ORIGINAL

IN THE SUPREME COURT OF FLORIDA
CASE NO. 88,844

ALACHUA COUNTY, FLORIDA, a political subdivision of the State of Florida; and the **CITY OF GAINESVILLE,** an incorporated municipality within Alachua County, Florida,

Appellants,

vs.

DWIGHT ADAMS, individually, as a citizen and taxpayer of Alachua County, Florida,

Appellee.
_____/

First DCA Case No. 96-00257

L. T. Case No. 95-3094-CA

ON DIRECT APPEAL FROM A DECISION RENDERED IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

AMICUS CURIAE BRIEF OF CLAY COUNTY IN SUPPORT OF APPELLANTS ALACHUA COUNTY AND CITY OF GAINESVILLE

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PRELIMINARY STATEMENT

This brief is submitted by *amicus curiae* Clay County, a political subdivision of the State of Florida, in support of the Appellants Alachua County and the City of Gainesville. As used herein the term "Alachua County" shall mean both Alachua County and the City of Gainesville.

Clay County adopts the entirety of the arguments advanced by Alachua County in its Initial Brief submitted in this appeal. The matters presented herein are respectfully submitted in amplification and supplementation thereof.

STATEMENT OF THE FACTS AND CASE

Clay County adopts the Statement of the Facts and Case set forth by Alachua County in its Initial Brief submitted herein.

QUESTION PRESENTED

Whether a special act that authorizes a particular use by Alachua County of the proceeds of a sales surtax levied under the authority of a general law and not otherwise authorized under said general law is constitutional.

SUMMARY OF THE ARGUMENT

§ 212.055(2), Fla. Stat. (1995), is the codification of a general law that authorizes counties to levy a certain infrastructure surtax. Ch. 94-487, Laws of Fla., is a special act that authorizes Alachua County and its municipalities to use the proceeds of the infrastructure surtax levied under the authority of § 212.055(2), Fla. Stat. (1995), to fund the operation and maintenance of certain infrastructure improvements. Said use is not authorized under § 212.055(2), Fla. Stat. (1995). The Florida Constitution does not prohibit a special act that authorizes a particular use of the proceeds of a tax levied under the authority of a general law that itself does not authorize said use. The First District Court of Appeal incorrectly concluded to the contrary in the decision under review in this appeal. The decision of this court in *Rowe v. Pinellas Sports Authority,* 461 So.2d 72 (Fla. 1984), stands for the proposition that a special act may authorize the use of the proceeds of a tax levied under the authority of a general law by pledging said proceeds to secure a bonded indebtedness. Because of the real potential that such a pledge may be enforced so that the proceeds are directly applied to service debt, such a pledge is as much a use of the proceeds as would be the direct and express funding of the debt service from said proceeds at the outset. The First District erroneously concluded that the pledge of the proceeds in *Rowe* was not a use of the proceeds, and therefore failed to follow the precedent established by this court in ruling that Ch. 94-487, Laws of Fla., is unconstitutional. The use of the general law tax proceeds authorized in Ch. 94-487, Laws of Fla., is permitted under the constitution. The contrary decision of the First District is error and must be reversed.

ARGUMENT

Introduction.

Ch. 94-487, Laws of Fla., enacted by the Florida Legislature during its 1994 regular session, provides in pertinent part:

> Section 1. In addition to the uses authorized by s. 212.055(2), Florida Statutes, the board of county commissioners of Alachua County and the municipalities of Alachua County may use local government infrastructure surtax revenues for operation of parks and recreation programs and facilities established with the proceeds of the surtax.

During the same session that Ch. 94-487, Laws of Fla., was enacted, the Legislature also enacted Ch. 94-459, Laws of Fla., which provides in pertinent part:

> Section 1. In addition to the uses authorized by s. 212.055(2), Florida Statutes, and notwithstanding s. 212.055(2)(e), Florida Statutes, the Board of County Commissioners of Clay County may use the proceeds of the local government infrastructure surtax for the purpose of retiring or servicing bonded indebtedness incurred prior to July 1, 1987, to finance infrastructure and subsequently refunded.

Ch. 94-487, Laws of Fla., and Ch. 94-459, Laws of Fla., are special acts, while § 212.055, Fla. Stat. (1995), referred to in each, is the codification of a portion of Ch. 87-239, Laws of Fla., a general law. Ch. 94-459, Laws of Fla. (the Clay County special act), and Ch. 94-487, Laws of Fla. (the Alachua County special act), authorize the use of sales surtax proceeds levied under the authority of § 212.055, Fla. Stat. (1995), for particular purposes that are not specifically authorized in the general law.

A special act that authorizes a particular use by Alachua County of the proceeds of a sales surtax levied under the authority of a general law and not otherwise authorized under said general law is constitutional.

As previously stated, Clay County adopts the entirety of the arguments advanced by Alachua County in its Initial Brief submitted herein. The discussion that follows is respectfully submitted in amplification and supplementation thereof.

The solitary and dispositive question presented is whether the constitution forbids a special act that authorizes a particular use by a county of the proceeds of a sales surtax levied under the authority of a general law that itself does not authorize such use. With regard to the presumption of constitutional validity accorded to acts of the Legislature more fully discussed in Alachua County's Initial Brief, Clay County only emphasizes the point that the burden of one bringing a constitutional attack is the highest known to the law of this state and the United States: invalidity must be shown beyond a reasonable doubt. *A.B.A. Industries, Inc. v. City of Pinellas Park,* 366 So.2d 761, 763 (Fla. 1979).

Distilled, the Appellee's argument is that Art. VII, § 1(a), Fla. Const., and Art. VII, § 9(a), Fla. Const., prohibit any special act authorizing the use by a county of the proceeds of a sales surtax levied under the authority of a general act that itself does not authorize such use. The Appellee argues, and the First District agreed, that the authority to levy a sales surtax and the authority to use the proceeds thereof for a particular purpose are functionally indistinguishable, each being but a component of a single concept. The foundation of that concept is asserted by the Appellee to be the combined meaning of the phrase in Art. VII, § 1(a), Fla. Const.: "No tax shall be levied except in pursuance of law . . . All other forms of taxation shall be preempted to the state except as provided by general law."; and the phrase in Art. VII, § 9(a), Fla. Const.:

"Counties . . . shall . . . be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes . . . ." The concept advanced by the Appellee, which must appear beyond a reasonable doubt, is that these simple phrases define the term "taxation" as inclusive of all events associated therewith, from the inception of the levy through the expenditure of the last quantum of its proceeds. The Appellee asserts that a particular use of tax proceeds is but a component of "taxation" as intended under the constitution, and that therefore legislation authorizing such use must be enacted as a general law. Clay County respectfully submits that such a conclusion and its premises are misplaced.

The decision of this court in *Rowe v. Pinellas Sports Authority,* 461 So.2d 72 (Fla. 1984), provides the clearest illustration to date that the levy by a county of a tax authorized by general law is in no way cognate with the use of its proceeds. *Rowe* stands squarely in the path of the analysis being advanced by the Appellee. *Rowe* must be distinguished or overruled in order to sustain the First District's decision and the Appellee readily recognized this when he suggested in his answer brief submitted to the First District that "Rowe may properly be cited for the proposition that the power to pledge lawfully collected tax revenues as prescribed in general law may be enlarged in a particular county by special law." Appellee's Answer Brief submitted to the First District Court of Appeal, p. 25. (emphasis as in original) Quite obviously the First District was persuaded to the Appellee's point of view, stating: "The pledging of tax revenues at issue in *Rowe* is significantly distinguishable from the ultimate use of tax revenues at issue in the present case." *Alachua County v. Adams,* 21 Fla. L. Weekly D1690, D1691 (Fla. 1st DCA July 25, 1996).

Respectfully, Clay County submits that distinguishing the pledge by Pinellas County of the tax proceeds to secure the Pinellas Sports Authority's bond issue as not a use of those proceeds within the meaning of the constitution is analytically flawed. In practical terms the pledge was a covenant to the bondholders that in the event of default in payment the bondholders, through the bond trustee, could force the proceeds of the tourist development tax to be used to pay debt service. In such a case the use of the tourist development tax proceeds to pay debt service becomes just as real and just as immediate as if those same proceeds had been designated to fund the debt service from the outset. To conclude, as did the First District, that the mere pledge of the tax proceeds is not a use thereof within the meaning of the constitution requires a blind disregard of the real and obvious potential for the future expenditure, the ultimate use, of those same proceeds. Under the distinction drawn by the First District and advanced by the Appellee, had the debt service for the bonds in *Rowe* expressly and deliberately been structured and authorized by the special act to be funded directly from the tourist development tax proceeds from the outset, the bond issue would have to have been invalidated because such use of the tax proceeds would have violated the constitution. Clay County submits that no such distinction was intended by this court in *Rowe*, which certainly had the foresight to understand that the pledge of the tax proceeds necessarily meant the ultimate expenditure of those proceeds in the event of default. The pledge of the proceeds was as much a use thereof as would have been their actual expenditure. Beyond a reasonable doubt there could be no other rational interpretation of *Rowe*.

The necessity of regarding the pledge in *Rowe* as encompassing all of its logical consequences in the event of default is entirely consistent with the long-established jurisprudence

of this court that governmental entities possessing the power to levy ad valorem taxes may not mortgage their real property or otherwise give security interests in their personalty without referendum approval. In *Nohrr v. Brevard County Educational Facilities Authority,* 247 So.2d 304 (Fla. 1971), this court reviewed a final judgment validating a certain bond issue. There the bond proceeds were to finance the construction and equipping of a dormitory-cafeteria and other educational facilities at the Florida Institute of Technology. The bond covenants were structured so that the project and all rents and revenues therefrom were assigned, pledged and mortgaged to secure the bonded indebtedness. This court affirmed the bond validation but struck the mortgage provisions of the trust indenture. Its rationale, consistent with its prior decisions, was that a mortgage with the remedy of foreclosure necessarily implicated the ad valorem taxing authority of the county. In this regard this court stated:

> Most certainly the county or the legislature would feel morally compelled to levy taxes or appropriate funds to prevent the loss of their properties through the process of foreclosure.
>
> * * * * *
>
> [A] mortgage with the accompanying right of foreclosure is not constitutionally permissible without an election. 247 So.2d at 311.

Though not specifically cited in *Nohrr*, the provision of the constitution understood to have been violated by the giving of the mortgage is Art. VII, § 12(a), Fla. Const., which requires referendum approval before a taxing entity may pledge ad valorem taxes to secure bonds issued for certain capital projects.

The result in *Nohrr* could not possibly have been achieved without first having contemplated the possibility that the present pledge of the real property to secure the bonded indebtedness would ripen in the future into the real and ultimate remedy of foreclosure in the

event of a default in payment. Therefore it is inconceivable that this court would conclude, as it did in *Nohrr*, that the constitution forbids a taxing entity's giving a mortgage without referendum approval because of the potential of foreclosure and the compulsion to raise taxes in avoidance thereof, but that it would not have intended that the pledge of the tourist development tax proceeds in *Rowe* should not be subjected to the same analytical end game with regard to the potential for the expenditure of tax proceeds to service the bond debt.

To construe the pledge in *Rowe* without reference to the consequence of the possible expenditure of tax proceeds in the future would require the abandonment of the cause and effect analysis employed by this court in determining in *Nohrr* that the mortgage pledge there violated the constitution. Yet, to sustain the distinction advocated by the Appellee that the pledge of the tax proceeds in *Rowe* was not the use thereof would require just such an abandonment of logic. Clay County submits that this court's decision in *Rowe* cannot be distinguished from the circumstances presented in the instant case. Therefore if the decision of the First District Court of Appeal is to be sustained then the decision of this court in *Rowe v. Pinellas Sports Authority*, 461 So.2d 72 (Fla. 1984), must be bulldozed, as it stands squarely in the path of the Appellee's argument. In this regard the County submits further that *Rowe* need not be so assaulted and should continue to occupy its position within this court's jurisprudence construing Art. VII, § 1(a), Fla. Const., and Art. VII, § 9(a), Fla. Const.

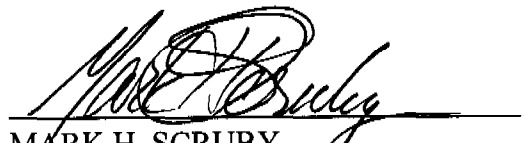
By failing to apply the full meaning of this court's decision in *Rowe*, and the inevitable conclusion to be drawn therefrom that the pledge of the tax proceeds is the same as the use thereof, the First District erred in concluding that the Alachua County special act is unconstitutional. As stated hereinabove, it is the Appellee's burden to demonstrate beyond a

reasonable doubt that the Alachua County special act is unconstitutional. In that the Appellee has failed. With the guidance of *Rowe*, and much to the contrary, there can be no doubt that the Alachua County special act is in full harmony with the constitution.

CONCLUSION

This court's decision in *Rowe v. Pinellas Sports Authority,* 461 So.2d 72 (Fla. 1984), stands squarely for the proposition that a special act may authorize the use of the proceeds of a tax levied under the authority of a general law that itself does not authorize such use. Contrary to the conclusion reached by the First District Court of Appeal, the authority to levy a tax is quite distinct from the authority to use the tax proceeds. Therefore, and as a matter of law, the Alachua County special act is constitutional. The contrary decision of the First District Court of Appeal is erroneous and should be reversed with directions that judgment be entered in favor of Alachua County.

Respectfully submitted this 16th day of September, 1996.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Amicus Curiae* Brief of Clay County in Support of Appellants Alachua County and City of Gainesville has been served upon each of the attorneys listed below at the addresses indicated by ordinary United States Mail this 16th day of September, 1996.

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