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# REVENUE BONDS FOR COMMERCIAL DEVELOPMENT IN WEST VIRGINIA: THE ENDORSEMENT BY THE WEST VIRGINIA SUPREME COURT OF APPEALS

STEVEN F. WHITE\*

## I. INTRODUCTION

Recently, in *State ex rel. The Ohio County Commission v. Samol*,<sup>1</sup> the West Virginia Supreme Court of Appeals sanctioned the issuance of tax exempt revenue bonds to finance the development of commercial projects under the West Virginia Industrial Development and Commercial Development Bond Act.<sup>2</sup> Although the court had previously sanctioned the revenue bond financing procedure for industrial projects,<sup>3</sup> this case tested the constitutionality of the Act as it applied to commercial projects.<sup>4</sup> With a broad stroke, the court removed any ambiguity in the interpretation of the Act. Upon a finding of public benefit, local governmental authorities in West Virginia now have wide discretion in issuing revenue bonds for economic development.

## II. INDUSTRIAL AND COMMERCIAL DEVELOPMENT BOND

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<sup>1</sup> No. 14865 (W. Va. July 15, 1980). The author's law firm filed an *amicus curiae* brief in the case on behalf of Jay Goldman d/b/a Goldman Associates.

<sup>2</sup> W. VA. CODE §§ 13-2C-1 to -20 (1979 Replacement Vol.) [hereinafter cited as the Act].

<sup>3</sup> See *State ex rel. County Court v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964).

<sup>4</sup> This perceived distinction between industrial and commercial ventures has troubled the bond counsel community in West Virginia for years. Many bond attorneys, including the author, have rendered approving opinions on commercial projects based upon the conviction that there is no true distinction between commercial and industrial projects. Other bond attorneys, however, have refused to approve revenue bonds for commercial projects prior to this test case.

### FINANCING

The revenue bond financing procedure provides an attractive alternative to conventional financing. It effectively permits the developer to pay a lower rate of interest on borrowed money since interest on the bonds is exempt from federal<sup>5</sup> and state<sup>6</sup> income taxes. The developer's cost to retire the bonds is therefore less than what would be necessary to repay a conventional loan. This permits industrial and commercial development when other financing is economically unfeasible. Thus, the revenue bond financing procedure provides state and local authorities with an effective carrot with which to encourage economic development.

The Industrial Development Bond Act was designed to obtain the advantages of this financing vehicle for the State of West Virginia. The purposes of the Act are to alleviate the critical conditions of unemployment existing in the state, to halt the exodus of the work force from the state and to establish a balanced economy in West Virginia.<sup>7</sup> Originally a method for counties and

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<sup>5</sup> The Internal Revenue Code provides that gross income does not include interest on the obligations of a state or local governmental unit. I.R.C. § 103(a)(1). The Code further provides that, with certain exceptions, the interest on industrial development bonds is not excludible from gross income. I.R.C. § 103(b)(1). Projects which are financed with revenue bonds under the Act are either within the exceptions enumerated under Section 103(b) or involve financing for a non-profit entity. Interest is therefore exempt from federal income taxation on bonds issued to finance these projects. The above discussion is a simplified statement of the basis for federal income tax exemption, with specific questions relating to the federal exemption being beyond the scope of this article.

<sup>6</sup> See W. VA. CODE § 13-2C-15 (1979 Replacement Vol.). This section provides that revenue bonds and the income therefrom are exempt from taxation except for inheritance, estate and transfer taxes.

<sup>7</sup> The Act in its present form contains the following legislative findings:

It is hereby determined and declared as a matter of legislative finding (a) that critical conditions of unemployment exist in many areas of this State; (b) that lack of employment and business opportunities have resulted in thousands of people leaving this State to find employment elsewhere, and this exodus has adversely affected the tax base of counties and municipalities within this State, resulting in an impairment of their ability to support local government; (c) that the development of new commercial, mining, industrial and manufacturing projects is essential to relieve unemployment and establish a balanced economy within the State; (d) that the present and prospective health, happiness, safety, right of gainful employment and general welfare of the citizens of each of the counties and municipalities of this State will be promoted by the

municipalities to finance new industrial plants, the Act was first expanded to encompass funding for additions to existing plants and then to include financing for the acquisition of existing industrial facilities. The West Virginia Supreme Court of Appeals has consistently upheld the constitutionality of the Act in the face of every new challenge.<sup>8</sup> Since the most recent challenge, the legislature has amended the Act to further extend its scope, permitting county or municipal financing of commercial development.<sup>9</sup>

The inclusion of commercial projects within the scope of the Act has resulted in hundreds of millions of dollars in low interest

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establishment of industrial projects and commercial projects as herein provided; (e) that the means and measures herein authorized for the promotion of industrial projects and commercial projects are, as a matter of public policy, for the public purpose of the several counties, municipalities and the State of West Virginia; (f) that the abatement or control of pollution of the environment of the State is necessary to protect the health and welfare of the citizens of the State, to protect the natural resources of the State and to encourage the economic development of the State; and (g) that in addition to the development of new industrial projects and commercial projects the retention of existing industrial projects and commercial projects within the State through the means and measures herein authorized is vital to the maintenance of a balanced economy and for the preservation of employment within the state and is for the public purpose of the several counties, municipalities and the State of West Virginia. W. VA. CODE § 13-2C-2 (1979 Replacement Vol.).

<sup>8</sup> See *State ex rel. County Court v. Kemp*, 151 W. Va. 349, 151 S.E.2d 680 (1966); *State ex rel. County Court v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964); *State ex rel. County Court v. Bane*, 148 W. Va. 392, 135 S.E.2d 349 (1964).

<sup>9</sup> The Act was amended in 1974 so as to include commercial projects within its scope. It defines a commercial project as:

[R]eal or personal property or both, including any buildings, improvements, additions, extensions, replacements, appurtenances, land, rights in land, water rights, franchises, machinery, equipment, furnishings, landscaping, utilities, railroad spurs and sidings, parking facilities, parking wharfs, approaches and roadways or any number or combination of the foregoing necessary or desirable in connection therewith or incidental thereto and includes, without limiting the generality of the foregoing, hotels and motels and related facilities, nursing homes and other health care facilities, facilities for participatory or spectator sports, conventions or trade show facilities, airport facilities, shopping centers, office buildings, residential real property for family units, and mass commuting facilities.

W. VA. CODE § 13-2C-3(a) (1979 Replacement Vol.).

mortgage money being made available to West Virginia home buyers in the last two years. This has permitted low and moderate income families to obtain housing at an affordable interest rate. In addition to the housing programs, shopping centers, hotels, office buildings, nursing homes and many other types of commercial developments have been financed by tax exempt revenue bonds.

### III. CONSTITUTIONAL CHALLENGES TO INDUSTRIAL DEVELOPMENT PROJECTS

There is a line of cases which has been consistently supportive of the Act, sustaining both its literal wording and its spirit. As the Act's application has expanded, the court has continued to uphold its constitutionality.

In *State ex rel. County Court v. Bane*,<sup>10</sup> the issue was whether the scope of the Act included the financing of additions to existing facilities as well as the funding of totally new construction. Because the language of the Act permitted "issuance of revenue bonds to defray the cost of acquiring '[a]n industrial plant or an addition, extension, or improvement thereto . . .';"<sup>11</sup> the court refused to distinguish between a warehouse addition to an existing plant and a totally new industrial facility.

Furthermore, the court, in the past, has been willing to sanction applications beyond the specific language of the Act, yet within the public purpose articulated by the legislature. For example, in *State ex rel. County Court v. Kemp*,<sup>12</sup> the question before the court was whether the Industrial Development Bond Act authorized a county court to issue bonds to finance the acquisition of an existing facility. Although the language of the Act at that time did not encompass existing facilities, the court held that since the acquisition promoted the public welfare as prescribed by the legislature in the Act, the powers of the county court "unequivocally permit the acquisition of an existing industrial facility through the issuance of Industrial Development

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<sup>10</sup> 148 W. Va. 392, 135 S.E.2d 349 (1964).

<sup>11</sup> *Id.* at 395, 135 S.E.2d at 351. See also W. VA. CODE § 13-2C-4(4) (1979 Replacement Vol.).

<sup>12</sup> 151 W. Va. 349, 151 S.E.2d 680 (1966).

Bonds.”<sup>13</sup>

The classic constitutional argument against industrial and commercial development bonds is that they constitute an impermissible extension of the public credit.<sup>14</sup> Emphasizing the statutory requirements that the bonds are to be payable out of revenues from the project and that the governmental authority issuing the bonds is not liable for payment, the West Virginia Supreme Court of Appeals has routinely held that bonds to finance a self-liquidating public project do not create a debt within the constitutional meaning.<sup>15</sup> The court in *State ex rel. County Court v. Demus* pointed to the fact that in any event the credit of the state is not being extended since specific language in the Act precludes such an extension.<sup>16</sup>

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<sup>13</sup> *Id.* at 355, 683. It is interesting to note that on this issue, the legislature followed the court's lead. When the Act was amended in 1974, it specifically stated that “the retention of existing industrial projects and commercial projects . . . is for the public purpose . . .” W. VA. CODE § 13-2C-2(g) (1979 Replacement Vol.).

<sup>14</sup> W. VA. CONST. art. X, § 6, provides in part: “The credit of the state shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person . . . .”

<sup>15</sup> *State ex rel. West Virginia v. Waterhouse*, 212 S.E.2d 724 (W. Va. 1974); See Note, *Constitutional Law - Extension of State Credit - Industrial Development Bond Act*, 67 W. VA. L. REV. 228 (1965); *Casto v. Ripley*, 114 W. Va. 668, 173 S.E. 886 (1934); *Brewer v. Point Pleasant*, 114 W. Va. 572, 172 S.E. 717 (1934); *State ex rel. County Court v. Demus*, *supra* note 8, established that since revenue bonds do not create a charge or indebtedness of the issuing body they do not violate the limit on bonded indebtedness prescribed in W. VA. CONST. art. X, § 8.

<sup>16</sup> See W. VA. CODE § 13-2C-7 (1979 Replacement Vol.). The finding that the bonds were self-liquidating and payable out of the revenues of the project rather than tax revenues was also the basis for the court in *Demus* deciding that W. VA. CONST. art. X, § 4 was not violated. This provision provides in part: “No debt shall be contracted by this state, except to meet casual deficits in the revenue, to redeem a previous liability of the state . . . .”

The same rationale was the basis for the court's holding that W. VA. CONST. art. X, § 8 was not violated. That provision provides in part:

No county, city, school district or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding 5% percentum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes . . . provided that no debt shall be contracted under this section

In *Demus*, the court also dealt with the issue of whether the exemption of property from taxation under the Act was prohibited. The court held that the legislature is empowered to exempt public property from taxation, and that the court would be bound by findings of the legislature.<sup>17</sup> Constitutional challenges based upon alleged violations of due process and equal protection were also dismissed by the court in *Demus* since there was no taking of property without compensation nor any discriminatory feature in the bond mechanism.<sup>18</sup>

The reasoning adopted by the court in earlier cases to defend the Act from constitutional attack is no less valid merely because the revenue bond procedure now permits funding for commercial projects. The structure of the Act as amended is essentially the same as it was when the court initially ruled on its constitutionality. Regardless of whether the bonds are issued for a commercial or industrial project, they are subject to these statutory requirements. Thus, they are not an unconstitutional debt on the public purse nor do they violate any of the other cited constitutional provisions.

#### IV. THE TEST CASE: STATE EX REL. THE OHIO COUNTY COMMISSION V. SAMOL

In April, 1980, the Ohio County Commission authorized the issuance and sale of commercial development bonds for approximately \$1,575,000 to finance the acquisition and improvement of the Warwood Shopping Plaza. The Commission had declared, as a matter of legislative finding, that the development would:

[P]rovide for increased tax revenues to the City of Wheeling

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unless all questions connected with the same shall have been first submitted to a vote of the people and have received three-fifths of all votes cast for and against the same.

<sup>17</sup> W. VA. CONST. art. X, § 1 provides in part:

Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law . . . but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property . . . may by law be exempted from taxation. . . .

<sup>18</sup> W. VA. CONST. art. X, § 9; W. VA. CONST. art. X, § 10; U.S. CONST. amend.

XIV.

and Ohio County, and additionally provide for increased employment . . . and; . . . [t]hat the acquisition of the said Project will contribute to the establishment and maintenance of a balanced economy, will encourage and enhance gainful employment, and will inure to the business, commercial, and fiscal benefit of the County and its residents . . . .<sup>19</sup>

Thomas Samol, administrator of the County Commission, having been advised by counsel that there might be a question about the constitutionality of revenue bond financing for commercial projects, refused to affix the Ohio County Commission seal to the bonds. In May, the Ohio County Commission filed a petition for a writ of mandamus with the Supreme Court of Appeals of West Virginia. The court granted the petition and held that since the statutory provisions relating to commercial revenue bonds are identical to those relating to industrial revenue bonds, the *Demus* constitutional reasoning was applicable. This holding thus resulted in the court sanctioning the use of the revenue bond financing procedure for a wide variety of commercial as well as industrial projects.

The central argument advanced by opponents of commercial projects is that they do not serve a valid public purpose. In responding to this argument, the court has consistently deferred to legislative determinations. As the court emphasized when it upheld the constitutionality of the original Act in *Demus*, "This court in giving credence and effect thereto has held that the power of the legislature of this state is 'almost plenary' and that its powers are limited only by express restriction or restrictions necessarily implied therein by a provision or provisions of our constitution."<sup>20</sup>

This deference occurs on two levels. First, the court has continually recognized the "salutory public purpose of the Act authorizing the bonds,"<sup>21</sup> respecting a legislative determination that the public will benefit from a statutory vehicle for encouraging economic development. Secondly, the specific finding of public purpose is primarily the function of the bond issuing authority and, "in the absence of fraud, collusion or bad faith, the wisdom

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<sup>19</sup> Resolution of the Ohio County Commission 2 (April 9, 1980).

<sup>20</sup> 148 W. Va. at 403, 135 S.E.2d at 356.

<sup>21</sup> State *ex rel.* Ohio County Commission v. Samol, No. 14865 at 4.



of such a finding cannot be questioned."<sup>22</sup>

In *Ohio County Commission v. Samol*, the court again refused to question legislative determinations:

Absent a claim that legislative findings are irrational or have no bearing on a legitimate state purpose, they are not subject to judicial investigation . . . . It does not require any lengthy discussion to realize that the renovation, expansion or creation of existing or new commercial projects give much the same economic benefit to a community as would comparable activities in the industrial area. Each serves to create or maintain employment and enhance tax revenues, and thereby operates to benefit the community and public in general.<sup>23</sup>

Across the country, governmental financing for economic development is increasingly seen as serving the public purpose<sup>24</sup> as the modern trend is to expand and liberally construe the definition of public benefit.<sup>25</sup> Other state courts have refused to sustain challenges to governmental financing of commercial projects. On the issue of whether commercial projects are within the ambit of specific revenue bond statutes, courts have agreed with legislative determinations that both commercial and industrial development projects are proper candidates for government funding. When asked to quash specific projects, courts have upheld local issuing authorities' findings that commercial projects can serve the public purpose.

For example, the Supreme Court of Missouri recently determined that industrial development bonds could be issued for commercial as well as industrial uses, since both are within the language of the Missouri revenue bond statute. In *State ex rel. Jardon v. Industrial Development Authority, Inc.*,<sup>26</sup> bonds were issued to construct an office building, along with fixtures, equipment and related support facilities. The relator in the case argued

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<sup>22</sup> *State ex rel. County Court v. Kemp*, 151 W. Va. at 354, 151 S.E.2d at 683.

<sup>23</sup> *State ex rel. Ohio County Commission v. Samol*, No. 14865 at 4-5.

<sup>24</sup> Twelve years ago, the North Carolina Supreme Court surveyed case law nationwide and noted that at that time at least forty-two states had some type of revenue bond financing program. See *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968).

<sup>25</sup> *State ex rel. Taft v. Campanella*, 50 Ohio St. 2d 242, 364 N.E.2d 21 (1977); *AM. JUR. Municipal Corporations* § 132.

<sup>26</sup> 570 S.W.2d 666 (Mo. 1978).

that the office building, unlike most projects funded through industrial revenue bonds, was commercial in nature, and as such placed a competitive hardship on other commercial enterprises. The court, in determining that it did not need to decide whether the nature of the enterprise was in fact commercial or industrial, stated that “[b]oth are within the language of the statute. We are not convinced that any greater burden falls upon other local enterprises if one is involved rather than the other, and we believe the public interest in an expanded economy with attendant employment outweighs any such hypothetical increase in competition.”<sup>27</sup>

Additionally, in the Tennessee case of *Small World, Inc. v. Industrial Development Board of the City of Tullahoma*,<sup>28</sup> local retailers challenged the city industrial development board’s action in authorizing revenue bonds to finance construction of a department store, asserting that the proposed project did not fall within the purposes of the Industrial Development Bond Act and that the city did not need another retail store. The Tennessee court, having upheld the constitutionality of the state’s Industrial Development Corporation Act in an earlier series of cases, disagreed with the local merchants saying, “Jobs are provided by retail establishments just as they are provided in the manufacturing process, and service is necessary to a community for its common good.”<sup>29</sup> Furthermore, the court similarly refused to second guess the industrial development board’s findings.

In a New York case, *Grossman v. Herkimer County Industrial Development Agency*,<sup>30</sup> the court held that the Act creating the Industrial Development Agency included the construction of commercial facilities and approved an option between the Agency and a commercial developer for the conversion of an existing industrial property to a mercantile building. In short, the vanguard of authority sees no constitutional or philosophical distinction between commercial and industrial candidates for receipt of revenue

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<sup>27</sup> *Id.* at 675.

<sup>28</sup> 553 S.W.2d 596 (Tenn. 1976).

<sup>29</sup> *Id.* at 599.

<sup>30</sup> 606 A.D.2d 172, 400 N.Y.S.2d 623 (1977).

bond financing.

## V. CONCLUSION

By stamping the amended Industrial Development and Commercial Development Bond Act with judicial imprimatur, the West Virginia Supreme Court of Appeals has removed a barrier which might have previously discouraged bond-issuing authorities from financing certain projects.<sup>31</sup> At present, state and local authorities have a liberal procedure available to encourage appropriate commercial and industrial projects.

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<sup>31</sup> Since this comment was written, Chief Justice Neely has filed a concurring opinion expressing concern with the liberality of the majority opinion. He would limit the holding to its facts, and similarly rule on each case individually. See *State ex rel. Ohio County Commission v. Samol*, No. 14865 (W. Va. Oct. 7, 1980) (concurring opinion).