

Spring 1984

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Recommended Citation

Dennis Scholl & Marc D. Jimenez, *The Florida Industrial Development Bond Financing Act: The Need for Judicial Consistency*, 12 Fla. St. U. L. Rev. 31 (2017).
<http://ir.law.fsu.edu/lr/vol12/iss1/2>

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THE FLORIDA INDUSTRIAL DEVELOPMENT BOND FINANCING ACT: THE NEED FOR JUDICIAL CONSISTENCY

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I. INTRODUCTION

Since its inception in 1969, the Florida Industrial Development Financing Act (FIDFA)¹ has served to promote and assist Florida's economy by attracting literally billions of dollars of industrial investment through the use of industrial development bonds (IDB's). After enthusiastic endorsement by legislators and commentators,² the statute arose as a response, albeit a belated one, to similar legislation by other southern states and enabled Florida to compete with offers by these states of tax-exempt financing for numerous industrial ventures.³ The statute has been an overwhelming success in attracting industry to Florida. In Dade County alone, bonds issued in a single year under the FIDFA accounted for the construction, rehabilitation or acquisition of over \$58,500,000 of industrial facilities. These industries would have located in other states were it not for the benefits of the Act,⁴ and as a result Dade County would have lost approximately 2,200 jobs created by these industrial enterprises.⁵

The adoption of the Act was hailed as "play[ing] a significant role in making Florida a better place in which to live."⁶ Recent actions by the Florida Supreme Court, however, have endangered the viability and utility of the Act in its use by Florida as a tool to compete with other sunbelt states to attract industry. The court's decisions have provided little continuity or guidance to local industrial development authorities as to what types of facilities will survive the judicial validation process.

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1. Ch. 69-104, 1969 Fla. Laws 473 (current version at FLA. STAT. §§ 159.25-.431 (1983)).

2. See Tew, *Industrial Bond Financing and the Florida Public Purpose Doctrine*, 21 U. MIAMI L. REV. 171 (1966).

3. Storace & Gong, *The Florida Industrial Development Financing Act: Public-Private Investment in Social Engineering*, 24 U. FLA. L. REV. 433 (1972). Florida was the forty-sixth state to enact some statutory authority for industrial revenue bonds. *Id.* at 433 n.1.

4. J. Haley, *Dade County Industrial Development Bond Summary* (Feb. 1983).

5. *Id.*

6. Storace & Gong, *supra* note 3, at 457.

In this article, the authors critically examine recent Florida Supreme Court cases reviewing validation of industrial revenue bonds for various projects. The authors conclude that the judicial reasoning in these cases is frustrating the purposes of the statute, that the legislature itself is taking too restrictive an approach to the use of IDB's in some instances, and that, in conjunction, these actions will negatively impact upon the state's efforts to attract new industry and provide for expansion of these businesses already located within the state.

II. FLORIDA'S USE OF INDUSTRIAL DEVELOPMENT REVENUE BONDS

A. *Nature of the Bonds*

In order to better evaluate recent judicial decisions, it is helpful to understand the nature and historical perspective of industrial development revenue bonds. IDB's are securities issued by a local government agency, with an elected body or an appointed authority, for the purpose of acquiring, contracting and/or equipping a capital facility for use by a private entity. The local issuing agency (the Issuer) serves as a pass through medium in order to obtain tax-exempt status for the bond financing. A loan is made to the Issuer by the bond purchasers; the authority in turn lends the bond proceeds to the private entity to finance the capital project.

IDB financing is attractive to all parties involved. First and foremost, the private entity is able to acquire capital at a reduced cost of funds because interest income from an IDB is exempt from federal income tax.⁷ Thus, a tax-exempt bond can be offered to investors at a lower rate of interest than that of a taxable corporate bond. The interest savings between a taxable and a tax-exempt bond can be quite substantial to a business entity contemplating various financing alternatives.⁸ An IDB also permits financing of

7. I.R.C. § 103 (1982) and accompanying regulations. A discussion of the federal income tax implications of an IDB is not within the scope of this article. The reader should note, however, that as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Congress enacted several new restrictions on the issuance of IDB's, including requirements that all bonds be approved by an elected public official and that certain facilities not be eligible for IDB's (including, but not limited to, massage parlors, skating facilities and sun-tan facilities). See I.R.C. § 103(k) (1982).

8. For example, a \$5,000,000 project offered the financing alternative of a taxable bond at an 11% fixed rate versus a nontaxable 8.5% fixed rate over a 10-year period would realize a savings of \$125,000 per year or \$1,250,000 over the term of the financing by selecting the nontaxable bond (without discounting to the present value of the savings). This illustration shows the obvious attractiveness of the IDB alternative. A portion of this savings is offset by

up to 100% of the cost of projects and extended financing of various qualified costs which are normally not financeable, such as legal, printing, accounting and underwriting costs.⁹ The ability to obtain 100% financing depends upon the financial strength of the borrower and the type of project. In addition, the bonds are typically exempt from the expensive process of registration with the Securities and Exchange Commission¹⁰ and compliance with the state blue sky laws.¹¹

The IDB is a hybrid financing vehicle conceived from a marriage between corporate and municipal bond financing. While certain municipal bonds are backed by the "full faith and credit"¹² of the issuing municipality, IDB's are not.¹³ The Florida Constitution, with specific exceptions, prohibits a local authority from pledging its full faith and credit or that of the state, county or municipality.¹⁴ The FIDFA and all bond documents also reflect this prohibition.¹⁵ With a corporate bond, the issuer of record is the corporation, whereas with an IDB the governmental entity is the issuer of

increased legal fees and other costs of issuance which the obligor will incur. Company counsel, bond counsel, trustees' counsel, local authority counsel, and, at times, underwriters' counsel may all be involved with the issuance. Despite the increased costs, the incremental interest savings between tax-exempt bonds and conventional financing make the bonds worthy of consideration for most issuances in excess of \$500,000.

9. FLA. STAT. § 159.44(5) (1983).

10. Securities Act of 1933, § 3(a)(2), 15 U.S.C. § 77c(a)(2) (1982).

11. Blue sky laws are state counterparts of federal securities legislation. See FLA. STAT. § 517.051(1) (1983), which exempts IDB's from registration.

12. See FLA. CONST. art. VII, §§ 10, 12.

13. Whether the local governmental entity has either a moral obligation or a financial obligation (in order to protect its municipal bond credit rating) to pay the principal and interest on bonds defaulted on by a private borrower is a concept outside the scope of this article. The recent Washington Public Power Supply System (WPPSS) debacle graphically illustrated the effect of a geographically related default on bonds. The State of Washington has paid a substantial interest premium in order to sell bonds in the public market despite having no legal responsibility for the default. The lack of legal obligation on behalf of an issuing entity is well settled in Florida. See *State v. Putnam County Dev. Auth.*, 249 So. 2d 6 (Fla. 1971), where the court noted that:

[I]t is apparent from the Act, and from the purpose of the Act, that the direct beneficiary of any project financed under this Act is a private institution or individual. In the event of a threatened foreclosure, then, the only party threatened with a loss would be the private party who was the beneficiary of the project. Therefore it follows that neither the State nor the County would feel compelled, directly or indirectly, to levy taxes or appropriate funds to prevent the foreclosure. The public would stand to lose no more in this foreclosure proceeding than it would in any other foreclosure proceeding which involved a local business or industry.

Id. at 12.

14. See FLA. CONST. art. VII, § 10.

15. FLA. STAT. § 159.33(1) (1983).

record.

There are three typical methods of establishing the financing relationship between the local authority and the private entity with regard to the payment of the bonds and the ownership of the facility. All result in the same payment structure. First, the authority may enter into an installment purchase agreement with the private enterprise which provides for the payment of periodic sums on an installment basis equal to the debt service on the bonds.¹⁶ Alternatively, the authority may enter into a lease agreement with the private entity which provides for lease payments, again equal to the debt service on the bonds.¹⁷ In either case the authority retains title to the project until the principal and interest on the bonds have been fully amortized,¹⁸ at which time the facility is turned over to the private entity for a nominal sum. The third type of financing is pursuant to a loan agreement whereby periodic payments of principal and interest are made to one authority, which retains a long-term mortgage on the property. However, because of the 1980 amendment to the FIDFA, the authority no longer is required to retain any indicia of title or a leasehold interest.¹⁹ The loan agreement has become the preferred method in Florida for many county agencies for various administrative reasons. In all of the financing vehicles the bondholders are paid from the revenues of the project and from any additional collateral or guarantees exacted from the private entity by the Issuer.²⁰

B. History

Prior to Florida's 1968 constitutional revision, article IX, section 10 barred, as a pledge of public credit for private enterprise, most industrial revenue bonds.²¹

The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State

16. FLA. STAT. § 159.27(18) (1983).

17. *Id.*

18. *Id.*

19. Ch. 80-287, § 2, 1980 Fla. Laws 1228 (current version at FLA. STAT. § 159.27(18) (1983)). These revisions permit the municipality to enter into nonleasehold financing arrangements with the private entity.

20. *See* FLA. STAT. §§ 159.27(1), .30 (1983). It is interesting to note that the removal of "lessee" and insertion of "financing agreement" language in § 159.27(18), which broadened the methods of financing, was not carried through to § 159.30, which still retains the limiting "lessee" and "agreement of lease" language.

21. FLA. CONST. of 1885, art. IX, § 10.

become a joint owner or stock-holder 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.²²

This section of the constitution was adopted in 1875 as an amendment to the 1868 constitution. Its intent was to "forbid [the state, counties and municipalities from] engaging directly or indirectly in commercial enterprises for profit."²³ The amendment arose in response to economic conditions in the post-Civil War reconstruction period. During this period many cities and counties within Florida had pledged their faith and credit to aid in the financing of private industry.²⁴ A substantial number of private enterprises failed, leaving the responsibility for the debt on the taxpayer. Thus, the economic impetus was generated to halt any such pledges of credit on behalf of private industry.²⁵

The Florida Supreme Court soon realized, however, that some combinations of public credit and private enterprise could be useful in stimulating economic development. Therefore, the court sought a new theory with which to distinguish viable enterprises worthy of government financial backing from the types of investments whose failure motivated the adoption of article VII, section 10.²⁶ In developing this doctrine the court first looked to the power of counties to tax as set forth in article IX, section 5 of the Florida Constitution.²⁷ "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. . . ."²⁸ In making its determination, the court drew a parallel between the limits on the taxing power of a county and the limits of the credit extension power of similar public entities. The result was that the court grafted the public purpose doctrine onto article IX, section 10, interpreting this section as if it read: "[T]he credit of the state shall not be pledged or loaned to any individual,

22. *Id.*

23. *Bailey v. City of Tampa*, 111 So. 119, 120 (Fla. 1926).

24. *Id.*

25. Note, *Industrial Development Bonds Under Article VII, Section 10 of the Florida Constitution of 1968*, 21 U. FLA. L. REV. 656, 660 (1969).

26. *Tew, supra* note 2, at 172.

27. *Id.* at 172-73.

28. FLA. CONST. of 1885, art. IX, § 5 (emphasis added).

company, or corporation or association, *for other than a public purpose.*"²⁹ Thus the public purpose doctrine was born.

Until the 1968 amendment to the Florida Constitution and the enactment of chapter 159, Florida Statutes, this doctrine governed the validity of every industrial bond issue in the state of Florida. Although this doctrine was created to sidestep the article IX, section 10 limitations, most attempts to generate tax-exempt financing were denied by the Florida Supreme Court.³⁰ Certain types of facilities, however, were approved based upon the public purpose doctrine.³¹ Yet these instances were few and occurred only when any private benefit was minor when compared to the overall public benefit. Factors used in determining the amount of private benefit included the degree of control retained by the public entity³² and the type of project for which financing was being sought.³³

These factors caused unusual results and certainly served to confuse the pre-1968 state of the law. Tourist-oriented recreational facilities met the public purpose test because of their overwhelming public benefit.³⁴ However, in *State v. Town of North Miami*,³⁵ an aluminum plant which provided jobs, added to the tax base of the city and promoted the general welfare did not meet the public purpose test because of the more than incidental benefit to private enterprise. The Florida Supreme Court, in reversing the trial judge's validation of the project, argued that:

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 super market, a new department store, a new meat market, a steel mill, a crate manufacturing plant, a pulp mill, or other 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

29. Tew, *supra* note 2, at 173 (emphasis in original).

30. See, e.g., *State v. Manatee County Port Auth.*, 193 So. 2d 162 (Fla. 1966) (bonds for construction of loading facility to be leased to a railroad company held invalid); *State v. Town of North Miami*, 59 So. 2d 779 (Fla. 1952) (en banc) (bonds for construction of aluminum processing plant held invalid).

31. See *O'Neill v. Burns*, 198 So. 2d 1 (Fla. 1967).

32. *Id.*

33. See *Raney v. City of Lakeland*, 88 So. 2d 148 (Fla. 1956).

34. See *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So. 2d 34 (Fla. 1956) (bonds for an auto racetrack); *State v. Escambia County*, 52 So. 2d 125 (Fla. 1951) (bonds for an island recreational center in connection with public beaches).

35. 59 So. 2d 779 (Fla. 1952).

buildings, for such purposes, a municipal purpose.³⁶

The logic supporting such a distinction has confounded various commentators.³⁷ One article suggested that the distinction made by the court was based on the strong language of the 1885 constitution,³⁸ which restricted the state or any municipality from granting credit to nonpublic entities.³⁹ In any event, until the 1968 revision of the constitution, the use of IDB's as a method of attracting industry was often attempted by local government but seldom upheld by the Florida Supreme Court. In consistently striking down these attempts, the court emphasized that the state was actually lending public credit for private purposes.⁴⁰ The court would only approve such financing when the private benefit was strictly incidental to the inherent public purpose.⁴¹

C. *Enactment and Enabling Legislation*

In 1968 Florida adopted a new constitution including a section authorizing the issuance of industrial revenue bonds.⁴² The section exempted airport facilities, port facilities, and industrial and manufacturing plants from the article VII, section 10 prohibition against state or local government pledging its credit.⁴³ In response, the legislature enacted the Florida Industrial Development Financing Act.⁴⁴ The FIDFA gave local governments autonomy to select

36. *Id.* at 784-85.

37. See, e.g., *Storace & Gong, supra* note 3, at 436; *Tew, supra* note 2, at 176-77.

38. FLA. CONST. of 1885, art. IX, § 10.

39. *Storace & Gong, supra* note 3, at 436. The authors noted that the Florida legislature in 1969 believed that "the state's natural endowments of clean air, clean water, and sunshine were in themselves sufficient to attract all the industry the state would need." *Id.* at 437 (footnote omitted).

40. *Id.* at 435.

41. *Id.* For an overview of the Florida Supreme Court's decisions establishing guidelines to determine permissible private involvement, see *Panama City v. State*, 93 So. 2d 608 (Fla. 1957); *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So. 2d 34 (Fla. 1956); *State v. Inter-American Center Auth.*, 84 So. 2d 9 (Fla. 1955); *Gate City Garage, Inc. v. City of Jacksonville*, 66 So. 2d 653 (Fla. 1953).

42. FLA. CONST. art. VII, § 10 provides in part:

[This section] shall not prohibit laws authorizing . . . :

(c) the issuance and sale by any county, municipality, special district or other local governmental body of . . . (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects.

43. *Id.*

44. Ch. 69-104, 1969 Fla. Laws 473 (current version at FLA. STAT. §§ 159.25-.431 (1983)).

industrial projects to fit the economic needs of the community. The FIDFA was amended in 1970⁴⁵ to add to the already expansive list of authorized projects⁴⁶ and authorized the counties to establish local development authorities.⁴⁷ The preamble to this amendment sets forth the legislative findings of public purpose inherent in the use of IDB financing to promote economic growth.⁴⁸

The FIDFA was amended again in 1980 to further expand the definition of a project which would qualify for IDB financing.⁴⁹ This definition appears to list every conceivable use of IDB's.⁵⁰

45. Ch. 70-229, 1970 Fla. Laws 663.

46. *Id.* § 2 (adding waste facilities and antipollution facilities to list of authorized projects) (current version at FLA. STAT. § 159.27 (1983)). For a complete list of authorized projects see *infra* note 50.

47. Ch. 70-229, § 1, 1970 Fla. Laws 663 (current version at FLA. STAT. § 159.45 (1983)).

48. Whereas, there is an immediate need for the development, construction, expansion and rehabilitation of industrial or manufacturing plants in Florida for the purpose of increasing opportunities for gainful employment, improving living conditions and otherwise contributing to the prosperity and general welfare of the state and its inhabitants; and

Whereas, Section 10 of Article VII of the Florida Constitution authorizes the legislature to enact laws providing for the issuance and sale by any county, municipality, special district or other local governmental body of revenue bonds to finance or refinance the cost of capital projects for industrial and manufacturing plants, when such revenue bonds are repayable solely from revenue derived from the sale, operation, or leasing of the capital projects; and

Whereas, it is necessary and in the public interest to maintain and improve the environment by providing an economical method for financing the acquisition and construction of capital improvements for the elimination, control and abatement of air and water pollution and other forms of pollution; . . . it is necessary and in the public interest to provide a method whereby such may be accomplished. . . .

Ch. 70-229, 1970 Fla. Laws 663.

49. Ch. 80-287, § 2, 1980 Fla. Laws 1228 (current version at FLA. STAT. § 159.27(5) (1983)).

50. As defined in FLA. STAT. § 159.27(5) (1981):

"Project" means any capital project comprising an industrial or manufacturing plant, a research and development park, an agricultural processing or storage facility, a warehousing or distribution facility, a headquarters facility, a tourism facility, a convention or trade show facility, an urban parking facility, a trade center, a health care facility, an airport or port facility, a commercial project in a designated slum area or blighted area, a pollution-control facility, or a hazardous or solid waste facility, including one or more buildings and other structures, whether or not on the same site or sites; any rehabilitation, improvement, renovation, or enlargement of, or any addition to, any buildings or structures for use as a factory, a mill, a processing plant, an assembly plant, a fabricating plant, an industrial distribution center, a repair, overhaul, or service facility, a test facility, an agricultural processing or storage facility, a warehousing or distribution facility, a headquarters facility, a tourism facility, a convention or trade show facility, an urban parking facility, a trade center, a health care facility, an airport or port facility, a commercial project in a designated slum area or blighted area, a pollution-control facility, or a hazardous or solid waste facility, and other facilities, including re-

The statutory language also recited, in an even more expansive manner than the 1970 amendment, the necessity of and public interest in using IDB financing for the revised list of projects.⁵¹

search and development facilities, for manufacturing, processing, assembling, repairing, overhauling, servicing, testing, or handling of any products or commodities embraced in any industrial or manufacturing plant, in connection with the purposes of a research and development park, or other facilities for or used in connection with an agricultural processing or storage facility, a warehousing or distribution facility, a headquarters facility, a tourism facility, a convention or trade show facility, an urban parking facility, a trade center, a health care facility, an airport or port facility, or a commercial project in a designated slum area or blighted area, or for controlling air or water pollution or for the disposal, processing, conversion, or reclamation of hazardous or solid waste; and including also the sites thereof and other rights in land therefor whether improved or unimproved, machinery, equipment, site preparation and landscaping, and all appurtenances and facilities incidental thereto, such as warehouses, utilities, access roads, railroad sidings, truck docking and similar facilities, parking facilities, office or storage or training facilities, public lodging and restaurant facilities, dockage, wharfage, solar energy facilities, and other improvements necessary or convenient for any manufacturing or industrial plant, research and development park, agricultural processing or storage facility, warehousing or distribution facility, tourism facility, convention or trade show facility, urban parking facility, trade center, health care facility, airport or port facility, commercial project in an enterprise zone, pollution-control facility, or hazardous or solid waste facility, and any one or more combinations of the foregoing.

Section 159.27(5) was amended again in 1983 to add "a motion picture production facility" and "a preservation or rehabilitation of a certified historic structure" to the list of legislatively approved projects. Ch. 83-271, § 19, 1983 Fla. Laws 1397.

51. FLA. STAT. § 159.26 (1981):

Legislative findings and purposes.

—The Legislature finds and declares that the agriculture, tourism, urban development, and health care industries, among others, are vital to the economy of the state and the welfare of the people and need to be enhanced and expanded to improve the competitive position of the state; that there is a need to enhance other economic activity in the state by attracting manufacturing development, business enterprise management, and other activities conducive to economic promotion in order to provide a stronger, more balanced, and stable economy in the state, while providing through pollution control and otherwise for the health and safety of the people; that in order to improve the prosperity and welfare of the state and its inhabitants, to improve living conditions and health care, to promote the rehabilitation of slum areas or blighted areas, to promote effective and efficient pollution control throughout the state, to promote the advancement of education and science, research in and the economic development of the state, and to increase purchasing power and opportunities for gainful employment, it is necessary and in the public interest to facilitate the financing of projects provided for in this part and to facilitate and encourage the planning and development of these projects without regard to the boundaries between counties, municipalities, special districts, and other local governmental bodies or agencies in order to more effectively and efficiently serve the interests of the greatest number of people in the widest area practicable; and that the purposes to be achieved by such projects and the financing of them in compliance with the criteria and requirements of this part are predominantly the public purposes stated in this section and that such

As a result of the 1970 and 1980 amendments there are now two ways in which a project can qualify for IDB financing: either under the constitutional exemption for "industrial or manufacturing" plants⁵² or under the public purpose doctrine.⁵³ By including in the FIDFA an expanded list of projects and including statements of public purpose in financing projects with IDB's, the legislature's intent was clear. The intent was to eliminate any constitutional challenge to IDB financing⁵⁴ and also to enable Florida to remain competitive with other states in its ability to attract and retain industry.

D. Early Cases After Legislative Revision

After the 1970 amendments to the FIDFA, the Florida Supreme Court maintained a limited role in reviewing the use of IDB issues. The court declined to conduct its own independent review of public purpose. Instead it looked to the specific statutory language of the FIDFA to determine whether the project fell within the category of projects which the legislature found to further a public purpose.

The foremost case applying this standard of review is *Nohrr v. Brevard County Educational Facilities Authority*.⁵⁵ Although in *Nohrr* the court was applying the Higher Educational Facilities Authorities Law⁵⁶ rather than the FIDFA to validate IDB's issued to construct county educational facilities, the underlying issue was the same. Both acts contained legislative findings detailing the public purpose behind IDB financing for certain projects.⁵⁷

The court looked to the limitations on the pledging of public credit contained in article VII, section 10 and found that the provisions of section 10(c), rather than being exemptions from the prohibition against pledging credit, were instead facilities for which the use of public credit was not being pledged.⁵⁸ Furthermore, the

purposes implement the governmental purposes under the State Constitution of providing for the health, safety, and welfare of the people, including implementing the purpose of s. 10(c) of Art. VII of the State Constitution.

52. FLA. CONST. art. VII, § 10(c).

53. See *supra* notes 26-29 & accompanying text.

54. Citrin & Schwartz, *Industrial Revenue Bond Financing in Florida: The Present Situation*, 55 FLA. B.J. 779 (1981). But see the 1983 amendments cited *infra* notes 100-105 and accompanying text.

55. 247 So. 2d 304 (Fla. 1971).

56. FLA. STAT. §§ 243.18-.40 (1969).

57. See FLA. STAT. § 243.19 (1969).

58. *Nohrr*, 247 So. 2d at 309. (Since neither the state nor the development authority

court held that the list of projects contained in section 10(c) was not intended to be exclusive: "This language may or may not apply to other projects, depending upon the particular circumstances in each instance."⁵⁹

The *Nohrr* opinion decisively formulated the approach to be taken in reviewing IDB issues. If a project is included in the list of projects in section 10(c) it is presumptively valid. If a project does not fall within the section 10(c) class then the court must look to see whether the project fulfills a public purpose.⁶⁰ Where the legislature has made such a finding in the FIDFA, that finding is determinative.⁶¹ To overcome such a finding, it must be shown that "such determination was so clearly wrong as to be beyond the power of the Legislature."⁶²

Subsequent decisions, including those that have validated IDB issues, have failed to strictly adhere to this approach. The authors assert that much of the confusion existing today could be eliminated by keeping within the confines of the *Nohrr* approach and deferring to the legislative determinations of public purpose articulated in the Act, rather than conducting an independent review of public purpose.

The next major case, *State v. Jacksonville Port Authority*,⁶³ appeared in 1974. In *Jacksonville Port Authority*, the Florida Supreme Court reviewed the issuance of IDB's for construction of a food distribution center and an "industrial" laundry. The court first examined the two projects to determine whether they qualified as industrial plants under either article VII, section 10(c) or the FIDFA. It noted that neither the Florida Constitution nor the Act defined "industrial plant." However, the court interpreted the legislative intent behind the FIDFA as mandating a liberal construction of the Act and therefore used a broad dictionary definition of the word "industry":⁶⁴

were liable in the event of default, the state's credit was not being pledged.)

59. *Id.* at 308.

60. *Id.* at 308-09.

All other proposed public revenue bond projects not falling into the exempted class described in Section 10(c) of Article VII would, of course, have to run the gauntlet of prior case decisions. . . . [T]he cases hold that the validity of each proposed public revenue bond financing project depends upon the circumstances, e.g., whether the purpose of the project serves a paramount public purpose.

Id.

61. *Id.* at 309.

62. *Id.*

63. 305 So. 2d 166 (Fla. 1974).

64. *Id.* at 168-69.

A department or branch of a craft, art, business, or manufacture: a division of productive or profit-making labor, esp. one that employs a large personnel and capital, esp. in manufacturing. . . . [A] group of productive or profit-making enterprises or organizations that have a similar technological structure of production and that produce or supply technically substitutable goods, services, or sources of income, [as] the poultry industry. . . .⁶⁵

The court held that under this definition both projects were qualified industrial plants. The court went on to bolster its analysis by citing the trial court's determination that the projects fulfilled a public purpose.⁶⁶

This extended review was not necessary and is indeed confusing. Once a plant qualifies as an industrial or manufacturing facility, there should be no further public purpose review.⁶⁷ It is only when a project does not fall within the article VII, section 10(c) class of projects that the court should go further and examine whether a public purpose is served.⁶⁸

An excellent application of the *Nohrr* approach to IDB validation was conducted by the court in *Wald v. Sarasota County Health Facilities Authority*.⁶⁹ In reviewing a bond issue for health care facilities, the court first considered whether the project came within section 10(c). After deciding that it did not, the court acknowledged that the *Nohrr* test required a further examination of the public purposes involved.⁷⁰ Therefore, the court looked to the legislative determination of public purpose within the statute.⁷¹ The standard of review was once again, as in *Nohrr*, whether the legislative determination was "so clearly wrong as to be beyond the power of the Legislature."⁷² Consistent with the *Nohrr* analysis, the court refused to make its own independent review of public purpose.⁷³

65. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1961)).

66. *Jacksonville Port Auth.*, 305 So. 2d at 167-69.

67. See *supra* notes 60-62 & accompanying text.

68. *Id.*

69. 360 So. 2d 763 (Fla. 1978). For additional cases applying the *Nohrr* review see also *State v. Leon County*, 400 So. 2d 949 (Fla. 1981); *State v. Volusia County Indus. Dev. Auth.*, 400 So. 2d 1222 (Fla. 1981).

70. *Wald*, 360 So. 2d at 769.

71. Health Facilities Authorities Law, FLA. STAT. §§ 154.201-.246, .203 (1975). This Act is again similar to the FIDFA in that it contains a list of projects found to fulfill public purposes and which therefore qualify for IDB financing.

72. *Wald*, 360 So. 2d at 770.

73. "By virtue of the legislative determination . . . that facilities governed by Chapter

With the passage of the 1980 amendments to the FIDFA, one would expect a decrease in the number of challenges to IDB issues. The legislature, however, failed to totally insulate IDB financing from court challenge. Unfortunately, two critical areas were overlooked. First, both the constitution and the FIDFA fail to define the phrase "industrial or manufacturing plants." Second, although the FIDFA appears to list every conceivable use of IDB's and expressly states that the Act is to be liberally interpreted,⁷⁴ the legislature, by not expressly stating that the list was not exhaustive, left the FIDFA open to attacks of statutory interpretation. These two problems have allowed the court to invalidate a number of projects. The rest of this article is devoted to several recent cases which have arisen under the FIDFA as amended in 1980⁷⁵ and to an analysis of the court's current approach to IDB issues. The inconsistencies found in these cases have led to uncertainty as to exactly what kinds of projects will be approved by the court. This uncertainty greatly decreases the utility of the Act as a device for spurring on Florida's economic growth.

III. RECENT FLORIDA SUPREME COURT CASES

A. *Orange County I*

On June 3, 1982 the court decided *State v. Orange County Industrial Development Authority (Orange County I)*.⁷⁶ In *Orange County I* the court affirmed the trial court's validation of an eight-million-dollar bond issue to finance the construction of a hotel "in connection with" the Orange County Convention Civic Center.⁷⁷ The court first detailed Orange County's successful tourism industry and attractions,⁷⁸ utilizing an approach reminiscent of that em-

154 are in the public interest, no independent judicial inquiry will be made into the public nature of facilities properly falling within this chapter." *Id.*

74. FLA. STAT. § 159.43 (1983) ("Part II of chapter 159, being necessary for the prosperity and welfare of the state and its inhabitants, shall be liberally construed to effect the purposes thereof. . . ."). See also *Jacksonville Port Auth.*, 305 So. 2d at 168.

75. FLA. STAT. §§ 159.25-431 (1983).

76. 417 So. 2d 959 (Fla. 1982).

77. *Id.* at 963. The trial court held that (1) the 1980 amendment to the Act was a constitutional exercise of legislative power; (2) the hotel was an industrial or manufacturing plant within the meaning of article VII, § 10(c) of the Florida Constitution; (3) the hotel would serve a paramount public purpose; and (4) the primary purpose of the project was to provide services in conjunction with the civic center, a facility qualifying under the Act and the constitution. *Id.* at 960.

78. [T]ourism in the Orange County area has grown primarily as the result of the opening of Walt Disney World in late 1971. This attraction is the number one

ployed in *State v. Daytona Beach Racing & Recreational Facilities District*,⁷⁹ a pre-1968 "public purpose" decision in which the court affirmed a validation of revenue bonds for racing facilities because of the attraction's value to the tourism industry of the Daytona Beach area.⁸⁰ The court in *Orange County I* then quoted the legislative findings of public purpose in the Act, which identifies tourism as vital to the state's economy, the people's welfare, and the state's competitive position.⁸¹

With strong support from precedent and legislative intent, the court could have based its constitutional analysis solely on the hotel's furtherance of this paramount public purpose as determined by the legislature.⁸² The court, however, proceeded to bolster its public purpose analysis by defending the legislature's determination that the projects defined in the Act furthered the public purposes identified by the legislature.⁸³ The court viewed the Act's 1980 amendment⁸⁴ as "in essence" codifying *State v. City of Miami*,⁸⁵ a decision approving revenue bonds for a convention center project, part of which included a lease to a private developer for the purpose of constructing and operating a hotel.⁸⁶ In *Orange County I* the standard for review was once again that a party challenging such a legislative determination had to show "that such de-

drawing card in the world and currently has an annual attendance of approximately fifteen million people. The \$800 million EPCOT futuristic theme park expansion program is scheduled for completion by Walt Disney World in 1983 and the annual attendance is expected then to increase dramatically.

Id. at 960.

The court also mentioned Sea World and numerous other tourist attractions, including the \$100 million Reedy Creek Family Resort and the \$170 million Little England Theme Park, as well as the planned \$170 million MCA/Universal Studios movie studio attraction. *Id.* at 960-61.

79. 89 So. 2d 34 (Fla. 1956).

80. "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." *Id.* at 37.

81. FLA. STAT. § 159.26 (1981).

82. *See, e.g., State v. Leon County*, 400 So. 2d 949 (Fla. 1981). In *Leon County*, the court approved revenue bonds for the construction of a health care facility owned by private investors. The court found that the facility served a paramount public purpose and emphasized the legislative finding that health care industries are vital to the economy of the state and the welfare of the people. *Id.* at 951.

83. Qualifying projects include a "convention or trade show facility . . . and all appurtenances and facilities incidental thereto, such as . . . public lodging and restaurant facilities. . . ." *Orange County I*, 417 So. 2d at 961 (quoting FLA. STAT. § 159.27(5) (1981)).

84. Ch. 80-287, 1980 Fla. Laws 1228.

85. 379 So. 2d 651 (Fla. 1980).

86. *Orange County I*, 417 So. 2d at 962.

termination 'was so clearly wrong as to be beyond the power of the Legislature.'"⁸⁷ Applying this standard, the court validated the IDB issue.

The emphasis which the *Orange County I* decision placed upon the hotel project's connection with and importance to the convention center represented a healthy shift away from the stubborn grip of the old public purpose doctrine towards an examination of the Act and a focus on its provisions, particularly the legislative determinations of public purpose. But, while the court appeared to follow the two pronged *Nohrr* analysis, it still devoted a large portion of the opinion to an examination of the public purpose behind the project. If the standard of review for legislative determinations is the "clearly wrong" standard, then only a minimal review should be necessary.

B. Osceola County

The court followed the *Nohrr* analysis more closely in *State v. Osceola County Industrial Development Authority*.⁸⁸ Here, the state challenged, on public purpose grounds, the proposed issuance of IDB's for a hotel in connection with Walt Disney World. The major portion of the opinion was devoted to a review of the FIDFA. The court found specific authorization within the Act for "property used for any public lodging establishment . . . if the primary purpose is to provide services in connection with another facility qualifying under this part," and found that the "primary purpose of the proposed [hotel] facility is indisputably to provide services to a qualifying project, a tourism facility as defined by section 159.27(5)."⁸⁹ Recognizing the express finding of public purpose in the statute, the court stated:

We should not substitute our judgment for that of the legislature on the general question of whether tourism is vital to the economy of the state and the welfare of the people, nor should we substitute our judgment for that of the trial judge on the specific

87. *Id.* (citing *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971)).

88. 424 So. 2d 739 (Fla. 1982), *rev'g on rehearing State v. Osceola County Indus. Dev. Auth.*, 7 Fla. L.W. 261 (June 3, 1982). This case was originally decided the same day as *Orange County I*. Justice Boyd authored the majority opinion in the first hearing. That opinion is substantially the same as his dissent upon rehearing. When viewed in conjunction with *Orange County I*, this case illustrates the strong division within the court over these issues and illustrates the great potential for inconsistent decisions.

89. *Osceola County*, 424 So. 2d at 741.

question of whether, based on the record in this case, the [hotel] facility serves that paramount public purpose. *We must also give great weight to the finding by the Osceola County Industrial Development Authority.* . . .⁹⁰

Accordingly, the trial court's validation of the issuance was upheld by the majority.⁹¹

Justice Boyd submitted a dissenting opinion that acknowledged his preference for a narrow construction of the Act "to save the statute from unconstitutionality."⁹² The dissenting opinion concentrated on the proposed project's failure to serve a paramount public purpose. For supporting precedents, Justice Boyd relied mainly on pre-1968 "public purpose" cases without considering the significance of the Act's 1980 amendment and the legislative determinations of public purpose found in section 159.26. Citing a 1978 decision, *Wald v. Sarasota County Health Facilities Authority*,⁹³ Justice Boyd stated that article VII, section 10 of the Florida Constitution requires that projects be payable only from project revenues and serve a paramount public purpose.⁹⁴ The public *necessity* of a proposed project determined its furtherance of a paramount public purpose; "general promotion of the economy" was not a valid public purpose.⁹⁵ The dissent then concluded that the proposed project was not necessary. Justice Boyd stated his necessity requirement in terms of "an amenity at a certain place or in connection with a certain public facility," adding the requirement of an expectation that the "private enterprise market [would not] adequately respond to the need."⁹⁶ The justice did not conclude that the hotel was not necessary to the tourism facilities or other nearby qualifying projects; but he did emphasize the perceived absence of the need for public financing because of the competition between investors in the area's hotel industry.⁹⁷

90. *Id.* at 742 (emphasis added).

91. *Id.*

92. *Id.* at 743 (Boyd, J., dissenting).

93. 360 So. 2d 763 (Fla. 1978).

94. *Osceola County*, 424 So. 2d at 743 (Boyd, J., dissenting).

95. *Id.* at 744.

96. *Id.*

97. *Id.*

Rather than concluding that this increased demand establishes a need for publicly assisted bond financing of a motel to be privately owned and operated for profit, I would conclude instead that various investors and groups of investors in the hotel and motel field will literally be vying with one another for the opportunity to finance the construction of hotels and motels in the central Florida area. Thus

At this point, Justice Boyd reached the crux of his dissenting opinion, identifying IDB financing as an “unnecessary entanglement of political authority with the private economic arena [which] interferes with the process of competition and has far-reaching consequences with regard to the outcomes of competition.”⁹⁸ The justice implied that developers assisted by public bond financing would be placed at a competitive advantage regardless of the quality of services provided. “Thus, political influence comes to mean more to a company’s chances for success than efficiency and performance.”⁹⁹

In 1983 the FIDFA was amended in response to the *Orange County I* and *Osceola County* cases.¹⁰⁰ The legislation originated in the House Finance and Taxation Committee.¹⁰¹ The bill’s sponsors were concerned that the public lodging exemption in section 159.27(12) was being interpreted too broadly. They argued that almost any hotel project in Orange County could be found to have as its primary purpose the provision of services in connection with another qualifying facility, such as a theme park or tourist facility, and that therefore, several projects which were neither economically necessary nor satisfied a public purpose were being validated.¹⁰² When the committee reviewed the bill, Representative Kutun, one of the prime sponsors of the IDB legislation, indicated that the committee intended to adopt Justice Boyd’s position in *Osceola County*—that the proposed project must be examined in terms of its necessity to another qualifying facility and whether the private marketplace would respond to the need.¹⁰³ The bill deleted the language which permitted the use of IDB’s for the facility only “if the primary purpose is to provide service in connection with another facility qualifying under this part” and inserted language which approved financing for the facility “if it is part of the complex of, or necessary to, another facility qualifying under this part.”¹⁰⁴ The bill was incorporated without change into House Bill 1220 which was adopted during the 1983 session.¹⁰⁵

there is little or no need for public bond financing.

98. *Id.* at 744-45.

99. *Id.* at 745.

100. Ch. 83-271, 1983 Fla. Laws 1397.

101. Fla. HB 1221 (1983).

102. Fla. H.R., Committee on Finance and Taxation, tape recording of proceedings (Apr. 20, 1983) (on file with committee).

103. *Id.*

104. Fla. HB 1221 (1983).

105. Ch. 83-271, § 19, 1983 Fla. Laws 1397.

The authors acknowledge that, in line with these 1983 amendments, the FIDFA should be construed to limit unnecessary abuses of IDB financing and should not be used to create a surplus of public projects. The necessity requirements adopted by the legislature with respect to the hotel and public lodging exception, however, should adequately deal with these concerns.

In contrast, Justice Boyd's theory, taken to its extreme, undermines the entire concept of IDB financing. The justice's concern over government's "unnecessary entanglement" with private industry would militate against the validation of *any* industrial development bond issue, because in every case, a private entity would receive "a decisive financing advantage . . . which other competitors [would] not enjoy."¹⁰⁶ This perspective would bring into question all IDB issues because public assistance through bond financing would, in any case, interfere with market forces and favor one private entity over others. One wonders why the "public necessity" for a project would make any difference in light of Justice Boyd's analysis. In any event, this undue concern over the "necessity" for public bond financing will hamper Florida's effort to attract industry. The authors submit that while the statutory revisions may set a slightly higher standard for validation in order to protect against abusive uses of IDB financing, the courts should not overreact to these changes and unnecessarily restrict the valid use of IDB's to enhance the competitive position of industry in Florida. The court in validation cases should incorporate the liberal construction expressly mandated by the terms of the FIDFA.¹⁰⁷

C. *Orange County II*

Despite the liberal interpretation given the FIDFA in *Osceola County*, the court in *Orange County Industrial Development Authority v. State (Orange County II)*¹⁰⁸ recently demonstrated that it will continue to give an overly critical review to IDB cases. In affirming the trial court's invalidation of bonds for the expansion of a commercial television station, the court held that the proposed expansion neither qualified as an "industrial or manufacturing plant" under the Florida Constitution and the Act nor served a paramount public purpose.¹⁰⁹

106. *Osceola County*, 424 So. 2d at 744 (Boyd, J., dissenting).

107. FLA. STAT. § 159.43 (1983).

108. 427 So. 2d 174 (Fla. 1983).

109. *Id.* at 176-79.

First, the court examined whether the FIDFA authorized the proposed project as an "industrial or manufacturing plant." The court gave token consideration to the liberal construction mandated by the Act¹¹⁰ and recognized that the provisions of article VII, section 10(c) were not meant to be exclusive,¹¹¹ but refused to adopt a flexible interpretation of "industrial plant." According to the court, under the definition offered by the development authority "any business would qualify as a project eligible to receive tax-free industrial development revenue bonds."¹¹²

The court relied on a dictionary definition of industry which "includes [the] requirement of the employment of a large personnel as well as capital."¹¹³ This definition provides little support for the court's proposition because of the arbitrary nature of determining when a facility employs a "large number of personnel." The station in *Orange County II* employed 110 persons and with the expansion would have employed 135,¹¹⁴ leaving one to wonder exactly what number of employees the court would consider sufficient. Furthermore, the court did not address the question of whether the nine-million-dollar bond issue involved a large amount of capital.

A comparison of the court's treatment of the definitional issue with the dissenting opinion's interpretation of the meaning of "industry" demonstrates the court's arbitrary and unpredictable approach towards an acceptable construction of the FIDFA. The development authority relied on the dictionary definition of "industry" previously used by the court in *State v. Jacksonville Port Authority*.¹¹⁵ In contrast to the majority's undue emphasis on "large personnel" and its blunt rejection of the development authority's application of the definition, Chief Justice Alderman's dissenting opinion took a less restrictive approach to the meaning of the term "industrial":

The project in question is clearly an industrial plant within the contemplation of chapter 159. Broadcasting is a branch of business involving both the technical craft of creating a television signal and the art of writing and producing material for television broadcasts. It is a division of productive or profit-making labor,

110. *Id.* at 177 (citing FLA. STAT. § 159.43 (1981)).

111. *Orange County II*, 427 So. 2d at 178 (citing *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971)).

112. *Orange County II*, 427 So. 2d at 178 (emphasis in original).

113. *Id.* at 177 (quoting WEBSTER'S THIRD NEW INT'L DICT. 1155-56 (1976)).

114. *Orange County II*, 427 So. 2d at 176.

115. 305 So. 2d 166 (Fla. 1974); see *supra* text accompanying note 65.

and it employs a large personnel and capital.¹¹⁶

The majority failed to adequately explain its rejection of the development authority's proposed definition.

Statements such as "to hold otherwise would be to give the words an unreasonable construction"¹¹⁷ and "would prove to be too much"¹¹⁸ are hardly substitutes for cogent analysis. The majority compounded this failure by summarily dismissing federal, state, and Florida decisions relied upon by the development authority to support the proposition that broadcasting is an industry, labeling the cases as "inapposite" or "not persuasive."¹¹⁹

The majority faced an even greater difficulty when considering the implications of *Jacksonville Port Authority*,¹²⁰ where the court held that a food distribution center and a laundry facility constituted "industrial plants" within the meaning of the Florida Constitution and the FIDFA.¹²¹ The court in *Orange County II* stated:

The furthest this Court has gone in its expansive reading of what constitutes an industrial plant was *State v. Jacksonville Port Authority*. . . . There, we validated bonds for a food distribution center and an industrial laundry, and only grudgingly found the latter to be an industrial plant. Since that decision, we have not extended the definition of "industrial plant" to include any project not specifically listed in Chapter 159, Part II. We shall not now. We thus hold that the commercial television station at issue here is not an industrial or manufacturing plant within the intentment of Chapter 159.¹²²

The court faltered in its attempt to explain why a laundry facility qualified as an industrial plant under the Act while a television station did not, especially considering the liberal treatment accorded to industrial development revenue bonds in *Jacksonville Port Authority* and mandated by the Act itself. The *Jacksonville Port Authority* court had emphasized this liberal construction and "the broad definition of 'industry' in common usage."¹²³ Furthermore, the laundry plant in question was characterized as an "in-

116. *Orange County II*, 427 So. 2d at 180 (Alderman, C.J., dissenting).

117. *Id.* at 177.

118. *Id.*

119. *Id.* at 178.

120. See *supra* notes 63-68 and accompanying text.

121. *Jacksonville Port Auth.*, 305 So. 2d at 168.

122. *Orange County II*, 427 So. 2d at 178 (citations omitted).

123. *Jacksonville Port Auth.*, 305 So. 2d at 169.

dustrial" laundry because the facility would service industrial working garments and was "not designed to serve the consuming public generally."¹²⁴ The connection with "industry" and the liberal construction of the phrase "industrial plant," then, formed the basis for validation.

Although a commercial television station is certainly not an industrial laundry, similar connections with "industry" could have been found by the *Orange County II* court. The broadcasting business is itself an industry, as recognized in many federal cases cited to but ignored by the *Orange County II* court.¹²⁵ In addition, the television station clientele would similarly include more "industrial" clients than clients who are members of the general public, as advertising on television stations is seldom done for personal rather than business reasons.

Orange County II reversed the trend towards a liberal definition and construction of the meaning of "industry" that began with *Jacksonville Port Authority* and which was, as the development authority argued, followed in *State v. Volusia County Industrial Development Authority*.¹²⁶ In *Volusia County* the court stated that industrial development financing is a subject that "may include many diverse areas, and is not necessarily limited to a traditional concept of 'industry.'"¹²⁷ Furthermore, as the development authority pointed out, the Florida Supreme Court's liberal approach in *Jacksonville Port Authority* had been cited by the Supreme Judicial Court of Massachusetts,¹²⁸ which stated: "Industry" is a generic term which may be applied readily to activities which are not confined to the process of fabricating new products from raw materials."¹²⁹

The abruptness of the change signaled by *Orange County II* is perhaps best illustrated by an argument made in that case by the development authority which was based on two Pennsylvania tax decisions. In 1948, the Pennsylvania Supreme Court held that a laundry was an industrial plant.¹³⁰ The Florida Supreme Court de-

124. *Id.* at 168-69.

125. *Orange County II*, 427 So. 2d at 178.

126. 400 So. 2d 1222 (Fla. 1981).

127. *Id.* at 1225.

128. Opinion of the Justices to the House of Representatives, 366 N.E.2d 1230, 1231 (Mass. 1977).

129. *Id.* at 1232.

130. *United Laundries, Inc. v. Board of Property Assessment, Appeals & Review*, 58 A.2d 833 (Pa. 1948).

cided *Jacksonville Port Authority* in 1974.¹³¹ In 1974, another Pennsylvania court found that a television station was an "industrial establishment."¹³² Nonetheless, in 1983, the Florida court in *Orange County II* refused to adopt this interpretation. These opinions call into question the court's poorly explained, blanket refusal to consider the *Orange County II* station as an "industrial or manufacturing plant" within the meaning of the Act.¹³³

The court in *Orange County II* also refused to validate the bond issue under the public purpose doctrine and held that the television station project served a private rather than public purpose.¹³⁴

The [private entity] would save around \$300,000 per year for the life of the bonds. There will be no benefit to the public other than the improved local news coverage which might produce a more informed citizenry in the central Florida area, a minimal increase in employment, limited economic prosperity to the community, and an alleged advancement of the general welfare of the people. A broad, general public purpose, though, will not constitutionally sustain a project that in terms of direct, actual use, is purely a private enterprise.¹³⁵

The bond issue in *Orange County II* failed because of the lack of a "paramount public purpose," even though the industrial development authority,¹³⁶ the Federal Communications Commission¹³⁷ and the court itself in a previous decision had concluded that a television station served a valid public purpose.¹³⁸ Chief Justice Alderman noted in his dissent that the development authority found that the project served a public purpose because the project would increase employment in the Orange County area by a minimum of twenty-five jobs, would result in better news coverage and a more informed citizenry in the area, and would "enhance the position of Central Florida as a potential media center" through commercials and public service announcements.¹³⁹ The court rejected this deter-

131. 305 So. 2d 166 (Fla. 1974).

132. *City of Pittsburgh v. WIIC-TV Corp.*, 321 A.2d 387, 388 (Pa. Commw. Ct. 1974).

133. The court dismissed the Pennsylvania cases as "taxation cases falling under statutes far different than the one at issue here, and within the context of public policies greatly dissimilar." *Orange County II*, 427 So. 2d at 178.

134. *Id.* at 179.

135. *Id.*

136. *Id.* at 181 (Alderman, C.J., dissenting).

137. *Id.*

138. *State v. City of Jacksonville*, 50 So. 2d 532 (Fla. 1951) (en banc).

139. *Orange County II*, 427 So. 2d at 181 (Alderman, C.J., dissenting).

mination, even though it was entitled to great weight under *Osceola County*,¹⁴⁰ and should not have been disregarded unless the state showed that the determination was "so clearly wrong as to be beyond the power of the Legislature."¹⁴¹

The court also ignored the fact that in granting the station a license the Federal Communications Commission had determined that the station served the public interest,¹⁴² a determination deserving "substantial judicial deference."¹⁴³ Chief Justice Alderman stated: "If the station did not serve a paramount public purpose, it would not be allowed to broadcast."¹⁴⁴

Finally, the court distinguished *State v. City of Jacksonville*, where the court had approved the municipal revenue certificates for the addition of television equipment to a city-owned radio station.¹⁴⁵ In *City of Jacksonville*, the municipal ownership of the station "was significant in our finding a public purpose in the project."¹⁴⁶ The mere difference in ownership, however, would not change the stations' furtherance of public purposes; in both cases, the goals and results of the stations' work would be the same. The situation in *City of Jacksonville* differed from that in *Orange County II* in form but not in substance. Both involved financing schemes that were approved by local government agencies based on the public purposes noted above, despite the fact that in one case a private entity saved money through the bond financing. This fact existed in both *Orange County II* and *Osceola County* yet changed neither the existence of public purposes nor the court's analysis in those cases.

The result of *Orange County II*, the nature of industrial development revenue bonds, and the significance of the FIDFA, show that now may be the time to bury the old public purpose doctrine and eliminate the uncertainty caused by judicial consideration of the existence of, and quantification of, private benefit in a bond issue. *Orange County II* resulted in the invalidation of a bond issue because a majority of the justices felt that a commercial television station did not serve a "paramount public purpose," ultimately a subjective determination based on obsolete precedent.

140. *Osceola County*, 424 So. 2d at 742.

141. *Nohrr*, 247 So. 2d at 309.

142. *Orange County II*, 427 So. 2d at 181 (Alderman, C.J., dissenting).

143. *Id.*

144. *Id.*

145. *Id.* at 179.

146. *Id.*

Earlier decisions established the public purpose doctrine in the area of industrial development revenue bonds,¹⁴⁷ but an examination of more recent cases reveals that the amended FIDFA now constitutionally authorizes nearly every project invalidated by the pre-1968 public purpose decisions. Even those pre-1968 decisions which validated bond issues raise questions about the logic behind the doctrine. For example, one may wonder why a racetrack¹⁴⁸ is more deserving of public assistance through industrial development revenue bonds than is a commercial television station.

D. *Linscott*

On December 22, 1983, the Florida Supreme Court issued its most recent IDB validation decision, *Linscott v. Orange County Industrial Development Authority*.¹⁴⁹ At issue was the authorization of \$4,500,000 in bonds to finance construction of a regional headquarters facility. The court agreed that the project did not qualify as an industrial or manufacturing plant.¹⁵⁰ Therefore, the court looked to the second prong of the *Nohrr* test and examined the public purpose involved as alternative grounds for validating the issue. The FIDFA specifically authorizes the issuance of IDB's for headquarters facilities,¹⁵¹ and contains legislative findings of public purpose in promoting economic development.¹⁵² Relying on the statute, the court in *Linscott* deferred to the legislative determinations without further analysis of its own as to the public purpose.

The major impact of this decision is that it establishes two important principles. First, nonrecourse revenue bonds are not to be viewed as a pledge of public credit:

Appellant characterizes subsection (c) as an exception to the prohibition against the pledging of public credit contained in the first paragraph of section 10. This characterization is misleading

147. See, e.g., *State v. Manatee County Port Auth.*, 193 So. 2d 162 (Fla. 1966) (revenue bonds for the construction of port facilities did not serve a public purpose); *State v. Town of North Miami*, 59 So. 2d 779 (Fla. 1952) (en banc) (revenue certificates for the construction of an aluminum plant did not serve a municipal purpose). See *supra* notes 30-36 and accompanying text.

148. See *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So. 2d 34 (Fla. 1956).

149. 443 So. 2d 97 (Fla. 1983).

150. *Id.* at 101.

151. FLA. STAT. § 159.27(5) (1983).

152. *Id.* § 159.26.

because it tends to focus exclusive attention on "industrial and manufacturing." More properly and closely read, subsection (c) is actually an interpretation of the first paragraph: non-recourse revenue bonds do not pledge the public credit.¹⁵³

This principle was first recognized in *Nohrr*, but has not been consistently followed. The second principle is that the project need only satisfy a public purpose, not a "paramount public purpose" as required in *Orange County II*, when the public credit is not being pledged.¹⁵⁴ As the court stated in *Linscott*, "An indirect public benefit may be adequate to support the public participation in a project which imposes no obligation on the public."¹⁵⁵ The court also acknowledged the legislative determination that the public interest is served by facilitating private economic development.¹⁵⁶ The decision in *Linscott* shows that there should be no bar to the validation of IDB's. IDB's are not within the constitutional prohibition against pledges of public credit and they promote the public interest through private economic development.

While the court in *Linscott* must be applauded for its return to the analysis suggested by the court in *Nohrr*, its opinion does not resolve the conflicting approaches used in earlier opinions. Indeed, the primary problem with the *Linscott* decision is that it fails to distinguish itself from the *Orange County II* decision—both as to *Orange County II*'s invalidation of IDB's for a commercial television station and as to the court's use of the "paramount public purpose" test.¹⁵⁷ This flaw in the majority opinion was noted by Justice Boyd in his dissent:

I find no substantial difference between this case and *Orange County Industrial Development Authority v. State*, . . . where the Court affirmed the denial of validation of bonds to finance development of a commercial television station. Our decision there was grounded not only on the lack of statutory authorization but also on the constitution.¹⁵⁸

While the authors of this article strongly disagree with Justice Boyd's restrictive view as to the use of IDB's for capital projects

153. *Linscott*, 443 So. 2d at 100.

154. *Id.* at 101.

155. *Id.* (quoting *State v. Housing Fin. Auth.*, 376 So. 2d 1158, 1160 (Fla. 1979)).

156. *Linscott*, 443 So. 2d at 101.

157. *Orange County II*, 427 So. 2d at 179.

158. *Linscott*, 443 So. 2d at 103 (Boyd, J., dissenting) (citation omitted).

under the FIDFA, we do find ourselves in accord with his observation that the court is rendering inconsistent decisions as to the use of IDB's.

Although an established doctrine may survive the factual situations from which it arises, the courts should consider retiring the doctrine when the doctrine's origin and development draw into question both its validity and usefulness. The public purpose doctrine is not an explicit constitutional mandate in the bond area, but rather has been judicially grafted upon the Florida Constitution's prohibition against pledges of the state's credit.¹⁵⁹ Furthermore, bonds not serving a "public purpose" nevertheless may be validated if they fall within the "industrial or manufacturing plants" exception to the prohibition.¹⁶⁰ Commentators have noted that the judicial fears underlying the public purpose doctrine—fear that a default on a bond issue ultimately will fall upon the taxpayers and involve the government taxing power, and that governmental involvement in an industry will upset the competition in the marketplace—are largely unfounded.¹⁶¹ These bonds do not pledge the credit of the state or in any way constitute a general obligation of government. Bond purchasers may only look to the revenues of a project to satisfy their claims. In addition, the existence of local development authorities and a rigorous statutory procedure for the approval of bonds by these authorities guard against any abuses or indiscretions that some may fear when government and private enterprise interact. Even this questionable motivation, however, is frustrated when a court does not consider the public purpose of a valid bond issue simply because it involves an "industrial or manufacturing plant." The reasons underlying a constitutional doctrine in the industrial development bond area should apply to all industrial development bonds, or the inevitable result, as exemplified by the court's recent opinions, will be inconsistent and arbitrary decisions. The analytical difficulties that result from the public purpose doctrine lead to the conclusion that the court should never have superimposed this requirement on a constitutional provision that did not already explicitly contain such a condition, especially considering the nature of industrial development revenue bonds.

The decisions analyzed above demonstrate that the types of projects emerging in the industrial development revenue bond area

159. See *supra* notes 26-29 and accompanying text.

160. See *supra* notes 42-43 and accompanying text.

161. See, e.g., Tew, *supra* note 2, at 188-89.

should be reviewed according to the mandates of the FIDFA, and not the stubborn reemergence of the public purpose doctrine. Justice Alderman in *Osceola County*, *Orange County I*, and *Orange County II*, set forth a consistent method of review which properly accords great weight to the FIDFA and has faith in the general structure of the Act, as well as in the development authorities that operate within it. This approach should eventually dominate in every industrial development revenue bond validation decision, since the test itself furthers the public welfare and treats in a realistic manner the use of industrial development revenue bonds in our modern society.

III. CONCLUSION

The Florida Industrial Development Financing Act can be a significant factor in the promotion of Florida's economic development. The local industrial development agencies established pursuant to the Florida statutes are acting within their bounds. They are using intelligence, restraint, and the parameters set forth by the Act to select projects which are solutions to local economic problems. These projects are of substantial benefit to the economic security and general welfare of the local citizens. The legislature has shown its willingness to modify the Act in response to competitive actions by other states and in response to Florida's evolving economic needs. Unless the Florida Supreme Court is presented with an obvious and blatant abuse of an IDB, the court should act in the limited capacity set forth in *Nohrr*. Instead, the court has recently elected to usurp the decision making process provided to the local authorities by the legislature. For the court to assume that its knowledge of conditions in Orange and Osceola Counties is greater than that of the local citizenry is unreasonable. The court's recent decisions harken back to days before the 1968 amendment authorized the bonds, to days when a racetrack was found to have a valid public purpose but an aluminum plant was not. This type of decision making may have been valid when the court was without legislative guidance, but it is no longer acceptable in the face of a thorough, clear statute which in addition expresses a legislative mandate requiring an expansive statutory reading.

