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Constitutional Aspects of Home Rule

In South Carolina

by

PEDEN McCLEOD

As you know, the Legislature has wrestled with Home Rule for some time. Home Rule started out in the Judicial Committee, went through the House, and came out with counties having five forms of government to choose from. The House as a whole did not approve the fifth form and in my personal opinion the constitutionality of the fifth form is doubtful. The House did not want it, the Senate did, and as in all legislation there was a compromise.

We need to get an overall understanding of the basic differences between the U. S. Constitution and individual state constitutions. The power that the U. S. government possesses is derived completely from the states through the U. S. Constitution, which was ratified by the states. But state constitutions rather than granting power generally, put restrictions on state power. The constitution of South Carolina (1895) was completely silent on county government organization, and because of this the General Assembly has been essentially free to do what it will with county government.

Charleston County was the first county to have any type of home rule, but this didn’t happen until 1948. In 1948 the Charleston County Council was adopted with the electorate being given the opportunity to choose between two forms of government. In spite of Charleston County’s lead in 1948, most counties in South Carolina continued to be governed by the legislative delegation through local acts. And even after the passage of the Home Rule Article in 1973, most counties continued to be governed by local legislation.

Just a few months ago, Governor Edwards refused to sign any of the local supply bills because he said he felt they were unconstitutional. About three or four weeks later he did agree to sign these local supply bills, but he stated at the time that he was doing so as a matter of practicality rather than legality. He could see the problems that would develop if counties had to operate their governments without any 1975-76 fiscal policy or appropriations bill.

*State Representative for District Number 121, Colleton County.
A committee composed of Senators, Representatives, and gubernatorial appointees was created in 1966 to study the 1895 South Carolina constitution and to make recommendations for change. I know you are aware that each time voters go to a general election there are innumerable amendments presented to them, because minor changes in debt ceilings for a county, or anything similar requires this procedure. But the final committee report in 1969 urged that any new constitution require the General Assembly to act so that county government will be established on a definite basis with specific powers and restrictions. It also recommended that all counties operate under general county laws, thereby avoiding special county by county legislation. It proposed that there be an active body in each county which would have general powers of local government similar to those now exercised by many city councils.

These two major proposals for change in the general laws for county governmental operations and county government on an at-home basis were incorporated into the new local government article (now Article VIII of the State Constitution) which was adopted by the electorate in 1972, and was ratified by the General Assembly on March 7, 1973.

The most significant section of the local government article in terms of limitations on the General Assembly is Section 7, which reads as follows: "The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and responsibilities of Counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government not to exceed five shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general law or laws applicable to the selected alternate form of government."

The above quoted section eliminates the complete power of the General Assembly to legislate for each county individually, and it is the basic constitutional provision around which the Home Rule act is structured. Prior to the passage of the new Article VIII, the General Assembly unrestrainedly exercised its authority to set up county government on an ad hoc basis, and to create special purpose districts to provide various services within the county. Section 1 of the new article permitted this hodge-podge of county government and all sorts of different forms and the special purpose districts to continue. It says: "The powers possessed by counties, cities, towns and other political subdivisions at the effective date of this constitution shall continue until changed in a manner provided by law." Well, to me that refers to March 7, 1973.
Problems come with any change in the law and this is no exception. In Newberry County they were trying to authorize issuance of some hospital bonds. Somebody did not want to pay the interest on these bonds and brought a suit to declare the action invalid. Their contention was that the effective date referred to was December 31, 1895 (when the original constitution was enacted). If this had been the case, then every local piece of legislation that had passed the General Assembly since 1895 would have been unconstitutional, void, and of no effect. However, the court did not interpret it that way. They held that the counties and political subdivisions existing as of March 7, 1973, would continue until the new law is implemented.

Nine months after the Newberry decision, the Supreme Court voided a special act creating a recreational district for Dorchester County and permitting the issuance of bonds therefore. This action was brought about when the General Assembly enacted legislation setting up the Lower Dorchester County Recreation Commission and authorized it to issue bonds to fund a special service district for recreation. The court held that the General Assembly had violated the constitutional provision prohibiting enactment of laws for specific counties.

The two questions presented to the court here were: 1) Is the new Article VIII inoperative until the General Assembly legislates Home Rule, and 2) Does the General Assembly continue to possess requisite power to carve up counties into special purpose districts? In deciding the point at which the Home Rule article became operative, the court stated: "There is no method by which any court can mandamus the General Assembly to enact laws. Thus there is no absolute assurance that the General Assembly will carry out the directive of Section 7 at any time. Accordingly, inactivity on the part of the General Assembly could permanently thwart and destroy Section 7. It is not reasonable to assume that the framers of Article VIII intended to give the General Assembly veto power over its effectiveness."

The court was saying that they would not allow the General Assembly to veto the effectiveness of the new article VIII by inactivity. They went on, "Had the framers of Article VIII intended to extend legislative power, Section 1 would have been drafted in such a fashion so as to provide that the powers of the General Assembly in this area would likewise continue until the directive of Section 7 had been implemented." Construed together Section 1 and Section 7 simply means that existing political subdivisions should continue to function as authorized by law as on March 7, 1973. It is clear that Section 7 does away with the necessity for creation by the General Assembly of
special purpose districts within an existing county. Accordingly, if, when established, the county government of Dorchester County feels the need to provide recreational facilities in a specific area of that county it may do so and may levy a tax to pay the costs thereof.

The high court answered the question of whether or not the General Assembly continued to possess the power to carve out special districts, but it did not answer the question whether the General Assembly could set up a special purpose district composed of one, two, or three or more counties: only that could not be done within a single county.

The enabling law contains about five pages describing the powers of counties. This includes unheard of power for a local government in South Carolina.

Another constitutional problem concerning local government is not found in the local government article, but in Article I, Section 8, which provides for the separation of legislative, executive, and judicial branches of government. The old system of legislative delegation control was held to be violative of this constitutional provision which was a part of the 1895 Constitution. The now famous Horry County taxpayer suit brought this constitutional defect to light with its exposure being an outgrowth of the increase in interest in local government. The Horry County government has been set up through a Board of Supervisors, with significant control retained by the legislative delegation. The Horry County supply bill allowed the majority of the county delegation to increase or decrease the appropriations made in the supply bill.

Horry County lies in Senatorial District Number 11. They have one resident senator and four house districts, three of which lie completely in Horry County. The fourth House District, Number 106, lies partly in Horry County and partly in Georgetown County. The Representative from that district, Representative Barrineau, is a resident of Georgetown County. One of the plaintiffs in Booth vs. Griffin was a resident of District Number 106 who lived in Horry County but was represented by Representative Barrineau. Because of the legislative delegation control of Horry County's supply bill, this fellow felt that he was not being represented.

The suit contended that the supply bill was unconstitutional because it violated the separation of powers requirement. Since the local delegation could not only shift funds around, but also set up various boards and commissions they got into what the court said is administrative functions. The court agreed with the contention.
The next thing the court said was that the authorizations practice was unconstitutional. Under this program, the legislative delegation could shift funds in mid-year or set up new boards or commissions by simply writing a letter authorizing such. They said that this violated the constitutional provision that money could only be expended from the Treasurer in pursuit of appropriations made by law. These letters were just letters written by the local delegation and did not involve spending money in pursuance of appropriations passed by law.

The constitution also provides that one cannot be taxed without his own consent or the consent of his representative. Plaintiffs felt that they were being taxed without their consent or the consent of their representative because Representative Barrineau had no say in the Horry County authorizations. The court held that this was a violation of the equal protection of the laws portion of the U. S. Constitution. However, the court stopped there and said that since the act had been approved by the entire House and Senate, and signed by the Governor, that it complied with the constitutional requirement.

The other issue had to do with the Horry County Board of Commissioners, which was appointed by the legislative delegation. Again, Representative Barrineau had no say in it. The court simply said that this would be unconstitutional in the future.

The court, however, retained jurisdiction in order to see how things developed. It did say that the current Board of Commissioners should continue to function on a de facto basis because there was no other government for the county.

The main point I want to make is that Section 7 of the new Article VIII has changed the situation from one where the county had practically no power except what was granted by Special Act of the legislature to one where counties have unheard of power. The General Assembly has been completely cut off from enacting local legislation in the future.