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R. William Ide, III

Donald P. Ubell

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FINANCING FLORIDA'S FUTURE: REVENUE BOND LAW IN FLORIDA

R. WILLIAM IDE, III* AND DONALD P. UBELL**

I. INTRODUCTION

Florida has experienced an explosive population growth which is placing severe demands on the state and its political subdivisions to provide capital improvements. This growth is expected to continue uninterrupted into the twenty-first century, when Florida will be the fourth most populous state in the country.[1] A heavy percentage of Florida's immigrants who will cause the population to swell are the "young old," who, as they age to the "old old" demographic category,[2] will require housing, health care facilities,[3]

* B.A. 1962, Washington & Lee University; LL.B. 1965, University of Virginia; M.B.A. 1972, Georgia State University. Private Practice, Kutak Rock & Campbell, Atlanta, Georgia.

** B.A. 1967, University of North Carolina; J.D. 1969, University of Michigan. Private Practice, Kutak Rock & Campbell, Atlanta, Georgia.

1. Florida's population was over six million in 1970; by 1980, the population had grown to over nine million, a 43.5% increase. THE WORLD ALMANAC AND BOOK OF FACTS 197 (1984). With an annual growth rate of three percent, Florida will be the fourth most populous state by 1990. Sipe & Starnes, *Florida's Infrastructure: Past and Future Requirements*, ECON. LEAFLETS, Sept. 1983, at 1-2. The following statement exemplifies the situation: "The growth of the City of Sunrise reflects the growth of the State of Florida during the past twenty years. In 1967 the City had a population of less than 3,200 people. By 1976 its population exceeded 32,000. The physical area of the City has increased 120 times." State v. City of Sunrise, 354 So. 2d 1206, 1207 (Fla. 1978).

2. The "young old" are considered to be those aged 60-69. They live largely an independent existence, with steadily increasing dependence as they move into the "old old" category, over age 80. *See generally* Witty & Spicie, *Building a Dream City for the Aged*, CONTEMP. AD., Nov. 1983, at 36; *The Challenge of Choosing a Nursing Home*, BUS. WK., Nov. 22, 1982, at 122. Congregate care facilities are an example of the kind of projects designed to accommodate and serve these individuals. Under this concept, a resident of a housing unit maintains the degree of independent living that he or she is capable of and draws on the available services to the degree he or she must. For example, the health facility provides the security of immediate health care attention, assists with administration of drugs, allows for on-site outpatient care, and provides therapy treatment. A resident is entitled to remain in the congregate care project until his or her death, until he or she fails to pay the monthly health care facility fee, or until continued occupancy presents a danger to the resident or to other residents; if the resident is unable to continue independent living in an apartment unit, he or she can be moved to the skilled health care facility.

3. "Currently some 1.3 million Americans, 5% of those over 65, fill the country's 21,500

and ancillary services[4] well beyond current capacity. In addition, other public needs such as water and sewer systems, solid waste disposal facilities, jails, roads, and schools must be met.[5]

Just when these demands are becoming most intense, the availability of federal funds to meet them has lessened.[6] Beginning with the Carter Administration and extending through the Reagan Administration, the federal government has progressively reduced revenue sharing grants and loans to the states for construction and maintenance of the infrastructure: the basic network of facilities such as transportation, water and sewer systems, and solid waste disposal systems.[7] In the categories of capital projects, this trend is even more pronounced.[8] Diminished federal funds may be justified, in part, on the basis that their original purpose was to alleviate diminished state and local tax capacity.[9] Today, however, the federal government is running a substantial deficit and state governments, with few exceptions, have budget surpluses.[10]

[nursing] homes nearly to capacity." Moore, *Way Out Front: Nursing Homes*, FORTUNE, June 13, 1983, at 142. "There is already a shortage of nursing beds." Blyskal, *Gray Gold*, FORBES, Nov. 23, 1981, at 80. "According to the National Council of Health Centers, which represents proprietary nursing homes, some 235,000 beds must be added in the next decade to the 1.6 million existing places to meet anticipated demand." *The Challenge of Choosing a Nursing Home*, *supra* note 2, at 122.

4. "Ancillary services" include adult day-care centers, home health aides, communal meals, congregate living, physical therapy, and recreational therapy.

5. *See generally* JOINT ECONOMIC COMMITTEE OF CONGRESS, HARD CHOICES: A REPORT ON THE INCREASING GAP BETWEEN AMERICA'S INFRASTRUCTURE NEEDS AND OUR ABILITY TO PAY FOR THEM (Feb. 1984).

6. For example, the amount of federal Environmental Protection Agency grants were reduced from $4.4 billion in 1980, to $3.5 billion in 1981, and to a current level of $2.4 billion. Giglio, *Infrastructure Banks Can Relieve States' Financing Problems*, BOND BUYER, Mar. 8, 1984, at 18.

7. The Office of Management and Budget reported that federal spending on public works peaked in 1980 and that constant dollar funding levels for local infrastructure needs had been "substantially trimmed" in the subsequent three fiscal years. *U.S. Has Sharply Cut Local Public Works Aid*, N.Y. Times, May 6, 1984, at 21, col. 2. Information collected by the Tax Foundation shows that federal grants to state and local governments in FY 1983 actually increased by four percent, an amount approximating the rate of inflation, to $88.8 billion. FY 1982, however, showed a $7 billion decline from the FY 1981 level of $92.5 billion so that grants remain below their peak level. *US Grants-in-Aid to Localities Rose by 4% in Fiscal '83*, BOND BUYER, May 11, 1984, at 20.

8. Craig, *Impact of Federal Policies on Municipal Bond Financing*, 34 NAT'L TAX J. 389, 391-92 (1981); Wolman & Peterson, *State and Local Government Strategies for Responding to Fiscal Pressure*, 55 TUL. L. REV. 773, 786-87 (1981).

9. *See, e.g.*, Watt, *The Goals and Objectives of General Revenue Sharing*, 419 ANNALS 13-17 (1975), *reprinted in* STATE AND LOCAL GOVERNMENT LAW 620-21 (S. Sato & A. Van Alstyne 2d ed. 1977); Herbers, *Should Washington Share Revenue With States?*, N.Y. Times, Jan. 22, 1981, § B, at 8, col. 2.

10. *See, e.g.*, *Local Surpluses Won't Slay the Monster Deficit*, BUS. WK., Oct. 22, 1984,

In the past, states and municipalities[11] have shifted to private corporations part of their burden of providing traditional services by assisting private corporations with their financing of projects. The municipality would sell an issue of industrial development bonds (IDB's) and in turn loan the proceeds to the private entity. As the interest on IDB's is, with certain limitations, tax exempt,[12] purchasers of such bonds can achieve a greater after-tax return on their investment as compared with non-tax-exempt bonds. Thus, the municipality can offer bonds bearing a reduced rate of interest. This savings is ultimately passed along through a lower interest rate on the loan to the private entity as an incentive to engage in the desired development. The private entity then uses the proceeds to construct the desired facility with ownership remaining in the private entity. The debt service on the bonds is paid from the revenues of the project and secured by the project itself and any additional guarantees by the private entity. The governmental entity does not pledge its full faith and credit behind the bonds. Thus, municipalities have been able to shift a portion of the responsibility for providing basic services to private entities, which in turn recover their costs from the users of the facilities.

The continued advantage of tax-exempt status for municipal-based borrowings, however, is threatened. Recently enacted federal legislation would severely curtail the use of IDB's, even when the facilities serve purposes one would normally characterize as public, such as pollution control or solid waste disposal.[13] New Internal

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at 62.

11. The word "municipalities" as the term is used within the context of this article refers to any county, municipality, taxing district, or other political subdivision within the state, whether incorporated by special act of the legislature or under the general laws of the state, which is authorized to issue bonds.

12. I.R.C. § 103(a) (CCH 1984) excludes income from state and local obligations from federal income taxation. Section 103(b)(1), however, excludes industrial development bonds from the definition of state and local obligations unless they meet certain requirements set forth in the remainder of § 103(b). Certain facilities, including those for pollution control, are listed in § 103(b)(4) as projects which will continue to qualify for tax-exempt IDB financing.

13. The Tax Reform Act of 1984 severely limits the availability of tax-exempt industrial development bonds to meet infrastructure needs with private development by restricting the amount of IDB's which may be issued within a given state and restricting the types of projects which qualify for such financing. *See generally* I.R.C. § 103(b) (CCH 1984).

Docks, wharves, convention and trade show facilities, airports, and mass transit facilities are exempt from the state cap provisions; however, they remain subject to the limits on depreciation and the more restrictive arbitrage limits that were imposed by the Act. In addition, § 103(b)(17)(A) imposes limits on the amount of bond proceeds that may be used for the acquisition of land.

Revenue Code section 103(n), for example, places a ceiling on the amount of "private activity bonds" that may be issued per year in each state. The term private activity bond includes most industrial development bonds.[14] The ceiling is $200 million or $150 times the state's population, whichever is greater.

Because of the size of the capital required for infrastructure projects, it is unrealistic to expect current year revenues of states or municipalities to be able to finance them.[15] As a result of the new limitations on IDB usage, government entities will be forced to move away from IDB's and find alternative sources of financing. Under the Code definition, when at least seventy-five percent of the proceeds are used directly or indirectly by a governmental entity or exempt person, the bond will not be considered an industrial development bond.[16] Therefore, bonds which are issued to provide for basic governmental facilities to be owned and operated by the governmental entity will not be considered IDB's, and consequently, not subject to the myriad of limitations imposed upon their use. The interest on these bonds will remain tax exempt under the general provisions of Internal Revenue Code section 103(a).[17]

In many instances, however, governmental entities need to enlist the support of private developers in constructing and operating new public facilities. To encourage private development of facilities serving the public interest, it is often necessary to allow the private developers to retain ownership of and operate the facilities. Governmental financing of such privately owned and operated facilities, however, falls within the definition of industrial development bonds and is therefore subject to the IDB limitations.

As a result, when the governmental entity wishes to finance private development of public projects, two basic types of governmental obligations will be available—general obligation bonds and revenue bonds. Since ad valorem taxes are pledged in support of

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14. I.R.C. § 103(n)(7) (CCH 1984).

15. It is not unusual for a single issue of bonds financing pollution control facilities to exceed $100 million. Of Tampa's $271 million 1984 budget, for example, $91.3 million was designated for a capital improvement program. The program includes $53 million for a refuse-to-energy plant and $28 million for improvements to the sewer system. *Tampa Sets $91.3 Million Capital Budget*, NATION'S CITIES WEEKLY, Sept. 5, 1983, at 11.

With competing interests seeking IDB financing it is not at all certain that such a large issue would be allocated a portion of the state ceiling. *See* Fla. Exec. Order No. 84-181, Executive Office of the Governor (Oct. 9, 1984).

16. I.R.C. § 103(b)(2)(A) (CCH 1984).

17. *See id.* § 103(b)(2).

general obligation bonds[18] and since they typically require voter approval,[19] revenue bonds will be a more likely choice in many situations.[20]

States and municipalities will also tend to favor the use of revenue bonds for many projects which they build or acquire in an effort to place the debt burden on the users of the facilities being financed.[21] Governmental entities may also choose to use revenue bonds for projects which do not result in traditional "user" fees, such as jails or government office buildings.[22] In some instances, it

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18. The general obligation bond is backed by the full faith and credit of the municipality, while the revenue bond is secured by specifically dedicated income, usually revenues generated by the project but sometimes supplemented by a collateral revenue source. *See, e.g.*, Flushing Nat'l Bank v. Municipal Acceptance Corp., 358 N.E.2d 848, 851 (N.Y. 1976); Ramsey v. Cameron, 139 S.E.2d 765, 769 (S.C. 1965). Interest on either obligation may be exempt from taxation under I.R.C. § 103 (CCH 1984).

A general obligation bond is considered to be one that is "payable from an unlimited general ad valorem tax on all taxable property." 15 E. McQUILLIN, MUNICIPAL CORPORATIONS § 43.05, at 479 (3d ed. 1970). A pledge of "full faith and credit" is what turns a bond into a general obligation bond, since then the government entity has made "both a commitment to pay and a commitment of the [entity's] revenue generating powers to produce the funds to pay." *Flushing*, 358 N.E.2d at 851. The term "general obligation" includes both limited and unlimited general obligation bonds for purposes of this article. "Full faith and credit" generally refers to ad valorem tax revenue backing, since the fear against which the constitutional provisions protect is the "unreasonable taxation of real estate owners." Note, *Counties: Supreme Court's Substantial Impact on Ad Valorem Taxation*, 35 U. FLA. L. REV. 175, 175 (1983). Real estate taxes were the primary source of revenues at the time constitutional restrictions on the use of general obligation bonds were written. The primary purpose of these restriction was to protect property owners. *See, e.g.*, State v. City of Jacksonville, 53 So. 2d 306 (Fla. 1951); State *ex rel.* Capitol Addition Bldg. Comm'n v. Connelly, 46 P.2d 1097, 1101 (N.M. 1935).

19. A bond which is guaranteed by the ad valorem taxing power of the municipality without the prior approval of the electorate is unconstitutional pursuant to FLA. CONST. art. VII, § 12, which provides in pertinent part: "[L]ocal governmental bodies with taxing powers may issue bonds . . . payable from ad valorem taxation and maturing more than twelve months after issuance only . . . when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation . . . ."

20. The referendum process is often protracted and can unnecessarily inhibit the ability of public officials to govern adequately and to provide needed services quickly. Revenue bonds, on the other hand, do not require voter approval as a condition of issuance. For a historical perspective, see Purvis v. City of Little Rock, 667 S.W.2d 936 (Ark. 1984).

21. Since revenue bonds are serviced by the revenue generated by the project (augmented, perhaps, by a collateral revenue source), the people benefiting from the service pay for it. *See* Skidmore v. City of Elizabethtown, 291 S.W.2d 3 (Ky. Ct. App. 1956); Wunderlich v. City of St. Louis, 511 S.W.2d 753 (Mo. 1974); Flushing Nat'l Bank v. Municipal Acceptance Corp., 358 N.E.2d 848 (N.Y. 1976); Ramsey v. Cameron, 139 S.E.2d 765 (S.C. 1965); *see also* Note, *Industrial Development Bonds: Judicial Construction vs. Plant Construction*, 15 U. FLA. L. REV. 262, 269-70 (1962). Since the total taxing power of an issuer is not pledged as security for payment of the bonds, revenue bonds typically bear slightly higher interest rates than the equivalent general obligation bonds would.

22. *See generally* Rose, *Developments in Revenue Bond Financing*, 6 U. FLA. L. REV.

may be possible to pledge certain non-ad valorem revenue sources as the underlying credit for a revenue bond issue,[23] but in other situations the credit may need to be that of the municipality in order for the bonds to be successfully marketed.[24]

Revenue bond issues appear to be used increasingly for state and local borrowing.[25] Some may question, however, whether Florida revenue bond law is ready for the projected onslaught of demands for the use of these bonds in raising capital. The purpose of this article is to analyze the present legal framework for the use of revenue bonds in Florida. Part II examines the historical development of bond financing in Florida. Part IIIA analyzes the evolution of the limitations upon the pledge of the public credit, and Part IIIB reviews the adoption and judicial construction of the public purpose requirement.

II. HISTORICAL PERSPECTIVE

A review of history is essential to an understanding of the types of projects that can be financed and the credit that can be pledged under Florida law. Only by appreciating the historical development of bond financing through changes in the Florida Constitution and legislation can one be adequately prepared to appreciate the present status of the law and the potential to meet Florida's needs with legal creativity in future revenue bond financings.

Florida law on bond financing seems to have moved in a remark-

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385, 394-98 (1953) (discussing expansion of revenue bonds to include facilities not normally considered to be revenue producing). Non-self-liquidating projects may be funded by bonds issued under FLA. STAT. ch. 125 (1983). *See* County of Volusia v. State, 417 So. 2d 968, 975 (Fla. 1982) (Alderman, J., dissenting).

23. *See infra* notes 57-121 and accompanying text.

24. Bondholders desire that the best possible credit backs the bonds in order to reduce the likelihood of a default. Therefore, a bond's marketability is enhanced if the underlying credit is that of the municipality. A number of factors are forcing credit enhancement. During the present period of increasing state and municipal needs for access to the bond market, buyers of bonds are becoming more credit conscious. Traditional buyers of bonds are turning to alternative investment opportunities for a number of reasons: the reduction in tax rates for individuals and corporations, past poor performance of the municipal bond market, the availability of better investment opportunities, and some defaults in the municipal market. In addition, state and local banks have taken a diminished role as buyers. *See* Craig, *supra* note 8, at 392-93.

25. In 1983, revenue bonds constituted 72% or $58.78 billion of the $81.2 billion total in state and local government issues. The 1982 share was 70% or $53.9 billion. *Tax-Exempt Volume of 1983 Sets Record of $8.2 Billion*, BOND BUYER, Jan. 3, 1984, at 1. The 10-year trend shows revenue bonds increasing from 24% of total state and local government issues in 1974 to 72% in 1983. *A Decade of Municipal Financing*, BOND BUYER, Dec. 8, 1983.

able parallel to the fluctuations in its economy.[26] Cyclical economic patterns have generated predictable constitutional, legislative, and judicial responses. The pattern is one of economic expansion, overextension of government debt, severe recession, and legislative restrictions on the ability of governments to incur debt. Once the pattern has been run, it repeats itself. As the economic picture improves, pressure grows to evade the legal restrictions on public debt. The courts acquiesce in the erosion of the restrictions, overextension eventually reoccurs, and the pattern begins anew.

In the early 1800's many Florida municipalities issued general obligation bonds and loaned the proceeds to private enterprises for such purposes as railroad building and canal construction.[27] When many of these businesses subsequently failed and were unable to make payments to the municipalities, the government entities were required to levy additional taxes to meet their obligations on the bonds.[28] Florida reacted to this questionable commitment of the taxing power by including its first constitutional restrictions on bond issuance in the 1868 constitution.[29] These limitations in the 1868 constitution, although designed to control debt financing, were insufficient to keep the legislature from extensively obligating the state tax resources for investments in private enterprise.[30]

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26. Florida's history contains a succession of economic booms, including (1) from 1763 to 1783, when Florida passed from Spanish control and became an English territory; (2) development before the Civil War; (3) reconstruction and industrialization after the Civil War; and (4) the land boom of the early 1900's. THE BROOKINGS INSTITUTE, A PRELIMINARY REPORT TO THE TAX INQUIRY COUNCIL OF FLORIDA ON THE FLORIDA FISCAL SITUATION 6-7 (1941).

27. Before the Civil War, counties were authorized to purchase stock in railroads in order to stimulate Florida's transition from an agrarian pioneer society into an industrialized society. Subsidies in the form of land grants were also offered. Most of the railroad tracks laid before the Civil War were destroyed during the war. During the Reconstruction Era, the state government guaranteed payment of the interest on the defaulting bonds issued by the railroads. The Trustees of the Internal Improvement Fund eventually took over the railroads, sold the railroads at a loss, and settled the debts by selling four million acres of public land at $.25 an acre. Patterson, *Legal Aspects of Florida Municipal Bond Financing*, 6 U. FLA. L. REV. 287, 291-92 (1953).

28. *Id.*; *see* McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 137, 140 (1930).

29. FLA. CONST. of 1868, art. XII, § 7 stated: "The Legislature shall have power to provide for issuing State bonds bearing interest, for securing the debt [of the State] and for the erection of State buildings, support of State institutions, and perfecting public works."

The power of the legislature to issue bonds and authorize municipalities to issue bonds is unlimited in the absence of constitutional restrictions. Amos v. Mathews, 126 So. 308, 315 (Fla. 1930); Patterson, *supra* note 27, at 287 n.3. Before the 1868 constitution, the legislature authorized counties to issue bonds. *E.g.*, County Comm'rs v. King, 13 Fla. 451 (1870); Cotten v. County Comm'rs, 6 Fla. 610 (1856).

30. The state used the broad authorization of the 1868 constitution to own stock in railroads and other private corporations. *See supra* note 27; D'Alemberte, *Commentary*, 26A FLA. STAT. ANN. 197 (West 1970); *see also* Patterson, *supra* note 27, at 290-91.

The legislature's actions precipitated the 1875 revisions to the Florida Constitution, which more severely restricted *state* bond issuances.[31] The 1875 amendment sought to prevent the use of the public credit, taxing power, money, or property to assist private enterprise.[32] When the 1885 constitution was written, it included even more explicit curbs on government debt financing. Article 9, section 6 allowed state bonds to be issued *only* to finance the repelling of an invasion or suppressing of an insurrection or for refunding at a lower rate bonds already issued, deliberately omitting the broad authorization found in the 1868 constitution, even as limited by the 1875 amendment.[33]

Although further restrictions on *state* financing were imposed with the 1885 constitution, it contained no language regarding the use of bond financing by municipalities other than the prohibition against participating in a private corporation.[34] By the early 1900's, municipalities had begun to issue bonds for a variety of purposes.[35]

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31. In 1875, the constitution was amended to omit the reference to public works and add provisions concerning the loaning of state credit. It also prohibited the state or a municipality from becoming a stockholder in a private corporation or obtaining or appropriating money for or loaning its credit to a private entity. Art. XII, § 7, as amended, stated:

> The Legislature shall have power to provide for issuing State bonds bearing interest for securing the debt of the State, for the erection of State buildings, and for the support of State institutions; but the credit of the State shall not be pledged or loaned to any individual, company, corporation, or association; nor shall the State become 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.

32. *See* State v. Jacksonville Port Auth., 204 So. 2d 881 (Fla. 1967); Cheney v. Jones, 14 Fla. 587 (1874).

33. FLA. CONST. of 1885, art. IX, § 6 stated: "The Legislature shall have power to provide for issuing State bonds only for the purpose of repelling invasion or suppressing insurrection, or for the purpose of redeeming or refunding bonds already issued, at a lower rate of interest." The restrictions on state bond financing were intended to " 'prevent the profligate increase of the public burden' " and to " 'prevent the depreciation of our credit.' " *In re* Advisory Opinion to Governor, 114 So. 850, 855 (Fla. 1927) (quoting Cheney v. Jones, 14 Fla. 587, 615 (1874)).

34. FLA. CONST. of 1885, art. IX, § 10 stated:

> The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become 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 stock-holder 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.

35. [O]ther obligations of state revenues were incurred generally through one of the specific authorizations in the 1885 Constitution, (i.e., school bonds, gas anticipa-

Unrestricted by the constitution, government entities again overextended the public credit.[36] When economic difficulties came to Florida in the 1920's, many of these issues went into default.[37] The national economic crisis followed, and as the defaults mounted, Florida responded in 1930 with an amendment to the 1885 constitution which severely limited the municipalities' power to issue bonds, unless approved by a vote of the freeholders.[38] Its goal was " 'to lay a restraint . . . on the spend-thrift tendencies of political subdivisions to load the future with obligations to pay for things that the present desires, but cannot justly pay for as they go, thereby necessitating the involvement of the public credit in some form of funding or borrowing operation . . . .' "[39] Despite this restrictive goal, municipalities proceeded to use various subterfuges to allow municipal debt to be created without submitting the question of its issuance to the electorate.[40] The Florida Supreme Court

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tion certificates, etc.) or through the revenue bond concept. The Florida state court allowed the state to build capital facilities through bonding with the bonds repaid by "rents" paid to the agency operating the facility. This stretched the revenue bond concept somewhat for in substance, if not in form, it obligated tax resources of the state.

D'Alemberte, *Commentary*, 26A FLA. STAT. ANN. 197 (West 1970). *See* Patterson, *supra* note 27, at 294. While this approach blocked some of the wide ranging uses of general obligation bonds, it also encouraged an evolution of the revenue bond approach.

36. Local government indebtedness skyrocketed from $110 million in 1922 to more than $600 million in 1929. Joubert, *Local Public Debt Policy in Florida: Part I*, ECON. LEAFLETS, Aug. 1944, at 1. "Local communities, determined to attract the most settlers and investors, entered into a vicious competition to build the most elaborate public works." *Id.*

37. The Florida land boom and overspeculation of the early 1900's and its subsequent collapse led to the "almost total paralysis of local government throughout the state." Currie, *Municipal Debt Adjustments in Florida, 1926-1940*, 4 MUN. FIN. J. 199, 199 (1983). As the land boom began to subside in the late 1920's, Florida was hit by two hurricanes, a fruit fly scare, and the national economic crisis. Therefore, many persons were unable to pay the inflated ad valorem taxes, and municipal resources were inadequate to service the public debt. For detailed figures on the municipal indebtedness during the 1920's and 1930's, see generally *id.*; Joubert, *supra* note 36.

Thus, the 1885 constitution was recognized as having "saved the state, but at the expense of the localities." REPORT OF THE SPECIAL COMM. ON TAXATION AND PUBLIC DEBT IN FLORIDA 149 (1935), *quoted in* Currie, *supra*, at 208 n.47.

38. The 1930 amendment provided that "the Counties, Districts or Municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors . . . shall participate . . . ."

39. State v. Miami Beach Redev. Agency, 392 So. 2d 875, 894 (Fla. 1980) (quoting Leon County v. State, 165 So. 666, 669 (Fla. 1936)).

40. One particularly creative form of bond financing was the use of certificates of payment. The court distinguished between the power to contract for current governmental needs based on anticipated revenues and the creation of an unauthorized debt in Tapers v. Pichard, 169 So. 39, 40-41 (Fla. 1936). Four months earlier, the court had rejected Leon

approved many of these devices in the years following the 1930 amendment.[41]

The broadening court decisions were apparently well received, if not as easily well understood,[42] because when the opportunity came to revise the constitution in 1968, the language chosen was largely a ratification of the prior judicial interpretations.[43] Gone were the restrictions of 1930, and while the 1968 constitution was to need later refinement,[44] it liberalized bonding authority for projects not tied to ad valorem taxes and for projects supporting economic development.[45] The current constitutional provisions controlling bond issues are complex and thorough, but balanced. In adopting the constitution and later amendments, however, the people have left questions to be answered on a case-by-case basis as

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County's issuance of bonds which were secured by a building tax of five mills per annum for five consecutive years. Leon County v. State, 165 So. 666, 667 (Fla. 1936). However, the court in *Leon County* left a loophole which the local governments immediately pursued. Governments could contract for public improvements, payable in multi-year installments and payable from specific taxes, when and if collected. *Id.* at 669. The plan approved in *Tapers*, which expanded upon the loophole left by *Leon County*, allowed public officials to impose the building tax and then use the revenues generated thereby to pay "certificates of payment." *Tapers*, 169 So. at 39-40. The certificates of payment were not considered to be "bonds," because they were issued every two weeks in settlement of the amounts owed for labor and construction as part of the normal budgetary requirements for an essential governmental function, i.e., constructing and maintaining a jail. *Id.* at 40-41. This type of financial arrangement was later specifically prohibited by the 1968 constitution and would now require the approval of the electorate. *See* FLA. CONST. art. VII, § 11(c); *see also* State v. County of Dade, 234 So. 2d 651, 653 (Fla. 1970); Mize v. County of Seminole, 229 So. 2d 841 (Fla. 1969).

41. See the court's historical discussion of the pre-1968 constitution judicial interpretations in State v. Miami Beach Redev. Agency, 392 So. 2d 875, 898 (Fla. 1980), and that of commentators in Greenfield, *Flexibility and Fiscal Conservatism: Provisions of the 1978 Constitutional Revision Relating to Bond Financing*, 6 FLA. ST. U.L. REV. 821, 823 (1978), and Patterson, *supra* note 27.

42. *See infra* notes 60-63, 65-67, and accompanying text.

43. *See* FLA. CONST. art. VII, § 11(c).

44. *See, e.g., id.* art. VII, § 10, permitting the use of bonds to finance the construction and operation of electric generating or transmission facilities (added in 1974); art. VII, § 14, permitting the use of bonds to finance construction of pollution control facilities, solid waste disposal facilities, and other water facilities (added in 1970 and amended in 1980); art. VII, § 15, permitting the use of bonds to finance loans to students at institutions of higher education (added in 1972); art. VII, § 16, permitting the use of bonds to finance housing and related facilities (added in 1980).

45. *Id.* art. VII, § 10. The revisions deleted the words "obtain or appropriate money for" contained in FLA. CONST. of 1885, art. IX, § 10. The deletion of those words is significant, and judicial interpretations of this action opened the way for industrial development bonds to be issued to promote economic development as long as there was no recourse to the municipal issue and the debt service on the bonds would be met by project revenues. *See* Nohrr v. Brevard County Educ. Fac. Auth., 247 So. 2d 304 (Fla. 1971); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

the structures of particular financings present themselves.

III. Current Constitutional Guidelines on the Use of Revenue Bonds

State and local governments are permitted by the Florida Constitution to incur general obligation debt, but voter approval of the issue is required before ad valorem tax revenues may be obligated.[46] Continued voter involvement in general obligation bonds reflects a concern that improvident politicians will overextend the debt level of the state or municipalities and thus place an unreasonable burden on Florida's taxpayers.[47] Municipal officials may be inclined to shy away from submitting these questions to the voters for political reasons, because of the time and attention required by the referendum process or out of a desire not to increase ad valorem taxes. In many situations, revenue bonds provide the logical alternative.

The name "revenue bond" alone does not make a revenue bond one in fact. Regardless of the form of an obligation or what it is called, if it pledges the ad valorem taxing power of a municipality, an approving referendum is required in Florida for the obligation to be valid.[48] Consequently, the first concern is to determine the effect of a proposed bond issue in light of the constitutional prohibition against improvident spending by municipal officials.[49] A bond issue which is secured by a promise whose "practical effect" is to pledge the ad valorem taxing power of the municipality must have the prior approval of the electorate.[50]

The development of the practical effect test by the Florida courts acknowledges the competing public policies involved. Florida case law has recognized that the current Florida Constitution is

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46. Fla. Const. art. VII, §§ 11, 12.

47. *See supra* notes 31-33 and accompanying text.

48. Fla. Const. art. VII, § 12. The designation of a revenue source as a certificate of indebtedness rather than as a bond is not sufficient to avoid the requirements of art. VII, § 12. Bonds and certificates of indebtedness are inherently alike. Both contain a promise under seal to pay a certain sum to the purchaser. *See* Sullivan v. City of Tampa, 134 So. 211, 215 (Fla. 1931) (quoting Board of County Comm'rs v. Home Sav. Bank, 236 U.S. 101 (1915)). The court will not defeat the intended purpose of the constitution or impair its prohibitions by narrowly construing its terms. *Sullivan*, 134 So. at 216. Moreover, the 1968 revision to the constitution explicitly treats bonds and certificates of indebtedness in the same manner. Fla. Const. art. VII, § 12. *See also* State v. Miami Beach Redev. Agency, 392 So. 2d 875, 897-98 (Fla. 1980).

49. State v. City of Miami, 152 So. 6, 11 (Fla. 1933).

50. *Id.; see also* Board of County Comm'rs v. Herrick, 167 So. 386, 393 (Fla. 1936).

a response to past misguided use of the state's tax resources and an attempt to regain control of the public debt by the citizens.[51] Nevertheless, the courts also seem to have recognized the need to balance the people's intent as expressed in the Florida Constitution against the demands on government to design financing packages that will allow it to continue to properly serve a growing population.[52] As a result, interpretations of the constitutional limitation on the use of the public credit have evolved to a point where municipalities are relatively unrestricted by the requirement for voter approval even though the use of revenue bonds may have moved into territories once thought to be solely the province of general obligation bonds.

After determining if the "revenues" pledged to a bond issue do not require voter approval, one must also show that the expenditures serve a "public purpose."[53] As is later demonstrated, the public purpose doctrine has followed an evolution similar to that of the credit that may be pledged in support of a bond issue. Despite today's expanded interpretations, mere indirect public benefit remains insufficient to justify the use of revenue bonds.[54]

A two-pronged test has therefore developed for analyzing the constitutional ability to issue revenue bonds. Bond counsel asked to opine on a proposed revenue bond issue must first determine that the ad valorem taxing power of a municipality is not being pledged, and second, determine that the project serves a requisite public purpose.[55] A bond issue which meets both of those tests may be successfully taken to validation by an authorized governmental entity.[56]

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51. *See supra* notes 31-33 and accompanying text.

52. *See infra* notes 113-18 and accompanying text.

53. *See infra* notes 122-55 and accompanying text.

54. *See infra* notes 145-50 and accompanying text.

55. *See* Orange County Indus. Dev. Auth., 427 So. 2d 174, 178 (Fla. 1983); Wald v. Sarasota County Health Fac. Auth., 360 So. 2d 763, 769 (Fla. 1978).

56. Validation proceedings determine both the authority of the agency to issue the bonds and the lawfulness of the purpose. *See* State v. Suwanee County Dev. Auth., 122 So. 2d 190, 193 (Fla. 1960). Validation is available for government debt financing under FLA. STAT. §§ 75.01-.17 (1983). A complaint requesting a determination of authority to incur the bonded debt is filed pursuant to § 75.02. The circuit court has jurisdiction of the action under § 75.01. *See generally* State v. Miami Beach Redev. Agency, 392 So. 2d 875, 884 (Fla. 1980); Nohrr v. Brevard County Educ. Fac. Auth., 247 So. 2d 304 (Fla. 1971); State v. Inter-Am. Center Auth., 84 So. 2d 9 (Fla. 1955).

A. Available Credit

If one were to ask bond counsel what credit could be used in support of a Florida revenue bond issue today, the answer would likely be that a municipality can pledge something less than all its available non-ad valorem revenues. While that is one reading given the court's opinion in *County of Volusia v. State*,[57] the actual language in that case and in later opinions suggests that this is not the standard. Instead, the concern in recent Florida case law appears to be whether the nature of the pledge would force an increase in ad valorem taxes.[58] It is submitted by the authors that the focus ought to be on the bondholders' access in the event of default to ad valorem tax revenues in excess of those nonvoted mills authorized under the constitution.[59]

The Florida Supreme Court has provided substantial guidance on the question of when a revenue bond provision will be considered to have a direct effect on the ad valorem taxing power. Early in its interpretation of the 1885 constitution, as amended in 1930, the court held that bonds payable solely from revenues to be generated by the capital project did not require a referendum.[60] The purpose of a self-liquidating project initially had to be the maintenance, improvement, or extension of an existing facility.[61] The rationale was that revenue-generating capabilities of the existing facility were known.[62] The court felt that borrowing to raise capital

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57. 417 So. 2d 968 (Fla. 1982).

58. *See infra* notes 84-110 and accompanying text.

59. FLA. CONST. art. VII, § 9(b) governs the maximum millage limits which local governments may impose. It provides:

> Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; . . . and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

60. *See* State v. City of Miami, 152 So. 6, 12 (Fla. 1933).

61. *See, e.g.*, State v. City of Tampa, 3 So. 2d 484, 485-86 (Fla. 1941); Williams v. Town of Dunnellon, 169 So. 631, 635 (Fla. 1936); State v. City of Daytona Beach, 158 So. 300 (Fla. 1934).

62. *See* State v. City of Miami, 152 So. 6 (Fla. 1933). Moreover, since the certificates being issued were payable solely from revenues generated by the facility, they were held not to be obligations of the municipality, and, therefore, did not require a referendum. The effect was to allow the financing of water system improvements under the rationalization

for operating utilities, secured only by a pledge of anticipated revenues, was not among the evils which the constitutional requirement was designed to prevent.[63]

As pressures grew to finance outside the referendum process, the court expanded the permissible uses of revenue bonds to include financing the construction of new facilities, as long as the only credit pledged was the revenue generated by the project itself.[64] Reasoning that the bondholders would not have access to the taxing power of the municipality if the revenues generated by the facility were insufficient to pay the debt, the court in *Board of County Commissioners v. Herrick*[65] held that bonds issued to finance self-liquidating projects were not general obligation bonds within the meaning of the constitutional limitations either in law or in fact.[66] Therefore, no referendum was required for bonds secured solely by project-generated revenue.[67] In reaching this conclusion, the court simply ignored its prior emphasis on examining the known capacity of an existing facility to generate sufficient revenue to service the bonds.

Through the time of the constitutional revision in 1968, the court continued to expand the concept of revenue bond financing. In *State v. City of Winter Park*,[68] the court upheld sewer revenue

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that the taxpayers had not been obligated. The court emphasized that the municipality had a primary obligation to provide a water system for its citizens. Sufficient authority existed to justify the use of this method of financing without prior electorate approval. *But see* Boykin v. Town of River Junction, 164 So. 558, 561 (Fla. 1935), in which the utility purchase was secured by revenues *and* by a mortgage, and the court concluded that the mortgage could give rise to an eventual municipal obligation to redeem the mortgage if there were a foreclosure.

63. *City of Miami*, 152 So. at 11-12.

64. *See, e.g., City of Miami*, 72 So. 2d at 656; State v. City of Key West, 14 So. 2d 707, 708 (Fla. 1943); Board of County Comm'rs v. Herrick, 167 So. 386 (Fla. 1936). In the early stages of the expansion of this doctrine, the court approved the issuance of bonds for the construction of a new bridge payable from the receipts from tolls of an existing bridge. *See* Flint v. Duval County, 170 So. 587 (Fla. 1936). In *Flint*, the net receipts from tolls on an existing bridge were tax resources and were not considered a pledge of the public credit. Although recognized as a new project, the court emphasized the relationship between the new bridge and the existing self-liquidating highway bridge. *Id.* at 597.

65. 167 So. 386 (Fla. 1936).

66. *Id.* at 393-94.

67. *Id.* at 394. The critical element is whether the taxing power or credit of the municipality is pledged. As long as the bonds are payable solely from the net revenues of the project, the bondholders have no recourse if the revenues are insufficient to pay the bonds. Therefore, no public credit is pledged. *Id.; see City of Key West*, 14 So. 2d at 708. See also State v. Halifax Hosp. Dist., 159 So. 2d 231 (Fla. 1963), as to the court's treatment of a pledge of gross revenues.

68. 34 So. 2d 740 (Fla. 1948).

bonds which were payable from the revenues of the facility augmented by the net proceeds of a utility service tax. The pledge of excise taxes in addition to revenue generated by the project was considered not to be a pledge of the full faith and credit of the municipality and, therefore, was held to be permissible without a referendum.[69] The court reasoned that a utility service tax was "derived from the proceeds of the utility" and was entitled to the same justifications as the self-liquidating revenue bond.[70] Public officials were, therefore, thought to be within the scope of their authority when they promulgated the tax, as the bondholders were still not in a position to compel the exercise of the municipality's taxing power on real or personal property in the event of a default.[71]

The legislature later enacted section 184.21 (now section 159.19), Florida Statutes,[72] which states in pertinent part:

> Any municipality may pledge the proceeds of utilities service taxes, cigarette taxes, or franchise taxes, as defined herein, or any other excise taxes or other funds which such municipality is authorized to levy and collect or will have available, as additional security for the payment of the principal of or interest on any revenue bonds or general obligation bonds issued hereunder or for reserves for such debt service.[73]

Without clearly explaining its rationale, the court in *Klein v. City of New Smyrna Beach*[74] accepted section 184.21 as a sufficient authorization for validating bonds secured by any excise taxes, special assessments, or charges against the facility constructed without electorate approval as long as no ad valorem taxes were pledged.[75] In so ruling, the court in *Klein* ignored the requirement imposed in *City of Winter Park* that the tax in some way be derived from the proceeds of the project itself.

The court has now recognized and approved a variety of tax resources to support revenue bond issues. Utility franchise taxes or

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69. *Id.* at 741.
70. *Id.*
71. *Id.*
72. Ch. 59-361, § 8, 1959 Fla. Laws 1257, 1262-63 (current version at FLA. STAT. § 159.19 (1983)).
73. *Id.*
74. 152 So. 2d 466 (Fla. 1963).
75. *Id.* at 467-68; *see also* State v. Board of Pub. Instr., 214 So. 2d 723, 724 (Fla. 1968) ("[N]o election . . . is necessary if the certificates of indebtedness or revenue certificates are payable from excise taxes or sources other than ad valorem taxes.").

user fees were early sources of support for revenue bonds.[76] The court has also approved the pledge of special assessments against specific properties to be benefited by the project,[77] cigarette taxes,[78] motor vehicle license taxes,[79] gas taxes,[80] and racetrack and jail funds.[81] By implication, the court in *Welker v. State*[82] approved the pledge of any revenue source except ad valorem taxes. The court stated that "a pledge of excise tax income with a simultaneous prohibition against an ad valorem levy does not necessitate a precedent expression of the freeholders of the issuing authority."[83]

Once alternative revenue sources were found not to have a direct effect on the ad valorem taxing power and were therefore available as security for a bond, the difficult question arose of whether the pledge of non-ad valorem revenues might have the indirect effect of forcing an increase in ad valorem taxes in order to pay for services which were being supported by the pledged excise revenues. Thus, the court developed the "incidental effect" test. In *Town of Medley v. State*,[84] the town proposed pledging a variety of revenue sources to secure payment of the public improvement revenue bonds being issued. These included the proposed water system proceeds, revenues from the cigarette tax, a franchise tax on electric power, utility taxes, and an occupational license tax.[85] Since no ad valorem taxes were pledged, the bonds did not directly pledge public credit and were not immediately within the purview of the constitutional restriction. The court was, however, forced to examine the implications such a widespread pledge of available resources would have on the ad valorem taxing power of the town.[86]

In any instance in which a municipality has been using funds

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76. *See, e.g.*, Miller v. City of St. Augustine, 97 So. 2d 256 (Fla. 1957); State v. City of Pompano Beach, 47 So. 2d 515 (Fla. 1950); Schmeller v. City of Fort Lauderdale, 38 So. 2d 36 (Fla. 1948).

77. *See, e.g.*, Klein v. City of New Smyrna Beach, 152 So. 2d 466 (Fla. 1963).

78. *See, e.g., id.*; Welker v. State, 93 So. 2d 591 (Fla. 1957).

79. *See, e.g.*, State v. Board of Pub. Instr., 214 So. 2d 723 (Fla. 1968).

80. State v. Division of Bond Fin., 246 So. 2d 102 (Fla. 1971).

81. State v. Orange County, 281 So. 2d 310 (Fla. 1973).

82. 93 So. 2d 591 (Fla. 1957).

83. *Id.* at 593.

84. 162 So. 2d 257 (Fla. 1964).

85. *Id.* Moreover, the authorizing ordinance specifically stated that the town was not either directly or indirectly obligated to levy ad valorem taxes for payment of the bonds. *Id.* at 257-58.

86. *Id.* at 258.

> from special non-ad valorem sources of revenue to meet its operating costs and then diverts those funds by pledging them to payment of a specific indebtedness . . . , the result will probably be that ad valorem taxes will have to be increased to make up the deficiency in funds available for operating expenses.[87]

Nevertheless, that result did not automatically make the bonds subject to the constitutional referendum requirement. "The incidental effect on use of the ad valorem taxing power occasioned by the pledging of other sources of revenue does not subject such bonds or certificates to [the] constitutional requirement."[88] The court stated that only bonds which directly obligate the ad valorem taxing power were subject to the constitutional referendum requirement.[89]

Governmental entities were therefore provided wide latitude in their search for revenues outside of the project with which to enhance the credit of a revenue bond issue. The court has gone so far as to approve a general pledge of "other funds except ad valorem taxes" in the event the excise taxes are not sufficient to service the bonds and operate the facility.[90]

Controversy has arisen concerning the ability of a revenue bond issue to include a pledge of *all* non-ad valorem revenues.[91] In *County of Volusia v. State*,[92] the court refused to validate capital improvement bonds for the construction of a new jail which were secured by a pledge of all legally available, unencumbered revenues of the county other than ad valorem taxes, and by a further pledge to maintain the programs and projects from which the unencum-

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87. *Id.*

88. *Id.; see also* State v. Alachua County, 335 So. 2d 554, 558 (Fla. 1976).

89. *Town of Medley*, 162 So. 2d at 258. The court, however, has consistently refused to allow a municipality to secure a bond with a mortgage. *See, e.g.*, Broward County Port Auth. v. State, 175 So. 796 (Fla. 1937); State v. City of Daytona Beach, 158 So. 300 (Fla. 1934). In Boykin v. Town of River Junction, 164 So. 558 (Fla. 1935), the court reasoned that the practical effect of the mortgage on the physical property of the utility was to create a situation in which the bondholder could compel the exercise of the taxing power in the event of a foreclosure to prevent the loss of the mortgaged assets. The court continues to hold, without deviation, that a revenue bond which is secured by a mortgage requires a referendum as it is a pledge of the full faith and credit of the municipality. State v. Miami Beach Redev. Agency, 392 So. 2d 875, 896 (Fla. 1980); Nohrr v. Brevard County Educ. Fac. Auth., 247 So. 2d 304, 310-11 (Fla. 1971).

90. *See* State v. City of Coral Gables, 72 So. 2d 48 (Fla. 1954).

91. *Compare* County of Volusia v. State, 417 So. 2d 968 (Fla. 1982) (bonds pledging *all* available sources not validated), *with* City of Palatka v. State, 440 So. 2d 1271 (Fla. 1983) (bonds pledging two specific revenues, not all revenues, validated).

92. 417 So. 2d 968 (Fla. 1982).

bered revenues were derived.[93] According to the court, the practical effect of such a pledge was to require increased ad valorem taxes.[94] The court reasoned that:

> To maintain all of the programs that produce the revenues, while devoting the revenues themselves to the retirement of the bonds, will inevitably require that ad valorem taxes be increased so that the county will have sufficient operating revenue to maintain the programs and services that generate the pledged revenues.[95]

Since a general pledge of all available non-ad valorem revenues was thought to have more than a mere incidental effect on the ad valorem taxing power of a municipality, a referendum was required.[96] The court further stated: "[T]hat which may not be done directly may not be done indirectly."[97]

In 1983, *City of Palatka v. State*[98] provided the court with another opportunity to examine the incidental effect test. The city sought to issue bonds secured by water and sewer revenues and utility taxes in order to finance the construction of a new sewage treatment plant and to refund prior bonds.[99] The court stated that the mere possibility of decreased available revenues, which in turn might necessitate the levy of additional ad valorem taxes, did not invoke the constitutional referendum requirement.[100] The court factually distinguished *County of Volusia* on the grounds that, in *City of Palatka,* only two specific revenue sources were pledged,[101] and the city had only covenanted to maintain the taxes at a sufficient level to pay the bonds.[102]

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93. *Id.* at 969. In addition, the county covenanted to do everything necessary to continue receiving the revenues as security for the bonds.

94. *Id.*

95. *Id.* at 971.

96. *Id.*

> While the county has not directly pledged ad valorem taxes to the payment of the bonds, its pledge of all other available revenues, together with its promise to do all things necessary to continue to receive the various revenues, will inevitably lead to higher ad valorem taxes during the life of the bonds, which amounts to the same thing.

Id. at 972. *See also* State v. Halifax Hosp. Dist., 159 So. 2d 231 (Fla. 1963).

97. *County of Volusia,* 417 So. 2d at 972.

98. 440 So. 2d 1271 (Fla. 1983).

99. *Id.* at 1272.

100. *Id.* at 1273.

101. *Id.* at 1272.

102. *Id.* at 1273. The lower court made a finding that the revenues pledged constituted approximately 80% of the total revenues, except ad valorem taxes, available to the city. However, during oral arguments and in its brief, the appellee conceded that the correct

Another "incidental effect" concern may arise from a pledge by government to make up deficits in the operating budget of the facility being financed with revenue bonds if the revenues are not sufficient to pay the debt service and operate the facility.[103] In *State v. City of West Palm Beach*,[104] bonds were issued to finance an off-street parking garage. The proceeds from the facility and on-street parking meters were to be applied first to the payment of the interest and principal of the bonds with any remaining funds to be used for operating expenses of the project. The city simultaneously pledged to make up any deficit in the operating expenses of the project from all non-ad valorem revenue sources.[105] By implication, 100% of the revenues of the project could be required for payment of the bond obligation, leaving the city responsible for the entire cost of operating the project. If the project-generated revenues were insufficient to meet debt service on the bonds, however, the bond documents provided that the bondholders would have no recourse to compel payment by the municipality. The court found that this arrangement would produce merely a possible incidental effect on the city's ad valorem taxing power, and therefore, was not subject to the constitutional referendum requirement.[106]

In *State v. Halifax Hospital District*,[107] the court rejected a bond issue which pledged the gross revenues of the facility for payment because the bond resolution also committed revenues of a current four-mill ad valorem levy to operate and maintain the facility for the life of the bonds.[108] In addition, the hospital district

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figure was 49% of non-ad valorem tax revenues. *Id.* at 1272. The supreme court stated:

> This situation does not fall within the purview of the *County of Volusia*, in which this Court reasoned that the *only* way Volusia County would be able to uphold its covenant to maintain the programs which generated all of its non-ad valorem revenues would be to raise ad valorem taxes to operate such programs.

Id. at 1273 (emphasis added). *See also* State v. City of Daytona Beach, 431 So. 2d 981, 983 (Fla. 1983).

103. *See, e.g.*, State v. Inter-Am. Center Auth., 281 So. 2d 201 (Fla. 1973); State v. Halifax Hosp. Dist., 159 So. 2d 231 (Fla. 1963); Sanibel-Captiva Taxpayers' Ass'n v. County of Lee, 132 So. 2d 334 (Fla. 1961); State v. City of West Palm Beach, 125 So. 2d 568 (Fla. 1960).

104. 125 So. 2d 568 (Fla. 1960).

105. *Id.* at 571.

106. *Id.* Of significance was the chancellor's finding that the city would not be obligated for the payment of the bonds themselves. The city was not indirectly, directly, or contingently liable for the obligation. No public credit was pledged and, therefore, there was no general obligation of the city resting upon the pledge of its full faith and credit. *See also* State v. Alachua County, 335 So. 2d 554 (Fla. 1976).

107. 159 So. 2d 231 (Fla. 1963).

108. *Id.* at 235.

pledged to continue collecting the four-mill ad valorem levy throughout the life of the bonds. The court refused to allow the form of the levy, i.e., a "special assessment," to disguise the true nature of the obligation. In the court's view, a pledge of the gross revenues in this instance would necessitate the levy of ad valorem taxes to operate the project and was therefore thought to be a mere pretense designed to circumvent the referendum requirement.[109]

The court's distinction, however, seems largely fictional. Since the ad valorem millage was already in place, the burden on the taxpayer was not increased by a pledge to continue to collect the levy. Moreover, a municipality can pledge to make up potential deficits in the operating budget of a facility if the revenue sources are insufficient to both service the debt and meet operating costs as in *State v. City of West Palm Beach.*[110] The effect on the annual operating budget of a municipality is no different under the *Halifax* situation from that in *City of West Palm Beach,* unless the municipality has no non-ad valorem revenue source. It would appear that the "incidental effect" test was incorrectly applied in *Halifax.*

If there is to be an "incidental effect" test in Florida, it can be better rationalized in light of its application in *County of Volusia v. State,*[111] where programs supported by pledged user fees were to be continued notwithstanding the possible necessity of using these fees to meet the debt service on the jail. Volusia County had pledged all legally unencumbered revenues, including regulatory fees and user charges.[112] A county park, for example, might have generated revenues from user charges, but all of those revenues were pledged to support debt service on the jail. The only way to meet the promise to maintain the county park so that revenues from user charges would continue would be to tap ad valorem tax revenues, since any increase in user charges would still be pledged to debt service on the jail. County park maintenance would clearly be an ongoing expense which under the covenant to maintain operations would have to be supported by ad valorem tax revenues.

Under the *County of Volusia* rationale, the court's concern seems to be with a government pledge of *all* non-ad valorem tax revenues in support of debt incurred on a capital project, together

109. *Id.*
110. 125 So. 2d 568 (Fla. 1960).
111. 417 So. 2d 968 (Fla. 1982).
112. *Id.* at 970.

with a covenant to maintain the programs and projects that generate those revenues. This is evidenced by the court's statement in *City of Palatka v. State*:[113] "[In *County of Volusia*] this Court reasoned that the only way Volusia County would be able to uphold its covenant to maintain the programs which generated all of its non-ad valorem revenues would be to raise ad valorem taxes to operate such programs."[114]

Cases subsequent to *County of Volusia* further illustrate this concern. In *Jacksonville Shipyards, Inc. v. Jacksonville Electric Authority*,[115] the City of Jacksonville pledged its non-ad valorem revenues from the Jacksonville Electric Authority (JEA) in support of a bond issue for the Authority. The record showed that JEA's rates had been set at a level to allow a contribution to the city of six to seven percent of the JEA revenues. The possibility that the city might not receive this annual contribution was characterized as having a merely incidental effect on the city's exercise of its ad valorem taxing power: "The situation does not even begin to approach the actual compulsion to increase *ad valorem* taxes which we found in *County of Volusia v. State*."[116]

In *State v. City of Daytona Beach*,[117] the city pledged revenue sharing funds and franchise fees received from Florida Power & Light Company in support of bonds for its civic and convention center. The court again found the effect on ad valorem taxation to be incidental and distinguished *County of Volusia*: "We have held such a pledge to be a promise to levy ad valorem taxes only when the record clearly reflects that *all* legally available non-ad valorem revenue sources have been pledged and the governmental body has agreed to do everything necessary to receive such revenue."[118] *City of Palatka*, similarly, pledged only two specific revenue sources and contained no covenant to maintain the facility generating the revenues.

Under the *County of Volusia* rationale, the troubling features of a revenue bond issue are a pledge of *all* non-ad valorem revenues in combination with a covenant to maintain the programs or projects which are producing those revenues. If only certain specific revenue sources are pledged, the potential effect on the gov-

113. 440 So. 2d 1271 (Fla. 1983).
114. *Id.* at 1273.
115. 419 So. 2d 1092 (Fla. 1982).
116. *Id.* at 1094.
117. 431 So. 2d 981 (Fla. 1983).
118. *Id.* at 983 (emphasis in original).

ernment's ad valorem needs do not become a concern, because the government is free to raise additional non-ad valorem revenues from other sources without a vote of the people to fund items in its operating budget. The covenant to maintain becomes significant to the court only if the pledged revenue sources are general rather than specific. A general pledge of all non-ad valorem revenues together with a covenant to maintain those services arguably requires ad valorem tax revenues to be the source of funds for projects and programs that were being funded by non-ad valorem revenues; it follows that this drain on ad valorem revenues may be large enough that greater ad valorem revenues will be needed to meet operating needs of those projects which are covered by the covenant to maintain.

County of Volusia and its progeny ignore the important point that no inherent obligation to increase ad valorem taxation necessarily follows from the promise to use ad valorem taxes to maintain those programs which are currently producing regulatory fees and user charges. A county is, for example, authorized to levy ten mills "for all county purposes" without seeking voter approval.[119] Within this ten-mill limitation, the county might simply reduce services in one area or another not covered by the covenant in order to accommodate the loss of regulatory fees and user charges to support services in still another area. The government need only make the political judgment to reduce service in one area, if necessary, to meet its annual operating obligations without increasing ad valorem tax revenues.

The proper analysis, however, should not be on the speculative impact on ad valorem taxes, but rather on the bondholders' remedies. The principle has been clearly stated from the outset by the court and the Florida Constitution that ad valorem tax revenues may not be pledged without an approving referendum. Since in *County of Volusia, City of Palatka, Jacksonville Shipyards,* and *City of Daytona Beach,* there were not approving referenda in support of the bond issues, the bondholders were entitled to look only to project revenues and whatever non-ad valorem revenues were pledged in support of the projects. The analysis therefore should simply be directed towards what revenue sources the bondholders have access to in order to satisfy debt service obligations.[120] Cur-

119. FLA. CONST. art. VII, § 9(b).

120. *See, e.g.,* Broward County Port Auth. v. State, 175 So. 796, 801 (Fla. 1937); Boykin v. Town of River Junction, 164 So. 558 (Fla. 1935).

rent ad valorem tax revenues may be drawn on only to the extent that the municipality's governing body makes a political decision to apportion those revenues.

If additional money were needed to meet debt service, public officials would be left to exercise one of several political choices. The governing board might simply determine to reduce services rather than ask for increased taxes. If the board seeks to increase ad valorem taxes, a referendum must be held; if the voters reject increased ad valorem taxation, the bondholders would continue to be left to project revenues enhanced by whatever was available from the previously pledged non-ad valorem tax sources. This would carry out the principle that only direct obligation of the ad valorem tax revenues require voter approval.[121]

B. Public Purpose

The limitation that Florida bond financings be for a public, not private, purpose first appeared in the 1875 amendments to the 1868 constitution.[122] When the court began to apply the public purpose requirement in the 1930's, it allowed bonds to be issued for essential governmental functions, such as for building a jail,[123] or facilitating local public ownership and operation of public utilities.[124]

The definition of an essential function expanded due to the court's awareness that the purpose of the constitutional prohibition against lending the public credit for the benefit of a private enterprise was not intended to hamper the ordinary powers of public authorities to provide for current governmental needs and requirements.[125] Once the court began to expand the concept of a public purpose, a variety of projects became eligible for revenue bond financing. The court eventually concluded that if the public purpose of the project were paramount, merely incidental private benefit flowing from the project would not be sufficient to defeat it.[126] This interpretation went beyond the literal wording of the

121. Town of Medley v. State, 162 So. 2d 257 (Fla. 1964).

122. FLA. CONST. of 1868, art. VIII, § 7 (1875). The purpose of the amendment was to preclude the use of the public credit by private entities. State v. Jacksonville Port Auth., 204 So. 2d 881, 882 (Fla. 1967).

123. *See, e.g.*, Leon County v. State, 165 So. 666 (Fla. 1936).

124. *See, e.g.*, Williams v. Town of Dunnellon, 169 So. 631 (Fla. 1936); State v. City of Miami, 152 So. 6 (Fla. 1933).

125. *See Leon County*, 165 So. at 669.

126. *See* State v. Board of Control, 66 So. 2d 209, 210-11 (Fla. 1953); Gate City Garage, Inc. v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953).

Florida Constitution,[127] but it was consistent with the underlying intent of protecting future taxpayers from a repetition of the undue burdens caused by the speculative excess associated with earlier years.[128]

The requirement that a project financed with revenue bonds have a public purpose retains current application. Even though the amendments to the constitution have dramatically increased the types of projects for which public funding is available,[129] and the scope and nature of the "public purpose" doctrine has evolved over time,[130] the validity of a proposed bond issue pledging the public credit for a project not enumerated in the Florida Constitution still depends on whether the project serves a paramount public purpose.[131]

The paramount public purpose doctrine is designed to "protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited."[132] Projects devoted entirely to traditional public functions should easily fulfill the public purpose requirement. The supreme court is aided in making the public purpose determination by legislative provisions identifying the types of projects which typically fulfill this requirement.[133] Trouble seems

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127. FLA. CONST. art. VII, § 10, prohibits the lending of credit to any corporation, association, partnership, or person, subject to listed exceptions.

128. *See* State v. Miami Beach Redev. Agency, 392 So. 2d 875, 894 (Fla. 1980).

129. With the 1968 constitution, Florida joined the national trend in bond financing and approved the use of industrial development bonds. Article VII, § 10(c) of the 1968 constitution authorizes bonds to be issued for private industrial or manufacturing plants. A bond which is for a private purpose may still be constitutional if it meets the requirements of art. VII, § 10(c). If the governmental entity is only a conduit for financing a project of a private entity, as it is in the true industrial development bond context, the public purpose analysis remains relevant but does not necessarily involve the element of public credit. *See, e.g.*, Orange County Indus. Dev. Auth. v. State, 427 So. 2d 174 (Fla. 1983). For a general overview of industrial development bonds and their uses in Florida, see Scholl & Jimenez, *The Florida Industrial Development Bond Financing Act: The Need for Judicial Consistency*, 12 FLA. ST. U.L. REV. 31 (1984).

130. "What constitutes a county purpose is not static and inflexible." State v. Monroe County, 3 So. 2d 754, 756 (Fla. 1941). *See also* Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975); Schmeller v. City of Fort Lauderdale, 38 So. 2d 36 (Fla. 1948).

131. *See* State v. Miami Beach Redev. Agency, 392 So. 2d 875 (Fla. 1980).

132. Bannon v. Port of Palm Beach Dist., 246 So. 2d 737, 741 (Fla. 1971); *see also* Linscott v. Orange County Indus. Dev. Auth., 443 So. 2d 97, 101 (Fla. 1983); Bailey v. City of Tampa, 111 So. 119, 120 (Fla. 1926).

133. *See, e.g.*, Florida Industrial Development Financing Act, ch. 80-287, 1980 Fla. Laws 1228 (current version at FLA. STAT. §§ 159.25-.431 (1983)). While this portion of ch. 159 deals only with industrial development bonds, it is submitted that the legislative determinations as to which types of facilities serve public purposes ought to have significant impact upon the public purpose issue in the revenue bond context.

to arise, however, with what might be called "mixed-use" projects from which private enterprises may derive some benefit and for which public revenues are to some degree pledged. Such mixed-use projects are becoming increasingly more common. Today, one may find that as a practical matter the public need is first determined by a political body, and the private entity is then enlisted to facilitate the successful completion of the project.

In *Panama City v. State*,[134] for example, the city proposed to issue bonds for a waterfront development project which contained both public facilities and private shops. The project was to consist of the Panama City Marina and the St. Andrew Marina. The Panama City Marina contained a city hall, civic auditorium, two concessions buildings, an administration building, and a marine sales and service building. The St. Andrew Marina contained a concessions building, a marine sales and service building, and an administration building. Both of the marinas included docks, docking facilities, waterways, parking areas, and necessary utilities.[135] The court deemed it unnecessary to question the public purpose of the facilities which were traditional public buildings.[136] Approximately twenty percent of the revenue pledged to the bonds was to come from the concessions buildings which consisted of retail and service shops. Pledged in support of the bonds were project revenues, excise tax revenues from sales of cigarettes and utility services, and license and franchise taxes. The court stated that when the primary improvement is clearly authorized as serving a public purpose, any incidental private benefit which accrues merely as an adjunct to the eligible facility is not prohibited.[137] It reasoned that an incidental private benefit is not sufficient to destroy the public nature of the overall plan[138] and therefore held that the financing of private shops as a part of the Panama City plan did not take away from the paramount public purpose for the financing.[139]

Two years later, however, the court in *City of West Palm Beach v. State*[140] found that private use and benefit dominated the proposed revenue bond financing of a civic center and marina which

134. 93 So. 2d 608 (Fla. 1957).

135. *Id.* at 610.

136. *Id.* at 612.

137. *Id.* at 613-14. The court refused to attach significance to a mere "appendage." See also Gate City Garage, Inc. v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953), where the court first developed this exception to the public purpose requirement.

138. *Panama City*, 93 So. 2d at 613-14.

139. *Id.* at 614.

140. 113 So. 2d 374 (Fla. 1959).

would have adjacent thereto a restaurant, stores, offstreet parking, artificial beaches, a swimming pool, and a fuel station. To the extent revenues were insufficient to meet debt service, utility service tax revenues were pledged as a supplemental source of funds. Of significance to the court was the fact that the civic center itself was to be leased to a private corporation with all adjacent facilities solely benefiting private enterprises.[141] Moreover, the lease of the civic center would surrender all control of the facility to the lessee.[142] According to the court, not only was the civic center itself questionable in its public purpose, but the close proximity of the project to the West Palm Beach business district brought into question the necessity for appurtenant private enterprises.[143] Thus, the project was found to amount to an "improper subsidy of private enterprise with public money."[144]

One distinguishing feature in determining if the benefited private facility is considered incidental to an eligible project appears to be the existence of a preexisting public need. In *Baycol, Inc. v. Downtown Development Authority,*[145] a major section of downtown Fort Lauderdale was to be destroyed to vacate land on which a parking facility, financed with voter-approved bonds, was to be erected; the facility was to serve a shopping mall to be built on top of the parking facility. The court in *Baycol* reasoned that the private project was generating the need for the public parking facility. Thus, the parking facility, although otherwise serving a public purpose, was merely incidental to the private purpose of constructing a shopping center.[146]

Just a few years later, however, in *State v. City of Miami,*[147] a bond issue to finance construction of a parking facility integrated with a convention center, hotel, and retail shops was found to have a public purpose.[148] The court accepted the testimony that the facility would provide a forum for educational, civic, and commercial

141. *Id.* at 375-76.

142. *Id.* at 378. *But see* State v. Daytona Beach Racing & Recreational Fac. Dist., 89 So. 2d 34 (Fla. 1956). In *Daytona Beach,* the court upheld the finding of a public purpose for the construction of a racetrack which was leased to private enterprises for a substantial part of the year. Emphasis was placed upon the importance of recreational facilities in the promotion of tourism which justified a holding that the public purpose predominated over the private benefit. *Id.* at 37; *see also* State v. Escambia County, 52 So. 2d 125 (Fla. 1951).

143. *City of West Palm Beach,* 113 So. 2d at 377.

144. *Id.*

145. 315 So. 2d 451 (Fla. 1975).

146. *Id.* at 454; *cf.* City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972).

147. 379 So. 2d 651 (Fla. 1980).

148. *Id.* at 653.

activities as well as increase tourism and international trade—all legitimate public purposes.[149] *Baycol* was distinguished:

> In *Baycol,* revenue bonds were sought to be issued to finance a public packing facility. The air rights above the facility were to be leased to a private developer for the construction of a shopping center. Finding that the need for the parking facility would only arise after completion of the shopping center, this Court refused to validate the bonds. In the instant case, however, there was an existing need and justification for the convention center-garage long before the contemplation of a hotel and retail area. The voters had approved this facility in 1964, and the City at that time did not contemplate the involvement of either the University or the developer. It is clear that the City's dominant interest has continually been the construction of the convention center-garage, and the lease of property by the City [for the hotel and retail space] is only incidental to the paramount public purpose.[150]

In weighing the degree of private benefit, the focus has been on the actual purpose and use of the project. One method used by the court to measure whether the public purpose predominates over the private benefit has been to examine the proportionate use to be made of the facilities by the public and private sectors. A bond issue to finance the construction of port facilities was found to be invalid in *State v. Manatee County Port Authority.*[151] The project was to include a phosphate loading facility and two railroads which would be leased to a private company. The record indicated that the private enterprise would use sixty percent of the land to be acquired and ninety-eight percent of the improved land.[152] The project was therefore thought to be a private enterprise operating under the guise of a public facility.[153] The broad general public purpose of economic development of the area, no matter how laudable, would not sustain a private project when public funds were being used to assist and enhance private enterprise.[154] As a result

149. *Id.*

150. *Id.*

151. 193 So. 2d 162 (Fla. 1966).

152. *Id.* at 163. A relatively small space adjacent to the private facility would be available for the handling of general cargo.

153. *Id.* at 164; *cf. Panama City,* 93 So. 2d at 611 (public purpose since private concessions would occupy only 1.22% of the total area with only 20% of the revenues to be derived from the rents).

154. *Manatee County Port Auth.,* 193 So. 2d at 164; *see also* Orange County Indus. Dev. Auth. v. State, 427 So. 2d 174, 179 (Fla. 1983); *cf.* State v. City of Jacksonville, 50 So. 2d 532

of the *Manatee County Port Authority* decision, not only must the private benefit be considered an adjunct of and necessary to the success of the public facility, the actual use of the physical structure must not be dominated by private enterprise.

Proportionality ought to have little place in determining public purpose, however. A proportionality analysis inevitably leads to the question of how much is too much. The question instead ought to be whether a public goal is being served even if there is some indirect benefit to private individuals. If, for example, a toll bridge from the mainland to an island were to be financed by revenue bonds, the bridge would have the effect of benefiting the private landowners on the island. Nevertheless, legitimate reasons of public safety and public welfare should provide a valid public purpose to the project. Those legitimate reasons ought to end the analysis, without consideration of the extent of the private benefit of the improvement.

An element of flexibility runs through the court decisions in the paramount public purpose area, which should encourage municipalities to create innovative financing packages for the court's review. The analysis should focus on whether a public goal is being served, even if the municipality needs private entities to carry out the project.

Now that Congress has limited the availability of industrial development bond financing,[155] joint ventures between governmental entities and private developers in which part of the project is financed with a revenue bond issue may well become more common if community development is to continue in Florida. The court will have to struggle with its paramount public purpose analysis to ensure that private enterprise is induced to participate in publicly generated projects, when the underlying interest evidenced by the project does indeed serve the public purpose.

IV. Practical Applications

The preceding discussion demonstrates that the Florida Constitution, as currently interpreted by the Florida Supreme Court, gives sufficient latitude to the Florida legislature to enable municipalities to structure public purpose projects which interface with private sector entrepreneurs. Indeed, the legislature has demon-

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(Fla. 1951) (municipal ownership of the radio station justifies the finding of a paramount public purpose which will be lacking if owned by private party).

155. *See supra* notes 13-14 and accompanying text.

strated a willingness to extend public officials similar flexibility. It has used the authority granted to it under the constitution, as interpreted by the Florida Supreme Court, to expand the areas in which revenue bonds may be issued. The Florida Revenue Bond Act permits local governments to finance bridges, causeways, waterworks systems, sewer systems, marinas, civic auditoriums, sports arenas, parking facilities, and solid waste disposal systems.[156] Health facilities authorities are authorized to issue revenue bonds to finance a wide variety of public health services.[157] In addition, jails, city office buildings, police stations, or other buildings serving municipal functions may be financed with revenue bonds issued by county authorities.[158]

The court accords a presumption of validity to a legislative finding that a certain project serves a public purpose. The court will reject the legislative finding only if the finding is shown to be "clearly erroneous."[159] A subsequent legislative determination of a public purpose can overcome a prior judicial decision categorizing the same type of project as providing a private benefit.[160] The court considers the impact of the legislative definition of public purpose to be significant, because of the evidence available to the legislature in making its findings.[161]

The legislature has also provided for flexibility in structuring the financing terms of bond issues. The question of the interest rate on the bonds provides a good example of that flexibility. The court has recognized the municipality's broad discretionary power to set interest rates. In *State v. Southeast Volusia Hospital District*,[162] for example, the electorate approved the issuance of bonds bearing interest "at such rate or rates not exceeding the legal rate as shall be determined at the time of the sale."[163] At the time of the election the maximum legal rate had been 6%. Subsequent to the bond election, the maximum legal rate was raised to 7.5% and the

156. Revenue Bond Act of 1953, ch. 28045, 1953 Fla. Laws 183 (current version at FLA. STAT. §§ 159.01-.19 (1983)).

157. FLA. STAT. § 154.219 (1983).

158. *Id.* § 125.013. Although a jail is not specifically included within the definition of "project" contained in § 125.011, the court has expanded the permissible uses of revenue bonds beyond the projects listed by the legislature. *See, e.g.*, County of Volusia v. State, 417 So. 2d 968 (Fla. 1982); Speer v. Olson, 367 So. 2d 207 (Fla. 1978).

159. Nohrr v. Brevard County Educ. Fac. Auth., 247 So. 2d 304, 309 (Fla. 1971); State v. Ocean Highway & Port Auth., 217 So. 2d 103, 105 (Fla. 1968).

160. *Ocean Highway*, 217 So. 2d at 105.

161. *Nohrr*, 247 So. 2d at 309; *Ocean Highway*, 217 So. 2d at 106.

162. 238 So. 2d 102 (Fla. 1970).

163. *Id.* at 104.

city officials raised the interest rate on unissued bonds to 7.5%. The court held that the officials acted within their discretionary power and the interest rate was, therefore, valid. The bonds were "subject to a change in the maximum interest rate until the time when they *were* sold."[164] The same argument can be used to justify a floating rate. As long as the notes do not exceed the maximum rate at the time they are sold, it is within the discretion of the municipal authority to continuously change the rate on unsold notes. Further, the authority could adopt a formula for determining a floating rate and delegate the determination of the actual rate based on that formula to a remarketing agent.[165]

Bonds may be sold at a discount.[166] "Zero bonds" may be used on which no interest is paid, but which are sold at a price that effectively incorporates a compounded interest rate.[167] Bonds may be sold through public bidding or through a negotiated sale.[168] Terms of the issue may be set within the discretion of the issuing entity.[169] The issuing body enjoys a similar discretion in determining costs of issuance.[170]

Questions may remain, however, as to how these principles will operate in practice in response to future financing needs. Two situations that might easily arise in a Florida municipality today are the development of an industrial park and the construction of tourist facilities which include a convention center, hotel, and

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164. *Id.* (emphasis in original).

165. See, e.g., Holloway v. Lakeland Downtown Dev. Auth., 417 So. 2d 963 (Fla. 1982), which said that FLA. STAT. § 215.84 was intended to give municipalities broad discretion to set interest rates at competitive levels. *Holloway*, 417 So. 2d at 966. This section permits bonds to bear interest "at a rate not to exceed an average net interest cost rate, which shall be computed by adding 150 basis points to the 20 'bond-buyer' Average Yield Index published immediately preceding the first day of the calendar month in which the bonds are sold." FLA. STAT. § 215.84(3) (1983).

166. FLA. STAT. § 125.013(3) (1983).

167. By setting the limit on interest as it did in *id.* § 215.84(3), the legislature invested broad discretion in the governmental authorities. A "zero" bond which carried a rate of return less than the maximum set by the legislature was in fact used by the Florida Housing Finance Agency in 1982. One bond issue might contain several interest rates based on differing maturities of bonds in the issue, but with an average net interest cost below the maximum allowable.

168. *See* Town of Medley v. State, 162 So. 2d 257 (Fla. 1964): "[I]n the absence of a provision of law requiring public sale of bonds or certificates of indebtedness, the issuing authority may adopt such method of sale as in their best judgment, in the exercise of a sound discretion, will be for the best interest of the municipality." *Id.* at 260 (citing State v. City of Daytona Beach, 42 So. 2d 764 (Fla. 1949)).

169. *See* Town of Riviera Beach v. State, 53 So. 2d 828, 831 (Fla. 1951); Crowe v. City of Jacksonville Beach, 167 So. 2d 753, 755-56 (Fla. 1st DCA 1964).

170. *See, e.g.*, FLA. STAT. § 125.013(2) (1983).

parking garage.

The first, an industrial park, might raise public purpose questions. A municipality might determine that creation of an industrial park, perhaps devoted to warehousing and light manufacturing, would present a significant opportunity to attract new employers to an area that has been stagnant in the development of new jobs even though no specific companies have yet been identified to use the industrial park. The municipality has a tract of land in mind which currently houses structures suitable only for demolition. What is needed is the acquisition of that land, demolition of the structures on that land, improvements to the water and sewer system serving the area, and relocation of streets and street lighting. The final product would then be sold or leased to the private entities attracted by the economic suitability of the park. The municipality, however, is unable to finance the development from current tax revenues.

The public purpose aspect to the project may become a stumbling block to such a revenue bond financing. In *State v. Town of North Miami*,[171] the Florida Supreme Court rejected an attempt by North Miami to issue bonds to finance the acquisition of land and construction of a manufacturing facility for lease to a private corporation. The court found that the public purpose requirements had not been met.

> Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.[172]

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171. 59 So. 2d 779 (Fla. 1952). While the court has accepted the public purpose of economic development in Linscott v. Orange County Indus. Dev. Auth., 443 So. 2d 97 (Fla. 1983), the court clearly emphasized that the bonds issued in that case " 'impose[d] no obligation on the public.' " *Id.* at 101 (quoting State v. Housing Fin. Auth., 376 So. 2d 1158, 1160 (Fla. 1979)). In situations such as in *North Miami*, an obligation would be placed on the public in the form of a pledge of certain taxes.

172. *Town of North Miami*, 59 So. 2d at 785.

An industrial park scenario was recently presented to the South Carolina Supreme Court in *Byrd v. County of Florence*,[173] where the court reached a conclusion similar to that of the Florida Supreme Court in *Town of North Miami*.[174] The bonds were general obligations supported by the pledge of ad valorem tax revenues. The South Carolina Constitution requires that general obligation debt be incurred only for a public purpose.[175] The court concluded that the industrial park could not further a public purpose:

> The Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.
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> . . . .
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> The primary beneficiaries, if any, of this project would be private businesses. They would be spared analysis cost, costs of roads, sewer, water and electricity facilities. Their benefits are great and certain. The benefits to the taxpayers are highly speculative at best.[176]

Despite this South Carolina decision, few would today question the public purpose behind economic development, and the Florida Supreme Court today might be expected to arrive at a different conclusion than it did in *Town of North Miami,* or distinguish its earlier decision. In other jurisdictions, promotion of economic development is now thought of as "a matter of state policy,"[177] and part of the state's responsibility is "to provide for the welfare and prosperity of its inhabitants."[178] The creation of an industrial park devoted to light manufacturing does not simply provide benefits in the form of jobs attributable to the private entity drawn to the industrial park. Such economic development also serves to reduce the public welfare costs associated with the unemployed. Depend-

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173. 315 S.E.2d 804 (S.C. 1984).

174. *Town of North Miami*, 59 So. 2d at 785.

175. S.C. CONST. art. X, § 14(4).

176. *Byrd*, 315 S.E.2d at 806-07.

177. Elliott v. McNair, 156 S.E.2d 421, 427 (S.C. 1967).

178. *Id.* at 428. Contrast the decisions of the Tennessee Supreme Court in Ferrell v. Doak, 275 S.W. 29 (Tenn. 1925), and McConnell v. City of Lebanon, 314 S.W.2d 12 (Tenn. 1958). In the latter decision, the court concluded that to provide against the "evils" of low wages and unemployment "is clearly a public or corporate purpose." *Id.* at 20.

ing on the location of the industrial park, it may also serve to reduce the costs associated with crime in the area targeted for revitalization. The ad valorem tax base will most likely increase, with a further effect in surrounding areas.[179] Private businesses are only incidental beneficiaries of any windfall that might come from the development of an industrial park. As Justice Ness pointed out in his dissent in *Byrd,* "[A]ttraction of industry to the state will employ our labor force and utilize our natural resources which increase our tax bases and incomes and thereby improves the state's overall quality of living."[180]

Town of North Miami itself provides some room for the court to move towards Justice Ness' position. The court suggested the result there might have been different if slum clearance and removal of blighted areas had been involved or if the project were serving "some such other undertaking for the protection and conservation of the public health, or to eliminate crime-breeding places or to conserve the morals, or protect the lives and limbs of the people."[181]

Additional arguments are available to illustrate public purposes involved in the industrial park situation. *State v. Manatee County Port Authority,*[182] which balanced the predominance of the public purpose over the private benefit, could support a limited reading of *City of North Miami.* Furthermore, in *State v. Daytona Beach Racing & Recreational Facilities District,*[183] the court found that the public purpose of promoting tourism predominated over the private benefit in the lease to a private enterpreneur of a racetrack constructed and owned by Daytona Beach. Given such broadening case law and the current evolution of economic development concepts, the Florida Supreme Court should be prepared to expand the public purpose analysis to recognize the public benefit derived from such projects as a revenue bond financing of the cost of land acquisition and infrastructure improvements for an industrial park.

The second situation, which might easily arise in Florida today,

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179. For example, several studies have demonstrated the economic impact of investment in mass transit facilities. *See* Callies, *A Hypothetical Case: Value Capture/Joint Development Techniques To Reduce the Public Costs of Public Improvements,* 16 URB. L. ANN. 155 (1979); Plant & White, *Mass Transit As a Development Stimulus: The Metro Example,* 6 S. PUB. AD. 504 (1983).

180. *Byrd,* 315 S.E.2d at 808 (Ness, J., dissenting).

181. *Town of North Miami,* 59 So. 2d at 787.

182. 193 So. 2d 162 (Fla. 1966).

183. 89 So. 2d 34 (Fla. 1956).

concerns a municipality that wants to develop its tourism industry by constructing a convention center that would be available for meetings, trade shows, and similar activities. Feasibility studies have demonstrated to the municipality that such a convention center can be successful only if it incorporates a hotel and parking facilities. The municipality is unable to find a private developer who is willing to undertake the risk of constructing the hotel. Consequently, the municipality wants to construct all facilities and lease the hotel to a company in the lodging industry.

Counsel for the municipality must determine if revenue bonds, based on project revenues augmented by excise tax revenues, might serve as a legitimate means of financing the entire facility. *State v. City of Miami*[184] would appear to support revenue bond financing of the convention center and parking garage portion of the project. In *City of Miami,* a similar complex was thought to provide "a forum for educational, civic and commercial activities" as well as to "increase tourism and international trade," which were valid public purposes.[185] The hotel in that case, however, was to be constructed and operated by the developer. Yet, in the present hypothetical, if it can be demonstrated that the hotel is in fact necessary to the success of the convention center and that private enterprise could not be expected to make the investment in construction of the hotel, the hotel ought to fulfill a public purpose as part of the convention center project. Whatever private benefit flows from the operating lease of the hotel to a private entity should not divert the focus of the analysis away from the purpose of the project when considered as a whole.

The municipality may also be concerned that revenues from parking, convention center rent, and lease payments from the hotel would be insufficient to service the bonded debt. In the alternative, even if that revenue stream were sufficient, the pledge of additional revenues might be necessary to ensure access to the investor market. In this case the municipality could use a pledge of non-ad valorem revenue sources in order to meet any deficit.[186]

V. CONCLUSION

American society has gone through dramatic economic changes in this century, and Florida's history has been one of the most dra-

184. 379 So. 2d 651 (Fla. 1980).
185. *Id.* at 653.
186. State v. City of West Palm Beach, 125 So. 2d 568 (Fla. 1960).

matic. Each business cycle of boom and bust has produced a major effect on the rules governing the issuance of municipal bonds in Florida. The free-wheeling provisions that characterized the early twentieth century led to municipal defaults when revenues evaporated in the 1930's. To protect property owners, restrictive constitutional provisions were adopted, and, of great significance, the courts assumed a role as protector of the taxpayers.

The needs of municipalities shifted after World War II, and an expanding economy forced the courts to move away from the strictly protective role by creating legal fictions to avoid unduly restricting the issuance of municipal bonds. The drafters of the 1968 constitutional amendments tried to reconcile the seemingly inconsistent judicial interpretations by setting forth in new constitutional language more liberal rules appropriate for the future. The passage of time has demonstrated that this approach has in large degree been judicially accepted. However, while the courts acknowledge what occurred in 1968, they have at times lapsed into a more restrictive approach which seeks to protect the taxpayers.

While the judiciary must remain alert to any attempted misuse of public borrowing authority, it must also recognize that the 1968 constitutional amendments reflect that the public's capital needs can only be met through borrowing. It must be recognized as well that not only has society become more complex, but its citizens have also become more sophisticated. Courts should therefore be less quick to shoulder the protective mantle. Public officials should be allowed to operate under straightforward rules and be trusted to make prudent decisions. Whatever blemishes have developed on the rules since the 1968 constitutional amendment, they should be cleared away and definite operating guidelines thereby provided to municipal officials. These individuals should then be accountable to the electorate for the actions they take. If public officials are thought to have breached these rules, the electorate should make that judgment and not the judiciary. Elected public officials must have the latitude which the constitution and Florida legislation now allows them so that they may meet their communities' needs of the foreseeable future.