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

INITIAL BRIEF OF APPELLANT

LAWSON LAMAR, STATE ATTORNEY
NINTH JUDICIAL CIRCUIT

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PREFACE

Appellant, State of Florida, will be referred to as "The State". Appellee, Florida School Boards Association, Inc., a Florida not-for-Profit corporation will be referred to as "The Association". The Orange County School Board will be referred to as "the Board". Appellant's appendix will be stated as a "App ____ "

JURISDICTIONAL STATEMENT

This is an appeal pursuant to Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure from a final Order issued pursuant to Chapter 75, Florida Statutes, validating bonds.

STATEMENT OF THE CASE

This is an appeal from a Final Judgment of the Circuit Court of the Ninth Judicial Circuit in and for Orange County validating not to exceed $230,000,000 Florida School Boards Association, Inc., ("The Association) Lease Revenue Bonds.

The Association, acting on behalf of the School District of Orange County, Florida ("The Board") filed a Complaint pursuant to Chapter 75, Florida Statutes, seeking validation of not to exceed $230,000,000 Lease Revenue Bonds. The Association served an Order to Show Cause on the State of Florida requiring the State of Florida, through the State Attorney of the Ninth Judicial Circuit, to show cause why the prayer of said Complaint should not be granted and the bonds validated. Pursuant to Chapter 75, Lawson Lamar, State Attorney, answered the Order to Show Cause and appeared at the trial raising the issue as to whether Validation should be granted since the Association and/or the Board failed to obtain referendum approval. The Complaint was heard by Judge W. Rogers Turner, Circuit Court Judge of the Ninth Judicial Circuit in and for Orange County on November 7, 1989. At the conclusion of the hearing, Judge Turner validated the bonds and held that an election was not required. (App.1) The State filed a timely Notice of Appeal on December 6, 1989.

STATEMENT OF THE FACTS

On September 26, 1989, the Orange County School Board ("The Board") adopted a resolution authorizing the Board to enter into a Lease-Purchase Agreement with the Florida School Boards Association, Inc., ("The Association"). (App. 2) The Lease-Purchase Agreement contemplates that the Association issue up to $230 million tax exempt bonds.

The proceeds from these bonds will be used by the Association to finance educational facilities. The educational facilities will include new schools to be built on land already owned by the Board, new schools to be built on land which will be purchased, and improvements and additions to existing educational facilities. In total, the project includes construction of 14 new schools and improvements to approximately fifty existing facilities. (App. 3, 29-30)

To accomplish this, the Board will lease to the Association for a nominal sum the property or educational facilities on which the new school or improvements are to be made through a "Ground Lease". (App. 4) The Association in turn will enter into another "Lease" whereby the Board will lease from the Association the new school, educational facility or improvement for actual use. (App. 5) The "Lease" will be for an initial term of one year ending on June 30, 1990 with fifteen successive annual renewal terms of one year. (App 1, 4) Upon payment of all amounts due under the "Lease" and upon payment of the bonds, title to the educational facilities will then vest with the Board. (App. 3, 45-46)

The debt service on the Bonds will be secured by the rent payments

made by the Board to the Association under the Lease. (App. 6) At the the end of each annual renewable lease term, the Board may decide not to appropriate the rent which would come due that next year under the Lease. If the Board decides not to appropriate monies for the rent, or if it cannot do so, the Lease-Purchase Agreement will terminate. The documents provide that the Association cannot compel the Board to appropriate funds for the Lease.

In the event of nonappropriation by the Board or a default on the bonds, the Association may take possession of the new school and the improved educational facilities and may either relet or sell its leasehold interest to generate sufficient revenues to pay off the bonds. (App. 3, 42)

The Association or its assignee will have exclusive use of the property until the bonds are paid. It is important to note that if the Board elects not to renew the lease, it must do so for the entire lease package and cannot select to fund just one or several of the schools or projects. (App. 3,17)

The Association is a not-for-profit corporation created pursuant to Chapter 617, Florida Statutes. The Association's bylaws adopted on July 25, 1989, state that the Association's purpose is in part to provide leadership on issues of public education by performing such acts as necessary to facilitate financing of schools and school boards throughout the state. (App. 7)

Although the issuer of the bonds, the Association will serve merely as a conduit of funds and will transfer all of its rights and obligations

to Sun Bank, N.A., a trustee pursuant to a trust agreement. (App. 8) The Board will contract for and provide for the construction and improvements of the education facilities. (App. 3,48)

The rent due under the Lease agreement is payable by the Board from its Capital Improvement fund and from any other legally ava lable funds which include the Public Education Capital Outlay and Debt Service Trust Fund (PECO), Capital Outlay and Debt Service monies, and up to one-half of the revenues received by the Board from a levy of not exceeding 2.0 mills on all real property in Orange county pursuant to Section 236.25(2)(e), Florida Statutes, which millage is known as the "capital outlay" millage. Although the other sources of revenues for the rent payments are purportedly from non ad valorem sources, funds der ved from capital outlay are clearly revenues from ad valorem taxation.

SUMMARY OF ARGUMENT

The Lease Revenue bond proposal before this Court should not be validated without an approving referendum by the voters of Orange County. Article VII, Section 12, Florida Constitution requires that bonds which are payable from ad valorem taxes and mature more than twelve months after issuance must be approved by the electors. In this case, the bonds are clearly payable from ad valorem tax revenues. The rent payments due by the Board to the Association under the Lease are derived from the capital outlay millage as defined in Florida Statutes, 236.25(2)(e). Since the rent proceeds will be used as security for repayment of the bonds debt service there is no doubt that this transaction involves a pledge of ad valorem taxes.

The Board's commitment to the Lease-Purchase transaction exceeds twelve months. Although the Board claims it's obligation is limited to a one-year lease with annual renewal options, the Board's commitment realistically far exceeds one year and involves a pledge of the Board's credit. In the event of a population decline or change in circumstance, the lease will not allow the Board to choose to fund only a few of the schools or educational facilities. The lease must be funded in its entirety and cannot be subdivided. The Board must choose to appropriate or not to appropriate each year for the entire lease package. Thus, the Board's assertion the lease only involves a one year commitment is unrealistic. The Board owns most of the property on which the schools and improvements will be constructed and the Board cannot risk the loss of the use of those

schools and improvements during the term of the bonds. The Board will be entering into contracts for construction of the schools and for improvements. The Board cannot on one hand obligate to pay for the facilities while on the other hand say that it can decide without obligation not to appropriate the funds for the annual lease payment.

Although the Board could enter into a lease purchase agreement, Sections 230.23(9)(b)(5) and 235.056(3), Florida Statutes codify the Florida Constitution by requiring an election to be held if rents under the lease are payable from ad valorem taxes and the agreement is for greater than twelve months. Since the lease purchase revenue bonds in this case involve a pledge of ad valorem taxes and a commitment far exceeding the twelve month limitation as stated in both the Florida Statutes and Florida Constitution, validation should not be granted without an approving referendum.

ARGUMENT

The sole issue before this Court is whether an election must be held approving the issuance of the bonds before validation may be granted. In order to resolve this issue, the Court must look to the history and judicial interpretation of article VII, section 12, Florida Constitution and review the mechanics of the entire Lease-Purchase Revenue Bond transaction.

Article VII, section 12 of the Florida Constitution states in pertinent part:

> Counties, School districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificate 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. ..

The Constitutional requirement of an election when taxes are pledged as security for indebtedness was not always contained in the Florida Constitution. In fact, prior to 1930, the Florida Constitution had no limitation on the power of local governments to incur debt. The 1868 and 1885 Florida Constitutions only limited the States power to incur debt. See article XII, section 7, Florida Constitution of 1868 and Article IX, Section 6, Florida Constitution of 1885.

In 1930, the Constitution was amended to read:

> ...the counties, districts or municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election...

Article IX, Section 6, Florida Constitut on of 1885 as Amended by Senate Joint Resolution 26, Acts 1929, adopted at general election of Representatives held November 4, 1930. The Amendment was enacted partly in response to "widespread bond defaults among local governments in Florida during the late 1920's and early 1930's". State v. City of Panama City Beach, 529 So. 2d 250 (Fla. 1988). The Referendum Requirement: A Constitutional Limitation on Local Government Debt in Florida 38 U. Miami L. REV 677 (1984) citing, A. Hillhouse, Municipal Bonds 24-27, 83-87 (1936). The Amendment's purpose was to lay a restraint "on the spendthrift tendencies of political subdivisions to load the future with obligations to pay for things the present desires, but cannot justly pay for as they go, thereby necessitating the involvement of the public credit in some form of funding or borrow ng operation by which money can be realized on credit beyond the present means of payment so as to become available for disbursement in paying for considerations received in the present to be discharged out of public revenues anticipated to be realized or raised in the future." Leon County v. State, 165 So. 666, 669 (Fla. 1936); ~~See~~ Boykin v. Town of River Junction, 164 So. 558 (Fla. 1935); ~~See also,~~ City of Jacksonville v. Savannah Machine and Foundry Co., 47 So.2d 634 (Fla. 1950).

Eventually, a distinction between indebtedness payable from the ad valorem taxing power and indebtedness secured by non ad valorem taxes was developed by the Courts. This Court held in Medley v. State, 162 So. 2d 257 (Fla. 1964), that the constitutional provision was never intended to require voter approval for the pledge of non-ad valorem

revenue previously used for operating expenses. The Supreme Court has consistently upheld this interpretation and ruled that an election is only required when bonds directly obligate the ad valorem taxing power. State v. Tampa Sports Authority, 188 So. 2d 795, 797 (Fla. 1966); Rianhard v. Port of Palm Beach District, 186 So. 2d 503, 506 (Fla. 1966). The 1968 Revision of the Florida Constitution reflected this distinction by specifying in Article VII, Section 12 that bonds payable from ad valorem taxation are subject to voter approval. See The Referendum Requirement at 689-692. This distinction is also reflected in Sections 230.23,(a)(b) and 235.056(3) Florida Statutes, which the Board cites as authority for entering into this transaction. Section 230.23(9)(b)(5) Florida Statutes, however, codifies the Florida Constitution by requiring an election to be held if rents are payable from ad valorem taxes and the agreement is for greater than twelve months.

Thus, the question in the instant case becomes whether the bonds are payable from ad valorem taxes. Clearly a portion of the revenues the Board will pay as rent to the Association come directly from the capital outlay millage. Section 236.35(2)(e), Florida Statutes. The ad valorem taxes will be used as rent revenues and will be pledged as security for the Association's obligations under the bonds.

Essentially, the Board is attempting to do indirectly what it would not be able to do directly under the Florida Constitution. In County of Volusia v. State, 417 So. 2d 1968 (Fla. 1982) this Court rejected a bond proposal which on one hand pledged as security for the bonds all legally available non-ad valorem revenues while on the other, covenanted to do all things necessary to continue receiving those

revenues. The Court held that a pledge of all available revenues, together with a promise to maintain the programs which would lead to receipt of the revenues, would have a substantial impact on the future exercise of ad valorem taxing power. Id. Ruling "that which may not be done directly may not be done indirectly," the Court denied validation of the bonds. Id.

If the Board were to issue the bonds directly, the Board would be required to obtain referendum approval. By structuring this transaction so that another entity actually issues the bonds, the Board is attempting to circumvent the election requirement. The Association's authority to issue tax exempt bonds is directly linked to the fact that the Association is acting on behalf of the Board. See Rev. Rul. 63-20, 1963-1 C.B. 24 (The obligations of a non-profit corporation will be considered issued on behalf of a governmental unit preserving their tax exempt status, if the corporation engages in activities which are essentially public in nature). See also Rev. Proc. 82-150, 1982. The Complaint for Validation and the style of the case itself make clear that the Association is acting on behalf of the Board, lending further support to the argument that the Board is attempting to do indirectly what they certainly would not be allowed to do directly. Also, by subdividing the Board's obligation to pay rent into one year renewable lease terms, the Board cannot escape the fact that its rent payments serve as security for the bonds and are derived directly from ad valorem revenues.

In addition, the rent due under the lease agreement is payable from other legally available funds. Since a great percentage of the

Board's funds are derived directly from ad valorem taxes and the Board states it will make rent payments under the lease from up to one half of the capital outlay millage assessment, there is no question that the proposal of these Lease Revenue Bonds will have, at a minimum, an indirect impact on the Board's ad valorem tax levy.

The Association intends to mortgage it's leasehold interest in the educational facilities as security for the bonds (App. 6) The Florida Supreme Court has indicated in Nohrr v. Brevard County Educational Facilities Authority, 247 So. 2d 304 (Fla. 1971) and its progeny that an election is required to approve bonds secured by a mortgage on physical property when the taxing power is directly or indirectly pledged. See Wilson v. Palm Beach County Holding Authority, 503 So. 2d 893 (Fla. 1987). The Court in Wilson stressed that even if the issuer of the bonds did not have taxing power, the issuer's relationship with the County or the legislature could be such that those entities would feel morally compelled to levy taxes or to appropriate funds to prevent the loss of those properties. Id. at 894. In Nohrr, the Court indicated that this argument would be even more persuasive if the bonds were to finance projects connected with public schools since there would be at least a moral compulsion to levy taxes or to appropriate funds to prevent the loss of the properties. Nohrr at 311.

This rationale should also apply to the leasehold mortgage in this case. If the Board defaults or decides not to fund the payments due under the lease, the Association or the Trustee could foreclose on the leasehold interest and either sell or relet the premises until the bonds have been paid. Since the Board already owns the land on

which many of the new schools will be built and, of course, owns the educational facilities which will be improved, the Board will have a strong moral obligation, if not a legal obligation, to fund the leases or risk the loss of the use of schools the Board desperately needs for a term of years.

Furthermore, the one year lease which is renewable on an annual basis, involves an obligation exceeding the one year limitation in both Section 230.23(a)(b), Florida Statutes and article VII, section 12, Florida Constitution. The Board cannot realistically elect not to renew the lease every year. The lease will not allow the Board to choose to fund only one or several of the educational facilities to be constructed with the bond proceeds and covered under the lease. The lease must be funded in its entirety and cannot be subdivided. Thus, even if there is a change in circumstances or population shift which may obviate the need for one or some of the educational facilities, the Board still must appropriate for the entire lease package or decide not to fund it in its entirety.

Finally, the Lease Purchase Bond Transaction appears to have been carefully tailored to comply with the Courts ruling in State v. Brevard County, 539 So. 2d 461 (Fla. 1989) In Brevard County, the County created a not-for-profit corporation to purchase certain equipment for lease to the County. The County's obligation to make payments under a one year lease with annual renewal options was secured solely by non-ad valorem revenues. The Court held that the proposal did not violate article VII, section of the Florida Constitution and was not an impermissible mortgage with a right of foreclosure. The Court held

that the County is simply renting equipment under the lease and could return to the lessor any leased equipment still owned by the lessor in the event of a default or non appropriation. Id at 464.

The Association and the Board's bond proposal before this Court fails for exactly the reasons delineated in Brevard. In Brevard County, the lease payments were payable only from non-ad valorem sources. The bonds in this case are secured by lease rental payments directly derived from ad valorem taxes. Secondly, in Brevard County the lease involved equipment. The lease in the case involves 14 new schools and additions and improvements to numerous other educational facilities. It goes without saying that there is a great difference in the rental of equipment which can be returned to the lessor if the lease is terminated and in the lease of schools and buildings. If there is a default or a failure to appropriate in this case, the Board, which already owns the schools and lands, could lose the use of those facilities during the term of the bonds.

Because of the public nature of the buildings and the need for their use, the suggestion that the Board can choose not to fund the leases after each year term is illusory. Furthermore, the Board will be contracting with builders and contractors to actually construct the new schools or improvements with the bond proceeds issued by the Association. Once the School Board makes a commitment to pay for these projects, the Board cannot then at the same time realistically decide to not fund the leases. This potentially could lead to contract disputes and lawsuits with construction companies and damage to the Board's credit rating.

As stated above, the Lease-Purchase Revenue bonds clearly call for the Board's commitment for longer than a mere twelve month renewable lease term. If not directly, the Board is indirectly pledging ad valorem taxes. This should trigger the constitutional requirement that the bonds not be validated until referendum approval is obtained.

CONCLUSION

There is no question that the Board desperately needs monies for the construction of new schools and for improvements to existing structures. If the Board were to issue bonds directly for this purpose, an election would be required. By structuring the transaction so that the Association actually issues the bonds and the Board's obligations are subdivided into a one-year "lease" with an annual renewal options, the Board cannot circumvent the Florida Constitution's dictate for a vote of the electors.

The trial Court's Final Judgment of Validation should be reversed and set aside until such time as the Board complies with the Florida Constitution and obtains referendum approval for the lease revenue bonds.

Respectfully submitted,

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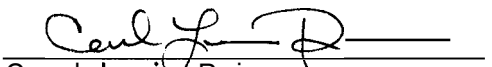
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas f. Lang, Esquire, Parker, Johnson, Owen, McGuire, Michaud, Lang and Kruppenbacher, P.A., 1300 Barnett Plaza, 201 S. Orange Avenue, orlando, Florida 32801; Seth P. Johnson, Esquire, Ruden, Barnett, McClosky, Smith, Schuster and Russell, P.A., 110 East Broward Blvd., Ft. Lauderdale, FL 33302 and Joseph L. Shields, General Counsel, Florida School Boards Association, Inc., 203 South Monroe Street, Tallahassee, Florida 32301 and Marguerite H. David, Esquire, Katz, Kutter, Haigler, Alderman, Eaton, Davis and Marks, P.A., 215 South Monroe Street, Suite 400, First Florida Bank Building, Tallahassee, Florida 32301 on this 21st day of December, 1989.

LAWSON LAMAR, State Attorney
Ninth Judicial Circuit



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