Florida Law Review

Volume 24 | Issue 3 Article 3

April 1972

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Recommended Citation

Michael R. Storace, *The Florida Industrial Development Financing Act: Public-Private Investment in Social Engineering*, 24 Fla. L. Rev. 433 (1972).
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THE FLORIDA INDUSTRIAL DEVELOPMENT FINANCING ACT: PUBLIC-PRIVATE INVESTMENT IN SOCIAL ENGINEERING

MICHAEL R. STORACE* and EDMOND J. GONG**

The adoption of the Florida Industrial Development Financing Act[1] by the Florida Legislature in 1969 was a long overdue embarkation into realistic competition for the nation's industry through modern corporate finance. A "late bloomer" in authorizing issuance of industrial revenue bonds, Florida lost innumerable industrial ventures for years to its Southern sister states because of the competitive disadvantages caused by the lack of such financing.[2]

The impact of this legislation on the economic growth of Florida promises to be substantial. Bonds issued under the Act have already financed a $1 million acquisition and modernization of a citrus by-product plant in Polk County, construction of a new $3.4 million meat-processing plant in Madison County, a $4.5 million air and water pollution control facility for an existing paper and pulp plant in Putnam County, and a $3.85 million acquisition and expansion of a meat-processing plant in Dade County.[3] Moreover, the increased tax base created by the projects financed by bonds authorized by this legislation will provide local governments additional taxing revenue sorely needed to accommodate the ever-accelerating requirements of an increasingly urbanized citizenry.

The social impact may be even more important and profound than the economic consequences of these issues. The Madison County issue, for example, is expected to create 240 new jobs. The Putnam County issue saved hundreds of jobs by preventing imminent closing of one of the county's major employers. The Dade County issue is projected to create 100 new jobs and an additional $900,000 of new payroll in a high unemployment sector of underprivileged and minority groups.

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The authors wish to specially acknowledge the contribution of Francis W. Sams of Miami who served as special counsel to the Senate Subcommittee on Local Government and under whose supervision the original draft of the Florida Industrial Development Financing Act was prepared for legislative introduction.

1. FLA. STAT. §§159.25-.43 (1969). Florida was the forty-sixth state to authorize issuance of industrial revenue bonds.

2. For instance, in 1967 alone, Alabama attracted $254.6 million in capital investment through issuance of industrial revenue bonds; Georgia, $92.7 million; Louisiana, $154.9 million; and South Carolina, $37.9 million; or a total of $540.1 million. *Hearings Before the Florida Senate Comm. on Reorganization* at 9 (March 19, 1969) [hereinafter cited as *1969 Hearings*].

3. *Id.*

Published by UF Law Scholarship Repository, 1972

Florida Law Review, Vol. 24, Iss. 3 [1972], Art. 3

INDUSTRIAL REVENUE BONDS — A DESCRIPTION

At the outset, it is appropriate to define industrial revenue bonds and describe the characteristics that distinguish them from corporate bonds, municipal bonds, and other types of revenue bonds. The bond authorized by the Florida Industrial Financing Development Act is issued by local government units[4] for financing the acquisition, construction, improvement, and renovation of industrial manufacturing or processing plants and their related facilities.[5] The facilities are then occupied by private enterprises under various possible arrangements. The local government agency may retain title to the property and lease the property and facility to the occupying company, with an option to purchase. On the other hand, the transaction may take the form of a conditional sale agreement or an outright sale with a long-term mortgage. In any case, the common practice is for the occupying company to ultimately become the owner of the property and facilities. Moreover, because of this fact, the facilities are usually acquired, constructed, and approved pursuant to specifications of the private enterprise expected to occupy them pursuant to a prior agreement.[6]

The issuing governmental agency retires the principal and interest on the bonds solely from the rentals or mortgage installment payments made by the occupying business.[7] Pledging the faith and credit of the local agency is specifically prohibited by the Florida constitution,[8] the Act,[9] and by the terms of the lease or mortgage. The term of the lease or mortgage may not expire until all the principal and interest on the bonds are retired.[10] The local government agency, therefore, retains a security interest in the property and the facilities until the retirement of the bonds even where, under a lease and option to purchase, the option to purchase is exercised before the term of the lease has fully run and the bonds have been completely retired.

Thus, the corporation actually obtains complete financing of the cost of acquiring, constructing, and renovating a new industrial facility. This financing also includes cost of feasibility plans; legal, accounting, and architectural expenses; and even costs and fees incurred in obtaining the financing.[11]

The industrial revenue bond, however, has particular advantages over more traditional corporate methods of obtaining financing from private placements or the public marketplace. First, the effective cost of financing is lower because the bonds are issued by a political subdivision of a state,

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4. FLA. STAT. §159.27 (4) (1969).
5. FLA. STAT. §159.27 (5) (1969).
6. Note, *Industrial Development Bonds Under Article VII, Section 10 of the Florida Constitution of 1968*, 21 U. FLA. L. REV. 656 (1969).
7. FLA. STAT. §159.30 (1) (b) (1969).
8. FLA. CONST. art. 7, §10 (c).
9. FLA. STAT. §159.33 (1969).
10. FLA. STAT. §159.30 (1969).
11. FLA. STAT. §159.27 (2) (e) (1969).

and their interest is exempt from taxation.[12] In addition, the bonds are exempt from registration requirements of both the state[13] and federal securities acts.[14] Second, there is long-term repayment of the debt out of current income, usually over a period of twenty years or more on a semi-annual or annual basis. Third, less time is required to complete the financing by virtue of freedom from burdensome and unnecessary governmental regulations.[15]

The financing also has advantages for the issuing governmental unit. As with many other municipal bond issues, a trustee's bank usually handles the collection of payments of principal and interest on the bonds and collects all lease, sale, and mortgage payments on a timely basis, thereby alleviating the governmental unit of this administrative burden. In addition, construction is usually supervised by the projected occupier of the facilities as the agent of the issuing authority, which frees the construction personnel of the governmental unit, insulating it from liability for faulty construction, price rises, litigation, and other risks of the construction process. Furthermore, since no referendum is required for the issuance of the bonds the governmental unit is able to respond quickly when a company desiring to locate has other competing options. Third, neither the faith and credit nor any revenues or taxing power of the local governmental unit other than the revenues derived from the lease or mortgaging of the facility itself is permitted to be pledged for repayment of the bonds.

HISTORICAL PERSPECTIVE[16]

Prior to the adoption of the 1968 constitution, industrial revenue bonds were generally held violative of the public finance provisions of the Florida constitution.[17] The Supreme Court of Florida regarded most attempts to issue these bonds as a constitutionally proscribed method of lending public credit for private purposes.[18] Only where the private benefit was strictly incidental[19] to an inherent public purpose or benefit[20] did the court approve such fi-

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12. INT. REV. CODE OF 1954, §103 [hereinafter cited as CODE]; *see* text accompanying notes 89-103 *infra*.

13. FLA. STAT. §159.34(5) (1969).

14. *See* text accompanying notes 80-88 *infra*.

15. *See* FLA. STAT. §159.34(5) (1969).

16. This section is intended only as a summary of the law prior to adoption of the 1968 constitution in order to lend some perspective. *See generally* Note, *supra* note 6, for a detailed analysis of Florida's pre-1969 posture on industrial revenue bonds.

17. FLA. CONST. art. 9, §10 (1885).

18. State v. Manatee County Port Authority, 193 So. 2d 162 (Fla. 1966) (holding invalid bonds whose proceeds were to finance construction of a phosphate loading facility to be leased to two private railroad companies); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952) (holding invalid bonds whose proceeds were to be used for the acquisition of land and construction of a plant to be leased to an aluminum manufacturing company); Brumby v. City of Clearwater, 108 Fla. 633, 149 So. 203 (1933). *See* Note, *supra* note 6, at 657, 660-61.

19. State v. Board of Control, 66 So. 2d 209 (Fla. 1954).

20. *Eg.*, State v. Okaloosa County Airport & Indus. Authority, 168 So. 2d 745 (Fla. 1964); State v. Dade County, 62 So. 2d 404 (Fla. 1953) (bond proceeds to finance construc-

nancing. Perhaps a further extension of this principle was the validation of bonds used to construct the Daytona Beach International Speedway. Here the supreme court found that tourism that would be generated by the completed facility constituted a sufficient public purpose to justify validation of the bonds.[21]

One of the great ironies of the pre-1968 positions taken by the court was that while travel and recreational or tourist-oriented facilities met the public interest test,[22] projects that promoted full employment and the general welfare of the community by virtue of providing additional industrial plants did not.[23] One author explained this result by noting that an excessive benefit accrued to the private lessee rather than to the public.[24] An exception occurred when a legislature expressly declared that such full employment was a public service to be served by the financing.[25]

These examples illustrate the confused state of the law prior to the 1968 revision of the Florida constitution. Though fundamentally antipathetic toward industrial revenue bonds, the supreme court did occasionally validate issues when persuaded that some public purpose would be the primary beneficiary of the issue. What constituted a public purpose, however, was never clearly defined in either the court's opinions or by the characteristics of the issues that were validated. While the airport and transportation authority issues possess an unquestionable underlying public function, it is more difficult to distinguish between the tourism generated by a raceway and the jobs that would be created by an aluminum manufacturing plant. If the distinction was that tourism would have a direct or indirect benefit to a greater proportion of the community (a supposition, the validity of which might itself be questioned), then the distinction between public and private purpose was one of degree rather than substance. The vagueness of this standard left the decision of whether to attempt such financing a matter of guesswork based more upon the number of benefited community members rather than the character of the project. The flaw in such an approach is evident. Certainly a plant providing jobs to a hundred hardcore unemployed workers serves as great or greater a public purpose as the raceway that draws tourists to benefit the community's more numerous merchants.

These anomalies were fundamentally the result of the court's struggle with the language of the 1885 constitution.[26] Moreover, there prevailed strong

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tion of warehouses and shop facilities on county-owned airport to be leased to private airline).

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

22. FLA. CONST. art. 9, §10 (1885); *see* notes 18-21 *supra*.

23. *E.g.*, State v. Jacksonville Port Authority, 204 So. 2d 881 (Fla. 1967); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

24. Note, *supra* note 6, at 661.

25. *E.g.*, State v. Ocean Highway & Port Authority, 217 So. 2d 103 (Fla. 1968).

26. FLA. CONST. art. 9, §10 (1885) stated: "Credit of state not to be pledged or loaned—the credit of the state shall not be pledged or loaned to any individual, company, corporation or stock-holder in any company, association, or corporation. The Legislature shall not authorize any county, city, borough, township, or incorporated district to become a stock-

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underlying attitudes, just as they probably served as the basis for the old constitutional language, that remained the chief obstruction to removal of the constitutional barrier to authorization of industrial revenue bonds. These included a strong feeling by many in industry, banking, and government that such bonds were alien to the capitalistic system; that they were a "socialistic" intrusion of government into private enterprise.[27] Perhaps equally potent was state chauvinism; a sincere but increasingly inaccurate conclusion that the state's natural endowments of clean air, clean water, and sunshine were in themselves sufficient to attract all the industry the state would need.[28] Finally, assaults by branches of the federal government on the tax-exempt status of such bonds clouded their future.[29] As the state experienced burgeoning population and urbanization, however, the need for broadening its economic base, which had been composed primarily of agriculture and tourism, became acute. The practical realization that accelerated industrial expansion was vital to keep pace with the state's growth finally overcame the old prejudices.

Accordingly, in 1968 Florida adopted a new constitution that included a provision authorizing industrial revenue bonds.[30] The new constitution and the implementing legislation that followed[31] provided the framework for resolving previous anomalies and uncertainties and established more definitive guidelines of the purposes for which the bonds could be issued.

ELEMENTS OF THE ACT

Upon adoption of the new constitution some difference of opinion arose on whether the provisions authorizing issuance of industrial revenue bonds were self-effectuating[32] or were merely permissive and hence required legislative implementation.[33] However, it was recognized that both charter (home rule) and non-charter counties (impliedly other local governmental units described in the constitution) could implement the constitutional provision by local act.[34]

The need for enactment of implementing legislation to establish uniform standards, criteria and procedures for issuance of the bonds was immediately

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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."

27. *1969 Hearings, supra* note 2, at 56.

28. *Id.* at 12.

29. *See* text accompanying notes 97-101 *infra.*

30. FLA. CONST. art. 7, §10 (c) (2).

31. FLA. STAT. §§159.25-.43 (1969).

32. Note, *supra* note 6, at 663.

33. FLA. CONST. art. 7, §10 provides: "[T]his shall not prohibit laws authorizing . . . (c) the issuance and sale by any county, municipality, special district or other local government body of . . . (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the property . . . ."

34. *1969 Hearings, supra* note 2, at 115 (testimony of the Director of the Florida Dep't of Bond Finance, Arnold L. Greenfield).

recognized.[35] A hodgepodge of local acts with varying criteria and procedures could well have had a disastrous effect upon Florida's new ability to compete for the nation's industries. A uniform system for issuance of the bonds on a rational and desirable basis was necessary not only to protect the state and its subdivisions, but also to insure marketability of the bonds.[36]

The challenge to the legislature, therefore, was great. The only hints the new constitution gave for establishing these criteria were the language demonstrating: (1) the intent that only local bodies issue industrial revenue bonds and not the state; (2) that the bonds were authorized only to the extent that their interest was exempt from federal income taxes; (3) that they be used to *finance or refinance* costs of capital projects; (4) that they be used for industrial or manufacturing plants; and (5) that they be payable solely from the revenues of the "sale, operation, or leasing" of the projects and not from the general revenues.[37]

Despite the expressed constitutional language, some people felt strongly that the state should have the power to approve or disapprove proposed issues, and that a state office or agency should be the dictator of the criteria and purposes for which the bonds might be issued, leaving little or no discretion to the local governmental units.[38] Although the constitution prohibited the state from issuing industrial revenue bonds, the legislature was not precluded from requiring approval by some "central state body."[39] The Act, however, rejects this additional bureaucratic requirement and provides instead that no consent is required from any "department, division, commission, board, body, bureau, or agency of the state."[40]

The Act did, however, create general criteria and purposes to be considered by the local agency in issuing the bonds.[41] Wide discretion was nevertheless given to the locality in administration of these criteria by providing that a "determination of the local agency as to compliance with such criteria and requirements shall be final and conclusive . . . ."[42] The Florida supreme court has also ruled that once the local agency has made a determination that the requirements of the Act are satisfied, the issue is finally and conclusively settled.[43] Moreover, nothing in the Act prohibits the local agency from adopting stricter requirements and criteria for issuance of the bonds.

Criteria

While delegating the broadest discretion to the local government unit in establishing guidelines for undertaking a given project, the Act does establish four general requirements: (1) that the local unit determine that

35. Note, *supra* note 6, at 663. *See generally 1969 Hearings, supra* note 2.
36. Note, *supra* note 6, at 663.
37. FLA. CONST. art. 7, §10 (c) (emphasis added).
38. Note, *supra* note 6, at 663. *See generally 1969 Hearings, supra* note 2.
39. *1969 Hearings, supra* note 2, at 115 (Greenfield testimony).
40. FLA. STAT. §159.34 (5) (1969).
41. FLA. STAT. §§159.26, .29 (1969).
42. FLA. STAT. §159.29 (1969).
43. State v. County of Dade, 250 So. 2d 875 (Fla. 1971).

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the project meets the purposes set forth in the Act;[44] (2) that the company occupying the facility be financially responsible and completely capable of fulfilling its obligations under the agreements relating to its occupation of the facilities and issuance and retirement of the bonds;[45] (3) that the local government be capable of satisfactorily coping with the impact of the contemplated project on the community by providing the public facilities that might be required by any increase in population or other circumstances resulting from the project;[46] (4) that adequate provisions be made for the operation and maintenance of the project and for the retirement of the bonds by the company.[47]

The fact that the Act only requires that the local governmental unit be guided by the statute's criteria makes the local agency the sole judge of the project's compliance with the criteria and implicitly permits the agency to impose stricter requirements of its own.[48] Thus, the emphasis of the Act is clearly on local discretion and autonomy so that the industry financed may fit the peculiar economic and developmental needs of the particular community.

Purposes

The expressed purposes for which bonds may be issued under the Act are:[49]

> (1) to promote the industrial economy of the state;
> (2) to increase opportunities for gainful employment and purchasing power;
> (3) to improve living conditions;
> (4) and otherwise to contribute to the prosperity and welfare of the state and its inhabitants.

Some question remained whether the purpose to "increase opportunities for gainful employment" required the creation of new jobs as opposed to the preservation of already existent jobs that were threatened by obsolescence or other features that might close an existing plant. The question appears to have been settled by the Florida supreme court in *State v. Putnam County Development Authority*.[50] There, a plant closing was threatened because of fines for violation of certain pollution ordinances. A stay against the closing was granted pending construction of an approved anti-pollution facility. The facility was to be financed with the proceeds of industrial revenue bonds issued under the Act by the Putnam County Development Authority.

The state attacked the issue on the ground that the project would not improve the area's economy but would only maintain the status quo, and

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44. FLA. STAT. §159.29 (1) (1969).
45. FLA. STAT. §159.29 (2) (1969).
46. FLA. STAT. §159.29 (3) (1969).
47. FLA. STAT. §159.29 (4) (1969).
48. FLA. STAT. §159.32 (1969).
49. FLA. STAT. §159.26 (1969).
50. 249 So. 2d 6 (Fla. 1971).

therefore did not meet the requirements of the Act.[51] The court, however, disagreed and found that the plant was one of the major industries in the county, that curtailment or termination of its operations would cause discharge of a large number of its employees, and that other employment was not readily available in the area.[52] Although the court expressed a belief that the treatment facility would increase the attractiveness of Putnam County to new industry and would provide additional employment at the plant, such predictions must fall more in the realm of hopeful conjecture than fact. Accordingly, the decision must stand for the proposition that retention of the status quo in employment and retention of an industry that would otherwise be lost is a purpose contemplated under promotion of the "industrial economy" and increasing of "opportunities for gainful employment."

Such a result is only proper and logical. Since the expressed purposes of the Act are to promote industry and employment, any construction of the Act that would bar financing of facilities to maintain already existing industry or restricting the Act to promotion of only new jobs or attraction of only new industries would be arbitrary and paradoxical.

This is especially true, since the Act in its definitions of "project"[53] and "cost"[54] expressly permits financing of expansions and improvements to existing industries as well as completely financing new facilities. Moreover, in *State v. County of Dade*[55] the court upheld the validity of the industrial revenue bond issue even though approximately 87 per cent of the proceeds was to be used for the acquisition of an existing facility and only the remaining 13 per cent was to be expended on renovation and expansion of the plant.[56]

The court's expansion of the scope of the Act to include anti-pollution facilities[57] was a development of tremendous significance. Recognizing that one purpose of the Act was to improve living conditions the court found "it . . . hard to imagine a more propitious project to improve the living conditions in our great state at this time than a pollution control project."[58] The court even went so far as to find a requisite purpose in preserving the beauty of the surrounding pine lands and water courses.[59]

It should be noted that supplementary legislation enacted in 1970 specifically provided for anti-pollution as well as other facilities, but the court was unable to use the 1970 Act. A detailed discussion of anti-pollution facilities and other aspects of the 1970 Act is found later in this article.[60]

It is evident, therefore, that the supreme court has recognized the legislative intent that the Act and its provisions be utilized and construed as

51. *Id.* at 10.
52. *Id.*
53. FLA. STAT. §159.27 (5) (1969).
54. FLA. STAT. §159.27 (2) (1969).
55. 250 So. 2d 875 (Fla. 1971).
56. *Id.* at 878.
57. State v. Putnam County Dev. Authority, 249 So. 2d 6 (Fla. 1971).
58. *Id.* at 10.
59. *Id.*
60. *See* text accompanying notes 163-170 *infra*.

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broadly as possible, especially with regard to the *purposes* for which the bonds may be issued.[61] These broad purposes, particularly those relating to improvement of living conditions and contributing to the prosperity and welfare of the state and its inhabitants, should be the basis for further innovative and imaginative legislation to provide governmental incentives to private investment in social, human, and environmental engineering.

Mortgaging of Project

The Act specifically provides for "the mortgaging of any project or any part thereof as security for the repayment of the bonds."[62] While the Act only refers to a lease,[63] it is nevertheless clear, both from the provisions and general powers in the Act[64] and a supreme court decision,[65] that mortgaging of the facilities is permissible to secure repayment of the bonds.

A far more difficult constitutional question, whether the Act authorized local governmental units to mortgage the facilities, arose because the new constitution authorizing industrial revenue bonds did not expressly permit mortgaging of the facilities.[66] The provisions of the new constitution authorizing industrial revenue bonds did not expressly permit mortgaging of the facilities. Thus, all of the supreme court's decision under the old constitution, which prohibited mortgaging of properties to secure repayment of revenue bonds issued by public bodies without approval by referendum,[67] remained as the general standards for constitutionality. The *Putnam County* court's rationale in upholding the constitutionality of the mortgage provisions of the Act is both interesting and instructive because of its forthright recognition of the true nature of industrial revenue bonds and the profound change affected by the new constitution.[68]

The threshold need to determine the constitutionality of mortgaging of the facilities is, of course, because the bonds may be issued without referendum.[69] The *Putnam County* court found that the constitutional prohibition against mortgaging of facilities without approval of the electorate was still viable where facilities to be financed by the bonds would serve a substantial public purpose.[70] This result is based on the contingency that in the event of default under the mortgage by the private user, the public body issuing the bonds might feel compelled to take over the project and pay for the bonds

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61. Fla. Stat. §159.43 (1969).
62. Fla. Stat. §159.35 (1969).
63. *See, e.g.*, Fla. Stat. §§159.29-.32 (1969).
64. Fla. Stat. §159.28(3) (1969).
65. State v. Putnam County Dev. Authority, 249 So. 2d 6, 10 (Fla. 1971).
66. *Id.*
67. *See, e.g.*, Hollywood, Inc. v. Broward County, 90 So. 2d 47 (Fla. 1956); Leon County v. State, 122 Fla. 505, 165 So. 666 (1936); Boykin v. Town of River Junction, 121 Fla. 902, 164 So. 558 (1935).
68. State v. Putnam County Dev. Authority, 249 So. 2d 6, 12-13 (Fla. 1971).
69. Fla. Stat. §159.34(5) (1969).
70. State v. Putnam County Dev. Authority, 249 So. 2d 6, 12 (Fla. 1971).

out of its general revenues in order to avoid losing the facility.[71] The court cited *Nohrr v. Brevard County Educational Facilities Authority*[72] as an example of a situation in which the old constitutional prohibition against mortgaging of the facilities to secure repayment of bonds was still viable. There the facilities to be mortgaged were educational, the public interest in maintaining such facilities being obvious. Industrial revenue bonds, however, were ruled an exception from the general doctrine because the court recognized that the dominant "purpose" of the Putnam projects financed by the bonds was the "benefit to private interest . . . the benefit to the public being an indirect one."[73] The distinction permitted mortgaging of the facilities because:[74]

> in the event of a threatened foreclosure, then the only party threatened with a loss would be the private party who was the beneficiary of the project. Therefore it follows that neither the State nor the County would feel compelled directly or indirectly, to levy taxes or appropriate funds to prevent the foreclosure. The public would stand to lose no more in this foreclosure proceeding than it would in any other foreclosure proceeding which involved a local business or industry.

Therefore, the mortgaging provisions of the Act did not directly or indirectly pledge the credit of the state or its political subsdivisions.[75]

The supreme court's recognition that the dominant purpose of the Act is to benefit a private interest, and that the benefit to the public will be indirect is critical. In effect, it rejects the view that the old doctrines of "public purpose" are still applicable to the bonds issued under the new constitution,[76] and constitutes judicial recognition of the entirely new standard that the legislature and the people intended to be used in reviewing the validity of these bonds. This break with the past will hopefully free the judiciary to deal with the present challenges for which the bonds might be used to provide solutions.

Interest Rate Limitation

An important factor affecting a bond's marketability is, of course, its yield to investors. Generally, the maximum interest payable on an obligation issued by public bodies and political subdivisions of the state is 7.5 per cent.[77] This prohibition, however, does not apply to an act authorizing bonds with a higher interest rate limitation or no interest rate limitation.[78]

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71. *Id.* at 10-12.
72. 247 So. 2d 304 (Fla. 1971).
73. State v. Putnam County Dev. Authority, 249 So. 2d 6, 12 (Fla. 1971).
74. *Id.*
75. *Id.*
76. Note, *Industrial Development Bonds Under Article VII, Section 10 of the Florida Constitution of 1968*, 21 U. Fla. L. Rev. 656, 661-63 (1969).
77. Fla. Stat. §130.012 (Supp. 1970).
78. Fla. Stat. §130.012 (2) (Supp. 1970).

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Since the Act imposes no such limitation the marketability of industrial revenue bonds is greatly enhanced.[79] In addition to enhancing the marketability of the bonds, the lack of interest limitation recognized that the private occupant and not the municipalities would be obliged to pay the interest on the bonds. The bond market itself, as the chief determinant of interest rates, would establish the interest rate on the bonds at a different level than if the full faith and credit of the municipality were pledged. Therefore, it was not only desirable, but essential, that no limitation be placed upon the interest rate.

Securities Acts and Registration Requirements

The primary attractiveness of industrial revenue bond financing to the business community is, of course, economic. In addition to the lower interest cost obtained by virtue of the interest's tax-exemption status,[80] the bonds are also exempt from the registration requirements of both the state and federal securities laws. This exemption saves not only substantial legal, accounting, and printing costs of initial registration, but also similar costs incurred in the numerous periodic reports required over the life of the issue. The Act also provides an express exemption from approval by any state board or regulatory agency,[81] including the Florida Securities Commission.

Moreover, a recent development in this type of financing provided that, to the extent that interest is exempt from federal taxation,[82] the bonds are automatically exempt from registration requirements of the Federal Securities Acts. The Securities and Exchange Commission had previously taken the position that such bonds were actually a corporate security for which registration was required.[83] Congress, however, found that the cost of the registration procedure, both financially as well as in terms of time, was prohibitive to smaller communities obtaining much needed financing through such bonds.[84] Congress' purpose in providing the bonds' tax-exempt status had been two-fold: (1) to encourage and assist states with relatively little industrial development; and (2) to provide an atmosphere in which young homegrown industries could obtain comparatively inexpensive financing necessary to compete with the established industries of heavily industrialized and capitalized Northeastern and Great Lakes states.[85]

Since the SEC's refusal to exempt the bonds from registration was frustrating these congressional purposes, the matter was legislatively resolved by an amendment to the Securities Acts, which provided that industrial revenue

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79. The overwhelming testimony offered to the legislature expressed the opinion that no interest ceiling or limitation should be set by the Act. *1969 Hearings, supra* note 2, at 59, 143, 234.

80. *See* text accompanying notes 89-103 *infra*.

81. Fla. Stat. §159.34(5) (1969).

82. *See* text accompanying notes 89-103 *infra*.

83. SEC Securities Act Release No. 8388 (Aug. 28, 1969); SEC Securities Act Release No. 4921 (Aug. 28, 1969).

84. 116 Cong. Rec. 5263 (1970).

85. *Id.*

bonds would be exempt from the registration requirements of the Federal Securities Acts where the bond's interest is exempt from federal taxation.[86]

Despite exemptions from security registration laws, several safeguards remain. The bonds are marketed pursuant to an official statement similar to the prospectus of a conventional corporate offering, the contents of which are scrutinized by the officers of the issuing municipality as well as by the investing public.[87] Moreover, exemption from the registration requirements does not relieve the corporation from the anti-fraud provisions of the Federal and Florida Securities Acts.[88] Therefore, investors are afforded both review of the issue by a concerned public body and the same protection against fraud in the marketing documents as in other offerings.

Tax Exemption

Interest on bonds qualifying under the limited categories established by the Internal Revenue Code is exempt from federal taxation.[89] Interest on the tax-exempt bonds is, of course, lower than on interest that is taxable because the net after-tax yield to the investor is higher than he would receive on a traditional, taxable corporate bond bearing a higher interest rate. The corporation, therefore, incurs a substantially reduced cost of financing through the lower interest rates attributable to the tax exemption.[90]

The tax-exempt nature of industrial revenue bonds was initially based on a ruling by the Internal Revenue Service.[91] The amount of financing undertaken under industrial revenue bonds was small. However, in the late sixties the use of industrial revenue bonds dramatically mushroomed as the cost of financing increased.[92] As states began to compete with each other for locating industry, enabling legislation was adopted, and the use of the bonds became increasingly abused. Initially validated by the Treasury for communities in order to benefit business concerns of relatively small size and for relatively small amounts,[93] issues began to be undertaken by major industrial concerns as a routine method of corporate financing. Multi-million dollar issues by corporate conglomerates became common.[94] Not only did this abuse

86. Pub. L. No. 91-373, §401 (a) (1970), *amending* 15 U.S.C. §77 (c) (1970); Pub. L. No. 91-373, §401 (b), *amending* 15 U.S.C. §78 (c) (1970).

87. *E.g.*, in the Dade County issue, the occupying enterprise, Spencer Foods, submitted extensive financial data and information regarding its operations, officers, directors, and earnings projections to the county commission and other officers for their examination and consideration. This information was carefully scrutinized and weighed heavily in the approval of the issue, since it was felt by the officers of the county that any failure of this issue would have an indirect but nonetheless important effect upon the credit standing of the general obligation and other revenue bond issues of the county.

88. 15 U.S.C. §77 (9) (1970); 15 U.S.C. §78 (j) (1970); Fla. Stat. §517.301 (1969).

89. Code §103 (c).

90. Note, *The Taxability of State and Local Bond Interest by the Federal Government*, 38 U. Cin. L. Rev. 703, 711 (1969).

91. Surrey, *Tax Trends and Bond Financing*, 22 Tax Law. 123, 125-27 (1968).

92. *Id.* at 125.

93. *Id.*

94. *Id.* at 125-27.

deprive the federal government of tax revenues,[95] it also flooded the municipal market, causing interest rates on traditional municipal, general obligation offerings to rise drastically.[96]

As the tax exemption came under increasing attack,[97] the Treasury has begun to retreat from its exemption of the interest from federal taxation.[98] However, the Senate, reacting to the continuing bona fide needs of rural states using this form of financing to attract industry, strongly resisted the action being proposed by the Treasury.[99] Initially, the Senate voted to continue indefinitely the exemption afforded industrial revenue bonds.[100] Shortly thereafter, however, a compromise was adopted by Congress that satisfied both the need to cure the abuses and to preserve the tax-exempt status of the bonds.[101]

The chief abuse associated with the bonds was the size of the issues being offered.[102] The revised sections of section 103 of the Internal Revenue Code resolved this problem by limiting the purpose for which bonds of unlimited amounts may be issued. It placed a dollar limitation upon the bonds that may be issued for reasons other than those for which no dollar limitation is applicable. The present Code, therefore, provides a strict limitation within which the tax exemption might be obtained, and regulates abuse while still providing a tax-exempt incentive for rural areas to attract small growing industries in order to compete with highly industrialized areas of the country.

Although the Code generally treats industrial revenue bonds as taxable,[103] two categories of industrial revenue bonds are afforded tax-exempt status: (1) certain small issues and (2) exempt activities.

Small Issue Exemption

A broad class of exempt issues is authorized by section 103 (c) (6) of the Code. These bonds, which are limited to a certain dollar amount, may be issued if the proceeds are to be used for the acquisition, construction, reconstruction, or improvement of land or property of a character subject to the allowance for depreciation, or to redeem part or all of a prior issue the proceeds of which were used for that purpose.[104]

The dollar limitation originally imposed on these issues was $1 million.[105]

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95. *Id.* at 125; Martori & Bliss, *Taxation of Municipal Bond Interest—"Interesting Speculation" and One Step Forward*, 44 NOTRE DAME LAW. 191, 210 (1968).

96. Martori & Bliss, *supra* note 95, at 211-12; Surrey, *supra* note 91, at 125.

97. For a synopsis of the arguments against tax exemption for the bonds *see* Martori & Bliss, *supra* note 95, at 200-10.

98. *See* Proposed Treas. Reg. §1.103-7, 33 Fed. Reg. 4950 (1968).

99. *See* Martori & Bliss, *supra* note 95, at 206, 208.

100. 2 U.S. CODE CONG. & AD. NEWS 2379 (1968).

101. Pub. L. No. 90-364 (June 28, 1968). This compromise was a revision of §103 of the CODE under §107 of the Revenue and Expenditure Control Act of 1968.

102. *See* text accompanying notes 91-96 *supra*.

103. CODE §103 (c) (1).

104. CODE §103 (c) (6) (A).

105. CODE §103 (c) (6) (A).

The issuing governmental unit, however, may be given the election to increase the amount of the issue to $5 million[106] by filing its election in accordance with certain proposed Treasury rules.[107] Presently, legislation is pending in Congress that would raise the limit to $10 million and apply it retroactively to the date of enactment of the small issue exemption in 1968.[108]

There are numerous pitfalls that can easily disqualify an offering from tax-exempt status under the small issue exemption. For instance, in determining whether the dollar limitation has been exceeded, certain prior issues must be added to the amount of the present issue.[109] This is true, however, only if the prior and present issues are to be used primarily to finance facilities located in the same incorporated municipality or county, and the principal user of the facilities is the same person or are two or more related persons.[110] Therefore, if a corporation finances the facilities with a $3 million issue in a particular municipality and subsequently attempts to finance another facility in the same municipality for another $3 million issue, the amounts of the two issues will be aggregated and the dollar limitation of the small issue exemption exceeded.

Two factors, however, must be emphasized. First, the provisions for aggregation of issues applies only when the facilities are located in the same incorporated municipality or in the same county, but not in any incorporated municipality.[111] Thus, a facility may be located in an incorporated municipality that is within a county, and another facility located in the same county, but not within the limits of the same incorporated municipality without aggregating the face amounts of both issues. Similarly, issues may be undertaken for facilities in two different municipalities within the same county without aggregating the amounts of the issues.

Second, the principal user of the facilities must be the same, or two or more related persons,[112] in order to cause aggregation of the amounts of the issues.[113]

Moreover, when the $5 million election is utilized, additional restrictions are imposed. In this situation any capital expenditures made on facilities located in the same incorporated municipality or same county (but not in an incorporated municipality) used by the same person or two or more related persons,[114] during the period beginning three years before the date of

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106. CODE §103 (c) (6) (D).

107. Proposed Treas. Reg. §1.103-10 (b) (2) (vi), 36 Fed. Reg. 10962 (1971).

108. S. Res. 1644, 92d Cong., 1st Sess. (1971); H. Res. 8346, 92d Cong., 1st Sess. (1971); H. Res. 4752, 92d Cong., 1st Sess. (1971).

109. CODE §103 (c) (6) (B).

110. *Id.*

111. *Id.*

112. Related persons are defined as: "(a) the relationship between such persons would result in a disallowance of losses under section 266 or 707 (b), or (b) such persons are members of the same controlled group of corporations (as defined in section 1563 (a), except that 'more than 50 per cent' shall be substituted for 'at least 80 per cent' each place it appears therein)." CODE §103 (c) (6) (C).

113. CODE §103 (c) (6) (B) (ii).

114. CODE §103 (c) (6) (E).

the issue and ending three years after the date of the issue, must be added to the amount of the issue as established under section 103 (c) (6) (B) in determining whether the dollar limitation has been exceeded.[115] These capital expenditures are to be added only if not financed out of other outstanding industrial revenue bond issues. This provision is the result of the fact that if they were financed out of other outstanding issues they would be aggregated under section 102 (c) (6) (B). The Code, however, provides that certain capital expenditures will not be taken into account in the foregoing formula.[116]

The proposed regulations also provide that if a corporation acquires the assets of another corporation under section 381 (a) or stock of another corporation under section 351 (a), neither situation constitutes a capital expenditure by the acquiring corporation.[117] However, if the exchange occurs during the six-year period beginning three years before the date of the bond issue and ending three years after said date, the expenditures may be included indirectly.[118] With regard to the acquisition of assets, the two corporations shall be treated as "related persons."[119] The result is that any expenditures made by the corporation whose assets are acquired, which fall under section 103 (c) (6) (D), shall be attributed to the acquiring corporation and aggregated to the amount of the bond issue. In connection with acquisition of the stock of another corporation, all capital expenditures made by the corporation whose stock was acquired and that fall under section 103 (c) (6) (D) are attributed to the acquiring corporation and added to the face amount of the bond issue.

The question becomes critical with acquisition of already existing facilities. For instance, in the Dade County issue, Spencer Foods had purchased a meat processing plant, the equipment, and a related facility from another corporation for approximately $4 million. A $3.85 million face amount of the issue was to finance the acquisition and improvement of the facility. Certain portions of the facility acquired had been constructed by the preceding owner within three years prior to the date of the bond issue. Under a strict construction of the Regulations and the Code it appeared that the cost of the construction, which had occurred during the last three years, had to be added to the face amount of the bond issue. The aggregation would have placed the total dangerously close to the $5 million limitation.

Such a result, of course, would have been anomalous. When the purchase

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115. CODE §103 (c) (6) (D).

116. *Id.* These expenditures include: (1) expenditures made to replace property destroyed or damaged by casualty to the extent of the fair market value of the property; (2) expenditures required by a change in federal, state, or local ordinances of general application or by regulations promulgated thereunder after the effective date of the issue; (3) expenditures required by circumstances not reasonably foreseeable at the date of the issue or arising out of mistake of law or fact, provided that the aggregate amount of such expenditures shall not exceed $1 million. CODE §103 (c) (6) (F), *as amended*, Pub. L. No. 92-178, §315 (b) (Dec. 10, 1971).

117. Proposed Treas. Reg. §1.103-10 (b) (2) (v) (a), 36 Fed. Reg. 10963 (1971).

118. Proposed Treas. Reg. §1.103-10 (b) (2) (v) (b), 36 Fed. Reg. 10963 (1971).

119. *Id.*

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price of the facility includes fair market value of expenditures made within the prior three years, those capital expenditures are already included in the purchase price that is financed by the bond issue. To add those expenditures to the face amount of the issue would count the same capital expenditure twice.

On this basis, a request for a ruling was made to the Internal Revenue Service that such capital expenditures should not be added to the face amount of the bond issue. The Service ruled that such capital expenditures made during the three years prior to the date of the bond issue by Spencer Foods or a related person (the preceding owner), the costs of which were reflected in the proposed bond issue, would not be added to the face amount of the bond issue for purposes of determining whether the bonds met the $5 million limitation.[120]

If the limitation is exceeded, the tax exemption is obviously lost. If, however, the exemption is lost by virtue of the aggregation of capital expenditures under section 103 (c) (6) (D), it is lost only prospectively from that date that the limitation was exceeded.[121]

The bonds will also lose their tax-exempt status when they are held by a substantial user of the facilities or a related person. A substantial user generally includes any non-exempt person[122] who regularly uses the facility in his trade or business.[123] This use may be satisfied by virtue of a contractual or preemptive right to exclusive use of the facilities, by occupancy under lease, or by regular non-incidental use under a license.[124] In the absence of special circumstances, however, persons working in the facilities as employees of a substantial user are not substantial users.[125] In addition, a regular user may not be a substantial user when the area he uses and the amount he derives are insubstantial as compared to the area and revenue of the entire facility.[126]

While bond interest will not be exempt from taxation for any period during which the bonds are held by a substantial user of the facilities or a related person,[127] the tax exemption is apparently lost only to the particular bonds held by a substantial user or related person and only for such periods as they are actually held by him.[128] Accordingly, even if a portion of the issue was held by a person in the prohibited class, the exemption would still apply to bonds held by persons outside that class. Moreover, once the bonds

120. Letter from Internal Revenue Service to Mr. Joseph Guandolo, Sept. 2, 1971, on file in the office of the *University of Florida Law Review*. Mr. Guandolo was the bond attorney for Dade County in this case.

121. CODE §103 (c) (6).

122. Generally, a non-exempt person includes a governmental unit or other non-taxable person under §501 of the Code. CODE §103 (c) (3).

123. Proposed Treas. Reg. 1.103-11 (b), 36 Fed. Reg. 10966 (1971).

124. *Id.*

125. *Id.*

126. *Id.*

127. CODE §103 (c) (7).

128. Proposed Treas. Reg. 1.103-11 (a), 36 Fed. Reg. 10966 (1971).

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were transferred out of the hands of the prohibited person, they would regain their tax-exempt status.

Exempt Activities

An industrial revenue bond is completely tax-exempt and is exempt from most of the restrictions of section 103 (c) (6) of the Code,[129] if substantially all of the issue's proceeds are to be used to provide either:

(1) residential real property for family units;
(2) sports facilities;
(3) convention or trade show facilities;
(4) airports, docks, wharves, mass commuting facilities, parking facilities, or storage or training facilities directly related to any of the foregoing;
(5) sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy, gas, or water; or
(6) air or water pollution control facilities[130] or for the "acquisition of development of land as the site for an industrial park,"[131] or for the acquisition of water, if available on reasonable demand to members of the general public.[132]

Unlike the small issue exemption,[133] there is no limitation upon the size of an issue to be used for these purposes.[134] The lack of a size limitation makes it unnecessary for the issuer to cope with the usual difficult problems presented by industrial revenue bond financing — prior issues,[135] aggregation of capital expenditures within three years prior and three years subsequent to issuance of the bonds,[136] and other facilities in the same community occupied by the same principal user[137] or a related person.[138] The bonds, however, will generally lose their tax-exempt status for the period held by a substantial user of the facilities or a related person.[139]

The facilities delineated under section 103 (c) (4) must "serve or be available for general public use" in order to qualify under the proposed regulations.[140] Additionally, the proposed rules for industrial parks do not contemplate use by a single enterprise.[141]

Moreover, facilities that are functionally related and subordinate to the facilities listed under section 103 (c) (4) may also be financed by the issue's

129. *See* text accompanying notes 104-128 *supra*.
130. CODE §103 (c) (4), *as amended*, Pub. L. No. 92-178, §315 (a) (Dec. 10, 1971).
131. CODE §103 (c) (5).
132. Pub. L. No. 92-178, §315 (a) (Dec. 10, 1971).
133. CODE §103 (c) (6).
134. CODE §103 (c) (4).
135. CODE §103 (c) (6) (B).
136. CODE §103 (c) (6) (D) (ii).
137. CODE §§102 (c) (6) (B) (ii), 103 (c) (6) (E) (ii).
138. CODE §§103 (c) (6) (B) (ii), 103 (c) (6) (C).
139. CODE §103 (c) (7).
140. Proposed Treas. Reg. 1.103-8 (a) (2), 36 Fed. Reg. 10958 (1971).
141. Proposed Treas. Reg. 1.103-9 (b), 36 Fed. Reg. 10961 (1971).

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proceeds.[142] Of course, they must be of a "character and size commensurate" with that of the main facility in order to qualify as "functionally related or subordinate."[143] The Treasury, however, has proposed the authorization of the application of "insubstantial amount[s] of the proceeds of a bond issue" to finance facilities that are not functionally related or subordinate.[144]

Finally, the proceeds may be used by the governmental unit either to (1) construct the property and leave it to the user in his trade or business; (2) make a loan to such user to construct the facilities; or (3) make a loan to a financial institution to increase the supply of mortgage funds available for financing such facilities, but requiring that the proceeds be used only for such facilities.[145]

The scope of the provision for issues to finance acquisition and development of land for industrial parks is broad. The Code defines the term "development of land" to include water, sewage drainage or similar facilities, or transportation, power or communication facilities, which are incidental to the user of the site as an industrial park.[146] Proceeds of an issue to be used for structures or buildings in the park are specifically excluded from the tax-exempt status.[147]

While there is no public-use requirement for industrial parks, there are public-oriented restrictions on such issues. The Treasury Regulations require that either control and administration of the tract be vested in governmental units or an exempt person. Alternatively, they provide that the uses of the tract must be regulated by minimum protective restrictions on the size of sites, parking, loading, and sellbacks and must be compatible with community use of the surrounding land.[148]

The mechanical descriptions of the structures and facilities that will qualify under the categories included in section 103 (c) (4) are enumerated in the proposed Treasury regulations.[149] Each case must be carefully analyzed with consideration given to both the broad applicable doctrines discussed earlier and the examples and detailed guidelines set forth in the Regulations.[150]

Determination of Tax-Exempt Status

Although some commentators expressed the opinion that a ruling from the Internal Revenue Service confirming the tax-exempt status of the bonds

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142. Proposed Treas. Reg. 1.103-8 (a) (3), 36 Fed. Reg. 10958 (1971).
143. *Id.*
144. *Id.*
145. Proposed Treas. Reg. 1.103-8 (a) (4), 36 Fed. Reg. 10958-59 (1971).
146. Code §103 (c) (5).
147. *Id.*
148. Proposed Treas. Reg. 1.103-9 (b), 36 Fed. Reg. 10961 (1971).
149. *See* Proposed Treas. Reg. 1.103-8, 36 Fed. Reg. 10958 (1971).
150. For a discussion of these guidelines in their pre-adoption proposed form *see* McCollum, *Industrial Development Bonds and Tax Policy: A Trend Toward Vivisection of Public Finance*, 23 Tax Law. 383 (1970).

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should be a prerequisite to their issuance,[151] the Florida supreme court has rejected this position.[152] In *State v. County of Dade*[153] the state argued that only the federal government could make a determination of tax-exempt status. Dade County had relied on the opinion of the county attorney in conjunction with its special bond counsel that the issue met all the requirements of the Internal Revenue Code for tax-exempt status. The court, in upholding the action of the county and its right to make the determination of tax-exempt status, stated that the state's argument:[154]

> [I]gnores the fact that the constitutional provision in question does not, by its terms, require a federal determination of this state right. Absent such language, in our judgment, it is more reasonable to assume that the framers of the provision intended that the universal practice in municipal bond matters of relying on the opinion of qualified bond counsel be followed. Accordingly, we hold that it is not necessary for a local agency contemplating a revenue bond issue to obtain the determination of exemption from the federal government, although, of course, such a local agency may go through the Internal Revenue Service or the U.S. Tax Court if it desires to do so.

Tax Policy

Attacks on the tax-exempt status of industrial revenue bonds have not ceased despite the new Code provisions, which go far to cure the old abuses. Although much of the continuing attack utilizes the same arguments made prior to adoption of the Tax Reform Act of 1969, new arguments based on the entire concept of federal taxation as an incentive to certain programs are the most frequently used arguments today. Other arguments would entirely abolish the tax-exempt status for any bonds issued by municipalities.

One of the most prominent arguments for abolition of tax-exempt status of industrial revenue bonds is the theory of "tax expenditures."[155] The theory basically asserts that tax exemptions and tax deductions deprive the federal government of tax revenues. Where the tax deductions and exemptions are allowed to encourage development in certain fields or to give assistance to certain groups, it is the equivalent of the federal government's spending one dollar in that field for every dollar of tax revenue that is lost by virtue of the deductions or exemptions given. The proponents of this

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151. *E.g.*, Note, *Industrial Development Bonds Under Article VII, Section 10 of the Florida Constitution of 1968*, 21 U. Fla. L. Rev. 656, 664 (1969).

152. State v. County of Dade, 250 So. 2d 875 (Fla. 1971).

153. 250 So. 2d 875 (1971).

154. *Id.* at 878.

155. The primary proponent of this theory is Professor Stanley S. Surrey, former Assistant Secretary of the Treasury, now a law professor at Harvard University. For the general background on Professor Surrey's theory *see* Surrey, *The Tax Reform Act of 1969—Tax Deferral and Tax Shelters*, 12 B.C. Ind. & Com. L. Rev. 307 (1971). For a detailed analysis of the theory of tax expenditures *see* Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary To Replace Tax Expenditures with Direct Governmental Assistance*, 84 Harv. L. Rev. 352, 370-80 (1970).

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theory argue that it would be better for the deductions and exemptions to be abolished, and for the federal government to use the additional tax revenues to make outright expenditures in these fields. The benefits sought by the proponents of this theory are that: (1) the federal government, by making direct expenditures, can more effectively control them and prevent abuses; (2) it will allow more accurate bookkeeping to more accurately reflect the amount of assistance given in each area and to various groups; and (3) it will be a more efficient way of rendering assistance and encouragement in a desired field.[156]

It is submitted that the tax expenditure theory, while persuasive, overlooks several important considerations vis-a-vis industrial revenue bonds. First, while the tax exemptions on industrial revenue bonds do deprive the Government of tax revenues, there is substantial evidence that the economic stimulus provided by the projects financed by the bonds "generates corporate and individual tax revenues to the federal and state governments which are far in excess of the tax revenues lost by reason of the exemption of interest."[157]

Second, and more important, is the inherent supposition on which the tax expenditure theory must be based: tax revenues generated by abolition of the exemption and utilized in the form of outright expenditures will equal the private investment generated by the bonds. Simple mathematics emphasize the fallacy of this assumption. Assuming a 6 per cent interest coupon, a 20-year term bond issue of $1 million marketed at par would yield a gross interest of $1,200,000. Assuming that all investors are in the 50 per cent tax bracket, the tax revenues generated by abolition of the tax exemption would only be $600,000 over the life of the issue. Support of the bureaucratic structure necessary to collect, allocate, and redistribute these revenues pursuant to the tax expenditure theory would further substantially reduce the revenues. Therefore, at best only $500,000 of truly expendable revenues would be generated by the tax expenditure theory and even these would have to be spread over a period of 20 years rather than permitting private enterprise to invest $1 million in the first year of the term of the bonds. In other words, tax expenditures in the first year would be $25,000 as opposed to private investment of $1 million. Even a matching funds program would have to be based on a ratio of 40-1, and one is constrained

156. *See, e.g.*, Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary To Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 371-80 (1970).

157. *Hearings Before the Senate Subcomm. on Rural Affairs* (remarks of Bennett S. Martin, Chairman, Advisory Comm. to the Nebraska Dep't of Economic Development) (Sept. 10, 1971). Further evidence of this result was introduced when the University of Florida scientifically established that 100 new factory jobs meant: 296 more people; $590,000 more personal income per year; $270,000 more bank deposits; 112 more households; 51 more school children; 107 more passenger cars registered; 174 more workers employed; 4 more retail establishments; $360,000 more retail sales per year. Note, *Industrial Development Bonds: Judicial Construction vs. Plant Construction*, 15 U. FLA. L. REV. 262, 278 (1962).

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to ask where the federal government would derive the additional revenues to fund such a program.

Moreover, the tax expenditure theory constitutes a regression to programs funded by a remote, highly-structured bureaucracy in Washington, at a period when the emphasis is on decentralization in the form of revenue-sharing and similar plans. Not only has experience shown that such highly centralized programs have lacked responsiveness to local needs and understanding of the peculiarities of local situations but the bureaucratic structure required to allocate and distribute these funds has also proved tremendously expensive. To counter the argument that federal financing or direct expenditures are more efficient, one need only point to the history of mismanagement and inefficiency of many federally-sponsored programs.

Finally, to argue that the tax expenditure theory should be implemented in the name of more accurate bookkeeping to reflect where federal money is being "spent" is strikingly similar to the sort of reasoning that would prompt a company to emphasize bookkeeping records to such an extent that the actual means of producing revenues deteriorates.

The revisions of section 103 of the Code evince specific areas in which Congress feels there is a social need to encourage private investments of either limited amounts[158] or unlimited degree.[159] It is doubtful that the federal bureaucracy can long support the programs for underprivileged and impoverished sectors of our society without gaining the support, and more critically, the participation of private investment. The tax expenditures program would nullify this purpose by excluding incentive to private investment in favor of the federal program that has such a dismal history.

It is submitted that the tax-exempt status of these bonds should remain with all limitations necessary to reduce abuses that had occurred before revision of the Code. Tax exemption is needed to stimulate private participation in social, human, and environmental engineering in the areas set forth in the Code. The Florida Industrial Development Financing Act should also be expanded to include these areas in order to extend the full benefit of the Code provision to Florida.

The Florida Act and Society

Impetus was given to the use of the Florida Industrial Development Financing Act for social and human needs by adoption of supplementary legislation in 1970.[160] The 1970 Act expanded the use of the bonds to waste facilities and anti-pollution facilities.[161] The following is a summary of the impact of this legislation. Consideration is also given to expansion of the Act into the other areas provided by the Code for which unlimited tax exemption is provided.

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158. *See* text accompanying notes 133-150 *supra.*
159. *See* text accompanying notes 146-150 *supra.*
160. Fla. Stat. §§159.44-.53 (Supp. 1970).
161. Fla. Stat. §159.46 (Supp. 1970).

Anti-Pollution Facilities

Although anti-pollution facilities were not expressly included in the 1969 Act,[162] they were included in the definition of "project" contained in supplementary legislation enacted in 1970.[163]

The scope of the 1969 Act, however, was extended to encompass anti-pollution facilities in *State of Florida v. Putnam County Development Authority*.[164] In this case the Florida supreme court held that the definition of "project" in the 1969 Act impliedly included pollution control facilities.

The *Putnam County* case illustrates the dilemma confronting those attempting to accommodate society's interest in industry and in ecology. In that case the Hudson Paper Company had been furnished notice that it was discharging improperly treated industrial waste from its Palatka mill located in Putnam County. It was ordered to furnish evidence of corrective procedure within 90 days. Hudson proposed construction of a water-treatment facility, the plans were approved by the control commission, and Hudson was given until January 31, 1973, to comply. Failure by Hudson to provide the facility within the time allotted would subject it to imposition of fines not exceeding $5,000 per day. Closing of the plant because of its inability to comply with the commission's edict would cause Hudson, one of the major industries of Putnam County, to discharge a large number of its employees in an area where other employment would not be readily available.

The Putnam County Development Authority, therefore, undertook the issuance of $4.5 million of industrial development bonds for the purpose of constructing the facilities, selling them to Hudson, and taking back a mortgage, under which installment payments would be sufficient to retire the principal and interest of the bonds.

The court found that the Act's definition of "project" as "any rehabilitation, improvement, renovation, or enlargement of, or any addition to, any buildings or structures for use as a factory"[165] impliedly included pollution control facilities.[166] It found this meaning in the general purposes of the Act included contribution to the economy of the community. The opinion indicated that maintaining the status quo of the community's economy satisfied this purpose, and that the project did not actually have to increase the economy of the community. However, the court did find that the treatment facility would increase the attractiveness of Putnam County to new industry and provide additional gainful employment at the Palatka mill.

Additional justification for the project was found in the purpose to "improve living conditions and otherwise contribute to the prosperity and the welfare of the state and its inhabitants . . . ." The court held "it [was] hard to imagine a more propitious project to improve the living conditions in our great state at this time than a pollution control project."[167]

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162. Fla. Laws 1969, ch. 69-104.
163. FLA. STAT. §§159.44 (2), .46 (Supp. 1970).
164. State v. Putnam County Dev. Authority, 249 So. 2d 6 (Fla. 1971).
165. FLA. STAT. §159.25 (5) (1969).
166. 249 So. 2d at 10.
167. *Id.*

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It was necessary to infer anti-pollution facilities from the 1969 Act rather than using the 1970 Act because of the agency issuing these bonds and the terminology of the 1970 Act. The 1970 Act created special industrial development authorities within each county for issuance of industrial revenue bonds and specially added, *inter alia,* anti-pollution facilities to the projects that they might finance.[168] Such authorities, however, could only be activated upon certain action being taken by the county commission. Although the terms of the 1970 Act applied all of the provisions of the 1969 Act to bonds and agencies under the 1970 Act,[169] it did not specifically make the provisions of the 1970 Act applicable to the bonds and agencies defined in the 1969 Act. On the other hand, "local agency" was defined in the 1969 Act as "any county or municipality existing or hereafter created . . . or any special district or other local government body existing or hereafter created pursuant to the laws of the state . . . ."[170] Therefore, the 1969 Act was used to uphold the validity of the bonds.

Accelerated Depreciation of Certain Property

In addition to the unlimited tax-exempt status on interest of bonds used to finance anti-pollution facilities, an additional tax incentive is provided by accelerated depreciation of these facilities. The scope of this article does not permit a detailed analysis of the rules for accelerated depreciation of anti-pollution facilities. Nonetheless, the following highlights of the Code and Treasury Regulation provisions should provide the general framework of these provisions and a basis for further analysis for each case.

Section 169 of the Internal Revenue Code provides that a taxpayer may elect to depreciate the basis of any certified pollution control facility over a period of 60 months for purposes of deduction against federal income taxes.[171] The election must begin with the month following the month in which the facility was completed or acquired, or in the succeeding taxable year.[172] After electing the accelerated depreciation, the taxpayer is given the option to later discontinue that election and continue depreciation under standard procedures of section 167 of the Code.[173]

Only so much of the basis of the facility as is attributable to its first 15 years of useful life is depreciable under the accelerated depreciation provisions.[174] Moreover, such depreciation is in lieu of both the standard depreciation of section 167[175] and the investment credit.[176] However, the additional first-year depreciation of section 179 is still available,[177] and both

168. Fla. Stat. §159.45 (Supp. 1970).
169. Fla. Stat. §159.47 (7) (Supp. 1970).
170. Fla. Stat. §159.27 (1) (1969).
171. Code §169 (a).
172. Code §169 (b).
173. Code §169 (c).
174. Code §169 (f) (2) (A).
175. Code §169 (a).
176. Code §169 (h).
177. Treas. Reg. 1.169-1 (a) (3) (iii) (1971); Treas. Reg. 1.169-3 (b) (2) (1971); Treas. Reg.

the standard depreciation deduction[178] and the investment credit[179] may be applied to the portion of the facilities not depreciated pursuant to section 169.

The critical consideration is exactly what constitutes a certified pollution control facility. It is defined in the Code[180] as a "new identifiable treatment facility which is used, in connection with a plant or other property in operation before January 1, 1969, to abate or control water or atmospheric pollution . . . which:"[181]

> (a) the state certifying authority has certified to the federal certifying authority that the facility has been constructed or acquired in conformity with the state program or requirements for abatement or control of water or atmospheric pollution; and
>
> (b) the federal certifying authority has certified that it is in compliance with the applicable regulations of federal agencies and is in furtherance of the general policy of the United States for cooperation with the states in the prevention and abatement of water pollution under the Federal Water Pollution Control Act[182] or air pollution under the Clean Air Act.[183]

The state certifying authority is restricted to those authorities[184] defined in the Federal Water Pollution Control Act[185] or Clean Air Act.[186] The federal certifying authority is the Secretary of the Interior for water pollution and the Secretary of Health, Education and Welfare for air pollution.[187]

The facility must be tangible property of a nature subject to the allowance for depreciation provided in section 167, which is identifiable as a treatment facility.[188] In addition, the facility must have been completed by the taxpayer after December 31, 1968, if the original use of the property commences after that date.[189] The facility must also be placed in service by the taxpayer before January 1, 1975.[190]

A facility will not qualify where its use will produce profits derived from the treatment of waste so that the costs of the facility would be recovered over its useful life.[191] Incidental profit,[192] however, does not in-

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1.179-1 (e) (1) (ii) (1964); however, due to the $10,000 limit on the amount of the first year depreciation [CODE §179 (b)] the benefit of this provision is, in most cases, minimal.

178. CODE §169 (g); Treas. Reg. 1.169-1 (a) (3) (1971).
179. CODE §169 (h).
180. CODE §169 (d) (1).
181. CODE §§169 (d) (1) (A), (B).
182. 33 U.S.C. §§466 *et seq.* (1970).
183. 42 U.S.C. §§1857 *et seq.* (1970).
184. CODE §169 (c) (2); Treas. Reg. §1.169-2 (c) (2) (1971).
185. 33 U.S.C. §1173 (a) (1970).
186. 42 U.S.C. §1857 (h) (b) (1970).
187. CODE §169 (d) (3).
188. CODE §169 (d) (4) (A).
189. CODE §169 (d) (4) (A).
190. CODE §169 (d) (4) (B).
191. CODE §169 (c).
192. Treas. Reg. 1.169-2 (b) (2) (ii) (1971).

clude any savings generated by "reuse or recycling of wastes or other items" recovered in operation of the facility.[193] Finally, the committee report indicates that the facility must actually reduce or abate pollution, rather than result in mere diffusion or dispersion of pollutants.[194]

CONCLUSION

The Florida Industrial Development Financing Act is very much in use. Although to date there have been only two public bond issues based on the Act, many issues appear to be in the offing. Undoubtedly, the Act will continue to evolve by way of court interpretation and legislative amendment. Efforts to limit interest rates and to require state review are not unlikely. Obviously, issues that are poorly executed and unsound will lead to stricter regulation. It would be better to avoid such occurrences so that Florida industrial bond issues will be well received in the financial centers of the Nation and among investment bankers.

The hard-core unemployment of the urban ghettos and the low income of rural Florida could be dramatically reduced with the wise utilization of the Act in creating new jobs and balancing the economy while simultaneously fighting pollution of our sacred environment. Moreover, the Act offers promising possibilities of involving establishments, too often pre-occupied with profit spreads, in the socially essential task of improving the living conditions of America's underprivileged. Surely, the Act should be expanded by the legislature to apply to low- and middle-income housing, recreational facilities, and health delivery systems.[195] If its short history is any indication, the Florida Industrial Development Financing Act will play a significant role in making Florida a better place in which to live.

193. Treas. Reg. 1.169-2 (d) (2) (1971).

194. 115 CONG. REC. 40767 (1969).

195. Governor Reubin O'D. Askew is considering submission of legislation that would amend the Act (and the Florida constitution if necessary) to permit construction of these types of desperately needed housing. Interview with Hugh MacMillan, Chief Legislative Aide to Governor Askew, in Tallahassee, Florida, Sept. 13, 1971. The Governor's bill proposing a constitutional amendment, which would authorize use of municipal bonds similar to industrial revenue bonds to finance lower middle-income housing, died in the House Committee on Appropriations on April 7, 1972, and was indefinitely postponed by the Florida Senate on April 5, 1972. FLA. H.R. JOUR. 1232 (April 7, 1972); FLA. S. JOUR. 801 (April 5, 1972).