IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1993 Term

_____

No. 21829

_____

WILLIAM S.E. WINKLER AND DIANE HICKLE,
Plaintiffs Below, Appellees

v.

STATE OF WEST VIRGINIA SCHOOL BUILDING AUTHORITY, AND UNITED NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE UNDER THE CERTAIN TRUST INDENTURE BY AND BETWEEN THE SCHOOL BUILDING AUTHORITY OF WEST VIRGINIA, A PUBLIC BODY CORPORATE AND UNITED NATIONAL BANK, AS TRUSTEE, DATED JANUARY 1, 1990, SECURING CAPITAL IMPROVEMENT REVENUE BONDS SERIES 1990a AND SUBSEQUENT SERIES, AS AMENDED AND SUPPLEMENTED,
Defendants Below,

STATE OF WEST VIRGINIA SCHOOL BUILDING AUTHORITY,
Appellant

Appeal from the Circuit Court of Kanawha County
Honorable Paul Zakaib, Judge
Civil Action No. 93-C-3601

AFFIRMED

Submitted: July 20, 1993
Filed: July 22, 1993

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1993 Term

No. 21830
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WILLIAM S.E. WINKLER AND DIANE HICKLE,
Plaintiffs Below, Appellees

v.

STATE OF WEST VIRGINIA SCHOOL BUILDING AUTHORITY, AND UNITED NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE UNDER THE CERTAIN TRUST INDENTURE BY AND BETWEEN THE SCHOOL BUILDING AUTHORITY OF WEST VIRGINIA, A PUBLIC BODY CORPORATE AND UNITED NATIONAL BANK, AS TRUSTEE, DATED JANUARY 1, 1990, SECURING CAPITAL IMPROVEMENT REVENUE BONDS SERIES 1990a AND SUBSEQUENT SERIES, AS AMENDED AND SUPPLEMENTED,
Defendants Below,

UNITED NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE,
Appellant

Appeal from the Circuit Court of Kanawha County
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JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction.

2. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syllabus Point 1, UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984).

3. A category of bonds that override the specific limitations contained in Sections 4 and 6 of Article X of the West Virginia Constitution are bonds that the Legislature issues after following the procedures contained in Section 2 of Article XIV of the Constitution relating to constitutional amendments. Under the amendment procedure, a majority of qualified voters voting on the issue must approve the issuance of the bonds.

4. The restrictions contained in Section 4 of Article X of the West Virginia Constitution deal with the creation of long-term debt by the State or its agencies by way of legislative enactments through revenue bonds or other similar obligations.

5. The plain language of Section 6 of Article X of the West Virginia Constitution is designed to restrict the State from granting credit to subordinate political subdivisions such as municipalities and counties, as well to forbid the State from granting credit or assuming liabilities for debts of private persons or other entities.

6. Section 4 of Article X of the West Virginia Constitution is not designed to prohibit the State or the state's agencies from issuing revenue bonds that are to be liquidated from contracts requiring rental payments from another state agency or from contracts for necessary services such as utilities; nor does this constitutional provision preclude the issuance of revenue bonds which are to be redeemed from a special fund.

7. Revenue bonds authorized under the School Building Authority Act, W. Va. Code, 18-9D-1, et seq., constitute an indebtedness of the State in violation of Section 4 of Article X of the West Virginia Constitution. To the extent that Syllabus Point 3 of State ex rel. Resource Recovery-Solid Waste Disposal Authority v. Gill, 174 W. Va. 109, 323 S.E.2d 590 (1984), holds to the

contrary, it is overruled.

8. "'In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.' Syl. pt. 5, Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979)." Syllabus Point 4, Kincaid v. Mangum, ___ W. Va. ___, ___ S.E.2d ___ (No. 21505 6/10/93).

9. Based upon our general principles of retroactivity of judicial decisions, revenue bonds issued by the State of West Virginia School Building Authority pursuant to W. Va. Code, 18-9D-1, et seq., prior to the date of this opinion are not invalid.

10. Because the the previous issue of State of West Virginia School Building Authority bonds is not invalid under principles of retroactivity and because we also have determined that the refunding of bonds does not create new debt, the State of West Virginia School Building Authority is authorized to issue refunding bonds from the Capital Improvement and Revenue and Refunding Bonds, Series 1993, to replace existing bonds at a lower interest rate.

Miller, Justice:

The question that we are asked to decide on this appeal is whether the Circuit Court of Kanawha County was in error when it held in its July 9, 1993 order that the Capital Improvement and Revenue and Refunding Bonds, Series 1993, issued by the appellant, State of West Virginia School Building Authority (SBA) in the amount of $338,145,000, were invalid as violating Sections 4 and 6 of Article X of the Constitution of West Virginia. These constitutional provisions restrict the ability of the State to issue bonds that draw upon the State's general revenue funds.

I.

The appellants are the SBA and the United National Bank (Bank). The Bank is the Trustee under a certain Trust Indenture between it and the SBA dated January 1, 1990, which indenture is part of the bond financing arrangements. The appellees are two citizens and taxpayers who sought a declaratory judgment with attendant injunctive relief against the SBA on June 16, 1993, in the Circuit Court of Kanawha County. Their claim was that the 1993 Series revenue bonds about to be issued pursuant to W. Va. Code, 18-9D-1, et seq., were unconstitutional because issuance of the bonds violated the provisions of Sections 4 and 6 of Article X of the West Virginia Constitution prohibiting state debt.

On June 21, 1993, the circuit court granted the Bank the right to intervene in this case. After several hearings were held, the circuit court, by order entered July 9, 1993, held that issuance of the bonds was unconstitutional, and therefore enjoined the SBA from issuing the bonds. The basis for the circuit court's holding was that the bonds commit the State Legislature to fund the bonds' retirement and that this commitment constitutes an impermissible debt against the State. We granted this appeal on July 13, 1993, on an expedited basis because of the urgent need for a decision on the issues involved in this case. A full hearing was held on July 20, 1993.

There is no question that the challenged bonds were authorized by the SBA under the provisions of W. Va. Code, 18-9D-1, et seq. The general outline of that article, with regard to the bond arrangement, is as follows. Under Section 4, the SBA may issue revenue bonds under the guidelines set out in that section. Pursuant to Section 6, a building capital improvement fund is "created in the state treasury." This same section authorizes the SBA to pledge this fund to liquidate the revenue bonds. Section 8 provides further directions as to the issuance of the bonds, the

trust indenture agreement, and the pledge of funds to liquidate the bonds. Section 12 spells out in more detail the trust agreement for the benefit of the bondholders. Section 13 mandates that a sinking fund be created in the State Treasurer's office in order to liquidate the bonds. Finally, under Section 14, this statement is made:

> "No provisions of this article shall be construed to authorize the school building authority at any time or in any manner to pledge the credit or taxing power of the state, nor shall any of the obligations or debts created by the school building authority under the authority herein granted be deemed to be obligations of the state."

It is Section 14, together with the disclaimer on the face of the bonds and language in the trust agreement, that causes the appellants to claim that the bonds are neither legal obligations of the State nor of the SBA, and therefore, that the bonds do not constitute a debt obligation of the State under Sections 4 and 6 of Article X of the West Virginia Constitution. The relevant proposed bond language is as follows:

> "The Series 1993 Bonds are limited obligations of the Authority payable solely from the Trust Estate pledged under the Indenture. The Authority may not at any time or in any manner pledge the credit or taxing power of the State, nor shall any of the obligations or debts created by the Authority under the Indenture be deemed to be obligations of the State.
>
> "The Series 1993 Bonds are being issued on a parity with the lien of certain outstanding bonds of the Authority on amounts on deposit in the Revenue Fund. All Bonds issued under the Indenture are secured by a pledge of moneys appropriated by the West Virginia State Legislature and transferred to United National Bank, as the trustee, for deposit in the Revenue Fund established under the Indenture. AMOUNTS AVAILABLE TO BE TRANSFERRED TO THE TRUSTEE FOR DEPOSIT IN THE REVENUE FUND ARE SUBJECT TO ANNUAL APPROPRIATION BY THE STATE LEGISLATURE. THE

STATE LEGISLATURE IS NOT LEGALLY OBLIGATED TO MAKE APPROPRIATIONS IN AMOUNTS SUFFICIENT TO PAY DEBT SERVICE ON THE BONDS."

The applicable language in the trust agreement relied upon by the appellants is:

> "All Bonds issued under the Indenture, including the Series 1993 Bonds, are secured by a pledge of Revenues. 'Revenues' means (i) any moneys appropriated by the State Legislature, deposited in the Building Fund and transferred to the Trustee in conformance with the Constitution and laws of the state and (ii) any other moneys, income or property pledged by the Authority to the payment of Bonds.
>
> "Moneys appropriated by the Legislature and transferred to the Trustee are currently the sole source of Revenues. AMOUNTS AVAILABLE TO BE TRANSFERRED TO THE TRUSTEE ARE SUBJECT TO ANNUAL APPROPRIATION BY THE LEGISLATURE. THE STATE LEGISLATURE IS NOT LEGALLY OBLIGATED TO MAKE APPROPRIATIONS IN AMOUNTS SUFFICIENT TO PAY DEBT SERVICE ON THE BONDS."

Before addressing the merits of the particular bond issue in this case, it is useful to review some of our prior cases analyzing Sections 4 and 6 of Article X of the West Virginia Constitution.

II.

A.

We wish to say at the outset that we are fully aware of the gravity of the bond issue in this case, particularly since it relates to our public educational system. This Court has not been insensitive to the needs of our school system. Almost fifteen years ago in Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979), we spoke forcefully to these needs, stating that the Thorough and Efficient Education Clause in Section 1 of Article XII of the West Virginia Constitution was not an empty vessel. We mandated in Pauley that our entire educational system be closely scrutinized and appointed a special judge to oversee this review.

Pauley did not address the question of the issuance of bonds to fund school building construction and capital improvements. The appellees appear to suggest that the Thorough and Efficient Education Clause can validate revenue bonds that are authorized by the Legislature, but are found to be unconstitutional under Sections 4 and 6 of Article X of our Constitution. We cannot agree with such an assertion because the generality of the Thorough and Efficient Education Clause in Section 1 of Article XII of our Constitution cannot override the more specific provisions on state debt limitation contained in Sections 4 and 6 of Article X. We pointed out in State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973), that: "Questions of constitutional construction are in the main governed by the same general rules as those applied in statutory construction." (Citation omitted). See also State ex rel. City of Princeton v. Buckner, 180 W. Va. 457, 461-62, 377 S.E.2d 139, 143 (1988).

We have frequently utilized the rule of statutory construction set out in Syllabus Point 1 of UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984):

> "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."

Finally, we acknowledge that when we are called upon to determine the constitutionality of a legislative enactment, we are guided by various restraints that we have imposed upon our judicial powers, as we outlined in Syllabus Point 4 of Tony P. Sellitti Construction Co. v. Caryl, 185 W. Va. 584, 408 S.E.2d 336 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 969, 117 L. Ed. 2d 135 (1992):

> """In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [W. Va. Const. art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative

> enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Syl. pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965).' Syl. pt. 2, West Virginia Public Employees Retirement System v. Dodd, 183 W. Va. 544, 396 S.E.2d 725 (1990)."

B.

We begin our legal discussion regarding the validity of these school revenue bonds by noting that there is a category of bonds that override the specific limitations contained in Sections 4 and 6 of Article X. They are bonds that the Legislature issues after following the procedures contained in Section 2 of Article XIV of our Constitution relating to constitutional amendments. Under the amendment procedure, a majority of qualified voters voting on the issue must approve the issuance of the bonds.

Bonds issued pursuant to a constitutional amendment override the more general bond limit restrictions because they were approved by the voters for the specific purposes contained in the amendment. Thus, under our traditional rules of constitutional construction, these bonds supersede the general bond limitations. See State ex rel. Brotherton v. Blankenship, supra; State ex rel. City of Princeton v. Buckner, supra. The bonds in this case do not fall into the category of bonds approved by constitutional amendment.

C.

The two constitutional provisions at issue in this case, Sections 4 and 6 of Article X, have been interpreted by this Court to serve the common purpose of restricting the Legislature's ability to create long-term debt. These provisions are often cited together in the same case; however, each provision serves a separate purpose. The restrictions contained in Section 4 of Article X deal with the creation of long-term debt by the State or its agencies through revenue bonds or other similar obligations by way of legislative enactments. See State ex rel. Board of Governors of West Virginia University v. O'Brien, 142 W. Va. 88,

97, 94 S.E.2d 446, 451 (1956). Moreover, in State ex rel. County Court of Marion County v. Demus, 148 W. Va. 398, 409, 135 S.E.2d 352, 359 (1964), we compared the purpose of Section 6 of Article X with Section 4, noting: "Section 4 of Article X of the Constitution imposes upon the state limitations with respect to indebtedness similar to those imposed upon counties and cities by Article X, Section 6 of the Constitution[.]" Indeed, the plain language of Section 6 is designed to restrict the State from granting credit to subordinate political subdivisions such as municipalities and counties, as well as to forbid the State from granting credit or assuming liabilities for debts of private persons or other entities.

Earlier, in Bates v. State Bridge Commission, 109 W. Va. 186, 188, 153 S.E. 305, 306-07 (1930), in alluding to the purpose of Section 4 of Article X, we spoke about "the experience of the mother state with debts contracted by her," of which the framers of our 1872 Constitution were aware and therefore "provided that this state should not contract indebtedness, except in specified instances[.]" 109 W. Va. at 189, 153 S.E. at 307. Moreover, in State ex rel. West Virginia Housing Development Fund v. Waterhouse, 158 W. Va. 196, 208-09, 212 S.E.2d 724, 731 (1974), the purpose of Section 6 of Article X was given the following summary: "This Court expressly noted that the 'purpose of Section 6 of Article X was to guard against the granting of the credit of the State in aid of any county, city, township, corporation or person . . . .'." Quoting State ex rel. Dyer v. Sims, 134 W. Va. 278, 289, 58 S.E.2d 766, 773 (1950), rev'd on other grounds, 341 U.S. 22, 71 S. Ct. 557, 95 L. Ed. 713 (1951).

Thus, we believe our cases make clear the substantive distinction between the provisions of Sections 4 and 6 of Article X of our Constitution. In this case, we deal only with Section 4. In State ex rel. Dyer v. Sims, supra, in regard to Section 4 of Article X, we stated in Syllabus Point 5:

> "Under Section 4, Article X, of the Constitution of this State, the Legislature is without power to create an obligation to appropriate funds, for a purpose not mentioned in said section, by future Legislatures. Such legislation, if otherwise valid, would be void under said section, as creating a debt inhibited thereby."

Although the wording of Syllabus Point 5 of State ex rel. Dyer v. Sims, supra, is somewhat awkward, it seems clear that the Court did not literally mean that any contract entered into by a state agency

that extended over more than one year was constitutionally infirm. Dyer recognized that by creating state agencies, the Legislature was obligating itself, in a constitutionally permissible manner, to pay funds necessary for those agencies' operational expenses from future general revenue funds:

> "Ordinarily, the creation of a State board or commission which requires an appropriation of public funds to carry out its purposes is not treated as the creation of a debt, although its generally contemplated continuation from year to year, and for an indefinite period, must necessarily involve future appropriations. Practically all agencies created by the Legislature require appropriations from time to time, and that was necessarily contemplated at the time they were created." 134 W. Va. at 290, 58 S.E.2d at 773.

Much of this same type of reasoning also was recognized in State ex rel. Hall v. Taylor, 154 W. Va. 659, 672, 178 S.E.2d 48, 56 (1971), where we said: "[A]dmittedly it is contemplated by the statute that the rent will be paid from general revenue funds to be appropriated by the Legislature to the various agencies and departments of the state government from year to year." Moreover, in State ex rel. Board of Governors v. Sims, 133 W. Va. 239, 244, 55 S.E.2d 505, 508 (1949), we specifically recognized that the Legislature's creation of a pension system, which required periodic funding from general revenues, did not constitute "the creation of a debt inhibited by Section 4 of Article X of the Constitution."

It is the fact that state agencies have recurring needs for services, such as rental space and utility services, that form the basis for our cases approving the State's lease-financing arrangements. In such a situation, the lease payments are used to retire revenue bonds that were issued to construct the building. See State ex rel. State Bldg. Comm'n v. Moore, 155 W. Va. 212, 184 S.E.2d 94 (1971). The foregoing rationale formed the basis for our approval of the energy supply contract entered into by the West Virginia University in State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Authority v. Gill, 174 W. Va. 109, 323 S.E.2d 590 (1984), even though the contract was not a lease. We stated in Syllabus Point 1 of Gill: "Bonds of a state or political subdivision payable solely out of revenue derived from a utility of a public nature acquired by the money derived from the

bonds do not create debts within the constitutional inhibition against the contraction of public debt."

Moreover, the foregoing rationale also was behind our approval of the issuance of industrial and commercial revenue bonds under W. Va. Code, 13-2C-1. Under this legislation, a county acquires land and contracts with a private corporation to lease the land for a rental sufficient to retire the bonds that are issued by the county to secure the funds to build the facility. See, e.g., State ex rel. Ohio County Comm'n v. Samol, 164 W. Va. 714, 275 S.E.2d 2 (1980); State ex rel. County Court of Marion County v. Demus, supra. All these various types of lease arrangements have been generally accepted elsewhere as valid against a claim of constitutional debt infirmity.

In addition, we have given our approval to the payment of revenue bonds that are liquidated out of a special fund. This concept is related to the lease-financing arrangement, but differs because the special fund is ordinarily a tax or a fee generated from the facility itself, such as tolls for the use of a bridge or road, or parking-garage fees. In State ex rel. Hall v. Taylor, 154 W. Va. at 672, 178 S.E.2d at 56, we stated the general basis for the special fund concept:

> "It is difficult to state the 'separate fund doctrine' precisely. Its application varies somewhat among appellate courts of various states. It is applied uniformly in relation to projects or facilities which are self-liquidating, such as the toll bridge cases. Some courts hold that the doctrine applies in any case of a fund created by a special excise tax as distinguished from property taxes."

The special fund doctrine provided the basis for both our approval of the State Road Commission's special fund to generate revenues to construct the building for the Department of Highways in State ex rel. Building Commission v. Moore, supra, and the use of the Alcoholic Beverage Control Commission's profits in the same case to fund the construction of its warehouse. The same rationale supports our toll-bridge cases and our cases dealing with the construction of student dormitories at West Virginia University out of special student fees. The special fund doctrine is generally recognized in other jurisdictions as not being violative of constitutional debt limitations.

The appellants argue that both the special fund doctrine and the service contract or lease agreement concept still involve funds that ultimately can be said to come from potential general revenue sources. Thus, they assert that these principles, which we have acknowledged to be acceptable as not violating Section 4 of Article X, are really no different than the more direct payments from general revenue funds used in this case.

We disagree because appellants overlook several significant differences. First, the special fund doctrine is based on the fact that a specific source of revenue is required to be identified and committed to the repayment of the bonds beyond mere annual appropriations from the general revenue fund. Second, by identifying and dedicating this specific source of funds, the process automatically limits the total value of bonds that can be used. The Legislature will have to quantify initially the amount it is willing to commit in order to avail itself of the special fund doctrine.

Much the same process occurs in the case of a service contract or lease arrangement. There, the revenue source is the rental payments or the amounts paid under the service contract. These amounts are ultimately controlled by the cost of the building which will determine the total value of bonds to be issued. The cost of the proposed building, in turn, will be governed by economic and market considerations which limit the cost of the project and the total value of bonds to be issued.

In other words, these funding sources, which we have approved in earlier cases, have built-in restraints that must be considered by the Legislature when it authorizes legislation for the issuance of the bonds. In this case, the bonds have no such identifiable controls because their payment is directly from the general revenue fund. There is no statutory restriction on the total value of SBA bonds that may be issued and, unlike special-fund or lease-payment bonding, there is no identifiable source that controls the total value of bonds to be issued.

From the foregoing law, this general principle emerges that Section 4 of Article X is not designed to prohibit the State or the State's agencies from issuing revenue bonds that are payable from contracts that require rental payments of another state agency or require other necessary recurring contractual expenses such as utilities; nor does this constitutional provision preclude the issuance of revenue bonds which are to be redeemed from a special

fund.

D.

The appellants place primary reliance on State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Authority v. Gill, 174 W. Va. 109, 323 S.E.2d 590 (1984), and in particular, on Syllabus Point 3:

> "The ultimate issue in determining whether bond financing creates a state debt in violation of Article X, Section 4 [of the West Virginia Constitution] is not whether the bonds may be paid from future legislative appropriations, but whether successive legislatures are obligated to make such appropriations."

We do not find Gill persuasive simply because in Gill there was a revenue source for liquidation of the bonds that was independent of a direct grant from the State's general revenue fund. In Gill, the West Virginia Resource Recovery-Solid Waste Disposal Authority (Authority) was authorized to issue revenue bonds to construct a power generating facility in Morgantown. West Virginia University had contracted to purchase a substantial amount of its energy use from the Authority and the University's payment for this service was to be used to liquidate the bonds issued by the Authority.

In the instant case, the appellants argue that although future legislative appropriations may be used to pay for the bonds, it is clear from the language of the bonds themselves that there is no legal obligation requiring the Legislature to make such appropriations. Certainly, Syllabus Point 3 of Gill, if divorced from the facts in that case, could be used to support the appellants' position. However, this syllabus point was derived from a conclusory statement at the end of the opinion. There was no discussion therein of its impact on Section 4 of Article X of our Constitution beyond the facts of Gill.

From a literal standpoint, if Syllabus Point 3 of Gill is the litmus test for the constitutionality of bonds issued by a state authority, then the constitutional limitation of Section 4 of Article X is meaningless. Under such an interpretation, the Legislature could authorize the State or its agencies to issue bonds in any amount so long as the bonds are used for a public purpose, and so long as the terms of the bonds make clear that the bonds are not state obligations and that the Legislature is

under no obligation to fund the bonds.

It is difficult for us to understand how the Gill case, under its facts, could be construed to authorize a radical change from our earlier bond cases. Certainly, the financing arrangement for the bonds in Gill was markedly different from the financing arrangement for the bonds in this case. The critical language in Gill followed a lengthy discussion and citation of cases approving long-term contracts by public agencies for the purchase of necessary services and concluded with this language: "We see no reason why the so-called 'service contract doctrine' should not apply to contracts entered into by the State or its agencies to buy energy." 174 W. Va. at 114, 323 S.E.2d at 595. (Citation omitted).

The obvious import of Gill was to loosen the rather harsh restrictions created in State ex rel. Hall v. Taylor, supra, as to the use of lease contracts to finance the retirement of revenue bonds. In Hall, the Legislature authorized the State Building Authority to issue some $24,000,000 in revenue bonds. The proceeds of the bonds were to be used to build several office buildings for the purpose of housing a variety of state agencies. The revenues for the repayment of the bonds were to come from rents paid by the various state agencies leasing the buildings. We concluded that because the agencies were funded by general revenue appropriations from the Legislature, that the Legislature would thus be required to pay the agencies' rents from such funds. This arrangement would create a state debt in violation of Section 4 of Article X of our Constitution.

Certainly, Gill's attempt to rectify Hall might have been better understood if its language were more precise. Gill also might have mentioned State ex rel. State Building Commission v. Moore, 155 W. Va. 212, 184 S.E.2d 94 (1971), where we approved the legislative authorization of the use of certain State Road Fund monies as rent for office space for the Department of Highways in a building constructed by the State Building Commission. The rental payments were to be utilized to liquidate revenue bonds issued by the Commission in order to build the facility. Moore also approved of a separate statutory provision that authorized a special fund from the sale of liquor "to be used by various agencies or departments of state government for payment of rent for office space leased from the Building Commission as a means of paying the principal of and the interest on 'state building revenue bonds of the state' . . . issued . . . to finance the construction of the buildings[.]" 155 W. Va. at 231, 184 S.E.2d at 105. We

found in Syllabus Point 4 of Moore that the legislation at issue therein did not violate Section 4 of Article X of our Constitution.

We earlier observed that none of our prior cases, including Gill, have ever considered a revenue bond mechanism similar to the one in the present case. Our earlier cases share a common mechanism for constitutional acceptance, i.e., the revenue bonds were payable from either a special fund dedicated to the purpose for which they were issued or were payable from lease rental payments or similar contract arrangements for a necessary service on the part of the public agency. Here we are faced with bonds issued by the SBA which will be liquidated by legislative appropriations from the general fund that the Legislature is not legally obligated to make. The ultimate contention in favor of the bonds' constitutionality is that because there is no legal obligation to pay the bonds, then there is no state debt created. Consequently, there is no violation of Section 4 of Article X.

While we may admire the legal sophistry of this argument, it defies our practical judgment. If the bonds are not paid, it is obvious that the State's credit will be impaired. The default on a bond issue of this size hardly can be expected to draw cheers from the bondholders or their brokerage houses or the bond financial rating services.

In considering the validity of revenue bonds, Hall v. Taylor, supra, admonishes us that "[i]t is the duty of this Court . . . to consider the substance of the plan envisioned by the statute in determining the question of constitutionality." 154 W. Va. at 673, 178 S.E.2d at 57. (Citation omitted). Moreover, Hall espoused the concept that a "mere legislative declaration that a state debt is not created . . . is not conclusive or binding on a court." 154 W. Va. at 674, 178 S.E.2d at 57. Following other jurisdictions, Hall held that it is a judicial and not a legislative question "[w]hether a state debt is created by [a] statute[.]" 154 W. Va. at 674, 178 S.E.2d at 57.

There are several cases from other jurisdictions that have dealt with revenue bonds issued in a fashion similar to the bonds in this case. The appellants point to Dykes v. Northern Virginia Transportation District Commission, 242 Va. 357, 411 S.E.2d 1 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 2275, 119 L. Ed. 2d 201 (1992), where the Fairfax County Board of Supervisors entered into a contract to issue $300,000,000 in revenue bonds to finance construction of a highway. The Board of Supervisors agreed

to pay for the liquidation of the bonds out of its general revenue funds. However, the contract had qualifying language stating:

> "[N]othing in this Contract shall be deemed to obligate the Board of Supervisors of the County to appropriate any sums on account of any payments to be made by the County hereunder. This Contract shall not constitute a pledge of the full faith and credit of Fairfax County or a bond or debt of Fairfax County in violation of Section 10 of Article VII of the Constitution of the Commonwealth." 242 Va. at 361-62, 411 S.E.2d at 3.

A challenge was made that this arrangement violated the prohibition against long-term debt in the Virginia Constitution, which required that such debt be submitted for approval of the voters. The Virginia Supreme Court initially recognized this contract escape clause, but focused on its practical effect:

> "Although the contract permits the county to discontinue its promised appropriations, we must also consider the practical effect of such a calamitous event in deciding whether the county in fact would be bound to continue to service the bond issue and, therefore, has incurred a 'debt' proscribed by Article VII, § 10(b). The county recognizes the importance of its fiscal integrity. . . .
>
> "The county also recognizes the disastrous effect that would follow any failure by the board of supervisors to make an annual appropriation and the county argues that such a disaster would never be permitted to occur. That argument implicitly acknowledges that the bond issue would have the practical effect of a long-term debt binding the county.
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> ". . . It is obviously contemplated that the issuance of the bonds in accordance with the contract would bind future boards of supervisors to make annual appropriations of

> sufficient funds to finance the bonds. Manifestly, the animating purpose of the bond contract arrangement is to create a long-term debt, without submitting the debt to a vote of the qualified voters of Fairfax County." 242 Va. at 364-65, 411 S.E.2d at 4-5.

However, the court granted a rehearing and, by a 4-3 margin, the court reversed its opinion and held the bonds to be constitutional. It came to this conclusion: "[W]e hold that Art. VII, § 10(b) is not applicable here because no constitutional debt was incurred by the County[.]" 242 Va. at 368, 411 S.E.2d at 10. This reversal was based on the premise that financial documents did not "impose a legally enforceable obligation on the County to appropriate the funds or to repay the bonds." 242 Va. at 368, 411 S.E.2d at 9. (Emphasis in original).

Much the same result was reached in Steup v. Indiana Housing Finance Authority, 273 Ind. 72, 402 N.E.2d 1215 (1980), where, in the revenue bond statute itself, there was language to the effect that the bonds were not an obligation of the state nor was there any obligation on the part of the legislature to fund the liquidation of the bonds. It was admitted that revenue to retire the bonds was to come from legislative appropriations, but the court stated:

> "[T]he legislature may appropriate funds to the capital reserve fund. However, no funds can flow into the reserve fund unless and until there is an appropriation by the legislature. The Act allows but does not require such appropriations." 273 Ind. at 78, 402 N.E.2d at 1219. (Emphasis in original).

We simply cannot agree with the rationale of the Virginia and Indiana courts as we find it too chimerical. Obviously, where the only source of funds for revenue bonds is general appropriations, it defies logic to say that the Legislature has no obligation to fund such bonds. These courts are willing to ignore the practical reality that will be visited upon a state's credit if there is a default on the bonds. What these courts have done is to ignore the plain language and practical effect of the bond legislation.

We find a more rational and logical approach in State ex

rel. Ohio Funds Management Board v. Walker, 55 Ohio St. 3d 1, 561 N.E.2d 927 (1990). There the Ohio legislature created the Ohio Funds Management Board and authorized the Treasurer to issue revenue anticipation notes. Under the legislation, the notes were declared not to be a debt or bonded indebtedness of the state. Moreover, the notes carried this disclaimer: "'[T]hey do not * * * represent or constitute a debt or bonded indebtedness of the state within the meaning of any provision of the Ohio Constitution [. . . .] The holders or owners of notes shall not be given the right, and have no right, to have excises or taxes levied by the state for the purpose of paying note service charges * * *.'" 55 Ohio St. 3d at 8, 561 N.E.2d at 933.

The Supreme Court of Ohio began its analysis by stating: "[W]e must look to both the plain language and practical effect of [the statute]. This court must examine a transaction not only for what it purports to be, but what it actually is." 55 Ohio St. 3d at 7, 561 N.E.2d at 932. (Citation omitted). The court then proceeded to analyze the various sections of the applicable legislation. It found a requirement therein authorizing payments from the general revenue fund "'to pay principal, interest, and premium, if any, payable on notes issued . . . and for paying financing costs and costs for . . . services . . . to the extent not paid from note proceeds.'" 55 Ohio St. 3d at 8, 561 N.E.2d at 933. (Citation omitted).

Moreover, the court found that there was statutory authority "granted to the noteholders to require the Treasurer to deposit sufficient tax revenues into the Note Service Fund to pay the notes[.]" 55 Ohio St. 3d at 8, 561 S.E.2d at 933. Based on these provisions, the Supreme Court of Ohio concluded that its constitutional debt limit was violated.

When we analyze the School Building Authority Act, W. Va. Code, 18-9D-1, et seq., we find a pattern similar to the Ohio legislation. W. Va. Code, 18-9D-6, creates in the "state treasury a school building capital improvements fund to be expended by the authority for the purposes of this article." This same section authorizes the SBA "to pledge all or such part of the revenues paid into the school building capital improvements fund as may be needed to meet the requirements of any revenue bond issue or issues authorized by this article . . . and in any trust agreement made in connection therewith[.]"

W. Va. Code, 18-9D-8, relates to the issuance of the bonds and requires them to be signed by the governor and by the president or vice-president of the SBA "under the great seal of the

state, attested by the secretary of state[.]" It goes on to require:

> "Any pledge of revenues for such revenue bonds made by the school building authority shall be valid and binding between the parties from the time the pledge is made; and the revenues so pledged shall immediately be subject to the lien of such pledge without any further physical delivery thereof or further act."

The right of the SBA to enter into trust agreements for bondholders is contained in W. Va. Code, 18-9D-12. In the following section, W. Va. Code, 18-9D-13, a sinking fund is created "in an amount sufficient to meet the requirements of any issue of bonds sold under the provisions of this article, as may be specified in the resolution of the authority authorizing the issue thereof and in any trust agreement entered into in connection therewith." Finally, we observe that while W. Va. Code, 18-9D-14, provides that the SBA cannot pledge the credit or taxing power of the State, and that the SBA's obligations are not "deemed to be obligations of the state," it does not contain any language to the effect that the Legislature is not obligated to fund the bonds.

From the foregoing provisions, it would be difficult to conclude that the revenue bonds issued by the SBA are not obligations of the State. Certainly, the requirement of maintaining the sinking fund in order to service the bonds and provide for their redemption indicates a financial commitment by the Legislature. The same is true with respect to the pledge of the fund for the benefit of the bondholders.

Moreover, in 1992, Section 17 was added to Article 9D of Chapter 18. It directs that unencumbered interest in an amount of One Million Dollars ($1,000,000) held by any bank acting as trustee be transferred to the State's general revenue fund. This section goes on to explain:

> "The purpose of the transfer of funds required by this section is to facilitate the appropriation of a like amount to the school building capital improvements fund, within the state budget for the fiscal year commencing on the first day of July, one thousand nine hundred ninety-two, to be used as debt service for revenue bonds to be issued

> by the authority pursuant to the provisions of section eight [§ 18-9D-8] of this article to finance needs projects to be selected by the authority which have not heretofore been funded because of the unavailability of necessary funding, and to pay the costs and reserves of such bond issues."

Here again we see a positive commitment on the part of the Legislature to pay the debt on the bonds.

Finally, unless we are to abandon our logic and common sense, we cannot help but conclude that the statutory scheme surrounding these bonds bespeaks a legislative requirement that they be funded. Much the same conclusion was reached by the Ohio Supreme Court in State ex rel. Ohio Funds Management Board v. Walker, supra. Even if we were to close our eyes to this statutory language, we could not close our minds to the practical consequences of this revenue arrangement. To accept the premise that the Legislature is not bound to fund the bonds and would allow a default, thereby impairing the credit rating of the State, assumes a naivete on our part that we simply do not possess.

Accordingly, we hold that the revenue bonds authorized under the School Building Authority Act constitute an indebtedness of the State in violation of Section 4 of Article X of the West Virginia Constitution. To the extent that Syllabus Point 3 of State ex rel. Resource Recovery-Solid Waste Disposal Authority v. Gill, supra, holds to the contrary, it is overruled. However, for the reasons assigned in the next sections, we decline to make this decision retroactive so as to invalidate the bonds earlier issued. Nor do we foreclose the SBA from exercising its right under W. Va. Code, 18-9D-9, to issue refunding bonds on the earlier issued bonds in order to secure a more favorable interest rate and, thereby, save state funds.

III.

In a number of cases, we have discussed whether the principles of a given opinion should be extended retroactively so as to be applicable to past events. In this case, we are aware that the SBA already has issued revenue bonds and that the funds from those bonds not only were used to complete new schools, but also, in a number of instances, as being used to fund construction already underway or authorized although not yet actually started.

It is apparent that voiding these bonds would bring

considerable financial chaos to the State. Not only would it be damaging to the school system and the construction that is taking place, but it would place an enormous financial hardship on the State and ultimately the citizens as taxpayers. Our test for determining whether to make a court decision retroactive was recently stated in Syllabus Point 4 of Kincaid v. Mangum, ___ W. Va. ___, ___ S.E.2d ___ (No. 21505 6/10/93):

> "'In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.' Syl. pt. 5, Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979)."

See also Syl. pt. 2, Devrnja v. West Virginia Bd. of Medicine, 185 W. Va. 594, 408 S.E.2d 346 (1991); Geibel v. Clark, 185 W. Va. 505, 510, 408 S.E.2d 84, 89 (1991); Syl. pt. 2, Ashland Oil, Inc. v. Rose, 177 W. Va. 20, 350 S.E.2d 531 (1986); Daily Gazette Co., Inc.

v. Committee on Legal Ethics, 176 W. Va. 550, 551-52, 346 S.E.2d 341, 342-43 (1985); Bond v. City of Huntington, 166 W. Va. 581, 600, 276 S.E.2d 539, 549 (1981); Syl. pt. 3, Ables v. Mooney, 164 W. Va. 19, 264 S.E.2d 424 (1979).

While our bond law has been relatively certain as to constitutional limitations, we are willing to accept the assertion that Syllabus Point 3 of Gill may have been misconstrued to authorize the revenue bonds issued by the SBA. To this extent, Gill may be claimed to have unsettled our constitutional law on bonds, at least to the extent that today's opinion could be said to have been unanticipated. Thus, the first two elements of our test would not favor retroactivity.

The third and fourth retroactivity considerations bear on the impact of the new decision. We have no doubt that today's opinion will substantially limit the SBA's ability to issue future revenue bonds. Also, to the extent that we have limited Gill, it may be said that a departure is created from Syllabus Point 3. Finally, we observe that the United States Supreme Court, in several of its cases where it found state bonds to be unconstitutional from a federal standpoint because of voter restrictions, refused to make the decisions retroactive and to strike down earlier bonds that contained the same constitutional infirmity. See, e.g., Hill v. Stone, 421 U.S. 289, 95 S. Ct. 37, 44 L. Ed. 2d 172 (1975); City of Phoenix v. Kolodziejski, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970); Cipriano v. City of Houma, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969).

Thus, based upon our general principles of retroactivity of judicial decisions, we conclude that revenue bonds issued by the SBA pursuant to W. Va. Code, 18-9D-1, et seq., prior to the date of this opinion are not invalid.

IV.

We also understand from the record that under the present bond issue, it is contemplated that some of the earlier issued revenue bonds are to be refunded. The right to refund these earlier bonds is specifically authorized under W. Va. Code, 18-9D-9, which states generally:

"The issuance of revenue refunding bonds under the provisions of this article shall be authorized by resolution of the school building authority and shall otherwise be subject to the limitations, conditions and provisions of other revenue bonds under this

article."

Allowing for the right to utilize refunding bonds is a common practice. It is designed for several purposes, one of which is to enable the bond issuing authority to obtain the advantage of lower interest rates through the use of refunding bonds. Refunding the bonds saves on the cost of liquidating the older bonds, which is the avowed purpose for part of the 1993 Series bonds. Other courts have recognized that this is a valid purpose for utilizing refunding bonds. See, e.g., Beaumont v. Faubos, 239 Ark. 801, 394 S.W.2d 478 (1965); State v. City of Miami, 155 Fla. 180, 19 So. 2d 790 (1944); State Highway Comm'n of Ky. v. King, 259 Ky. 414, 82 S.W.2d 443 (1935); State ex rel. Maestri v. Cave, 193 La. 419, 190 So. 631 (1939); People ex rel. City of Rock Island v. Rungren, 378 Ill. 408, 38 N.E.2d 723 (1941). See generally Annot., Power of Governmental Unit to Issue Bonds as Implying Power to Refund Them, 1 A.L.R.2d 134 (1948).

In Board of Education of the County of Hancock v. Slack, 174 W. Va. 437, 445, 327 S.E.2d 416, 425 (1986), we discussed the concept of refunding bonds and stated: "There is no question that the majority of jurisdictions still hold that refunding bonds do not create a new indebtedness." (Citations omitted). We find no present violation of Section 4 of Article X in issuing part of the 1993 Series bonds for this purpose because no new debt is created through refunding the bonds.

Consequently, we determine that the previous issue of SBA bonds is not invalid under principles of retroactivity, and, because we also have determined that the refunding of bonds does not create new debt, the SBA is authorized to issue refunding bonds from the new 1993 series bonds to replace existing bonds at a lower interest rate.

V.

In closing, we wish to reemphasize what we stated earlier: No prudent bond counsel reading the specific financial arrangements outlined in Gill could have believed that it would authorize the revenue bonds at issue in this case. We are amazed that no attempt was made before the original issue of the SBA bonds to obtain an opinion as to their validity from the Attorney General. Moreover, in view of the amount involved and the purpose of the bonds, prudence would have dictated that a court determination should have been sought as to their legality. We cannot help but echo the admonition of this Court given more than

twenty years ago in Hall v. Taylor, 154 W. Va. at 677, 178 S.E.2d at 59:

> "If by this decision this state may be embarrassed financially, it is not the fault of this Court. The parties knew or should have known that this was a questionable procedure, and the matter of the validity of these bonds and the question of whether they were general obligation bonds or revenue bonds could have been tested in a proper proceeding in a court of competent jurisdiction before the Building Commission proceeded to the point where admittedly chaos may result because of the decision of this Court in this case."

We, therefore, conclude for the foregoing reasons that the judgment of the Circuit Court of Kanawha County should be affirmed.

Affirmed.