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May 7, 2020

Assembly Republican Leader Jon M. Bramnick:
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Dear Assemblyman Bramnick:

Mr. Kevin Logan of your staff requested an opinion regarding whether or not the State may issue general obligation bonds without voter approval to meet the needs of the State arising from the COVID-19 pandemic. Specifically, he asked whether the exception to the debt limitation clause “to meet an emergency caused by disaster or act of God” in Article VIII, Section II, paragraph 3, subparagraph e., would apply to the issuance of debt to combat the COVID-19 pandemic, and whether the proceeds of such bonds may be considered revenue for purposes of an appropriations act.

BORROWING FOR A DISASTER

It is the opinion of Legislative Counsel that the COVID-19 pandemic is a disaster contemplated by the debt limitation exception and the State therefore may issue bonds, without the usual requirement for voter approval, to meet COVID-19 related emergency needs.

The Constitutional parameters for the conduct of the State’s fiscal affairs are set forth in Article VIII, Section II. They include the requirement for a single fiscal year, a balanced budget and a limitation on incurring debt. Paragraph 2 of section II sets forth the requirement for an annual and balanced budget.

No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be

ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year....
[N.J.Const. (1947), Art. VIII, § II, par. 2.]

The courts have referred to this paragraph as, “. . . the center beam of the State's fiscal structure. It cannot in any sense be regarded as merely providing governmental "housekeeping details," necessary and important but not truly vital. See Vreeland v. Byrne, 72 N.J. 292, 304-305 (1977). Its terms must therefore be given full and complete effect in accordance with their clear and obvious intent.” City of Camden v. Byrne. 82 N.J. 133, 151, (1980).

Paragraph 3 of Section II prohibits the State from incurring debt in an amount exceeding 1 percent of the appropriations in the general appropriation law for that fiscal year, unless the debt is approved at a general election and other conditions are met. Sub-paragraph e provides an exception to this debt limitation.

This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God. (emphasis added)

The final clause, “or to meet an emergency caused by disaster or act of God” was added when the 1947 Constitution was drafted. The proceedings of the constitutional convention do not provide a robust explanation for this clause. A statement from the committee on Taxation and Finance noted that the clause had practically been put in effect “in 1932 by the Legislature and looked upon with a great deal of propriety by the people of the State because those things had to be done.” Constitutional Convention of 1947, Convention Proceedings, Volume I, at 149.

Although the Constitution does not define the terms “disaster” or “act of God,” the New Jersey Supreme Court has stated that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Vreeland v. Byrne, 72 N.J. 292, 302, (1977) (internal quotation marks and citation omitted). The Oxford American Dictionary defines disaster as, “a sudden event, such as an accident or a natural catastrophe, that causes great damage or loss of life.” Oxford American College Dictionary (1st edition, 2002).

It is worth noting that there is an instructive statutory corollary. When the Legislature enacted The Civilian Defense and Disaster Control Act (N.J.S.A. App.A.:9-33 et seq), which grants the Governor emergency powers, it defined disaster as “any unusual incident resulting from natural or unnatural causes which endangers the health, safety or resources of the residents of one or more municipalities of the State, and which is or may become too large in scope or unusual in type to be handled in its entirety by regular municipal operating services.” The Governor invoked this statutory authority in Executive Order No. 103 of 2020, which responds directly to the

COVID-19 pandemic. Based on the history of Article VIII, Section II, Paragraph 3e, the plain meaning of the term disaster, and the Legislature's subsequent use of that term in relevant law, it is reasonable to conclude that the debt limitation exception applies to a COVID-19 pandemic.

In summary, the Constitution requires the enactment of an annual, balanced budget free from borrowing unless that borrowing is either approved by the voters or is to meet an emergency caused by disaster. The COVID-19 pandemic is the type of disaster contemplated by the Constitutional exception. The exception to the debt limit clause allows the State to incur debt through the issuance of general obligations bonds without voter approval "to meet an emergency caused by [COVID-19]."

BORROWING FOR REVENUE

It is also the opinion of Legislative Counsel that borrowing to supplement revenue for future fiscal year budgets would violate Article VIII, Section II of the Constitution and the principles set forth by the New Jersey Supreme Court in Lance V. McGreevey 180 N.J. 590 (2004).

The drafters' inclusion of the paragraph 3e exceptions to the debt limitation clause allows borrowing money where the anticipated revenue certified in accordance with Article VIII, Section II, paragraph 2 of the Constitution becomes insufficient due to an unexpected event. However, the Constitution does not define "emergency" or the meaning of "to meet an emergency."

The other exceptions to the debt limitation clause contained in paragraph 3e are: "for purposes of war," "to repel invasion," and "to suppress insurrection." Each is a discrete problem that sets forth a nexus test. For example, if the State needs to borrow money "for purposes of war" it may do so as long as the expenditure has a nexus to the war. Borrowing to buy warfighting equipment and weapons falls clearly within this provision. An ancient maxim of statutory construction is that the meaning of words may be indicated and controlled by those with which they are associated. This maxim, *noscitur a sociis*, applies to associated words in a manner similar to application of the more familiar doctrine of *in pari materia* to statutes covering the same subject matter. Germann v. Matris, 55 N.J. 193, 210 (1970), see also Soto v. Scaringelli, 189 N.J. 558, 572 (2006). Read in context with the other exceptions in paragraph 3e, "to meet an emergency" appears to be limited to borrowing to directly resolve the presently identifiable emergency. Consequently, just as the purchase of weapons bears a nexus to "for purposes of war" it is clear that purchasing ventilators and personal protective equipment bears a nexus to meeting the COVID-19 emergency. It is also reasonable to argue that the sudden, unanticipated and precipitous shortfall of expected revenue, resulting from the COVID-19 pandemic is the type of emergency contemplated by paragraph 3e. At the time the appropriations act was enacted, anticipated revenue was determined without knowledge of the COVID-19 pandemic. The shortfall of revenue in the current fiscal year was unanticipated and caused by the COVID-19 pandemic. Therefore it is fair to conclude that the State can borrow both for expenses directly addressing COVID-19 and to meet the needs of the State at the time the 2020 appropriations act was enacted. That is, the State can borrow to replace certified, anticipated revenue that was never realized due to COVID-19.

As noted above, Article VIII, Section II, paragraph 2 of the Constitution provides that all spending as far as can be ascertained or reasonably foreseen must be provided in a single appropriations law and further requires that no appropriations law may be enacted if the appropriations exceed the revenue on hand and anticipated during the relevant fiscal period. The debt limitation exceptions apply only to the general prohibition against borrowing and the requirement for voter-approval within paragraph 3. The exceptions do not provide an exemption to the balanced budget requirements of paragraph 2.

The language and structure of Article VIII, Section II indicate that exceptions to the debt limitation clause are intended only to allow the State to address a specific, unforeseen spending need that arises notwithstanding the Legislature's and Governor's previous compliance with the anticipated revenue certification, and balanced budget provisions of Article VIII, Section II, paragraph 2. When a Fiscal Year 2021 budget is adopted, normal constitutional procedures, including revenue certification and balanced budget requirements will apply. While revenue shortfalls related to the COVID-19 disaster may persist for some or all of the fiscal year, there will not be a precipitous and unforeseen shortfall, but rather an anticipated decline in revenue. Borrowing to supplement anticipated revenue is inconsistent with the purpose of Article VIII, Section II, paragraph 2 (a balanced budget) and has been expressly rejected by the New Jersey Supreme Court:

the question is whether the constitutional framers would have considered the Appropriations Act, relying as it does on \$1.9 billion in borrowed monies to fund general expenses, to be consistent with a "balanced budget." (For purposes of our analysis, general expenses include the ordinary, operating, and day-to-day costs of government.) The short answer is no. We cannot reasonably find that the current Appropriations Act constitutes a balanced budget without defeating the very purpose behind the Appropriations Clause. That purpose is to bar the State from adopting an annual budget in which expenditures exceed revenues. [Lance v. McGreevey 180 N.J. 590, 596 (1980).]

The Supreme Court's ruling in Lance v. McGreevey, not only sets forth the purpose of the appropriations clause generally, it also defines the term "revenue" as it is used in the appropriations clause to exclude bond proceeds because, according to the Court, bond proceeds are not considered revenue for budgetary purposes. Lance at 593. The Court held that "borrowed monies, which themselves are a form of expenditure when repaid, are not income (i.e., revenues) and cannot be used for the purpose of funding or balancing any portion of the budget pertaining to general costs without violating the Appropriations Clause." Id. at 598. Although that case concerned the State's issuance of *appropriations-backed bonds* and the Court did not address *general obligation bonds* issued under the emergency exception to the debt limit clause, it set forth the important principle that borrowed money cannot be considered revenue. As a result, even general obligation bonds

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issued under the exception to the debt limitation clause cannot be considered revenue for the purpose of balancing a future budget.

In conclusion, The COVID-19 pandemic is a disaster that has resulted in an emergency as contemplated by the New Jersey Constitution. Accordingly, the State may borrow money to meet the emergency caused by COVID -19 without voter approval and without violating the debt limitation clause. The proceeds of the bonds are borrowed money and may be used to pay for equipment and expenses directly related to COVID-19. This opinion sets forth justification for using borrowed money to pay for COVID-19 related equipment and to meet the needs of the State previously determined when the FY2020 budget was enacted. However, borrowed money may not be used to replace general revenue to support non-COVID-19 related spending in future budgets. What future expenses are directly related to COVID-19 is a matter to be resolved jointly by the Legislative and Executive Branches through the legislative process, including future budget acts.

Respectfully.

Jason M. Krajewski
Legislative Counsel

By: /s/ N. Lang
Neal Lang
Associate Counsel

JK: