

IN THE SUPREME COURT OF FLORIDA

DR. GREGORY L. STRAND,

Appellant,

CASE NO. SC06-1894

L.T. CASE NO. 2006-CA-881

vs.

ESCAMBIA COUNTY, FLORIDA,
a political subdivision of the State of
Florida,

Appellee.

**AMICUS CURIAE BRIEF AND APPENDIX OF
FLORIDA SCHOOL BOARDS ASSOCIATION, INC.
IN SUPPORT OF ITS MOTION FOR
CLARIFICATION OR REHEARING**

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STATEMENT OF INTEREST

The Florida School Boards Association, Inc. (the "FSBA") is a statewide, non-profit organization which has served as the collective voice for all Florida school districts since 1930. The FSBA has a special interest in this case because of the possible consequences this Court's decision will have on the ability of school districts to finance the construction of school facilities needed to comply with Florida constitutional and statutory mandates.¹

¹Examples of mandates that the school districts will be unable to fulfill include the constitutional class-size amendment, and the growth-management financial feasibility requirement.

In 2002, the people of Florida amended Article IX, section 1 Florida Constitution, imposing maximum class-size enrollment limitations on public school districts, and requiring that a sufficient number of classrooms exist by the year 2010 so that student classroom enrollments do not exceed the enrollment caps provided in the Constitution and section 1003.03, Florida Statutes.

The school concurrency provisions of section 163.3180(13), Florida Statutes, mandate that counties and municipalities in Florida, in conjunction with public schools, adopt a financially feasible capital facilities program for achieving and maintaining adopted level-of-service standards for school facilities. As defined in section 163.3164(32), Florida Statutes, "financial feasibility" means that "sufficient revenues are currently available or will be available from committed funding sources for the first 3 years, or will be available from committed or planned funding sources for years 4 and 5, of a 5-year capital improvement schedule for financing capital improvements, which are adequate to fund the projected costs of capital improvements identified in the comprehensive plan necessary to ensure that adopted level-of-service

The Court's decision to recede from State v. School Board of Sarasota County, 561 So. 2d 549 (Fla. 1990), was wholly unexpected and unnecessary to the decision in the case before the Court. Receding from the School Board of Sarasota decision is not required to resolve any issue before the Court and raises serious questions concerning the continued validity of certificates of participation or lease purchase obligations, the primary financing vehicle utilized to fund public school construction in Florida. This case first came before this Court when the Appellant, Dr. Gregory L. Strand, appealed a Final Judgment entered by the First Judicial Circuit Court validating tax-increment-financed bonds to be issued by Appellee, Escambia County. The stated purpose of the bonds was to finance a road-widening project in the Southwest Escambia Improvement District which would improve economic development and alleviate traffic congestion. Pursuant to the Ordinance and the Resolution adopted by Escambia County, funds derived from tax increment revenues would be the primary source of revenues pledged for the payment of the debt service on the proposed bonds.

The continued validity of School Board of Sarasota County, which approved the issuance of certificates of participation or lease purchase obligations without a

standards are achieved and maintained within the period covered by the 5-year schedule of capital improvements."

referendum, was never placed at issue by the parties to this case. Since the decision was issued in 1990, school districts of this state have relied on School Board of Sarasota County to issue certificates of participation or lease purchase obligations to fund capital improvements without going through validation proceedings. However, on September 6, 2007, the Court issued its Slip Opinion in this case, which reversed the final judgment, and unexpectedly receded from School Board of Sarasota County as well as State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980). Almost immediately after this decision, the credit ratings on Florida school district certificates of participation or lease purchase obligations were placed on credit watch within the bond market.

The FSBA's interest in this case is confined to the Court's ruling with respect to the School Board of Sarasota County decision. Florida school districts have collectively issued over thirteen billion dollars of certificates of participation or lease purchase obligations without the referenda provided for by Article VII, section 12, Florida Constitution, in reliance on the holding in School Board of Sarasota County. These lease obligations were never validated, and therefore, their continued validity after this Court's decision in the instant case is not resolved based on the Court's ruling that its decision will not affect bonds which have been validated prior to the opinion becoming final.

Additionally, budgetary decisions on future school capital outlay projects have been disrupted and construction plans suspended as school districts attempt to determine whether certificates of participation or lease purchase obligations remain a constitutionally viable financing tool. School districts have included \$7,613,501,038 in certificates of participation or lease purchase obligations in their individual 5-year capital improvement programs mandated by law. Appendix A, along with other information on outstanding obligations, lists the principal amount of certificates of participation and lease purchase obligations planned by individual school district

As representatives of Florida school districts, the FSBA has serious concerns regarding the potential implications of this Court's decision on existing and anticipated obligations of school districts. This issue is of great public concern and has statewide implications regarding the continued construction of essential school facilities. This Court has recognized the FSBA as fairly representative of the education community's interests in its September 20, 2007, order which, in part, granted the FSBA Amicus Curiae status for purposes of rehearing or clarification. The FSBA believes its participation on rehearing or clarification will assist the Court in resolving the issues in this case.

SUMMARY OF ARGUMENT

In receding from School Board of Sarasota County, the Court's opinion in the instant case misapprehended the factual distinction between the financing structure approved in School Board of Sarasota County from the tax increment bonds before the Court. The certificates of participation or lease purchase obligations approved in School Board of Sarasota County are fundamentally dissimilar to the tax increment bonds presently at issue, as the obligations at issue in School Board of Sarasota County contain neither a pledge of ad valorem taxing power nor a pledge of ad valorem revenues, and do not mature more than twelve months after issuance. Accordingly, these lease and debt obligations are not inconsistent with Article VII, section 12, Florida Constitution. The Court was not obligated to recede from School Board of Sarasota County to reach its holding in the present case, and all references to School Board of Sarasota County contained in the Slip Opinion should be deleted.

Additionally, the Court's ruling that the decision in the instant case does not affect bonds that were validated prior to the opinion becoming final misapprehends the scope of bond validation proceedings as an alternative proceeding available to governments issuing debt obligations in tax exempt capital markets. School districts of this state have collectively over \$13 billion in outstanding certificates of participation or lease purchase obligations; the three original issues in School Board of

Sarasota County were the only of these obligations ever validated. If rendered as presently written, the Slip Opinion has substantial implications for existing and anticipated obligations of Florida school districts. Accordingly, the FSBA respectfully requests that the Court revise the ruling in the Slip Opinion to state that the decision "does not affect bonds or obligations that were issued prior to this opinion becoming final."

ARGUMENT

I. CERTIFICATES OF PARTICIPATION OR LEASE PURCHASE OBLIGATIONS ARE FUNDAMENTALLY DISSIMILAR UNDER ANY CONSTITUTIONAL ANALYSIS TO THE TAX INCREMENT BONDS AUTHORIZED BY ORDINANCE IN THE INSTANT CASE AND RECEDING FROM THE DECISION IN STATE V. SCHOOL BOARD OF SARASOTA COUNTY, 561 So. 2d 549 (FLA. 1990), WAS UNNECESSARY UNDER THE CONSTITUTIONAL ISSUES RESOLVED IN THIS CASE.

The receding by the Court in the Slip Opinion of its prior decision in School Board of Sarasota County in the following quote from the Slip Opinion is a misapprehension of the points of law and fact contained in such decision and is unnecessary to the decision on the tax increment financing scheme before the Court in this cause:

Upon considering the tax increment financing scheme in this case, we deem it necessary to reassess this premise underlying Miami Beach and School Board of Sarasota County. As explained below, our reassessment makes it necessary to recede from this premise. We now hold that the phrase "payable from ad valorem taxation" in article VII, section 12 refers not only to a pledge of the taxing power itself but also to a pledge of ad valorem tax revenues. And, because tax increment financing pledges funds obtained from ad valorem tax revenues, bonds that rely upon such financing schemes are bonds "payable from ad valorem taxation." Consequently, approval of such bonds by referendum, as mandated by article VII, section 12, must be obtained.

Strand v. Escambia County, Slip op. at 8. Further references in the Slip Opinion to the School Board of Sarasota County decision arise from this misapprehension of the points of law and facts resolved in such prior decision.

The underlying premise adopted by the Court in the Slip Opinion that the phrase in Article VII, section 12, Florida Constitution, "refers not only to a pledge of the taxing power itself but also to a pledge of ad valorem tax revenues" was not the underlying premise in the School Board of Sarasota County case. Slip Op. at 8. This misapprehension in the Slip Opinion of the settled constitutional footing of the School Board of Sarasota County decision permeates all citations in the Slip Opinion to School Board of Sarasota County. The financing structure before the Court in the School Board of Sarasota County case is fundamentally dissimilar to the premise bothersome to the Court in the instant case in its analysis of the tax increment financing structure at issue. Such fundamental difference leads to a different conclusion in the application of Article VII, section 12.

The certificates of participation or lease purchase obligations approved in School Board of Sarasota County are fundamentally dissimilar to the tax increment bonds issued by ordinance in the instant case in that the obligations approved in School Board of Sarasota County contain neither a pledge of the ad valorem taxing

power nor a pledge of ad valorem revenues in violation of the first prong of the constitutional test embodied in Article VII, section 12, Florida Constitution.²

The certificates of participation or lease purchase obligations approved in School Board of Sarasota County are likewise dissimilar to the tax increment financing scheme before the Court in the instant case in that any obligation of the school board under the underlying lease agreements is subject to annual appropriation during the ordinary budget cycle of the school district and thus no obligation is created "maturing more than twelve months after issuance" in violation of the second prong of the constitutional test embodied in Article VII, section 12, Florida Constitution.

A. The School Board of Sarasota County Decision Is Consistent With the First Prong of the Constitutional Test in Article VII, section 12, Florida Constitution.

The following quote in the Slip Opinion from the School Board of Sarasota County decision overlooks the facts in the decision and may have resulted in the Court

²A purchaser of a certificate of participation in a lease purchase obligation owns a divisible portion of each annual lease payment paid to the trustee. Such annual lease payments are divided into an interest and principal component. In the event of a decision by the school district not to appropriate an annual lease payment and to terminate the annual lease obligation, as discussed on pages 15-16 of this Amicus Curiae Brief, the trustee reenters the property and leases or disposes of the lease asset to pay any remaining principal component. The trustee has no right to compel the school district to exercise taxing power or to appropriate ad valorem tax revenue to pay any annual lease payment.

misapprehending the points of law at issue and constitutional construction resolved in the School Board of Sarasota County case:

The holding in Miami Beach led to the holding in School Board of Sarasota County. In School Board of Sarasota County, we expressly held that the phrase "payable from ad valorem taxation" refers only to the pledge of taxing power, not to the pledge or use of ad valorem tax revenues. 561 So. 2d at 552. Thus, we held that the school board was authorized to pledge its ad valorem tax revenues as one of several sources of debt service. Id.

Slip op. at 10.³

In School Board of Sarasota County, the Court did not hold "that the school board was authorized to pledge its ad valorem tax revenues as one of several sources."

Slip op. at 10 (emphasis supplied). Under the facts and financing structure before the Court in the School Board of Sarasota County case, neither the ad valorem taxing power nor ad valorem taxes were pledged for the payment of the certificates of participation or lease finance obligations.

³The statement in the quote that the Court expressly held in School Board of Sarasota County that the phrase "payable from ad valorem taxation" refers only to the pledge of the taxing power is incorrect. The Court in the School Board of Sarasota County case makes no such statement. The reference in the quote is from the holding of the Court in the Miami Beach case.

In the financing structure approved in School Board of Sarasota County, ad valorem taxes were but one of several revenue sources available on an annual basis to pay the underlying lease payments. The Court held as follows:

Money from several sources, including ad valorem taxation, will be used to make the annual facilities' lease payments. If, in any year, a board does not appropriate money to pay the lease, the board's obligations terminate without penalty and it cannot be compelled to make payments. The board then has two options. It may purchase the facilities and terminate the ground lease. Alternatively, it may surrender possession of the facilities and lands for the remainder of the ground-lease term and is free to substitute other facilities for those surrendered.

Slip op. at 26 (footnotes omitted). The Florida Legislature has limited the amount of the 10 mill ad valorem taxing capacity for school purposes that individual school districts can annually appropriate for capital outlay or to pay lease purchase obligations for school facilities. Such annual appropriations do not rise to the constitutional status of a pledge enforceable by bondholders.

In addition to a minimum millage rate established by the Legislature to set school district local efforts for the ensuing fiscal year required in section 1011.71(1), Florida Statutes, subsection (2) of section 1011.71 limits the "capital outlay" millage for all school districts to two mills. Section 1011.71(2)(e), Florida Statutes, further limits the annual appropriation of lease payments under lease-purchase agreements to

an amount "not exceeding, in the aggregate . . . three-fourths of the proceeds from the millage levied by a district school board." The Court held in Florida Department of Education v. Glasser, 622 So. 2d 944 (Fla. 1993), that individual school districts did not have the constitutional authority to exceed the capital outlay millage cap or restriction set by the Legislature. The Legislature has expressly authorized school districts to enter into lease-purchase agreements for educational facilities and appropriate the proceeds of the capital outlay millage authorized in section 1011.71(2), Florida Statutes. See § 1013.5(2), Fla. Stat.

Thus, the amount of ad valorem taxes available to a school district during its annual budget decision is limited by the Legislature. The school district has the unbridled discretion to budget the amount of ad valorem taxes authorized by the Legislature for annual capital expenditures or to pay annual lease payments pursuant to a lease purchase agreement. The historical excesses that occurred in the "Boom Days" cannot be replicated or fueled by school districts under this legislative restraint imposed by the Legislature.

For the first time, the Court in the instant case holds squarely that the phrase "payable from ad valorem taxation" in Article VII, section 12, Florida Constitution, refers not only to a pledge of the taxing power but also the pledge of ad valorem tax revenues. By such a ruling, the Court recedes from its prior decision on tax increment

financing in State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980). The Court unnecessarily receded from School Board of Sarasota County as such prior opinion is not inconsistent with the constitutional interpretation in the instant case.

Under prior precedent, a pledge of ad valorem taxes in violation of the first prong of Article VII, section 12, Florida Constitution, occurs when a bondholder or outside party can compel the exercise of the taxing authority or interfere with the budgetary discretion of the governing board or, where the ad valorem taxing power is indirectly pledged under a financing structure in a manner which will invariably lead to an increase in ad valorem taxation. See State v. Brevard County, 539 So. 2d 461 (Fla. 1989). For example, in Volusia County v. State, 417 So. 2d 968 (Fla. 1982), the pledge of all non-ad valorem taxes coupled with a promise to maintain all programs generating the various revenues was held to have more than an incidental affect on the exercise of the taxing power.⁴ Likewise, in State v. Halifax Hospital District, 159 So.

⁴The Court in State of Florida v. Brevard County, 539 So. 2d 461 (Fla. 1989), the seminal case upholding certificates of participation or lease purchase obligations, distinguished Volusia County as follows:

We find the proposed bond issue in the instant case easily distinguished from that in County of Volusia. Not only is there no covenant to maintain revenue-generating services, the county, in adopting its budget on an annual basis,

2d 231 (Fla. 1963), the pledge of all hospital revenues coupled with an agreement to maintain current levels of ad valorem taxation for hospital operations was held to be an indirect pledge of the ad valorem taxing power.

No bondholder has the power to compel an appropriation of lease payments under the certificates of participation or lease purchase obligations approved in the School Board of Sarasota County decision and nothing in the financing structure creates an indirect pledge of the ad valorem taxing power.

B. The School Board of Sarasota County Decision Is Consistent With the Second Prong of the Constitutional Test in Article VII, section 12, Florida Constitution.

Under the construction of the Court in the instant case, the pledge of ad valorem taxes is contained in the ordinance authorizing tax increment exempt bonds "maturing more than twelve months after issuance." Art. VII, § 12, Fla. Const. Under the terms of the ordinance, the tax exempt bonds will be issued for a term of not greater than 35 years. Funds annually transferred to the trust fund created by the ordinance are pledged for the payment of debt service on the tax increment bonds when issued. Bondholders can compel an appropriation of the available funds accumulated in the

preserved its right to decide to terminate the lease without further obligation.

trust fund to pay scheduled debt service. The county reserved no right to annually terminate obligations during the stated term of the bonds.

In contrast, the potential appropriation of ad valorem taxes in the financing structure approved in School Board of Sarasota County was subject to an annual appropriation by the school board within its budgetary discretion and thus the second prong of the constitutional test was not violated. The Court held in School Board of Sarasota County as follows:

In State v. Brevard County, 539 So. 2d 461 (Fla. 1989), we interpreted the "maturing more than twelve months after issuance" language of article VII, section 12. The Brevard agreements provided traditional lease remedies and preserved the county's right, in adopting its annual budget, to terminate the lease without further obligation. We held that article VII, section 12 was not violated. As in Brevard, the agreements here give the boards freedom to decide anew each year, burdened only by lease penalties, whether to appropriate funds for the lease payments.

561 So. 2d at 552.

The Court overlooked the fact that preservation of the school board's right to terminate the underlying lease obligation in the adoption of its annual budget without further financial obligation satisfied the second prong of the constitutional test in School Board of Sarasota County. As recognized in School Board of Sarasota County, in the event of a decision by the school board not to appropriate funds to

make a lease payment, the trustee, on behalf of the bondholders, has certain limited options none of which include the right to direct a budgetary decision of the school board. The Court summarized these limited options in School Board of Sarasota County as follows:

The trustee may relet the facilities for the remainder of the leases' term or sell its interest in the leases to generate revenue to pay bondholders. As an additional precaution, insurance has been purchased for the benefit of bondholders to cover the risk of insufficient revenue. Amounts received in excess of that owed to bondholders must be paid to the board as ground rent.

561 So. 2d at 551. Or, stated another way, the annual appropriation of the lease payments in the financing structure of the certificates of participation or lease purchase obligations approved in School Board of Sarasota County did not violate Article VII, section 12, Florida Constitution. The Slip Opinion misapprehended this factual distinction between the financing structure approved in School Board of Sarasota County from the tax increment bonds before the Court in the instant case.

II. THE RECEDING BY THE COURT FROM PRIOR CONSTITUTIONAL PRECEDENT AFFECTS ALL OUTSTANDING BONDS PREVIOUSLY ISSUED NOT ONLY THOSE VALIDATED UNDER OPTIONAL STATUTORY PROCEEDINGS.

In receding from its prior decision in State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), by holding that bonds payable from tax exempt financing are subject to the referendum requirement of Article VII, section 12, Florida Constitution, the Court, in the Slip Opinion, specifically directed as follows as to prior issued bonds:

Also, our decision in this case does not affect bonds that were validated prior to the opinion becoming final.

Slip op. at 26.

School districts of this State have \$13,021,234,367 in outstanding certificates of participation or lease purchase obligations. Appendix A lists the total amount of outstanding certificates of participation or lease purchase obligations issued by school district, as of September 1, 2007.⁵ The principal amount of outstanding certificates of participation or lease purchase obligations, in most instances, represents multiple obligations issued over a number of years. The only certificates of participation or

⁵Appendix A also contains the number of schools constructed with certificates of participation or lease purchase obligations (a total of 280 schools), the number of student stations provided (a total of 485,423 student stations) and the percentage that student stations constructed with certificates of participation or lease purchase obligations represent of the total student stations available in the individual school district.

lease purchase obligations that were validated were the three original issues consolidated in the School Board of Sarasota County decision.

Shortly after the Court's decision in the instant case, Standard & Poor's placed its ratings on Florida school district certificates of participation or lease purchase obligations on CreditWatch. Attached as Appendix B is the RatingsDirect circular, dated September 11, 2007, published by Standard & Poor's Ratings Services. Additionally, Moody's Investors Service, in response to the Court's decision, published an investor's alert. Attached as Appendix C is the Special Comment circular, dated September 2007, published by Moody's Investors Service.

The limitation on the affect of the decision in the instant case only to "bonds that were validated prior to the opinion becoming final" misapprehends the scope of bond validation proceedings in Chapter 75, Florida Statutes, as an alternative proceeding available to governments issuing debt obligations in tax exempt capital markets. The thrust of the Slip Opinion is to create two categories of outstanding school district obligations -- those that have been validated and those that have been issued but not validated. This distinction has created uncertainty as to the validity of the vast majority of the outstanding school obligations which were issued but not validated.

Id. Accordingly, this decision has substantial implications for both existing and anticipated obligations of school districts, and is an issue of great public interest.

The practical implication of the attachments and similar circulars is that as the credit rating on certificates of participation or lease purchase obligations is reduced and the risk is increased, the cost of borrowing is increased. The interest rate on variable rate certificates of participation or lease purchase obligations, such as those existing in School Districts of Miami-Dade, Hillsborough, Lee, Orange, Palm Beach and Pasco Counties, will increase, making it more difficult for such school districts to repay their obligations. This also has an adverse effect on the secondary market on certificates of participation or lease purchase obligations issued by Florida schools. Additionally, future issuances of certificates of participation or lease purchase obligations may be placed in jeopardy because the placement of the ratings of such obligations on CreditWatch or in an investors article creates a negative climate for Florida school district obligations in the securities market. If a vibrant secondary market does not exist for securities, they will invariably be subject to a higher interest rate.

Under established prior precedent, bonds previously issued, not only those validated, are affected by a change in judicial construction. See Cipriano v. City of Houma, 395 U.S. 701 (1969). Cipriano involved a challenge brought by non-property

owners to a Louisiana statute authorizing municipalities to issue revenue bonds if the bonds were approved by a "majority in number and amount of the property taxpayers qualified to vote." Id. at 703. The United States Supreme Court invalidated the limitation of the franchise, but refused to apply its decision retroactively "where the authorization to issue the securities is legally complete on the date of this decision," due to the substantial risk of injustice or hardship to the municipalities having previously issued such bonds. Id. at 706.

CONCLUSION

Amicus Curiae respectfully suggests to the Court that the following revisions to the Slip Opinion would satisfy the clarification requested in this Amicus Curiae Brief without affecting its holding:

1. Delete the following paragraph from the Slip Opinion:

The holding in Miami Beach led to the holding in School Board of Sarasota County. In School Board of Sarasota County, we expressly held that the phrase "payable from ad valorem taxation" refers only to the pledge of taxing power, not to the pledge or use of ad valorem tax revenues. 561 So. 2d at 552. Thus, we held that the school board was authorized to pledge its ad valorem tax revenues as one of several sources of debt service. Id.

Slip op. at 10.

2. Delete all the references to the School Board of Sarasota County case in the Slip Opinion.
3. Revise the second sentence in the first full paragraph on page 26 of the Slip Opinion as follows, "Also, our decision in this case does not affect bonds or obligations that were issued prior to this opinion becoming final."

Respectfully submitted,

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I HEREBY CERTIFY that a true and accurate copy of the foregoing brief and appendix has been furnished by United States Mail with adequate postage this 24th day of September, 2007, to the following:

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CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief is presented in Times New Roman font, 14 point type, a font that is proportionately spaced as required by the Florida Rules of Appellate Procedure.

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