



## DEPARTMENT OF LEGAL AFFAIRS

## THE CAPITOL

TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH

Attorney General  
State of Florida

May 23, 1988

Mr. Lloyd A. Soughers  
Superintendent of Schools  
School Board of Brevard County  
1260 South Florida Avenue  
Rockledge, Florida 32955

Dear Mr. Soughers:

This is in response to your request for assistance in construing a proposed lease-purchase agreement into which the Brevard County School District proposes to enter. The agreement would be used by the Brevard County School Board to acquire certain tangible personal property, i.e., equipment for implementing an energy conservation management plan. Based upon this office's conversation with your special counsel, your question may be restated as follows: Does the proposed lease-purchase agreement violate s. 12, Art. VII, State Const., as an indirect pledge of the school district's ad valorem taxing power?

In sum, it is my opinion that:

The agreement does not violate s. 12, Art. VII, State Const., as an indirect pledge of the school district's ad valorem taxing power since it precludes the repossession by the lessor of the equipment covered by the agreement.

The proposed lease-purchase agreement provides that title to the equipment vests in the lessee upon the date specified on each delivery order and that the lessor shall have no right, title or interest in or to the equipment.<sup>2</sup> The agreement states that upon the appropriation of the lease payments for a fiscal period<sup>3</sup> these payments shall constitute a current expense of the lessee and shall not be construed to be a debt of the lessee:

The payments due hereunder are to be made only from the lessee's legally available appropriated revenues and neither the lessee, the State of Florida, nor any political subdivision or agency thereof shall be obligated to pay any sums due

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to lessor hereunder from ad valorem or other taxes and neither the full faith and credit of the lessee, nor the State of Florida nor any political subdivision or agency thereof is pledged for payment of such sums due hereunder and the contractual obligation hereunder to request an appropriation to pay same does not constitute an indebtedness of the lessee, or the State of Florida or any political subdivision or agency thereof within the meaning of any constitutional, statutory or charter provision or limitation.<sup>4</sup>

If the board does not appropriate sufficient funds for payments, the lease terminates at the end of the fiscal period.<sup>5</sup>

If the lease is terminated for nonappropriation of funds, "Lessee agrees peaceably and immediately to convey by bill of sale each and every component of the Equipment to Lessor and deliver immediate possession thereof to Lessor . . . ." <sup>6</sup> However, the agreement specifically provides that the lease will not

result in the creation of any lien, charge, security interest or other encumbrance upon any asset of Lessee or the Equipment pursuant to any indenture, mortgage, deed of trust, bank loan, credit agreement or other instrument or agreement by which Lessee is a party or by which it or its assets may be bound[.] <sup>7</sup>

For breach of a covenant other than the covenant authorizing the lessee to transfer title and possession of the equipment upon the occurrence of an event of nonappropriation, the lessor has the right to seek enforcement of the performance of such covenant, to seek compensatory damages for the breach, and to seek other legal or equitable remedies.<sup>8</sup> Alternatively the lessee may, at its expense, transfer possession and legal and beneficial title of all of the equipment to the lessor in full satisfaction of the concluding payment as described in the agreement.<sup>9</sup> However, the agreement specifically states:

If the Lessee refuses or fails to voluntarily transfer immediately all of the Equipment to the Lessor . . . then the unpaid balance of the lease purchase price of the Equipment shall become immediately due and payable but only

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from Lessee's legally available funds and Lessor's sole remedy (other than other rights and remedies it may have at law against Lessee's legally available funds for compensatory damages) shall be to seek a judgment against Lessee for the unpaid balance of the lease purchase price of the Equipment which, at any time under this Lease, is equal to the Concluding Payment, which judgment shall be enforceable solely against Lessee's legally available funds.<sup>10</sup>

The limitation of remedies clause of the agreement further states that, notwithstanding the lessee's covenant to immediately transfer title to and possession of the equipment

(a) there is no intention to create a right in Lessor under this Lease to involuntarily dispossess Lessee of title to or use of any Equipment, (b) the sole remedies of Lessor for an Event of Default by Lessee under Section 20(b) hereof is to sue for compensatory damages calculated in accordance with and proceed under Section 21(d) hereof, and (c) in consideration of Lessor's remedies set forth in Section 21(d) hereof Lessor irrevocably waives any right to specific performance of Lessee's covenant to return title to and possession of any Equipment to Lessor upon a[n] Event of Non-Appropriation.<sup>11</sup>

Upon termination of the lease for any reason, the agreement provides that the "Lessee shall, at Lessee's expense, forthwith return the Equipment to Lessor, packed for shipment in accordance with the manufacturers' specifications . . . ."<sup>12</sup> If the lessee fails or refuses to return and deliver the equipment to the lessor, the lessor may seek a judgment against the lessee for the unpaid balance of the lease-purchase price of the equipment.<sup>13</sup>

Section 12, Art. VII, State Const., provides that:

Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates 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 who are owners of freeholds therein not wholly exempt from taxation; or
- (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

In AGO 80-9 this office determined that a municipality was not authorized to finance the purchase of a computer under a sale and purchase arrangement granting a security interest in the equipment with an accompanying right of foreclosure or other remedy to enforce the performance of the city's obligations. Since the proposed agreement expressly authorized the repossession and sale of the equipment upon the municipality's default, this office concluded that a "security interest" in the equipment had been created. Because the city could be coerced into levying an ad valorem tax in order to avoid loss of the equipment, this office concluded that such a contractual financing plan constituted an indirect pledge of the municipality's ad valorem taxing power. Section 12(a), Art. VII, State Const., therefore, mandated that the agreement be approved by the electors of the city.<sup>14</sup>

In a similar opinion relating to the authority of noncharter counties to make interest payments pursuant to a lease-purchase agreement, this office again cautioned that "[n]o lien or security interest in the equipment or county's property may be given nor may ad valorem tax revenues be pledged unless approved by county voters in a referendum."<sup>15</sup>

While the proposed lease-purchase agreement by the Brevard County School District provides for a voluntary return or transfer of the equipment from the school district back to the lessor upon the conditions specified therein, the only contractual remedy the lessor has in the event that the school board does not return the property is to sue for compensatory damages.<sup>16</sup> No right to specific performance of the school board's covenant to return title to and possession of the equipment to the lessor is provided in the contract.<sup>17</sup>


Therefore, in the absence of any judicial or legislative comment otherwise, it is my opinion that the provisions of the proposed equipment lease-purchase agreement would not constitute an indirect pledge of the credit of the school board in that the

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school board would not be coerced to levy ad valorem taxes to extinguish the debt created in order to avoid loss of the equipment. Under the provisions of this agreement, the loss of the specific property financed is not threatened as the lessor's only recourse in the event of default is an action for damages.

I trust these informal comments will be of assistance to you.

Sincerely,



Robert A. Butterworth  
Attorney General

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1 The general authority and responsibility for approval of the terms of particular lease-purchase contracts to which a district school board is a party is placed by statute in the Department of Education. See, s. 235.056(3)(a), F.S., as amended by s. 1, Ch. 88-4, Laws of Florida, and s. 230.23(9)(b)5., F.S.

2 Section 16., proposed Equipment Lease-Purchase Agreement.

3 See, s. 1., supra, defining "Fiscal Period" to mean each fiscal year of the lessee, from July 1 to June 30.

4 Section 6., supra, p. 8.

5 Id. at pp. 9-10. And see, s. 20.(a)-(d), supra, defining an "event of default" to include: lessee's failure to pay any amount due in accordance with the terms of the lease; failure by the lessee to immediately transfer title to and possession of the equipment to the lessor after a nonappropriation of funds; failure of the lessee to perform any other covenant, agreement, or provision of the agreement, and such failure is not cured within ten days of written notice thereof by the lessor; or discovery by the lessor that any written statement, representation, or warranty made by the lessee in connection with the agreement is false, misleading, or erroneous in any material respect.

6 Id. at p. 10.

- 7 Section 19.(d), supra.
- 8 Section 21.(b), supra.
- 9 Section 21.(c), supra.
- 10 Section 21.(d), supra.
- 11 Section 21.1, supra.
- 12 Section 22., supra.
- 13 Id.
- 14 Cf., Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971) (revenue bonds secured by a mortgage on the physical properties to be financed could not be issued by public bodies unless approved at an election); Betz v. Jacksonville Transportation Authority, 277 So.2d 769 (Fla. 1973); State v. Putnam County Development Authority, 249 So.2d 6 (Fla. 1971); Hollywood, Inc. v. Broward County, 90 So.2d 47 (Fla. 1956); and AGO's 76-121 and 73-164 (deferred payment plan created a conditional indebtedness on the part of the local governmental entity in the nature of a legal liability for a capital venture predicated upon the general credit; the plan placed the local governmental entity in a position of being coerced into levying a tax in order to prevent the loss of the property by foreclosure and was not permissible without an approving referendum).
- 15 Attorney General Opinion 80-25. Cf., AGO 79-18, concluding that counties are permitted to borrow money to be repaid over a 3-year period for the purpose of making improvements to county roads provided that no mortgage is required and the money used for repayment is derived from uncommitted funds and non-ad valorem tax revenues, and AGO 78-110, stating that a municipality may pledge non-ad valorem tax revenues, if available and not previously encumbered, to purchase personal property but may not, in the absence of an approving referendum, finance the purchase of such property by borrowing money and giving a lien or mortgage on the property to be purchased as further or additional security for the loan.
- 16 Section 21.1, proposed Equipment Lease-Purchase Agreement.
- 17 Section 21.1, supra, provides that the "Lessor irrevocably waives any right to specific performance of Lessee's covenant to return title to and possession of any Equipment to Lessor upon a[n] Event of Non-Appropriation."