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Robert K. Corbin

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March 20, 1986

Mr. Douglas R. Norton
Auditor General
111 West Monroe, Suite 600
Phoenix, Arizona 85003

Re: I86-031 (R85-121)

Dear Mr. Norton:

You have asked whether satisfaction of a judgment rendered against a county, city or town would constitute an expenditure of local revenues when determining whether that entity has exceeded the constitutional expenditure[1] limitation set forth in art. IX, § 20, the Constitution of Arizona.

Generally, if a judgment arises out of a non-collusive tort, its satisfaction does not fall within the expenditure limitation. If the judgment arises out of a contract, it must be considered within the expenditure limitation.

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[1] Constitutional and statutory limitations on debt, expenditure or taxation by government entities are treated interchangeably by the courts. E.g. Town of Flagstaff v. Gomez, 29 Ariz. 481, 486, 242 P. 1003, 1004 (1926). The cases reason that an incurred debt constitutes an obligation to spend which will customarily be paid through taxation. Therefore, whether these limitations are phrased in terms of incurring the debt, spending to discharge the debt or taxing to provide the spending source, they are treated as different approaches to the same goal of controlling the fiscal activities of the governmental entity. For this reason the cases identifying all three limitations are discussed under the phrasing of your question which is directed to expenditure limitations.

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The main distinction whether a spending or taxing limitation applies is whether the debt has been voluntarily or involuntarily incurred. Town of Flagstaff v. Gomez, 29 Ariz. 481, 485-486, 242 P. 1003, 1004 (1926). There, the Arizona Supreme Court stated:

> The general rule is that limitations of the nature set forth in the provisions above quoted refer only to obligations voluntarily incurred by the municipality, and have no bearing upon judgments rendered against it by reason of its torts.

Judgments arising out of tortious acts are involuntary debts.

> The general rule is that constitutional or statutory limitations upon municipal or county indebtedness or upon the amount of municipal or county taxation do not apply to obligations sounding in tort [including property damage]. Hence, it is not a defense to an action of tort against a municipality or county that a judgment for the person injured by the tort will increase the indebtedness of the municipality beyond the constitutional or statutory limit.
>
> The rule as to tort obligations must be restricted in operation to liabilities truly tortious in nature, involuntary, and imposed by law and not contract. Where anyone, including a political body, knowingly does an act which is the breach of an express contract as well as of a duty imposed by law on account of the relationship of the parties as an incident of the contract, the liability is voluntarily assumed, whether the form of the action is ex contractu or ex delicto. Although the constitution does not exempt municipalities or counties, no matter how great their indebtedness, from liability for wrongful and tortious acts, it likewise does not authorize the voluntary assumption of

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> obligation to pay money by the scheme of a tort. The distinction between real or unpremeditated torts and voluntary acts, under the technical name of "tort," done by agreement for the accomplishment of a purpose prohibited by contract, is clear and substantial. Thus, a municipal corporation cannot intentionally evade the debt limit by constructing a public improvement which necessarily inflicts damage to adjoining property without making any award of compensation and then assuming the liability as for a tort.

56 Am. Jur. 2d, Mun. Corp., § 643 at p. 692-693. See also McQuillan Mun. Corp. § 41.29 (3d ed).

There are two reasons for the distinction between voluntary and involuntary acts or torts as opposed to contract. First, the purpose of spending limitations is to control the amount of indebtedness which can be created by individuals authorized to act for the city, town or county. Such liabilities are voluntarily created and must be accounted for in the budgeting process. A judgment arising out of a tortious act is an unanticipated debt which is involuntarily imposed upon the governmental entity by the courts.

The second reason for this distinction is that contracts entered into with governmental entities are voluntarily undertaken subject to the constitutional spending limitations and the budgeting process necessary to determine if the assumption of the contractual obligation will exceed the debt limitation. Those contracting with such governmental entities are held to have had notice of the constitutional spending limitations and to have voluntarily limited their contractual rights to those limitations. McBean vs. City of Fresno, et al., 112 Cal. 159, 44 P. 358 (1896).

To determine whether the satisfaction of a judgment would be an expenditure subject to the constitutional expenditure limitation, you first must determine whether the debt arises from a voluntary contract or arises out of tortious acts. If it arises out of tortious acts, it will be outside the expenditure limitation unless it was voluntarily incurred to avoid the spending limitation.

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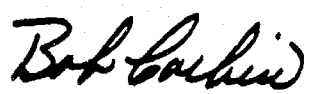
If the expenditure is involuntary because it is a judgment arising out of a tortious act, it is not subject to the constitutional expenditure limitation.

Sincerely,



BOB CORBIN
Attorney General

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