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Local Government -- Airport Not a "Necessary Expense" within Meaning of Article VII, Section 6, of the North Carolina Constitution

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should cease to allow such a spurious distinction to stand between the injured insured and the compensation for which he paid his premium dollar.[54]

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Local Government—Airport Not a "Necessary Expense" within Meaning of Article VII, Section 6, of North Carolina Constitution

The "necessary expense" exception contained in article VII, section 6, of the North Carolina Constitution[1] affords county and municipal governments limited relief from the onerous burden of submitting proposed expenditures to a vote of the people before taxes can be levied and collected or debts contracted. No clear test exists for determining what expenses of local governments are necessary, and the North Carolina Supreme Court has proceeded in catalogue fashion, classing some public functions as necessary within the meaning of the constitution and others as unnecessary.[2]

In the recent case of *Vance County v. Royster*,[3] the court declined to overrule thirty years of precedent and declare a public airport to be a "necessary expense" within the meaning of article VII, section 6. The decision attracted widespread attention throughout North Carolina when the Federal Aviation Agency immediately suspended payment on all grant agreements with airports

[54] See Clifford, *Insurance, Survey of N.C. Case Law*, 45 N.C.L. REV. 955, 962 (1967) (suggests that it is time for North Carolina to get out of the "Serbonian Bog").

[1] *No debt or loan except by a majority of voters.*—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same *except for the necessary expenses thereof*, unless approved by a majority of those who shall vote thereon in any election held for such purpose. (emphasis added). Prior to an amendment adopted in the general election of 1948, the last clause of the section read "unless by a vote of the majority of the qualified voters therein." The amendment reduces the number of voters necessary to approve any proposal submitted. Also note that this section was formerly section 7 of article VII; by amendment adopted November 6, 1962, sections 6, 9, and 10 were deleted from article VII, and the remaining sections numbered accordingly.

[2] See Coates & Mitchell, *"Necessary Expenses" within the Meaning of Article VII, Section 7, of the North Carolina Constitution*, 18 N.C.L. REV. 93, 94-105 (1940) [Hereinafter cited as Coates].

[3] 271 N.C. 53, 155 S.E.2d 790 (1967).

in the state; the suspension was ordered because FAA attorneys feared that the *Royster* decision cast doubt on the lawfulness of the agreements under the constitutional provision.[4] Upon intervention by members of the North Carolina congressional delegation, the suspension was revoked at the end of August.[5]

Royster involved a condemnation proceeding. The county commissioners had joined with the City of Henderson and the Henderson Township Airport Authority in submitting a "project application" and executing a grant agreement with the FAA, in order to secure federal funds. A site for the airport was chosen, and the county, together with the city and the airport authority, entered into a twenty-five year lease with the Secretary of the Army. *At no time was the proposed airport put before the voters of the county in an election.* The land of respondents adjoined the airport site, and the county attempted to condemn three and three-tenths acres of it to remove the trees and thereby provide a safe approach to the runway. The condemnation proceedings were contested in superior court, where condemnation was approved and damages awarded.[6]

The supreme court reversed, denying the county's right to exercise the power of eminent domain on behalf of the airport. It was conceded that the proposed airport was a public use for which private property could be taken,[7] but the court held that the power of eminent domain failed for lack of authority to construct and maintain the airport.[8] The terms of the twenty-five year lease and cer-

[4] Durham Morning Herald, Aug. 3, 1967, § A, at 3, col. 1.
[5] *Id.*, Aug. 31, 1967, § C, at 1, col. 5.
[6] 271 N.C. at 54-59, 155 S.E.2d at 792-95.
[7] It is clearly established by the decisions of this Court that the acquisition of land for, and the construction and operation of, an airport for use by the public is a purpose for which a city or a county or both may appropriate and expend public funds and for which it or they may acquire land by the exercise of the power of eminent domain.
Id. at 60, 155 S.E.2d at 795-96.
[8] It is clear upon the record before us that the proposed taking of the land of respondents is to provide a safe approach to an airport which is to be constructed pursuant to the lease of the land for the airport proper, the 'grant agreement' and the 'project application,' and not otherwise. If the petitioner does not have authority to construct and operate the contemplated airport pursuant to the provisions of these documents, the taking of the land of the respondents so as to provide a safe approach to such airport is beyond the authority of the petitioner.
Id. at 61-62, 155 S.E.2d at 796-97.

tain provisions of the grant agreement were found to obligate the county's credit in violation of article VII, section 6.[9]

The court refused to preserve the constitutional validity of the airport project by bringing airports within the ambit of the "necessary expense" exception. Without discussing the merits of including airports in the list of "necessary expenses," the opinion dismissed the question in three sentences, citing precedent from 1938 and 1946:

> [I]t is the duty of the court to determine whether the proposed indebtedness is for a "necessary expense" within the meaning of the above provision of the Constitution . . . Pursuant to this authority and duty, this Court has determined that the construction of a public airport is not a "necessary expense" in that sense. *Airport Authority v. Johnson, supra*;[10] *Sing v. Charlotte, supra*.[11] Thus a county or city may not contract a debt or pledge its faith for the construction or operation of such an airport without first submitting the question to a vote of the people of such county or city.[12]

Thus the court declined to review the holding made thirty years ago, when aviation was in its infancy, notwithstanding the progress and development made in the intervening years, and the resultant demand for airport facilities.

Article VII, section 6, was inserted into the constitution of 1868 as a popular check on the discretion of the legislature and local officials. It was largely motivated by dissatisfaction with the financial chaos occasioned by the failure of railroads and other internal improvements in which local governments had heavily invested; prior to 1868, counties and municipalities had been free to levy taxes and issue bonds upon approval by the General Assembly.[13]

Since adoption of the constitution of 1868, the North Carolina

[9] The court found that the "full credit" of the county was pledged to pay the annual rent of 1,250 dollars under the lease, and that even though there was a provision for termination of the lease, the provision did not permit unilateral termination by the county. Also stressed were covenants contained in the project application and incorporated into the grant agreement which obligated the county to complete construction, and operate and maintain the airport. According to the court, neither the obligation to construct nor the obligation to maintain the airport was limited in the terms of the documents. *Id.* at 62, 155 S.E.2d at 797.

[10] 226 N.C. 1, 36 S.E.2d 803 (1946).

[11] 213 N.C. 60, 195 S.E. 271 (1938)

[12] 271 N.C. at 63-64, 155 S.E.2d at 798.

[13] *See* University R.R. v. Holden, 63 N.C. 410, 426, 431-32 (1869); 30 N.C.L. REV. 313 (1952).

Supreme Court has been perplexed by the challenge of devising a formula by which the expenses of county and municipal government could be divided into those "necessary" and those unnecessary to local governmental administration.[14] By and large, it has been a problem of weighing the democratic, libertarian principles of article VII, section 6, against the modern demands of efficient, effective local government.[15] Among other definitions, "necessary expenses" have been held to be those "ordinary and usual expenditures reasonably required to enable a county to properly perform its duties as part of the State Government."[16] A subsequent attempt at precision sheds little more light:

> The decisions heretofore rendered by the Court make the test of a 'necessary expense' the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is "necessary" . . . .[17]

One writer, commenting on this definition, noted, "Reasonable judges as well as reasonable men may reasonably differ on the meaning of these shibboleths."[18] None the less, the court has reviewed local expenditures, finding some "necessary" and others unnecessary. Among those functions for which taxes can be levied

[14] " 'It would be difficult or impossible to draw a precise line between what are and what are not the necessary expenses of the government of a city,' said the court in *Wilson v. Charlotte,* 74 N.C. 748, 759 (1876); and court decisions from that day to this have demonstrated the truth of this observation." Coates 100. This article gives excellent treatment to judicial interpretation of the "necessary expense" clause prior to 1940.

[15] An absolute prohibition to contract a debt is a prohibition to contract at all, for every contract may and naturally does end in a debt. We cannot suppose that the Constitution intended to deprive these great and necessary public corporations of a power which is usual to all corporations, which these have possessed, and which is necessary to their usefulness, if not to their very existence . . . . Wilson v. Charlotte, 74 N.C. 748, 758-59 (1876). Compare with that, this statement from *Royster*: "When the Constitution puts into, or leaves in, the hands of the people a checkrein upon the discretion of their duly elected officials, it is not a true Liberalism which would give to the constitutional provision an interpretation such as to loosen the hold of the people upon the checkrein." 271 N.C. at 63, 155 S.E.2d at 797.

[16] Keith v. Lockhardt, 171 N.C. 451, 456, 88 S.E. 640, 642 (1916).

[17] Henderson v. Wilmington, 191 N.C. 269, 279, 132 S.E. 25, 30-31 (1926).

[18] Coates 105.

and debts contracted without a referendum are abattoirs,[19] payment of interest on bonds already issued,[20] construction of a courthouse and jail,[21] building and maintenance of public roads,[22] lighting of streets,[23] training and paying of policemen,[24] water and sewer systems,[25] medical treatment for indigents,[26] construction of jetties and boardwalks,[27] and construction of a garbage incinerator.[28] Among purposes which have been classified as unnecessary are parks, playgrounds and recreational centers,[29] public libraries,[30] municipal auditoriums,[31] urban redevelopment programs,[32] construction of a public hospital,[33] and, of course, airports.

Goswick v. Durham,[34] the first case involving the legitimacy of local expenditures for construction of an airport, came before the court in 1937. The City of Durham had purchased land for the airport from funds derived from non-tax revenues, and was preparing to construct the airport, without submitting the project to a referendum. The court upheld the land purchase, but granted an injunction against expenditure of funds for construction. The city made no claim that the airport was a "necessary expense" within the meaning of article VII, section 6; but the court noted:

> While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal expense within the meaning of Article VII, sec. 7, of the Constitution . . . yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities for the use of the "argosies of magic sails . . . dropping down with costly bales"

[19] Moore v. Greensboro, 191 N.C. 592, 132 S.E. 565 (1926).
[20] Wilson v. Charlotte, 74 N.C. 748 (1876).
[21] Wilson v. High Point, 238 N.C. 14, 76 S.E.2d 546 (1953).
[22] Ellis v. Greene, 191 N.C. 761, 133 S.E. 395 (1926).
[23] Ellison v. Williamston, 152 N.C. 147, 67 S.E. 255 (1910).
[24] Green v. Kitchen, 229 N.C. 450, 50 S.E.2d 545 (1948).
[25] Eakley v. Raleigh, 252 N.C. 683, 114 S.E.2d 777 (1960).
[26] Martin v. Raleigh, 208 N.C. 369, 180 S.E. 786 (1935).
[27] Storm v. Wrightsville Beach, 189 N.C. 679, 128 S.E. 17 (1925).
[28] *Id.*
[29] Purser v. Ledbetter, 227 N.C. 1, 40 S.E.2d 702 (1946).
[30] Westbrook v. Southern Pines, 215 N.C. 20, 1 S.E.2d 95 (1939).
[31] Greensboro v. Smith, 241 N.C. 363, 85 S.E.2d 292 (1955).
[32] Horton v. Redevelopment Comm'n, 262 N.C. 306, 137 S.E.2d 115 (1964).
[33] Barbour v. Carteret County, 255 N.C. 177, 120 S.E.2d 448 (1961).
[34] 211 N.C. 687, 191 S.E. 728 (1937).

> to the same extent that paved streets and roads are now regarded for purposes of communication and transportation on land.[35]

A year later, in *Sing v. Charlotte*,[36] the court faced the question of whether a municipality could transfer money in a contingent fund derived from tax revenues to a fund for the maintenance and operation of its municipal airport; the issuance of bonds and levying of additional taxes to finance construction had been approved by the people, but no referendum was held on the transfer of funds for maintenance and operation. The supreme court affirmed the order granting an injunction, applying the test laid down in *Henderson v. Wilmington*,[37] and concluding, "When thus tested, an airport is not a necessary governmental expense."[38] Justice Clarkson dissented vigorously from the determination that the airport was not a "necessary expense" for Charlotte. The dissent pointed to the initial referendum approving construction, and argued that it imposed an implied obligation upon the city to make expenditures necessary to maintain the airport.[39] Seeking to limit the inclusion of airports within "necessary expenses," the Justice argued that an expense might be necessary for one municipality, but not for another.[40] He concluded, "I think that the overwhelming logic of the instant case compels the recognition that a municipal airport at Charlotte, under the conditions set out in the judgment, is a 'necessary expense.' "[41]

In subsequent cases involving airports and article VII, section 6, the court has resolved the question with a brief restatement of

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[35] *Id.* at 689-90, 191 S.E. at 729.

[36] 213 N.C. 60, 195 S.E. 271 (1938).

[37] If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is "necessary" within the meaning of art. VII, sec. 7, and the power to incur such expense is not dependent on the will of the qualified voters. 191 N.C. at 279, 132 S.E. at 30-31.

[38] 213 N.C. at 65, 195 S.E. at 273.

[39] *Id.* at 74, 195 S.E. at 279.

[40] For a full discussion of the role of the courts in determining what are necessary expenses, particularly in relation to the power of the courts to declare an expenditure to be a necessary expense for a narrowly-drawn class of counties and municipalities, *see* Coates 112-15.

[41] 213 N.C. at 76, 195 S.E. at 280.

the *Sing* holding.[42] The dictum in *Goswick* and Justice Clarkson's dissent in *Sing* have gone unnoticed in later cases.

Today, North Carolina airports are constricted in their development and operation by the constitutional prohibition. Common sense would dictate that the costs incidental to minor improvements and operation hardly justify resort to the cumbersome and expensive machinery of county-wide referendum; yet the developed case law requires that a referendum be held before a local government can appropriate money out of a contingent fund,[43] or contract any debt,[44] for its airport—even if acquisition of the airport was previously approved by a vote of the people.[45]

A survey of the constitutions and statutes of neighboring states indicates that the constitutional disability under which public airports labor in North Carolina is unique to the state. South Carolina permits its counties and cities to levy taxes and issue bonds for construction and maintenance of airports, upon approval of the legislature.[46] In Virginia, the constitutional prohibitions relating

[42] Vance County v. Royster, 271 N.C. 53, 64, 155 S.E.2d 790, 798 (1967); Yokley v. Clark, 262 N.C. 218, 222, 136 S.E.2d 564, 567 (1964); Airport Authority v. Johnson, 226 N.C. 1, 7, 36 S.E.2d 803, 808 (1946).

[43] Sing v. Charlotte, 213 N.C. 60, 65, 195 S.E. 271, 273 (1938), proceeds on the theory that the money in such funds was derived in whole or in part from *ad valorem* taxes; the county or municipality is free to appropriate moneys derived from non-tax sources for airport purposes. Airport Authority v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946).

[44] Yokley v. Clark, 262 N.C. 218, 136 S.E.2d 564 (1964). The indebtedness cannot be rendered constitutional by providing for its payment from non-tax funds. *Id.* at 222, 136 S.E.2d at 567; Vance County v. Royster, 271 N.C. 53, 64, 155 S.E.2d 790, 798 (1967). The dangers of a literal, too-exacting construction of the phrase "contract a debt" were pointed out in Wilson v. Charlotte, 74 N.C. 748, 758 (1876): "Such a prohibition would be unreasonable. The duties of a county or city government cannot be performed without often contracting debts . . . . An absolute prohibition to contract a debt is a prohibition to contract at all, for every contract may and naturally does end in a debt." So long as the court construes "debt" restrictively, so that almost any contract made by a city or county is held to incur a debt within the meaning of article VII, section 6, the opportunity for North Carolina local governments to secure federal aid may be curtailed. Most federal grants have "strings" attached; the local government is called upon to make certain covenants, contractual in nature (as in *Royster,* to operate and maintain the airport). Unless the particular purpose for which federal aid is sought falls within the perimeter of "necessary expenses," the county or municipality may find itself without the authority to execute the grant agreement. Yokley v. Clark, *supra* at 224, 136 S.E.2d at 568, cited in Vance County v. Royster, *supra* at 65, 155 S.E.2d at 799.

[45] Sing v. Charlotte, 213 N.C. 60, 195 S.E. 271 (1938).

[46] S.C. CONST. art. 10, § 6. This section was amended in 1945, by insertion of a clause which reads "[T]he General Assembly shall have power to authorize a county or township to levy a tax or issue bonds for the pur-

to debt apply to borrowing by local governments, rather than to the assumption of contractual obligations *per se*;[47] and by statute, local governments are empowered to appropriate funds for the construction and maintenance of airports.[48] Under the Georgia Constitution,[49] the General Assembly is authorized to permit counties to levy taxes to construct, improve, and maintain airports; and a general enabling statute was enacted.[50] Another section of the Georgia Constitution permits counties and municipalities to contract debts up to a value equal to one-fifth of one percent of the assessed value of taxable property on the county or city's books.[51]

The Mississippi Constitution[52] provides that the General Assembly is to make laws to prevent abuse by local governments of their powers to tax and assume debts; there is no provision in the constitution comparable to article VII, section 6. Legislation enabling counties and cities to acquire and maintain airports has been enacted.[53] In other states, the constitutional limitations on debt are directed to the amount of the debt, rather than to the purposes for which the debt is incurred.[54]

The growth of commercial aviation and the comparative lack of constitutional restrictions on airport development in other states seem to suggest a need for a fresh examination of airports as "necessary expenses." That examination was not undertaken in *Royster*. Any contention that the airport contemplated by Vance County is presently necessary for the county would be dubious at best;[55] the court declined, however, to limit its holding to the airport in ques-

poses of construction and maintenance of an airport or the construction and maintenance of landing strips." For the law prior to the 1945 amendment, see Parrott v. Gourdin, 205 S.C. 364, 32 S.E.2d 14 (1944).

[47] VA. CONST. art. 7, § 115a.

[48] VA. CODE ANN. §§ 5.1-43, 45 (1966).

[49] GA. CONST. art. 7, § 2-5701.

[50] GA. CODE ANN. § 11-206 (1933).

[51] GA. CONST. art. 7, § 2-6001.

[52] MISS. CONST. art. 4, § 80.

[53] MISS. CODE ANN. §§ 7537-7539 (1957).

[54] CAL. CONST. art. 11, § 18; ILL. CONST. art. 9, § 12; IND. CONST. art. 13, § 1; OKLA. CONST. art. 10, § 26; W. VA. CONST. art. 10, § 8.

[55] At the time of the arguments in *Royster*, there were only a few privately-owned aircraft in Vance County, and there was no indication that the airport would be served by commercial airlines. No feasibility study was undertaken; the principal benefit argued by proponents of the airport was that it would increase the use of recreational facilities at Kerr Lake and thereby boost the county's economy. 271 N.C. at 57, 155 S.E.2d at 793. The failure of the county commissioners to hold a referendum was unexplained.

tion. Instead it reapplied the rule of thirty years ago, that airports are not one of those purposes which may be considered "necessary" within the meaning of article VII, section 6.

In *Goswick v. Durham,* the first of the "airport cases," the opinion noted that "The law is an expanding science, designed to march with the advancing battalions of life and progress and to safeguard and interpret the changing needs of a commonwealth or community."[56] It is questionable whether the court in *Royster* has stayed in step with those battalions.

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Securities Regulations—Convertible Debentures Not A Class of Equity Security

In *Chemical Fund, Inc. v. Xerox Corp.*,[1] the Second Circuit Court of Appeals was for the second time[2] faced with construing the meaning of "any class of any equity security" in section 16[3] of the Securities Exchange Act of 1934. Chemical Fund is an open end diversified investment company. Early in December 1962, the Fund owned 91,000 shares which represented 2.36 percent of the Xerox common stock.[4] In 1961 the Fund acquired four and one

[56] 211 N.C. at 690, 191 S.E. at 730.

[1] 377 F.2d 107 (2d Cir. 1967).

[2] In Ellerin v. Massachusetts Mut. Life Ins. Co., 270 F.2d 259 (2d Cir. 1959), the court held that the ten percent holder of a series of stock was not the ten percent holder of a class of equity security for the purposes of section 16(b).

[3] Section 16(a) of the statute defines insider for the purposes of the statute as "Every person who is directly or indirectly the beneficial owner of more than ten percentum of any class of any equity security . . . or who is a director or an officer of the issuer of such security. . . ." Securities Exchange Act of 1934, 15 U.S.C. § 78p(a) (1964). The section under consideration in the principal case reads:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . .

Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1964).

[4] At that time Xerox had 3,851,844 shares of common stock outstanding. Chemical Fund, Inc. v. Xerox Corp., 377 F.2d 107, 110 (2d Cir. 1967).