

# University of Miami Law Review

---

Volume 21 | Number 1

Article 8

---

10-1-1966

## Industrial Bond Financing and the Florida Public Purpose Doctrine

Tom Tew

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

Tom Tew, *Industrial Bond Financing and the Florida Public Purpose Doctrine*, 21 U. Miami L. Rev. 171 (1966)

Available at: <https://repository.law.miami.edu/umlr/vol21/iss1/8>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# INDUSTRIAL BOND FINANCING AND THE FLORIDA PUBLIC PURPOSE DOCTRINE

TOM TEW\*

I.	INTRODUCTION .....	171
II.	STATE V. TOWN OF NORTH MIAMI—AN UNFORTUNATE BEGINNING .....	174
III.	THE PUBLIC PURPOSE DOCTRINE .....	176
	A. <i>Who Determines a Valid Public Purpose—The Court or The Legislature?</i> ..	176
	B. <i>Projects in the Public Purpose</i> .....	176
	C. <i>The Incidental Test</i> .....	177
	D. <i>Private Enterprise and the Public Purpose Doctrine—Four Leading Cases</i> ..	178
	a. GATE CITY GARAGE INC. V. CITY OF JACKSONVILLE .....	178
	b. PANAMA CITY V. STATE .....	179
	c. STATE V. DAYTONA BEACH RACING & RECREATIONAL FACILITIES DISTRICT ....	180
	d. STATE V. INTER-AMERICAN CENTER AUTHORITY .....	180
	E. <i>Cotney—False Hope</i> .....	181
	F. <i>A Retreat from Cotney—The Gate City Garage and Panama City Test</i> ...	182
	G. <i>The Favorite Sons</i> .....	185
	a. AIR TRAVEL .....	185
	b. RECREATION .....	186
	c. TRADE FAIRS .....	187
IV.	PROPOSED JUDICIAL CONSTRUCTION AND/OR LEGISLATIVE ACTION .....	188
V.	THE TENNESSEE STORY .....	191
VI.	A CAVEAT .....	194
VII.	CONCLUSION .....	194

## I. INTRODUCTION

*Laudable as is the effort of the people to lift their locality to a more prosperous condition by their own bootstraps, so to speak, we do not think it can be done within the framework of our laws. Section 10, Article 9, seems completely to bar the way. . . . We regret that we cannot for reasons to constitutional restrictions approve what appears to be an earnest effort to improve the lot of the citizens of Washington County.<sup>1</sup>*

The irony of the quoted matter forms the basis for this article, for indeed the laudable efforts of many of Florida's county development commissions are presently barred by this antiquated, outmoded section of the Florida Constitution:

The Credit of the state shall not be pledged or loaned to any individual company, corporation or association; nor shall the state, a joint owner or stockholder in any company, association or corporation. The legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.<sup>2</sup>

---

\* Member of the Florida Bar; Associate, Shutts & Bowen, Miami Florida; former Editor-in-Chief of the *University of Miami Law Review*; Student Instructor for Freshman Research and Writing, University of Miami School of Law.

1. State v. Washington County Dev. Authority, 178 So.2d 573, 574 (Fla. 1965).

2. FLA. CONST. art. IX, § 10.

The application of Article IX, section 10, has split the Florida Supreme Court more often than not. The difficulty does not lie with the wording of section 10 itself, but rather with the application of its companion, the "public purpose doctrine."

Section 10 of Article IX of the Florida Constitution was first adopted in 1875 as an amendment to section 7 of Article XIII of the Constitution of 1868. The case of *Bailey v. City of Tampa*,<sup>3</sup> suggests that the motive behind its enactment was an attempt to restrict the history of state, county and municipal financial activity prior to the enactment of section 10 whereby these government bodies loaned their credit to railroads, banks and other commercial interests in the state.<sup>4</sup> Many of these private commercial interests proved to be poorly organized and managed and the ensuing flood of inevitable financial reverses fell upon the states, counties or municipalities which had become involved. They in turn, laid the burden on the taxpayers.

The memory of these events and the resultant philosophy of restricting the pledging of credit is still alive today, as was exemplified in the 1959 case of *City of West Palm Beach v. State*.<sup>5</sup> The court stated:

The procedure whereby public funds are used to aid or promote individuals or private authorizations in private enterprise is a dangerous and undemocratic course and may not be followed except where it is clear and unmistakable that such private enterprise is a necessary adjunct to some proper public function.<sup>6</sup>

The danger is not totally blinding however, and the Florida Supreme Court realized soon after the adoption of section 10 that not every involvement by government with a private enterprise was necessarily detrimental. A new theory was sought whereby the courts could distinguish the less undesirable financial arrangements, permissible under section 10, from those which could not be permissible. The search ended with the employment of the "public purpose doctrine," theretofore connected with the power of counties and municipalities to tax. The doctrine is set forth in section 5 of Article IX of the Florida Constitution:

The legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and *municipal purposes* and for no other purposes and all property shall be taxed upon the principles established for state taxation. . . .<sup>7</sup>

The gauge of the validity of a county or a municipal tax was an available parallel for gauging a public purpose and the court chose to

---

3. 92 Fla. 1030, 111 So. 119 (1926).

4. *Id.* at 120.

5. 113 So.2d 374 (Fla. 1959).

6. *Id.* at 377.

7. FLA. CONST. art. IX, § 5.

expand this doctrine, originally set forth in the *taxing section* of the constitution, to a solution of the *funding problems* arising under section 10 of Article IX. The Supreme Court of Florida began to read section 10 as if it read "the credit of the state shall not be pledged or loaned to any individual, company, or corporation or association, *for other than a public purpose.*" To this day, this construction, revolving around the unwritten public purpose doctrine, governs the determination of constitutional validity of every industrial bond issue in the State of Florida.

In addition to the use of the public purpose doctrine to determine the validity of taxing under Article IX, section 5, and bonding under Article IX, section 10, the doctrine must be read together with: Article IX, section 1, excepting from just valuation for taxes properly exempted by law for "municipal purposes;" Article IX, section 7: "No tax shall be levied for the benefit of any chartered company of the state;"<sup>8</sup> and sections 1<sup>9</sup> and 12<sup>10</sup> of the Declaration of Rights of the Florida Constitution which limit the power of eminent domain to those takings of private property justifiable as being for public purposes when just compensation is made.<sup>11</sup> Yet, it is in connection with section 10 of Article IX that the public purpose doctrine has received its greatest judicial interpretation, an interpretation that may be applied in most situations to cases in the other sections.

A hypothet will focus the scope of this article. The elected officials of X County, Florida, have met with the executives of Y Aircraft Manufacturing Corporation. As an inducement for Y Company to locate its new manufacturing plant in X County, the County has agreed to construct a new manufacturing plant to be leased to the Y Aircraft Corporation. The construction of this plant is to be financed by an industrial development bond issue<sup>12</sup> and the rental proceeds of the lease will be pledged to meet the obligations under the bond as well as the interest payments. Both parties to the agreement are pleased because of the obvious benefits which will accrue to each. The new industrial payroll will create a sounder economic community. The new employees of Y Manufacturing Company will create new deposit savings in the com-

---

8. "Tax levies are legal only insofar as they are clearly authorized by law for proper public purposes." *City of Bradentown v. State*, 88 Fla. 381, 102 So. 556 (1924).

9. "All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, requiring possessing and protecting property, and pursuing happiness and obtaining safety." FLA. CONST., DECL. OF RIGHTS, § 12.

10. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation." FLA. CONST., DECL. OF RIGHTS, § 12.

11. *Compare Grubstein v. Urban Renewal Agency*, 115 So.2d 745 (Fla. 1959) with *Adams v. Housing Authority*, 60 So.2d 663 (Fla. 1952).

12. The industrial development bond is a public security payable only from the proceeds of a particular self-liquidating project owned by the issuing governmental agency. 26 FLA. JUR. *Public Securities* § 68 (1959). For an excellent discussion of the industrial development bond see *Industrial Development Bonds: Judicial Construction, U.S. Plant Construction*, 15 U. FLA. L. REV. 262, 269 (1962).

munity and will add generally to the community's economic consumption. These employees will need new homes, new automobiles, and thus, in turn their presence will create new jobs necessary to serve other increased economic demands. In short, the effect of Y Company's presence in X community will be multiplied far beyond the actual payroll of Y Company. The Y Company will also benefit since it has been able to establish a new manufacturing plant and facilities without a large capital outlay. Particularly important is the tax benefit that will accrue to Y Company. Under the present revenue rulings, Y Company can deduct the rents paid to the county as ordinary and necessary business expenses under the Internal Revenue Code.<sup>13</sup> This obvious, mutually advantageous relationship would be judicially welcomed in our southern sister states of Georgia, Louisiana, Tennessee, Alabama and Arkansas; but it cannot be implemented in the State of Florida. Why? Our supreme court would invalidate the bond issue that would underwrite the plant construction as a violation of section 10, Article IX, of the present Florida Constitution and the public purpose doctrine.

It is the purpose of this article to review section 10 of Article IX and its companion, the public purpose doctrine, in order to point out their retarding effect on the Florida economy in the context of the current intense economic competition for new industry in the South. The need for a re-evaluation of the purpose of the doctrine is made particularly acute by the well documented prediction that by 1970, Florida will have an estimated eight million people and will rate eighth in size in the United States, surpassing Massachusetts and New Jersey in population.<sup>14</sup> It is no longer feasible to support such a large population on tourism alone; all informed voices agree—the need is for industrialization. Florida's manufacturing employment presently represents only fifteen percent of its total employment, a figure which compares poorly with the national average of thirty percent.<sup>15</sup> It appears obvious that the new jobs that must be found can best be supplied by increased industrialization of Florida. It is hoped that the courts, as well as the 1967 Legislature (impressed as they are with their self-assigned task of evaluating Florida's antiquated Constitution) will study the picture developed by this article.

## II. STATE V. TOWN OF NORTH MIAMI—AN UNFORTUNATE BEGINNING

The pattern for the judicial construction of section 10 was firmly established for better or for worse in the leading case of *State v. Town of North Miami*.<sup>16</sup> In this case, the town attempted to issue certificates which were to be used to purchase land, thereon to erect an aluminum

---

13. INT. REV. CODE OF 1954, § 103(a)(1).

14. FIRST RESEARCH CORPORATION, *Florida's Future*, p. 7.

15. *Id.* at 9.

16. 59 So.2d 779 (Fla. 1952).

plant which was to be leased to an aluminum corporation for twenty years. The rent was calculated to fully amortize the principle and interest on the certificates and to produce some additional revenues. In validating the certificates, the circuit court declared that the credit of the town of North Miami had not been pledged within the literal meaning of section 10. The supreme court rejected this argument and concluded that if the execution of the proposed plan would serve a municipal purpose, then the town would have the authority to issue the certificates of indebtedness to accomplish that purpose; however, if the erection of the plant was not deemed a municipal purpose, then the certificates would be invalid. The court sidestepped the obvious plea that the aluminum plant would be of economic benefit to the community by stating:

Every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new supermarket, a new department store, a new meat market, a steel mill, a crate manufacturing plant, a pulp mill, or establishments which could be named without end may be of material benefit to the growth, progress, development and prosperity of a municipality. But these considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose.<sup>17</sup>

Thus, the argument of the circuit court, based squarely upon the literal translation of section 10, was met and defeated by a resort to the public purpose doctrine. From that starting point, it was judicially established that the validity of any bond issue would thereafter be determined upon the battleground of public purpose, and as developed, whether any private benefit realized was merely incidental to this public purpose. While only conjecture, it should be mentioned that the court, before entering into a discussion of the law in relation to these questions, pointed out and rightly so, that the lease arrangement was particularly favorable to the corporation and that it contained a clause that allowed the corporation to obtain fee simple title to the property by the payment of 1,000 dollars at the end of the lease period. Thus, under this clause of the agreement, the town would have been obliged to sell to a private corporation for only 1,000 dollars property that had cost 400,000 dollars. It is interesting to speculate as to what the attitude of the supreme court might have been towards the industrial bond issue had the agreement been more equitable to the town, rather than so one-sided in favor of the corporation. Such a windfall to the corporation may well have triggered a memory of the earlier motivations for the enactment of section 10.

---

17. *Id.* at 784-785. The court buttressed its argument with the following quote:

If the purpose is purely a private one, there is no power to issue [bonds] without regard to the existence of any statutory or charter provisions, since even the legislature cannot authorize the issuance of bonds for a purely private purpose.

4 McQUILLAN, MUNICIPAL CORPORATIONS, § 2436, pp. 147, 148 (2d ed. 1947).

### III. THE PUBLIC PURPOSE DOCTRINE

#### A. *Who Determines a Valid Public Purpose?*

Before a particular transaction can be deemed to be for a public purpose, it is necessary to first establish who will determine this question: the legislature or the courts? It is generally agreed that the question is one for the legislature.<sup>18</sup> However, courts have reserved various degrees of permissible judicial review of this legislative determination. In Florida, the legislative determination that a particular project may be for a public purpose is not conclusive upon the courts, but such declaration is very persuasive when taken in connection with the purpose sought to be accomplished.<sup>19</sup> When the legislature determines that a public purpose would be served, the courts will supposedly not find to the contrary unless the legislature has acted unjustly, unreasonably, or was arbitrary.<sup>20</sup> The court will take judicial notice of facts and conditions shown by the pleadings as well as those facts contained in the record which support or defeat the requirement that the primary purpose and aim of the proposed project is that of a public and a municipal purpose.<sup>21</sup>

#### B. *Projects in the Public Purpose*

The most baffling question concerning the validity of bond issues under section 10 is the determination of the scope of activities which will qualify as a "public purpose." Generalizations are easily made. Many situations are readily recognized as being for a public purpose, while other more complex state-private financial arrangements must be analyzed by weighing the relative public and private purposes achieved.

Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants and residents within the governmental body.<sup>22</sup> The Florida courts have accepted this general rule for determining a public purpose.<sup>23</sup> However, like most general principles, the precise meaning of the terms can only be understood from their

18. 37 AM. JUR. *Municipal Corporations*, § 120 (1941). "The fountainhead and source of all municipal power or authority is the Legislature." *Gate City Garage v. City of Jacksonville*, 66 So.2d 653, 655 (Fla. 1953).

19. There are certain limits beyond which the Legislature cannot go. It cannot authorize a municipality to spend public money or lend or donate, directly or indirectly, public property for a purpose which is not public. A legislative determination may be persuasive, but it is not conclusive.  
*State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952).

20. *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So.2d 34 (Fla. 1956); *State v. City of Jacksonville*, 53 So.2d 306 (Fla. 1951); *State v. Monroe County*, 148 Fla. 111, 3 So.2d 754 (1941).

21. *Gate City Garage v. City of Jacksonville*, *supra* note 18, at 656.

22. 37 AM. JUR. *Municipal Corporations*, § 120 (1941).

23. *State v. Washington County Dev. Authority*, *supra* note 1; *City of Clearwater v. Caldwell*, 75 So.2d 765 (Fla. 1954); *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So.2d 483 (1947).

previous judicial application to specific factual situations. Adding to the lack of clarity, the Florida Supreme Court has declared that the "question of what constitutes a municipal purpose is not static."<sup>24</sup>

As discussed, many cases lend themselves to a ready solution when the general public purpose test is applied. The Florida Supreme Court has recognized that recreational facilities,<sup>25</sup> off-street parking,<sup>26</sup> bridges,<sup>27</sup> roads,<sup>28</sup> hospitals,<sup>29</sup> armories,<sup>30</sup> streets and sidewalks,<sup>31</sup> planetariums,<sup>32</sup> and school dormitories<sup>33</sup> are within the public purpose doctrine. These traditional municipal areas of activity offer no problem to construction of section 10.

### C. *The Incidental Test*

With the advent of broader economic improvement programs instituted by many counties, the courts were forced to adopt a new test in determining whether the project was within the permissible limits of the public purpose doctrine. This test became known as the "incidental test." This change was necessitated by the fact that many "public" projects involved, necessarily, some sideline financial ties with private industry. The extent of private industry's involvement in the program would, therefore, only invalidate the program if the private interest was determined to be more than "merely incidental" to the major purpose. If the primary objective of the project remained public, merely incidental benefits to private industry would not invalidate a bond issue underwriting the project. The opinion in *State v. Board of Control*<sup>34</sup> clearly expresses the courts' attitude.

It is impossible to conceive of a public improvement which will not incidentally benefit some private individual, association or

24. *City of Fernandia v. State*, 143 Fla. 802, 197 So. 454 (1940).

25. *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So.2d 34 (Fla. 1956) (auto race track); *State v. Escambia County*, 52 So.2d 125 (Fla. 1951) (development of public beaches); *State v. City of Daytona Beach*, 160 Fla. 13, 33 So.2d 218 (1948) (construction of stadium, boat basin, and recreational center).

26. *Gate City Garage Inc. v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953); *Chase v. City of Sanford*, 54 So.2d 370 (Fla. 1951); *State v. City of Miami Beach*, 47 So.2d 865 (Fla. 1950).

27. *Masters v. DuVal County*, 114 Fla. 205, 154 So. 172 (1934), *cert. denied*, 293 U.S. 559; *Stockton v. Powell*, 29 Fla. 1, 10 So. 688 (1892); *Skinner v. Henderson*, 26 Fla. 121, 7 So. 464 (1890).

28. *Hillsborough Co. v. Keefe*, 82 F.2d 127 (1936), *cert. denied*, 298 U.S. 679; *State v. Brevard County*, 99 Fla. 226, 126 So. 353 (1930).

29. *State v. Walton County*, 97 Fla. 59, 119 So. 865 (1929); *McRae v. McSwain*, 95 Fla. 893, 116 So. 862 (1928).

30. *State v. Florida State Improvement Comm'n*, 47 So.2d 627 (Fla. 1950); *State v. Dickenson*, 44 Fla. 623, 33 So. 514 (1902).

31. *State v. City of Pensacola*, 40 So.2d 569 (Fla. 1949).

32. *Burton v. Dade County*, 166 So.2d 445 (Fla. 1964).

33. *State v. Board of Control*, 66 So.2d 209 (Fla. 1953). The court held that as the University of Florida is a public institution and is for public purposes, a bond issue to construct student dorms was not in violation of Art. IX, § 10, of the Florida Constitution.

34. 66 So.2d 209 (Fla. 1953).



corporation engaged in private enterprise for private gain. The location and construction of courthouses, schools, roads, bridges, colleges and the buildings essential to their operation, are predominantly and primarily for a public purpose and, yet, each of them may be of some benefit to a private individual, association or corporation, engaged in private business for private gain. The mere fact that someone engaged in private business for private gain will be benefited by the very public improvement undertaken by the government or a governmental agency, should not and does not deprive such improvement of its public character or detract from the fact that it primarily serves a public purpose. And incidental use or benefit which may be of some private benefit is not the proper test in determining whether or not the project is for a public purpose.<sup>35</sup>

D. *Private Enterprise and the Public Purpose Doctrine—  
Four Leading Cases*

The permissible amount of private enterprise involvement in a project is difficult to ascertain by a review of the Florida Supreme Court's opinions. In each of the following four cases the proposed bonding plan was approved as a valid public purpose even though private enterprise was incidentally involved. These cases are discussed in detail in order to later point out the court's logical inconsistencies in their application of the public purpose doctrine.

a. GATE CITY GARAGE, INC. V. CITY OF JACKSONVILLE

In *Gate City Garage, Inc. v. City of Jacksonville*,<sup>36</sup> the supreme court reviewed an appeal from a final decree validating an issuance of municipal parking revenue bonds. The appellants argued that the reservation, in the cities, of authority to lease a filling station on the affected property contravened the constitutional prohibitions against the utilization of public authority to take one man's property for another's private gain. Herein the door to a discussion of the public purpose was opened by both the eminent domain provisions of the constitution, section 12 of the Declaration of Rights, as well as section 10 of Article IX. The court held that the construction and leasing of a filling station on a parking lot of the size contemplated were merely incidental private purposes; the primary purpose was to construct a parking lot to serve a public. The court took judicial notice of the fact that space in many county buildings is leased, and concessions are granted, to private individuals for the sale of "food, magazines, newspapers, public telephones and other things which are mere incidents to the main or primary purpose

---

35. *Id.* at 211.

36. 66 So.2d 653 (Fla. 1953).

of the buildings, but are for the convenience of those who use the buildings or facilities for a public purpose."<sup>37</sup>

The fact pattern of *Gate City Garage, Inc.* should be remembered because a later supreme court case, *State v. Clay County Development Authority*<sup>38</sup> announced that the facts of *Gate City Garage* and those of *Panama City v. State*<sup>39</sup> should form guidelines of the permissible percentage of private involvement in a public purpose project.

#### b. PANAMA CITY V. STATE

In *Panama City v. State*, the circuit court dismissed the petition of the city to validate waterfront improvement revenue bonds. The proceeds from the proposed bonds were to be used for the erection of two large waterfront developments in Panama City. Two marinas were to be constructed, which were to have all necessary docks, docking facilities, waterways, parking and utilities required for the operation of a large marina. At one of the marinas a concession building with shops to be leased to private individuals was to be constructed. Of the total area of both marinas, the concession buildings in question were to occupy only 1.22 percent of the total area. While obviously influenced by the small area occupied by the concession buildings, the court focused on the necessity of the concession buildings and the businesses "to ensure the success of the main undertaking."<sup>40</sup> The court concluded that as the facilities were a necessary adjunct to the successful operation of the main enterprise, the businesses were in that respect incidental to the operation of the marina and not the principal purpose of the undertaking.

*Panama City* should be contrasted with *City of West Palm Beach v. State*.<sup>41</sup> In *City of West Palm Beach*, the circuit judge declined to validate a bond issue where the proceeds were to be used to finance construction of a civic center with a marina and commercial shops. On appeal, the supreme court affirmed and alluded to two fatal defects in the issue which distinguished the case from *Panama City*. The first distinguishing point was that in *City of West Palm Beach* the entire civic center was to be leased to the private corporation and the corporation was to have the power to make all the rules and regulations affecting the use of the civic center. The court pointed out that in *Panama City* the fact that the city retained control of the project and leased only the various

---

37. *Id.* at 659. The court then cited with approval 18 AM. JUR. *Eminent Domain*, § 41 (1938), "The general rule is settled that the exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which did not itself warrant the exercise of the power."

38. 140 So.2d 576 (Fla. 1962).

39. 93 So.2d 608 (Fla. 1957).

40. *Id.* at 614.

41. 113 So.2d 374 (Fla. 1959).

units was the theory on which the court found that the bond issue did not violate section 10. Moreover, the agreement with the private enterprise contained a provision, that in the event revenues from the lease were insufficient to pay the principal and the interest on the bonds then the monies derived from the utilities service tax in succeeding years were to be pledged in support of the bonds. The court found that such a provision not only violated section 10 of Article IX but also violated the West Palm Beach City Charter which allowed revenue bonds for the purposes of providing funds for projects, but required that the bonds be retired exclusively from the revenues of the project and that the City could not pledge utility franchise taxes for any deficits. The opinion suggests in an indirect manner, that even though the legislature had granted the City of West Palm Beach the authority to pledge franchise utility taxes, such a pledge of credit would be violative of section 10 of Article IX. The circuit court further found that the close proximity of the marine project to a main shopping center in West Palm Beach, would remove the requisite set forth in *Panama City*, that the shopping facilities be necessary to the project.

C. STATE V. DAYTONA BEACH RACING & RECREATIONAL FACILITIES DIST.

In *State v. Daytona Beach Racing & Recreational Facilities Dist.*,<sup>42</sup> the supreme court affirmed a validation of revenue bonds for racing and recreational facilities as a valid public purpose even though a private corporation was allowed to use the facilities during six months of the year for scheduled motor racing. The appellant argued that to allow the corporation to use the facilities during half of the year for forty years, with no capital investment, constituted a loan of the District's credit. The court responded that the undertaking was for a public purpose and was not violative of section 10 even though some "private parties may be incidentally benefited."<sup>43</sup> While six months can hardly be considered an incidental benefit, the true impact of the case is found in the court's attempt to support the attraction for the purposes of tourism.

d. STATE V. INTER-AM. CENTER AUTHORITY

Combining both the lease-to-the-concessionaire aspect of *Panama City* and the tourism aspect of *Daytona Beach Racing & Recreational Facilities Dist.*, is the case of *State v. Inter-Am. Center Authority*.<sup>44</sup> In 1951, the legislature created the Inter-American Center Authority as an agency of the state.<sup>45</sup> The Authority was authorized to construct, maintain, operate and provide for the establishment of an Inter-American culture and trade center in or about the City of Miami. The culture and

---

42. 89 So.2d 34 (Fla. 1956).

43. *Id.* at 37.

44. 84 So.2d 9 (Fla. 1955).

45. FLA. STAT. ch. 554 (1963).

trade center would provide means to display industrial, commercial, agricultural and other products of the state. To advance this project, the Authority was authorized to issue revenue bonds, but without pledging the credit of the state or any subdivision thereof. A proceeding was brought to invalidate an issue by the Authority on the basis that the Inter-American Culture and Trade Center was not a public purpose and therefore violated section 10 of Article IX of the Constitution. The court concluded that

Since the erection of a Trade Center is designed to strengthen cultural relations among the countries of the Western Hemisphere, it cannot be said that it amounts to a pledge or loan of the credit of the state to an individual, company, corporation or association in violation of Section 10 of Article IX of the Constitution.<sup>46</sup>

Nor, stated the court, could any lease or rental to concessionaries, or other leases, employed to accomplish the purposes of the central authority be said to be a loan of the credit of the state.

#### E. Cotney—*False Hope*

Finally, in 1958, after a series of unrelated factual determinations of what constituted an incidental benefit, the supreme court in *State v. Cotney*,<sup>47</sup> set forth what appeared to be a bold statement in favor of projects that involved private enterprise in countywide development. The Attorney General brought the original proceedings in quo warranto to attack the validity of chapter 57-1226, Special Acts of Florida 1957, which authorized the Clay County Development Authority. The Authority was granted the power to lease or purchase real property and to construct improvements to be paid for by the proceeds of issued revenue certificates. Permissible projects included those for the purpose of development, expansion and promotion of industry, commerce, agriculture, natural resources, vocational training and the construction of buildings and plants for the purpose of selling, leasing or renting such structures to private persons, firms or corporations. The Attorney General attacked the Act as in violation of section 10 of Article IX. The court summarized:

We have no doubt that the Clay County Development Authority was created to and will serve a valid public purpose in providing for the over-all development of Clay County. The setting aside for industrial and commercial purposes of a portion of the property already purchased is certainly a part of the balanced over-all plan for the County's development; but there is nothing in the record here to show that this was the primary purpose for the acquisition of the federal government's surplus tract of

---

46. *Supra* note 44, at 12.

47. 104 So.2d 346 (Fla. 1958).

land, rather than an incidental part thereof. In these circumstances we find nothing in the previous decisions of this Court construing § 10 of Article IX requiring us to hold that the Authority's acquisition of property and disposed program for its development amount to an appropriation of the Authority's funds for, or the lending of its credit to, a private enterprise.<sup>48</sup>

Thus, it was clear that the supreme court had authorized this construction and lease of property to a private corporation since it was in concert with the county's over-all development plan. Thus, suggested the court, if the financial arrangement with private enterprise is only an incidental part to the over-all development, then the revenue bonds of the developmental authority will not be in violation of section 10.

The *Cotney* court's favorable attitude towards coupling private enterprise with an over-all county development program inspired the drafting of similar development authorities by various counties which were promptly adopted by the Legislature.<sup>49</sup> It finally appeared that after allowing incidental benefits on a small scale such as leases to shopholders, the court had come full swing to allow the construction and leasing to private enterprise on a large development program.

#### F. *A Retreat from Cotney—The Gate City Garage and Panama City Test*

Unfortunately, the *Cotney* decision was the last of the court's favorable attitude towards economic assistance to private enterprise. In the cases that followed, the court returned to its prior position and allowed limited economic assistance only when the facts were similar to those of *Gate City Garage* and *Panama City*. This change in direction was suggested by *State v. Suwannee County Dev. Authority*,<sup>50</sup> and was convincingly settled in the 1962 case of *State v. Clay County Dev. Authority*.<sup>51</sup> In *Suwannee*, the County Development Authority proposed a bond issue that would be used to purchase real estate on which to construct buildings to lease to private enterprise. The authorities argued that this project was the first step in a much larger over-all development project. The Authority insisted that the over-all project was for a valid public purpose and the construction and lease to a private enterprise was merely

---

48. *Id.* at 349.

49. In the 1957 session, Baker County, ch. 57-1129; in the 1959 session, Gilchrist County, ch. 59-1308; Hamilton County, ch. 59-1322; Jefferson County, ch. 59-1429; Lafayette County, ch. 59-1460; Liberty County, ch. 59-1506; Madison County, ch. 59-1529; Okaloosa County, ch. 59-1629; Suwannee County, ch. 59-1903; Taylor County, ch. 59-1927; Union County, ch. 59-1939; Walton County, ch. 59-1961; Washington County, ch. 59-1964; in the 1961 session, Bradford County, ch. 61-1894; Holmes County, ch. 61-2270; Jackson County, ch. 61-2285; Lake County, ch. 61-2373; Putnam County, ch. 61-2727; Wakulla County, ch. 61-2982.

50. 122 So.2d 190 (Fla. 1960).

51. 140 So.2d 576 (Fla. 1962).

incidental. The Authority relied on *State v. Cotney*.<sup>52</sup> In reversing the circuit court's decree validating the certificates, the supreme court refused to accept the proposed future program of the Authority. The court argued that the evidence showed that the Authority had not yet devised any broad project and thus distinguished *Cotney* on the facts. Justice Thornall, concurring specially, focused on the defect in the Suwannee County Development Authority's proposed project.

I concur in the judgment of reversal for the reason that the revenue bond resolution omits entirely a commitment of the proceeds to any reasonable definite project within the limits of appellee's statutory authority. Conceivably, a legitimate plan could be developed. However, it is impossible to determine from the resolution or the validating decree the nature of the project which the appellee contemplates undertaking. The testimony of the members of the appellee Authority is entirely speculative as to how or for what purpose the revenue bond proceeds will be used. Not a single member of the Authority appeared to have any specific or reasonably definite ideas as to what would be done with the money. It is possible that the money could be applied to a public purpose under the resolution. However, the entire proceedings are totally lacking in any showing that the monies will be used for a purpose contemplated by the authorizing statute.<sup>53</sup>

Justice Terrell, on the other hand, dissented on the basis that he was convinced that the appellee had shown the proposed acquisition of land and construction of a building to be leased to an industry was a very small portion of the over-all county development program. Thus, it appears that Justice Terrell was convinced that an over-all program existed while the majority was not. The *Suwannee County Dev. Authority* case does not specifically recede from *State v. Cotney*,<sup>54</sup> but reaffirms the court's suspicion of economic assistance when there is the lack of a valid well-defined over-all program that meets a public purpose. In this regard, the two cases can be viewed together without internal conflict.

The death blow to *State v. Cotney*, was not to come until 1962 when the supreme court heard the case of *State v. Clay County Dev. Authority*.<sup>55</sup> In *Clay*, the circuit court entered a decree validating certificates that provided that the development authority would construct and equip an industrial plant on portions of its previously acquired airfield and would lease that plant to a private corporation for sixteen years with an option to renew for ten additional years. It was agreed that the Authority would finance the cost of buildings and equipping the plant by the issuance

---

52. 104 So.2d 346 (Fla. 1958).

53. *Supra* note 50, at 194.

54. *Supra* note 52.

55. *Supra* note 51.

and sale by the Authority of revenue certificates that would be paid solely from the sums to be paid by the company to the Authority over the initial sixteen year term of the lease. The lease did allow the company an option to renew for a period of ten years at an annual rate of 15,000 dollars per year. It is interesting to note that the renewal clause in this case provided for a substantial annual rental whereas the renewal clause in the case of *Town of North Miami* provided for the payment of taxes that amounted to only 1,000 dollars a year. In essence the court reviewed its determination in *State v. Cotney*, and declared that the holding was meant to be limited to projects that were "embraced within our holding in the Gate City and Panama City cases."<sup>56</sup> Thus, for the majority, the size of the project seemed to control. Naturally, the limited scope of the facts in those two cases sounded the death knell of large-scale industrial development bonding in Florida. For the development authorities were not interested in aiding the small shop leaseholder, or the concession stand owner, but rather were looking to entice large-scale industry to the area.

Justice Terrell and Justice Thornal dissented with compelling arguments. Justice Terrell pointed out that in the financial arrangement, not one cent from the public treasury of the Authority was pledged to support the certificates and no lien on the property was imposed. The sole security was limited to the rents derived from buildings proposed to be constructed with the proceeds. He then argued that the case fell squarely within the court's precedent that when the over-all purpose of the act to be accomplished is a public purpose it will not be held invalid because of an incidental private benefit. Justice Terrell was not moved to retreat to the limited fact pattern of *Gates City* and *Panama City*. Justice Thornal was even more vigorous in his dissent. He reminded the majority that in *Cotney*, the court specifically held that the comprehensive over-all development program now sought to be implemented was a recognized public purpose to wit: The economic and cultural improvement and betterment of Clay County and its municipalities. To justice Thornal, it appears that the court was reversing its position in *Cotney*.

The Attorney General in *State v. Cotney* supra questioned this very same statute (the statute creating the Clay County Development Authority) in an obvious effort to eliminate doubts regarding the Authority's powers. He contended that the Act violated Section 10, Article IX, Florida Constitution, because it authorized the acquisition and development of public property for private purposes. This Court, in no uncertain terms, overruled the point when it held the construction of improvements *on a part* of the previously acquired land and the leasing thereof to private concerns would be a mere incident to the overall purpose which permeated the entire statute, to wit: The improvement and development of Clay County. I feel that appellee au-

---

56. *Id.* at 579.

thority was authorized to proceed in reliance on that decision. It now appears to me that without expressly receding from the clear holding in *State v. Cotney*, supra, we are reversing our position. We are telling the authority that it has no power to accomplish that which, less than three years ago, we told them it was their function to accomplish in the public interest.<sup>57</sup>

Justice Thornal argued convincingly that the instant case was analogous to the previously decided case of *State v. Dade County, Florida*,<sup>58</sup> in which the court authorized the Dade County Port Authority to raise money to construct a large warehouse and overhaul shop on public land for the immediate benefit of National Airlines. He reasoned that there was no distinction between the economic benefit brought to the City of Miami by the additional airline facilities and the economic benefit sought to be brought to Clay County by the adoption of this project. Justice Thornal's thinking is sound.

### G. *The Favorite Sons*

Justice Thornal's dissent in *Clay* focuses on the court's inconsistent position in the application of the public purpose doctrine. This logical inconsistency has the result of favoring some aspects of private enterprise while penalizing others. The author submits that if the economic development of a community is at issue, it is meaningless to promote air travel, trade fairs, and auto racing while discouraging industrial enterprise. The *Clay* court excluded these cases from the *Gate City* and *Panama City* test and deemed the projects to be for a public purpose. Under close scrutiny, however, the net result of these cases appears to be the improvement of the public welfare, whether through additional recreational facilities or improved transportation service and it is questioned whether the court can determine categorically what projects are so connected with the public welfare<sup>59</sup> so as to be excluded from the application of Article IX, section 10.

#### a. AIR TRAVEL

In *State v. Dade County*,<sup>60</sup> the Circuit Court of Dade County validated a proposed issue of the Dade County Port Authority's special fund certificates to construct a warehouse and overhaul shop to be leased to National Airlines. National Airlines agreed to pay rent for the use of the premises at an amount sufficient to pay both the principal and interest on the revenue certificates as they matured. Without reference to section 10 of Article IX, the supreme court affirmed the circuit court's validation.

---

57. *Id.* at 585.

58. 62 So.2d 404 (Fla. 1953).

59. Contrast the cases of *State v. Dade County*, 62 So.2d 404 (Fla. 1953) and *State v. Okaloosa County Airport & Industrial Authority*, 168 So.2d 745 (Fla. 1964) with the early case of *State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952) and the later *Clay* case, 140 So.2d 576 (Fla. 1962).

60. 62 So.2d 404 (Fla. 1953).



Eleven years later, in *State v. Okaloosa County Airport & Industrial Authority*,<sup>61</sup> the court did apply section 10 to an industrial bond development issue for the construction of certain buildings to be leased to a private aircraft corporation. In *Okaloosa*, the Airport Industrial Authority entered into a contract with Fairchild Stratos Corporation whereby the Authority agreed to construct certain buildings and improvements upon property owned by the Authority that would provide facilities for repair, maintenance and care of aircraft using the Authority's airport. The improvements would be financed by certificates issued by the Authority. These certificates were to be repaid solely from the rents paid by Fairchild. The appellants argued that the proposed issue violated section 10, Article IX of the Constitution and cited *State v. Clay County Dev. Authority*.<sup>62</sup> The court distinguished *Clay* on the facts and concluded:

The facilities proposed by the Authority in the case at bar constitute an additional and direct benefit to the public by improving service at the local airport, the adequate provisions of which is the primary public purpose. Clearly, there is an interdependence between the Authority's airport and the facilities proposed for the repair, maintenance and care of the aircraft of the flying public using said airport. For example, runways on the public airport are not the only facilities essential to the functional operation of an adequate airport. A number of other facilities and aids are essential including those contemplated in the project here. However, no clear interdependence between the plastics factory and a recognized public purpose was found to exist in the Clay County case.<sup>63</sup>

Thus, without reference to *State v. Panama City*,<sup>64</sup> the court adopted the philosophy that a private benefit would be permissible when the private enterprise's existence was a necessary "essential" to the operation of a larger public purpose.

#### b. RECREATION

The case of *State v. Daytona Beach Racing & Recreational Facilities Dist.*<sup>65</sup> illustrates another favorite son-recreation. The supreme court validated a bond issue to be used to construct and operate a racing and recreational facility. These facilities were to be leased to a private corporation for six months of the year so that the corporation could conduct a series of motor racing events. Despite the extent of the private industry's use of the facilities, the supreme court held that section 10 of the constitution was not violated since the public purpose of the project was paramount. Thus, the supreme court made the determination that

---

61. 168 So.2d 745 (Fla. 1964).

62. 140 So.2d 576 (Fla. 1962).

63. *State v. Okaloosa County Airport & Industrial Authority*, 168 So.2d 745-747 (Fla. 1964).

64. 93 So.2d 608 (Fla. 1957).

65. 89 So.2d 34 (Fla. 1956).

recreational facilities are in the public welfare, and thus should be protected.

The corporation would conduct automobile racing events of international interest, as well as other attractions. Tourism, both as between the areas of our state and as between the states of this nation, is a competitive business. The sand and the sun and the water are not sufficient to attract those seeking a vacation and recreation. Entertainment must be offered. Even ignoring its use by the District for periods aggregating one half of the year, or more, for other recreational and educational purposes for the public, the facility in question, considering the use to which it will be adopted and their expected effect on the public welfare, is definitely more a vital valid public purpose than would be any of the schemes contemplated in the three instances cited above.<sup>66</sup>

The three instances referred to by the court were the development for industrial purposes of an aluminum plant,<sup>67</sup> the acquisition of an area for lease to a private enterprise for industrial and commercial purposes,<sup>68</sup> and a lease of fifty years from the City to a private enterprise for the construction of a hotel.<sup>69</sup> Thus, the court declared that the racing activity was in the public welfare and definitely a more valid public purpose than the industrial development sought to be achieved in the other instances. But is the public welfare better served by a racing facility that will entertain only a segment of the community? And, if the court is not concerned with the economic aspects of the racing facility, why did it include the statement that tourism is a competitive business and the sand and the sun and the water are not sufficient without other forms of entertainment to attract those seeking a vacation and recreation? No one can doubt that tourism is in the economic welfare, but why is a plastics manufacturing plant in Clay County or an aluminum plant in the Town of North Miami not also in the economic public welfare? In both situations, private enterprise is being rewarded for its contribution to the community. In *Daytona Beach Racing*, the private enterprise obtained profits for six months of the year. Can this situation really be distinguished from a manufacturer's efforts to profit on a yearly basis? Can six months of activity on the part of the Racing Corporation really be defended as an incidental benefit?

### C. TRADE FAIRS

Another apparent favorite of the court is seen in *State v. Inter-Am. Center Authority*.<sup>70</sup> The supreme court affirmed a decree of the circuit

---

66. *Id.* at 37.

67. *State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952).

68. *Adams v. Housing Authority*, 60 So.2d 663 (Fla. 1962).

69. *City of Clearwater v. Caldwell*, 75 So.2d 765 (Fla. 1954).

70. 84 So.2d 9 (Fla. 1955).

court validating bonds issued by the Inter-American Culture & Trade Center. The Center Authority adopted a resolution authorizing the issuance of bonds and the execution of a trust indenture securing them, which was included in the bond resolution. A provision of this trust indenture came under attack as violative of section 10 of the constitution. The section in question provided that the Authority could lease, exchange or trade any part of the land acquired by the Authority for payment or satisfaction of any bonds or other obligations of the Authority and that the Authority may lease the property for residential, commercial or industrial uses for a period of years. The court concluded that these leases or rentals to concessionaires would not violate section 10 if they sought to accomplish the purpose of the Center Authority, determined by the court to be for a valid public purpose. The court found the public purpose nature of the project in its design to "strengthen cultural relations among the countries of the western hemisphere,"<sup>71</sup> and in the legislature's declaration that "the creation of the Authority and the carrying out of its purposes is in all respects to the benefit of the people of this state and is a public purpose."<sup>72</sup> It is undeniable that the strengthening of cultural relations among the countries of the western hemisphere will be in the public welfare. Yet, it must be pointed out that those industries leasing concessions will receive direct economic rewards for their participation in the project. The industrial displays are naturally to encourage inter-American business which will bring a profit to the participating companies. This economic growth will accrue to the benefit of the members of the South Florida community. But why is this indirect economic support of the South Florida community permissible under section 10 of the constitution while a direct economic benefit to the community by an industrial development bond project is not?

#### IV. PROPOSED JUDICIAL CONSTRUCTION AND/OR LEGISLATIVE ACTION

It is difficult to precisely define the court's disfavor with an industrial bond project supported entirely by the revenues of a rental relationship with a private corporation. Two arguments, however, have occurred throughout the cases. The principal fear is that a default in payment by the private corporation will fall on the municipal corporation and ultimately on the taxpayers. Secondly, the courts have expressed an unwillingness to affect the free enterprise sense of competition by favoring a particular industry in the area. Neither of these two arguments, however, should prohibit the implementation of industrial bond projects in Florida.

As to the fear of the industries' default in payment under the lease, it must be pointed out that the proposed bonds are not a general obliga-

---

71. *Id.* at 12.

72. *Ibid.*

tion of the municipal corporation, and that the bond holders are limited by their contracts to the revenues of the project.<sup>73</sup>

The desire to refrain from interfering with private enterprise is an appropriate argument where several like businesses are competing in an area.<sup>74</sup> However, this argument does not seem applicable where the new industry is not competing with an established business. A lack of such competition would generally be present in urban South Florida areas and rural areas that are attempting to attract industry.

Despite these two arguments, it is evident that precedent is the main motivating force behind the court's adherence to its adverse position on industrial development bonds. To meet this precedent, the author submits two alternative judicial constructions that will allow the use of the industrial bonds in the State of Florida.

It must be recalled that the validation of a bond issue is a two-step process. First it must be established that the project is for a public purpose, and second, whether the bond is violative of section 10. Therefore, the natural approach would be to broaden the concept of a project for a public purpose. This approach would allow the court to take a long range look at the economic welfare that would be obtained. If the courts have been able to draw the distinction between a primary and incidental private industry benefit, it should be up to the task of determining whether a proposed lease construction agreement between the City and the private enterprise would be in the public welfare. If the lease provided for a rent that was reasonable for the facilities and would not constitute a windfall to the private enterprise, then the court could consider the over-all economic benefit to the community. The court could also apply the competition test to exclude projects that would discriminate against an established manufacturer.

The second suggested vehicle of judicial construction which would

---

73. While the issuing agency is not directly liable under an industrial bond issue, some writers have advanced two indirect harms to the issuing agency. First, if the issuing agency's negligence or breach of trust occasions the default, the issuing agency may be liable. Second, the record of the default would impair the issuing agency's borrowing power, and the public would be forced to support this higher interest by an increase in taxes. Note, *Incentives to Industrial Relocation: Municipal Bond Plans*, 66 HARV. L. REV. 898 (1953). However, these arguments have been deemed unrealistic by another writer.

There are, at best, highly speculative arguments which ignore the fact that similar consequences may attach to revenue bonds issued for any purpose, and which grossly underestimate the skill of legal draftsmen, the cautious procedures of the bond market and the sophistication of purchasers. Realistically, the modern bond buyers who purchase industrial development bonds do not place their reliance on the possibility of perfecting a tenuous negligence claim.

Note, *Industrial Development Bonds: Judicial Construction, U.S. Plant Construction*, 15 U. FLA. L. REV. 262, 277 (1962).

74. Thus, in *City of West Palm Beach v. State*, 113 So.2d 374 (Fla. 1959), the proposed marina would compete with downtown shops.

allow the use of industrial development bonds would be to sever the public purpose test from a consideration of section 10. Thus, in evaluating a particular bond proposal, the court would focus on whether the credit of the City was pledged. Therefore, if it were determined that the credit of the municipal corporation was not pledged, the court would no longer need to consider whether the over-all project was for a public purpose. Or to put it another way, once something was found to be outside of section 10, the public purpose test would not apply. This approach has been suggested in several of the supreme court opinions. Justice Terrell, dissenting in *State v. Clay County Dev. Authority*,<sup>75</sup> pointed out that

not one cent from the public treasury of the Authority was pledged to support the certificates in question; that no lien on the property was imposed to support them, but that their sole security was limited to rents derived from the building proposed to be constructed from the proceeds of the certificates. The public credit was in no sense bound to pay the principal or interest on them.<sup>76</sup>

In the earlier case of *State v. City of Tallahassee*,<sup>77</sup> this approach was taken by Justice Whitfield in a concurring opinion. The majority upheld the bonding certificates because they were for a valid public purpose. The purpose of the certificates was to construct an office building in which space would be rented to federal, state and county governments. Rather than focusing on the public purpose nature of the project, Justice Whitfield stated that the certificates can legally be validated because the certificates and the proceedings for issuing those certificates expressly exclude the pledge of any tax or property resources of the City for the payment of the certificates. These proposed judicial constructions would alter the result in both *State v. Town of North Miami*,<sup>78</sup> in the construction of an aluminum plant, and in *State v. Clay County Dev. Authority*<sup>79</sup> in the construction of the plastics plant. In both situations the rent was calculated to fully amortize the principal and interest under the bond issue. Thus the purchasers of the bonds would only look to the specific revenue.

While there is ample authority for the courts to judicially construe section 10 so as to authorize industrial development bonds, the general tenor of the opinions would seem to necessitate legislative action in this area. Aside from the momentary deviation of *State v. Cotney*,<sup>80</sup> the supreme court's attitude has been that a project that is not primarily

---

75. 140 So.2d 576 (Fla. 1962).

76. *Id.* at 582.

77. 142 Fla. 476, 195 So. 402 (1940).

78. 59 So.2d 779 (Fla. 1952).

79. *Supra* note 75.

80. 104 So.2d 346 (Fla. 1958).

public in nature under the traditional definition of that word will not be valid under section 10 of the constitution. Thus, a constitutional amendment to section 10 to allow industrial development bonds would seem the most probable avenue to allow for this method of industrial development. A few states have passed such an amendment.<sup>81</sup> Other states have achieved the same results by statute.<sup>82</sup> In these instances the results have been most favorable and should point the way for Florida to follow course. Naturally, a statute would not be appropriate due to the constitutional provision of section 10; however, an addition to section 10 would suffice.

#### V. THE TENNESSEE STORY

The Tennessee legislature has provided three alternative methods of attracting industry to Tennessee. Each of these bonding plans have secured new industry and employment for the state. However, the Tennessee Code sections authorizing the issuance of general obligation bonds for industrial development is indeed a step further than the use of industrial revenue bonds as urged by the author.

In 1951 the Tennessee legislature authorized municipalities and counties to issue revenue bonds for the construction of facilities which were to be leased to industry<sup>83</sup> "to encourage the increase of industry and commerce within this state, thereby reducing the evils attendant upon unemployment."<sup>84</sup> This act requires that the lease produce revenues sufficient to pay the interest and principal on the bonds. These bonds are not an indebtedness of the municipality and constitute a lien upon the rentals from the industrial building. The Act further provides that a three-fourths majority of the qualified voters who vote in the municipality must approve the issue.<sup>85</sup> This early attempt at industrial bond financing produced from 1951, the year of its inception, to 1963, a total of 127

---

81. Louisiana, LA. CONST. art. XIV, §§ 14(b)(2); Missouri, MO. CONST. amend. 4; Maryland, MD. CONST. art. III, § 54.

82. Alabama, ALA. CODE ANN. tit. 37, §§ 511 (20 to 32) (1959); Arkansas, ARK. STAT. ANN., §§ 13-1601-14 (Supp. 1961); Colorado, COLO. REV. STAT. ANN., §§ 36-20-1-10 (Supp. 1960); Georgia, GA. CODE, §§ 69-15; Idaho, Idaho Laws 1959 ch. 265 (declared unconstitutional in *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960)); Illinois, ILL. REV. STAT. ch. 24, §§ 1211-24 (Smith-Hurd 1960); Kentucky, KY. REV. STAT., §§ 103.200 -280 (1959); Maryland, MD. ACTS 1953 ch. 662, § 103; Mississippi, MISS. CODE ANN., §§ 8936-46 (1957); Nebraska, NEB. REV. STAT., §§ 18-1601-13 (1954) (declared unconstitutional in *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 N.W.2d 269 (1956), but subsequently the Nebraska voters amended the constitution to provide for industrial bond issues, NEB. CONST. art. XV, § 16 (approved Nov. 1960); New Mexico, N.M. STAT. ANN., §§ 14-14-31-43 (Supp. 1954); North Dakota, N.D. REV. CODE, §§ 40-5701-18 (Supp. 1957); Tennessee, TENN. CODE ANN., §§ 6-2901-16 (Supp. 1960); Vermont, VT. STAT. ANN. tit. 24, §§ 2701-14 (1959); Wisconsin, WIS. STAT., § 66.52 (1957).

83. TENN. CODE ANN., § 6-1701 (1965).

84. TENN. CODE ANN., § 6-1703 (1965).

85. The 1951 Act was upheld as constitutional in *Holly v. City of Elizabethton*, 193 Tenn. 46, 241 S.W.2d 1001 (1951).

projects representing bond issues of 66,290,000 dollars with new employment of 20,795.<sup>86</sup>

Despite the success of the 1951 Act, the Tennessee legislature in 1955 added two chapters to the Tennessee Code to serve as new appeals to industry. The attractiveness of the revenue bond issued under the 1951 Act was dimmed by the fact that the municipality's credit was not pledged to support the issue. This limiting feature was removed by the passage of the Industrial Building Bond Act of 1955<sup>87</sup> which authorized municipalities to issue general obligation bonds, the proceeds of which were to be used to purchase or construct buildings for lease to private industry. To issue bonds under this Act, the municipality must first apply to the Building Finance Committee of the Tennessee Industrial and Agricultural Development Commission for a "certificate of public purpose and necessity."<sup>88</sup> The Act enumerates certain factors that must be found by the Commission before a certificate can be issued.<sup>89</sup> The issue must then be passed by a three-fourths majority of those voting at a referendum election.<sup>90</sup> From 1957 to 1965 general obligation bonds totaling 25,274,000 dollars have been issued under this Act with a potential employment of 13,350.<sup>91</sup>

The 1955 Tennessee legislature also authorized the organization of Industrial Development Corporations.<sup>92</sup> This Act provided for the incorporation within state municipalities of public corporations, chartered by the Secretary of State

---

86. Figures compiled by the Staff Division for Industrial Development, Tennessee Industrial Research Section, May 1964.

87. TENN. CODE ANN., §§ 6-2901-2916 (1965).

88. TENN. CODE ANN., § 6-2905 (1965).

89. (1) That there are sufficient natural resources readily and economically available for the use and operation of the particular industrial building and enterprise for at least ten (10) years, but in no event less than the period of time for which any bonds may be issued for acquiring or constructing said industrial building.

(2) That there is available a labor supply to furnish at least one and one-half (1½) workers for each operative job in said enterprise within an area of twenty-five (25) miles from the proposed location.

(3) That there are adequate property values and suitable financial conditions, so that the total bonded indebtedness of the municipality, solely for the purposes authorized by this chapter, shall not exceed ten per cent (10%) of the total assessed valuation of all the property in the municipality ascertained by the last completed assessment at the time of the issuance of such bonds. TENN. CODE ANN., § 6-2906 (1965).

90. The Industrial Building Bond Act of 1955 was declared constitutional in *McConnell v. City of Lebanon*, 203 Tenn. 498, 314 S.W.2d 12 (1955). However, the language of the court does not appear to render the Act constitutional under all circumstances. In *Lebanon*, the court found a virtual employment and migration crisis existed in the issuing county and it may be argued that the court will limit the application of the Industrial Building Bond Act of 1955 to situations of employment crisis. See Note, *Financial Industrial Development in the South*, 14 VAND. L. REV. 621, 626-627 (1961).

91. Figures compiled by the Staff Division for Industrial Development, Tennessee Research Section, Jan., 1966.

92. TENN. CODE ANN., §§ 6-2801-2820 (1965).

to acquire, own, lease, and dispose of properties to the end that such corporation may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises to locate in or remain in this state and further the use of its agricultural products and natural resources, and to vest such corporation with all powers that may be necessary to enable them to accomplish such purposes.<sup>93</sup>

One such power was the power to "issue its bonds for the purpose of carrying out any of its powers."<sup>94</sup> However, all bonds issued by the corporations were to be payable solely out of the revenues derived from the lease or sale of the constructed facilities.<sup>95</sup> To make these bonds more attractive, the Act allows the municipality where the corporation is located to pledge its full faith and credit as surety to the payment of the principal and interest by first obtaining a certificate<sup>96</sup> of public purpose from the Building Finance Committee of the Tennessee Industrial and Agricultural Development Commission and second by approval by a three-fourths vote of those voting in a referendum election.

The economic impact in the period from 1955 to 1965 under this Act is also impressive: 60,753,500 dollars worth of bonds issued providing 10,876 potential jobs.<sup>97</sup>

In addition to Tennessee, the southern states of Kentucky and Alabama also have impressive records of attracting new industry through the use of industrial bond issues. In Kentucky,<sup>98</sup> Municipal Industrial Revenue Bonds, as they are known, have generated, in a period from 1950 until March 10, 1966, eighty-four industrial leases<sup>99</sup> financed by bonds totaling 130,308,000 dollars.<sup>100</sup> Alabama municipalities<sup>101</sup> have

93. TENN. CODE ANN., § 6-2802 (1965).

94. TENN. CODE ANN., § 6-2808(7) (1965).

95. TENN. CODE ANN., § 6-2809 (1965).

96. For the factors that govern the issuance of a certificate, see note 89 *supra*.

97. Figures compiled by the Staff Division for Industrial Development, Tennessee Industrial Research Section, Feb., 1966.

98. KY. REV. STAT. § 103.200 (1965).

99. Representative companies and their products include: General Shoe Corp. (shoes); General Tire & Rubber Co. (tires); Hoover Ball & Bearing Co. (upholstery springs); Great Lakes Carbon Corp. (perlite insulation); Rand McNally & Co. (book publishing); The Crane Co. (plumbing fixtures); Electric Parts Corp. (electric bedcovering); Harvey Aluminum (aluminum); Cutler-Hammer, Inc. (electrical controls); Crucible Steel Co. (magnets); Levi Strauss & Co. (sta-prest trousers); Hobart Mfg. Co. (home dishwashers). It should be noted that the industries involved are generally in the "light industry" classification and would have been compatible with Florida's present economy had these companies come to Florida.

100. Compiled from figures supplied by the Department of Commerce, Industrial Development Division, Commonwealth of Kentucky.

101. The Alabama Legislature authorized the issuance of Industrial Revenue Bonds, ALA. CODE ANN. tit. 37, §§ 511(20)-(32) (1958) and the Alabama Supreme Court held that the article did not violate §§ 45, 94, or 228 of the Alabama Constitution. Nor were the bonds authorized by the article "indebtedness" within the meaning of § 225 of the Constitution; nor "bonds" within the meaning of § 222. *Newberry v. Andalusia*, 257 Ala. 49, 57 So.2d 629 (1952).



reported a partial listing of bonds issued through 1965 totaling over 283,662,000 dollars.<sup>102</sup>

### VI. A CAVEAT

While Tennessee courts have reacted favorably to the provisions of the 1955 Acts that allow a state to pledge its credit to support a general obligation bond issue, such a position can only be defended on economic grounds rather than on sound principles of judicial construction that permit revenue bonds on the theory that they are not pledges of the credit of the municipality. Whereas revenue bonds are not the obligation of the municipality and thus not a total affront to the public purpose doctrine, the use of general obligation bonds to promote industry may be abusing a good thing. In short, a caveat to the Florida Legislature and other state legislatures is in order.

It must be remembered that the key to the entire concept of industrial bond financing is the tax free interest on the bonds. Some writers fear that the use of general obligation bonds to promote private industry may lead Congress to reexamine the tax free nature of all industrial bond issues.<sup>103</sup> Treasury Secretary Fowler already has proposed for congress to end the tax exemption for industrial revenue bonds.<sup>104</sup> Such Congressional action would be a devastating blow to industrial bond financing and would undercut the action of those legislatures that have approved such financing. Thus, over enthusiastic state legislatures may, if they do not exercise restraint by authorizing only revenue bond financing, kill the proverbial goose that is now providing new industry and jobs. For this reason, the author recommends that any amendment to section 10 of Article IX be expressly limited to revenue bonds supported solely from lease proceeds.

### VII. CONCLUSION

Many southern states have shown that a sympathetic attitude towards the industrial development bond program will work to stimulate the state's economy. Florida can no longer afford to avoid this competition for the location of new industry in the South. An amendment to section 10 of Article IX of the Florida Constitution would be a step in the right direction.

---

102. Compiled from figures supplied by the Alabama State Planning and Industrial Development Board. Representative companies and the issuing municipality include: Hamermill Paper Co. (Selma—25,000,000 in 1965); Revere Copper & Brass (Scottsboro—55,000,000 in 1965); Union Bay-Camp Paper Corp. (Prattville—45,000,000 in 1964); Bendix-Westinghouse Automotive Air Brake Co. (Cullman—3,000,000 in 1964); Vulcan Materials (Bessemer—2,100,000 in 1964); Cornelius Co. (Scottsboro—1,500,000 in 1963); General Electronics of New Jersey (Sheffield—1,200,000 in 1963); Cluett Penbody & Co. (Carbon Hill—500,000 in 1963).

103. SURREY & WARREN, *FEDERAL INCOME TAXATION* 172-200 (1960); 50 COLUM. L. REV. 618, 637 (1959).

104. *Miami Review & Daily Record*, July 14, 1966, p. 16, col. 4.