

**[J-67-2006]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

PROGRAM ADMINISTRATION	:	No. 136 MAP 2005
SERVICES, INC., F/K/A R.D. FOWLER &	:	
ASSOC., INC.,	:	
	:	Appeal from the Order of the
Appellee	:	Commonwealth Court entered on May 19,
	:	2005 at No. 2535 CD 2003, reversing the
	:	Order of the Court of Common Pleas of
v.	:	Dauphin County, Civil Division, entered on
	:	November 13, 2003 at No. 2992 S 2001
	:	
DAUPHIN COUNTY GENERAL	:	
AUTHORITY,	:	
	:	
Appellant	:	RE-SUBMITTED: May 18, 2006

**DISSENTING OPINION**

**MADAME JUSTICE BALDWIN**

**DECIDED: August 20, 2007**

I respectfully dissent. I disagree with the majority's conclusion that section 5607(d)(12) of the Pennsylvania Municipality Authorities Act constrains the Authority to maintain contracts with the Appellee which are related to the governmental functions of the Authority. The Act permits Authorities to incur long-term indebtedness for up to 40 years through the issuance of bonds, and to contract with private entities in connection with these bond issuances. The purpose of the Act is to further the public policy of making low-cost, long-term funds available to government entities for public projects; and the contracts that it contemplates are those with bond investors. This is clear from the legislative statement that a purpose of the statute is to "provide for the security of the bonds and the rights of the bondholders." 53 Pa.C.S. § 5607(d)(12) (Purposes and Powers).

The majority interprets the language of the statute, that municipal authorities may make agreements with the purchasers or holders of bonds “or others in connection with any bonds,” to include even the type of program administrative contract at issue here. I do not agree that this statutory enactment encompasses contracts with entities such as the Appellee, who by their own admission carry out functions that are merely ministerial and ancillary to the primary business of securing financing for schools. I believe that this provision applies to contracts with bond investors, or trustee banks, which would be consistent with the purpose of the statute to ensure the security of bondholder’s rights. The majority subscribes to an overbroad interpretation of this language to apply it to any contract that the Authority executes relating to School Pool program administration. This interpretation would be anathema to the expressed legislative purpose that long-term contracts are permitted to ensure the security of bondholders, and is not consistent with the frequently expressed public policy of permitting governmental entities to disavow contracts relating to governmental functions that their predecessors have enacted.

Nothing in the contract between the Authority and the Appellee impairs, or indeed even affects, bondholder rights. Moreover, 53 Pa. C.S. § 5617 states, “the Authority shall not be authorized to do anything which will impair the security of the holders of the obligations of the Authority or violate any agreements with them or for their benefit.” This language underscores that the Act is intended to ensure that no contract with *bondholders* may be terminated. I cannot subscribe to the majority’s view that the program administration agreements are equivalent in importance to the financing or security documents that are contemplated by the language of the Act, as they are not connected with the issuance or servicing of bonds.<sup>1</sup>

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<sup>1</sup> While it is true, as the majority points out, that the Legislature’s function is to set public policy, the statute in question does not embody the public policy of vitiating the Authority’s ability to carry out its governmental functions, but merely permits municipal authorities to (continued...)

Consequently, I believe this Court is required to address the central issue of this case, *i.e.* whether a municipal authority, in issuing tax-exempt revenue bonds for the use of school districts to build and finance public school buildings, is performing a governmental or a proprietary function.<sup>2</sup> If the function is governmental, the board of the Authority may not bind successor Boards to long-term contracts entered into for the administration of such bond programs, in contrast to the generally binding nature of long-term contracts of non-governmental entities. The rationale for the rule is that newly appointed or elected governmental figures should be responsive to their electorate or appointing bodies, rather than to their predecessors' contractual partners. I would hold that the "conduit financing" bond program at issue in this case is a governmental function, and that the Authority is thus permitted to terminate its contract with the Appellee.

The doctrine that governmental entities may not contract with others beyond their term of office in the exercise of their governmental functions has a convoluted history. It has changed continuously as political approaches to local governmental powers have changed and has been the subject of much confusion and disparate application in our state and federal courts. Indeed, as we stated in Morris v. Sch. Dist. of Twp. of Mount Lebanon, 393 Pa. 633, 637-38, 144 A.2d 737, 739 (1958): "Perhaps there is no issue known to the law which is surrounded by more confusion than the question whether a given municipal operation is governmental or proprietary in nature."<sup>3</sup> The doctrine causes friction between

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enter into contracts. I do not subscribe to the majority's opinion that the current statute alters the general rule that contracts are voidable if they concern an Authority's governmental functions.

<sup>2</sup> A proprietary function is a business function that may be performed by governments but is also performed by private enterprises.

<sup>3</sup> In Morris Twp. we discussed this issue in the context of governmental immunity which we later eliminated in Ayala v. Philadelphia Bd. Of Public Ed., 453 Pa. 584, 305 A.2d 877 (1973), thus overruling Morris Twp. on other grounds.

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two important public policies, namely: (1) the expectation that contracts will be performed and not abrogated; and (2) the sovereignty of governments in performing their essential functions to promote public health, education and welfare. While the balancing of these competing interests has been inconsistent, no federal or state court has been able to create a viable alternative approach.<sup>4</sup>

Despite the competing interests involved, the rule that an authority or governmental entity may not bind its successors in pursuing its governmental functions has been expressed over decades in this Commonwealth, and is succinctly explained in Commonwealth ex rel. Fortney v. Bartol, 342 Pa. 172, 20 A.2d 313 (1941):

In the performance of sovereign or governmental, as distinguished from business or proprietary, functions, no legislative body, or municipal board having legislative authority, can take action which will bind its successors. It cannot enter into a contract which will extend beyond the term for which the members of the body were elected.

Id. at 175, 20 A.2d at 314 (citations omitted).

The question of whether a municipal authority is acting in a governmental capacity has resisted a simple response. A useful starting point in this analysis is our decision in Mitchell v. Chester Hous. Auth., 389 Pa. 314, 321, 132 A.2d 873, 876 (1957). In Mitchell, our Court discussed the considerations present in analyzing contracts “relating inseparably to the overall functioning of a public body.” Id. As we noted there, inasmuch as municipal authorities are instrumentalities of government, they are agencies that perform governmental functions although they may also perform proprietary functions. Id. at 320,

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<sup>4</sup> For a discussion of the history and application of the doctrine, see Janice C. Griffith, Local Government Contracts: Escaping from the Governmental/Proprietary Maze, 75 Iowa L. Rev. 277 (1990).

132 A.2d at 876. In Mitchell, we held that a municipal housing authority performed governmental functions in pursuance of the Housing Authorities Act then in place (35 P.S. § 1541 *et seq.*), including responsibility to clear substandard housing and plan and reconstruct safe and sanitary housing for low-income people.

Our Court continued the governmental-proprietary function discussion in Lobolito, Inc. v. North Pocono School Dist., 562 Pa. 380, 755 A.2d 1287 (2000). In Lobolito, a school district entered into an agreement with a private developer to build a sewage treatment plant in connection with the planned construction of a school. When a successor school board decided that the school would not be built, the school district disavowed its agreement with the sewage treatment plant developer. The developer brought suit to recover costs incurred in preparation for construction. Our Court undertook a detailed analysis of the distinction between governmental functions and proprietary functions in agreements with governmental bodies. We wrote:

This Court has long viewed agreements involving governmental bodies in a different light than agreements made exclusively between private parties. Since the mid-nineteenth century, we have distinguished between agreements encompassing governmental functions of governing bodies from agreements encompassing proprietary or business functions. See Western Saving Fund Soc’y of Philadelphia v. City of Philadelphia, 31 Pa. 175, 183 (1858) (distinguishing governmental contracts or contracts encompassing “things public,” from proprietary contracts, or contracts encompassing “things of commerce”).

Lobolito, 562 Pa. at 384, 755 A.2d at 1289. In determining how to interpret the agreement to construct the sewage plant, our Court in Lobolito noted the importance of examining the “crux” of the Agreement, which was not to build a sewage treatment plant, but to construct a new school. We noted “[t]he creation and operation of public schools have traditionally been governmental functions in Pennsylvania.” Id. at 388, 755 A.2d at 1291.

Without descending too deeply into the quagmire of the governmental/proprietary debate, I believe that the ability to issue tax-exempt bonds for the purpose of constructing new public schools, or allowing public school districts to refinance existing debt, is a governmental function that a private enterprise could not undertake. The purpose of School Pool I and School Pool II was to assist school districts within Dauphin County to obtain financing for capital improvements or new construction of schools. The bondholders, or lenders, received tax-exempt interest on the bonds. The borrowers, or school districts, received the benefit of lower cost borrowing than if they issued the bonds themselves because of shared economies with regard to the administration of the program. The Authority acted as a conduit between the two for the benefit of the school districts, and did not earn a profit from the operation of the program. Notably, as an instrumentality of state government, the bonds issued by the Authority are tax exempt. Tax-exempt financing can also be accomplished if individual school districts issued the bonds themselves, but cannot be accomplished by a private bank, bond underwriter or other non-governmental entity. Lending money that comes from the purchase of tax-exempt bonds to school districts to build schools is simply not a proprietary function, as it could not be carried out by private businesses. Moreover, the bond revenue was being used exclusively for public purposes.

For the foregoing reasons, I believe that the majority erred in finding that the Act precludes our Court from addressing the primary issue in this case, and that had the majority addressed it, it would have been required to conclude that the Authority's tax-exempt bond financing programs are governmental functions.