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William W. Watkins

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SOUTH CAROLINA CONSTITUTIONAL LAW

I. CONSTITUTIONAL DEBT LIMITATIONS

In *Painter v. West,*[1] the South Carolina Supreme Court declared Act No. 1077 of the 1972 Acts of the General Assembly[2] unconstitutional. The court's decision has significance not only because of the amount of money involved, an initial bond issue of five million dollars, but also because of the decision's effect on the "special fund" doctrine. Many state constitutions purport to limit the power of state and local governments to incur indebtedness.[3] Nineteenth century constitutional drafters believed that inflexible standards would curtail irresponsible debt-incurring activities of the type witnessed during the 1840's and 1850's. It was assumed that the debt limits, as established, were high enough to satisfy any future requirements.[4] The South Carolina constitution reflects this nineteenth century reasoning. Article 10, section 11 provides:

> To the end that the public debt of South Carolina may not hereafter be increased without the due consideration and free consent of the people of the State, the General Assembly is hereby forbidden to create any further debt or obligation, either by the loan of the credit of the State, by guaranty, endorsement or otherwise, except for the ordinary and current business of the State, without first submitting the question as to the creation of such new debt, guaranty, endorsement or loan of its credit to the qualified electors of this State at a general State election . . . .[5]

Due to increasing demand for local services, the capital requirements of local government have risen to levels unforeseen by the authors of the 1895 constitution. In response, the legislature has developed various techniques to circumvent debt restrictions. The "special fund" doctrine is one such device. It involves the issuance of debt securities which are not backed by the full faith and credit of the State. Since such securities are not obligations

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1. 199 S.E.2d 538 (S.C. 1973).
2. 57 Stat. 2237 (1973).
3. Bowman, *The Anachronism Called Debt Limitation*, 52 IOWA L. REV. 863 (1967).
4. *Id.* at 867.
5. S.C. CONST. art. 10, § 11.

of the State, they are not debts subject to the debt ceiling.[6] To qualify a debt under the special fund doctrine, a two prong test must be met. First, the general faith and credit of the governmental unit must not be pledged in support of the undertaking; second, no specific revenues other than those arising from the improvement itself may be pledged.[7]

The South Carolina Supreme Court has previously sanctioned the use of the special fund doctrine. In *Arthur v. Byrnes*[8] the court stated:

> It is now well settled that the General Assembly may authorize the issuance of general obligations of the State without submitting the question as to the creation of such debt to the qualified electors as required by Section 11, Article 10, where such obligations are secured by the pledge of a fund established or set aside which is reasonably sufficient to pay such obligations without resorting to the levy of a property tax.[9]

In short, an obligation of such character does not constitute a debt within the contemplation of article 10, section 11.

Act No. 1077 authorized the Budget and Control Board to issue revenue bonds without an election. The monies raised were to be disbursed to local units of government to provide them the necessary matching funds for obtaining maximum federal financial benefits for the construction of sewage systems. These disbursements in the form of state grants were, in effect, loans by the State to the local units to be repaid over a long term. Although the full faith and credit of the State was not pledged to repay the bonds, a bond reserve fund was to be appropriated from general tax funds. This reserve was to serve as a secondary source for the retirement of the bonds if the local units' funds proved inadequate.

6. For example, in People *ex rel.* Gutnecht v. City of Chicago, 414 Ill. 600, 619, 111 N.E.2d 626, 637-38 (1953), the court stated:

> To constitute a debt against a municipality there must be an obligation which the municipality must, if need be, meet with its funds or property. But if the obligation is to be paid solely from the income derived from the property purchased with the bonds or their proceeds, no indebtedness is incurred.

7. Bowman, *supra* note 3, at 877.

8. 244 S.C. 51, 77 S.E.2d 311 (1955).

9. *Id.* at 57, 77 S.E.2d at 313. The court cited for authority:

State *ex rel.* Roddey v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951); Arthur v. Johnston, 185 S.C. 324, 194 S.E. 151 (1937); State *ex rel.* Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625 (1936); Crawford v. Johnston, 177 S.C. 399, 181 S.E. 476 (1935); State *ex rel.* Richards v. Moorer, 152 S.C. 455, 150 S.E. 269 (1929).

When the local unit received a grant or loan, the Act required that an assistance agreement be entered into with the State Budget and Control Board. The agreement would prescribe the method of repayment by the local unit and the board could require either the imposition of an ad valorem property tax, a service charge, or both to raise the necessary funds.

In *Painter v. West,*[10] the constitutionality of this Act was challenged on the grounds that it violated article 10, section 11, by authorizing the State to incur further debt without an election. Applying the special fund doctrine, the lower court held that the Act did not create a debt of the State and that no election was required.[11] In reversing the lower court, the supreme court rejected the applicability of the doctrine and stated:

> Absent in the instant case is an essential prerequisite to the validity of the bonds under the so-called special fund doctrine, to-wit; a fund established or set aside which is reasonably sufficient to pay the obligations without resorting to the levy of any property tax. To the contrary, there is contemplated and specifically authorized the levy of property taxes, albeit not on a statewide basis, to raise in substantial part the primary fund for retiring bonds which the State proposes to issue.[12]

The court refused to allow circumvention of the election requirement by the creation of special districts and levying of a local property tax. The court observed that the General Assembly could divide the State into special districts and, in this way, avoid the election requirement if the Act were declared constitutional.[13]

In defending the Act's constitutionality, the attorney general also argued that the Act created a special assessment and, hence, did not constitute a property tax within the meaning of article 10, section 11. Although the funds were to be used to establish a sewage system enhancing the health and welfare of local units,[14] the court found in the following language of section one of the Act that broader benefits were also envisioned:

> [E]fforts have been and are being made at local levels to provide for the treatment of sewage and other effluent in order that the streams, rivers and watercourses *of the State* may be freed

10. 199 S.E.2d 538.
11. *Id.* at 540.
12. *Id.*
13. *Id.* at 540, 541.
14. *Id.* at 541.

> from pollution and in that way hazards to health now existing be reduced or eliminated . . . .[15]

The court noted that a tax is properly termed an assessment only when levied solely on the property to be uniquely benefited by proposed improvements. The tax at issue failed to qualify as an assessment because:

> There is nothing to show that water pollution control, as set forth in the Act, is such a local improvement as will confer any special benefit on the property owners in the local units, so as to justify regarding the ad valorem tax as an assessment for a benefit conferred.[16]

The court's decision in *Painter* may be seen as simply deliniating the outer limits of the special fund doctrine. Other decisions dealing with the related doctrine of the "special purpose district", however, suggest an alternative view. The court has a history of upholding the constitutionality of bond acts if the bonds are for beneficial purposes and have been issued in good faith. For example, the court in *Berry v. Milliken,*[17] after discussing the fact that many governmental units had, in real terms, exceeded their constitutional indebtedness limit, said: "Serious prejudice would result if they now had to resort to the time consuming process of constitutional amendment."[18] As in previous cases, a special purpose district was held not to be bound by the constitutional limitation. The court did not choose to display comparable liberality in dealing with the act challenged in *Painter.* It is possible that the court was suggesting that the legislature amend the state constitution rather than continue such efforts to circumvent its provisions.[19] To take advantage of the available federal funds after *Painter,* the General Assembly has passed a new act[20] which provides for a general obligation of the State to overcome the constitutional infirmities of the previous act.

Not all constitutional debt limits, however, apply to the state

15. *Id.* (emphasis added).

16. *Id.* at 542. It should be noted that courts in the past have upheld the special fund doctrine on the theory that the electoral requirement was intended to protect local property owners from excessive taxation. Since the full faith and credit of the state was pledged, the courts have reasoned that this purpose is fully accomplished.

17. 234 S.C. 518, 109 S.E.2d 354 (1959).

18. *Id.* at 529, 109 S.E.2d at 359.

19. *See generally* Bowman, *supra* note 3.

20. No. 835 [1973] S.C. Acts & Jt. Res. 1869.

government. Some are directed to the indebtedness of local units. Paralleling methods used on the state level, many techniques have been developed to circumvent these local debt limitations. One of the earliest techniques approved by the courts was the creation of special purpose districts. Such a district is a governmental entity with territory coextensive, in whole or part, with that of the principle unit. The concept of the special purpose district relied upon the idea that indebtedness ceilings will be applied to each governmental entity separately, irrespective of the fact that they encompass the same geographic area.[21]

A provision of the South Carolina constitution represents an attempt to deal with the proliferation of special purpose districts; where there exists an overlapping of territory between two or more political subdivisions, each possessing the power to incur debt, such subdivisions shall exercise that power so that their aggregate debt will remain under 15% of assessed property value.[22] To avoid this limitation, use of the special assessment has been judicially allowed in South Carolina.[23] The rationale for the special assessment is that property benefiting from proposed improvements should bear the cost of the project. To accomplish that end, a special purpose subdistrict is usually established to administer an improvement program. Under this approach the municipality must not be liable on the bonds and the general credit of the city must not be pledged.[24] The creation of a special fund and a special purpose district thereby avoids the debt limitation.

A recent case involving the special purpose district is *Wright v. Profitt*.[25] There, a sewer subdistrict was created in Greenville with authorization to issue bonds.[26] A taxpayer challenged the constitutionality of the statute creating the district and the issuing of bonds for which he would be required to pay ad valorem taxes. The sewer commission planned to build sewers in ten of the more heavily populated areas in the subdistrict over a five year

21. Bowers, *Limitations on Municiple Indebtedness*, 5 VAND. L. REV. 37 (1952).

22. S.C. CONST. art. X, § 5. As in the case of constitutional limits on State debt, courts have been, for the most part, very liberal in interpreting limits on local units when they conflict with projects that have a beneficial purpose. *See, e.g.*, Berry v. Milliken, 234 S.C. 518, 109 S.E.2d 354 (1973), where the South Carolina Supreme Court, in the face of the 15% limit, allowed aggregation above that amount. For a discussion of how judicial liberality can weaken such provisions, see generally Bowers, *supra* note 21, at 46.

23. *E.g.*, Mills Mill v. Hawkins, 232 S.C. 515, 103 S.E.2d 14 (1957).

24. *See* Kansas City v. Ward, 134 Mo. 172, 35 S.W. 600 (1896).

25. 261 S.C. 68, 198 S.E.2d 275 (1973).

26. No. 687 [1969] S.C. Acts & Jt. Res. 1301.

period. The completed sewer lines would not reach the homes of the taxpayer and others living in rural areas of the district. Nevertheless, the taxpayer would have been required to pay the ad valorem tax to help finance the bonds. He claimed that this would result in an assessment without a benefit and, therefore, constitute both a taking of his property without due process and a denial of equal protection.

Relying heavily on *Mills Mill v. Hawkins*,[27] the supreme court found in favor of the subdistrict, citing the rule in this jurisdiction that benefits accruing to property need not be direct or immediate in order to justify an assessment. Here the taxpayer would benefit in having a sewer line nearer his property and in the improved conditions of sanitation and health throughout the area. The court also responded to the taxpayer's contention that construction might stop after the initial phase, which was thirteen miles from his home, by stating: "The presumption is that the Commission will perform its duty . . . . Mere speculation that it may not do so is insufficient to entitle plaintiff to relief on constitutional grounds."[28]

The goal of attaining a sound fiscal policy provided the original motivation for indebtedness limitations.[29] It has been seen that such limits are easily avoided, and it is questionable whether they should be retained. It would seem that a responsible governing body could be entrusted to make decisions regarding borrowing without the debt limit serving as a "Sword of Damocles" inhibiting its exercise of discretion.[30]

II. COUNTY AND MUNICIPAL AFFAIRS

In 1966, the South Carolina General Assembly created the Committee to study the Constitution of 1895. The committee's report submitted an entirely new constitution, but recommended against the convention procedure and instead advised that a method be used whereby the new constitution could be submitted on an article by article basis to the electorate.[31] Consequently, a

27. 232 S.C. 515, 103 S.E.2d 14 (1957). For an interesting analysis of this case see Toal, *Edens: The Prime Obstacle To a Redevelopment of South Carolina Water Law*, 23 S.C.L. REV. 63, 67-70 (1971).

28. 261 S.C. at 74, 198 S.E.2d at 278.

29. *See* Bowman, *supra* note 3.

30. *Id.* at 898.

31. *See* Neel v. Shealy, 199 S.E.2d 542, 544 (S.C. 1973).

new article VIII was submitted and ratified on March 7, 1973.[32] It is contemplated that an entirely new constitution will be created in a similar manner.[33]

The new article VIII, originally intended as part of a completely new constitution, failed to specify a date when it was to become effective. In *Neel v. Shealey*,[34] the supreme court held in a per curiam opinion that the provisions of the new article VIII are to apply prospectively in their operation from March 7, 1973[35] and, therefore, upheld a challenged hospital bond act for Newberry County.

In *Neel*, taxpayers had challenged the hospital bond on a theory based on the interrelation of sections 1 and 7 of the new article VIII. Section 7 prohibits the enactment of "special legislation" while section 1 states:

> The powers possessed by all counties, cities, towns and other political subdivisions at the *effective date of this Constitution* shall continue until changed in a manner provided by law.[36]

Reading these two sections together, the challengers argued that all special legislation enacted between the effective date of the 1895 constitution (to which the new article VIII is an amendment) and March 7, 1973, the ratification date of the new article VIII, is unconstitutional. Therefore, they asked that the hospital bond, which was authorized under such special legislation, be declared unconstitutional.

The court thought it obvious that the language in section 1 was retained in the final version of article VIII as a result of poor draftsmanship, since the authors initially intended that an entirely new constitution be presented.[37] The court had little trouble finding a basis for its decision in other sections of the article. Particularly, the court pointed to the provision in section 7 which provides that five alternative forms of government be established,[38] finding itself "unable to glean any intention other than of a prospective application of this provision."[39] Noting the clear

32. *Id.* at 545.
33. *Id.* at 544.
34. 199 S.E.2d 542 (S.C. 1973).
35. *Id.* at 547.
36. S.C. CONST. art. 8, § 1 (emphasis added).
37. 199 S.E.2d at 546-47.
38. *Id.* at 548, 547.
39. *Id.*

intent of the drafters and the rule that "a statute will never be given such a [retroactive] construction, unless it is required by the express words of the statute . . . ,"[40] the court concluded that the new article VIII "speak[s] from the occasion of its ratification rather than the effective date of the 1895 Constitution."[41]

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40. *Id.* at 545, *quoting* Curtis v. Renneker, 34 S.C. 468, 13 S.E. 664 (1891).
41. *Id.* at 547.