



ALAN WILSON
ATTORNEY GENERAL

October 25, 2016

The Honorable Curtis M. Loftis
State Treasurer
Post Office Box 11778
Columbia, SC 29211

Dear Treasurer Loftis:

You seek our opinion regarding whether "[t]he General Assembly has improperly authorized the South Carolina Transportation Infrastructure Bank (the "STIB") to use tax revenues toward the payment of its revenue bonds. You reference Art. X, § 13(9) of the South Carolina Constitution which authorizes the State or its agencies "to incur indebtedness for any public purpose payable solely from a revenue-producing project or from a special source, which source does not involve revenues from any tax but may include fees paid for the use of any toll bridge, toll road or tunnel." By way of background, you further state the following:

[a]s for the STIB's revenue bonds, S.C. Code § 11-43-320 broadly authorizes the STIB to pledge toward payment any of its revenue, money, funds, or income from any source. The sources of funds made available to the STIB are practically too numerous to identify in this letter.

As recently noted in an audit of the STIB conducted by the Legislative Audit Council (the "LAC"), . . . it appears the General Assembly has enacted laws which indirectly accomplish that which cannot directly be accomplished under Article X, § 13(9). The LAC's audit report identifies a number of statutes which require other state agencies such as the S.C. Department of Transportation (the "DOT") and the S.C. Department of Motor Vehicles (the "DMV") to annually allocate or transfer funds derived from tax revenues – whether appropriated annually to such agencies or collected by them directly – to the STIB. . . The audit report goes on to note that a number of these statutory funding sources which originated in some form from tax revenues were pledged by the STIB toward the payment of its revenue bonds in 2015.

With the above in mind, I share the LAC's concern that the General Assembly has created a statutory process which indirectly authorizes that which is directly prohibited by Article X, § 13(9) of the State Constitution.

Law/Analysis

At the outset, it is important to emphasize the presumption of constitutionality of any statute enacted by the General Assembly, including § 11-43-320. As we have previously recognized,

. . . legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) (“All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.”). “A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the Constitution.” Joytime Distrib. & Amusement Co. Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Moreover, “[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.” Op. S.C. Atty. Gen., August 19, 1997.

Op. S.C. Att’y Gen., 2007 WL 4284626 (November 27, 2007). In addition, we have consistently advised that a statute “must continue to be enforced unless set aside by a court or repealed by the General Assembly.” Op. S.C. Att’y Gen., 2003 WL 20143494 (April 1, 2003).

Art. X, § 13 deals with the bonded indebtedness of the State, both general obligation debt and revenue bond debt. Art. X, § 13(9) provides as follows:

[t]he General Assembly may authorize the State or any of its agencies authorities or institutions to incur indebtedness for any public purpose payable solely from a revenue-producing project or from a special source, which source does not involve revenues from any tax but may include fees paid for the use of any toll bridge, toll road or tunnel. Such indebtedness may be incurred upon such terms and conditions as the General Assembly may prescribe by law. All indebtedness incurred pursuant to the provision of this subsection shall contain a statement on the face thereof specifying the sources from which payment is to be made.

It is this provision with which you are concerned. As our Supreme Court observed in Taylor v. Roche, 271 S.C. 505, 507, 248 S.E.2d 580, 581 (1978), “Article X of the South Carolina Constitution . . . became effective from and after November 30, 1977.” In City of Rock Hill v. Harris, 391 S.C. 149, 153, 705 S.E.2d 53, 54-55 (2011), the Court summarized the rules of construction for a provision of the State Constitution, such as Art. X, § 13(9), as follows:

[w]hen this Court is called upon to interpret our Constitution, it is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law. See Miller v. Farr, 243 S.C. 342, 133 S.E.2d 838, 841 (1963) (stating that the Court’s efforts in construing the South Carolina Constitution are aimed at assessing the intent of the framers and the people who adopted it). Therefore, the Court will look at the “ordinary and popular meaning of the words used,” Richardson v. Town of Mount Pleasant, 350 S.C. 291, 294, 566 S.E.2d

523, 525 (2002), keeping in mind that amendments to our Constitution become effective largely through the legislative process. Miller v. Farr, 243 S.C. 342, 347, 133 S.E.2d 838, 841 (1963). For this reason, “the Court applies rules similar to those relating to the construction of statutes” to arrive at the ultimate goal of driving the intent of those who adopted it. Id.

In City of Rock Hill, the Court also emphasized that “the power of our State legislature is plenary and thus the “authority given to the General Assembly by our Constitution is a limitation of legislative power, not a grant. . . .” 391 S.C. at 154, 705 S.E.2d at 55. Further, the Court also stated:

[a]bsent ambiguity, the court will look to the plain meaning of the words used to determine their effect. . . .

However, the plain meaning rule is subject to this caveat:

[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Id. (quoting Kiriakides v. United Artists Commc’ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

391 S.C. at 154, 705 S.E.2d at 55.

Turning now to the issue of revenue bond financing, our Supreme Court stated in Elliott v. McNair, 250 S.C. 75, 83, 156 S.E.2d 421, 426 (1967), the following:

Industrial Revenue Bond financing represents a type of financing of relatively recent origin. It dates back to the Mississippi Act of 1936 which permitted the issuance of both general obligation bonds and revenue bonds for the purpose of financing industrial enterprises. See the case of Albritton v. City of Winona, 181 Miss. 75, 178 S. 799, 115 A.L.R. 1436. More than thirty states have now enacted statutes which permit this type of financing although only a few besides Mississippi permit the issuance of general obligation bonds. In by far the great majority of instances, state statutes which authorize this type of financing, limit the bonds to those which are payable solely from the revenue of the particular project or enterprise. Accordingly, it is apparent as in the case here, that the sole obligation of the political unit issuing the bonds is to apply the revenues resulting from the project or from its leasing to the payment of the principal and interest of the bonds. Our Act is quite specific, and Section 4 thereof provides: Bonds and interest coupons issued under authority of this Act shall never constitute an indebtedness of such county within the meaning of any state constitutional

provision of statutory limitation and shall never constitute or give rise to a pecuniary liability of the county or a charge against its general credit or taxing powers, and such fact shall be plainly stated on the face of each bond.

(emphasis added).

Moreover, in State ex rel. McLeod v. Riley, 276 S.C. 323, 334, 278 S.E.2d 612, 618 (1981), Justice Harwell noted with respect to revenue bonds:

[r]evenue bond legislation is no longer a novel device. This Court has, in fact, on several occasions in recent years passed upon the constitutionality of various legislative plans. Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) (Industrial Bond Act as originally enacted found constitutional); Harper v. Schooler, 258 S.C. 486, 189 S.E.2d 284 (1972) (Revenue bond law to finance pollution control facilities to be used by industry found constitutional); Bauer v. South Carolina State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978) (Legislation authorizing the Housing Authority to issue notes and bonds with the proceeds to be used in a variety of programs to alleviate a shortage of sanitary, safe and affordable housing is upheld). In each of these cases, key determinations were made that the public credit was in no way pledged and that the legislative declarations of public purpose were not clearly erroneous.

State ex rel. McLeod v. Riley, (Harwell, J. concurring in part and dissenting in part) (emphasis added). Thus, in revenue bond financing, the defining characteristic is that “the public credit is in no way pledged.” Id.

We turn now to your specific question -- whether an agency’s revenues can be used to service or pay off industrial revenue bonds which it issues. We understand that the full faith and credit of the State has in no way been pledged in support of SCTIB revenue bonds. The LAC report of May, 2016, referenced in your letter, concluded that “[b]ecause the General Assembly allocates State tax funds to SCDOT and then requires SCDOT to reallocate non-tax funds of the same dollar amount to SCTIB (“South Carolina Transportation Infrastructure Bank”), a reasonable argument can be made that this practice may be an indirect transfer of tax funds.” The Audit Council Report references §§ 11-43-310 and 11-43-320 which “authorize SCTIB to issue revenue bonds backed by ‘any of its revenue or funds . . . subject only to any prior agreements with the holders of particular bonds. . . .’” However, the Audit Council based its conclusion that “a reasonable argument could be made” of a violation of Art. X, § 13(9) upon the fact that “the General Assembly allocates State tax funds to SCDOT and then requires SCDOT to reallocate non-tax funds of the same dollar amount to SCTIB. . . .”

In this regard, the Audit Council Report references three statutes: §§ 11-43-160, 12-28-2915 and 11-43-165. According to the Audit Council:

S.C. Code § 11-43-160 requires that SCDOT transfer to SCTIB “an annual contribution set by the board of an amount not to exceed revenues produced by one cent a gallon of the tax on gasoline. . . .” A March 30,

2015, opinion of the Attorney General concluded that the state motor fuel user tax is a tax because its primary purpose is to raise revenue. Based on this principle, it is likely that State appropriations (derived primarily from income taxes and sales taxes) and the State electric power tax are also taxes.

S.C. Code § 12-28-2915 requires that SCDOT transfer to SCTIB each year, from non-state tax sources, an amount equivalent to fifty percent of revenues above 20 million received from a tax on sellers of electricity.

S.C. Code § 11-43-165 states that “[e]ach fiscal year the South Carolina Department of Transportation shall transfer fifty million dollars from non-tax sources to the South Carolina Transportation Infrastructure Bank.” This transfer from SCDOT to SCTIB is contingent on an appropriation of \$50 million, comprised largely of tax funds, from the General Assembly to SCDOT.

The Audit Council also cited the opinion of Bond Counsel for SCTIB which concluded that no violation of Art. X, § 13(9) was present. Bond counsel was quoted by the Audit Council Report as follows:

[Bond] counsel is of the firm opinion that [the prohibition against using tax funds to repay revenue bonds] means the State may not be compelled to levy a state tax to pay a revenue bond as the State must when it issues a general obligation bond....

What the SCTIB cannot do directly or indirectly is pledge [the] State’s full faith, credit and taxing power to a revenue bond issues by the SCTIB.

Here the SCTIB is not pledging the State’s full faith, credit and taxing power to anything, directly or indirectly. Rather, it is as directed by the SCTIB Enabling Act, using non-state revenues as the sole source of ‘Pledged Revenues’ for payment of SCTIB revenue bonds.

(emphasis added). Amplifying upon this conclusion, Bond Counsel then stated:

New Article X constituted a major revision of the limitations upon incurring general obligation debt and incurring revenue indebtedness. While the phrase “... a special source which sources does not involve revenues from any tax . . .” did not appear in Article X prior to the 1977 amendment, the many cases decided under the special fund doctrine made it clear that the draftsmen of new Article X were sensitive to ensuring that the State could never be compelled to levy general state taxes to repay a revenue bond but would be compelled to levy general state taxes to repay a general obligation bond. Section 13(2) of Article X defining general obligation debt establishes this distinction.

Bond Counsel cited with approval numerous decisions of our Supreme Court, such as Arthur v. Byrnes, 224 S.C. 51, 77 S.E.2d 311, 314 (1953), which concluded that “[i]mplicit in all of our decisions involving the application of the special fund doctrine is the assumption that it will never be necessary to resort to general taxation to pay the obligations proposed to be issued.” (emphasis added). The Supreme Court went on to say in Arthur that “the phrase ‘reasonably sufficient’ used in so many of our decisions should be construed as meaning that the special fund or revenue pledged will with reasonably anticipated certainty be sufficient to pay the principal and interest of such obligations.” Id.

Briggs v. Greenville County, 137 S.C. 288, 135 S.E. 153 (1926) is a landmark case in South Carolina regarding the “special fund” doctrine. The Court in Briggs stated:

[t]his court has held a number of times that obligations of the same character as these bonds, secured by the pledge of a fund which might reasonably be expected to meet the obligations without resort to the levy of a property tax, did not constitute bonded debt within the meaning of the constitutional limitations, notwithstanding that the full faith, credit, and taxing power of a political subdivision were pledged for the payment of the obligations. . . . [cases cited].

The present case cannot be distinguished upon the ground that these bonds are “direct and general obligations” of a political subdivision, “payable primarily from a property tax. . . .”

137 S.C. 288, 135 S.E. at 158-59. (emphasis added). See also Caddell v. Lexington County School Dist. No. 1, 296 S.C. 397, 400, 373 S.E. 598, 599 (1988) [“In its historical context, general obligation debt refers to that which is ultimately by taxes on the property within the political entity.”]; Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 360, 287 S.E.2d 476, 484 (1982) (Harwell, J. concurring) [“The holder of a general obligation bond is legally entitled to require the political subdivision to levy property taxes against its property owners to assure satisfaction of the debt (i.e. ad valorem tax).”].

And, in Brashier v. S.C. Dept. of Transportation, 327 S.C. 179, 187, 490 S.E.2d 8, 12 (1997) (overruled on other grounds), the Court summarized the law as follows:

[t]here is no lending of the State’s credit unless “general credit and taxing powers are pledged.” State ex rel. Medlock v. South Carolina State Family Farm Dev. Auth., 279 S.C. 316, 320, 306 S.E.2d 605, 608 (1983). “The limitation imposed by Art. X, § 11 . . . relates solely to general obligation bonds payable from the proceeds of ad valorem tax levies.” Carll v. South Carolina Jobs-Economic Dev. Auth., 284 S.C. 438, 443-44, 327 S.E.2d 331, 335 (1985) (quoting Elliott v. McNair, 250 S.C. 75, 85, 156 S.E.2d 421, 426 (1967) (emphasis added). See also Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 353, 287 S.E.2d 476, 481 (1982) (“bonds issued [by the State] which are payable out of special funds [such as revenue bonds] do not create debts”; Elliott, 250 S.C. at 86, 156

S.E.2d at 427 (“The word ‘credit’ as here used was intended to protect the State against pecuniary liability.”)

(emphasis added).

In addition, in Arthur v. Johnston, 185 S.C. 324, 194 S.E. 151, 153 (1937), our Supreme Court recognized that bond funding is not necessarily limited to revenues derived from the project, but such funding could derive from a special fund source of funding as well. Moreover, such a special fund source might well consist of tax revenues. The Court rejected the argument that bond funding did not consist entirely of revenues from the special enterprise promoted by the Act and, therefore, such funding was prohibited. The Court explained:

[t]his limitation, however, is not sustained by the cases cited and relied upon. It is true that in some of the cases the fund was derived from the revenue of the special enterprise or project promoted by the act, but this is not true as to others, and with reference to some of them, it would only be true indirectly.

In the case of Sullivan v. City Council of Charleston, 133 S.C. 189, 133 S.E. 340, which was decided by the Court en banc, the special fund was not derived from the revenues any special enterprise or project, but, on the contrary the same was derived from general property taxes which had previously been levied and remained uncollected. Hence, the act involved in that case was much more far reaching than that involved in the case at bar. The certificates authorized to be issued by the city, representing past due and unpaid taxes, not only were guaranteed by the municipality and provision was made for a special levy to supply any deficiency, but an annual levy was authorized to pay the interest on the certificates.

Here, the proposal is to set aside a part of the income tax, the amount of which has already been fixed by the law and presumably is reasonably sufficient to take care of the proposed certificates. It will be observed that no new income tax is levied for this purpose, but the income tax already levied is allocated as the fund out of which these certificates are to be paid

It is, of course, true that the use of the income tax for the purpose of paying these certificates prevents its use to that extent for any other purpose and will thus deplete the funds of the state to the extent of such payments. But that is true of every case sustaining the issuance of such bonds or certificates. In the case of State ex rel. Richards v. Mooror, 153 S.C. 455, 150 S.E. 269, the primary source for the payment of the obligations was the gasoline tax, and the issuance of these bonds was held not to increase the state’s debt, although it is obvious enough that the use of the gasoline tax for this purpose depletes the revenues of the state to that extent.

(emphasis added). Thus, the Court distinguished between tax revenues from an already existing tax and the imposition of a new tax. Further, in Wolper v. City Council of Chas., 287 S.C. 209,

366 S.E.2d 871 (1985), the Court explained the distinction between general obligation debt and indebtedness payable from a revenue-production project or special source. The Court emphasized that the Act in question “creates no scheme of taxation; rather it authorizes the increased increments of an existing tax to be designated for redevelopment purposes.” 287 S.C. at 214, 336 S.E.2d at 874. The Court further explained:

[m]unicipalities may incur two types of indebtedness:

- (1) general obligation bonds, secured by the full faith, credit and taxing power of the municipalities; and
- (2) indebtedness payable from a particular revenue-producing project or a special source authorized of Article X, Section 14(1) of the South Carolina Constitution. See City of Beaufort v. Griffin, 275 S.C. 603, 274 S.E.2d 301 (1981); Article X, Section 1.4(2) and (3) South Carolina Constitution.

Tax increment redevelopment funding is expressly authorized by Article X, Section 14(10) of the South Carolina Constitution. The redevelopment debt is to be retired from a special source, i.e. the incremental increase of ad valorem taxes on property within the redevelopment area. In the event the redeveloped area do not increase or increase at a slower rate than anticipated, the repayment of the redevelopment debt is negatively affected. The redevelopment bondholders may not look beyond the special fund for retirement of the debt. The bonds are not secured by the full faith, credit and taxing power of the municipality, and therefore cannot be classified as a general obligation debt. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938). The debt limitation of Article X, Section 14(7) does not apply. See S.C. Code Ann. Section 31-6-20(B) (Supp. 1984).

(emphasis added). Thus, the special fund was the extent of bond holder protection and holders of the bonds were unprotected by new tax revenue.

Our previous opinions have dealt with your question, but have not spoken with one voice as to the conclusion. In Op. S.C. Att’y Gen., 1994 WL 377863, (Op. No. 94-37) (June 14, 1994), we addressed the issue of whether “the General Assembly may appropriate funds in support of “revenue bonds issued by the South Carolina Resources Authority.” The statutes in question relative to the Authority made clear that “neither the faith and credit nor the taxing power of the State, or any of its political subdivisions, is pledged to the payment of the principal or interest on the bond... [.]”

Our 1994 Opinion referenced Art. X, § 13, particularly subsection (1), which provides that “(1) . . . the State shall have power to incur indebtedness in the following categories and in no others: (a) general obligation debt; and (b) indebtedness payable solely from a revenue-producing project or from a special source does not involve revenues from any tax . . . [.]” The Opinion, also quoting Art. X, § 13(9), concluded as follows:

[w]hen all of these statutes and constitutional provisions are read together, it is clear that it is not the legislature or constitutional intention that the State’s full

faith and credit be pledged in support of bonds issued by the Authority. However, I understand from your letter that the Authority's indebtedness is payable only from revenue received from the water or sewer infrastructures that are built. If that is so, the State would appear to have the power, but not the duty, to incur indebtedness on behalf of these revenue-producing bonds. S.C. Constitution, Article X, § 13.

(emphasis added). In other words, the 1994 Opinion did not read literally § 13(9)'s language "which source does not include revenues from any tax," but applied the longstanding emphasis upon the pledge of the State's full faith and credit taxing power, as expressed in numerous cases.

The 1994 Opinion also cited and quoted from Carll v. S.C. Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985) in support of its conclusion. In Carll, our Supreme Court affirmed the Order of the Circuit Judge challenging the constitutionality of the Authority (JEDA) on a variety of grounds. One basis for constitutional challenge in Carll was that the JEDA Act pledged the credit of the State to private corporations in violation of Art. X, § 11. However, the Court rejected such argument, stating as follows:

[t]he 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." Elliott v. McNair, 250 S.C. 75, 85, 156 S.E.2d 421 (1967). Not only is there no pledging of the proceeds of ad valorem tax levies here, there is also this disclaimer in Section 12 of the Act:

In making such agreement, the authority does not have the power to obligate itself except with respect to program funds and cannot incur a pecuniary liability or a charge upon the general credit of the authority or of the State or against the taxing powers of the State.

This disclaimer is sufficient to protect the State from pecuniary obligations. Bauer [v. S.C. State Housing Authority], 271 S.C. 219, 246 S.E.2d 869 (1978)]....

In Elliott v. McNair, we discussed the purpose behind the constitutional limitation:

"... the word 'credit' ... was intended to protect the State from pecuniary liability. . . ." Elliott v. McNair, 250 S.C. 75, 86, 156 S.E.2d 421 (1967). The Act in no way imposes any pecuniary liability on the State. Appellant speculates that if the Authority defaults on its bonds, the State may choose to pay off the bonds.

The purpose of the constitutional limitation is to prevent the State from being **obligated** to use State tax revenues to pay off the bonds. Elliott. McNair, supra; Bauer v. South Carolina State Housing Authority, supra; and State ex rel. Medlock v. South Carolina Family Farm Development Authority, 279 S.C. 316, 306 S.E.2d 605, 609 (1983).

Carll, 284 S.C. at 443-44, 327 S.E.2d at 335. (emphasis added). Moreover, our 1994 opinion cited with approval the foregoing quote as it also applied to Art. X, § 13(9). Thus, based upon Carll, we stated:

[i]t would appear that similar to the JEDA bonds addressed in Carll, although the State is not obligated to pay off the Authority's bonds, it also would not absolutely be prohibited. However, the law is not altogether clear in this area and it is unknown how a Court would rule on this issue.

Our 1994 Opinion also quoted Casey v. S.C. State Housing Authority, 264 S.C. 303, 215 S.E.2d 184, 188 (1975) to the effect that "[t]here is . . . on the part of the legislature always a compelling desire, if not a moral obligation, to protect the credit and the good name of the State by appropriating monies to make good deficits created by State agencies." Further, we quoted 63A Am. Jur.2d, Public Funds § 73 that "public funds may be appropriated" for a moral obligation of the State. Based upon the various authorities referenced, we thus concluded:

[t]he State's full faith and credit is specifically not pledged for these bonds and, therefore, there is no statutory or constitutional obligation upon the State to redeem these bonds. Whether the General Assembly would determine to pay off the bond would apparently be something that would have to be decided by the General Assembly on a case by case basis. As noted before, this issue as well as your previous question appears to be issues of novel impression, and only a court of competent jurisdiction could definitely rule on the questions that you have raised.

The advice provided in our 1994 Opinion -- that a court must ultimately resolve the issue -- is well taken. In an earlier opinion, Op. S.C. Att'y Gen., 1988 WL 485354 (December 29, 1988), we referenced Art. X, § 13(9) regarding a question as to whether Turnpike Bonds could be "supplemented with other funds which are to be repaid with turnpike facility revenues." We concluded that Art. X § 13(9) prohibited the use of "turnpike facility revenues" for such purpose. Unlike the 1994 Opinion, we read § 13(9) literally. We stated the following:

[c]learly, these funds which are supplemented could be funds of the State Highway Fund which involves revenues from tax sources. Based upon Article X Section 13(9) which is quoted above, this provision would probably be found to violate the South Carolina Constitution in any case where the funds which are used as a supplement include tax funds since Article X Section 13(9) specifically disallows the use of revenues from any tax. A method prescribed by the Constitution for legislative action such as this is exclusive. Legislative power is unlimited except to the extent that it is circumscribed by the Constitution. State ex rel. Edwards v. Osborne, 7 S.E.2d 526 (1940). . . .

The Legislature cannot accomplish indirectly what it cannot do directly. . . . This result is certainly not clear and since only a court can declare a statute unconstitutional, a test case of some sort would be necessary in this instance.

Again, the legislature could add language which makes it clear that revenues from tax sources may not be used to finance Turnpike Bonds. (emphasis added).

In addition, the Supreme Court's decision in Robinson v. White, 256 S.C. 410, 182 S.E.2d 744 (1971), decided prior to the adoption of new Article X, further blurs the issue. In Robinson, the revenues obtained from business license taxes were used to secure revenue bonds issued by the City of Greenville. The use of such funds was challenged on the basis that "it allows the City to incur bonded debt without a favorable vote as to the creation thereof. . . ."

In short, the argument in Robinson was that the supplemental funding in effect transformed a revenue bond into general obligation debt. The Supreme Court agreed, stating as follows:

[i]t is the contention of the appellant that to the extent unrelated funds (business license tax) are used to service the bonds, the general funds of the city will be depleted and the city authorities will then look to the taxpayers to replenish the general funds. It is argued that the end result is that the tax payer is burdened with payment of the bonds just as fully as if they had been issued as general obligation bonds in an amount equal to the unrelated funds pledged. We agree.

Neither the taxpayer nor this court can predict with exactness how the city council would solve the problem created by the depletion of funds, but we think there is a very real danger that in the final analysis it will be the taxpayer who bears the additional financial burden which would result. Whether the problems be solved by adding a new source of revenue, or increasing ad valorem taxes, or increasing other taxes already in existence, or by curtailing services, the people bear the brunt of the bond issue. The fact that, as a [bookkeeping] operation, the debt payments are made from the business license tax instead of from general funds does not alter the fact that the taxpayer foots the bill. Approval of the plan would effectively deprive the taxpayers of the constitutional protection afforded by Article VIII, Section 7. We think that the plan of financing and the pledging of the business license tax violate the spirit, if not the very letter, of the constitutional provision. It permits the city to do by indirection that which it could not do by direction. Under the stipulated facts, the constitutional guaranty is jeopardized with sufficient certainty to necessitate and require the intervention of this court. The taxpayer cannot wait until after the bonds have been issued, and until such time as it is positively proven that his rights have been violated, to seek relief from the court.

It is common knowledge that in city financing substantial revenues are derived from such collections as licenses, permits, fines, forfeitures, sewer charges, and other similar sources, it is also common knowledge that property or ad valorem taxes are then added as needed to make up the difference to balance the budget.

At this time the plaintiff cannot with positive certainty prove that the ad valorem tax will be used to make up the depleted revenue and such proof is not required.

We are convinced that the debt to the extent of the depleted revenue will fall at least indirectly upon people who pay taxes of various kinds to the city. It will fall upon such a language segment of the people as to effectually be the obligation of taxpayers generally.

256 S.C. at 417-18, 182 S.E.2d at 747-48. (emphasis added).

The dissent in Robinson, authored by Justice Bussey, and concurred in by Justice Brailsford, concluded that there was nothing to prohibit use of the business license tax revenues in support of the bonds in question. According to the dissenting opinion,

[t]he bonds in the instant case are secured primarily by revenues from the parking facilities; secondarily by a portion of the business license fees; and not all by an ad valorem tax levied upon any taxable property. It clearly follows that these obligations do not constitute bonded debt within the purview of the Constitution, as such term has been consistently defined by this Court. Our prior definition is too firmly and well established to be currently discarded without discussion.

Appellant argues that the diversion of a portion of the business license fees converts such into a “bonded debt” because of the possible contingency of an increase in ad valorem taxes resulting from such diversion. This contention is, I think, fully met and disposed of by the rationale of the opinion in the Briggs case (Briggs v. Greenville County supra) and the various other cases therein cited and analyzed.

256 S.C. at 419-20, 182 S.E.2d at 748-49. (emphasis added). Thus, the dissent in Robinson relied upon the “special fund” doctrine, discussed above, as well as the fact that the imposition of a property tax did not secure the indebtedness. As noted, according to the Supreme Court, bond holders “may not look beyond the special fund for retirement of the debt. The bonds are not secured by the full faith, credit and taxing power of the [governmental entity] and therefore cannot be classified as a general obligation debt.” Wolper v. City Council of City of Charleston, supra. As the Court noted in Wolper, where an act “creates no new scheme of taxation” to finance the debt, it is not general obligation debt. In short, the governmental entity – be it the State or its subdivisions – must be legally obligated to raise taxes in order to finance the bonds.

Our 1994 Opinion, discussed extensively herein, concluded that Art. X, § 13(9) likely is not violated by the use of an agency’s appropriated revenues in support of revenue bonds issued by that agency. In 1994, we concluded that so long as the full faith and credit of the State’s taxing power is not obligated in support of the revenue bonds, use of appropriated funds to satisfy the bond payments is not absolutely prohibited by Art. X, § 13(9). Such is consistent with our conclusion in Op. S.C. Att’y Gen., 1990 WL 482408 (February 14, 1990) that the Constitution “clearly requires that when the State or one of its political subdivisions is to incur general obligation debt, its full faith, credit and taxing power are to be pledged for the repayment thereof.” A revenue bond does not pledge the full faith and credit taxing power.

The 1994 Opinion quoted from Carll v. Jobs-Economic Development Authority, *supra* and other decisions of the South Carolina Supreme Court in support of its conclusion. Moreover, we have also examined the opinion of bond counsel, written in response to the Legislative Audit Council's Draft Report, dated May 17, 2016, Bond counsel cited numerous decisions of our Supreme Court which reinforces the 1994 Opinion. Bond counsel concluded that Art. X, § 13(9)'s meaning is that "[t]he State may not be compelled to levy a general state tax to pay a revenue bond as the State must when it issues a general obligation bond. This Opinion [of Bond Counsel] is based upon the evolution of Article X in the South Carolina Constitution of 1895, as amended in 1977 and, in particular the 'special fund doctrine' as interpreted prior to the 1977 constitutional amendment." (emphasis added). Our 1994 Opinion, as well as that of Bond Counsel, are thus amply supported by Supreme Court precedent and the Court's application of the "special fund" doctrine.

We note, however, that our 1994 Opinion also stated that "[t]he law is not altogether clear in this area and it is unknown how a Court would rule on this issue." That is the case because the Supreme Court has never squarely interpreted the words of Art. X, § 13(9). The 1994 Opinion found "the issues of novel impression, and only a court of competent jurisdiction could definitely rule on the questions that you have raised." Moreover, our Opinion of December 29, 1988 appears to conflict with the 1994 Opinion, finding that Art. X, § 13(9) "specifically disallows the use of revenues from any tax" in support of revenue bonds. Robinson v. White, *supra*, while it may be distinguished, as using an "unrelated" form of tax revenue,¹ still can be read as supporting reasoning of the 1988 Opinion. Importantly, the 1988 Opinion also noted that "only a court can declare a statute unconstitutional" and thus "a test case of some sort would be necessary in this instance." Further, the 1988 Opinion presented the option that "the legislature could add language which makes it clear that revenues from tax, sources may not be used to finance" revenue bonds.

It is apparent that the language of Art. X, § 13(9) is the source of the differing conclusions reached about its meaning. The provision states that revenue bonds must be payable "solely" from a revenue-producing project" or from a special source. . . ." Moreover, the "special source" may "not involve revenues from any tax." Read literally, and at first blush, it is easy to see why it could be reasonably concluded that no tax revenues whatsoever may be used in support of the revenue bonds. However, as explained above, the decisions of our Supreme Court historically do not appear to support such a literal reading. Further, we have found no evidence that the framers of Art. X, § 13(9) intended to depart from this longstanding precedent. Our 1994 Opinion thus looked behind the literal language to the purpose of Article X, in concluding that while the State was not obligated to use tax revenues to support revenue bond

¹ See Kaminski v. Higgins, 257 S.C. 222, 225, 185 S.E.2d 365, 366 (1971) [Robinson v. White ". . . on similar facts, a divided court held this doctrine [special fund] to be inapplicable to municipal bonds to be paid in substantial part from the pledge of revenues derived from business licenses, which, as here, were unrelated to the public improvement for which the bonds were authorized."] With respect to revenue bonds issued by SCTIB, we doubt whether a court would conclude the revenues used to fund the bonds would be considered "unrelated to the public improvement for which the bonds were authorized."

obligations, it was not prohibited from doing so. As noted above, the ultimate goal in interpreting the Constitution is to derive the intent of those who adopted it. City of Rock Hill v. Harris, *supra*. One would think that if the framers had intended to undo years of Supreme Court precedent, the voters would have been notified.

Nevertheless, the language is ambiguous. Bond counsel recognized this ambiguity regarding the exact meaning of the language of Art. X, § 13(9), noting that “[t]he LAC Final Draft Report puts much emphasis on the phrase ‘... does not involve revenue from any tax. . . .’” The opinion letter of bond counsel acknowledged, moreover, that “there has been no South Carolina Supreme Court opinion interpreting” this phrase.

Conclusion

Accordingly, it is our opinion that, based upon existing Supreme Court decisions, a court would probably apply the same reasoning as our 1994 Opinion, thereby concluding that use of SCTIB revenues may be constitutionally applied to SCTIB revenue bonds, so long as the taxing power of the State to impose new taxes is not pledged. Regardless of whether tax revenues or non-tax revenues are involved in funding SCTIB revenue bonds, no such full faith and credit of the State is pledged here. In other words, it appears that, with respect to SCTIB revenue bonds, “no new scheme of taxation,” Wolper, *supra*, is involved. The State is not, in other words, obligated to support the revenue bonds with a pledge of its taxing power. Further, we must presume the constitutionality of SCTIB statutes, particularly in light of the broad authority given the General Assembly by Art. X, § 13(9) to incur indebtedness “upon such terms and conditions” as it “may prescribe by law.” Moreover, we have found no evidence that the framers of Art. X, § 13(9) meant to depart from well settled case law existing prior to the adoption of Art. X, § 13(9).

We caution, however, that there is ambiguity as to the meaning of Art. X, § 13(9) – particularly with respect to the language “does not involve revenues from any tax” – such that a declaratory judgment action should resolve the issue once and for all. As Bond Counsel has noted, no Supreme Court decision has squarely addressed the meaning of Art. X, § 13(9)’s language. Our efforts to ascertain the original meaning of these words in Art. X, § 13(9) have proved unavailing. Both our 1994 and 1988 Opinions thus recommended judicial clarification, and we renew that recommendation today. A declaratory judgment action would thus be helpful to resolve the issue with finality.

Sincerely,



Robert D. Cook
Solicitor General