

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC09-633

(L.T. No. 2D08-1998)

POLK COUNTY BUILDERS ASSOCIATION, INC., et al.

Petitioners,

v.

POLK COUNTY, a subdivision
of the State of Florida,

Respondents.

*ON DISCRETIONARY REVIEW FROM A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT*

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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EXPLANATION OF REFERENCES

A conformed copy of the decision of the Second District Court of Appeal in *Polk County Builders Association, Inc., et al., v. Polk County*, ___ So.2d (Fla. 2nd DCA 2009) is appended hereto at Tab A. This decision will be referred to as *Polk County Builders*.

The Petitioners here, Polk County Builders Association, Inc., Hickman Homes, Inc., Tyler Homes of Polk County, Inc., and Florida Home Builders Association, Inc., are collectively referred to as “petitioners.” The Respondent, Polk County is referred to as the “County.”

The 2002 citizen initiated amendment to Article IX, § 1 (a) Fla. Const. known as “Florida’s Amendment to Reduce Class Size” will be referred to as the “Amendment” or “Class Size Amendment.” Reference to the “Amendment” or Article IX, § 1 (a) Fla. Const. indicates reference to the following text of the present state constitution (2002 amendments italicized):

Section 1. Public Education

- (a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing in its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other education programs that the needs of the people may require. *To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are sufficient number of classrooms so that:*

- 1. The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for pre-kindergarten through grade 3 does not exceed 18 students;*
- 2. The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students;*

3. *The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.*

*The class size requirements of this subsection do not apply to extracurricular classes. **Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local school districts.** Beginning with the 2003-2004 fiscal year, the **legislature shall provide sufficient funds** to reduce the average number of students in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection. (emphasis supplied).*

STATEMENT OF THE CASE AND FACTS

Petitioners, residential construction companies and trade associations, seek review of *Polk County Builders* which expressly construed Article IX, § 1 (a) Fla. Const. in affirming a circuit court ruling that local ordinances imposing substantial educational impact fee increases on behalf of a school board, in order to fund costs associated with the class size reduction requirements of Article IX, § 1(a) did not violate any funding provisions of Article IX, § 1 (a).

Article IX, § 1 was amended in 2002 by a citizen initiative known as “Florida’s Amendment to Reduce Class Size” (hereafter “Amendment”). In approving the measure for placement on the ballot, this Court observed that requiring adequate legislative funding of reduced classroom sizes in the public school system was the primary purpose of the measure. *Advisory Opinion to the Attorney General Re: Florida’s Amendment to Reduce Class Size*, 816 So.2d 580, 585 (Fla. 2002).¹

¹ In the referenced decision, this Court rejected a logrolling challenge because the Amendment’s funding provisions did not deal with a separate subject, but rather, provided “detail of how the ballot initiative will be implemented.” *Id.* at 583. Noting that state statutes already provided for class size reduction, the Court also stated that placing the responsibility for funding the initiative on the legislature was the amendment’s “chief purpose.” *Id.* at 584-585.

Pre-election publicity concerning the Amendment reflected that the funding mechanism was at the heart of the debate over the measure. *See, e.g.,* Tampa Tribune, *The Education Election* (October 20, 2002), available at <http://pqasb.pqarchiver.com/tampatribune/access/218688721.html>; Orlando Sentinel, *Voters Weigh Cost of Plan to Limit Size of Classes* (October 30, 2002), at <http://pqasb.pqarchiver.com/orlandosentinel/access/228054721.html>; South Florida Sun-Sentinel, *Logistics, Money Are At Issue in Class Size Ballot Question* (October 22, 2002), available at http://pqasb.pqarchiver.com/sun_sentinel/access/218557501.html; and *The Miami Herald*, *Vote Yes on Constitutional Amendment*

The approved ballot summary stated that the measure would “require that the legislature provide funding,” and that it would require “the Legislature, and not local school districts, to pay for the costs associated with reduced class size.” *Id.* at 581. The text of the Amendment thrice reiterated this prescribed funding mechanism stating, “the legislature shall make adequate provision” and “payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local school districts” and “the legislature shall provide sufficient funds.” The people of Florida adopted the Amendment in the fall of 2002, and it became Article IX, § 1(a) of the Florida Constitution.

No. 9 (October 28, 2002), available at MiamiHerald.com archives, last visited June 25, 2008. These sources are appropriately considered. *Advisory Opinion to the Governor - 1996 Amendment 5*, 706 So.2d 278, 282 (Fla. 1997).

In 2005, the Polk County Commission adopted two ordinances on behalf of the local school district (Ordinances 05-48 and 05-063) which increased educational impact fees *more that fivefold* for new residential construction. According to the County's own impact fee consultant, **70.15%** of these fees were attributable to costs associated with meeting the requirements of the Amendment.²

In 2006, Petitioners sued to invalidate Ordinances 05-048 and 05-063 to the extent they conflict with the funding provisions of Article IX, § 1(a) (and therefore, also violate Article VIII, § (1)(g), which forbids local ordinances inconsistent with general law).³ In addition to facial constitutional challenges, Petitioners Hickman Homes, Inc. and Tyler Homes of Polk County, Inc. brought as-applied challenges since they had been required to actually pay fees under the ordinances.⁴

² Specifically, fees increased from \$1,607 to \$8,596.91 for each single-family dwelling unit, from \$832 to \$5,843.64 for each multi-family dwelling unit, and from \$807 to \$4,613 for each mobile home dwelling unit. (R. 4-5, 46-50). The County's own consultant concluded that, but for inclusion of the Amendment-driven costs, the increases would have only been up to \$2,838 for single family units, \$1,929 for multi-family units, and \$1,522 for mobile homes. (R. 51-59).

Notably, the County imposed these increases despite being the fourth highest recipient of state legislative appropriations for class size reduction purposes and being listed among the counties deemed on-target for meeting the deadlines in the Amendment. (R. Vol. 1 at 144, 154).

³ Even home rule charter counties may not act inconsistent with state law. *Pinellas County v. City of Largo*, 964 So.2d 847, 853 (Fla. 2d DCA 2007); *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So.2d 637, 653 (Fla. 2d DCA 2007).

⁴ Accordingly, they were forced to bear the double burden of state ad valorem taxation *and* locally imposed impact fees to meet the goals of the Amendment.

Though Ordinance 05-48 permits adjustments to account for legislative appropriations received, the adjustment only benefits fee payers in subsequent fiscal years. Hickman and Tyler do not receive any rebate under the ordinance. Further, adjustments actually made by the County in 2006 and 2007 did not eliminate Amendment compliance costs. *E.g.*, single family unit fees were reduced to \$6,006 in 2006 and to \$4,171 in 2007, but the fees remained significantly above the \$2,838 figure which excluded Amendment compliance costs from the calculation. (R. 56-57).

Petitioners contended below that the subject ordinances violate the plain language of Article IX, § 1(a) which specified the manner in which the costs associated with meeting the class size reduction goals would be funded (through the state legislature and not local school districts). The County asserted that, under its home rule power, it could “voluntarily” contribute funding to meeting the class size reduction goals.

In granting summary judgment, the trial court agreed with the County’s argument that Article IX, Section 1(a) did not “preempt or otherwise prohibit local school districts / counties from voluntarily contributing local funding toward class size reduction.” (R. 1507). The Second District Court affirmed in *Polk County Builders*, holding that Article IX, § 1 (a) does not expressly preempt counties from participating in funding the voter-approved ballot initiative to reduce class size.⁵

Petitioners timely filed a notice of seeking discretionary review in this Court.

SUMMARY OF ARGUMENT

This case is worthy of discretionary review because it is not only the first to construe Article IX, § 1(a) as amended in 2002, but raises broader questions concerning whether a county may violate the will of the people expressed in the state constitution under the guise of home rule

⁵ The majority opinion in *Polk County Builders* only addressed the express preemption theory raised by Petitioners. It completely ignored Petitioner’s parallel contentions that the ordinances invalidly conflict with the plain language of Article IX, § 1(a) and exceed the limits of home rule powers under Article VIII, § (1)(g). The concurring opinion alleges that Petitioners specifically waived conflict. That is inaccurate. At oral argument, in response to questions concerning whether Petitioners were asserting implied or express preemption, Petitioners indicated that they were asserting an express preemption theory, not an implied preemption theory. Petitioners never waived conflict as an independent grounds for invalidation. (See Initial and Reply Briefs below.)

power and whether citizens may be exposed to disproportionate cost burdens for initiatives without fair notice.

Polk County Builders construed Article IX, § 1(a) in a manner that ignores its plain language and that undermines the will of the people to have the goals of class size reduction met fully through state legislative appropriation, and not through variable local school district funding. The Second District Court of Appeal ignored glaring conflict between the subject county ordinances and the funding method prescribed in the Amendment. The inevitable outcome of *Polk County Builders* is not what was advertised to and adopted by the people in 2002. It will only promote legislative abdication of the responsibility to timely and fully fund class size reduction in the public schools around the state, and may expose select citizens to disproportionate cost burdens without fair notice.

ARGUMENT

I. The district court’s decision addressed a question of first impression and expressly construed Article IX, § 1(a) as having no funding restrictions.

The Second District Court construed Article IX, § 1(a) as having no funding restriction associated with class size reduction Amendment, reasoning that the language did not rise to the level of an express preemption. This ruling both ignores the plain language of the Amendment and Florida precedent.

This Court has a long tradition of enforcing funding methods prescribed by the constitution, particularly in the area of public education. It recently invalidated a statutory scholarship funding program that was inconsistent with the Court’s interpretation of an “adequate

provision” clause in Article IX, § 1 (a). *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006). In *Bush*, this court reasoned that where the constitution specifies the means of executing a mandate, the specified means creates a restriction against use of other means. *Id.* at 406-407. In reaching its conclusion, the Court relied upon a previous state Supreme Court decision which invalidated education funding bonds at variance with constitutionally prescribed funding methods, *Weinberger v. Board of Public Instruction*, 93 Fla. 470, 112 So. 253 (1927). The following quote from *Weinberg*, relied upon by the majority in *Bush*, is equally apropos here:

[W]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

Bush at 407, quoting *Weinberg* at 256.

Reading all the provisions of the Amendment embodied in Article IX, § 1 (a), *in pari materia*, leads to the inescapable conclusion that the people placed the obligation to fully fund the costs associated the class size reduction mandate on the state legislature and that they did not want the mandate funded at the local level. The Polk County ordinances at issue compete with and undermine that obligation, and force some citizens to bear the costs disproportionately.

This was not what the voters intended.⁶

⁶ The Second District majority only addressed preemption, with the conclusory holding that “the language . . . fails to meet the test for express preemption.” The only “test” for express preemption is that there be “clear language stating that intent.” *Phantom of Clearwater Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005). The panel seemed fixated on terms of art

The county disclaimed any conflict with the Amendment by arguing it may “voluntarily” contribute and that its local funding may “co-exist” with the state legislative funding obligation established by the Amendment. This defies the plain language of the Amendment and common sense. The people placed the obligation to *adequately* and *sufficiently* fund on the state legislature, and allowing imposition of local impact fees diminishes, and may ultimately lead to the elimination of, that obligation.

The subject ordinances and the clear language of the Amendment cannot co-exist. *Compare, Phantom of Brevard Inc. v. Brevard County*, ___ So.2d ___, 33 Fla. L. Weekly S1002, 2008 WL 5333392 (Fla. 2008) (finding no conflict between supplemental local regulation of fireworks requiring liability insurance and state fireworks statute, because the statute was *silent* as to insurance.) By contrast, the Amendment was repeatedly express about placing the funding obligation solely on the legislature. As this Court reasoned in *Bush*, an “adequate provision” mandate can be viewed as a restriction where the constitution specifies the means by which it shall be accomplished. *Id.* at 407. Where the manner of fulfilling an obligation is specified, the constitution “does not authorize additional equivalent alternatives.” *Id.* at 408.

The County and Second District Court attempt to excuse the encroachment of the

such as “preempted to the state,” without due regard for the citizen initiative origins of the Amendment, which ostensibly required the use of language understandable to all voters, not just lawyers. While in lay terms, the language of the Amendment could not be clearer that the intent of the measure was to place all funding responsibility on the legislature “and not” local school boards. Voters presumably approved the measure with the assurance that costs of implementation would be borne more uniformly through state-wide legislative means.

ordinances on the grounds that they serve the common goal of reducing class size. Having a common end does not excuse conflict on means. *Tallahassee Memorial Regional Medical Center Inc. v. Tallahassee Medical Center, Inc.*, 681 So.2d 826, 832 (Fla. 1st DCA 1996) (invalidating ordinances because they conflicted with the method of funding emergency services prescribed by state law, by reassigning the obligations for payment and collection of service costs); *Browning v. Sarasota Alliance for Fair Elections, Inc.*, 968 So.2d 637, 653 (Fla. 2d DCA 2007)(striking proposed amendment to county charter which purported to supplement state Election Code provisions designed to ensure vote accuracy; despite similar ends, the difference in means rendered the proposed amendment invalid).

II. The district court’s decision is contrary to the will of the people expressed in the Article IX, § 1(a) and establishes a precedent that will undermine the primary purpose of the amendment.

In assessing the constitutional validity of allegedly conflicting funding mechanisms, the Court should look to potential practical outcomes. *Bush* at 408-409 (statutory scholarship program would divert funds from public schools and undermine the “high quality” requirement); *St. Johns County v. Northeast Florida Builders Ass’n Inc.*, 583 So.2d 635, 639-640 (Fla. 1991) (exemption from educational impact fee ordinance would convert the impact fees to user fees in violation of the “free public schools” clause). If allowed to stand, *Polk County Builders* will undermine the purpose of the 2002 citizen initiative to require the legislature to sufficiently fund class size reduction. It would tempt the legislature to either substantially abdicate its funding responsibility, appropriate more funds to counties which have not self-funded the mandate (penalizing citizens in fee-imposing counties by placing the financial burden unequally on them), or reward self-funded counties with matching funds or similar incentives (creating pressure on all

counties to self-fund and rendering “voluntary” local funding a practical nullity). In any of these events, the voters will have been deprived of fair notice that their approval of the Class Size Amendment could expose them to the disproportionate cost burdens involved in bearing both state taxation and concentrated local fees.

CONCLUSION

Given the foregoing, Petitioners respectfully request that this Court exercise its discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii) to review the Second District Court of Appeal’s decision in *Polk County Builders*.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this Amended Jurisdictional Brief has been furnished by U.S. Mail to Gregory T. Stewart, Nabors, Giblin & Nickerson, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, FL 32308 this 4th day of May, 2009.

By: _____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font pursuant to Rule 9.210(a)(2), Fla.R.App.P.

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