OA 3-5-90
15

IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of Orange County, Florida, including non-residents owning property or subject to taxation therein, and all others having or claiming any right, title or interst 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.

FILED
SID J. WHITE
FEB 1 1990
CLERK, SUPREME COURT
By _____ Deputy Clerk

CASE NO. 75,154

REPLY BRIEF OF APPELLANT

LAWSON LAMAR, STATE ATTORNEY
NINTH JUDICIAL CIRCUIT

CAROL LEVIN REISS
ASSISTANT STATE ATTORNEY
FLORIDA BAK NO. 501034
Post Office Box 1673
Orlando, Florida 32802
(407) 836-2430

COUNSEL FOR DEFENDANT/APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

ARGUMENT

VALIDATION OF NOT TO EXCEED $230 MILLION LEASE REVENUE BONDS WITHOUT AN APPROVING REFERENDUM VIOLATES ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION.

As stated in the initial brief, the sole issue before this Court is whether an election must be held approving the issuance of the bonds before validation may be granted. Appellee implicitly suggests that the State's argument has no merit because it was not raised to Appellee's satisfaction at trial or involves sub-issues.

The central issue, however, is quite clear. Article VII, Section 12 of the Florida Constitution requires school districts with taxing powers to obtain the approval of the electors in order to issue bonds, payable from ad valorem taxes and which mature more than twelve months after issuance. Thus, the Court cannot decide the issue before it, without addressing the sub-issues of whether ad valorem taxes will be directly or indirectly pledged and whether the Orange County School Board's commitment realistically exceeds twelve months.

The issue was raised at trial in the State's opening remarks and was part of the questioning throughout the trial (App. 3, pages 8, 16-18, 29-32, 47-62, 65). To assert that the State's position is without merit or erroneous would be ignoring the public importance placed on resolving the legal issues at bar and the fact that there are currently two other school boards with bond proposals very similar to the instant case on appeal to this Supreme Court. See, State of Florida v. School Board of Collier

County, Case No. 75,009; State of Florida v. School Board of Sarasota County, Case No. 74,979. Moreover, constitutional issues regarding the issuance of bonds are not precluded even though they were not raised in the validation proceeding. See, 42 Fla. Jur. 2d, Public Securities section 122 (1983); Weinberger v. Board of Public Instruction of St. Johns County, 93 Fla. 470, 112 So. 253 (Fla. 1927).

Appellee, in its answer brief, suggests that because the Orange County School Board does not actually issue the bonds, the constitutional requirement of an election does not come into play. Appellee cannot dispute the fact that the Florida School Boards Association, hereinafter referred to as "the Association," issues the bonds on behalf of the Orange County School Board, hereinafter referred to as "the School Board". The style of this case and the bond documents themselves reflect this (App. 1-2, App. 4-5, App. 8). Moreover, the bonds only retain their tax exempt status because the Association issues them on behalf of the School Board. See, Internal Revenue Ruling 63-20; Internal Revenue Procedure 82-86.

To say that the School Board will not be issuing or will have no real part in issuing the bonds, ignores the realities of the entire bond transaction. It is not disputed that the Association intends to issue the bonds on behalf of the School Board, and enter into a ground lease whereby for a nominal. sum the School Board leases to the Association property or educational facilities on which new schools or improvements are to be made (App. 4). The bond proceeds then are used by the

School Board, as agents of the Association, to construct new schools and make improvements to existing educational facilities (App. 3, 48). The School Board enters into an annual renewable "Lease" with the Association for use by the School Board of the new schools and improved educational facilities (App. 5). Theoretically, at the end of each annual renewable lease term, the Board may decide not to appropriate the rent due for next year's lease and can terminate its obligation under the "Lease" (App. 1,4).

The School Board's "Lease", however, includes all schools, educational facilities and or improvements constructed with the bond proceeds and the Board must choose to fund or not to fund the "Lease" in its entirity (App. 3, 17). The project is anticipated to include construction of fourteen new schools and improvements to at least fifty existing facilities (App. 3, 29-30). Much of the construction and improvements will be done on land already owned by the School Board. As Appellee states on page two of the answer brief, the project also contemplates new schools and improvements to be built on property yet to be purchased. Contrary to Appellee's assertion, this is an important and contested point that will be discussed later in this reply.

The debt service on the bonds will be secured by the payments made by the School Board to the Association under the "Lease" (App. 6). The School Board's rent due under the "Lease" is payable in part by 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. This tax assessment is known as the capital outlay millage.

Clearly if the School Board were to directly issue the bonds, Article VII, Section 12 of the Florida Constitution would require the School Board to first obtain electorate approval. By structuring the bond proposal so that the Association technically issues the bonds, Appellee cannot circumvent the constitution's dictate.

Appellee erroneously suggests that because the School Board does not pledge ad valorem taxes as security for the bonds and cannot be compeled to levy taxes in the event of a default, that the bonds are not "payable from ad valorem taxation." The State has already addressed the first assertion. Although the bond documents say that ad valorem taxes are not pledged as security for the bonds, the realities of the bond proposal indicate otherwise. The rental payments due under the lease are derived in part directly from the capital outlay millage pursuant to Section 236.25(2)(e), Florida Statutes. See, (App. 3, 26-27). These rental payments are pledged as security for the bonds (App. 6). Thus, the Appellee's suggestion that the State is interpreting the constitution's language "payable from ad valorem taxes'' to mean capable of being paid from ad valorem taxes makes no sense. The debt service for the bonds in this case clearly will be indirectly, if not directly, secured by ad valorem tax revenues.

The Appellee cites State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980) in support of its argument. In Miami Beach, the redevelopment agency sought to issue bonds to finance land acquisition and to finance improvements in connection with the redevelopment of slums and blighted areas. The controlling statute at the time required that before any redevelopment projects could be instituted, the governing body must create and provide for the funding of a redevelopment trust fund to be maintained until the debt service for the bonds is retired. Id at 881. The trust fund was to be funded in an amount not less than the amount of tax increment revenue that accrues to the local government. Id. at 893. The statute defined ad valorem tax increment as the difference between the ad valorem taxes levied by those local governments each year and the amount that would have been produced by the same levy on the assessed value of taxable property in the redevelopment area before the implementation of the plan. Id.

The state attorney objected on grounds that the bonds were payable from ad valorem taxes within the meaning of Article VII, Section 12, requiring a vote of the electorate. The Supreme Court rejected this argument and stated that there was no requirement that the trust be funded by ad valorem taxes at all but only "merely a requirement of an annual appropriation from any available funds." Id. at 894. The "ad valorem tax is not necessarily deposited directly into the fund but is merely the measure of the contributions the county and city will make annually from its general operating revenues until the bonds have been paid". Id.

Although it is true that the bonds in Miami Beach did not pledge the ad valorem taxing power, the Appellee in this case is overemphasizing its importance to the case at bar. Unlike Miami Beach, it is a certaintity in this case that ad valorem taxes will be used to fund the leases which serve as security for the bonds and will not be used merely as a measure for the annual appropriation under the "Lease" (App. 3, 26-27). The School Board has only limited sources of revenue. A great percentage of those revenues are derived directly from ad valorem taxation. The Association cannot now imply that the School Board may not fund the leases from the capital outlay assessment or that the State has not proven the School Board intends to do so. See, (App. 3, 26-27). (If the lease is renewed for a second year, it will be subject to annual appropriation by the School Board, the funds will be utilized from the capital improvement tax.) *See,* (App. 3, 50). (When asked if he has determined the percentage of funds which will come from the capital outlay millage to fund the leases, co-bond counsel firm's Dale Recinella answered he had not.)

Appellee mistakenly would like this Court to adopt the test as to whether a third party or the bond holders can compel the School Board to levy ad valorem taxes to fund the leases as determinative of the issue as to whether ad valorem taxes have been directly or indirectly pledged. This test, however, is not the only one applied by this Court. In County of Volusia v. *State,* 417 So.2d 968 (Fla. 1982) this Court held that the pledge of all legally available, non-ad valorem unencumbered revenues of

the county, along with a covenant to do all things necessary to continue receiving those revenues, would have the effect of requiring increased ad valorem taxation so that an election was required. Although in State v. Brevard County, 539 So.2d 461 (Fla. 1989), the Court determined the bond holders or a third party cold not compel the county to levy taxes to fund a lease purchase agreement, the Court specifically noted the county's obligation to make payments under an annual lease agreement for equipment will be secured solely by non-ad valorem revenues. In reaching this conclusion, the Court noted that in the event of a default or nonappropriation of funds for the lease, the county could return to the lessor any leased equipment still owned by the lessor. Id. at 463-464. In Nohrr v. Rrevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971) this Court looked to whether the county or the legislature would feel morally compelled to levy taxes or to appropriate funds to prevent the loss of properties through the process of foreclosure.

Undoubtedly, School Boards can enter into lease purchase agreements under sections 230.23(9)(b)(5) and 235.056, Florida Statutes. Notwithstanding Article VII, Section 12 of the Florida Constitution, these sections cannot be construed to authorize the School Board to enter into a lease purchase agreement which extends beyond twelve months and involves funding of lease payments with ad valorem revenues without an election. Section 230.23(9)(b)(5), Florida Statutes states in pertinant part "notwithstanding any other statutes, if the rental is to be paid

from funds received from ad valorem taxation and the agreement is for a period greater than 12 months, an approving referendum must be held.'' Contrary to Appellee's suggestion on pages 22-23 of its answer brief, the record reflects the School Board's agreement under this bond proposal extends beyond twelve months.

The School Board intends to finance fourteen new schools and improvements to at least fifty educational facilities with the bond proceeds. All schools and improvements will be controlled under the one lease. At the time off annual appropriation, the School Board must choose to fund all of the educational facilities covered under the lease or none at all (App. 3, 17). The School Board's ability to choose not to fund the lease is really nonexistent. To not do so would result in the loss of the use of the schools and improvements for the term of the bonds.

It is this very reason, the moral compulsion to fund, which this Court used in deciding the case in Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971). Appellee erroneously suggested the State relied on Nohrr because of the prohibited mortgage with a right of foreclosure. This is incorrect. In Nohrr, this Court did not allow a mortgage with the right of foreclosure but did not do so over the issue of foreclosure itself, but on grounds that the County could feel morally compelled to levy taxes or to appropriate funds to prevent the loss of properties through the process of foreclosure. Id. In Nohrr, the Court indicated 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 those properties. Id. at 311. See, Wilson v. Palm Beach County Holding Authority, 503 So.2d 893 (Fla. 1987). (A mortgage security interest is not in itself invalid when the issuer did not pledge ad valorem taxes and had no taxing powers.)

In the case at bar, the Association or its assignee would retain a leasehold interest in the new schools and improved educational facilities contstructed on land already owned by the School Board. It is unlikely and difficult to believe that in the event of a default or nonappropriation that the School Board could allow the Association or its assignee to retake the premises for the remaining life of the bonds to relet the property. Furthermore, as Appellee states on page two of the answer brief, it is contemplated the bonds will be used to purchase property on which new schools will be built. Appellee cannot distinguish how an unconstitutional and prohibited mortgage with a right of foreclosure would not be involved in this scenario pursuant to this Court's rulings in both Nohrr and Wilson, supra. Certainly, the School Board would at least feel morally compelled to fund a lease where the Association purchased the property. The School Board might have to raise taxes to insure funding of the "Lease" or risk the loss of the educational facilities constructed on land purchased by the Association with bond proceeds.

Appellee erroneously contends that the instant case is consistant with this Court's decision in State v. Brevard County,

539 So.2d 461 (Fla. 1989). The fact that this case involves the financing of schools and involves the use of ad valorem taxation distinguishes this case from Brevard County. In Brevard, the bond proceeds were to be used to fund a lease purchase agreement for equipment which, unlike the case at bar, could be returned to the lessor in the event of a default on nonappropriation. The lease payments in Brevard were only to be funded by non-ad valorem sources unlike this case which contemplates the substantial use of ad valorem tax revenues.

Finally, Appellee has cited numerous out of state cases in support of its position. Although the cases address relevant issues to lease-purchase agreements, all of the cases revolve around whether a lease-purchase agreement constituted debt violative of each state's constitutions. Article VII, Section 12 of the Florida Constitution does not refer to debt, but whether or not an election is required when a school district with taxing powers issues bonds . . . payable from ad valorem taxation and maturing more than twelve months after issuance. Also, Section 230.23(9)(b)(5), does not refer to debt but instead prohibits the School Board from entering into a lease purchase agreement when the rent for such agreement is derived from ad valorem tax sources and the agreement is for a period greater than twelve months.

CONCLUSION

There is no question that if the School Board were to issue the bonds directly an election would be required. By structuring the transaction so that the Association actually issues the bonds and the School Board's obligations are subdivided into a one-year "lease", funded by ad valorem revenues, which serves as security for the bonds, the School Board cannot circumvent the Florida Constitution's dictate for a vote of the electors. The School Board would at the very least be entering into an agreement which would realistically exceed twelve months and involve an indirect, if not direct, pledge of ad valorem taxation. Therefore, the trial court's final judgment of validation should be reversed and set aside until such time as the School Board complies with Article VII, Section 12 of the Florida Constitution and obtains referendum approval for the lease revenue bonds.

Respectfully submitted,

LAWSON LAMAR
STATE ATTORNEY

CAROL LEVIN REISS
ASSISTANT STATE ATTORNEY
FLORIDA BAR NO. 501034
Post Office Box 1673
Orlando, FL 32801
(407) 836-2430

COUNSEL FOR DEFENDANT/APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief 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, Schuster and Russell, P.A., 110 East Broward Blvd., Ft. Lauderdale, Florida 33302; Joseph L. Shields, General Counsel, Florida School Boards Association, Inc., 203 South Monroe Street, Tallahassee, Florida 32301; Marguerite H. Davis, Esquire, Katz, Kutter, Haigler, Alderman, Eaton, Davis and Marks, P.A., 215 South Monroe Street, Suite 400, First Florida Bank Building, Tallahassee, Florida 32301; William M. Rowland, Jr., Esquire, Roland, Thomas and Jacobs, P.A., 1786 North Mills Avenue, Orlando, Florida 32803 and Dale Recinella, Esquire, Ruden, Barnett, McClosky, Schuster and Rusell, P.A., Monroe Park Tower, Suite 1010, Tallahassee, Florida 32301, this 31st day of January, 1990.

CAROL LEVIN REISS
ASSISTANT STATE ATTORNEY