New Jersey State Legislature

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Honorable Richard A. Merkt
12 Old Brookside Road
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Dear Assemblyman Merkt:

You have requested a legal opinion asking whether the Debt Limitation Clause[1] amendments contained in Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 would render unconstitutional the subsequent enactment of Assembly Bill No. 2873 or similar legislation authorizing additional contract bonds for school facilities. You are advised that State Supreme Court precedent indicates that the conditions imposed by the revised Debt Limitation Clause as proposed in Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 may be interpreted as inapplicable to laws such as Assembly Bill No. 2873 which authorize additional contract bonds to meet the constitutional obligation imposed by the Education Clause.[2] However, an analysis of the same question relying on certain canons of construction could reasonably conclude otherwise.

The Debt Limitation Clause provides that "[t]he Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State. . . ." unless such a measure is "submitted to the people at a general election and approved by a majority. . . ." N.J. Const. (1947), Art. VIII, Sec. II, par. 3. The State Supreme Court has interpreted the

[1] Article VIII, Section II, paragraph 3 of the State Constitution is commonly referred to as the "Debt Limitation Clause."

[2] Article VIII, Section IV, paragraph 1 of the State Constitution is commonly referred to as the "Education Clause." It provides that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. (1947), Art. VIII, Sec. IV, par. 1.

Debt Limitation Clause to apply "only when the State is legally obligated to make payments [on the debt] authorized by the Legislature." Lonegan v. New Jersey (Lonegan II), 176 N.J. 2, at 9 (2003) citing Lonegan v. New Jersey (Lonegan I), 174 N.J. 435, at 446 (2002). This interpretation of the Debt Limitation Clause has carried with it divergent treatment of general obligation bonds and contract bonds.

General obligation bonds are legally enforceable against the State and backed by the full faith and credit of the State. See Lonegan I, 174 N.J. at 439, n.1 (citing John Downs & Jordan Elliott Goodman, Barron's Dictionary of Finance and Investment Terms 171 (1991)). In compliance with the Debt Limitation Clause, a law authorizing general obligation bonds must be submitted to the voters for approval, among other requirements.[3] Conversely contract bonds, which disclaim enforceability against the State, have not been made subject to the conditions of the Debt Limitation Clause. See Lonegan I, 174 N.J. at 446.

Typically, contract bonds are "issued by an independent state authority on a contract between the State Treasurer and the [issuing] authority" which explicitly denotes that "payment on the bonds by the State is subject to legislative appropriations." See Lonegan I, 174 N.J. at 439, n.1 (citing John Downs & Jordan Elliott Goodman, Barron's Dictionary of Finance and Investment Terms 171 (1991)). While the State Supreme Court has acknowledged payments on bonds which are subject to legislative appropriations are "highly likely," the Court has agreed with the contention that there is a constitutionally significant difference between "highly likely" and "legally bound." Lonegan II, 176 N.J. at 13. In so ruling, the Court has established an interpretation of the Debt Limitation Clause which enables the Legislature to enact laws authorizing contract bonds, absent voter approval.

The proposal contained in Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 amends the Debt Limitation Clause to require voter approval for laws authorizing appropriation-backed debt, including contract bonds. Specifically, Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 adds the following language to the Debt Limitation Clause:

> . . . the Legislature shall not enact any law that, in any manner, creates or authorizes the creation of a debt or liability . . . [that] has a pledge of an annual appropriation as the ways and means to pay the interest of such debt or liability as it falls due and pay and discharge the principal

[3] In addition to providing for voter approval, laws authorizing general obligation bonds must detail the purpose for which the proceeds shall be dedicated and the maximum duration over which repayment must occur. See N.J. Const. (1947), Art. VIII, Sec. II, par. 3.

> of such debt, unless a law authorizing the creation of that debt for some single object or work distinctly specified therein shall have been submitted to the people at a general election . . . .

The text of Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 requires voter approval for laws authorizing contract bonds, given the words which specify application to measures of debt backed by a "pledge of an annual appropriation."

In your request for this opinion you asked whether the enactment of Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 would render Assembly Bill No. 2873 or similar legislation void as unconstitutional. Assembly Bill No. 2873 amends the "Educational Facilities Construction and Financing Act" (EFCFA) to authorize additional contract bonding for the purposes of financing school facilities and does so without providing for voter approval.[4] At first glance, it would seem that the Debt Limitation Clause, as amended by Assembly Committee Substitute for Assembly Concurrent Resolution No. 151, would preclude the enactment of Assembly Bill No. 2873. However, the State Supreme Court has given contract bonding authorized by EFCFA special significance because of its link to the constitutional obligation imposed by the Education Clause.[5] See Lonegan I, 174 N.J. at 440.

In Lonegan I, the Court was presented with a Debt Limitation Clause challenge to the contract bonding authorized by EFCFA. The Court upheld EFCFA based upon the inapplicability of the Debt Limitation Clause to non-binding debt and for the "separate and distinct reason" that EFCFA was enacted in furtherance of the mandate found in the Education Clause.[6] Id. The Court also noted that it knew of no other "state bonds dedicated to the provision of constitutionally required facilities." Id. at 460. While the Court did not explicitly state that laws designed to meet the mandate of the Education Clause are immune to the Debt Limitation Clause, it seemed to imply as much.

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[4] Section 1 of Assembly Bill No. 2873 amends EFCFA to provide an additional $2,500,000,000 "for the State share of costs for [Abbott] SDA district school facilities projects . . . . ".

[5] "The contract debt authorized by the EFCFA is *sui generis*." Lonegan I, 174 N.J. at 460.

[6] In Lonegan I, the Court also noted that debt issued under EFCFA effectuated the "core purpose" of the School Fund Provision of the State Constitution. Lonegan I, 174 N.J. at 461. The findings and declarations section of EFCFA explicitly mentions the Legislature's duty to meet the requirements of the Education Clause. N.J.S.A. 18A:7G-2. In that same section, there is no reference to EFCFA's role in effectuating the purpose of the School Fund Provision. See id.

Prior to Lonegan I, the notion that the Education Clause may supersede another provision of the State Constitution had been offered by the State Supreme Court in a limited context. Specifically, in a challenge to the sufficiency of State funding for public education, the Court noted that if there is a "theoretical conflict between the strictures of the Appropriations Clause and the mandate of the Education Clause, we hold the latter to be controlling . . . "[7] Robinson v. Cahill (Robinson), 69 N.J. 133, 154 (1975). While the Robinson case did not involve a challenge to the Debt Limitation Clause, it may be worth considering given the similarity in nature between the Appropriations Clause and the Debt Limitation Clause, as both place conditions on the manner in which the State manages its finances.

Given the State's regular use of contract bonds, the application of the Debt Limitation Clause to appropriation-backed debt may reasonably be characterized as a significant shift in the State's financial practices. See Lonegan I, 174 N.J. at 466 (Stein, J., concurring in part and dissenting in part). Traditionally, the State Supreme Court refrains from interpreting a major change in policy unless the intent to do so is clear. See, for example, State v. Western Union Tel. Co., 12 N.J. 468, 486 (1953) (The intent to change a long-established rule is not to be imputed absent clear intent); Singleton v. Consolidated Freightways Corp., 64 N.J. 357, 362 (1974) (There is a presumption against intent to enact a substantive change).

The text and interpretive statement of Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 reveals a clear intent to require voter approval for laws authorizing contract bonding. The text of Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 imposes its conditions upon law which "authorizes the creation of a debt . . . " backed by a "pledge of an annual appropriation . . . . " The interpretive statement of Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 even mentions a shift away from current precedent validating the use of contract bonds as a "legal means of avoiding submitting the issuance of debt for voter approval." However, if the State Supreme Court truly considers EFCFA contract bonds to be "separate and distinct" from other contract bonds which are not directed at satisfying a constitutional mandate, then in that regard it may not appear that Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 sufficiently articulates an intent to change those practices. Lonegan I, 174

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[7] Article VIII, Section 2, paragraph 2 of the State Constitution is commonly referred to as the "Appropriations Clause." It provides as follows: "No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year . . . " N.J. Const. (1947), Art. VIII, Sec. II, par. 2.

N.J. at 440. Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 does not explicitly address appropriation-backed debt authorized to fulfill a separate constitutional obligation, absent a link to a constitutional source of revenue.

Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 includes an exception to the voter approval requirement for appropriation-backed debt which is to be repaid "from a source of State revenue otherwise required to be appropriated pursuant to another provision of this Constitution."[8] This exception would not seem to apply to contract bonds issued to meet the mandate imposed by the Education Clause, as there is no source of revenue explicitly required to be appropriated by the Education Clause.[9]

By exempting certain types of contract bonds, but not those authorized to satisfy a separate constitutional obligation, without a constitutional source of revenue, it may be surmised that Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 has been written to require voter approval for EFCFA contract bonds. This type of reasoning falls under the canon of construction *expressio unius est exclusio alterius*, which stands for the proposition that the express mention of one thing implies the exclusion of all others not mentioned. See Black's Law Dictionary 476 (7th ed. 2000). Although persuasive, this canon of construction has not been granted prominence by the State Supreme Court. The Court has considered it as an aid to interpretation and one which should be applied with caution. See Allstate Ins. Co. v. Malec (Allstate), 104 N.J. 1, 8 (N.J. 1986).[10]

Application of the Debt Limitation Clause to EFCFA contract bonds could also be muddled by the contemporaneous passage of Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 and Assembly Bill No. 2873. Regardless of the relationship between the effective dates of both measures, if the same Legislature passes two measures

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[8] There is an additional exception to the voter approval requirement in Assembly Committee Substitute for Assembly Concurrent Resolution No. 151. It applies to appropriation-backed debt that is repaid using sums collected from user fees generated by the project that the debt was originally borrowed to facilitate. This exception does not appear to be applicable to EFCFA contract bonds.

[9] It may be of note that the State Supreme Court has held in the context of the Appropriations Clause that contract bond proceeds do not constitute revenue. McGreevey v. State, 180 N.J. 590 (2004).

[10] In Allstate, the Court noted that the canon *expressio unius est exclusio alterius* is merely an aid in determining legislative intent, not a rule of law. Allstate Ins. Co. v. Malec (Allstate), 104 N.J. 1, 8 (N.J. 1986).

contemporaneously, it might be assumed that both acts are to be read so as to not conflict.[11] To that point, there is an Attorney General Opinion which concludes that "contemporaneous enactments of the Legislature are to be read consistently [and]...the same principle should also apply in the interpretation of a constitutional amendment proposed to the people contemporaneously with a statute in *pari materia*." A.G.F.O. 1977-No.12. The State Supreme Court has had occasion to consider contemporaneous enactments "in ascertaining the true sense and meaning of constitutional and statutory provisions." Lloyd v. Vermeulen, 22 N.J. 200, 210 (1956); See also State v. Elizabeth, 59 N.J.L. 134 (N.J. Sup. Ct. 1896). There also exists a presumption of validity for legislation challenged on a constitutional basis. See State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 526 (1999). The coalescence of these factors could lead to an interpretation that treats the enactment of legislation authorizing additional contract bonds for school facilities as an indication of the Legislature's intent behind Assembly Committee Substitute for Assembly Concurrent Resolution No. 151, rather than as a measure in conflict with a newly enacted constitutional provision.

By its text, the contents of Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 would seem to preclude laws authorizing additional EFCFA contract bonds when such laws do not provide for voter approval. However, the State Supreme Court has assigned special prominence to the role EFCFA contract bonds play in meeting the obligation imposed by the Education Clause. Without a clearer showing of intent to subject the mandate of the Education Clause to the conditions of a revised Debt Limitation Clause, it is our opinion that the Court's holding in Lonegan I would be applied in interpreting Assembly Committee Substitute for Assembly Concurrent Resolution No. 151 so that it may be considered inapplicable to laws such as Assembly Bill No. 2873 which authorize additional EFCFA contract bonds.

Very truly yours,

Albert Porroni
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By: _____
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AP:S/ms
c Mary C. Beaumont

[11] Upon voter approval, amendments to the State Constitution take effect 30 days later, unless otherwise specified by the amendment. N.J. Const. (1947), Art. IX, par. 6.