

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Nov 20 2020
S.C. SUPREME COURT

Honorable Carmen T. Mullen

Common Pleas Number: 2020-CP-07-01840

Town of Hilton Head Island, South Carolina, Plaintiff/Intervenors
v.
Beaufort County, South Carolina, Defendant/Plaintiff/Respondent
v.
James Beckert, in his official capacity as Beaufort Co. Auditor, Defendant/Appellant

MOTION FOR AN ORDER OF CERTIFICATION
PURSUANT TO SCACR RULE 204

THE APPELLANT HEREBY MOVES THIS COURT for an Order of Certification pursuant to SCACR Rule 204(b) as to the above-captioned matter currently on appeal to the Court of Appeals. Certification is proper because this appeal involves a matter of public importance: the issuance of a temporary injunction commanding Appellant, as auditor of Beaufort County, to levy taxes using a debt millage rate which will produce *insufficient* funds to pay the principal and interest on bonded indebtedness as to a Rural and Critical Land Bond issued by Beaufort County. This insufficiency is a matter of public importance because a failure to raise sufficient tax revenue to pay the principal and interest violates the statutory obligation of the county auditor and will result in default on payments on debt and the downgrading of the bond rating of the county if the insufficiency exceeds the amount of money available in the

sinking fund.

Further, certification is proper because the circuit court's order violates the separation of powers doctrine. The temporary injunction violates this doctrine because the circuit court ruling requires an executive branch official to substitute a valuation made by a legislative body, the Beaufort County Council, despite the fact the millage rate calculation as to bonded indebtedness is reserved to the auditor by the General Assembly. Because this valuation involves a nonjusticiable political question, the circuit court was without subject matter jurisdiction to issue its ruling.

STATEMENT OF THE CASE AND THE FACTS

On June 22, 2020, Beaufort County Council adopted a budget ordinance (Budget Ordinance 2020/22) which included millage rates for both general obligations and debt servicing. Of issue in this appeal, the Budget Ordinance set a millage of 4.8 as to the Rural and Critical Lands Bond (RCLB)¹ indebtedness. The total millage rate for both general operations and debt servicing *as listed in the Budget Ordinance* is 65.22 mills².

On or about August 24, 2020, Beaufort County Council passed an ordinance (LESC Ordinance 2020/29) providing for the imposition of a Law Enforcement Service Charge (LESC).

On September 17, 2020, the Plaintiff/Intervenor Town of Hilton Head Island filed a suit, 2020-CP-07-01840, against Beaufort County seeking a declaratory judgment as to the validity and constitutionality of the LESC and injunctive relief prohibiting

¹The Budget Ordinance (2020/22) lists the debt servicing at issue as "Purchase of Real Property Program" but it is clear from the parties' treatment of this labeling that this phrase refers to the Rural and Critical Land Bond debt.

²An irregularity exists on the face of the Budget Ordinance as the listed millage rates do not actually equal 65.22. It appears this may be a math error committed by County Council.

Defendant/Plaintiff/Respondent Beaufort County from collecting this fee.

On September 18, 2020, Defendant/Plaintiff/Respondent Beaufort County initiated a lawsuit against Defendant/Appellant Beckert seeking an order to compel Defendant/Appellant Beckert to include the LESC on the tax books and duplicate. Complaint, ¶ 29, 2020-CP-07-01850.

On September 21, 2020, Hilton Head filed a motion seeking to intervene in the Beaufort County suit against Defendant/Appellant Beckert, 2020-CP-07-01850, and to consolidate the two suits.

On September 25, 2020, Defendant/Plaintiff/Respondent Beaufort County filed a motion seeking temporary relief and mandamus requiring Defendant/Appellant Beckert to include the LESC on the tax books and duplicate.

On or about September 29, 2020, Defendant/Appellant Beckert assigned debt servicing millage to the tax rolls and created a duplicate. The tax rolls and duplicate included the LESC as to those taxpayers to whom Ordinance 2020/29 applied. However, the debt servicing millage rate calculated to be proper and sufficient by Defendant/Appellant Beckert was a rate of 5.8 mills as to the Rural and Critical Lands Bond debt.

On October 13, 2020, Defendant/Appellant Beckert filed the original Motion to Dismiss indicating that Beaufort County's complaint did not state a justiciable case and controversy because the date on which he was to apply the LESC had not yet arrived and so there was no failure to perform his duties.

On October 19, 2020, Defendant/Plaintiff/Respondent Beaufort County amended its suit against Defendant/Appellant Beckert to add an allegation concerning the calculation of a sufficient millage rate concerning debt servicing (Debt Servicing Millage). This Amended

Complaint filed by Beaufort County concerned both the LESC and the Debt Servicing Millage. However, the Amended Complaint divided the averments into two causes of action by the type of relief sought instead of the issues underlying the complaint. The first cause of action requested mandamus relief as to both the LESC issue and the Debt Servicing Millage issue. The second cause of action requested declaratory judgment as to these same two issues.

On October 25, 2020, Plaintiff/Intervenor Hilton Head amended its suit to add two plaintiffs who are individual taxpayers who reside within the Town of Hilton Head Island. The basis of the suit remained the same as did the prayer for relief.

On or about October 29, 2020 and with the consent of all parties, the Court granted Hilton Head's motion to intervene and consolidate the cases.

On October 30, 2020, Beaufort County amended its Motion for Temporary Relief to include a request for temporary relief through injunction and mandamus as to both the LESC and the Debt Servicing Millage.

On November 3, 2020, Beaufort County filed an Amended Answer to Hilton Head's Amended Complaint.

Also on November 3, 2020, Defendant Beckert filed an Answer to the Amended Complaint filed by Beaufort County.

On November 5, 2020, Defendant/Appellant Beckert filed an Amended Motion to Dismiss Pursuant to SCRCF Rule 12(b) as to both the LESC issue and the Debt Servicing Millage issue.

On November 12, 2020, the Honorable Carmen T. Mullen presided over hearings involving the three amended motions. She indicated at the end of the hearing that she would grant the Defendant/Plaintiff/Respondent's Amended Motion for a Temporary Injunction as to

the Debt Servicing Millage issue requiring Defendant Beckert to change the debt millage rate he calculated at 5.8 to the debt millage rate of 4.8 mills contained within the Budget Ordinance. Judge Mullen also denied the Town of Hilton Head's Amended Motion for Temporary Injunction as to the LESC. She took Defendant/Appellant Beckert's Amended Motion to Dismiss concerning the LESC under advisement and did not rule upon this motion as to the Debt Servicing issue for the RCLB millage rate³.

A proposed Order granting the temporary relief was provided to Judge Mullen by Beaufort County on November 13, 2020. Objections to this proposed Order were filed, along with the proposed Order, by Beckert on November 16, 2020. On November 20, 2020, Judge Mullen signed the proposed Order as slightly amended to correct typographical errors.

On November 20, 2020, a Notice of Appeal and Proof of Service was served upon all counsel of record by both US mail and by email, due to the exigent nature of the issue on appeal. The Notice of Appeal was also filed electronically with the Court of Appeals pursuant to procedures put in place in response to the Covid-19 pandemic. Undersigned intends to also file immediately a Petition for a Writ of Supercedeas seeking a stay of the imposition of Judge Mullen's Order.

ARGUMENT

This Court should issue an Order of Certification as to the case at bar because the risk of insufficiency concerning a millage rate as to bonded indebtedness pledged upon the full faith and credit of a county is a matter of significant public interest. Further, the violation of the separation of powers doctrine inherent in the Order at issue on appeal and the judicial intervention into a

³The granting of the Amended Motion for Temporary Injunction as to the Debt Servicing effectively functions as a denial of Defendant/Appellant Beckert's Amended Motion to Dismiss pursuant to SCRCF Rule 12(b)(1) and (6) concerning the Debt Servicing Millage issue.

nonjusticiable political question is a legal principal of major importance. Thus, certification is proper for either of these reasons alone but even more so considering both of these concerns cumulatively.

To begin, a simple search on Westlaw using the phrase “millage rate” produces 23 decisions issued by the South Carolina appellate courts. Only one of these opinions was issued following the creation of the Court of Appeals in 1983. However, all but two of these cases were decided by the Supreme Court. One of these two was ultimately modified in part by later Supreme Court review producing two dissenting votes. Thus, the Supreme Court’s past actions indicate an inclination to review millage rate issues when this issue is raised on appeal.

Debt Millage Rate Calculation is a Matter of Significant Public Interest

With a general residential population of approximately 200,000 persons, the ruling at issue is by definition of significant public interest to a significant number of persons who are property taxpayers in Beaufort County. This public interest is recognized in the circuit court’s Order which suggests the “County’s interest” parallels that of “its taxpayers” concerning the existence of imminent harm. See *Order Granting Temporary Injunction as to the Rural and Critical Lands Debt Service Millage Rate*, page 6, first paragraph.

A more significant matter of public importance concerns the potential for default on bond payments given the insufficiency created by the 4.8 mill rate imposed by the court and contained in the Budget Ordinance. Both Appellant and Respondent relied upon affidavits to support their positions concerning the motion for temporary relief. No matter what value of the mill is used to calculate the mill rate for the RCLB debt, both parties agree that the 4.8 mill rate will be insufficient to produce enough money to pay the principal and interest on the bond without resort to the sinking fund. Only by resort to the sinking fund and with a nearly 100 percent timely

collection rate will the taxpayers avoid default on the bond debt. The resulting consequences of a default is a matter of significant public interest.

Violation of the Separation of Powers Doctrine and Orders Addressing Nonjusticiable Political Questions are Legal Principles of Major Importance

Of major legal importance is the fact that the injunction compels Appellant Beckert to violate his statutory duty to levy a sufficient rate to pay principal and interest. In SC Code Section 4-15-150, it is required that an auditor levy “... a tax, without limit, on all taxable property in the county sufficient to pay the principal and interest of such bonds ... and to create such sinking fund as may be necessary.” This statute, on its face, does not indicate sufficiency can be determined by resort to the sinking fund. In plain and unambiguous language, the auditor is required by duty imposed by the General Assembly to levy a tax which is sufficient. In the case *sub judice*, the 4.8 mill rate imposed by the injunction will come up short.

But the greatest point of major legal importance concerns the delegation of the authority to set the mill rate for bond indebtedness. The General Assembly has assigned certain calculations as to mill rates to the legislative county government when this concerns operations budgeting. However, without ambiguity, the General Assembly acted differently as to the mill rate for bond indebtedness by delegating that authority solely to the county auditor.

The Supreme Court has recognized this delegation of authority in the opinion in *Stackhouse v Floyd*, 149 SE2d 437 (SC 1966). In *Stackhouse*, the Supreme Court stated that the auditor’s job to set millage rate for bond indebtedness is an act reserved to the auditor in his ministerial duty as an agent of the General Assembly. *Stackhouse*, at 445-446. Specifically, the *Stackhouse* Court stated that an auditor is compelled to levy annually “a tax sufficient to pay principal and interest of the bonds” and that the auditor “acts in a ministerial fashion as the agent

of the General Assembly in this matter.” *Id.* The circuit court’s order substituting the calculation made by a legislative body for the determination made by the auditor is a usurpation of the General Assembly’s power to make laws and the executive branch power to execute these duties. This violates the separation of powers doctrine⁴.

Because of the legislative delegation of this power by the General Assembly, the judiciary is without subject matter jurisdiction to order the auditor of any county to act in any way concerning the determination of the millage rate as to bond debt. This becomes a nonjusticiable political question. Undersigned recognizes that justiciability concerns about ripeness, mootness and standing no longer trigger subject matter jurisdiction concerns but the very nature of the separation of powers doctrine suggests that nonjusticiability of a political question goes straight to the issue of subject matter jurisdiction. See *Eagle Container Co., LLC v. Cty. of Newberry*, 622 S.E.2d 733, 744 (SC Ct. App. 2005), rev'd, 666 S.E.2d 892 (SC 2008).

This Court has previously discussed the type of valuation issues which are considered nonjusticiable political questions. See *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 632 S.E.2d 277 (SC 2006). In that opinion, this Court cited US Supreme Court authority for the proposition that the political question doctrine “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the ... confines of the executive branch). *Id.* at 278 citing *Baker v. Carr*, 369 U.S. 186, 210–11 (1962). Undersigned suggests that the most simple and basic type of valuation is one involving a mathematical calculation such as the determination

⁴If this appeal involved a final judgment as opposed to temporary relief, original jurisdiction might be proper pursuant to SCACR Rule 203(d)(1)(A)(ii) and/or (iii). The fact this temporary relief requires performance of the same one time act as the performance requested in the Amended Complaint, the effect of this Temporary Injunction is the same as a permanent one.

of a mill rate. See *County of Lee v Stevens*, 289 SE2d 155, at 156 (SC 1982).

It is worth noting that not only is the mill rate determination at issue but that the underlying value of the mill upon which this calculation is involved is also at issue. Both of these valuations are reserved to the auditor as to bond indebtedness. See *In Re Betty J. Catoe*, Opinion No. 85-24 (SC Atty Gen Op. March 20, 1985)(relying upon *Stackhouse* to conclude “The auditor, however, is to determine the mills necessary to produce the tax revenue.”). This Court has also recognized that the value of a mill may change. See *County of Lee v Stevens*, 289 SE2d 155 (SC 1982).

Underscoring the public importance of the sufficiency of the mill rate determination for bond debt and the reservation of that question to the auditor are the comments on this subject made by the South Carolina Department of Revenue. During a presentation made by the South Carolina Department of Revenue on June 27, 2019 at a Beaufort County Council Millage Workshop, Government Affairs Administrator Sanford Houck stated: “Millage for bonded indebtedness has no limitation. ... The county auditor is authorized to set millage to make that bond payment. That’s one of the things that the auditor is tasked with doing by state law.” <https://beaufortcountysc.new.swagit.com/videos/64634>, at minute mark 23:15-23:55.

Finally, at the interplay of public significance and major legal importance is the fact that this power grab can be repeated in 46 different counties should this Court allow the lower court’s injunction to stand and the Appellant be forced to use an insufficient rate.

CONCLUSION

Therefore, this Court should issue an order certifying this appeal for consideration and transfer the matter from the Court of Appeals because it involves both a matter of significant public interest and a legal principal of major importance.

Respectfully submitted by:

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November 20, 2020

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