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CONSTITUTIONAL LAW

I. USE OF GENERAL OBLIGATION BONDS FOR INDUSTRIAL DEVELOPMENT IS UNCONSTITUTIONAL

In *Byrd v. County of Florence*¹ the South Carolina Supreme Court declared unconstitutional the use of general obligation bonds² by a political subdivision for industrial development when the principal and interest for the bonds were to be paid from *ad valorem* taxes.³ The court held that the development of an industrial park was not a public purpose for which general obligation debt could be incurred under the South Carolina Constitution.⁴

Florence County Council passed an ordinance authorizing the sale of general obligation bonds to allow the county to purchase a 575 acre tract in the western part of Florence County. The ordinance provided that the tract would be used to develop an industrial park that would be sold or leased to private industry, thus providing additional jobs and improving the economic base of the county.⁵ The debt service and principal of the general obligation bonds were to be repaid over a period of years from proceeds derived from *ad valorem* taxes imposed on Florence County property owners.

“Public purpose” is not specifically defined by statute, but is a judicial construct subject to judicial determination. Courts have never specifically defined public purpose as contrasted with

1. 281 S.C. 402, 315 S.E.2d 804 (1984).

2. *The North American Securities Administration Association Glossary of Securities Terms* (date not provided) defines a general obligation bond as a tax-exempt bond whose pledge is the issuer's good faith and full taxing power. The glossary distinguishes a general obligation bond from an industrial revenue bond, which is defined as a municipal bond issued for the purpose of constructing facilities for profit-making corporations. The corporation, rather than the municipality, is liable for the payment of the interest and the principal.

3. BLACK'S LAW DICTIONARY 48 (5th ed. 1979). An *ad valorem* tax is a tax imposed on the value of property.

4. S.C. CONST. art. X, § 14(4) provides that “general obligation debt may be incurred only for a purpose which is a public purpose and which is a corporate purpose of the applicable political subdivision.”

5. Florence, S.C., County Council Ordinance No. 14-82/83 at 5.

private purpose, but have employed a case by case approach.⁶ The South Carolina Supreme Court has stated that public purpose is a fluid concept, influenced by circumstances such as time, place, population, and economy.⁷ The court has also established that the objective of a public purpose is to promote public health and welfare.⁸ More than a remote public benefit is required to fulfill a public purpose.⁹ In *Byrd* the court stated that “[a]ll bonds, whether general obligation or revenue, must meet the demands of the Constitution that a public purpose be served.”¹⁰ Building an industrial park as an incentive to attract industry did not meet the public purpose requirements.

The *Byrd* court based its decision on the following three grounds: the speculative nature of the project, the liability to the taxpayers, and the indirect benefit to the public. The speculative nature of the project was demonstrated by the trial record, which stated that “the industries to be located in the park are unknown and indefinite, and no commitments or contracts by any industry to locate within the park have been made.”¹¹ The supreme court concluded that the nature of the project was too speculative since the purchaser or tenant for space in the park was not identified.¹² The court noted that a county council “is constitutionally limited to borrowing money for a clearly demonstrated nonspeculative public purpose.”¹³

In addressing the liability to the taxpayers of Florence County, the court admitted that it generally approved of industrial revenue bonds for purposes characterized as economic or industrial development, as it had in *Elliott v. McNair*.¹⁴ The court distinguished *Byrd* from *Elliott* by explaining that *Byrd* involved general obligation bonds under which “taxpayers may

6. *Anderson v. Baehr*, 265 S.C. 153, 217 S.E.2d 43 (1975).

7. *Caldwell v. McMillan*, 224 S.C. at 158, 77 S.E.2d at 801 (1953).

8. 265 S.C. at 162, 217 S.E.2d at 47.

9. *Id.* at 163, 217 S.E.2d at 48.

10. 281 S.C. at 404, 315 S.E.2d at 805.

11. Record at 4.

12. 281 S.C. at 405, 315 S.E.2d at 805.

13. *Id.*

14. 250 S.C. 75, 156 S.E.2d 421 (1967). In *Elliott* the court upheld the constitutionality of using industrial revenue bonds because the bonds were payable from the revenue of the project and the county was protected from pecuniary involvement. In *Elliott* the county purchased property to lease to private industry for a price sufficient to meet the debt on the revenue bonds.

lose much," rather than industrial revenue bonds under which "taxpayers cannot lose."¹⁵

The third reason articulated by the court was that article X, section 11 of the South Carolina Constitution, proscribes pledging or loaning public credit to benefit private enterprise. The court reasoned that the primary beneficiaries of the proposed development would be private businesses, which would be spared "analysis cost, costs of roads, sewer, water and electricity facilities."¹⁶

To summarize its rationale in *Byrd*, the court set forth a four-part test to determine public purpose. First, the court should consider the project's intended public benefit. Second, the court should examine whether the public is the primary beneficiary. Third, the court should consider whether the project is speculative. Finally, the court must determine to what extent the public interest will be served.¹⁷ The court did not include in the test the source of repayment of the bonds, which it had specifically emphasized as a relevant and logical consideration¹⁸ in defining public purposes.

In the dissent Justice Ness argued that there were four reasons for classifying the development of an industrial park as a public purpose. The first reason was that the court had previously approved of counties "acquiring, leasing and disposing of properties" for industrial development in *Elliott v. McNair*.¹⁹

15. 281 S.C. at 405, 315 S.E.2d at 805.

16. *Id.* at 407, 315 S.E.2d at 807. After *Byrd*, the supreme court held in *Carll v. S.C. Jobs-Economic Dev. Auth.*, 284 S.C. 438, 327 S.E.2d 331 (1985) that the South Carolina Jobs-Economic Development Fund Act (1983 S.C. Acts 379, No. 145) was not violative of art. X, §11 of the S.C. Constitution even though the purpose of the act was to provide loans, investments, research, and technical and managerial advice to industry locating in the state. S.C. CODE ANN. §41-43-70 (Supp. 1984). The court stated: "The limitation imposed upon the power of the General Assembly by Article X, §11 of the South Carolina Constitution 'relates solely to general obligation bonds payable from the proceeds of *ad valorem* tax levies.'" 284 S.C. at 443-44, 327 S.E.2d at 335, (quoting *Elliott v. McNair*, 250 S.C. 75, 85, 156 S.E.2d 421, 426).

17. *Id.*, 315 S.E.2d at 806.

18. *Id.* at 405, 315 S.E.2d at 805.

19. *Id.* at 410, 315 S.E.2d at 808. *Elliott* provided:

The Act [Industrial Revenue Bond Act] here under consideration recites that South Carolina has promoted industrial expansion and has actively supported the State Development Board, for which public moneys have been appropriated, and through it has endeavored to promote the industrial development of the state for the welfare of its inhabitants. *This has been done as a matter of state policy. It is the purpose of this Act to empower the governing bodies of*

Justice Ness found *Byrd* to be inconsistent with the court's prior definition of public purpose.

Second, the dissent rejected the majority's reasoning that private industry, rather than the public, would be the primary beneficiaries of the project.²⁰ The dissent reasoned that the experience of other industrial parks in South Carolina and other states indicated that this investment would pay for itself through the creation of new tax dollars and jobs and would thus strengthen the local economy.²¹

The dissent also discussed the purpose of the Florence County Ordinance—the development and encouragement of industry—and noted that this purpose was similar to that of the State Development Board.²² Justice Ness contended that if the ordinance was unconstitutional because of its “indirect” benefit to the public, the State Development Board's actions were likewise unconstitutional.²³

The dissent's final argument focused on the South Carolina Home Rule Act,²⁴ which authorizes county governments to levy *ad valorem* taxes for economic development. The dissent suggested that Florence County could have financed the industrial park by *ad valorem* taxes, but chose instead to pass the cost of developing the industrial park to industries that bought or leased the property. Justice Ness stated that there was no difference in the degree of speculation in the bonds issuance proposed by Florence County and that of the General Assembly's appropriation of money to the State Development Board.²⁵

The *Byrd* decision may be either narrowly or broadly construed. Under a narrow reading, the decision would affect only

the several counties of the state under the terms and conditions of this Act, to provide such assistance and to that end to acquire, own, lease and dispose of properties, through which the industrial development of the state will be promoted

250 S.C. at 87, 156 S.E.2d at 427 (emphasis added). In the dissent Justice Ness asserted that the project in *Byrd* was identical to that in *Elliott*. *Id.* at 408, 315 S.E.2d at 807.

20. 281 S.C. at 411, 315 S.E.2d at 808-09.

21. *Id.* at 409, 315 S.E.2d at 807.

22. *Id.*, 315 S.E.2d at 807-08. The purpose of the State Development Board is “[t]o promote and encourage industrial development, private business and commercial enterprise” S.C. CODE ANN. § 13-3-20(6)(1976).

23. 281 S.C. at 409, 315 S.E.2d at 807-08.

24. S.C. CODE ANN. § 4-9-30(5)(1976).

25. *Id.* at 409, 315 S.E.2d at 808.

the purchase and development of industrial parks to be sold or leased to private industry through general obligation bonds rather than industrial revenue bonds. *Byrd* prohibits political subdivisions from purchasing and developing property to be sold or leased to private industry if the political subdivision is unsure that industry will buy or lease the property²⁶ and the liability for the project rests on the taxpayer. Under this interpretation, "public purpose" is described in terms of risk to the taxpayer. Therefore, the *Byrd* decision would apply only to general obligation bonds because, unlike industrial revenue bonds, they involve a risk to the taxpayer. The *Elliott* court's definition of public purpose²⁷ can be reconciled with *Byrd*'s only if a distinction is made between the use of industrial revenue bonds and of general obligation bonds.

A broad interpretation of *Byrd* would require application of the four-part test to general obligation bonds, industrial revenue bonds, and other public funds used to purchase and develop property to be sold or leased to industry. If *Byrd* is interpreted broadly, questions regarding the extent to which government may spend public money for industrial development remain unanswered. The dissent's concern with the State Development Board's use of public funds to promote industrial development and the authority of a county under the Home Rule Act to use *ad valorem* taxes for economic development raises serious questions.²⁸ Because industrial development is of vital concern to the

26. *Byrd* suggests that the speculative nature of a project depends on the reliability of industry commitments prior to the issuance of the bonds. The majority believed the Florence County project was too speculative because neither a purchaser nor a tenant could be identified. Although Justice Ness stated that two industries were "considering" locating in the Florence area, there was no assurance of this fact. 281 S.C. at 409, 315 S.E.2d at 807.

27. Whether a project primarily benefits the public, rather than private individuals, is a question of degree. The court has stated that "[l]egislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment." *Anderson v. Baehr*, 265 S.C. 153, 163, 217 S.E.2d 43, 47 (1975). In *Anderson* the court held that a city project for slum clearance in preparation for sale to private developers was not for a public purpose and was, thus, unconstitutional. The project was financed by revenue bonds. The court found the benefit to the public "indirect."

28. Immediately after the *Byrd* decision, the Judiciary Committee of the South Carolina Senate introduced S.995, 105th Sess. (1984), proposing a constitutional amendment allowing the state and its political subdivisions to "incur general obligation debt for the

economy, employment, and tax base of South Carolina, the General Assembly should address the questions raised by *Byrd* and decide to what extent general obligation bonds may be used to encourage and promote industrial development. The determination of this issue is particularly significant because the Deficit Reduction Act of 1984²⁹ places a volume cap on the amount of industrial revenue bonds that can be issued in the state.³⁰ Because of this cap, the state may have to rely more on general obligation bonds to promote its economy in the future.

Inez Moore Tenenbaum

II. SOUTH CAROLINA TEACHER EMPLOYMENT ACT: NO DUE PROCESS HEARING FOR ADMINISTRATIVE REASSIGNMENT

In *Snipes v. McAndrew*³¹ the South Carolina Supreme Court held that a public school principal has no property interest in the position of principal and no right to a due process hearing under the South Carolina Teacher Employment and Dismissal Act³² (TEDA) when he is "merely transferred, reassigned or demoted."³³ The court found that a school district's administrative reassignment does not constitute a dismissal under the employment contract and does not raise a constitu-

purpose of promoting economic and industrial development . . . including . . . the establishment and maintenance of industrial parks." The bill passed the senate, but was not received by the South Carolina House of Representatives in time to be considered in the 1984 session. During the 1985 session a similar bill, S.304, 106th Sess. (1985), was introduced by the Senate Finance Committee, passed by the senate, and referred to the Ways and Means Committee of the house of representatives, where it remained at the close of the session.

29. Pub. L. No. 98-369, 98 Stat. 494 (1984).

30. The Act imposes a limit on the maximum principal amount of industrial revenue bonds (also called industrial development bonds) that may be issued within a geographical area. The volume cap is set on a statewide basis at \$150 per resident per year (\$100 in 1986). Pub. L. 98-369 § 621.

31. 280 S.C. 320, 313 S.E.2d 294 (1984).

32. S.C. CODE ANN. §§ 59-25-410 to -530 (1976 & Supp. 1984). The Act requires the school district to decide whether teachers' employment contracts will be renewed for the coming year and to give them written notification of the decision on or before April 15. A teacher who will not be reemployed must be given the same notice and opportunity for a hearing that is provided for a teacher dismissed for cause during the school year. *Id.* at §§ 59-25-410 to -420.

33. 280 S.C. at 324, 313 S.E.2d at 296.

tional right to a due process hearing. The court expressly refused to tamper with the school district's delegated authority³⁴ over administrative policy decisions of employee placement within the school district.³⁵

Snipes and Shaw were principals in Richland County School District One.³⁶ In March 1981 McAndrew, the Superintendent of Richland County School District One, notified Shaw by letter that his leadership as a principal was inadequate and consequently, he would be reassigned to a classroom teaching position for the 1981-82 school year.³⁷ On April 9, 1981, the School Board notified Snipes that he was to be reassigned as assistant principal for the 1981-82 school year.³⁸ Counsel for both Shaw and Snipes requested a hearing before the Richland County School Board concerning their clients' terminations as principals. The Board replied that Shaw's and Snipes' reassignments³⁹ were merely administrative and, therefore, not covered by the TEDA.⁴⁰ Subsequently, each man's counsel was permitted to ap-

34. The legislature has specifically empowered a school district's board of trustees to make employment decisions:

On or before April fifteenth of each year, the boards of trustees of the several school districts shall decide and notify, in writing, the teachers, as defined in § 59-1-130 of the 1976 Code, in their employ concerning their employment for the ensuing year

On or before August fifteenth the superintendent, principal, where applicable, or supervisor shall notify the teacher of his tentative assignment for the ensuing school year.

S.C. CODE ANN. § 59-25-410 (Supp. 1984).

35. 280 S.C. at 323, 313 S.E.2d at 296.

36. Shaw was principal of John P. Thomas Elementary School for 15 years and Snipes was principal of Alcorn Middle School for 10 years. Both were issued identical contracts for the 1980-81 school year, under which they accepted the duties of a principal for a period of 220 days. Record at 176-79. Each contract was a standard Contract for Certified Personnel issued by Richland County School District One. *Id.* at 213, 218, 220, 221, 232.

37. Record at 223-24. The letter did not indicate that Shaw's reassignment was prompted by a failure to meet any of his yearly goals, established in Fall 1980. *See infra* note 44. Instead, the reasons cited were poor leadership and an unacceptable achievement rate by students at John P. Thomas Elementary School.

38. *Id.* at 216, 219. McAndrew had notified the school board in February 1981 that Snipes' leadership qualities were inadequate: he had failed to monitor the teaching and manage the physical plant properly. McAndrew's subsequent memorandum of April 9 cited the same grounds for Snipes' reassignment.

39. The new contracts for the 1981-82 school year stipulated that Shaw be employed as a teacher for 185 days and that Snipes be employed as an assistant principal for 220 days. *Id.* at 218, 232.

40. *Id.* at 219, 227.

pear before the Board on May 11, 1981, but no due process hearing was permitted in either case.⁴¹ The Board declined to direct the Superintendent to rescind the administrative reassignments.

Respondents filed actions in the circuit court and obtained a temporary order enjoining the appellants from filling all principal positions in the District, thus preserving at least two vacant principalships pending a hearing on the merits.⁴² The chief justice of the South Carolina Supreme Court superseded this order upon condition that the respondents be maintained *pendente lite* in the salary status of their previous positions.⁴³ After a full hearing the circuit judge made the following conclusions: (1) the administrative reassignment was a nonrenewal of their contracts for the position of principal; (2) the school district did not properly or promptly notify respondents of their nonrenewals in accordance with the TEDA or the Principal Evaluation System (PES);⁴⁴ and (3) the respondents held a legitimate property interest in their positions as principals of which they could not be deprived without a due process hearing.⁴⁵ Accordingly, the circuit court ordered the respondents reinstated as principals.⁴⁶

On appeal the supreme court reversed the circuit court. The court first noted that the term "teacher" as defined in the TEDA includes both administrative or supervisory personnel

41. *Id.* at 179. The basic requisites of a due process hearing under the TEDA, such as presentation of witnesses, cross examination, taking of depositions, and other normal adversarial hearing procedures, were denied the respondents. *Id.* at 171-73, 183.

42. 280 S.C. at 322, 313 S.E.2d at 295-96.

43. *Id.*, 313 S.E.2d at 296. The effect of the new contracts would have been to reduce Snipes' salary by \$11,915.00 and Shaw's salary by \$6,248.00 from the 1980-81 levels. The school district, however, agreed to freeze the respondents' salaries at the 1980-81 levels until the salaries of their new positions reached the levels of their 1980-81 salaries.

44. Under the PES, principals, in conjunction with an assistant superintendent, established goals and time limits pursuant to the Principal's Professional Growth Plan. The principals were then to be evaluated on their success or failure in meeting these goals over a three-year period. A principal could appeal to the assistant superintendent for instructions when a disagreement arose concerning the results of any evaluation. Any principal who did not show a marked improvement in performance would not be renewed as a principal. The principal then would have the right to appeal the nonrenewal decision pursuant to the PES. Record at 199-202. Respondents, however, both received letters from assistant superintendents stating that they were to be evaluated for a period of one year and would be expected to set goals for the upcoming year. Record at 214, 222.

45. Record at 185-86.

46. 280 S.C. at 322, 313 S.E.2d at 296.

and teachers.⁴⁷ Since, however, the express language of the TEDA refers only to dismissal or nonrenewal, and not to transfer, reassignment, or demotion, the court concluded that the Act does not apply to the school district's policy decisions concerning the assignment of employees.⁴⁸ The court also stated that because the PES was not operative during the relevant school year, 1980-81, its "right to appeal" provision did not afford respondents due process rights.⁴⁹ Finally, the supreme court rejected the trial court's finding that the TEDA created and defined a property interest⁵⁰ for the respondents in their continued employment as principals.⁵¹ Instead, the court held that while the Act created a claim of entitlement to continued employment within the school system as a teacher, which by definition includes both administrative and nonadministrative positions,⁵² it

47. *Id.* S.C. CODE ANN. § 59-1-130 (1976) defines "teacher" as "any person who is employed either full-time or part-time by any school district either to teach or to supervise teaching."

48. 280 S.C. at 322, 313 S.E.2d at 296. *See Adams v. Clarendon County School Dist. No. 2*, 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978)(court noted that the TEDA was "designed to afford the teacher safeguards against arbitrary *discharge* from employment while at the same time recognizing the public's legitimate interest in quality education" (emphasis added)). Two other states, Indiana and Arkansas, have had teacher dismissal acts that, like South Carolina's, address the dismissal and nonrenewal of contracts, but not transfer or demotion. Ind. Code Ann. §§ 20-6-121-1, -2 (Burns 1975); Ark. Stat. Ann. §§ 80-1264 to -1264.10 (1980)(repealed 1983). Both acts were interpreted as requiring procedural due process only in cases of dismissal or nonrenewal, not for transfer within the school system. *See New Castle-Henry Township School Corp. v. Hurst*, 145 Ind. App. 131, 247 N.E.2d 835 (1969); *Smith v. West Memphis School Dist.*, 635 F.2d 708 (8th Cir. 1980).

49. 280 S.C. at 324, 313 S.E.2d at 297. The court relied on testimony given at trial by two assistant superintendents that only the goal setting portion of the PES was operative.

50. *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the United States Supreme Court rejected the respondent's claim that he had been deprived of a property interest without due process of law. Respondent Roth was hired for a one-year (1968-69) teaching position at the University of Wisconsin. During the school year he was informed he would not be hired for the 1969-70 term. Because the respondent was given no reasons for not being rehired and was afforded no opportunity to challenge the decision at a hearing, he brought an action alleging violation of his right to procedural due process. The Supreme Court held that Roth had no property interest in his position that required the university to give him a hearing. The fourteenth amendment procedural protection of property protects only acquired security of specific benefits. Wisconsin statutory law never granted Roth a right to be rehired, and his abstract concern in being rehired was insufficient to trigger due process protection. *Id.* at 577.

51. 280 S.C. at 324, 313 S.E.2d at 297.

52. *See supra* note 47 and accompanying text.

did not create a property interest in continued employment as a principal.⁵³

Snipes v. McAndrew firmly established the ability of school boards to reassign personnel without being burdened with the expense of providing a full adversarial hearing for each reassignment. To hold otherwise would create administrative chaos and entangle school boards in needless arbitration and litigation. A school system must shift personnel each year as exigencies arise; allowing extensive due process battles over each shift could chill school board decision making. Although the result in *Snipes* may appear harsh, school boards must remain free of judicial restraints that would burden, rather than enhance, a school district's operations.

Richard K. Warther

53. 280 S.C. at 324, 313 S.E.2d at 297. Thus, a principal's property interest and the right to procedural due process only apply when the principal is dismissed from the school system.