

1968

Venus Tripp v. Granite Holding Company and  
Dougias Optical Company : Brief of Respondent  
Granite Holding Company : Brief of Respondent  
Douglas Optical

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# 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 MAGNESI-  
UM PROJECT, a joint venture,

*Defendants and Respondents.*

Case No.  
11287

## Brief of Defendants and Respondents

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

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FILED

JUN 19 1968

Clk, Supreme Court, Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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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

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## Brief of Defendants and Respondents

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### NATURE OF THE CASE

This is a class action for a declaratory judgment determining questions of constitutionality and interpretation of a state statute and actions taken and to be taken by the defendants and respondents pursuant to authority contained in the statute.

### DISPOSITION IN THE LOWER COURT

The trial court, without a jury, was presented documentary and testimonial evidence and entered judgment

in favor of defendants and respondents holding that the Utah Industrial Facilities Development Act (Chapter 29 Laws of Utah 1967; Title 11, Chapter 17 Utah Code Annotated, 1953 Supp., herein referred to as the "Act") is constitutional and that certain agreements between the defendants and actions proposed to be taken pursuant to these agreements including the issuance of revenue bonds by Tooele County are lawful and valid.

## RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment of the trial court.

## STATEMENT OF FACTS

Respondents accept the statement of facts of Appellant with the following clarifications and additions:

While Tooele County has little available excess housing, presently has a low unemployment rate and would need to provide additional public services such as schools and sewage systems, the construction of these new facilities would in itself be a major boon to the Tooele County economy (Tr. 20). The proposed electrolytic minerals extraction plant for the production of magnesium, chlorine and related products from the waters of Great Salt Lake will initially cost between \$52 million and \$60 million. There was no evidence that the defendants could arrange financing in some other way than by the issuance of industrial revenue bonds although National Lead Company, one of the partners in The Magnesium Project, is a substantial company financially. There was evidence

that cost is a major factor in the establishment of a project such as this and that savings in financing costs which might be accomplished by industrial revenue bond financing is a major inducement to the establishment of the project in the first instance (Tr. 36). The court can take judicial notice of substantial increases in interest rates nationally, an increase experienced in the municipal bond market, in the industrial revenue bond market and in the corporate bond market.

While Tooele County has agreed (Ex. P-2) to investigate the feasibility of the project and make general surveys in this regard, it has not expended tax moneys for this purpose nor does it expect to do so (Tr. 16, 21-22). If such costs are incurred, the County would be reimbursed out of the proceeds of the sale of the revenue bonds (Para. 4.3, Ex. D-4).

The financing program briefly stated will involve entering into a lease and agreement between the County and either Energy Leasing Services, Inc., or The Magnesium Project or their successors or assigns. The lease form will be substantially in the form of Exhibit D-4. If the lease is made with Energy Leasing Services, Inc., this will be done to provide additional financing to the backers of the project and a sublease substantially in the form of Exhibit D-7 will be entered into. The County will also enter into the mortgage and indenture of trust in substantially the form of Exhibit D-5 and pursuant thereto will issue revenue bonds secured by a mortgage on the project and by a pledge of the revenues from the project consisting of the rentals payable under the lease.

The bonds will be purchased by Goodbody & Co. pursuant to Exhibit P-3. Unconditional guarantee of payment of the bonds or of the rentals from either The Magnesium Project, H-K, Inc., National Lead Company or from any of them may be required if the backers of the project are not otherwise directly responsible for payment of the rentals under the lease. The lease continues and the obligation to pay rentals continues in all events until the principal and interest and all other costs incident to the bonds (such as trustees' fees, redemption premiums, etc.) are fully paid. The lease can be terminated only when the bonds are paid or provision for their payment is satisfactorily made (Article XI of Exhibit D-4).

## ARGUMENT

### POINT I

THE DEBT LIMIT AND BOND ELECTION REQUIREMENTS OF THE UTAH CONSTITUTION ARE NOT VIOLATED BY THE ISSUANCE OF REVENUE BONDS UNDER THE ACT

The Act specifically provides (11-17-4) that revenue bonds issued under the Act "shall be limited obligations of the municipality or county [and] shall not constitute nor give rise to a general obligation or liability of the municipality or county or a charge against its general credit or taxing powers." Further, 11-17-5 provides that the bonds must be secured by a pledge and assignment of the revenues out of which the bonds are to be payable and may be secured by other security devices such as a mortgage or by a pledge of the lease of the project. The county or the municipality may also make other covenants or agreements with the bondholders and the lessee

of the lease of the project "except that in making any such agreements or provisions a municipality or county shall not have the power to obligate itself except with respect to the project and the application of the revenues from it and shall not have the power to incur a general obligation or liability or a charge upon its general credit or against its taxing powers." To make these restrictions doubly effective the Act also provides in 11-17-5(4) that no breach of any agreement with the bondholders or with the lessee of a project "shall impose any general obligation or liability upon the municipality or county or any charge upon their general credit or against their taxing powers."

The Respondents have fully complied with these restrictions. The lease (Ex. D-4) obligates the County to issue revenue bonds to finance the construction of The Magnesium Project plant and facilities and to use the proceeds of the bonds solely for that purpose. The County is not obligated beyond the amount of bond proceeds available for the purpose of constructing the project (Sec. 4.6, Ex. D-4). On the other hand, the lease obligates the lessee to pay rent equal to the principal and interest due on the bonds as and when they become due plus any other expenses incident to the issuance and payment of the bonds including redemption premiums, trustees' fees and the like (Sec. 5.3 of Ex. D-4). The obligation to pay this rent is unconditional until all of the bonds are fully paid. This is a so-called "hell and high water" lease, which gives no excuse for nonpayment of rent whatsoever. Specifically, there is no excuse if the project is not completed, if the project is totally

destroyed or condemned, if there is a change in any laws or even if the County fails to perform any of the limited agreements it will make.

The agreements between the bondholders and the County are set forth in the mortgage and indenture of trust (Ex. D-5). Here it is crystal clear that the bondholders have no rights against the County which would involve any tax moneys of the County or any of the other funds belonging to the County other than the funds arising from payment of the rentals by the lessee of the project. As required by the Act, the bond form at page 7 of Exhibit D-5 provides specifically that the bonds and the interest due on the bonds do not and shall never constitute an indebtedness of the County nor a charge against the general credit or taxing powers of the County. The bonds are to be payable "solely out of the revenues and other amounts derived out of the sale or leasing of the Project financed through the issuance of the Bonds and which has been leased to the Lessee." The provisions of the mortgage and indenture confirm these limitations (e.g., Ex. D-5: Sec. 203, p. 24; Sec. 401, p. 34; Sec. 1409, p. 69).

The effect of the Act and the use of the Act by the County in connection with The Magnesium Project is to authorize issuance of only revenue bonds, limited obligations issued in the name of the County but creating no debt or liability against the County or any tax moneys of the County.

The bonds fit within the well recognized "special fund doctrine" which has long been the law of this State and

almost all other states (72 A.L.R. 687; 96 A.L.R. 1385; 146 A.L.R. 331) and which holds that obligations not payable from tax moneys are not debts within the meaning of state constitutional debt limit and bond election requirements. In Utah this principle was established in *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878 (1929), and has been adhered to in the subsequent cases of *Fjeldsted v. Ogden City*, 83 Utah 278, 28 P.2d 144; *Wadsworth v. Santaquin City*, 83 Utah 321, 28 P.2d 161; *Utah Power & Light Co. v. Provo City*, 94 Utah 203, 74 P.2d 1191; *Utah Power & Light Co. v. Ogden City*, 95 Utah 161, 79 P.2d 61; and *Barlow v. Clearfield City*, 1 U.2d 419, 268 P.2d 682. The same principle has been applied and expanded with regard to revenue bonds issued by the state for university purposes (*Spence v. Utah State Agricultural College*, 119 Utah 104, 225 P.2d 18; *Conder v. University of Utah*, 123 Utah 182, 257 P.2d 367). The rule applies when, as here, the sole source of payment to the bondholders is the revenues produced from property purchased out of the proceeds of the bonds or payable from the property itself. There is no debt created in the constitutional sense nor is there any requirement that the taxpayers must approve the issuance of the bonds. This is so because the bondholders cannot look to any tax money as a source of payment for the bonds. As the court stated in *Barnes v. Lehi City*, *supra*,

In the instant case, impounding the earnings of the electric light and power plant in a special fund which is expressly pledged for the purpose of maintaining the plant and the payment of the interest and purchase price installments as they accrue under the proposed contract casts no addi-

tional burden on the taxpayers of Lehi City. . . . The credit of the city is not extended, nor is any money which is derived from taxation or other existing sources of revenue expended, in the purchase price or maintenance cost of the plant. The city cannot be coerced to applying any part of its general revenue for the payment of the purchase price of the plant or for any part of the cost of maintenance thereof. *Id.*, 279 Pac. at 885.

In this case, the framework under which the financing program will proceed is similarly limited. The bondholders are told and retold that their only source of payment is the lease revenues paid by the lessee, that their only remedy is against the fund arising from rentals paid under this lease and against the property comprising the project and its facilities and equipment. Bond proceeds, not tax money, are used to construct the project. The County can in no event be sued for any money judgment if the bonds are not paid nor is it at any time obligated to spend any County funds raised from taxation for the project or for the payment of the bonds. The face of the bonds themselves will bear this plain restriction (11-17-4(1)). No one is misled, no debt or liability of the County is created.

Appellant recognizes the applicability of the special fund rule, but argues it might be violated if a county mortgaged property acquired from tax money to secure industrial revenue bonds. A sufficient answer is that this will not be the case here as no County funds have been spent (Tr. 16, 22) and no property purchased by the County from tax funds will be used for the project. If any funds are spent, the County will be reimbursed out



of the bond proceeds (Ex. D-4, Sec. 4.3). If any county or municipality in the future attempted to use tax moneys or property purchased from tax moneys without reimbursement from the bond proceeds, such county or municipality would not be complying with the restrictions of the Act that a project or a bond issue would not be a charge against its general credit or taxing powers. In such a case a court could certainly prohibit the attempted transaction. This does not make the Act unconstitutional, but only makes unlawful the actions of a county or municipality which attempts to violate the Act.

Thus we have here a new application of established principles of law, but while employed in a different way, the principles nevertheless remain the same. There is no violation of Utah Constitution, Article XIV, Sections 3 and 4.

## POINT II

THE ACT DOES NOT AUTHORIZE A COUNTY OR CITY TO LEND ITS CREDIT IN VIOLATION OF ARTICLE VI, SECTION 31, UTAH CONSTITUTION.

To date at least forty states have enacted some type of industrial promotion legislation. Most of these states permit the use of revenue bond programs to induce industry to locate in their state. Only a very few of the acts have been found unconstitutional (See Appendix C); one of these states (Nebraska) later reversed the decision by adoption of a constitutional amendment. Wyoming, a neighboring state with a constitution and an industrial revenue bond act similar to those in Utah has upheld its act in three recent cases: *Uhls v. State*

*ex rel. City of Cheyenne*, 429 P.2d 74; *Reed v. City of Cheyenne*, 429 P.2d 69; *Powers v. City of Cheyenne*, 435 P.2d 448. The most recent decision upholding an industrial revenue bond act is from Oregon: *Carruthers v. Port of Astoria*, 438 P.2d 725. For a list of cases upholding industrial revenue bond acts see Appendix A.

Article VI, Section 31 was adopted after extensive debate in the Utah Constitutional Convention held in 1895 and has remained unchanged to date. It reads as follows:

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.

A different "lending of credit" article was first proposed to the convention by Brigham H. Roberts as follows:

Neither the State of Utah nor any political subdivision thereof shall become a stockholder in or loan its credit to nor make any appropriation for the benefit of any person, company, association or corporation, unless two-thirds of the qualified voters at a regular election to be held shall assent thereto. (I Proceedings of Utah Constitutional Convention 894, hereinafter cited as "Proceedings")

Apparently because of objections to the possibility of lending of credit when two-thirds of the voters had approved, this proposal was not adopted.

A second proposal by Mr. F. S. Richards, more restrictive than the one adopted, reads as follows:

No appropriation shall be made by this State nor any political subdivision thereof to any person, corporation, association, or institution, not under the absolute control of the State, nor shall the State or any political subdivision thereof give, lend or pledge its credit for any such person, corporation, association or institution. (I Proceedings at 951)

This proposal, too, was rejected. Note that the prohibition contained in both of these proposals — against the State or its political subdivisions making any appropriation for the benefit of a private concern — was omitted from the article finally adopted.

The debate over the Roberts proposal is recorded on pages 894 to 929 of the Proceedings, and from pages 951 to 1002 is found the debate on the Richards proposal and the proposal of C. S. Varian which was eventually adopted.

Concerning the meaning of “lending of credit,” delegate David Evans, who supported the article which was adopted, said the following:

What is loaning the credit of a State or a county or a municipality? In short, it means that if any corporation or enterprise desiring to start a business and for the purpose of aiding it, the State endorses or rather guarantees the bond or paper of such individual or corporation. . . . (I Proceedings at 953)

Samuel R. Thurman, one of our most distinguished constitutional framers, supported the final article and had the same understanding of the concept. He said:

It is not a question of the State being permitted to make donations and give bonuses from time to time of the money that the State has in hand and under its immediate control, and that too, for purposes which the State believes to be a public benefit, but *it is a question of mortgaging the State, not for the payment of its own debt but for the payment of the debt of another.* (I *Proceedings* 979) (Emphasis added)

Mr. Thurman repeatedly referred to the idea that the Article's purpose was to prohibit the State or its political subdivisions from guaranteeing the bonds and other debts of private organizations. But Thurman and other delegates made it clear that they did not intend to prohibit all aid or assistance to private enterprise.

The evil feared by the framers was that the failure of private undertakings to which a state lent its credit would result in eventual resort to the taxing power of the State. This desire to prevent the use of the taxing power to pay private debts arose in a day when the revenue bond, as distinguished from the general obligation bond, was virtually unknown. Revenue bonds do not involve governmental debt as does the general obligation bond. Revenue bonds under the Utah Industrial Facilities Development Act are paid only with project revenues; they therefore do not obligate the taxing power of the governmental unit issuing the bonds. Consequently the fears of the framers of the constitution that the taxing power of the State would be called upon do not exist under the Act we are concerned with here.

The Iowa Court had a similar understanding of lending of credit when it said in a case involving industrial revenue bonds:

What is meant herein by a loan of "credit"? . . . This particular section of our Constitution was taken bodily from the Constitution of New York. As a part of the Constitution of New York, it was the result of past experience in the history not only of New York, but of other states as well, whereby aspiring new states had loaned their credit freely and extravagantly to corporate enterprises which had in them much seductive promise of public good. These enterprises included railways, canals, water powers, etc. *The corporate body in each case was the primary debtor; the state became the underwriter; it loaned its credit always with the assurance and belief that the primary debtor would pay.* Pursuant to the secondary liabilities, the state became overwhelmed with millions of dollars of indebtedness which never would have been undertaken as a primary indebtedness, and which never would have been permitted by public sentiment, if it had been known or believed that the secondary liability would become a primary one through the universal failure of the primary debtor. The ultimate cry of the surety is: I would not have become surety if I had known or believed that I should have to pay the debt. This is as true of states as of individuals. *It was to remove this delusion of suretyship with its snare of temptation that this section of the Constitution was adopted. It withheld from the constituted authorities of the state all power or function of suretyship.* *Green v. City of Mt. Pleasant*, 131 N.W. 2d 5, 14-15 (Iowa 1964) (Emphasis added).

This same understanding that the "lending of credit" concept has no application when revenue bonds are involved was expressed by the Wyoming Supreme Court as follows:

If courts, which take opposite points of view relative to the lending of credit, can agree that revenue bonds such as those here involved are not a general liability of the city and are not subject to payment through the exercise of the taxing power, we ought to be justified in adhering to the principle that the legislature and bondholders themselves, and not the courts, will be responsible for whatever results from this type of financing.

We have to recognize the inherent right of parties to contract as they see fit. *If a bond purchaser, with his eyes wide open, sees fit to purchase revenue bonds . . . for the sake of a Federal tax advantage, he certainly will be on notice of the fact that there will never be any pecuniary liability against the City . . . and that he will be able to look only to the revenues of the project and the project property itself for payment of his bonds. With it expressed clearly in the law and on the face of each bond that neither the credit nor taxing power of the municipality is pledged, no bondholder will ever be heard to say he was deceived or that he thought otherwise.*

The constitutional provision we are discussing precludes a city from loaning or giving its credit to or in aid of an individual or corporation. *This does not prohibit a city from aiding or benefiting a corporation, if its credit is not involved.* Licenses and franchises are frequently granted by cities and counties to individuals and corporations. *No doubt the recipients receive aid and a*

*benefit, but no public credit is involved. Uhls v. State, supra* at 83 (Empasis added).

The Oregon Supreme Court expressed it this way:

[T]he revenue bond method of financing could not have been in the ken of the constitution writers . . . . The only conclusion that can be drawn from history is that they were looking for a way . . . to prevent exposing the sources of public revenue to potential hazard. *Carruthers v. Port of Astoria, supra*, at 728.

The quotes by the Appellant from statements of delegates Varian and Richards were made in the context of a discussion of the use of general obligation bonds or the use of state suretyship of private bonds, either of which involves the use of the taxing power. The quoted comments of both delegates refer to the evil sought to be ended by the lending of credit proviso — ultimate resort to the taxing power if a financed project fails. Considered in context neither delegate was asserting that no aid or assistance should ever be given to private industry. This is done in many ways by all governments, ranging from assistance in the form of research on industrial problems, providing workmen's compensation insurance through the State Insurance Fund and, of course, broadly speaking, providing the framework of government within which private industry itself operates. But where there is no resort to the taxing power, there is no lending of credit. This is the case here because the Act (11-17-4) prohibits any such recourse as does the mortgage and indenture involving this particular project (Ex. D-5).

Appellant insists that if bonds are not paid when due, the credit of the County will be impaired and relies on dictum from *Wadsworth v. Santaquin City*, *supra*. As dictum, the language quoted is not persuasive precedent and in fact the recognition in that case of the special fund doctrine supports Respondents' position. It should be noted that the credit of Tooele County would in no way be impaired if there were a failure to pay the rentals on The Magnesium Project lease. When the bonds are initially marketed they are not sold on the basis of the credit of the municipality as Appellant alleges. The record shows instead that revenue bonds are sold on the basis of the financial strength of the company or companies backing the project (Tr. 34). If a failure occurs, the only credit rating that would be injured would be that of the private company for whom the project was constructed and any private guarantors of the payment of the bonds.

In addition, contrary to the dictum of Justice Folland in the *Wadsworth* case that "no prudent city will permit its promise to pay to go unfulfilled where it has received and enjoyed the fruits of the obligation," a more recent Utah case has held that only a legal obligation and charge against the city can be paid by the city. In *State v. Spring City*, 123 Utah 471, 260 P.2d 527, this court held that even though the city had sold and used the proceeds of bonds which the court declared were illegal and thus "enjoyed the fruits of the obligation," the city could not be compelled to repay the bond purchasers. Thus Tooele County, here, could insist on the strict application of the provisions of the Act and of the mortgage



and indenture relating to this project and refuse to make payment of the bonds even if they went into default. Indeed it is not an overstatement to say that the courts would prohibit the County from attempting to repay any of the bonds since the County has no legal obligation to do so.

Appellant quotes from the Ohio case of *State v. Brand*, 197 N.E.2d 328 to the effect that the borrowing power of the state would be lessened and thus the burden on the tax power of the state would be greater. This theory cannot be assumed without evidence and economic analysis. Appellant has made no showing that the borrowing power of the state will be lessened nor has he related a lessened borrowing power to a greater burden on the taxing power. (It would appear that the burden of taxes would be less over the long run if there were no borrowing). The trial did establish instead that the revenue bonds would be issued not on the credit rating of the County but on the credit rating of the private companies involved in the project. If the project were to fail, only the credit of the companies and its private guarantors would be affected. Thus the suggestion in Appellant's brief that interest rates on other tax free bonds "likely will be increased" and that governmental units "may have to pay higher rates of interest on 'legitimate' bonds issued to finance public improvements" because of the use of industrial revenue bonds are merely unsupported suppositions. Even if this were the case, that would not involve a lending of credit in the constitutional sense, for revenue bonds are neither a charge against any tax moneys or an obligation payable directly

or indirectly out of tax moneys. To the extent that the Idaho, Ohio and Nebraska Supreme Courts reached contrary views in the cases cited by Appellant, we disagree with the conclusions reached and point out, again, that these cases stand alone against the many other cases supporting this type of financing.

It is, of course, true that the financing cost is less on these type of bonds because under present federal income tax laws and by the provisions of the Act (11-17-10) interest on these bonds is exempt from income taxation. Furthermore, the record indicates that in some cases perhaps a greater percentage of the cost of a project could be financed (Tr. 73), but neither of these advantages involve in any way an obligation assumed by the state or any county or city. The name of the County as the issuer of the bonds is certainly not the same as the use of its credit.

As discussed above, the "lending of credit" sought to be prohibited by the framers of the Utah constitution was public suretyship of private securities or assumption of private obligations by the public with the resulting resort to the taxing power of the public agency in the event of private failures. The framers showed no intent that "lending of credit" was to have the expanded meaning suggested by the Idaho and Nebraska cases. On the contrary, "lending of credit" is not involved in revenue bond financing and the framers intended that private enterprise could be benefitted by public action when lending of credit is not involved. This court should follow the intent of the framers of our constitution by finding

that when no resort can be had to the taxing power of the public agency, Tooele County in this case, there is no violation of Article VI, Section 31.

### POINT III

#### THERE IS SUBSTANTIAL PUBLIC PURPOSE FOR THE ACT.

In many of the cases involving industrial promotion legislation, attacks have been made on the basis that the legislation involves a use of public agencies or public funds or public property in furtherance of private purposes and, thus, it is not for a "public purpose." Sometimes this principle is asserted to be founded in the "lending of credit" provisions of state constitutions. Other courts discuss it in terms of a general constitutional principle that there is a public sphere within which the legislature may act and a private sphere in which the legislature may not act. Still other courts discuss this in terms of an application of the "due process" clauses of state constitutions and of the United States Constitution. See Note, 1967 Utah Law Review 455; 19 Vand. L. Rev. 25 (1965).

The lending of credit provision of our constitution is discussed in Point II of this brief, where we pointed out there is no lending of credit because the Act involves only revenue bonds which do not obligate the credit of the County and which do not permit any charge on the taxing power. There being no lending of credit, we need not then go to the question of whether there can be a lending of credit if it is for a public purpose as was suggested in the cases of *Bailey v. Van Dyke*, 66 Utah

184, 240 Pac. 454, and *Wallberg v. Utah Public Welfare Comm.*, 115 Utah 242, 203 P.2d 935. In the former case this court found a public purpose when public funds were used to assist the farming industry by the employment of county farm agents and, in the latter case, that Article VI, Sec. 31, was not violated by the imposition of a lien on land owned by recipients of public welfare. Both statutes were held to be for a valid public purpose.

With respect to the argument that there is an implied constitutional limitation on the powers of the legislature, we suggest that this is wholly foreign to previous interpretations of our state constitution by this court. In *Wood v. Budge*, 13 U.2d 359, 374 P.2d 516, this court stated:

Our Legislature is directly representative of the people of the sovereign state, and thus had inherently all of the powers of government except as otherwise specified by the State Constitution. . . . Therefore, it can do any act or perform any function of government not specifically prohibited by the State Constitution.

Our state constitution being then a limitation on power, not a grant of power, there is no possibility of implied constitutional limitations of the kind suggested.

The 14th Amendment of the United States Constitution was formerly used in several cases to strike down state legislation. See, for example, *Loan Ass'n v. Topeka*, 87 U.S. 655 (1875). But recent cases have held that state legislatures may properly enact economic legislation which regulates the property rights of its citizens.

*Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 81 L.Ed. 1245 (1937). This deference to legislative judgment is illustrated in a case involving an industrial promotion act enacted by the State of Mississippi in which the United States Supreme Court found no substantial federal question to be involved (*Albritton v. City of Winona*, 303 U.S. 627). It appears clear that the present case does not present any issue under the 14th Amendment to the United States Constitution except, possibly, on the question of the tax exemption provisions of the Act, which are discussed in Point V of this brief.

Turning next to public purpose as a part of due process under state constitutions, most state courts have had no difficulty in finding a public purpose sustaining industrial development legislation (*Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834; *City of Gaylord v. Beckett*, 378 Mich. 273, 144 N.W.2d 460; *Wayland v. Snapp*, 232 Ark. 57, 334 S.W. 2d 633; *Roan v. Connecticut Industrial Building Commission*, 189 A.2d 399; *Carruthers v. Port of Astoria*, *supra*. See other cases collected in Appendix B). There is a clear trend toward reversing the 19th Century doctrines of limitations on the legislature (e.g. *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759 (1853)) to the modern recognition that state government in the exercise of its police powers must consider and become involved in the economic aspects of our society for the general welfare of all. As the Delaware court stated:

Recent decisions in other jurisdictions, we think, demonstrate a growing tendency on the part of legislatures and courts to expand the con-

cept of public purpose beyond the narrow limits represented by the earlier decisions. . . . *In re Opinion of the Justices*, 54 Del. 366, 177 A.2d 205, at 214.

There is also a firmly established rule that courts defer to the determination of the legislature as to what is a proper public purpose and what type of legislation is needed for the public good. Courts will intervene only in a "plain case of departure from every public purpose which could reasonably be conceived." (*Carmichael v. Southern Coal and Coke Co.*, *supra*). See also, *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799; *State v. City of Pittsburg*, 188 Kan. 612, 364 P.2d 71. In *Faulconer v. City of Danville*, 313 Ky. 468, 232 S.W.2d 80, the rule was stated as follows:

In enacting the statute under which the present venture is undertaken, the legislature deemed the acquisition and ownership by a city of an "industrial building" to be a public project. The legislative determination of what is a public purpose will not be interfered with by the courts unless the judicial mind concedes it be without reasonable relation to the public interest or welfare and to be within the scope of legitimate government. The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classed as involving a public purpose. . . . It reaches perhaps its broadest extent under the view that economic welfare is one of the main concerns of city, state and the federal governments.

This general principle is in line with earlier decisions of this court. In *Lehi City v. Meiling*, 87 Utah 237, 48 P.2d 530, this court stated:

It is one of the objects of government to promote the public welfare of the state and provide for the material prosperity of its people. It is for the Legislature to determine the manner and extent to which it will exercise this function of government, and its determination upon that point is limited by its own discretion, and is beyond the interference of the courts. *Id.*, 48 P.2d at 535.

In the instant case there is ample evidence to show that in passing the Act the Legislature was acting within its proper sphere in promoting and protecting the public health, welfare and morals. The Act is referred to as relating to "industrial development," and Section 1 of the Act specifies that it "shall be for the purpose of achieving greater industrial development in the State of Utah." The trial court found that a valid and substantial public purpose was contemplated by the Legislature in the enactment of the Act (Findings, para. 15) and by the Board of Commissioners of Tooele County in its proposed implementation of the provisions of the Act (Findings, para. 13).

Following the doctrine set forth in *Lehi City v. Meiling*, *supra*, this court should uphold the legislation, indulging the usual presumptions in its favor. Certainly the enactment here is not a "clear and demonstrable usurpation of power" (*Lehi City v. Meiling*, 48 P.2d at 535) which the court should invalidate. The trial court's finding that "there is a valid and substantial public purpose and public benefit to the County subserved by the issuance of the proposed revenue bonds and the construction of the project from the proceeds of the sale

thereof" (Finding, para. 14) directly corroborates the legislature's exercise of its discretion. For this reason, we shall only briefly highlight the supporting evidence on this point in the record.

The evidence shows that between \$50 million and \$60 million will be spent in initial construction of the project, including some \$10 million of supplies to be obtained from Utah sources; that peak employment during construction will be between 800 and 1,000 construction workers and that the plant, when in operation, will require 300 employees with an annual payroll of \$3,360,000 or \$2,960,000 after fringe benefits are deducted (Tr. 27-28, 53, 57; Ex. D-13). Yearly purchases from Utah sources will amount to \$3,230,000 (Exs. D-6, D-11, D-12). Professor Iver Bradley of the University of Utah, an experienced statistician and economist, applied the results of his economic research to these figures and determined that the wage payments and Utah purchases of supplies by the project will increase the total yearly household income to Utah households by \$6,760,000 (Tr. 53; Ex. D-12) and that the project payroll will represent a 32% increase in the wages paid in Utah in the chemical manufacturing sector of our economy (Tr. 55; Ex. D-13). Additional economic benefits not measured by the study will be derived from expenditures of \$2 million in the state each year for electrical energy (Tr. 29, 54); transportation expenditures (Tr. 30, 54); expenditures of approximately \$500,000 a year in state and local taxes and \$163,000 per year in state land rentals and royalties (Tr. 31, 58), and the spurt to the economy caused by the initial construction of the project (Tr. 57-



58). It is also likely that new industries using magnesium, chlorine, gypsum and other by-products produced by The Magnesium Project will locate in Utah (Tr. 31, 54).

The economic benefits above referred to become even more significant when the present Utah and Tooele County economies are observed. Commissioner R. Sterling Halladay, of the Board of Commissioners of Tooele County, testified (Tr. 19-20) :

THE WITNESS: The employment in our County, we're very much concerned. A very high percent of our employment is Federal employment, while our economy is good because [of the present] employment that we enjoy, it could be wiped out by the stroke of a pen overnight, and we would be in a very bad circumstance, both with regards to the private individual, as well as all of our municipalities and your county government is concerned. I'm not sure as to the percentage of Federal employment, but I'm — it must be over 50% Federal employment here in this county [Exhibit D-16 shows that over 80% of the wage and salary payments in the years 1962 to 1965 came from government sources].

Professor R. Thayne Robson, of the University of Utah Bureau of Economic and Business Research, testified that the economy of the State of Utah needs to grow by 14,000 to 15,000 new jobs a year to absorb the normal increase in the labor force and to re-employ persons displaced in other industries and should grow by 15,000 to 18,000 jobs per year to provide the needed growth rate for Utah's economy. Over the past 5 years the economy has not grown sufficiently to absorb these

normal increases and, consequently, there has been a substantial migration out of the state to find jobs (Tr. 78-79).

In Tooele County more of the personal income (84.4%) comes from wages and salaries than in the state as a whole (69.7%), and government accounts for 69.9% of the total as compared to a state-wide average of 19.6% (Ex. D-14). Similar information is shown on Exhibits D-15 and D-16. Exhibits D-17 and D-18 indicate the relatively small share of the Tooele County economy occupied by manufacturing with the actual number of manufacturing establishments declining between 1958 and 1963 and the number employed in manufacturing being less in 1963 than in 1939. Other information on Tooele County is shown on Exhibits D-19 and D-20 relating to taxes and Exhibit D-21 relating to some aspects of the Tooele population.

Professor Robson also testified that the short-term effect of The Magnesium Project during the construction period "would be a great boost and boom for the Utah economy" (Tr. 85) and that the long-term effect on Tooele County and the State of Utah "would be very substantial and very significant" (Tr. 86).

Certainly on this evidence and similar evidence relating to the State as a whole, the Tooele County Commission and the Legislature of the State of Utah were reasonable in concluding that financing of private industry through the use of industrial revenue bonds was a proper public activity and for the public benefit. Au-

thorization of use of these income tax exempt revenue bonds affords a relatively simple means by which the goals of private industry and public bodies can be accomplished to their mutual benefit. We need not and do not in this case contend that this legislation is a panacea for all the economic problems of the State or of Tooele County, but clearly if this legislation is upheld it does place Utah on an even basis with other states in the competition for new jobs and increased economic prosperity (Tr. 71). There is a proper public purpose in this type of legislation and it should be sustained.

#### POINT IV

THE ACT PROPERLY DELEGATES POWERS TO CITIES AND COUNTIES, APPLIES UNIFORMLY, GRANTS NO SPECIAL PRIVILEGES, DELEGATES TO NO SPECIAL COMMISSION AND REQUIRES BOND PROCEEDS TO BE USED FOR PROPER PURPOSES.

Appellant in Points II, III and VI of his brief alleges violation of several constitutional provisions which we will discuss under this general point.

(A) *Delegation of Powers.* Unless specifically limited by the state constitution, the legislature has all powers of government (*Wood v. Budge, supra; Lehi City v. Meiling, supra; Salt Lake City v. Christensen Co.*, 34 Utah 38, 95 Pac. 523, 17 L.R.A.(N.S.) 898). In exercising this power, it can delegate to cities and counties such authority as it deems advisable. This does not violate any separation of powers concept of Article V, Section 1, for the cities and counties within the scope of their dele-

gated powers act as arms of the state. This court stated in *Nowers v. Oakden*, 110 Utah 25, 169 P.2d 108 at 113:

County Commissioners are legislative as well as executive bodies. The delegation of legislative or quasi legislative powers to such a body could not be questioned. . . .

With regard to cities, the legislature is not restricted to the subjects set forth in Article XI, Section 5. This court stated in *Wadsworth v. Santaquin City*, *supra*, 28 P.2d at 168-69:

The power granted in the amendment [to Article XI, Section 5] to cities forming their own charters, while taking such cities out of the orbit of legislative action as to municipal and local affairs, is no limitation on the power of the legislature with respect to the organization of other cities and the conferring of power on them by general law.

Thus, it cannot be said that the lack of specific reference to industrial revenue bond financing in Article XI, Section 5, negates the existence of such authority. The legislature can supply this authority which it has done by the adoption of the Act here in question. *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P.2d 773, does not conflict with this conclusion for the holding there was that a city ordinance on civil rights was invalid because civil rights authority was neither granted by Article XI, Section 5, nor was it authorized by any statute. This is not a holding that Article XI, Sec. 5 is the only source of city powers.

We recognize that a delegation by the legislature must be limited by proper standards, but such standards

are set forth in the Act. The most basic of these is found in 11-17-1 that the Act is for the purpose of "achieving greater industrial development in the State of Utah." The city or county must act in promoting this purpose so as not to give rise to a general obligation or liability of the city or county or a charge against its general credit or taxing powers. It must act reasonably in determining appropriate terms for the leases, providing for adequate security for the bonds, providing for proper disposition of the proceeds of the bonds and carrying out the purposes of the Act for the public benefit of the municipality or county involved. Necessarily, the municipality or county must be granted considerable discretion, for these projects will vary greatly in type and extent. Lease provisions applicable in one situation may not be appropriate in another. Similar discretion is exercised by officials of cities and counties every day under various statutes and in various circumstances. See *Utah Power & Light Co. v. Provo City*, *supra*, 74 P.2d at 1196.

Appellant specifically points to the fact that the Act fails to provide the maximum price at which revenue bonds issued under the Act may be sold or a maximum interest rate on the bonds. Since the bonds are not an obligation of the city or county and will be paid by the company involved in the project, it is entirely appropriate for the legislature to permit the market place to determine the rate of interest and the price of the bonds.

Section 11-17-3 of the Act provides that a project must be located within the State of Utah and "may be

located within or partially within" the municipality or county which is sponsoring the project. Appellant contends this constitutes an improper delegation even though it is clear that the project here will be located entirely within Tooele County (Tr. 27). We see nothing wrong in permitting a city or county to so act so long as they act reasonably and within the purposes of the Act. Based on the evidence discussed in Point III, it would appear that the City of Tooele or the City of Grantsville will receive many of the benefits which will inure to Tooele County from the establishment of the project and should be permitted to sponsor such a project. If, however, Tooele County sponsored a project located near St. George, the County Commissioners might well be acting unreasonably and, thus, beyond the authority of the Act. We also note that the phrase could be construed as requiring projects to be at least partially within the municipality or county. The phrase "may be located within or partially within, such municipality or county" could be construed to mean that the municipality or county has discretion as to the two named alternatives, that is, either within or partially within but no other. We suggest but do not endorse such a construction, for we believe it would unduly and unnecessarily restrict the location of industry around cities and counties which benefit from the establishment of such an industrial project.

The question of location and, indeed, the essence of the question of delegation is adequately answered by *State v. City of Pittsburg*, 188 Kan. 612, 364 P.2d 71 at 78-79. An industrial revenue bond act authorizing loca-

tion of projects "in any city or its environs, without limitation as to distance" was not an improper delegation, the court held. The legislature must fix general standards, but "the filling in of details must, in the very nature of things, be left to the local authorities." The court noted "the legislature and the people have the right to assume that public officials will exercise their express and implied powers fairly, honestly and reasonably."

(B) *Uniformity, No Special Privileges, Vagueness.* Pointing to Article VI, Section 26 (private or special laws), or in Federal constitutional terms, equal protection of the laws, Appellant argues that the Act constitutes special legislation. He asserts there is no reasonable basis for the exclusion of public utilities as a project which could be financed under the Act and suggests that only telephone, electric and gas utilities are so excluded. We read Section 11-17-2(2) as excluding all public utilities as defined in Section 54-2-1. A classification between public utilities and other types of business or industry is certainly reasonable and has been customarily recognized. These types of companies traditionally subject to regulation by the Public Service Commission should continue to be so regulated and should not become involved with cities or counties in a project under the Act. Note, also, that the exclusion applies generally without exception to all utilities and thus operates uniformly.

This also answers Appellant's assertion that exemption of the revenue bonds from the Uniform Commercial Code violates the uniformity provisions. The Commercial Code itself contains numerous exclusions from its operation. Here another exclusion applies to all bonds

issued under the Act and this is applied uniformly and equally without discrimination of any kind. This same reason justifies the exemption of projects under the Act from the competitive bidding laws plus the added reason that there is no need for competitive bidding when government does not pay the bill. We can assume that the private industry involved in the project, which is paying the bill, will see to it that the lowest possible prices for construction and for financing are obtained.

Finally, Appellant contends that there is broad discretion given to a city or county as to what industry it would sponsor under the Act. The mere fact that a county is free to negotiate with whom it pleases does not violate any constitutional guarantee. The Act is general by its terms and would permit any industrial enterprise, except public utilities, to lease a project from the county. The county itself, as a subdivision of state government, is left with legislative powers which it may use in determining the method and procedure it will follow in its use of the Act. See *Nowers v. Oakden*, *supra*, and see generally *State v. Mason*, 94 Utah 501, 78 P.2d 920; *Thiokol Chemical Corp. v. Peterson*, 15 U.2d 355, 393 P.2d 391; *Marquardt v. Weber County*, 360 F.2d 168. See also Note, 1967 Utah Law Review 431. In the latter two cases the courts held that the act in question was non-discriminatory in terms and there was no violation of equal protection guarantees as a result of discrimination in application of the act when the discrimination



was not "intentional and systematic." In *State v. Demus*, 135 S.E. 2d 352 (W. Va. 1964), industrial promotion legislation was sustained, the court holding that there is no violation of equal protection guarantees even if some persons are incidentally benefitted more than others in achieving the purposes of the legislation. See also *Green v. City of Mt. Pleasant, supra*; *Roe v. Kervick, supra*; and *State v. Kallas*, 97 Utah 492, 94 P.2d 414.

Appellant points to no particular provision of the Act which he considers vague, ambiguous or uncertain and our reading of the Act does not indicate any vagueness, ambiguity or uncertainty whatsoever. This court has established the rules concerning vagueness of statutes in several cases including *Nowers v. Oakden, supra*, (no unconstitutional vagueness if the Act "when construed with related sections, conveys a definite meaning to 'those whose duty it is to execute it'"); *Kent Club v. Toronto*, 6 U.2d 67, 305 P.2d 870; *Tygesen v. Magna Water Co.*, 119 Utah 274, 226 P.2d 127, 131 (Courts will not declare an act invalid "because it has not been expressed as aptly or clearly as it could have been had different terms been used. . . . Only when it is impossible to resolve the doubts will an act be declared invalid for uncertainty or vagueness.").

(C) *Irrevocable Franchise*. On the basis of Article I, Sec. 23, Utah Constitution, Appellant objects to Section 11-17-13 of the Act. This section merely provides that the legislature will not make changes in the Act which would affect outstanding bonds issued under the Act so as to "alter, impair or limit the rights thereby

vested until the bonds . . . are fully met and discharged.” But the provision goes on to make it clear that amendments may be made “if and when adequate provision shall be made by law for the protection of the holders of the bonds or persons entering into contracts with any county or municipality.” Thus the purpose and effect of the provision is not to grant an irrevocable franchise or privilege, but to reasonably protect contracts which have been made. Attempted amendments which would impair vested contract rights of bondholders or others would undoubtedly violate Article I, Section 18, Utah Constitution. See also *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P.2d 477, *appeal dismissed*, 336 U.S. 930, where a 99 year lease of state property was held not to constitute an irrevocable franchise, privilege or immunity. It would appear that Appellant concedes, and quite properly, that the principles of that case sustain leases made under the Act here in question.

(D) *Special Commission*. Article VI, Section 29, Utah Constitution, prohibits delegation by the legislature to any special commission, corporation or association power to perform any municipal function. The municipal function under the Act here involved is to induce industry to locate in the municipality by erecting a project, not to operate a project. Indeed the municipality or county is prohibited from operating a project. There is no delegation of any municipal function to a private company leasing property from the city or county under the Act since the company merely operates a plant erected by a city or county which has performed its function of inducing industry to locate in the area. The company

while operating property, title to which is vested in the county or municipality, in doing so pursuant to a lease, the terms of which are controlled by the county or municipality. For the same reason there is no delegation to a trustee or receiver who might operate the property if a default occurs in the bonds. These same questions were discussed and a virtually identical constitutional provision was construed by the Wyoming Supreme Court in *Uhls v. State*, *supra*, 429 P.2d at 84-85. The court there held that this constitutional provision is designed "to protect against the exercise of the taxing power and other purely municipal functions by officials not subject to the people's control." This result is consistent with interpretations by this court of Article VI, Section 29. See *Logan City v. Public Utilities Comm.*, 72 Utah 536, 271 Pac. 961 at 972.

Also note that there is in reality no delegation under the Act except to municipalities and counties. Accordingly, cases such as *Carter v. Beaver County Service Area No. 1*, 16 U.2d 280, 399 P.2d 440, *Backman v. Salt Lake County*, 13 U.2d 412, 375 P.2d 756, and *State Water Pollution Control Bd. v. Salt Lake City*, 6 U.2d 247, 311 P.2d 370, are distinguishable because in all those cases a special commission or district or state agency had been created to which powers had been delegated. The powers granted by the Industrial Facilities Development Act are granted without discrimination to "each municipality and each county." The Act thus does not constitute an interference with a municipality or county, but extends a privilege which is permissible as this court noted in *Merkley v. State Tax Comm'n.*, 11 U.2d 336, 358 P.2d 991.

(E) *Use of Borrowed Moneys.* Article XIV, Section 5, of the Utah Constitution is not violated by the Act. It requires moneys borrowed by a legal subdivision of the State to be used "solely for the purpose specified in the law authorizing the loan." The Act here expressly authorizes bond proceeds to be used only for industrial development. The lease and mortgage and indenture of trust, Exhibits D-4 and D-5, specifically require the Respondents to use the bond proceeds only for the purposes specified in the Act which, in this case, will be construction of this industrial project. Only if the bond proceeds are actually used for purposes not authorized by law will the constitutional provision be violated and, should that occur, the courts may take action to prohibit the diversion. There is obviously nothing in the Act itself which authorizes any diversion.

#### POINT V

**PROPERLY INTERPRETED, THE ACT DOES NOT GRANT IMPERMISSIBLE TAX EXEMPTIONS.**

Section 11-17-10 of the Act provides as follows:

All property acquired or held by the county or municipality under this act is declared to be public property used for essential public and governmental purposes; and all such property and bonds issued under this act and the income from them are exempt from all taxes imposed by the state of Utah, any county, any municipality, or any other political subdivision of the state. This exemption shall not extend to the interests of any private person, firm, association, partnership, corporation or other private business entity in such property or in any other property such business

entity may place upon or use in connection with any project, all of which shall be subject to the provisions of section 59-13-73 and all other applicable laws, nor to any income of such private business entity, which, except as provided in this section for such bonds and the income from them, shall be subject to all applicable laws regarding the taxing of such income.

Appellant in Point V of his brief interprets the above section to grant at least a partial exemption from the property tax. This is a strained interpretation to reach a possibly unconstitutional result and violates the established canon of construction that laws should be interpreted to avoid constitutional questions.

Consider for the moment the situation if the Act did not contain a section such as 11-17-10. Had that been true, the private company leasing an industrial plant and equipment from a city or county could very properly claim a property tax exemption for county owned property as expressly provided in Article XIII, Section 2 of the Utah Constitution because the title to the plant and equipment remains in the county or city until the bonds are paid and the options to purchase provided for in the lease are exercised. To avoid this result the legislature recognized the argument, but said instead that the private company would pay the same amount as it would otherwise pay in property tax by requiring application of Section 59-13-73 to the property the private company "may place upon or use in connection with any project." The tax is "in the same amount and to the same extent as the ad valorem property tax would be if the possessor

or user were the owner thereof" (59-13-74). A fair reading of the privilege and use tax sections referred to make it clear that the value, tenure, title or ownership of the interest of the private business in the otherwise tax exempt property is irrelevant and that the tax is imposed whenever there is possession or other beneficial use by a private party. This was the construction adopted by this court in *Thiokol Chemical Corporation v. Peterson, supra*, which case was relied on and approved in *Marquardt v. Weber County*, 360 F.2d 168 (10th Cir. 1966).

A similar "in lieu of property tax" provision was upheld in *Powers v. City of Cheyenne, supra*. Appellant's claim that "likely" the tax imposed would not be the same and that each individual assessor would apply the law differently can be answered simply by this court declaring that the tax under 59-13-73 is to be imposed on project lessees under the Act on the same basis as if the lessee were paying a property tax on property, title to which is owned by it. Our statute is in no way similar to the Virginia statute involved in *Industrial Development Authority v. Suthers*, 208 Va. 51, 155 S.E.2d 326, where the statute provided for rental payments in lieu of property taxes and granted the local authority power to agree "at any time" to a definite sum to be paid for such purpose. The opportunity for discrimination in such a statute is self-evident.

Some states have granted a clear tax exemption which has been upheld. See *State v. Demus*, 135 S.E.2d 352 (W.Va. 1964); *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 303 P.2d 920. Utah chose, instead, to impose a

tax in lieu of property tax and to require payment of the usual corporate franchise tax on income. There can be no constitutional infirmity in this approach under Sections 2, 3, or 10 of Article XIII of the Utah Constitution. Since there is no exemption, there is no discrimination or inequality which could raise any question under the 14th Amendment to the United States Constitution or under similar provisions of our state constitution.

Appellant makes no objection to the exemption of the revenue bonds themselves from property taxation or to exemption of the interest on the revenue bonds from income taxation. Exemption of intangible property such as bonds from property taxation is expressly authorized by Article XIII, Section 3, of the Utah Constitution. Exemption from income tax of the interest on bonds issued by municipalities and other governmental agencies is in line with long-standing state policy (See 59-14-4 (2)(d); 11-14-14) uniformly applied and the exemption in the Act is only a specific application of this general state policy.

#### POINT VI

#### INVESTMENT OF PUBLIC FUNDS IN REVENUE BONDS ISSUED UNDER THE ACT IS PERMISSIBLE.

The trial court held that because the County had determined not to purchase or invest in any of the bonds (Exhibit P-2) the question was not properly before the court and was not determined (Conclusions of Law, para. 3(a); Declaratory Judgment and Decree, para. 2). Appellant nonetheless raises the question again suggesting

that a state investment in these revenue bonds would constitute an assumption of the debt of a county contrary to Article XIV, Section 6, Utah Constitution. This ignores the plain fact of such a transaction that the state rather than assuming debt would become a creditor at the time of the purchase of the bonds, not a debtor. The state would not be obligated to pay the debt but as a creditor would receive interest and be entitled to receive the principal when it came due. Furthermore, because of the "special fund doctrine" referred to in POINT I, the County is not the debtor. The state, like any other bondholder, could look only to the revenues from the project for payment of the bond and the property comprising the project which is mortgaged as additional security.

If Appellant intends to suggest that any investment by a public agency in securities, including securities which a private corporation is required to pay, is unconstitutional, the claim was set to rest by this court in *State Land Board v. State Finance Commission*, 12 U.2d 265, 365 P.2d 213. *Andres v. First Arkansas Development Finance Corp.*, 230 Ark. 594, 324 S.W. 2d 97 upheld state investment in industrial development bonds. See also *Industrial Development Authority v. Eastern Kentucky Regional Planning Commission*, 332 S.W.2d 274 and *Halbert v. Helena-West Helena Industrial Development Corp.*, 226 Ark. 620, 291 S.W.2d 802. The authorization of investment by the act is no more than that intended in the statute considered in the *Land Board* case, and should be treated as such by this court.



If, however, the court is concerned with the constitutionality of this section, it is clearly severable from the remainder of the Act. The primary purpose of the Act is to provide a financing method to induce private industry to locate in Utah. Enhanced marketability of the bonds issued to accomplish this purpose by permitting sale to public agencies is certainly a subordinate matter not essential to the major purpose of the Act and if defective should be severed from the remainder of the Act.

## CONCLUSION

For the foregoing reasons, we submit that the Utah Industrial Facilities Development Act is in all respects valid and constitutional and that the proposed actions of the respondents here in operating pursuant to this Act should be declared to be lawful in all respects. To arrive at this result the court need not and should not indulge in philosophical speculations as to the desirability of this type of legislation. That decision was made by the legislature which recognized that industrial development for this state is of vital concern. Had they felt otherwise they would not have established in 1965 the Utah State Industrial Promotion Board, whose assignment is specifically to induce industry to locate in this state. The Act here in question provides another tool with which

this Board can accomplish its purposes enabling it to compete on a more equal basis with other states whose courts have already approved this type of legislation.

We submit that the decision below should be affirmed.

Respectfully submitted,

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## APPENDIX A

The following is a list of cases upholding the constitutionality of legislation authorizing industrial development revenue bond financing:

ALABAMA	<i>Newberry v. City of Andalusia</i> , 257 Ala. 49, 57 So. 2d 629 (1952) (no "lending of credit" when revenue bonds are issued) <i>In re Opinion of the Justices</i> , 256 Ala. 162, 53 So. 2d 840 (1951) (no "lending of credit" when revenue bonds are issued)
ARKANSAS	<i>Wayland v. Snapp</i> , 232 Ark. 57, 334 S.W.2d 633 (1960) (no "lending of credit" when revenue bonds are issued)
GEORGIA	<i>Smith v. State</i> , 217 Ga. 94, 121 S.E.2d 113 (1961) (by local constitutional amendment)
IOWA	<i>Green v. City of Mt. Pleasant</i> , 256 Iowa 1184, 131 N.W.2d 5 (1964) (no "lending of credit" when revenue bonds are issued)
KANSAS	<i>State ex rel. Ferguson v. City of Pittsburg</i> , 188 Kan. 612, 364 P.2d 71 (1961) (no "lending of credit" when revenue bonds are issued)
KENTUCKY	<i>Gregory v. City of Lewisport</i> , 369 S.W.2d 133 (Ky. 1963) (no "lending of credit" when revenue bonds are issued) <i>Faulconer v. City of Danville</i> , 313 Ky. 468, 232 S.W.2d 80 (1950) (no "lending of credit" when revenue bonds are issued)
LOUISIANA	<i>Hebert v. Police Jury</i> , 200 So. 2d 877 (La. 1967) (no "lending of credit" when revenue bonds are issued; constitutional authorization)
MAINE	<i>Opinion of the Justices</i> , 210 A.2d 683 (Me. 1965) (limited approval)
MICHIGAN	<i>City of Gaylord v. Beckett</i> , 378 Mich. 273, 144 N.W.2d 460 (1966) (no "lending of credit" when revenue bonds are issued)

MISSOURI	<i>State ex rel. City of El Dorado Springs v. Holman</i> , 363 S.W.2d 552 (Mo. 1962) (constitutional amendment authorizes both general obligation and revenue bonds)
NEBRASKA	<i>State ex rel. Meyer v. County of Lancaster</i> , 173 Neb. 195, 113 N.W.2d 63 (1962) (constitutional amendment authorizing industrial revenue bonds said by the court to be for private purposes)
NEW HAMPSHIRE	<i>Opinion of the Justices</i> , 209 A.2d 474 (N. H. 1965)
NEW MEXICO	<i>Village of Deming v. Hosdreg Co.</i> , 62 N.M. 18, 303 P.2d 920 (1956)
NORTH DAKOTA	<i>Gripentrog v. City of Wahpeton</i> , 126 N.W. 2d 230 (N.D. 1964)
OKLAHOMA	<i>Harrison v. Claybrook</i> , 372 P.2d 602 (Okla. 1962)
OREGON	<i>Carruthers v. Port of Astoria</i> , .... Ore. ...., 438 P.2d 725 (1968) (no "lending of credit" when revenue bonds are issued)
SOUTH CAROLINA	<i>Elliott v. McNair</i> , .... S.C. ...., 156 S.E.2d 421 (1967) (no "lending of credit" when revenue bonds are issued)
TENNESSEE	<i>West v. Industrial Development Bd.</i> , 206 Tenn. 154, 332 S.W.2d 201 (1960) (no "lending of credit" when revenue bonds are issued)  <i>Holly v. City of Elizabethton</i> , 193 Tenn. 46, 241 S.W.2d 1001 (1951) (no "lending of credit" when revenue bonds are issued; distinguished two prior Tennessee cases holding unconstitutional general obligation bond programs)
VIRGINIA	<i>Fairfax County Indus. Dev. Auth'y v. Coyner</i> , 207 Va. 351, 150 S.E.2d 87 (1966) (no "lending of credit" when revenue bonds are issued)  <i>Industrial Dev. Auth'y of Chesapeake v. Suthers</i> , 208 Va. 51, 155 S.E.2d 326

(1967) (constitutional except for tax provision)

- WEST VIRGINIA      *State ex rel. County Court v. Demus*, 148 W. Va. 398, 135 S.E.2d 352 (1964) (no "lending of credit" when revenue bonds are issued)
- WISCONSIN          *State v. Barczak*, 34 Wis. 2d 57, 148 N.W. 2d 683 (1967) (no "lending of credit" when revenue bonds are issued)
- WYOMING            *Uhls v. State*, 429 P.2d 74 (Wyo. 1967) (no "lending of credit" when revenue bonds are issued)
- Reed v. City of Cheyenne*, 429 P.2d 69 (Wyo. 1967) (no "lending of credit" when revenue bonds are issued)
- Powers v. City of Cheyenne*, 435 P.2d 448 (Wyo. 1967) (no "lending of credit" when revenue bonds are issued)

## APPENDIX B

The following is a list of cases which, in addition to those cases listed in Appendix A, have upheld legislation authorizing governmental programs of promoting industrial development as having a public purpose:

ALABAMA	<i>Opinion of the Justices</i> , 254 Ala. 506, 49 So. 2d 175 (1950)
ALASKA	<i>De Armond v. Alaska State Development Corporation</i> , 376 P.2d 717 (Alas. 1962)
ARKANSAS	<i>Myhand v. Erwin</i> , 231 Ark. 444, 330 S.W. 2d 68 (1959)  <i>Hackler v. Baker</i> , 233 Ark. 690, 346 S.W. 2d 677 (1961) (constitutional amendment authorizes both general obligation and revenue bonds)
CONNECTICUT	<i>Roan v. Connecticut Indus. Bldg. Comm'n</i> , 150 Conn. 333, 189 A.2d 399 (1963)
DELAWARE	<i>In re Opinion of the Justices</i> , 54 Del. 366, 177 A.2d 205 (1962)
KENTUCKY	<i>Industrial Dev. Auth'y v. Eastern Ky. Regional Planning Comm'n</i> , 332 S.W.2d 274 (Ky. 1960)  <i>Dyche v. City of London</i> , 288 S.W.2d 648 (Ky. 1956)
LOUISIANA	<i>Miller v. Police Jury</i> , 266 La. 8, 74 So. 2d 394 (1954)
MARYLAND	<i>Maryland Indus. Dev. Fin. Auth'y v. Meadow-Croft</i> , 243 Md. 515, 221 A.2d 632 (1966)  <i>City of Frostburg v. Jenkins</i> , 215 Md. 9, 136 A.2d 852 (1957)
MISSISSIPPI	<i>Albritton v. City of Winona</i> , 181 Miss. 75, 178 So. 799, appeal dismissed, 303 U.S. 627 (1938)

- NEW HAMPSHIRE    *Opinion of the Justices*, 103 N.H. 258, 169 A.2d 634 (1961)
- NEW JERSEY        *Roe v. Kervick*, 42 N.J. 191, 199 A.2d 834 (1964)
- TENNESSEE         *Mayor and Alderman of the City of Fayetteville v. Wilson*, 212 Tenn. 55, 367 S.W.2d 772 (1963)
- McConnell v. City of Lebanon*, 203 Tenn. 498, 314 S.W.2d 12 (1958) (found general obligation bonds to be constitutional when used for public purposes arising out of a "virtual crisis")
- Darnell v. County of Montgomery*, 202 Tenn. 560, 308 S.W.2d 373 (1957)

## APPENDIX C

The following is a list of cases finding unconstitutional legislation authorizing industrial development revenue bond financing\* and which failed to find a public purpose in such legislation:

- FLORIDA                      *State v. Town of North Miami*, 59 So. 2d 779 (Fla. 1952) (dictum that there was a lending of credit when revenue bonds issued)
- IDAHO                        *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960) (Idaho Constitution is more restrictive than Utah Constitution as to "lending of credit": "No [state] subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever ..." (Idaho Const. Art. 8 §4)
- NEBRASKA                   *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 N.W.2d 269 (1957) (case overruled by constitutional amendment; revenue bond program found constitutional in case cited in Appendix A)
- NORTH CAROLINA        *Mitchell v. North Carolina Industrial Development Financing Authority*, .... N.C. ...., 159 S.E.2d 745 (1968)
- OHIO                         *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 197 N.E.2d 328 (1964)

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\*A Maryland statute allowing a state industrial development agency to guarantee loans to private companies was found to violate the lending of credit proviso of the Maryland Constitution. *Development Credit Corp. v. McKean*, 237 A.2d 742 (Md. 1968).

A Georgia case, *Smith v. State*, 222 Ga. 552, 150 S.E.2d 868 (1966), held that a tax exemption granted by a state constitutional amendment violated due process and equal protection of federal fourteenth amendment.