facilities does not serve as a viable basis without any record support to conclude that the School Board has no choice but to renew the Lease Agreement. The fact that more than one building is under the Lease Agreement does not result in any compulsion on the School Board to renew the Lease Agreement.

Master leases with provisions to renew the lease by annual appropriation of all the rent are not new in Florida. This Court has approved the concept of master financing of multiple buildings under a lease-purchase agreement and has held that the explicit authority to finance implies the authority to do so in the most economical and

efficient manner. In State v. Florida Development Commission, 142 So.2d 69 (Fla. 1962), this Court determined that the university board of control had the authority to enter into a lease-purchase agreement covering buildings at various universities throughout the state. Id. at 71. The purpose of consolidating the projects into a single master lease is the great savings to the lessee in dollars, personnel time and interest cost.

Although the State attempts to negate the applicability of State v. Brevard County by contending that that decision did not involve the pledge of ad valorem taxes (in fact, neither does the present case) and that that case involved equipment leases, this Court's recent decision in Brevard County, read in unison with Miami Beach Redevelopment Agency, is not only instructive on the issue of duration of the obligation within the context of Article VII, section 12, but also is instructive on the question of whether the subject Lease-Purchase Agreement constitutes a security interest or mortgage.

The distinction attempted to be drawn by the State on the basis of equipment lease versus leases of schools and buildings is illusory. This Court in Brevard County considered a lease-purchase financing arrangement for equipment under which, pursuant to ordinance and resolution, the county authorized a lease-purchase arrangement for certain equipment to be leased by the county pursuant to an annual lease agreement subject to appropriation. 539 So.2d at 462. As is the case here before this Court, the term of the lease in Brevard County expired on the last day of any fiscal year in which the county passed an annual budget without appropriating sufficient funds to make the scheduled lease payments for the ensuing fiscal year. Id. The State therein contended that the county's obligation under the lease violated Article VII, section 12, prohibiting counties from issuing certificates of indebtedness payable from ad valorem taxation and maturing more than twelve months after issuance except upon approval by vote of the

freeholders. Id. at 463. This Court held that the county in adopting its budget on an annual basis preserves its right to decide to terminate the lease without further obligation. Id. at **464.**

This Court determined with particularity the advantages set forth by the county for the utilization of the lease purchase arrangement over a traditional commercial lease with renewal options, which advantages **as** evidenced by the record exist by virtue of the present Lease-Purchase Agreement between the Orange County School District and FSBA. These are that the public body exercises significantly more control over the activities of the lessor, that the single client nature of the lessor insulates the public body from financial or other difficulties which may result from transactions of the lessor with other lessees (such protections exist here because all FSBA lease revenue bonds are non-recourse), and access to the tax-exempt capital market is likely to result in lower costs. Brevard County at 463.

The State's further claim at page **14** of its brief that the School Board's option to terminate is illusory because of the nature of the public buildings and its unfounded conclusion that the School Board cannot realistically decide not to fund the leases are pure and simple conjecture. It remains within the sound budgetary discretion of the School Board to opt to renew the Lease Agreement or to choose alternative school sites. The State advances no argument supportable by the record to support its assertion that ad valorem taxes are being pledged in this case in excess of twelve months. It presented no witnesses below to support these allegations. The Trial Court's findings to the contrary of the State's present argument is clothed with a presumption of correctness, is supported by the record before this Court, is supported by decisional authority, and should be affirmed.

C. The State erroneously asserts that since the Lessor, FSBA, intends to mortgage its leasehold interest in the educational facilities, a referendum is required.

The State incorrectly relies on Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971) for its assertion that, because the Lessor, FSBA, intends to mortgage its leasehold interest in the educational facilities, a referendum is required. The FSBA is not a governmental entity subject to the rule which requires a referendum. The FSBA is a non-profit educational organization unaffiliated with the School Board of Orange County. It is the Association that is mortgaging its interest, and it can mortgage no greater interest than it possesses. The Lease-Purchase Agreement and mortgage documents provide that the mortgage is subordinate to the fee simple title interest of the School Board in the land and buildings and that no interest of the School Board is being encumbered. At all times, the School Board will retain superior liens on the property and retain fee simple title ownership. When the bonds are paid off, all interests of the Association will immediately transfer to the School Board of Orange County and the ground lease will immediately terminate.

Here, first of all as explained above, there is no pledge of taxing power. Rather it is made expressly clear by the Lease-Purchase Agreement, the other documents, the transcript of the hearing, and the pertinent statutes that there is no pledge of taxing power. In the present case there will be no mortgage on public property as suggested by the State. In Nohrr, a county educational facilities authority sought validation of revenue bonds to provide financing for dormitory facilities as a private college. The bonds were to be secured in part with a mortgage on the facilities and real property involved. This Court held a referendum was required because Brevard County might feel "morally compelled to increase ad valorem taxes to prevent a foreclosure in the

event of default. Id. In that case, unlike the present case, the mortgage granted by the educational facilities authority gave a right of foreclosure on its interest in the lands and buildings which constituted the dormitory-cafeteria project.

More recently in Wilson v. Palm Beach County Housing Authority, 503 So.2d 893 (Fla. 1987), this Court addressed the issue of whether an election for bond approval was necessary where a housing authority granted a mortgage security interest in the project and receded from Nohrr to the extent that it conflicted with its opinion in Wilson. Id. at 894. The Court held that it was clear the Palm Beach County Housing Authority has no ad valorem taxing authority, and in issuing its bond, there is no direct or indirect pledge of the taxing power. Id. This Court further rejected the argument that Palm Beach County, the State of Florida, or any political subdivision, would experience coercion to levy a tax to prevent foreclosure of the project. Id. The Court then affirmed the trial court's validation of the revenue bonds. Id. In the present case, the same is true of FSBA. As was the case in Wilson, the mortgage provisions here do not constitute a debt, liability, or obligation of the School Board of Orange County nor do they pledge the full faith and credit of Orange County or the Orange County School Board.

Moreover, Uvesco, Inc. v. Petersen, 295 So.2d 353 (Fla. 4th DCA 1974), involved a sale-leaseback transaction with a mortgage and a note. Upon default of the lease by the tenant, the lease would terminate pursuant to customary landlord-tenant procedures. The court held that to declare that the lease must be terminated pursuant to "foreclosure" proceedings as being part of an overall financing transaction instead of pursuant to the customary landlord-tenant procedures would require the court to rewrite the agreement. Id. The court determined that the parties knowingly entered into a lease and knowingly entered into a mortgage and that the respective instruments clearly

reflect what those instruments were intended to be and how the rights of the parties were intended by those instruments to be determined. It affirmed the trial court's construction of the lease as a lease and the trial court's striking of the affirmative defense relating to a mortgage and a foreclosure. Thus the underlying lease was to be treated as a lease with landlord remedies only even though there was an outstanding note and mortgage which the lease secured.

In Brevard County, this Court explained that the recourse of the lessor if the lease is terminated is the same as in the case of any other lease. 539 So.2d at 464. If the lease is terminated, the county will have a contractual commitment to return to the lessor any leased equipment still owned by the lessor. If the county permits the lease to terminate, the lessor may relet or sell the equipment. In either event, any monies received by the lessor exceeding the county's remaining obligation under the lease must be returned to the county. Id. The present Lease-Purchase Agreement contains the same protections of the School District's constitutionally protected property rights as were presented in Brevard County. Furthermore, the mortgage granted by the FSBA to the Trustee on the FSBA's interest in the property is explicitly subordinate to the rights of the School District under the Lease Agreement. The mortgage provides as follows:

> Notwithstanding anything to the contrary contained herein, the Trustee shall not be entitled to foreclose the rights of the School Board as lessee under the Lease during the Lease Term thereof or otherwise diminish the rights of the School Board under the Lease as set forth in Section 22 thereof.

(App.6, p.11).

Consequently, no mortgage has been created in the property of the School Board and the lien granted by the FSBA on the FSBA's interest in the property is explicitly

subordinate to the rights of the School Board and cannot in any way make the School Board worse off than the county was in the Brevard County decision?

If the proceeds of sale or reletting of the project are not sufficient to pay the bonds, there is no liability on the part of the School Board or School District.

The conclusion argued by the State does not make sense. For example, assume a vendor entered into a lease-purchase agreement identical to the one approved by this Court in Brevard County with a school board or a county. No constitutionally prohibited mortgage or security agreement has been created. The vendor then finances its lease receivables with its line bank and grants a blanket lien on the vendor's interest in such property, subject to the rights of the lessee. Does the lease suddenly become unconstitutional? Or take the case of a developer who has been awarded the lease-purchase

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[3]Additionally, the Lease Purchase Agreement expressly provides:

> Following an Event of Lease Default or an Event of Non-Appropriation and the termination of the Lease Term, the Trustee shall be entitled to exercise its rights as mortgagee under the Mortgage and as assignee under the Assignment and to foreclose the rights, title and interest of the Association in the Project provided that the School board shall nevertheless remain entitled hereunder to: (a) have the right as described in Paragraph 23C of the Mortgage and Section 10.03 of the Trust Indenture to purchase the Project on the terms and conditions set forth therein, and (b) if and to the extent the Net Proceeds of sale and/or re-lettin? of the Association's interest in the Project exceeds the amounts which would otherwise have been required to be paid by the School Board through the Maximum Lease Term. the School Board shall be entitled to the excess. The rights of the School Board set forth in the immediately preceding sentence shall survive the termination of the Lease Term and shall be superior to the rights of the Trustee under the Mortgage and the Assignment. [Emphasis added]

(App.5, p.52).

construction of a facility by a school board and enters into a lease-purchase agreement with the school board as lessee which complies with Brevard County. No constitutionally prohibited mortgage or security agreement has been created. The developer then finances his investment in the building by issuing a note to his bank secured by a mortgage on the developer's interest in the building but subject to the rights of the lessee. Does the lease suddenly become unconstitutional? Of course not. Privately-owned buildings leased to units of government in Florida have usually been financed by their owners with a note and mortgage of the landlord's interest. The only difference here is that the FSBA has structured this financing to result in tax exempt interest rates and lower rent to the School Board. So long as (1) the mortgage of the lessor's interest is solely of the lessor's interest and (2) all the protections of the lessee required by Brevard County are incorporated in the lease and (3) the rights of the lessee are explicitly superior to the rights of the lessor's mortgagee, there has been no encroachment upon the constitutionally protected interest of the School Board lessee. There is no right of foreclosure against the property of the School Board lessee.

D. Decisions from other jurisdictions supporting validation.

The use of annual lease-purchase agreements subject to annual appropriation is becoming more common throughout the United States. The issue of whether the same or a similar type of lease-purchase arrangement as involved in the present case require referendum approval has been addressed by the highest court of many states other than Florida. Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin have approved

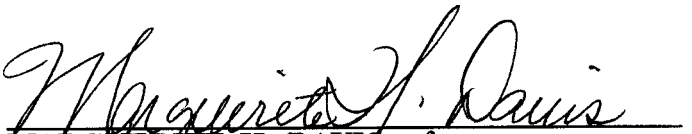
lease-purchase financing without elector approval. See Markides, "Government Leasing: A Fifty State Survey of Legislation and Case Law," 18 Urban Lawyer 1 (1986). Approval of these lease-purchase arrangements has rested primarily on the ability of the governmental entity to walk away from its lease obligation through not renewing the lease or not appropriating sufficient funds. See: Barkley v. City of Rome, 381 S.E.2d 34, 35 (Ga. 1989), wherein the Georgia Supreme Court held that where lease purchase agreements contained clauses stating that the City of Rome could decline to renew the contract every year without further obligation or penalty, the lease-purchase agreements could not be considered debt for purposes of constitutional limitation on debt; State ex rel. Kane v. Goldschmidt, ___ P.2d ___, 308 Or. 573 (Or. 1989) (en banc), wherein the Oregon Supreme Court upheld an annual lease subject to appropriation financing by the State of Oregon as not constituting a debt on the basis that it does not create a fixed charge against future revenue and does not impair the flexibility of planning and the ability of future legislatures to avoid a tax increase; Caddell v. Lexington County School District No. 1, 373 S.E.2d 598, 599 (S.C. 1988) wherein the South Carolina Supreme Court held that the certificate of participation annual lease subject to appropriation did not create debt of the school district under the South Carolina Constitution and declared that this result was in accordance with the overwhelming majority of jurisdictions; Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D. 1988) wherein the North Dakota Supreme Court held that a sale-leaseback-purchase financing arrangement of the City of Bismark did not obligate the City's taxing powers where the lease contained a non-appropriation mechanism. Glennon Heights. Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983), wherein the Colorado Supreme Court held that a lease-purchase agreement did not violate the state constitution's limitation on debt because debt in the con-

stitutional sense did not exist because there was no legally enforceable right to require the general assembly to appropriate sufficient funds for renewal of the lease term every year or to require the state to exercise its option to purchase.

CONCLUSION

The final Judgment of Validation should be affirmed.

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carol Levin Reiss, Assistant State Attorney, P.O. Box 1673, Orlando, Florida 32801; Thomas F. Lang, Esquire, Parker, Johnson, Owen, McGuire, Michaud, Lang & Kruppenbacher, P.A., 1300 Barnett Plaza, 201 S. Orange Avenue, Orlando, Florida 32801; William M. Rowland, Jr., Esquire, Roland, Thomas & Jacobs, P.A., 1786 North Mills Avenue, Orlando, Florida 32803; and Dale S. Recinella, Esquire, Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., Monroe Park Tower, Suite 1010, Tallahassee, Florida 32301 this 11th day of January, 1990.

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