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Supreme Court of Nevada.

STATE ex rel. NEVADA **BUILDING AUTHORITY**, Relator,
v.
William E. **HANCOCK**, Secretary of the Nevada **Building Authority**, Respondent.

No. 6157.

April 21, 1970.

State **Building Authority** petitioned for writ of mandamus to compel **Authority's** secretary to publish resolution declaring the **Authority's** intention to issue securities. The Supreme Court, Thompson, J., held that statutory financing scheme whereby it was contemplated legislative appropriations would be used to pay rent on **buildings** constructed by the **Authority** and the **Authority** would then use that rent to pay off bonds sold to finance construction of **buildings** was unconstitutional under constitutional provision limiting amount of state debts to 1% of assessed valuation of state.

Petition denied.

West Headnotes

[1] **States** 84
360k84 Most Cited Cases

Building Authority created by state to construct public **buildings** is a part of the state government since it is managed by public officials and its income depends upon governmental appropriations for rent.

[2] **States** 115
360k115 Most Cited Cases

Statutory financing scheme whereby it was contemplated legislative appropriations would be used to pay rent on public **buildings** constructed by State **Building Authority** and **Authority** would then use rent to pay off bonds sold to finance construction of the **buildings** was unconstitutional under provision limiting state debt to 1% of assessed valuation of state. St.1969, c. 448; Const. art. 9, § 3.

[3] **States** 115
360k115 Most Cited Cases
(Formerly 360k15)

To the extent that revenues used to service bonds are derived from a nongovernmental source, or from rentals paid by a state agency which in turn deprives rent paying income from user fees, bonds do not create a state "public debt" within constitutional provision limiting state debt to 1% of assessed valuation of state. St.1969, c. 448; Const. art. 9, § 3.

[4] **States** 115
360k115 Most Cited Cases

"Special fund" exception removing bonds from limitation of constitutional article limiting state public debt to 1% of assessed valuation of state is not available if government obligates itself to contribute to fund used to pay off bonds. Const. art. 9, § 3.

[5] **States** 115
360k115 Most Cited Cases

If Legislature should pledge itself to make future appropriations for rent in order to service bonds sold by public **authority** to finance construction of public **buildings**, such pledge would create an immediate indebtedness for the aggregate amount required by the period of the pledge within constitutional article limiting amount of state debt to 1% of state's assessed valuation. Const. art. 9, § 3.

[6] **States** 115
360k115 Most Cited Cases

Successive biennial appropriations for rent on public **buildings** constructed by state **authority** which would use rents to pay off bonds issued by **authority** to finance construction were a legislative pledge to make future appropriations and such appropriations did not fall within "current revenue" exception to constitutional provision limiting state public debt to 1% of state's assessed valuation. St.1969, c. 448; Const. art. 9, § 3.

[7] **States** 115
360k115 Most Cited Cases

Financing provisions of Act creating a public **building authority** to construct public **buildings** and finance same with bonds were inextricably intertwined and, when taken as a whole, all were unconstitutional under article limiting amount of state debt to 1% of state's assessed valuation. St.1969, c. 448; Const. art. 9, § 3.

***310 **334** Russell W. McDonald and Frank W. Daykin, Legislative Counsel Bureau, Carson City, for

SUBCOMMITTEE on Higher Education/CIP
DATE: 04-25-03 EXHIBIT D

relator.

Harvey Dickerson, Atty. Gen., and Robert A. Grove, Deputy Atty. Gen., for respondent.

*311 OPINION

THOMPSON, Justice.

This proceeding in mandamus tests the constitutionality of ch. 448 (1969) Stats. **335 of Nev. 778 in the light of Nev.Const. *312 art. 9, s 3 limiting the public debts of Nevada to one percent of the assessed valuation of the State.

The relator, Nevada **Building Authority**, was created by the mentioned statute. It is designated therein as a body corporate and politic. Its members consist ex officio of the members of the State Planning Board, and the manager of the latter Board is the secretary of the **Authority** and the respondent to this proceeding.

The legislature through ch. 448 directed the Nevada **Building Authority** to build and provide facilities for use by the State and its agencies and empowered it to acquire real property and issue securities for this purpose. Accordingly, the **Authority** adopted a resolution declaring its intention to issue securities in the amount of $5,600,000 to construct an athletic field and an education **building** on the campus of the University of Nevada at Las Vegas, and a chemistry **building** and an education **building** on the University of Nevada campus at Reno.

The securities were to be issued in any convenient denomination or denominations and were to mature at any convenient time or times not later than 50 years from their respective dates of issuance. The resolution further specified that '(t)he bonds will not constitute an obligation of the State of Nevada or of the University of Nevada System or any other using agency, and are payable solely from the income of the **Authority**.' That income would be derived from charges, fees or rentals for the use of the **buildings** or facilities and would be sufficient to service the securities issued. The resolution thus passed was authorized by several of the provisions of ch.448.

The respondent, as secretary of the **Authority**, was directed to cause to be published the declaration and other matters relating thereto. He refused to do so, and this proceeding to compel action was commenced.

The assessed valuation of the State of Nevada for fiscal year 1969--70 was $1,708,027,706, one percent of which is $17,080,277. The State debts subject to the one percent constitutional limitation amounted to $15,711,000 as of January 1, 1970, leaving an unused limitation as of that date in the amount of $1,369,277. The respondent declined to comply with the directive of the **Building Authority** since the bonds proposed for the University **building** program when added to the bonds outstanding and authorized constitute debts in excess of the constitutional limit. It is conceded that the proposed bonds do not fall within either of the specific exemptions provided by the constitution which relate respectively to the public defense and to the State's property and natural *313 resources. Nev.Const. art. 9, s 3; State ex rel. State Gen. Oblig. Bond Com'n. v. Koontz, 84 Nev. 130, 437 P.2d 72 (1968); Marlette Lake Co. v. Sawyer, 79 Nev. 334, 383 P.2d 369 (1963). Moreover, it is agreed that the remedy of mandamus is appropriate. State ex rel. State Gen. Oblig. Bond Com'n. v. Koontz, supra; Marlette Lake Co. v. Sawyer, supra.

1. 'The state may contract public debts; but such debts shall never, in the aggregate, exclusive of interest, exceed the sum of one per cent of the assessed valuation of the state * * *.' So reads the relevant part of Nev.Const. art. 9, s 3. In an effort to avoid the debt limit thus imposed and to provide essential public facilities, the legislature enacted ch. 448. [FN1] The relator contends that the statutory scheme for the construction of public facilities is constitutionally permissible since public debts within the meaning of the constitutional proscription are not created. This contention requires our dissection of the statute and its implications.

> FN1. In 1968 the voters of this State defeated a proposed constitutional amendment to increase the debt limit from one percent to three percent. The measure failed by 10,679 votes, 67,071 to 56,392.

336 [1] a. Initially, we must consider the nature of the **Authority created. Meaningful differences exist between a public operating **authority** on the one hand, and a public **building authority** on the other. An operating **authority** normally retires its debt with revenue received from nongovernmental commercial users of the facility in question. This is not the case with a **building authority** since it normally finances the construction project by borrowing funds, renting its completed project to a state agency or unit of

government, and repaying its debt out of the rent received. It is apparent that a **building authority** is turly a part of the government since it is managed by public officials and its income depends upon governmental appropriations for rent.

The **Authority** created by ch. 448 is a **building authority**. It is designated as such, and the significant provisions with regard to financing proposed public construction are in line with the usual **building authority** schemes. For example, Sec. 12 requires each bond issued by the **Authority** to 'state upon its face that it is payable solely from revenues derived from the operations of **buildings** or facilities * * * or from the income to be derived from rental leases * * * or both * * * (and) that it does not constitute an obligation of the State of Nevada, or of any department, board, commission or agency ***314** thereof * * *.' Thus, the bonds contemplated are not general obligation bonds of the State to which is pledged the full taxing power. Instead, the debts to be incurred are for self-liquidating projects to be serviced as to principal and interest entirely from revenues generated by the project itself.

Sec. 8 provides, however, that rentals payable from a state agency may be derived from legislative appropriations made in each biennium, or the legislature may pledge itself to make future appropriations for rent, either in full or to the extent not defrayed by revenues. These provisions are the essence of the financing scheme. The permissive word 'may,' used with regard to legislative appropriations for rent, cannot serve to disguise the basic character of the scheme. Without question the legislature will appropriate the needed funds. If it did not do so, the contemplated public construction for state agency use could not proceed.

[2] Accordingly, we are compelled to conclude that the **Building Authority** created by ch. 448 is truly a state agency governed ex officio by members of the State Planning Board, serving neither private customers nor commercial income, formed to construct public **buildings** for use by state agencies and deriving its income from governmental rents. It is a creature of the legislature and can be dissolved by the legislature whenever it so desires, causing all of its assets to revert to the State. Government funds are thus channeled for payment of the bonds issued by the **Authority**. See State v. Volusia County School Bldg. Authority, 60 So.2d 761 (Fla.1952); Hively v. School City of Nappanee, 202 Ind. 28, 169 N.E. 51 (1929); State ex rel. Public Institutional Bldg. Authority v. Griffith, 135 Ohio St. 604, 22 N.E.2d 200 (1939); Reynolds v. City of Waterville, 92 Me. 292, 42 A. 553 (1898). The creation of a separate body corporate does not alter the essence of the scheme. Ayer v. Commissioner of Admin., 340 Mass. 586, 165 N.E.2d 885 (1960); State ex rel. Washington State Bldg. Financing Authority v. Yelle, 47 Wash.2d 705, 289 P.2d 355 (1955); State Office Bldg. Com'n v. Trujillo, 46 N.M. 29, 120 P.2d 434, 440 (1941). We therefore reject as unrealistic the relator's contention that the Nevada **Building Authority** is somehow to be considered an entity entirely separate and apart from the State.

Subordinately, the relator contends that the financing proposal embodied in ch. 448 is nonetheless constitutionally sound. The proposal does not create state debts, according to the relator, since it falls within recognized exceptions to the constitutional proscription. We do not agree, and turn briefly ***315** to discuss these exceptions and our ****337** reasons for finding them inapposite to the issue before us.

[3] b. The 'special fund' exception. As already stated, Sec. 12 contemplates that the bonds shall be serviced from revenues generated by the project itself. To the extent that such revenues are derived from a nongovernmental source, or from rentals paid by a state agency which in turn derives rent paying income from user fees, a State public debt within the meaning of the constitution is not created. The nongovernmental user supplies the special fund from which the bondholders receive their pay, and the **Authority** merely acts as an agent to collect the revenues. See Quill v. City of Indianapolis, 124 Ind. 292, 23 N.E. 788, 790, 7 L.R.A. 681 (1890); Attorney Gen. ex rel. Eaves v. State Bridge Com'n, 277 Mich. 373, 269 N.W. 388 (1936), where the bonds were serviced by revenues supplied by the users of a toll bridge; McClain v. Regents of the University, 124 Or. 629, 265 P. 412 (1928), where the bonds for the construction of a university dormitory were to be paid from rentals charged student users; State ex rel. State Park and Recreation Commission v. New Mexico State Authority, 76 N.M. 1, 411 P.2d 984 (1966), where the bonds for the construction of a state park were to be paid from user fees. In such a case the nongovernmental user is the debtor rather than the State.

[4] This exception simply is not available if the government obligates itself to contribute to the fund--to supplement it with tax receipts since, in such case, the government has exceeded its role as a mere collection agent and has undertaken partial, or perhaps full payment of the debt. See State Office Bldg. Com'n v. Trujillo, 46 N.M. 29, 120 P.2d 434, 444, 445 (1941); State v. Yelle, supra. As heretofore

stated, the financing proposal of ch. 448 contemplates, indeed requires, legislative appropriations if public construction is to go forward. The special fund exception is, therefore, inapplicable.

[5] c. The 'earned installment' doctrine, or the 'executory contract' exception. The relator argues that should the legislature pledge itself to make future appropriations for rent in order to service the bonds issued by the **Authority**, such a pledge would fall within the executory contract exception and thereby avoid the co stitutional debt limit. The essence of this doctrine is that a debt is not created until the consideration has been furnished. Accordingly, so the relator's argument goes, were the legislature to pledge itself to make future ***316** appropriations for rent as authorized by Sec. 8, a debt within art. 9, s 3 is not created since the rentals to be paid by the state agency leasing the facility out of such appropriated funds do not become debts until and as the **building** is used. In short, a debt is not created at the time the legislative pledge is made.

Such a legislative pledge presents this question. Is the pledge to be deemed one for the aggregate amount over the period of the duration of the long term lease to the state agency, or merely a pledge for the amount due on the biennium's allocable portion of the aggregate? In our view, realism demands that the indebtedness is immediately created for the aggregate amount required by the period of the pledge. Were the State to pledge its taxing power as security for the bonds payable in the future, such a pledge would fall squarely within art. 9, s 3. Surely a pledge to make future appropriations for rent out of tax revenues must be similarly treated. A present debt is created by such a legislative pledge. To view the matter otherwise would exalt form over substance and impair the integrity of our constitutional government.[FN2]

FN2. The case of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19 S.Ct. 77, 43 L.Ed. 341 (1898), the leading decision on the executory contract exception upon which the relator relies, has application only where there is no express agreement to appropriate money in the future.

****338** [6] d. The 'current revenue' doctrine. The legislative appropriations for rent may, under Sec. 8, be for a single biennium as contrasted with a legislative pledge to appropriate funds for rent during the full term of the lease and of the bonds issued by the **Authority**. Normally, there is no constitutional concern with expenses payable out of current revenue. Such expenses are not debts within art. 9, s 3. State ex rel. Ash v. Parkinson, 5 Nev. 15 (1869). The constitutional concern is to limit commitment of future revenues. Therefore, argues the relator, successive biennial appropriations for rent are to be equated with expenses of government payable out of current revenue, and for that reason, are not countable against the State debt limit. The argument carries some persuasive force. Within the context of the public **building** program involved, however, it is our view that successive biennial appropriations for rent until the bonds issued by the **Authority** are fully retired must be considered in the same light as a legislative pledge to make future appropriations for the same purpose. It is inconceivable that the legislature would default in either ***317** instance since the good faith of Nevada would not allow it. See also State Office Bldg. Com'n v. Trujillo, supra, at 448, 46 N.M. 29.

[7] 2. Ch. 448 is an amendment to Title 27 of NRS and is subject to the rule of severability. See Vol. 1 NRS p. XXIII, s 6. We are unable to separate the financing provisions of the Act. They are inextricably intertwined. We hold that the financing proposal of ch. 448, when considered as a whole, falls within the proscription of Nev.Const. art. 9, s 3 and is unconstitutional. The petition for mandamus is denied, and this proceeding is dismissed.

COLLINS, C. J., and ZENOFF, BATJER and MOWBRAY, JJ., concur.

468 P.2d 333, 86 Nev. 310

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