DEBT AND FINANCING OPTIONS FOR COUNTIES

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INTRODUCTION

Georgia's counties face a broad range of expenses in the delivery of services to their citizens, property owners, and local businesses. Counties also face decisions on how best to pay these expenses:

- Should all such expenses be paid only out of current revenues?
- Should such expenses be deferred until sufficient revenues from taxes, fees, etc., are in place? (This is sometimes called "pay-as-you-go" or "pay-go" financing.)
- Should counties obtain revenues from alternate sources to pay these expenses up front, and repay those original sources from future governmental revenues – in other words, should the county incur debt?

As with household and business debt, some of the same considerations come into play for counties in answering the above questions. For example, waiting until sufficient revenues are in hand to pay for a new fire station avoids the interest expense of a loan or other form of debt. However, construction costs may rise over the period of time that the county is accumulating enough revenues to pay for that fire station outright, such that the facility may cost more than if it had been built earlier. In addition, public demand or need may make it impractical to defer construction until the fire station can be paid for outright with in-hand tax revenues. Of course, incurring debt means that future taxpayers (and county commissioners) will be "on the hook" for obligations that they had little or no role in creating.

County commissioners have many factors to consider when deciding whether to take on debt for their counties. This chapter provides an overview of general limitations on county debt, types of financing structures, and the bond validation process. The purpose of this chapter is to provide a basic understanding of debt financing, including:

- General obligation debt.
- When a voter referendum for general obligation debt and other types of debt financing must be conducted.
- Different types of short and long-term debt financing options available to counties.
- Advantages of revenue bonds.
- Use of special purpose local option sales tax (SPLOST) and transportation special purpose local option sales tax (TSPLOST) bonds.
- Governmental authorities that can finance county projects.
- Rules and restrictions of debt financing structures

GENERAL LIMITATIONS ON DEBT

Conceptually, the decision to take on debt for counties may involve policy-related and practical questions similar to those faced by households and businesses. However, incurring debt as a county government involves greater accountability and foresight because the burden of the debt is held by all taxpayers. There are many special restrictions that apply specifically to counties and other local governments. A county cannot simply go to the local bank and take out a loan.

As a starting point, it is important to understand what is, and what is not, a "debt" in a legal sense. The Georgia Constitution (Constitution) defines and sets certain limits on what is considered county debt and how such debt can be incurred. In the context of governmental borrowing, the Supreme Court of Georgia defines debt as any liability that will not be paid by (1) money already in the government treasury or (2) taxes to be levied in the same year that the debt was incurred.[1] As such, the rules regarding the county's ability to incur debt apply to obligations that will exist beyond the year in which the obligation is incurred.

General Obligation Debt

In general, local governments may not incur debt without the approval of a majority of voters in a referendum.[2] Such debt is often referred to as "general obligation debt," meaning that the government has agreed to use its full taxing and revenue-raising authority to pay that debt as it comes due. State law restricts when a general obligation debt may be placed on a ballot for voter approval; there are specific dates in any given year when such a referendum may be conducted: [3]

- During odd-numbered years, the third Tuesday in March or the Tuesday after the first Monday in November.
- During even-numbered years, on the date of the general statewide primary or on the Tuesday after the first Monday in November.
- In presidential election years, also on the date of the presidential preference primary.

If the referendum voters approve/authorize the county to incur the debt, the resulting debt obligations become ironclad — the county's full taxing power and resources are pledged to the repayment of the debt. This action is often referred to as a pledge of the county's "full faith and credit." Counties do not have the power to declare bankruptcy. Therefore counties — including future governing authorities — are fully and legally committed to repaying the general obligation debt once it is incurred.

The Constitution places additional restrictions on general obligation debt. For example, a county may not incur general obligation debt — alone or in combination with outstanding general obligation debt previously issued — if that total debt would exceed

10% of the assessed value of all taxable property within the county.[4] Further, the Constitution requires that the repayment term for any general obligation debt may not exceed 30 years.[5]

General obligation debt usually takes the form of the county issuing bonds, which are securities sold either on the public bond market or to a single purchaser (i.e., a "private placement"). The bond purchaser pays to the county the face amount of the bonds, and the county then uses the money to acquire the facilities and/or equipment in question. In exchange, the county agrees to levy a property tax sufficient to pay back the principal amount plus an agreed-upon interest rate over an agreed-upon number of years (never more than 30 years, as noted above).

A significant benefit of general obligation bonds used to finance public projects is that bond purchasers do not have to pay federal and state income tax on the interest that they receive. Because of this, bond purchasers are willing to accept a lower interest rate on the money loaned. Therefore, the county's overall borrowing costs are lower, because the county pays less in interest on the debt. The rules regarding tax-exempt financing[6] — whether through general obligation bonds or other financing structures discussed in this chapter — are complex. Therefore, a county should engage qualified bond counsel and/or financial advisor(s) to assist in structuring new debt in the most advantageous manner, including ensuring that interest on the debt is tax-exempt for the purchaser.

OTHER TYPES OF FINANCING STRUCTURES

While general obligation debt may be the most common type of debt that counties incur, a variety of financing structures with various benefits (and limitations) are also available to them. Depending on the need, these structures often serve as more appropriate funding sources. This section discusses the following debt financing mechanisms:

- Temporary loans/tax anticipation notes (TANs).[7]
- Lease-purchase financing.[8]
- Revenue bonds.[9]
- SPLOST and TSPLOST bonds.[10]
- Governmental authority financing.
- Intergovernmental agreements.[11]

TANs

The general limitations discussed above apply to debt as defined by the courts — an obligation that **will not** be repaid by funds already on hand or by taxes that will be levied in the current year. Loans or obligations that **will** be repaid in the current year are not considered debt for purposes of seeking voter approval via referendum. However, even in this context, other rules apply.

Occasionally, counties need to obtain funds on a short-term basis for cash-flow purposes. One common example involves counties with a calendar-year fiscal year. In this instance, the county begins paying for budgeted items in January (personnel, operational costs, maintenance obligations, etc.), but the county's single largest revenue source – property taxes – is generally not available until late in the calendar year when tax bills come due and are paid. Therefore, additional monies may be needed on a short-term basis to fill this temporary gap in available funds. In another (but less frequent) example, a county may need to pay for a capital expense in the near future. However, the revenue to fund that expense – such as proceeds from a SPLOST – is not anticipated to be available until later in the year. In each of these situations, a county may choose to take on a short-term, or temporary, loan via the issuance of TANs.

Similar to other forms of debt, such as bonds, TANs are in the nature of IOUs. In exchange for up-front payment of the face (principal) amount by TAN purchasers (e.g., banks or other investors), the county agrees to repay the purchasers the principal amount of the TANs plus a stated amount of interest.

The Constitution places limitations on the use of TANs for such short-term operational and/or capital expenses: [12]

- TANs/temporary loans must mature and be repaid on or before December 31st of the year incurred.
- The total amount may not exceed 75% of the county's total gross receipts from all taxes in the prior calendar year.
- The total amount may not exceed the county's total anticipated revenues in the current calendar year.
- No temporary loans may be incurred if any similar temporary loan remains outstanding from a prior calendar year.

Lease-Purchase Financing

Lease-purchase is another debt financing option that is specifically authorized by state law and includes multi-year lease, lease-purchase, and purchase contracts.[13]

Multi-Year Lease-Purchase

Despite the use of the term "multi-year," this type of financing does not technically obligate the county to repay obligations beyond the then-current calendar or fiscal year.[14] The multi-year lease-purchase structure is not considered a debt by the definition for constitutional purposes, i.e., an obligation that will exist beyond current-year revenues. Therefore, it is not subject to voter approval.[15] Such contracts may be used for the acquisition of services or for capital facilities and property.

As “multi-year" implies, the county leases the facility or property through the initial calendar or fiscal year term and each annual term for which the contract is renewed.[16] The lease payments are equal to the annual principal and interest payments on the original amount borrowed. If the county continues to make such payments through all renewal terms, title to the property then vests in the county via the “purchase” component of the transaction.

Several statutory limitations on the use of multi-year lease-purchase contracts exist:

- Unless the acquisition and/or construction of court facilities is involved, a county may not obligate itself to more than $25 million in principal debt for real property using multi-year lease-purchase contracts.[17]
- Property may not be financed via a multi-year lease purchase contract if that same property has been the subject of a failed voter referendum within the previous four years.[18] For example, if the county had previously asked the voters to approve general-obligation bonds or a SPLOST to acquire and build a park and that referendum failed, the county cannot finance that park via a multi-year lease-purchase contract until four years have passed since the failed referendum.
- The total amount to be financed via a multi-year lease purchase contract, when added to all outstanding general obligation debt, may not exceed 10% of the assessed value of all taxable property in the county.[19]
- With regard to multi-year lease-purchase contracts relating to real property (as opposed to equipment or services), the average annual payments on such contracts may not exceed 7.5% of the county’s governmental fund revenues for the prior calendar year.[20]
- A county must conduct a public hearing prior to entering into a multi-year lease-purchase contract relating to real property.[21]

Contracts using the lease-purchase mechanism must contain three specific provisions set out in state law.[22] First, the contract must state the county’s entire obligation for the then-current fiscal or calendar year, as well as for each subsequent fiscal or calendar year for which the contract may be renewed.[23] Second, if the county is acquiring personal property, the contract must provide that title to the property remains in the vendor until the contract is fully paid.[24] The second provision is the key point for avoiding the debt restrictions noted above. Third, the contract must provide that it terminates absolutely — without further obligation on the county’s part — at the end of the current calendar or fiscal year, as well as at the end of each subsequent calendar or fiscal year for which the contract is renewed.[25] The law does allow lease-purchase contracts to be structured so that renewal is automatic, unless the county affirmatively votes to not renew the lease.[26]

Benefits and Risks
A significant benefit of the multi-year contract structure is that a county is only obligated for payments under the contract for the funds appropriated for such purpose in the current fiscal or calendar year. Therefore, no constitutional "debt" is created and voter approval is not required.

However, there are other practical considerations for counties using a multi-year contract financing structure. The possibility that a county will choose to not annually renew such a contract increases the lender's risk, with the result that the county may pay a higher interest rate than it would under a traditional, long-term bond financing. Additionally, while counties have the flexibility to choose not to renew a lease-purchase contract for a subsequent year, not renewing will likely mean forfeiting the collateral for that contract — the equipment or facility(ies) financed.[27] For example, a failure to renew a contract could result in the repossession of sheriff's patrol vehicles, motor graders, and other vehicles — or even loss of real property and buildings that were acquired and constructed using this financing option. In this manner, the decision to not renew a lease-purchase contract operates much like a decision not to pay your home mortgage or car loan; the collateral for that loan may be seized by the lender. However, unlike a mortgage or personal car loan, the county is not liable for the remaining principal balance of the original amount financed under a lease-purchase contract; only the collateral pledged as part of the contract is at risk.

In practice, counties rarely choose to not annually renew multi-year lease-purchase contracts. Because of the potential loss of equipment or property needed and the potential impact on a county's ability to obtain future financing, counties typically renew such contracts on an annual basis.

Certificates of Participation Financing
A particular type of lease-purchase contract financing that counties sometimes use is called certificates of participation (COPs) financing. COPs transactions function much like general-obligation bonds. COPs are sold to investors on the municipal bond market, with each certificate representing an undivided interest in the right to receive periodic repayment of principal and interest on the amount originally received from the COPs sales.

Unlike general obligation bonds, however, counties retain the authority to choose to not renew a COPs transaction beyond the county's current fiscal year.[28] As opposed to other lease-purchase contracts where the lender may be a single party (i.e., a bank), the use of COPs may be more advantageous where the amount of money the county seeks is more than a single bank may be willing to loan via a lease-purchase contract. As a result — and similar to bonds — COPs may be purchased by multiple investors, thereby broadening the borrowing market for a particular transaction.

Revenue Bonds
The issuance of revenue bonds — another type of financing/borrowing — is available for county facilities that generate revenue. For example, water and wastewater facilities, sports venues, parking decks, and exhibition halls generate fee revenue from users of those facilities. While such facilities could also be financed via other methods described in this chapter, Georgia law authorizes revenue bonds as a separate mechanism for acquiring, constructing, and equipping revenue-generating facilities.

As the name implies, revenue bonds are repaid solely from revenues generated from the project financed by those bonds, rather than by general tax revenues. Revenue bonds may be issued without voter approval, unless the bonds are intended for use for electricity generation and distribution systems projects (an exception that only applies if the government issuing the revenue bonds has existing electric utility assets with a book value of less than $300 million).[29] Revenue bonds also allow a long window of repayment for counties, over a term of up to 40 years.[30]

SPLOST/TSPLOST Bonds
SPLOST bonds are a hybrid of revenue bonds and general obligation bonds issued specifically for financing capital projects authorized as part of a county 1% SPLOST. Issuance of SPLOST bonds requires referendum approval by a majority of county electors voting in a special election.[31] Although there are some differences, the same general rules apply to bonds issued by a county in conjunction with a TSPLOST.[32]

Issuance of SPLOST bonds provides a payment mechanism for SPLOST capital projects at the outset of a five-or-six-year SPLOST, rather than waiting for sufficient SPLOST receipts to accumulate. SPLOST bonds are first repayable from proceeds from the 1% SPLOST itself. However, if SPLOST proceeds are insufficient to make principal and interest payments as they come due, such bonds are secondarily secured by the county's pledge to levy enough ad valorem taxes to make those payments.[33]

Unlike other general-obligation bonds or revenue bonds, the maximum repayment term for SPLOST bonds cannot exceed the length of the SPLOST itself: five years (if the county has implemented the SPLOST without entering into an intergovernmental agreement on distribution of proceeds with the cities within the county) or six years (if such an intergovernmental agreement is reached among the county and cities).[34] These requirements are slightly different for a TSPLOST, which may last for up to five years.[35]

Governmental Authority Financing
In some circumstances, a county may have the option of obtaining financing through a governmental authority that is authorized to finance projects within that county. Many counties have a "constitutional" development authority, as opposed to a statutory authority — meaning that governmental authority was created via a local amendment to

the Constitution prior to 1983.[36] The powers of such constitutional development authorities often include the ability to issue revenue bonds to finance public projects. For some counties, the General Assembly has created — by local Act — building or public facilities authorities that have similar power to provide financing for county facilities.[37]

In these authority financing structures, the county and authority enter into an intergovernmental agreement. The authority agrees to issue revenue bonds, and the county agrees to use the proceeds of the sale of those bonds to fund one or more projects. In turn, the county agrees to pay the principal and interest on the bonds as they come due, thereby providing the "revenue" to pay the revenue bonds. As with other revenue bonds, voter approval is not required.

Other Intergovernmental Agreements

Similar to the authority financing structures described above, all counties have the constitutional power to enter into agreements with governmental entities such as the state, other counties or cities, and other governmental authorities.[38] Because this authorization comes from the Constitution itself, other constitutional debt limitations discussed at the outset of this chapter do not apply.[39] Specifically, two or more public entities have the power to contract with each other — for a term of up to fifty years — for the provision of "activities, services, or facilities which the contracting parties are authorized by law to undertake or provide."[40] As a result, a county may enter into an intergovernmental agreement to finance county facilities and/or equipment over a term of up to fifty years.

Using this constitutional authorization, a county may contract for another governmental entity to loan the county money or to issue bonds (depending on the other entity's powers) to finance county equipment and facilities. The county is required to pay back that obligation over a number of years, as agreed to by the parties. Examples include a county agreeing to:

- Pay principal and interest (debt service) on bonds issued by an airport authority to make improvements to the county airport.[41]
- Pay debt service on bonds issued by a coliseum authority to finance construction of a baseball stadium.[42]
- Pay debt service on bonds issued by a resource recovery authority to finance a recycling center.[43]
- Pay debt service on bonds issued by a hospital authority for health facilities.[44]
- Repay a loan from the Georgia Environmental Finance Authority to pay for county water or wastewater facilities.[45]

Both constitutional authority bonds and other financing arrangements that are secured by county (or other government) payments under an intergovernmental agreement are sometimes called “back-door” general obligation bonds. The county has pledged to raise sufficient revenues to pay the principal and interest on the bonds or contractual debt in much the same way as true general obligation bonds, but without the necessity of voter approval.

BOND VALIDATION

Many types of county financing structures, including general obligation bonds and revenue bonds are subject to validation proceedings prior to issuance of those bonds. SPLOST/TSPLOST bonds usually go through the validation process, but it is not legally required in that setting. A bond validation is a court proceeding in which the superior court in the county determines whether the plan for financing the project(s) in question has been properly structured and is legal.[46]

During the bond validation process, citizens have the opportunity to intervene and be heard regarding whether the bonds in question should be validated. If the bonds are, in fact, validated by the court, the bonds are thereafter insulated from any other attacks against their legality.[47] This approval provides assurance to purchasers of the bonds that no later attack on the bonds’ validity will be permissible. As such, bond validation serves to enhance the attractiveness of the bonds to the bond market and, in turn, potentially lowers interest costs to the county.

CONCLUSION

Georgia law allows counties many options to finance debt obligations that can be advantageous to the governing authority and taxpayers, both to accelerate the delivery of facilities, equipment, and services to constituents and to keep borrowing costs relatively low. When considering which type of financing mechanism is the most appropriate, this chapter can serve as a resource to commissioners regarding the basics of debt financing. County governing authorities should retain the services of qualified bond counsel and/or financial advisors to assist in structuring any new debt in a manner that is most advantageous to the county.

By practicing sound debt management, counties can limit the burden assumed by future county leaders, while providing much-needed services and facilities to their citizens.

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[1] See, e.g., *City Council of Dawson v. Dawson Waterworks Co*., 106 Ga. 696, 713, 32 S.E. 907, 914 (1899) (“Any liability which was not to be discharged by money already in the treasury, or by taxes to be levied during the year in which the contract under which the liability arose was made, is a ‘debt,’ within the meaning of the

constitution"); *Bauerband v. Jackson County*, 278 Ga. 222, 223, 598 S.E.2d 444 (2004); *Barkley v. City of Rome*, 259 Ga 355, 381 S.E.2d 34 (1989).

[2] Ga. Const. art. IX, § V, para. I(a).

[3] O.C.G.A. § 21-2-540(c)(2).

[4] Ga. Const. art. IX, § V, para. 1(a).

[5] Ga. Const. art. IX, § V, para. 6.

[6] For example, the funding must be for a project exclusively related to a governmental function unless the project meets the requirements of the private activity test, 26 U.S.C. § 141; certain information returns must be filed with the Internal Revenue Service (e.g., Form 8038-G or 8038-GC), 26 U.S.C. § 149; the county may not violate arbitrage rules (i.e., the county may not receive more than a specified amount of interest in return for investing the funds before using them), 26 U.S.C. § 148; and limitations exist on use of tax-exempt funds to reimburse prior expenditures, 26 CFR § 1.150-2. For more information, see Tax Exempt and Government Entities, Publication 4079: *Tax-Exempt Governmental Bonds*. Internal Revenue Service, Tax-Exempt and Government Entities Division, Sept. 2019, irs.gov/tax-exempt-bonds.

[7] Ga. Const. art. IX, § V, para. 5.

[8] O.C.G.A. § 36-60-13.

[9] O.C.G.A. § 36-88-60, et seq.

[10] O.C.G.A. § 48-8-121 (SPLOST); O.C.G.A. § 48-8-263 (single-county TSPLOST).

[11] Ga. Const. art. IX, § III, para. 1.

[12] Ga. Const. art. IX, § V, para. 5.

[13] ACCG operates a financing program that primarily uses multi-year lease-purchase contracts for the purpose of allowing counties to finance facilities and equipment.

[14] O.C.G.A. § 36-60-13(a)-(d).

[15] See, e.g., *Barkley v. City of Rome*, 259 Ga. 355, 356, 381 S.E.2d 34 (1989).

[16] O.C.G.A. § 36-60-13(a)-(d).

[17] O.C.G.A. § 36-60-13(h)(1)(B).

[18] O.C.G.A. § 36-60-13(f).

[19] O.C.G.A. § 36-60-13(e).

[20] O.C.G.A. § 36-60-13(h)(1)(A).

[21] O.C.G.A. § 36-60-13(g).

[22] O.C.G.A. § 36-60-13(a) and (b).

[23] O.C.G.A. § 36-60-13(a)(3).

[24] O.C.G.A. § 36-60-13(a)(4). See however, O.C.G.A. § 36-60-15, which provides that counties are authorized to accept title to property under lease-purchase and installment sale agreements and to transfer title back to the vendor if the transaction is not fully consummated.

[25] O.C.G.A. § 36-60-13(a)(1).

[26] O.C.G.A. § 36-60-13(a)(1) and (2).

[27] O.C.G.A. § 36-60-15.

[28] O.C.G.A. § 36-60-13(a)(1).

[29] O.C.G.A. § 36-82-61(4)(c)(iv).

[30] O.C.G.A. § 36-82-64.

[31] O.C.G.A. § 48-8-111(c).

[32] O.C.G.A. § 48-8-263. Effective July 1, 2022, the dates for holding SPLOST referenda and single-county TSPLOST referenda are slightly different. Compare O.C.G.A. § 21-2-540(c)(2)(SPLOST) to O.C.G.A. § 48-8-264.1 (single-county TSPLOST).

[33] O.C.G.A. § 48-8-111(e)(2).

[34] O.C.G.A. § 48-8-111(b)(2).

[35] O.C.G.A. §§ 48-8-262(d)(2)(C) and 48-8-263.

[36] The 1983 Georgia Constitution prohibited future "local" constitutional amendments – i.e., those applying to less than the entire state. However, the 1983 Constitution included a mechanism to continue the validity of pre-1983 local constitutional amendments. Ga. Const. art. XI, § I, para. 1(b). As of 2019, there are approximately 70 constitutional development authorities. See, Local Amendments to the Constitution of Georgia: Conundrums Continued and Curiosities Curtailed, Joe Scheuer, ACCG Assistant General Counsel, 2019 Edition.

[37]Columbus Industrial and Port Development Commission, 1965 Ga. Laws 702, and 1967 Ga. Laws 947, continued by local Act, 1986 Ga. Laws 3780 and 3782, see also 1971 Ga. Laws Exec. Sess. 2007 § 4-623 (This commission succeeds the Columbus-Muscogee County Port Development Commission and the Muscogee County Development Authority); Habersham County Industrial Development Authority, 1964 Ga. Laws 876, continued by local Act, 1985 Ga. Laws 4207; Macon-Bibb County Urban Development Authority, 1974 Ga. Laws 1754, continued, 1985 Ga. Laws 5269, and also by local Act, 1986 Ga. Laws 4698; Peach County Industrial Development Authority (funding), 1970 Ga. Laws 992, continued by local Act, 1987 Ga. Laws 3667.

[38] Ga. Const. art. IX, § III, para. 1.

[39] See, e.g., *McLucas v. State Bridge Bldg. Auth*., 210 Ga. 1, 8, 77 S.E.2d 531 (1953); *Avery v. State of Ga*., 295 Ga. 630, 761 S.E.2d 56 (2014).

[40] Ga. Const. art. IX, § III, para. 1.

[41] *Avery v. State of Ga*., 295 Ga. 630, 761 S.E.2d 56 (2014).

[42] *Savage v. State of Ga*., 297 Ga. 627, 774 S.E.2d 624 (2015).

[43] *Ambac Indemn. Corp. v. Akridge*, 262 Ga. 773, 425 S.E.2d 637 (1993).

[44] *Turpen v. Rabun Cty. Bd. of Comm'rs*, 251 Ga. App. 505, 554 S.E.2d 727 (2001).

[45] O.C.G.A. § 50-23-6.

[46] See, generally, Articles 2 and 3 of Chapter 82 of Title 36 of the Georgia Code: O.C.G.A. §§ 36-82-20 through 36-82-28, 36-82-40 through 36-82-47, and 36-82-60 through 36-82-85.

[47] Ga. Const. art. XI, § IX, para. 4; O.C.G.A. § 36-82-24; See *Turpen v. Rabun Cty. Bd. of Comm'rs*, 251 Ga. App. 505, 508, 554 S.E.2d 727, 730 (2001) ("Thus, a judgment validating revenue bonds or certificates 'from which no timely appeal [is] filed, [is] conclusive on the question of the validity of the bonds and the security therefor'"); *Ambac Indemn. Corp. v. Akridge*, 262 Ga. 773, 774, 425 S.E.2d 637 (1993); *Charlton Devel. Auth. v. Charlton County*, 253 Ga. 208, 209, 317 S.E.2d 204 (1984).