1968

Clyde J. Allen, For Himself and All Other Residents and Taxpayers of Tooele County, Utah, Similarly Situated v. Tooele County, A Political Subdivision of The State of Utah; George Willis Smith, George Buzianis and R. Sterling Halladay, Individually and As Members of The Board of Commissioners of Tooele County; Energy Leasing Services, Inc., A Delaware Corporation; and The Magnesium Project, A Joint Venture : Brief of Appellant

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Bryce E. Roe and Ralph L. Jerman; Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

CLYDE J. ALLEN, for himself and all other residents and taxpayers of Tooele County, Utah, similarly situated,

Plaintiff and Appellant,

v.

TOOELE COUNTY, a political subdivision of the State of Utah; GEORGE WILLIS SMITH, GEORGE BUZIANIS and R. STERLING HALLADAY, individually and as members of the Board of Commissioners of Tooele County; ENERGY LEASING SERVICES, INC., a Delaware corporation; and THE MAGNESIUM PROJECT, a joint venture,

Defendants and Respondents.

Case No. 11297

APPELLANT'S BRIEF

Appeal from a Judgment of the District Court of Tooele County, State of Utah Honorable D. F. Wilkins

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NATURE OF CASE

This is a class action for a declaratory judgment determining questions of the construction and validity of a state statute and actions taken by Tooele County pursuant to authority contained in the statute.

DISPOSITION IN LOWER COURT

The trial court, without a jury, held that the Utah Industrial Facilities Development Act (Chapter 29 Laws of Utah 1967; Title 11, Chapter 17, Utah Code Annotated 1953) is constitutional, valid and lawful; and that certain agreements negotiated and made between the defendants, and revenue bonds to be issued and sold by Tooele County, are lawful and enforceable in all respects.

RELIEF SOUGHT ON APPEAL

Plaintiff and appellant seeks reversal and remand to the District Court with directions to enter a judgment declaring the Utah Industrial Facilities Development Act to be unconstitutional and void, and actions taken and being taken by the defendants to be unlawful.

STATEMENT OF FACTS

The Statute Involved

On March 9, 1967, the 37th Utah Legislature enacted Senate Bill No. 187, known as the "Utah Industrial Facilities Development Act," to become effective May 9, 1967, as Chapter 29, Laws of Utah 1967 (codified as Title 11, Chapter 17, Utah Code Annotated 1953). The sections of the act are the same in the session laws as in the code, i.e., Section 1 of Chapter

29, Laws of Utah 1967, is codified as 11-17-1 Utah Code Annotated 1953. Section 16, the last section of the original act, is a garden variety savings clause that does not appear as a section in the code.

Sections 1 and 2 of the act are devoted to identifying the act and defining terms used in it.

Section 3 confers upon municipalities and counties the power to acquire and construct property suitable for "manufacturing, warehousing, commercial or industrial purposes" other than public utilities; to lease projects for such rentals and upon such terms and conditions as the governing body deems advisable; to issue revenue bonds for the purpose of financing the projects; and to grant options to renew leases and to purchase projects. The section prohibits a county or municipality from itself operating any project, from acquiring any part of a project by condemnation, and from acquiring or leasing projects which would compete with telecommunication, electric and natural gas utilities.

Section 4 describes the bonds as limited obligations which shall not constitute a general obligation or liability, or a charge against the general credit or taxing powers of, a municipality or county. The section contains additional provisions as to the form of the bonds, interest, and registration, and permits inclusion in the bonds of other provisions "deemed for the best interests of" the issuer. The bonds may be sold at public or private sale "as may be determined by the governing body to be most advantageous," and the bonds are to be negotiable.

Under Section 5 the issuers are directed to secure the bonds by "pledge and assignment of the revenues out of which such bonds may be made payable," and authorizes, in addition, a mortgage covering all or any part of the project, a pledge and assignment of the lease of such project, and "such other security device as may be deemed most advantageous by the governing body issuing the bonds." The issuer is authorized to include in the mortgage, among others, provisions related to fixing of rentals, terms to be incorporated in the lease, maintenance and insurance, use of special funds from the revenues of the projects, rights and remedies, appointment of a receiver upon default in the payment of principal and interest on the bonds, and foreclosure of the mortgage. In this section it is again expressly provided that breach of any agreement shall not impose any general obligation or liability, or create a charge upon the general credit or taxing powers of a municipality or county.

Under the provisions of Section 6 bonds may be refunded in advance or by exchange of refunding bonds to be issued under terms and conditions similar to those provided in Sections 4 and 5.

Section 7 provides that the proceeds from the sale of any bond shall be applied only for the purposes for which the bonds were issued; that any accrued interest and premium received may be applied to the payment of principal or interest; and that proceeds not needed for the project are to be applied toward payment of principal or interest on the bonds.

The "cost of acquiring or improving any project" is defined by Section 8 to include cost of acquisition or improvement of real estate, cost of enlarging, construction, reconstructing, improving, maintaining, equipping, or furnishing the project, including architect or engineer's fees, and expenses in connection with authorization, sale and issuance of the bonds, legal fees, financial advisors' fees, printing costs, and the interest on such bonds during construction, and for a reasonable period of time before and after construction.

Section 9 prohibits the municipality or county from commingling bond proceeds, project revenues, and interest, with any other funds of the county or municipality.

Section 10 declares that property acquired or held by the county or municipality under the act is "public property used for essential public and governmental purposes," and the property, the bonds issued under the act, and the income from them are exempted from taxes imposed by the state, county, municipality, or any other political subdivision in the state. There is an additional provision that the exemption shall not extend to "the interests" of the private persons, which shall be subject to the provisions of 59-13-73 Utah Code Annotated 1953, or other applicable law. The private entities are not exempted from taxation of income from the projects.

Section 11 contains a provision that the act shall not be be construed as limiting other powers that a county or municipality may already have.

Section 12 provides that the bonds are to be legal securities that may properly be purchased by public officers and public bodies of the state and its political subdivisions; and that may properly and legally be deposited with and received by any state or municipal officer for any purpose for which the deposit of bonds or obligations of the state is now or may hereafter be authorized by law.

Under the provisions of Section 13 the legislature agrees that the state will not hereafter alter, impair or limit the rights until the bonds, together with interest, are met and discharged and the contracts are fully performed, but that such alteration or impairment may be accomplished if provision is made for protection of the bond holders or persons entering into contracts with a county or municipality. The counties and municipalities are authorized to include the legislative pledge in bonds and contracts issued and entered into pursuant to the statute.

Section 14 exempts the bonds from provisions of the Uniform Commercial Code.

Section 15 exempts the bonds and projects from competitive bidding provisions otherwise applicable to sales and purchases of property, construction contracts, and sales and purchase of bonds.

The Planned Project

After the Utah Industrial Development Facilities Act was passed by the Legislature the Tooele County Commissioners decided to use the act for development of private industry within the county (Tr. 10). No formal investigation or hearing was undertaken by the county before the decision was made, though some inquiries were made by the Commissioners (Tr. 10). The inquiries disclosed some facts that would tend to negative the desirability of the proposed project. Commissioner R. Sterling Halladay testified that there is a low unemployment rate in Tooele County; housing is of doubtful availability; Grantsville does not have adequate sewage disposal facilities; and there is serious question as to the availability of school rooms. No methodical investigation was made to determine the effect of the bond issue on future bonding capacity for public improvements (Tr. 10-13). It was thought that diversification of industry is desirable (Tr. 20).

The County Commissioners did not meet with any group other than The Magnesium Project to discuss use of the act to develop private industry in Tooele County (Tr. 10).

Since about the effective date of the act negotiations have been going on between The Magnesium Project and Tooele County with respect to issuance of County bonds for the financing, acquisition, and construction of an electrolytic minerals extraction plant near Great Salt Lake, at an estimated cost of $52,000,000.

Tooele County is neither populous nor wealthy. In 1960 the population was 17,868 and there has been no marked growth since. In 1967 the total assessed valuation of property within the county was $28,122,-264.00, upon which taxes in the amount of $1,925,078.30 were levied and approximately $1,900,000.00 collected (Ex. P-1). It is expected that the assessed valuation for 1968 will be somewhat less than $30,000,000.00, and total taxes about $2,000,000.00 (Tr. 14, 18).

The Magnesium Project is a joint venture the interests in which are owned approximately 20% by H-K, Inc., a Utah corporation, and 80% by National Lead Company, a New Jersey corporation (Tr. 24). The financial condition of H-K, Inc., was not shown, but National Lead Company is a well-to-do corporation capable of obtaining its own financing. In 1967 the assets of the company were valued at more than $575,000,000, and income before taxes was almost $95,000,000 (Ex. D-8).

The ability to obtain financing for projects such as that planned for Great Salt Lake is dependent upon the underlying financial strength of the operators of the project, and bonds issued for development of the electrolytic extraction plant, to be readily marketable, would have to be guarantied by one or more of the members of the joint venture (Tr. 34). Although the company could arrange its own financing, it desires to use bonds issued by Tooele County because it is anticipated that the income from the bonds will be exempt from taxation by the United States and the State. Tax-exempt bonds customarily are purchased at lower rates of interest than bonds that are not exempt (Tr. 40).

Possible availability of tax-exempt bonding, however, is not the sole (and probably not the primary) motivation for location of the project in Tooele County. The Great Salt Lake is one of the world's best sources of magnesium and lithium; and the Tooele County site is strategically located with respect to ponding areas and railheads (Tr. 37-38).

Although not all of the agreements between Tooele County and The Magnesium Project have been executed, two of them have; the others have been reduced to writing and agreement reached on substantially all of the material terms and conditions to be contained in them.

On March 14, 1968, Tooele County entered into a letter agreement (Ex. P-3) with Goodbody & Co., a securities dealer, under which the company agreed to accept delivery of and pay for not more than $60,000,000 of bonds at a purchase price of $975 per $1,000 principal amount, plus accrued interest, and at a coupon rate of 5¾ per cent, subject to certain conditions.

On March 18, 1968, an agreement (Ex. P-2) was executed by The Magnesium Project and Tooele County under which the county agreed to make a search for and survey of, and to obtain options on property to be used for the project; also to investigate availability and prepare a report of possible water sources and highway locations, and conduct a survey of the labor force. To accomplish this the county agreed to utilize its officers, agents, and employees, and allocate necessary funds. The company agreed to make studies as to the "feasibility" of carrying out an electrolytic minerals extraction operation at the proposed site, and to notify the county whether it would enter into a lease with the county.

Both of the above agreements referred to a "Lease and Agreement" and a "Mortgage and Indenture of Trust," which are to be the governing documents. The lease and indenture both have been worked over in considerable detail and it is apparent that the county and The Magnesium Project are in substantial agreement on the terms to be included in them (Tr. 32-33). The lease consists of 46 pages, and the mortgage and indenture of trust consists of approximately 70 pages of printed material.

Although the agreement of March 18, 1968, referred to "feasibility" studies to be made by the company, testimony at the trial indicated that the feasibility had been dependent primarily upon the company's being able to obtain electric energy at a rate it regarded as being low enough to permit economical operation of the project. At the trial there was testimony that the company and Utah Power & Light Company, supplier of electrical energy, had substantially agreed upon all of the terms of an electrical supply contract and that execution of a contract was imminent (Tr. 37). Since the trial, newspaper reports indicate that a contract has in fact been signed by Utah Power & Light Company and The Magnesium Project. It thus appears that the county has executed contracts under which it is obligated to spend county money and use county personnel in aid of The Magnesium Project. In addition, the parties have progressed so far in their negotiations on the lease, mortgage, and indenture of trust that it may fairly be said that an agreement has been reached, whether or not is has been signed. There is a genuine controversy between the plaintiff and the defendants concerning the validity of the statute, the lease, and the bonds, as well as the agreements incidental to them.

ARGUMENT

POINT I

The act is unconstitutional because it authorizes lending of credit in aid of private enterprises.

Article VI, Section 31, Utah Constitution, provides:

> "The legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking."

Proponents of public bonding for the purpose of encouraging industry (defendants among them) have consistently argued that such constitutional provisions do not apply to industrial development bonds for the following reasons: (1) inasmuch as the development of private industry aids the general economy, the bonds are for a public purpose, not a "private individual or corporate enterprise or undertaking;" and (2) inasmuch as the bonds are not charges against the general revenues of a municipality or county, there is no "lending of credit."

The argument that the bonds are not in aid of private enterprise should have been laid at rest during Utah's constitutional convention. Article VI, Section 31 did not sneak into the constitution. The Report of Proceedings of the Utah Constitutional Convention contains lengthy debates about the desirability of such an article. Those opposed to the section argued that the territory's credit was needed to "build up industry, the prosperity and resources of the territory" (Page 909).

The section in question was proposed by Mr. Varian whose comments included the following:

> "The purpose of my section is to prohibit the lending of credit *in any way* for the furtherance of such enterprises as are indicated (Page 952) * * * It is a solemn duty, sir, that we have, to guard the public revenue and the public property from spoilation. We may not farm it out through future generations to be disposed of for other than the *necessary purposes of government*. You

> have it in your power to put into this organic law a statement which shall be in accord with the prevailing public and financial interests everywhere, that no public body, either state nor county, city nor township, nor district, shall ever burden the people's property, shall ever encumber the people's revenues, with an indebtedness designed to aid *other than public institutions* (Page 1001)." [Emphasis added.]

Another of the proponents, Mr. Richards, at Page 913 of the proceedings quoted Cooley, the renowned constitutional lawyer, as follows:

> "It has been well and forcibly said that individuals and corporations embark in manufactories for the purpose of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic, or the day laborer. They engage in the selected branch of manufactories for the purpose and with the hope and expectation not of loss, but of profits. The general benefit of the community resulting from every description of well regulated labor is of the same character, whatever may be the branch of industry upon which it may be expended. All useful labors, no matter what the field of labor, serve the state by increasing the aggregate of its profits, its wealth. There is nothing of a public nature."

The arguments for some form of public aid to private industry are the same today as when the constitution was being considered and adopted. They are variations of the latter-day Wilson's ingenuous remark: "What's good for General Motors is good for the country."

An incidental public benefit resulting from the creation and success of a private enterprise does not remove that enterprise from the "private" category and convert it into a "public institution."

A modern day recognition of the difference between "private" and "public" purposes is found in *State v. Town of North Miami*, 59 So.2d 779, (Fla., 1952), wherein the Supreme Court of Florida said:

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

The "lending of credit" argument must also fail. The quoted proceedings of the constitutional convention show that Section 31 was meant to prohibit the lending of credit "in any form," not only to protect the tax revenues but also the properties of the state and its subdivisions. Admittedly, some other courts have considered similar constitutional provisions and have held that if the general taxing power is not obligated for repayment of the bonds, there is no "lending of credit." But this court has itself recognized that "credit" involves factors other than the source from which the funds are to be repaid. As stated in *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P. 2d 161, 169 (1933) a case involving "revenue" bonds, the court said:

> "Nevertheless, the bonds must be paid when due, or city credit will be impaired. With noiseless foot and steady tread the day of reckoning inevitably comes to demand its toll. To a city, no less than to a state or individual, untarnished credit and an honored name are of inestimable worth. No wealth or power which may come to a community is of more lasting importance than the good name it maintains by keeping its faith unbroken by meeting all of its engagements and obligations. In spite of the fact that full faith and credit of a city is not pledged to payment of the revenue bonds, no prudent city will permit its promise to pay to go unfulfilled where it has received and enjoyed the fruits of the obligation."

In *State v. Brand*, 176 Ohio St. 44, 197 N.E.2d 328, (1964), a case involving industrial development revenue bonds, the court said:

> "The sale of revenue bonds of the state to raise money necessarily involves a borrowing of money even though no indebtedness of the state results. If the bonds are not paid, the borrowing power of the state will as a result be adversely affected, even though the bonds do not represent a debt of the state. The borrowing power of the state is related to the taxing power because, to the extent that the state's borrowing power is lessened, a greater burden will be placed upon its taxing power."

The Ohio court recognized what has long been recognized in financial circles, that the interest rate payable on bonds is determined in large measure by competition among bond sellers. If tax free bonds are multiplied, the interest payable by municipalities and counties on other tax free bonds likely will be increased. The result is that municipalities, cities, and counties may have to pay higher rates of interest on "legitimate" bonds issued to finance public improvements.

Increased interest and decreased borrowing power are not the only elements suggesting a "lending of credit" contrary to Section 31. The act is broad enough to permit a municipality or county to secure revenue bonds by pledge of income from property not acquired with bond proceeds. Section 3(1) permits acquisition by devise, gift, or exchange, as well as by purchase from bond revenues. By other provisions of Section 3, a project may be constructed on property "owned" by the municipality or county and the project may then be leased to any person, firm, partnership or corporation for the operation of a private project.

Moreover, Section 3 permits municipalities and counties to use their funds and their efforts, apart from bond proceeds, in aid of private enterprise, and to assume legal and financial obligations in connection with development of a project. Indeed, the contract between Tooele County and The Magnesium Project (Ex. P-2) places a burden upon the county to acquire options and to make surveys and investigations of sites, labor markets, and so forth. These additional burdens have been recognized as being aids to private enterprise which are prohibited by constitutional provisions similar to Utah's.

In *State v. City of York,* 164 Neb. 223, 82 N.W.2d 269 (1957), the court held that a statute permitting cities to issue industrial development revenue bonds violated a constitutional provision against giving or lending of credit of the state, saying:

> "It is true that the revenue bonds are not a general liability of the city and they are not subject to payment through the exercise of the taxing power. But they do cast burdens upon a city with reference to their issuance and payment. The city and its officers are charged with the duty of fixing and collecting the rentals from which the revenue bonds are to be paid. This necessitates the execution of leases, the fixing of rentals, the taking of chattel mortgages on equipment to secure payment of rent, the providing of insurance coverage, and the determination of payments to be made in lieu of taxes. It imposes duties and responsibilities upon the city and its officers on matters which are private rather than public in character. The issuance of the bonds in the name of the city for the payment of the cost of the project evidences the fact that the credit of the city has been extended. The city is the payer of the bonds and it is primarily liable for their payment. The bonds become the obligations of the city. The fact that the means of payment is limited does not make it any less so. A failure of payment is a default by the city. The constitutional prohibition does not infer that

> the credit of the State or its political subdivisions may be given or loaned except when a general liability exists. The prohibition clearly provides that the credit of a state may not be given or loaned to an individual, association, or corporation under any circumstances. * * * It seems clear to us that the revenue bonds are issued by the city in its own name to give them a marketability and value which they would otherwise not possess. If their issuance by a city is an inducement to industry, some benefits must be conferred, or it would be no inducement at all. Such benefits, whatever form they may take, necessarily must be based on the credit of the city. The loan of its name by a city to bring about a benefit to a private object, even though general liability does not exist, is nothing short of a loan of its credit."

In the present case, testimony of an officer of The Magnesium Project substantiates that the name of the county, its credit, is important in connection with the borrowing—important because it leads to a tax exemption on the bonds; important because tax exemption results in a lower interest rate.

In 1959 Idaho enacted an industrial development act very like Utah's. The act was held unconstitutional by that state's Supreme Court in *Village of Moyie Springs, Idaho, et al. v. Aurora Manufacturing Co.*, 82 Idaho 337, 353 P.2d 767 (1967), in a lengthy opinion in which the court considered all of the customary arguments. With respect to "lending of credit" it said:

> "It is obvious that one of the prime purposes of having the necessary bonds issued by it in the

> name of the municipality is to make them more readily salable on the market. Thus the credit of the municipality is extended in aid of the project, regardless of the limitations placed upon the remedy of the purchaser * * *"

The court was not swayed by decisions of other jurisdictions upholding industrial development revenue acts, observing that the decisions "read like apologies to constitutional limitations, dictated by expediency."

The contemplation of the Utah Industrial Facilities Development Act is that the municipalities and counties will issue their bonds for the acquisition and construction of projects to be operated by private enterprise, and that they may not operate the projects themselves. It was recognized in *State v. Town of North Miami*, 59 So.2d 779, Fla., (1952) that as soon as the bonds are sold by the municipality, the moneys received become public moneys and their use for the construction of a project to be operated by private enterprise is, in essence, the use of public moneys for private purpose prohibited by organic law.

Not content with permitting municipalities and counties to lend their credit for development of projects in which they are interested, the legislature has empowered *all* public bodies to lend their credit. Section 12 makes such bonds "securities in which all public officers and public bodies of the state and its political subdivisions may invest." An "investment" in such bonds —call it what you will—is a lending of credit to the enterprise; and if the bonds are purchased by the State there would be a violation of Article XIV, Section 6, which provides that "the State shall not assume the debt, or any part thereof, of any county, city, town, or school district."

In arguing that industrial development bonds are for a valid public purpose, proponents assert that the economy generally will be benefited, and some evidence to that effect has been introduced in this case. But showing of a public benefit in the instant case (if one is shown) does not save the act because the act itself requires neither benefit nor purpose. The state has not established any standards as to what is or is not a public purpose, and it cannot be assumed that private industrial development, per se, is one. The act does not require, and in this instance the county did not make, any findings with respect to the total impact of the project upon county government. As pointed out in *M. M. Smith et al., v. State of Georgia et al.,* 222 Ga. 552, 150 S.E. 2d 868, 871:

> "* * * appellants emphasize that this amendment does not limit the activities of the county in furnishing facilities to private enterprise solely on those occasions to relieve unemployment, or for any other public purpose, with which conclusion we agree. This amendment would permit the county to issue bonds for a purely private purpose; for example to secure funds to construct a building or plant to be leased to and occupied by an already existing and operating business with a perfectly adequate building which would perform the same functions, employ the same number of people, and add nothing

> in the way of industry, or alleviate unemployment, or otherwise contribute to the public good. * * * This amendment does not, as appellees argue, provide for the promotion and development of new industry in the county. New industry might be developed, but there is nothing in the act which requires that the funds be used for development of new industry, or to relieve unemployment or to provide new jobs so that its citizens may be furnished employment and not be forced to leave the county to find employment, or for any other public purpose."

Finally, Article VI, Section 31 is violated by Section 3(4) of the act under which counties or municipalities may grant to the lessee of any project an option to purchase the project or to renew any lease for a nominal sum. It is easy to see a situation in which the county has become the owner of a property of substantial value. Its opportunity to sell the property without any safeguards as to price or bidding, or to lease the property for a nominal sum, is tantamount to making a gift to a private enterprise, at least insofar as the fair rental value of the property exceeds the rent reserved, or the fair market value exceeds the purchase price in the option.

II

The act is unconstitutional because it permits municipalities and counties to grant privileges or immunities to private companies.

Article I, Section 23 of the Utah Constitution provides:

> "No law shall be passed granting irrevocably any franchise, privilege, or immunity."

Inasmuch as the legislation permits municipalities and counties to grant to private enterprises the right to use public property for long periods of time there seems to be little question that the act permits the granting of privileges or immunities by municipalities and counties. These terms have been interpreted with some breadth by the court. See *Thomas v. Daughters of the Utah Pioneers,* 114 Utah 108, 197 P.2d 477.

We recognize, however, that most of the decisions applying Article I, Section 23, have been concerned with the question of whether a privilege or immunity granted by the state or one of its political subdivisions has been granted "irrevocably." In Section 13 of the act there is a provision that the State of Utah agrees with the holder of any bonds issued under the act that the state "will not alter, impair or limit the rights thereby vested until the bonds, together with applicable interest are fully met and discharged and such contracts are fully performed." Unquestionably such provision binds the hands of future legislatures and violates Section 23.

III

The act constitutes special legislation, not of uniform operation, and constitutes an unlawful delegation of legislaitve power.

The act as written runs counter to three constitutional provisions which overlap in some degree and should be considered together. Article VI, Section 26 of the Utah Constitution provides:

> "The legislature is prohibited from enacting any private or special laws in the following cases: . . . 16. Granting to an individual, association or corportaion any privilege, immunity or franchise. . . "

Article I, Section 24:

> "All laws of a general nature shall have uniform operation."

Article VI, Section 1:

> "The legislative power of the state shall be vested:
>
> "1. In a senate and house of representatives which shall be designated the legislature of the State of Utah.
>
> "2. The people of the State of Utah as hereinafter stated . . ."

In addition, Article V, Section 1, provides for a separation of powers as between the legislative, executive, and judicial.

The above sections should be considered together, because the act, taken as a whole, includes some classifications which are unreasonable, fails to set out legislative standards for the determination of the need for "projects" and, by grants of power to counties, permits them to proceed through "special legislation" toward a development of industry they deem desirable.

The concept of "special legislation" has been before this court in a number of cases. In *Allen v. Trueman*, 100 Utah 36, 110 P.2d 355 (1941), a statute allowing owners of trademarks and trade names to invoke criminal procedure of search and seizure to protect civil rights was held to have granted a special privilege and was therefore invalid under subdivision 16 of Article VI, Section 26. An act allowing 70% of the barbers in an area to fix prices and hours was held invalid on similar grounds in *Revne v. Trade Commission*, 113 Utah 155, 192 P.2d 563 (1948). See also *Justice v. Standard Gilsonite Company*, 12 Utah 2d 357, 366 P.2d 974 (1961), wherein a provision of the Industrial Commission Act requiring payment of wages to separated employees within 24 hours after separation violated Section 26 for the reason that it excluded banks and mercantile houses without any justification for such exclusion. In *Backman v. Salt Lake County*, 13 Utah 2d 412, 375 P.2d 756 (1962), the Civic Auditorium Act was held to have violated Section 26 because it applied only to cities of a population of 250,000 or over.

The need for uniformity of legislation has been recognized in other cases. In *Orem City v. Payne*, 16 Utah 2d 355, 401 P.2d 181 (1965) and *Roe v. Salt Lake City*, ... Utah 2d ...., 437 P.2d 195, legislation has been held to be unconstitutional because of classifications and exclusions which had no apparent justification.

The Utah Industrial Facilities Development Act is offensive to these various constitutional provisions for a number of reasons. In the first place, the act contains some express exclusions, without a reasonable distinguishing basis.

Section 3 of the act prohibits municipalities and counties from financing projects "for telecommunication facilities, the generation, transmission, or distribution of eletcric energy beyond the project site or the production, transmission, or distribution of natural gas." There is no apparent reason why industry generally should be subjected to the competition engendered by participation of municipalities and counties in private enterprise, while those listed in Section 3 are not. The exclusion cannot be justified on the ground that these businesses are regulated utilities, since other regulated utilities are not excluded and might take advantage of the act. The act also amounts to special legislation in that it exempts these particular bonds from provisions of the Uniform Commercial Code and exempts the bonds and construction from public laws placing upon municipalities and counties the burden of requiring competitive public bidding.

Implicit in the special legislation concept is a matter involved with the practical application of the statute, which in turn is concerned with the delegation of legislative power without proper standards. It is apparent that a county or municipality seeking to use the act is not required to make any particular findings about public purpose or public benefit. It is free to negotiate with whomever it wishes—whenever it wishes—and to arrive, in a substantially unfettered discretion, at such provisions for leases, bonds, repayments, options to renew leases, and so forth, as it sees fit. There is no provision in the act authorizing private industries to apply for the treatment or setting any standards by which the county or municipality can determine to whom the benefits of the act will be extended. As it is doubtful that any county or municipality could keep on heaping bond issue upon bond issue, only those few who are able to move quickly will be able to take advantage of the act.

The county, because of the void spaces in the act, is free to operate in the following areas: the fixing of interest; minimum prices at which bonds may be sold; extension of projects beyond the boundaries of the county without limitation as to distance; agreement to use other security devices without limitation; amount of rentals to be obtained (since the act does not even require that rentals be sufficient to pay principal and interest on the bonds.)

IV

The act would allow municipalities and counties to contravene constitutional debt limit provisions and for that reason is invalid.

Article XIV, Section 3 of the Utah Constitution provides:

> "No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, * * * or by any city, town or village or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt."

Article XIV, Section 4 of the Utah Constitution provides:

> "When authorized to create indebtedness as provided in Section 3 of this Article, no county shall become indebted to an amount, including existing indebtedness exceeding two per centum of the value of the taxable property therein * * * no part of the indebtedness allowed in this section shall be incurred for other than strictly county, city, town or school district purposes * * *"

Both of these provisions will be violated by the proposed financing. Respondents have argued that the financing will fall within the "special fund" doctrine enunciated in earlier Utah cases and hence there is no violation of Sections 3 and 4. The act, however, goes much further than the proceedings involved in those cases. The court has, in fact, recognized that the special fund doctrine is not applicable where the bonds are payable out of the revenues of both an existing and an expanded system. See *Fjeldsted v. Ogden City*, 83 Utah 278, 28 P.2d 144 (1933) and *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P.2d 161 (1933). The legislature in enacting the so-called Granger Act also recognized the limitation when it provided for allocation of revenues attributable to previously existing facilities separately from those attributable to any proposed improvements or additions to such facilities. From the evidence adduced at the trial, there can be no doubt that the amounts involved are far greater than would be allowed by Sections 2 and 3. The total amount of bonds to be issued far exceeds two per cent of the assessed valuation of Tooele County. It would, in fact, be double the total valuation. Moreover, the act does not preclude a municipality or county from constructing projects on property already owned by them, purchased by them with public funds, acquired by exchange, or given to them. Inasmuch as the bonds may be secured in part by a foreclosable mortgage on the project, it is entirely possible that property other than that acquired with bond revenues would be charged with the debt, and the municipality or county would lose property it already had. Thus it cannot logically be argued that indebtedness of the municipality or county will not be created, or that the proceedings come strictly within the special fund doctrine.

V

The act is unconstitutional because it grants forbidden tax exemptions and allows unexempt tangible property in the state to escape taxation.

Sections 2, 3, and 10 of Article XIII of the Utah Constitution all insist upon equality of taxation in this state. Certain exemptions are provided by Section 2 but none of them is involved in this case. It provides:

> "All tangible property in this state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value * * *"

Section 3 provides in part that:

> "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in this State, according to its value in money."

Section 10 provides:

> "All corporations or persons in this State, or doing business herein, shall be subject to taxation for State, County, School, Municipal, or other purposes, on the real and personal property owned or used by them within the Territorial limits of the authority levying the tax."

The scheme of Section 2 is that *all* tangible property in the state not specifically exempted by the constitution (or the laws of the United States) shall be taxed equally and fully. No exemption is provided under the constitution for industrial plants. The fact that the plants or projects will technically be owned by the municipality or county should be of no moment, for as stated in the dissenting opinion in *Village of Demming v. Hosdreg*, 62 N.M. 18, 303 P.2d 920 (1956) "The feature of municipal ownership is a sham." The real owner will be the private business entity.

Section 10 of the act exempts from taxation all property acquired or held by that county or municipality under the act and such property together with the bonds and the income from them are exempt from all taxes imposed by the State of Utah or any of its political subdivisions. It then allows a three-prong exemption—each resulting in discrimination. While the section does provide that the "interests" of any private person or firm are not exempt and makes such "interests" subject to the provisions of Section 59-13-73 Utah Code Annotated 1953 the legislature must have intended to grant an exemption not theretofore bestowed, and it would seem that the tax on such property would be less than if it were owned outright by the private business entity. Otherwise there would have been no need for the exclusionary language of Section 10 of the act. If Section 59-13-73 were intended to apply without qualification, the legislature need only have said so. Then the tax would have been the same as "if the possessor or user were the owner thereof." The same thing would apply under Section 3. If, as the act provides, the property of the project is exempt from all taxation and only the "interests" of the private business entity is taxed, likely there will not be a uniform and equal rate of taxation on the property according to its value in money. There is nothing in the act to define the term "interests" or to indicate how it is to be determined. Thus, each individual asssesor will be left the choice of applying the section according to his understanding of the term.

This court has, on several occasions repudiated legislation because it conflicted with one or more of the above constitutional provisions. For example, in *Foulger v. State Tax Commission,* 16 Utah 2d 165, 397 P.2d 298, the court, with little discussion, held that Freeport Legislation was unconstitutional and the tax exemption granted by the legislation was invalid by reason of said sections. See also *Duchesne City v. State Tax Commission,* 104 Utah 365, 140 P.2d 335 and *Moon Lake Electrical Association v. State Tax Commission,* 9 Utah 2d 384, 345 P.2d 612. In the latter case, an act which limited the ad valorem tax on electrical cooperatives to $50 times the miles of line of the cooperative was held invalid for the reason that it conflicted with Sections 2 and 3. The court noted that under those sections, the tax must be based on the cash value of the properties held, and that the desirability of the legislation was immaterial.

In *Industrial Development Authority v. Southers,* 155 S.E.2d 326 (Va., 1967) a somewhat similar act was held unconstitutional on the basis it conflicted with a constitutional provision that:

> "All taxes, whether state, local or municipal, shall be uniform for the same class of subjects within the same territorial limits of the authority levying the tax."

The court said:

> "The idea of taxation imports equality of apportionment * * * it is this which distinguishes taxation from arbitrary exaction * * * exemption

of the property of one person casts an inequitable burden on others not thus graciously favored."

VI

The act violates various other provisions of the Utah and Federal Constitutions and cannot be upheld.

The most apparent constitutional objections to the act have been brought to the court's attention. Yet, there are others, which to no lesser degree require invalidation of the act and the proceedings taken under it.

Article VI, Section 29, of the Utah Constitution prohibits the legislature from delegating "to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions." Inasmuch as the private corporation would operate property of the county or municipality it cannot be gainsaid that it would not only be supervising and interfering with a municipal improvement and property, but also that it in effect would be performing a municipal function. Moreover, the act allows upon default, a trustee or receiver to take charge of the property with power to charge and collect rents, and apply the revenues. He would have custody of and disburse public funds, and would otherwise control and manage public property and revenues — in violation of the above sections.

Several decisions of this court invalidating legislation under Section 29 are *County Water System v. Salt Lake City*, 3 Utah 2d 46, 278 P.2d 285; *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878; and *Logan City v. Public Utilities Commission*, 72 Utah 536, 271 Pac. 961.

Article I, Section 24 Utah Constitution provides:

> "All laws of a general nature shall have uniform operation."

As stated under Point II, the act allows municipalities to issue bonds to finance certain industrial projects but specifically excludes others without any justifiable reason. For that reason, as well as the fact that only a favored few will, as a practical matter, be able to take advantage of the act, it is violative of Section 24. There is nothing in the act which authorizes private industry to apply for its benefits or sets any standards by which the county or municipality can determine to whom such benefits will be accorded. Thus they can pick and choose to whom they will grant favorable treatment.

The act also runs counter to Article VI, Section 5, Utah Constitution which sets forth the powers that the legislature may validly confer upon municipalities. There is nothing in Section 5 which would authorize them to finance projects for private business enterprise or issue bonds payable for revenues derived from property not constituting public utilities, particularly when secured by foreclosable mortgages on such property. Section 5 was held to have required invalidation of legislation in *Backman v. Salt Lake County, supra.*, dealing with the Civic Auditorium and Sports Arena Act of 1961 and in *Nance v. Mayflower Taverns, Inc.*, 106 Utah 517, 150 P.2d 773. In the latter case the court stated.

> "The constitution, Article VI, Section 5 grants to cities forming charters pursuant to the procedures outlined in Section 5 of Article XI the power to exercise 'all powers relating to municipal affairs, and to adopt and enforce within its limit, local police, sanitary and similar regulation which does not conflict with the general law * * *
>
> "Neither the statute nor the constitution authorizes municipalities to legislate in regard to civil rights.,"

There is nothing in the constitution which authorizes municipalities to have the powers conferred by the act and it cannot therefore be sustained.

Another provision which is violated by the act and the proposed proceedings thereunder is Article XIV, Section 5 of the Utah Constitution which provides that:

> "All moneys borrowed by, or on behalf of the State or any legal subdivision thereof, shall be used solely for the purpose specified in the law authorizing the loan."

In *Bohn v. Salt Lake City*, 79 Utah 121, 8 P.2d 591 this court held that restrictive provisions in construction contracts let by Salt Lake City which increased the cost of such project without enhancing its value constituted a pro-tanto diversion of funds and hence violated Section 5. The same type of situation prevails in this case. Section 15 of the act renders inapplicable to projects financed thereunder any laws or regulations purporting to require the letting of construction contracts by advertisement and public competitive bidding. This makes it possible for public funds to be diverted from their intended purpose because of unnecessarily high construction costs caused by negotiated rather than competitive letting of contracts. Also, Section 3 includes a great number of things which are "deemed" to be part of the costs of acquiring or improving a project. Although some of them may be necessary for such purposes, others would not enhance the value of any projects and would constitute an unconstitutional diversion of funds.

The act also violates Article I, Section 2, of the Utah Constitution, and the 5th and 14th Amendment to the United States Constitution, in that it would deprive plaintiff of his property without due process of law for the reason that it involves an inequality of taxation, and grants tax exemptions to some persons that will not be available to others and is discriminatory. Plaintiff, as a taxpayer of Tooele County will suffer loss if there should be a failure on the part of the county to recoup all the money it has expended.

VII

The portion of the act authorizing investment by the state, its political subdivisions and others in bonds issued under the act is unconstitutional, is not severable from the rest of the act, and renders it invalid.

The respondents have argued and the trial court agreed that Section 12 of the act, which authorizes the state, its political subdivisions and all public bodies thereof, as well as banks, trustees and other fiduciaries to purchase said bonds, is not involved in this present case inasmuch as Tooele County has indicated that it does not intend to invest therein. This does not mean, however, that the state or other political subdivisions will not do so. And unless the section is patently severable from the rest of the act, the question is not so much what will be done as what can be done under it. As stated in *Allen v. Trueman,* 100 Utah 136, 110 P.2d 355 (1941) "We are concerned not so much with what was done under the act and the facts presented by this case, as with what it authorized to be done * * *"

Section 12 seems to be an integral part of the act. It is designed to aid the marketability of the bonds and certainly without such help, the act will lose much of its efficacy. Thus, the court could not say that without such provision the act would nevertheless have been passed. And if the state or one of its political subdivisions purchase the bonds and default occurs, they will suffer the loss. In a very real sense, they will have assumed an obligation of the county or municipality in contravention of the constitution.

CONCLUSION

In this case the plaintiff challenges the validity of action taken and being taken by Tooele County in the negotiation and execution of agreements relating to the sale of revenue bonds, execution of mortgages, and entry into a lease with an option to purchase. But the inquiry must not be limited to the question of whether Tooele County, under properly enacted enabling legislation, might proceed as they have proceeded in encouring the advent of new industry into the county. A necessary pre-requisite for any action by the county with regard to the issuance of revenue bonds, the acquisition and construction of projects, and the leasing of such projects with options to renew or options to purchase, is the prior enactment of a statute which is within the power of the legislature to enact, and the power of the legislature must be determined by examining the constitutional limitations placed upon it.

Even if a "public purpose" is found in the encouragement of new industry, generally, for the State of Utah, existence of such a public purpose does not give the legislature carte blanche to pursue the public purpose by unconstitutional means. Statutes enacted by it in order to further the public purpose, as the legislature sees it, must nevertheless conform to the express inhibitions and prohibitions of the Constitutions of Utah and the United States.

For this reason, the court must consider not only the actions taken by Tooele County and The Magnesium Project with respect to the particular bond issue involved here, but must give consideration to the legislation itself, i.e., was it within the power of this legislature to validly enact the Utah Industrial Facilities Development Act. To make this determination the act itself must be considered as a whole. It is plaitniffs contention that the constitutional flaws in this piece of legislation are so numerous that the entire act must fall. It is arguable, if not clear, that the unconstitutionality of Section 12 alone, since it directly affects the marketability of industrial development revenue bonds, would be held to invalidate the entire statute. But Section 12 is only one of the flaws in the statute. As pointed out above, it is replete with violations of express constitutional provisions.

Moreover, we do not concede and we do not believe the record shows that the development of industry, without the establishment of legislative standards as to the areas in which, and the circumstances under which industry will be brought into a particular county, serves any public purpose. And the facts introduced at the trial in this case indicate that the commissioners of Tooele County did not make an independent investigation as to the total effect of The Magnesium Project on the county and the public facilities which must be maintained by it. Although employment might be increased, the evidence indicated that the county is ill equipped to handle any great influx of employees, either by way of housing, schooling, or sewage disposal facilities. The unemployment rate is low and it is difficult to justify a participation of the county in development of a private project in the absence of some local situation which demands the development of new industry.

Issuance of industrial development revenue bonds by municipalities and counties has some effects which are thought by responsible opinion to be less than desirable. As pointed out in "Municipal Industrial Development Bonds," 19 Vand. L. Rev. 25 (1965) such bonds have been officially criticized by the Investment Bankers Association of America, the Municipal Finance Officers Association, and the Municipal Law Section of the American Bar Association.

It is not self-evident that industrial development in every area is a public benefit. As pointed out in the Vanderbilt Law Review article, "It is a long way from a small, depression born measure in Winona, Mississippi, to the multi-mililon dollar project in a large, already prosperous city." To enact legislation of this sort, the legislature should set forth the public policy basis for authorizing bonds, if they are otherwise valid, so that arbitrary action by municipalities and counties may be avoided and the citizens and taxpayers, as well as competitors of contemplated industries, might have some assurance that the bonds are genuinely being issued for a "public purpose" instead of in aid of a strictly private enterprise.

And finally, the act must fail because it violates the express provision of the Utah Constitution that the

State shall not authorize any municipality or county to lend its credit in aid of any private enterprise.

The statute and the actions taken and proposed to be taken under it by Tooele County and The Magnesium Project should be held invalid because in contravention of the Constitutions of Utah and the United States.

Respectfully submitted,

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ADDENDUM

After the type was set and the brief paged, we discovered another recent case dealing with industrial development bonds: *Mitchell v. North Carolina Industrial Development Financing Authority*, ... N.C. ...., 159 S.E. 2d 745 (1968). The case holds the North Carolina bonding statute unconstitutional because not involving a "public purpose." It also contains an excellent history of industrial development bonds and litigation about them.