

# FREE ENTERPRISE VS. ECONOMIC INCENTIVES: THE EVOLUTION OF THE “PUBLIC PURPOSE” FULCRUM

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In the law of taxation, eminent domain, etc., [public purpose] is a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private interest, inclination, or liberality. The term is synonymous with governmental purpose.<sup>1</sup>

In the modern realm of public-private partnerships<sup>2</sup> (“P3s” in the trade), the proper roles of the public and private sectors are under constant economic and political (policy) pressures to increasingly blend. In Florida, the state constitution stands in the way of a complete merger of public and private capital and risk,<sup>3</sup> but there are exceptions.<sup>4</sup> Game on. This Article explores those

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1. HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY 1394 (Publisher’s Editorial Staff ed., 4th ed. 1968) (citations omitted).

2. See, e.g., *Russell v. Se. Hous., LLC*, 162 So. 3d 262 (Fla. 3d Dist. Ct. App. 2015), *reh’g denied* (Apr. 17, 2015), *review denied*, SC15-917, 2016 WL 1065886 (Fla. Mar. 17, 2016) (involving a private developer of a U.S. Navy complex); *Tucker v. State*, 884 So. 2d 168 (Fla. 2d Dist. Ct. App. 2004) (recognizing construction of courtroom through partnership between Stetson University College of Law and the Second District); FLA. STAT. § 334.30 (2016) (“Public-Private Transportation Facilities”); see also *id.* § 339.2825 (2013) (“Approval of Contractor-Financed Projects”); *id.* § 287.075 (2016) (non-exclusive process to solicit or receive a P3 proposal).

3. FLA. CONST. art. VII, § 10 (“Pledging credit.—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit . . .”).

4. *Id.* art. VII, § 10(c) (express authorization for capital projects for airports, ports, industrial and manufacturing plants); *Linscott v. Orange Cnty. Indus. Dev. Auth.*, 443 So. 2d 97, 101 (Fla. 1983) (implied authority for regional headquarters of multistate insurance company); *Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304, 308 (Fla. 1971) (implied authority for revenue bonds for private college dorm).

exceptions in the context of P3s. The fulcrum is the concept of public purpose (benefit) versus private benefit.<sup>5</sup>

I. “PUBLIC PURPOSE” MEANING NEITHER DEFINED NOR STATIC

In 1938, the Florida Supreme Court was called upon to decide whether the City of Jacksonville could issue bonds and condemn land to construct low-rent housing. The City’s actions were affirmed by the Court, writing:

What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a “public” as distinguished from a “private” purpose, but have left each case to be determined by its own peculiar circumstances. Gray, *Limitations of Taxing Power*, § 176. “Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to continue the existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.”<sup>6</sup>

Similarly, the literal term “public purpose” is not defined in the Florida Constitution. However, the concept by many names is

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5. Although the majority of the cases cited will be in the context of the government borrowing and spending money, it is helpful to note that the

standard for determining the question of “public purpose” is the same under article VII, section 10 [pledging credit] and article X, section 6 [eminent domain]. If a project serves a public purpose sufficient to allow the expenditure of public funds and the sale of bonds under article VII, section 10, then the use of eminent domain in furtherance of the project is also proper.

*State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 885 (Fla. 1980) (citing *State v. Town of N. Miami*, 59 So. 2d 779, 785 (Fla. 1952)). Conversely, the Court has flatly stated that the public purpose concepts used to constitutionally test borrowing and spending money “simply cannot be superimposed upon or commingled with the constitutional ad valorem taxation exemption analysis.” *Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238, 241 (Fla. 2001) (Sebring IV); see Martin M. Randall, *The Different Faces of “Public Purpose”: Shouldn’t It Always Mean the Same Thing?*, 30 FLA. ST. U. L. REV. 529 (2003) (discussing post-*Kelo* statutory limitations upon constitutionally permitted use of eminent domain); see also *infra* note 108 (discussing Florida’s legislative reaction to *Kelo v. City of New London*, 545 U.S. 469, 480–84 (2005)).

6. *Marvin v. Hous. Auth. of Jacksonville*, 183 So. 145, 149 (Fla. 1938) (quoting *Green v. Frazier*, 253 U.S. 233, 240 (1920)).

consistently used by the courts<sup>7</sup> to evaluate whether a particular expenditure is a legitimate exercise<sup>8</sup> of the peoples' power surrendered to the state.<sup>9</sup> Most of this caselaw involves judicial validation of public debt.<sup>10</sup> Validation is an expedited judicial process which examines and confirms for the benefit of a lender (bondholder or bank) the government's legislative power to borrow money. A critical part of that judicial examination is whether the state or local government is lending its credit to a private party in violation of the state constitution.<sup>11</sup> The word private is the antonym of public. In short, then, constitutional caselaw has set the boundaries of "public purpose" by deciding what is too private to be allowed.

It is obvious that, over the past several generations, government at all levels has played an ever-increasing role in every American's life. In the context of public borrowing and spending, a survey of validation caselaw over the past fifty years demonstrates that the once sacred citadel of free and private enterprise wholly separated from government<sup>12</sup> has fallen in favor of using the power and assets of government to do many things that, at least in the present day, appear to be good. But one distinction remains clear in the cases. In Florida, it matters

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7. "This Court has used a myriad of terms in assessing the sufficiency of public purpose in revenue bond proceedings." *N. Palm Beach Cnty. Water Control Dist. v. State*, 604 So. 2d 440, 446 n.7 (Fla. 1992) (citing *State v. City of Orlando*, 576 So. 2d 1315, 1317 (Fla. 1991)) ("a paramount public purpose" and "a valid [public] purpose"); *State v. City of Panama City Beach*, 529 So. 2d 250, 256 (Fla. 1988), *receded from on other grounds*, *City of Orlando*, 576 So. 2d at 1317 ("valid purposes"); *Linscott*, 443 So. 2d at 101 ("a public purpose"); *Orange Cnty. Indus. Dev. Auth. v. State*, 427 So. 2d 174, 179 (Fla. 1983) ("paramount public purpose"); *Miami Beach Redevelopment Agency*, 392 So. 2d at 886 ("some substantial benefit to the public"); *State v. Hous. Fin. Auth. Polk Cnty.*, 376 So. 2d 1158, 1160 (Fla. 1979) ("if the public interest, even though indirect, is present and sufficiently strong," and "a reasonable and adequate public interest"); *Nohrr*, 247 So. 2d at 309 ("a public purpose").

8. *Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1095 (Fla. 2008) ("some substantial benefit to the public"); *N. Palm Beach Cnty. Water Control Dist.*, 604 So. 2d at 446 ("To pass constitutional muster, a government bond issue must serve a truly public purpose, i.e., it must bestow a benefit on society exceeding that which is normally attendant to any successful business venture."); *Wald v. Sarasota Cnty. Health Facilities Auth.*, 360 So. 2d 763, 770 (Fla. 1978) ("public interest").

9. FLA. CONST. art. I, § 1 ("All political power is inherent in the people.").

10. FLA. STAT. ch. 75 (2016) ("Bond Validation").

11. FLA. CONST. art. VII, § 10; *supra* note 3.

12. *See State v. Jacksonville Port Auth.*, 204 So. 2d 881, 882 (Fla. 1967) (acknowledging that the purpose of the 1875 amendment to the Florida Constitution of 1868 was to stop public bodies from taking financial risks for the benefit of private enterprises following the failure of poorly managed railroads and banks that had left the public responsible for their debts).

greatly whether the governmental assets to be used are in hand today, and if they are not whether they will be obtained in the future by coercion (taxes) or voluntary contribution (enterprise net revenues). The concept of public purpose has been the vehicle by which this social change has been recognized in the caselaw.<sup>13</sup>

## II. LEVERAGING PRIVATE CAPITAL WITH PUBLIC ASSETS

A strategically applied public asset, especially an older, underutilized, and even depreciated one, can be a valuable tool to attract many multiples of its value in private investment. This, in turn, can become a catalyst to generate economic activity in the larger community, generating even more multiples of the initial, combined public and private investments. This principle is easily recognized at play in three circumstances:

- Economic development—create or accelerate positive growth;<sup>14</sup>
- Blight elimination or redevelopment—abort a downward economic and social spiral by encouraging investment before the property depreciates enough to make private investment economically feasible;<sup>15</sup> or
- Acquisition of a needed asset or service with primarily private rather than public capital, labor, or expertise.<sup>16</sup> This third aspect is mentioned, but the primary focus of this Article is upon economic development and

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13. As an aside, the adjectives “invalid” or “improper” are sometimes used to describe a purported public purpose that fails the constitutional lending credit test of Article VII, section 10. The Author suggests that as an alternative to “invalid public purpose” the more informative phrase would be “insufficient public purpose.” When the term “proper” or “valid” public purpose pops up in an opinion or article concerning this constitutional test, it is helpful to read it as “sufficient public purpose” in order to remain mindful that the whole concept floats on a spectrum of who benefits the most: a few who are somehow connected to the matter (unconstitutional) or the many who have less direct connections.

14. FLA. STAT. § 125.045 (2016) (county economic development powers); *id.* § 166.021(8) (municipal economic development powers).

15. FLA. STAT. ch. 163, Part III (“Community Redevelopment Act of 1969”); *see also* David E. Cardwell & Harold R. Bucholtz, *Tax-Exempt Redevelopment Financing in Florida*, 20 STETSON L. REV. 667 (1991) (recognizing Community Redevelopment Act as providing opportunity for public-private partnerships to leverage private investment with tax increment proceeds).

16. *See, e.g.*, FLA. STAT. § 334.30 (2016) (“Public-Private Transportation Facilities”). An example of this type of project would be the No Petro liquefied natural gas fueling facility, which opened in Tallahassee on September 25, 2012, and was developed through a partnership between the School Board of Leon County, Florida, and a private party.

redevelopment, as opposed to acquiring needed infrastructure or services.<sup>17</sup>

A few of the many specific vehicles by which this principle is executed are:

- direct grants-in-aid to private parties;<sup>18</sup>
- construction of horizontal infrastructure substantially or even primarily benefiting a private party;<sup>19</sup>
- demolition of private property;<sup>20</sup>
- sale or lease of public property below fair market value;<sup>21</sup>
- relocation payments for private parties;<sup>22</sup>
- debt forgiveness and conditional earn-outs benefitting private parties;<sup>23</sup>
- tax refund;<sup>24</sup>
- brownfield redevelopment bonus refund;<sup>25</sup>
- property tax abatement;<sup>26</sup>
- government becoming an income-partner with private party;<sup>27</sup>

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17. See Chasity H. O'Steen & John R. Jenkins, *We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era*, 41 STETSON L. REV. 249 (2012) (discussing funding infrastructure redevelopment); Kathryn G.W. Cowdery, *Public-Private Partnerships in Providing Water and Wastewater Utility Service: The Trend Toward Privatization in Florida*, 74 FLA. B.J. 38 (Oct. 2000) (discussing funding utilities through privatization).

18. FLA. STAT. § 125.045(3) ("making grants to private enterprises for the expansion . . . or the attraction"); *id.* § 288.0659 ("Local Government Distressed Area Matching Grant Program").

19. *Id.* § 125.045(3) ("developing or improving local infrastructure"); *id.* § 163.370(2)(c)3 ("[i]nstallation, construction or reconstruction of streets").

20. *Id.* § 163.370(2)(c)2 ("[d]emolition and removal of buildings and improvements").

21. *Id.* §§ 163.380, 125.045(5)(a)4, 166.021(8)(e)1d.

22. This occurs via conditional grants. *Id.* §§ 125.045(5)(a)1, 166.021(8)(e)1a.

23. *Id.*

24. *Id.* § 288.106 (qualified target industry businesses).

25. *Id.* § 288.107.

26. *Id.* §§ 125.045(5)(a)3, 166.021(8)(e)1c.

27. This occurs by sharing enterprise income without sharing risk or becoming a "joint owner with" the private party. FLA. CONST. art. VII, § 10; *see also* Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1089–95 (Fla. 2008) (lease of public property); City of W. Palm Beach v. Williams, 291 So. 2d 572, 578 (Fla. 1974) (lease to private party of city marina held by city in its proprietary capacity was not an unconstitutional joint venture but rather within legislative discretion to provide tax relief); Dade Cnty. Bd. of Pub. Instr. v. Michigan Mut. Liab. Co., 174 So. 2d 3, 6 (Fla. 1965) (purchase of membership in insurance mutual does not make the school board an unconstitutional joint owner with the other owners of the mutual where the policy is not assessable and the primary purpose is to obtain insurance protection). Although these cases do not

- non-recourse revenue bonds (payable solely from project revenue);<sup>28</sup>
- tax increment bonds<sup>29</sup> and covenants to annually budget and appropriate non-ad valorem revenue,<sup>30</sup> without pledging the *power* to tax;<sup>31</sup>
- pledge of specific, non-ad valorem taxation such as the local business tax,<sup>32</sup> public service tax,<sup>33</sup> a county or city's share of a county infrastructure sales surtax,<sup>34</sup> or for a county alone, the tourist development bed tax,<sup>35</sup>
- eminent domain permitted the transfer of condemned land to a private party in order to assemble tracts of land for re-development<sup>36</sup> prior to Florida's legislative reaction to *Kelo*;<sup>37</sup> and

specifically address an income-only contract between a public and private party, the principles involved in the analysis of the contracts in each situation are the same.

28. FLA. CONST. art. VII, § 10(c) (express authorization for capital projects for airports, ports, industrial and manufacturing plants); *Linscott v. Orange Cnty. Indus. Dev. Auth.*, 443 So. 2d 97, 100 (Fla. 1983) (implied authority for regional headquarters of multistate insurance company); *Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304, 308 (Fla. 1971) (implied authority for revenue bonds for private college dorm).

29. FLA. STAT. ch. 163, Part III (2016); *id.* § 163.387 (Community Redevelopment Trust Fund).

30. *See Volusia Cnty. v. State*, 417 So. 2d 968, 972 (Fla. 1982) (striking down a pledge of all non-ad valorem revenues coupled with covenant to do all things necessary to continue to receive those revenues because there was too great a potential impact on ad valorem taxation and therefore a referendum was required under Article VII, section 12 of the Florida Constitution). Subsequent refinements of this financing mechanism that address the two deficiencies cited in *Volusia County* have been upheld. *See, e.g., State v. Brevard Cnty.*, 539 So. 2d 461, 463 (Fla. 1989) (regarding annual appropriations only).

31. *Strand v. Escambia Cnty.*, 992 So. 2d 150, 159 (Fla. 2008) (recognizing county home-rule power to create a tax increment trust fund and finally confirming the constitutional distinction between pledge of taxing "power" and pledge of tax "revenues" if and when those revenues are received, as first held in *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980)).

32. FLA. STAT. Ch. 205 (2016).

33. *Id.* §§ 166.231–166.232.

34. *Id.* § 212.055(2).

35. *Id.* § 225.0104.

36. *Id.* § 163.340(8)(c) (defining "blight" to include "[f]aulty lot layout in relation to size, adequacy, accessibility, or usefulness").

37. *Kelo v. City of New London*, 545 U.S. 469, 480–84 (2005), *superseded by statute*, 2006 Mo. Legis. Serv. H.B. 1944 (West), *as recognized in* *Planned Indus. Expansion Auth. of Kansas City v. Ivanhoe Neighborhood Council*, 316 S.W. 3d 418, 426 (Mo. Ct. App. 2010) (holding the City's exercise of eminent domain power in furtherance of an economic development plan satisfied the federal constitutional "public use" requirement affirming prior cases reading "public use" to mean "public purpose"). *But see* 2006 Fla. Laws ch. 2006-11 (H.B. 1567) (codified at FLA. STAT. §§ 73.013, 73.014, 166.411) (placing limitations on how municipalities exercise eminent domain). *See infra* note 108 (discussing Florida's legislative reaction to the *Kelo* decision).

- any one or more of the above wrapped into a public-private partnership agreement<sup>38</sup> to support economic development or re-development or to acquire needed infrastructure (which partnerships, thankfully, defy a concise or consistent definition).

### III. SUMMARY OF FLORIDA'S CONSTITUTIONAL LIMITS

From a Florida constitutional perspective, all the myriad vehicles set out above, and others not mentioned or yet invented, can be grouped into two broad categories: (i) borrowing money for a public-private partnership and (ii) contributing assets already in-hand to a public-private partnership. The obvious distinction is timing. That is, whether the government is attempting to commit future assets versus the appropriation of current assets.<sup>39</sup> The primary constitutional pinch point that allows some vehicles to pass but complicates or stops others is the prohibition against lending credit, which provides in part: "Pledging credit.—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person."<sup>40</sup>

This same clause prohibits joint ownership of assets or businesses by the government and a private party.<sup>41</sup> This prohibition is so facially clear, and an attempted violation so easily recognizable, that it does not merit discussion. Technically, the convenient label "public-private partnership" is a misnomer,<sup>42</sup>

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38. See Partnership for Public Facilities Infrastructure Act Guidelines Task Force Final Report and Recommendations, FLORIDA DEP'T OF MGMT. SERVICES (July 1, 2014), available at [http://www.dms.myflorida.com/content/download/104626/592850/Final\\_Report\\_and\\_Recommendations\\_Partnership\\_for\\_Public\\_Facilities\\_and\\_Infrastructure\\_Act\\_Guidelines\\_Task\\_Force.pdf](http://www.dms.myflorida.com/content/download/104626/592850/Final_Report_and_Recommendations_Partnership_for_Public_Facilities_and_Infrastructure_Act_Guidelines_Task_Force.pdf) (discussing how public-private partnerships work and what the state of Florida can do to foster them) [hereinafter "*Task Force Final Report*"].

39. A subtler distinction is whether the future "asset" is the *power* to tax versus the *revenue* of a tax. See *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 48 So. 3d 811, 822–23 (Fla. 2010) (recognizing the distinction between taxing power and tax revenues); see also *infra* note 80 (discussing tax increments).

40. FLA. CONST. art. VII, § 10. The words immediately following the quoted portion are "but this shall not prohibit laws authorizing," and it is the ensuing, lettered subsections that create all the legal gamesmanship. *Id.*

41. *Id.*

42. See *infra* note 179 (discussing the history of the term public-private partnership).

but is useful if “properly understood.”<sup>43</sup> Finally, there is another constitutional limitation that is closely related but also sufficiently clear as to require only mention in passing. It is the requirement that the pledge of payment from ad valorem taxation beyond a year may be made only for a capital project authorized by law and must be approved by referendum.<sup>44</sup>

#### A. Local Government Borrowing Money for a Public-Private Partnership

A Florida local government may borrow money secured by its ad valorem taxing power for more than twelve months only to finance or refinance a capital project. The loan must be approved by a vote of the electors unless the new loan is only to refinance at a lower rate an old loan previously approved by the voters.<sup>45</sup> Since the electorate must approve such a loan, if the notice and balloting process is fair, it is almost axiomatic to say that the loan will be cloaked with a strong presumption of public purpose. These types of loans are not often made, especially for projects involving private parties against which strong anti-taxation public sentiment will likely arise.

If the loan is to be repaid only from revenue generated by a project *and* that type of project is expressly authorized in the Florida Constitution, there is *per se* a sufficient public purpose and no inquiry is required into whether the public purpose is sufficient or the financial benefit to private parties is too great. Those listed in the Florida Constitution are non-recourse revenue

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43. Whatever that new term of art in our legal lexicon means. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2233–34 (2015) (Alito, J., with Kennedy and Sotomayor, JJ., concurring) (“Properly understood, today’s decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”).

44. FLA. CONST. art. VII, § 12. This section provides:

Local bonds.—Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only: (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

*Id.* This type of financing is sometimes referred to as pledging the “full faith and credit” of the borrower and is often termed “general obligation debt.”

45. *Id.*



bonds to finance an airport or port facility, and non-recourse revenue bonds to finance an industrial or manufacturing plant where interest on the debt is exempt from federal income tax.<sup>46</sup>

If a local government uses its taxing power or pledges its credit to borrow money for a project with a private component, there must be a “paramount public purpose” with only an “incidental private benefit.”<sup>47</sup> If both conditions are met, the Court has established the precedent that a private party is not disproportionately benefited, and therefore there is no unconstitutional lending of public “credit.”<sup>48</sup>

Where a local government’s non-recourse debt is secured by and payable only from project revenues, then neither the taxing power nor the *proceeds* of a tax are obligated.<sup>49</sup> Thus, there is no lending of credit, and an ordinary public purpose<sup>50</sup> has often been

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46. *Id.* art. VII, § 10.

47. *State v. Osceola Cnty.*, 752 So. 2d 530, 536 (Fla. 1999) (finding that a pledge of a tourist development tax, under Florida Statute section 125.0104, to finance a privately operated convention center served a paramount public purpose); *Poe v. Hillsborough Cnty.*, 695 So. 2d 672, 679 (Fla. 1997) (finding that an infrastructure sales surtax, under Florida Statute section 212.055(2), in addition to a tourist development tax served a paramount public purpose).

48. *N. Palm Beach Cnty. Water Control Dist. v. State*, 604 So. 2d 440, 441–42 (Fla. 1992).

Thus, in order to determine if the bonds run afoul of the constitution, we must first determine whether the District’s taxing power or pledge of credit is involved. If either is involved, then the improvements must serve a paramount public purpose. However, if we conclude that neither is involved, then the paramount public purpose test is not applicable and “it is enough to show only that a public purpose is served.”

*Id.* (quoting *Linscott v. Orange Cnty. Indus. Dev. Auth.*, 443 So. 2d 97, 101 (Fla. 1983)) (internal citations omitted). *See Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304, 308–09 (Fla. 1971) (holding that a dormitory for a private college served a paramount public purpose). *But see Orange Cnty. Indus. Dev. Auth. v. State*, 427 So. 2d 174, 175 (Fla. 1983) (holding that the expansion of a commercial television station was not a paramount public purpose).

49. *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 48 So. 3d 811, 822 (Fla. 2010) (“Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.”) (quoting *Nohrr*, 247 So. 2d at 309); *id.* at 823 (recognizing the distinction between promising to use the *power* to impose a tax and promising to pay from the *revenues* of a tax discretionarily imposed as affirmed in *Strand v. Escambia Cnty.*, 992 So. 2d 150, 159 (Fla. 2008)).

50. For a city, arguably a “municipal purpose” could be required. *See* FLA. CONST. art. VIII, § 2(b) (outlining the powers granted to municipalities); FLA. STAT. § 166.021 (2016) (defining “municipal purpose” and further detailing the powers granted in the Florida Constitution); *State v. City of Orlando*, 576 So. 2d 1315, 1317 (Fla. 1991) (holding that borrowing money solely for reinvestment is not a municipal purpose as required by the Florida Constitution). Query: are “municipal purposes” a sub-set of “public purposes”?

held sufficient.<sup>51</sup> Unfortunately, this straightforward rule is not always followed by the Court,<sup>52</sup> and confusion results. When the Court refuses to validate a bond payable solely from project revenue, even though such borrowing literally does not pledge the credit of the government, in effect the Court is prohibiting the government from spending on a project the monies earned by that same project. It would be helpful for the Court to justify its opinion by holding simply that private benefit still outweighs the public benefit in violation of Article VII, section 10, and therefore the government cannot be involved, even though neither public credit nor a public source of money will be touched. Said differently, it would be helpful for the Court to be as candid as it has occasionally been and bluntly hold that, despite the fact that no government power or assets are involved, the Florida Constitution requires a particular project or adventure be left entirely to private, free enterprise.<sup>53</sup> Instead, in at least five cases

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51. *Osceola Cnty.*, 752 So. 2d at 536 (“If the County has not exercised its taxing power or pledged its credit, the obligation must merely serve a public purpose.”); *Linscott*, 443 So. 2d at 101 (affirming the lower court’s validation of revenue bonds to finance the regional headquarters of a multistate insurance company and recognizing that “[w]ith the adoption of the Constitution of 1968 the ‘paramount public purpose’ test developed by [caselaw] under the Constitution of 1885 lost much of its viability”); *Wald v. Sarasota Cnty. Health Facilities Auth.*, 360 So. 2d 763, 770 (Fla. 1978) (holding revenue bonds for a private hospital valid as serving mere public interest, even though the Court made no independent judicial inquiry into the public nature of the hospital where the legislature had found in enabling legislation that such facilities were in the “public interest”).

52. *State v. JEA*, 789 So. 2d 268, 272–73 (Fla. 2001) (finding that JEA’s guarantee of certain obligations necessary to participate in competitive energy wheeling arrangement served a paramount public purpose and only incidentally and conditionally benefited private parties who had a very small share in arrangement); *Orange Cnty. Dev. Auth.*, 427 So. 2d at 175 (declining non-recourse, project revenue bonds to finance expansion of commercial television station because this was not a *paramount* public purpose); *State v. Osceola Cnty. Indus. Dev. Auth.*, 424 So. 2d 739, 740–42 (Fla. 1982) (examining whether an obligation served a paramount public purpose when a Days Inn motel was financed by non-recourse bonds, even though no pledge of credit involved, and finding that it did); *State v. Orange Cnty. Indus. Dev. Auth.*, 417 So. 2d 959, 962–63 (Fla. 1982) (finding a paramount public purpose in a case involving another Days Inn, another non-recourse bond not pledging credit, and another finding of paramount public purpose); *Nohrr*, 247 So. 2d at 308–09 (noting that under the 1968 Constitution the “gauntlet” of paramount public purpose and only incidental private benefit still must be run to validate revenue bonds for a private project, here a private college dormitory).

53. *City of Orlando*, 576 So. 2d at 1317. “[W]e see no valid public purpose in investing for investing’s sake. Making a profit on an investment is an aspect of commerce more properly left to commercial banking and business entities.” *Id.* (quoting *State v. City of Panama City Beach*, 529 So. 2d 250, 257 (Fla. 1988) (McDonald, C.J., dissenting)). *State v. Town of N. Miami*, 59 So. 2d 779, 785 (Fla. 1952), *superseded by* FLA. CONST. art. VII, § 10(c) (1968), *as recognized in Linscott*, 443 So. 2d. at 100 (fearing “the ultimate destruction of the private enterprise system”).

the Court has raised the standard of public purpose required (from ordinary to paramount), which confounds its many attempts to define a relationship between the source of payment and the degree of public purpose required.<sup>54</sup>

### B. Local Government Contributing Assets in Hand to a Public-Private Partnership

In short, this is simply a home-rule issue. As authorized by the state constitution and implemented by statute, a city enjoys the home-rule authority to exercise any power that the state may exercise<sup>55</sup> except where “expressly prohibited by law.”<sup>56</sup> A non-charter county is statutorily granted the home-rule powers that are authorized by the self-government clause of the Florida Constitution, provided they are not inconsistent with general or special law.<sup>57</sup> A charter county is directly granted home-rule powers by the self-government clause of the Florida Constitution upon approval of its charter by vote of the county electors, provided those powers are not inconsistent with general or special law.<sup>58</sup> Thus, as a general rule, the practical limit of a local government’s exercise of its home-rule power to leverage private investment with a current asset is the fact that the exercise must not be inconsistent with or preempted by state law.<sup>59</sup> And, “[o]f course, public bodies cannot appropriate public funds

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54. See *supra* note 51 (discussing Florida’s variable public-purpose standard).

55. FLA. CONST. art. VIII, § 2(b); FLA. STAT. § 166.021 (2016). See *City of Orlando*, 576 So. 2d at 1317 (noting that a municipality’s purpose is to serve the public and explaining why the bond at issue in the case satisfies neither a public nor a municipal purpose).

56. FLA. STAT. § 166.021(1). Municipal home-rule power may also be impliedly preempted by a pervasive legislative scheme. *Tallahassee Mem’l Reg’l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st Dist. Ct. App. 1996). Home-rule powers also may not conflict with state law, which is always superior. *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972); *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1067–68 (Fla. 3d Dist. Ct. App. 1981) (applying conflict analysis after passage of the Municipal Home Rule Powers Act (FLA. STAT. ch. 166) (1973)). *But see* *Phantom of Brevard, Inc. v. Brevard Cnty.*, 3 So. 3d 309, 313 (Fla. 2008) (noting that the county had home-rule power to impose fireworks regulations greater than the state).

57. FLA. CONST. art. VIII, § 1(f); FLA. STAT. § 125.01(3)(b) (2016); *State v. Orange Cnty.*, 281 So. 2d 310, 312 (Fla. 1973) (non-charter county authorized to take any action that is not expressly prohibited by general or special law).

58. FLA. CONST. art. VIII, § 1(g). A limiting special law could be the charter itself, which means that the electors may withhold enumerated powers from a charter county.

59. For a discussion of the common law nuances between the varieties of such fatal inconsistencies, see ROBERT L. NABORS, 2011 FLORIDA HOME RULE GREEN BOOK, Call Street Publications (2011), especially chapter 7, “General and Special Act Preemption.”

indiscriminately, or for the benefit of private parties, where there is not a reasonable and adequate public interest.”<sup>60</sup>

Although the Florida Constitution forbids a county or city from using its “taxing power or credit to aid” a private party,<sup>61</sup> where a current asset is appropriated to leverage private capital, no new financial obligation is created to be repaid in the future. Thus, the “credit” of the county or city is not involved, and therefore the local government does not unconstitutionally use its credit to aid a private person.<sup>62</sup> Of course, a public purpose, or in the case of a city, a municipal purpose, must be served in all cases.<sup>63</sup> Also, because a city or county may not become a “joint owner with”<sup>64</sup> a private entity, it cannot simply invest in a project by becoming an equity partner with, or a shareholder of, a private developer. A below-market lease of city land and buildings does not make the city a joint owner with the lessee.<sup>65</sup> Purchase of non-assessable liability insurance from a mutual company does not make a public school board a joint owner with other members of the mutual.<sup>66</sup>

Finally, care must be taken to structure the transfer or use of the asset through a control mechanism that ensures that over time the asset will be used for the public purpose intended.<sup>67</sup> Simply put, if a local government desires to support a Little League team by appropriating current funds for team uniforms, the finding of a mere public purpose will suffice, but the city should pay the vendor’s invoice directly and not write the check to the coach who might pay his rent with the money.

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60. *State v. Hous. Fin. Auth. of Polk Cnty.*, 376 So. 2d 1158, 1160 (Fla. 1979).

61. FLA. CONST. art. VII, § 10.

62. *Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971); *see also Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1095–97 (Fla. 2008) (holding that a public authority did not use its credit in violation of the Florida Constitution when it previously budgeted to build a promised road and already owned the wetlands given to mitigate a private project).

63. *Hous. Fin. Auth. of Polk Cnty.*, 376 So. 2d at 1160; *see* FLA. STAT. § 166.021(2) (2016) (defining “municipal purpose”).

64. FLA. CONST. art. VII, § 10.

65. *Jackson-Shaw*, 8 So. 3d at 1093–94.

66. *Dade Cnty. Bd. of Pub. Instr. v. Michigan Mut. Liab. Co.*, 174 So. 2d 3, 6 (Fla. 1965).

67. *O’Neill v. Burns*, 198 So. 2d 1, 2, 4–5 (Fla. 1967) (finding unconstitutional a state appropriation of fifty-thousand dollars to Junior Chamber of Commerce, a not-for-profit corporation, in part, because “it does not appear that any semblance of control of the contemplated property is retained in the State”).

These two broad categories are summarized in the two tables below.

Borrowing Money for a Public-Private Partnership

<u>Local Government Action: Executory Promise to Deliver in Future Years</u>	<u>Referendum Required?</u>	<u>Predominate Public Purpose Required &amp; Only Incidental Private Benefit?</u>	<u>Only a "Public Purpose" Required?</u>
Ad Valorem Taxing Power ("Credit")	Yes <sup>68</sup>	Not necessary	Yes
Non-Recourse Revenue Bond Proceeds for: <sup>69</sup> <ul style="list-style-type: none"> <li>• Airport or port</li> <li>• Industrial or manufacturing plant</li> <li>• Electric energy facility</li> </ul>	No	Not necessary	Per se
Non-Ad Valorem Taxing Power ("Credit") <ul style="list-style-type: none"> <li>• Tourist Development Tax<sup>70</sup></li> <li>• Local Government Infrastructure Sales Surtax<sup>71</sup></li> </ul>	No	Necessary <sup>72</sup>	Not sufficient
Project Revenue Only	No	Not necessary <sup>73</sup> (but might be) <sup>74</sup>	Yes <sup>75</sup> (but may not be sufficient) <sup>76</sup>

Contributing Assets in Hand to a Public-Private Partnership

In the three classifications below, governmental incentives are of more limited use in attracting private investment because investors have less assurance that the resource will be available

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68. FLA. CONST. art. VII, § 12.

69. *Id.* art. VII, § 10.

70. FLA. STAT. § 125.0104 (2016).

71. *Id.* § 212.055(2).

72. *See supra* note 47 (paramount public purpose found).

73. *See supra* note 51 and accompanying text (mere public purpose sufficient).

74. *See supra* note 52 and accompanying text (mere public purpose insufficient even though only project revenue pledged).

75. *Id.*

76. *Supra* note 51.

in the future. The first class, of course, is an extremely narrow, one-shot affair with no future prospects at all.

<u>Local Government Action</u>	<u>Referendum Required?</u>	<u>Predominate Public Purpose Required &amp; Only Incidental Private Benefit Permitted?</u>	<u>Only a "Public Purpose" Required?</u>
Executed Appropriation & Delivery of Assets in Hand, Within Same Budget Year <sup>77</sup>	No	Not necessary	Yes
Executory Covenant to Budget & Appropriate <sup>78</sup>	No	Not necessary	Yes
Executory Certificate of Participation ("COP") <sup>79</sup>	No	Not necessary	Yes
Executory Tax Increment Financing <sup>80</sup>	No	Not necessary	Yes

77. One commission cannot bind a future one regarding discretionary appropriations. *See Bd. of Cnty. Comm'rs of Marion Cnty. v. McKeever*, 436 So. 2d 299, 301–02 (Fla. 5th Dist. Ct. App. 1983) (discussing how each commission should annually prepare and adopt budgets, in the context of a constitutional challenge to a motor fuel tax ordinance).

78. Such a covenant is an executory promise to budget and appropriate in future years non-ad valorem revenues, but it is expressly subject to the government's obligation to provide essential services and reserves the right to discontinue programs generating those revenues, leaving the creditor with only the remedy to seek judicial interpretation of what essential services are. *See Cnty. of Volusia v. State*, 417 So. 2d 968, 969 (Fla. 1982) (holding that a pledge of all future non-ad valorem revenues was an indirect pledge of ad valorem taxation, which would require a referendum); *Headley v. City of Miami*, 118 So. 3d 885, 889–94 (Fla. 1st Dist. Ct. App. 2013) (discussing how competent substantial evidence supported PERC's determination that the city's financial inability to provide essential services to its residents supported statutory immunity from unfair labor practice); *see also supra* note 30 (discussing development of this action to address the defects noted in *Volusia County*).

79. COP debt is secured by the local government's promise to lease a governmental facility (frequently a school) from a single purpose not-for-profit corporation formed to issue the debt, develop the facility, and lease it to the government. The key is that the government may cancel the lease at any annual, upcoming budget cycle, so the lease payments are literally only current appropriations, as if the government were buying pencils. The creditors are issued Certificates of Participation representing an undivided interest in the lease payments, which, as an investment vehicle, are functionally equivalent to bonds, except that their creditworthiness is based not only on the government's income and assets but also, and perhaps more importantly, upon its continued need for the facility, such as a school. If the lease is cancelled, the issuer corporation must find alternative value in the facility to pay anything to the COP holders. *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 48 So. 3d 811, 815–17, 819–21 (Fla. 2010) (validating COPs at the supreme-court level for the public purpose of acquiring land for restoration of Everglades); *State v. Sch. Bd. of Sarasota Cnty.*, 561 So. 2d 549, 550–51 (Fla. 1990) (discussing this factual scenario with respect to a school).

80. FLA. STAT. § 163.387(3)(a) (2016). Because tax increment debt is payable from a trust typically funded in practicality by ad valorem tax proceeds, it would appear that tax increment bonds (frequently called "TIF" bonds for "tax increment financing") issued

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under the Community Redevelopment Act of 1969, FLA. STAT. ch. 163, Part III (the Act), to finance restoration of slum and blighted areas (i) would require a referendum and (ii) would require the showing of a predominate public purpose when the financing is used to entice private investment into a redevelopment project. For a clear discussion of the subtle explanation of why a referendum is not required, see *Strand v. Escambia Cnty.*, 992 So. 2d 150, 156–61 (Fla. 2008), in which the Court literally reversed itself on this precise point, the point being summarized later in *Miccosukee*, 48 So. 3d at 823 (stating that in *Strand*, “this Court reaffirmed its long-held distinction between pledges of ad valorem *taxing power* and the use of ad valorem *tax revenues*”). The tax increment contributed to the trust fund described below is only *measured* by the increase in ad valorem assessed value; it may be paid from any lawful source. FLA. STAT. § 163.387(1)(a).

Regarding a predominate public purpose, in the seminal TIF case *State v. Miami Beach Redevelopment Agency*, the Court concluded that the use of eminent domain and TIF financing to acquire, clear, and develop property that will be put to “substantial private and commercial uses after redevelopment[] is in furtherance of a public purpose and is constitutional.” 392 So. 2d 875, 885–91 (Fla. 1980). Some TIF validation cases never address the issue of public purpose and private benefit because the developments to be funded are traditional public works projects. See *Strand*, 992 So. 2d at 152, 155–56 (four-lane public road widening); *City of Parker v. State*, 992 So. 2d 171, 174 (Fla. 2008) (funding public infrastructure, streetscapes, and public plaza improvements). Others, however, virtually ignore the issue. See *Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662, 665 (Fla. 2002) (finding the great quantity of unrefuted information in the record before the city council was competent substantial evidence that supported the city’s conclusion that the area was blighted and therefore qualified for “statutorily authorized revenue bonds” with no analysis of the benefit to the private developer, which had entered a public-private partnership with the city to jointly redevelop the property).

The public-purpose latitude shown local governments in financing Community Redevelopment Act projects involving private investors may be the result of two factors combined. First is the fact that the Act requires the local government to follow a lengthy, and very public, statutory process in order to engage in TIF (financing). FLA. STAT. ch. 163, Part III. That process commences with a study, “supported by data and analysis,” to determine whether slum or blight as defined in the Act exists and needs to be addressed. *Id.* § 163.355. If that step is satisfied, then a redevelopment plan must be adopted to address the specific necessities found in the study. *Id.* §§ 163.360, 163.362. After that, if TIF is to be used, a trust fund must be established by ordinance to receive, hold, and apply the tax increment only to implement the plan and address the need. *Id.* § 163.387. All of that is required before a TIF borrowing may proceed. Perhaps this elaborate and very public process is silently accepted as virtually guaranteeing that the public purposes are paramount over the private benefits that will flow from the redevelopment plan. Second, there is a tendency for a legislative designation of sufficient public purpose to be taken at face value by the courts, the same designation by fiat that the dissent railed against in *N. Palm Beach Cnty. Water Control Dist. v. State*, 604 So. 2d 440, 446–47 (Fla. 1992) (Shaw, J., dissenting).

In any event, even though it may be counterintuitive, the Author believes that TIF should be grouped with contributions of current assets as opposed to borrowing against future revenue streams because, if property values decline or if for any year the local governments contributing to the trust fund lower the millage rate to a point that produces no tax increment, the creditor will receive nothing and has no remedy. And this grouping is consistent with the practical fact that the Author found in TIF redevelopment caselaw no reported disputes over lending the local government’s credit to the private parties involved.

#### IV. EVOLUTION OF PUBLIC PURPOSE IN FLORIDA CONSTITUTIONAL LAW

In the 1800s, Florida had a checkered experience with borrowing money for private railroads and canals that often failed.<sup>81</sup> Its bonds were repudiated many times.<sup>82</sup> Excesses by the carpetbag government during Reconstruction (1865–1876) generated an amendment to the state constitution to prohibit the legislature from borrowing money for anything except “repelling invasion or suppressing insurrection.”<sup>83</sup> On the other hand, local governments were not so limited, and they “had a field day.”<sup>84</sup>

The Florida “land boom collapsed in the 1920s,” and in 1930 the Florida Constitution of 1885 was amended to require referendum approval of local government bonds.<sup>85</sup> To avoid a vote, “local governments turned to . . . revenue bonds.”<sup>86</sup> The play was simple: if “the city[] as a taxing unit” was not bound for the debt, then the “certificates” issued to evidence the debt were not “bonds” in the constitutional sense.<sup>87</sup> Of course, this was in the era of Dillon’s Rule,<sup>88</sup> before home rule,<sup>89</sup> so a city was required to possess the express general (statutory) or special (charter) authority to issue the debt and build whatever it intended to build with the proceeds.<sup>90</sup> We may speculate that the necessity of this express authorization for the city to become involved in the project in the first place<sup>91</sup> may have comforted the Court in holding that, where taxes were not involved, enterprise-fund

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81. *E.g.*, Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076, 1085–86 (Fla. 2008); State v. City of Panama City Beach, 529 So. 2d 250, 252 (Fla. 1988).

82. *E.g.*, City of Panama City Beach, 529 So. 2d at 252.

83. *Id.*

84. *Id.* (quoting Grover C. Herring & George John Miller, *Florida Public Bond Financing—Comments on the Constitutional Aspects*, 21 U. MIAMI L. REV. 1, 4 (1966)).

85. City of Panama City Beach, 529 So. 2d at 252.

86. *Id.* at 253.

87. Panama City v. State, 185 So. 452, 453 (Fla. 1938).

88. City of Boca Raton v. State, 595 So. 2d 25, 27 (Fla. 1992) (“Powers not granted a municipality by the legislature were deemed to be reserved to the legislature. This reservation of authority was known as ‘Dillon’s Rule’ as expressed in John F. Dillon, *The Law of Municipal Corporations* § 55 (1st ed. 1872). Under the 1885 constitution, the Florida courts consistently followed Dillon’s Rule.”).

89. See *supra* notes 55–59 and accompanying text (summarizing Florida home rule).

90. Patton v. Panama City, 169 So. 638, 638–39 (Fla. 1936) (affirming that waterworks revenue certificates were not “bonds” requiring referendum where the city was statutorily authorized to own and operate the water system).

91. State v. City of W. Panama City Beach, 127 So. 2d 665, 665 (Fla. 1961) (“No one contests the power of the city to construct and operate the water system.”).



revenue “certificates” (waterworks certificates, for example) were not “bonds.”<sup>92</sup>

The “outstanding purpose” of the 1930 constitutional amendment had been to restrain the “tendencies of political subdivisions to load the future with obligations to pay for things the present desires.”<sup>93</sup> But local governments simply turned to revenue certificates, so what was to limit those borrowings? The opponents of publicly financed quasi-private projects convinced the Court that the 1930 referendum requirement was also “designed ‘to restrict the activities and functions of the State, county and municipality to that of government and forbid their engaging directly or indirectly in commercial enterprises for profit.’”<sup>94</sup>

In the 1950s in Florida, if a project served a private rather than a public purpose, it could not be financed by a city or county, even if the debt was payable solely from project revenues and no taxes nor “credit” of the city or county was promised.<sup>95</sup> That literal statement remains true today—but the meaning of “public purpose” (or alternatively the level of private benefit allowed) has changed dramatically.

In 1952, the Town of North Miami attempted to validate non-recourse revenue certificates to finance construction of an aluminum manufacturing plant to be leased to a private party and create jobs and significant economic benefits.<sup>96</sup> In the leading opinion of the time, *Town of North Miami*, the Court turned down the project because it found that the legislature could not have constitutionally authorized this use of public money to benefit a private party.<sup>97</sup> As summarized by the Court:

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

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92. This semantic distinction may have fulfilled an economic and social need, but at their respective cores, both terms merely refer to the written evidence of an executory promise to pay money, the same as does the term “promissory note.”

93. *State v. City of Panama City Beach*, 529 So. 2d 250, 252–53 (Fla. 1988) (quoting *Leon Cnty. v. State*, 165 So. 666, 669 (Fla. 1936)).

94. *City of Panama City Beach*, 529 So. 2d at 253 (quoting *Bailey v. City of Tampa*, 111 So. 119, 120 (Fla. 1926)) (citing *Brautigam v. White*, 64 So. 2d 781, 782 (Fla. 1953)).

95. *State v. Town of N. Miami*, 59 So. 2d 779, 780–81, 787 (Fla. 1952).

96. *Id.* at 780.

97. *Id.* at 787.

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.<sup>98</sup>

The Court further explained:

Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter that [sic] such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.<sup>99</sup>

At the same time, an equally strict view of public purpose arose in the realm of eminent domain in order to protect private property rights.<sup>100</sup> Protecting private property rights and protecting private business from government competition became complementary sides of the same coin and represented a common posture of the Court in the late 1940s and 1950s.<sup>101</sup> The unqualified clarity of the Court's eminent domain opinions complemented the Court's narrow lending-credit opinions. A seminal eminent domain case for the era involved an attempt to condemn a privately owned and fenced hunting preserve into a public park.<sup>102</sup> In *Peavy-Wilson Lumber Co. v. Brevard County*,

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98. *Id.* at 784–85.

99. *Id.* at 785.

100. *E.g.*, *Peavy-Wilson Lumber Co. v. Brevard Cnty.*, 31 So. 2d 483 (Fla. 1947).

101. *See, e.g.*, *Town of N. Miami*, 59 So. 2d at 785:

Our government was founded upon the firm foundation that private property cannot be taken except when it will serve a public purpose. . . . If private property may be purchased by the municipality for the use and benefit of a private corporation, then it may be acquired by the great power of eminent domain for such a purpose.

102. *Peavy-Wilson Lumber Co.*, 31 So. 2d at 484.

the land owner had fenced out local hunters who found relief in a sympathetic county commission.<sup>103</sup> The 1947 Court ignored a lesser threshold of “public benefit” and held there was no “public necessity” for the taking:

[T]he sum total of the claim was founded on “public demand,” “public desire” and “public benefit” rather than “public necessity.” . . . There surely must be some rule of law which will safeguard the rights of citizens and yet unhamper organized society to govern its citizens and provide the public necessities requisite to the general welfare. . . . To take one man’s property, against his will—at public expense, and make it available to a group who may have the leisure and inclination to hunt and fish constitutes a private rather than a public use.

. . .

Public benefit follows naturally when any worthy enterprise is established, resulting in employment and greater taxes for the government; but public necessity does not require that the several counties should condemn private property and engage in competition with the citizens who make a living by providing hunting and fishing lodges and other forms of amusement.<sup>104</sup>

The term “public necessity”<sup>105</sup> did not flourish, yet the holding that employment was not a sufficient public purpose to condemn land demonstrates the tenor of the Court in the 1940s. Five years later, the City of Daytona Beach tried essentially the same thing with what it believed to be a controlling distinction.<sup>106</sup> The Court disagreed.<sup>107</sup> The land in the *Daytona Beach* case was blighted, and the taking was planned for a redevelopment<sup>108</sup> project.<sup>109</sup> Still no love from the Court, which emphatically stated:

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103. *Id.* at 485.

104. *Id.* at 486–87.

105. *Id.*

106. *Adams v. Hous. Auth. of City of Daytona Beach*, 60 So. 2d 663, 664–65 (Fla. 1952), *overruled by* *Baycol, Inc. v. Downtown Dev. Auth. of City of Fort Lauderdale*, 315 So. 2d 451 (Fla. 1975).

107. *Id.* at 669.

108. Under the Court’s interpretation of public purpose in the context of eminent domain and the Constitution of 1968, the Daytona project would have been routine prior to the Florida legislature’s reaction to the U.S. Supreme Court’s decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 483–84 (2005) (holding that the City’s exercise of

It is inconceivable that any one would seriously contend that the acquisition of real estate for the declared purposes [retail,

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eminent domain power in furtherance of an economic development plan satisfied the federal constitutional “public use” requirement and affirming prior cases reading “public use” to mean “public purpose”). *But see* FLA. STAT. §§ 73.013, 73.014, 166.411 (2016) (instituting stricter restraints on state government eminent domain actions than the permissive stature of *Kelo*). Theoretically, under Florida law, economic development (promoting the good) was never a sufficient public purpose for a city or county to take private property through eminent domain because, arguably, a higher standard of eliminating the evils and social ills of blight was required. But many felt the distinction was without a difference. In 2006, the legislature revised sections 73.013, 73.014, 166.411 (Laws Chapter 2006-11, Laws of Florida, 2006) to severely curtail the authority of a local government or a Community Redevelopment Agency to use eminent domain to assemble contiguous tracts of private property in order to make possible a private redevelopment project eliminating blight. Whether at that time there was a viable distinction in Florida law between economic development and blight elimination was the subject of some debate. In a June 2006 article, the Fort Lauderdale Sun Sentinel quoted Frank Schnidman, a Florida Atlantic University economic development professor with thirty years of expertise in land policy issues, as follows:

I [recently] said the bill [Chapter 2006-11, Laws of Florida, 2006] was a perfect example of the Legislature putting its mouth in drive before putting its brain in gear. The decision [*Kelo*] was handed down and [Attorney General] Charlie Crist came out with an opinion that said, “Florida is safe because it could never happen here.” The governor issued a press release, the House set up a select committee, the Senate set up a committee, and they were all going to protect us from the evils of the Supreme Court and the feds. What they said in their arrogance was, “We’re going to be the leader. We’re going to not only fix the problem[;] we’re going to make model legislation for the whole country.”

But what they should have done was humbly apologize to the taxpayers of Florida because they created the problem. Over the years we have allowed the chamber of commerce types to change the definition of what’s blighted so that it covers almost anything. The thing that should have been done in Florida is that they should have just tightened the definitions relating to what’s blighted. But instead what they did was they prohibited in any shape or form the use of eminent domain for redevelopment. In the statute it says that it’s not a public purpose under the Constitution to alleviate slum and blight. Well, the Legislature can say that, but it’ll be the courts that determine what the Constitution means.

. . .

I’m predicting that the Legislature is going to have to come back. This is a major glitch. What if we have a major hurricane? How do you assemble the property in order to be able to rebuild? Or how do you deal with true blighted property?

Nicole Sterghos Brochu, *Face to Face: A Conversation with Frank Schnidman*, SUN SENTINEL (June 25, 2006), <http://www.sun-sentinel.com/opinion/sfl-opqa25jun25-story.html>. Mr. Schnidman was correct that the courts are the ultimate arbiters of what is a public purpose under the Constitution, but in the field of eminent domain the Legislature controls the gate and may lock out local government if it chooses to do so. So far his prediction has not come true.

109. *Adams*, 60 So. 2d at 664–65.

wholesale, and office space] set forth in the proposed Redevelopment Plan is for a public use or purpose. No one has ever heard of any corporation, association or individual going into any of the above mentioned businesses except for profit or gain. If the municipalities can be vested with any such power or authority, they can take over the entire field of private enterprise without limit so long as they can find a blighted area containing sufficient real estate.<sup>110</sup>

In the *Daytona Beach* eminent domain case, the Court relied more upon the protection of private enterprise from government intrusion than it did upon the protection of private property rights.<sup>111</sup> Restraining government from intrusion into the private sector through either eminent domain or direct economic competition was the Court's order of the day, but the tide was about to change.

One year after the City of Daytona lost its redevelopment case,<sup>112</sup> the Court in 1953 bent a little to uphold Jacksonville's plan to take property by eminent domain, lease a portion for a filling station, and borrow money to build a public, fee-for-service parking garage to be repaid solely from revenue generated by the project.<sup>113</sup> In *Gate City Garage, Inc. v. City of Jacksonville*,<sup>114</sup> the Court yielded just enough to allow Jacksonville to deal with its parking problem and decided that:

Constructing and leasing a filling station on a parking lot the size of that contemplated is a mere *incident*, the primary purpose being to acquire and construct a parking lot to serve a public and municipal purpose.

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110. *Id.* at 668–69.

111. A good self-analysis of the Court's "drawing away" from the rigors of *Peavy-Wilson Lumber Co.* and *Adams* appears in *Baycol, Inc. v. Downtown Dev. Auth. of City of Ft. Lauderdale*, 315 So. 2d 451, 457 (Fla. 1975). *Baycol* recognizes as "crystalized" the point that clearing slum areas by eminent domain to remove "breeding places for crime and disease" is a sufficient and constitutional public purpose even though the low income housing to be developed will be owned by private parties, but refuses to extend that principle to a parking garage intended to serve primarily a private shopping center to be developed. 315 So. 2d at 457–58 (quoting *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So. 2d 745, 748 (Fla. 1959)). See *supra* text accompanying note 108 (discussing Florida's post-*Kelo* legislative reaction).

112. *Adams*, 60 So. 2d at 670.

113. *Gate City Garage, Inc. v. City of Jacksonville*, 66 So. 2d 653, 658–63 (Fla. 1953).

114. *Id.* at 653.

“[A] public purpose which is primary and *paramount* will not be defeated by the fact that incidentally a private use or benefit will result.”<sup>115</sup>

Times had changed. North and South Korea had signed a peace treaty. The “forgotten war” was, well, unfortunately forgotten by some.<sup>116</sup> A peaceful nation was prospering, so why should the government not play a part in stoking the economic fires?<sup>117</sup> The Court opened the door for all that was to come. The dual, overlapping proportionality test we have today was born. Non-recourse, revenue bonds could be sold to finance a project that would have a private component without violating the prohibition against lending credit if the project was for a *paramount public purpose* with merely an *incidental private benefit*. Note that the test was born in a non-recourse, revenue bond case—no tax proceeds nor taxing power involved.<sup>118</sup>

Over the next fifteen years (c. 1952–1967), a variety of projects to be funded by both project revenue and excise (non-ad valorem) taxes were examined using this test, or something similar, with a predictable lack of consistency, although the Court contends that it was consistent.<sup>119</sup> The holdings from those opinions were as follows:

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115. *Id.* at 659 (quoting 18 Am. Jur. *Eminent Domain* § 41 (1936)) (emphasis added).

116. Richard Ernsberger Jr., *Interview: Melinda Pash: Why Is Korea the “Forgotten War”?*, AM. HIST., June 2014, at 24, available at <http://www.historynet.com/interview-melinda-pash-why-is-korea-the-forgotten-war.htm#sthash.6zYfgEj8.dpuf>.

117. See David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 323 (1963):

[After WWII] [n]egative attitudes toward expanding government were overcome by a resurgence of the American drive for growth and progress. The primary economic energy for this drive has come from the industrially underdeveloped southern and border states which are in the midst of their regional take-off. Significant secondary support has come from the mature economies of the Middle Atlantic and New England states that have decided to come to grips with the many adverse long run regional trends.

118. *Gate City Garage*, 66 So. 2d at 654.

119. *State v. Jacksonville Port Auth.*, 204 So. 2d 881, 883 (Fla. 1967) (“In the past fifteen years a majority of this Court has consistently adhered to the mandates of this section of the Constitution when confronted by proposals to issue public securities in which the private interests to be served by the overall project was more than incidental.”); *Orange Cnty. Indus. Dev. Auth. v. State*, 427 So. 2d 174, 179 (Fla. 1983).

Running throughout this Court’s decisions on paramount public purpose is a consistent theme. It is that there is required a paramount public purpose with only an incidental private benefit. If there is only an incidental benefit to a

- VALID: Non-recourse project revenue bonds to purchase and improve the Pensacola Beach Casino and recreational facilities to be leased to private parties to promote tourism as part of a larger project to develop infrastructure on Santa Rosa Island.<sup>120</sup>

- VALID: University student dormitory revenue certificates. "An incidental use or benefit which may be of some private benefit is not the proper test in determining whether or not the project is for a public purpose."<sup>121</sup>

- VALID: Non-recourse revenue certificates to finance construction of a warehouse to be leased to the Orange Bowl Committee of Miami to store floats and equipment necessary for the Orange Bowl Festival.<sup>122</sup>

- VALID: Non-recourse revenue bonds to finance construction and maintenance of the Daytona racetrack to be turned over to a corporation not less than six months per year; corporation would realize profit. Races found to promote tourism by offering entertainment which must be offered because "[t]he sand and the sun and the water are not sufficient to attract those seeking a vacation and recreation. . . . The public purpose here seems to be predominant [not 'paramount'] and the private benefit and gain to be incidental."<sup>123</sup>

- VALID: Combination of project revenue (twenty percent) and excise tax revenue (eighty percent) pledged to finance construction of city marina to contain city hall, civic auditorium, and two private concessions buildings and public slips. Private use was found to be "incidental to the operation of the marina . . . not the principle purpose of the undertaking."<sup>124</sup>

- VALID: Portion of public land previously purchased set aside for private, commercial purposes as part of balanced over-

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private party, then the bonds will be validated since the private benefits "are not so substantial as to tarnish the public character" of the project.

*Id.* (quoting *State v. City of Miami*, 379 So. 2d 651, 653 (Fla. 1980)).

120. *State v. Escambia Cnty.*, 52 So. 2d 125, 127–30 (Fla. 1951).

121. *State v. Bd. of Control*, 66 So. 2d 209, 211, 213 (Fla. 1953).

122. *State v. City of Miami*, 72 So. 2d 655, 655–66 (Fla. 1954).

123. *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So. 2d 34, 35–38 (Fla. 1956).

124. *Panama City v. State*, 93 So. 2d 608, 610–11, 614 (Fla. 1957).

all plan for the County's development was "incidental" to "primary purpose."<sup>125</sup>

- INVALID: Purchase of real estate and construction of a building to be leased to a private business was a private purpose rather than a first step in an over-all public development.<sup>126</sup>

- INVALID: The "primary purpose" of non-recourse revenue certificates to finance the construction of an industrial plant on a small portion of a former airfield for lease to a corporation was to "finance private enterprise."

The only possible public purpose which it serves is to promote the general development of the area by furnishing employment to the residents of Clay County. This is the factor which prompted the project. If [the Court] approve[s] the issuance of bonds by the public authorities of this State to build and finance private enterprises and put such enterprises in the exclusive possession and control of such leases as is proposed to be done here, in order to alleviate unemployment and to promote the economic development of the area, then there is no limit to the extent to which the credit of the State and its authorities may be extended to private interests. In such event the constitutional provision above quoted will become meaningless.<sup>127</sup>

- INVALID: County was borrowing from the United States to aid in financing a rural development project so that rural home sites could be constructed and sold to private purchasers.<sup>128</sup>

- INVALID: Sixty percent of new port facilities would be used exclusively by two railroads. The provision for public dockage space for general cargo was inconsequential and incident to the main object to use public funds to assist private enterprise. Race track (enterprise fund) revenue was to be pledged. Private benefit not "incidental."

[The Court] thought and hoped that [it] had laid down a specific exception to the rule that public funds may not be spent for private purposes. This rule was announced as early

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125. *State ex rel. Ervin v. Cotney*, 104 So. 2d 346, 349 (Fla. 1958).

126. *State v. Suwannee Cnty. Dev. Auth. of Suwannee Cnty.*, 122 So. 2d 190, 191-92 (Fla. 1960) (distinguishing *Cotney* on ground that the private use in that case was an incidental, first step, which was not the case here).

127. *State v. Clay Cnty. Dev. Auth.*, 140 So. 2d 576, 580 (Fla. 1962).

128. *State v. Washington Cnty. Dev. Auth.*, 178 So. 2d 573, 573-74 (Fla. 1965).



as 1933 in the case of *Brumby v. City of Clearwater*, 108 Fla. 633, 149 So. 203. In the intervening years, the exception has been recognized. [The Court has] repeatedly held that use of part of the proceeds of such bonds for incidental private operations will not vitiate the entire issue, but [it has] reiterated the restriction that diversion of any part of the funds will not be tolerated unless the expenditure is purely incidental to the main project.<sup>129</sup>

- INVALID: Excise tax improvement bonds to purchase land, construct buildings, furnish equipment, and lease it to private party for spring training headquarters was only an “incidental advantage to the public” and not a “public or municipal purpose.”<sup>130</sup>

This line of cases culminated in *State v. Jacksonville Port Authority*,<sup>131</sup> in which the Court refused to validate non-recourse, project revenue bonds to finance a shipyard to be leased and operated by Lockheed Aircraft Corporation, which would promote the public port and the general welfare of the area by increasing payrolls and providing employment.<sup>132</sup> The Court appeared to tire of bucking the trend of other state governments, which were using public assets to attract and leverage private investment, noting that:

The question of whether the public welfare will be promoted by the issuance of public securities to finance or aid in the financing or the construction and operation of private enterprise as is presently being done in some states under specific constitutional or statutory provisions is not for this Court to decide. Perhaps the modern trend of government encroachment on the free enterprise system is the wise road to follow. So long, however, as the Constitution reads as it does now, it seems clear that we have no choice in the matter.<sup>133</sup>

One year later, in 1968, the people of Florida amended the state constitution to expressly—and according to the Court,

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129. *State v. Manatee Cnty. Port Auth.*, 193 So. 2d 162, 163–64 (Fla. 1966).

130. *Brandes v. City of Deerfield Beach*, 186 So. 2d 6, 7, 12 (Fla. 1966).

131. 204 So. 2d 881 (Fla. 1967).

132. *Id.* at 881, 885.

133. *Id.* at 882–83.

impliedly<sup>134</sup>—authorize a wide variety of non-recourse, public revenue bonds to finance projects with material private benefits.

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134. FLA. CONST. art. VII, § 10. To some, including the Author, a literal construction of this section would read subsection (c) as merely an exception from the subsection (a) prohibition against lending credit, an exception that is set out to support only the few types of revenue bonds expressly listed in subsection (c) and not as an implied authorization to issue revenue bonds for other purposes so long as the “predominate public purpose and incidental private benefit” test developed under the 1885 Constitution is met. The Court read just the opposite and held open the door to permit the broad spectrum of revenue bonds available in other states. But the logic is strained at best, or at least the language used to convey the logic is strained:

It appears that the framers of Fla. Const., art. VII, s 10(c) (1968), . . . provided that the public revenue bond financing of these projects (airports, ports or industrial or manufacturing plants) alone, in contrast to the financing of any other projects, was recognized by the Constitution itself as not constituting the lending or use of public credit. Moreover, the naming of these particular projects was not intended to be exclusive, denying ab initio public revenue bond financing of all other types of projects. The language employed is *not* that no public revenue bonds shall be issued to finance any projects except those described in [s]ection 10(c), but that the prohibition against lending a public unit’s credit does not apply to the projects described in [s]ection 10(c). This language may or may not apply to other projects, depending upon the particular circumstances in each instance.

All other proposed public revenue bond projects not falling into the exempted class described in [s]ection 10(c) of Article VII would, of course, have to run the gauntlet of prior case decisions to test whether the lending or use of public credit for any of them was contemplated. See, for example, the case of *State v. Jacksonville Port Authority*, 204 So. 2d 881 (Fla. 1967), which presents a good index to decisions of this Court on both sides of the subject. It will be noted that under similar language in the 1885 Constitution ([s]ection 10, Article IX) to that appearing in the first paragraph of [s]ection 10 of Article VII of the 1968 Constitution the cases hold that the validity of each proposed public revenue bond financing project depends upon the circumstances, e.g., whether the purpose of the project serves a paramount public purpose, although there might be an incidental private benefit, and other criteria.

*Nohrr v. Brevard Cnty. Educ. Facilities Auth.*, 247 So. 2d 304, 308–09 (Fla. 1971) (emphasis added) (validating revenue bonds for private college dorm).

Appellant characterizes subsection (c) as an exception to the prohibition against the pledging of public credit contained in the first paragraph of section 10. This characterization is misleading because it tends to focus exclusive attention on “industrial and manufacturing.” More properly and closely read, subsection (c) is actually an interpretation of the first paragraph: non-recourse revenue bonds do not pledge the public credit. *Nohrr* [247 So. 2d 304]. Nothing is permitted by subsection (c) which is prohibited by the first paragraph. A governmental body may not pledge the public credit for a private entity. This distinction between an exception and an interpretation can be clearly seen if subsection (c) is contrasted with subsection (d), which permits a government body to become a joint owner with, or give, lend, or use its taxing power or credit to aid, any corporation, association, partnership or person, for projects involving electrical energy generation or transmission facilities. Subsection (d)

In the case of *Linscott v. Orange County Industrial Development Authority*,<sup>135</sup> the Court was given the opportunity to reflect upon the purpose of the 1968 pledging-of-credit amendment:

The impact of the adoption of article VII, section 10(c) of the Florida Constitution (1968) was to recognize constitutionally that the public interest was served by facilitating private economic development and to overturn *Town of North Miami* and *Jacksonville Port Authority* holdings that non-recourse revenue bonds were pledges of the public credit.

. . .

With the adoption of the Constitution of 1968, the “paramount public purpose” test developed by [caselaw] under the Constitution of 1885 lost much of its viability. The test is still applicable when a pledge of public credit is involved, but where such pledge is not involved, as here, it is enough to show only that a public purpose is served.<sup>136</sup>

However, as Robert Nabors succinctly explained to the Florida Municipal Attorneys Association in 2010,

The decision in *Orange County Industrial Dev. Auth. v. State*, 427 So. 2d 174 (Fla. 1983), is arguably inconsistent with the decision in *Linscott v. Orange County Industrial Dev. Auth.* [443 So. 2d 97, 100–01 (Fla. 1983)]. In *Linscott*, it was held that the construction of a regional headquarters office of a multi-state insurance company that was to be financed with non-recourse revenue bonds only had to meet a public purpose test. However, in *Orange County Industrial Development Authority* [] it was held that the non-recourse revenue bonds issued to construct television broadcast studios and related offices were required to satisfy a paramount public purpose

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thus grants an exception to the prohibitions of the first paragraph; subsection (c) grants no such exception.

*Linscott v. Orange Cnty. Indus. Dev. Auth.*, 443 So. 2d 97, 100–01 (Fla. 1983) (validating revenue bonds for regional headquarters of multistate insurance company). In a subsequent case, the Court itself referred to the lettered subparagraph as an “exception” but then proceeded to apply the earlier logic (or illogic) of *Linscott* set out above (that the subsection is not an “exception” but rather is an “interpretation”) in order to validate the bonds. *State v. Osceola Cnty.*, 752 So. 2d 530, 535 (Fla. 1999).

135. 443 So. 2d at 100–01 (validating non-recourse, project revenue bonds for the regional headquarters of a multistate insurance company).

136. *Id.*

test even though no tax or public funds were pledged under the bond structure.

Under the reasoning of the Court in the *Orange County Industrial Dev. Auth.* decision, . . . [for a project impliedly authorized] under Article VII, section 10(c), Florida Constitution, the paramount public purpose test is applied notwithstanding the 1968 constitutional amendment relating to non-recourse revenue bonds under the analysis in *Linscott*.<sup>137</sup>

More recently, and ignoring the conflict between its two 1983 opinions in *Linscott* and *Orange County*, the Court in *Jackson-Shaw Co. v. Jacksonville Aviation Authority*<sup>138</sup> came down squarely on the side of a “mere public purpose” standard for non-recourse, project revenue bonds. The Court held that a complex, public-to-private lease and infrastructure development agreement was constitutional because no public credit was involved, and so

[i]f the State or a political subdivision has not given, lent, or used its credit, a project must *merely serve a public purpose*. This Court has explained that under the public purpose test “it is immaterial that the primary beneficiary of a project be a private party, if the public interest, even though indirect, is present and sufficiently strong.” However, this Court has also cautioned that “public bodies cannot appropriate public funds indiscriminately, or for the benefit of private parties, where there is not a reasonable and adequate public interest.” Even where there is no proposed public indebtedness, neither the State nor a political subdivision “may expend public funds for or participate at all in a project that is not of *some substantial benefit to the public*.”<sup>139</sup>

Conversely, the Court stated in dicta, “On the other hand, if the State or a political subdivision has given, lent, or used its credit, a project ‘must serve a paramount public purpose and any benefits to a private party must be incidental.’”<sup>140</sup> The opinion in

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137. Robert L. Nabors, Nabors, Giblin & Nickerson, P.A., *Back to Basics: Municipal Economic Development Incentives* 8–9 (July 29, 2010) (transcript on file with the Author and *Stetson Law Review*).

138. 8 So. 3d 1076 (Fla. 2008).

139. *Id.* at 1095 (emphasis added) (internal citations omitted).

140. *Id.* (internal citations omitted).

*Jackson-Shaw* is a must-read for an economic development or redevelopment project involving non-recourse, project revenue debt; a public-private lease; or any form of current asset-transfer agreement. Apparently a “*mere public purpose*” means only “*some substantial benefit to the public*” which may be “*indirect*.”

Shortly after deciding *Jackson-Shaw*, in another must-read case, *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*,<sup>141</sup> the Court summarized its prior holdings:

The basic test for determining whether an expenditure of public funds violates this section of the Florida Constitution is whether such expenditure is made to accomplish a public purpose. If the District has used either its taxing power or pledge of credit to support issuance of bonds, the purpose of the obligation must serve a paramount public purpose and any benefits to a private party must be incidental. If the District has not exercised its taxing power or pledged its credit to support the bond obligation, the obligation is valid if it serves a public purpose. Incidental private benefit from a public revenue bond issue is not sufficient to negate the public character of the project.

As used in article VII, section 10, “credit” means “the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.” This Court has explained that the lending of credit means:

[T]he assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.<sup>142</sup>

#### A. A Bridge Too Far?

Does a sixteen-million-dollar, six-mile road with extensive landscaping to provide access and enhance the “Caribbean

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141. 48 So. 3d 811 (Fla. 2010).

142. *Id.* at 822 (citing *State v. Hous. Fin. Auth. of Polk Cnty.*, 376 So. 2d 1158, 1160 (Fla. 1979)) (alterations in original) (internal citations omitted).

Island” motif of a private, three-course golf community with million-dollar houses serve a public purpose? Yes,<sup>143</sup> according to the majority in *Northern Palm Beach County Water Control District v. State*.<sup>144</sup> The bond resolution in this case referred to the revenue stream as a “drainage tax,” but the Court properly found that it was a valid special assessment,<sup>145</sup> not a tax, and hence the credit of the District was not pledged.<sup>146</sup> Because the District’s credit was not pledged, “the bonds need[ed] only serve a public purpose rather than a paramount public purpose.”<sup>147</sup> Because the District’s enabling legislation declared that “provision in a water management plan for roads for the exclusive use and benefit of a unit of development and its residents’ to be a ‘public purpose,’” the Court validated the bonds without discussion.<sup>148</sup> The dissent was more colorful in finding that, as a matter of fact within the province of the Court, no public purpose was served. Quoting the dissent:

Simply designating a project “public” by legislative fiat does not necessarily make it so, especially where uncontroverted facts attest otherwise. A quote from Lewis Carroll makes the point:

*“I don’t know what you mean by ‘glory,’” Alice said.*

*Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’”*

*“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.*

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143. Caveat: do not try this at home without adult supervision, as it requires a special act of the legislature.

144. 604 So. 2d 440 (Fla. 1992) (reversing the trial court’s refusal to validate special assessment bonds).

145. Valid special assessments are those that benefit the property assessed and are reasonably apportioned. *City of Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992).

146. *N. Palm Beach Cnty. Water Control Dist.*, 604 So. 2d at 442.

147. *Id.*

148. *Id.* at 443; see also *Wald v. Sarasota Cnty. Health Facilities Auth.*, 360 So. 2d 763, 770 (Fla. 1978) (no independent judicial inquiry made as to whether private hospital project served a paramount public interest where legislature had found in enabling legislation that such facilities were in the public interest).

*"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."*

*"The question is," said Alice, "whether you can make words mean so many different things."*

*"The question is," said Humpty Dumpty, "which is to be master—that's all."*

Lewis Carroll, *Through the Looking Glass* 113 (Dial Books for Young Readers, NAL Penguin, Inc. 1988) (1872). Under our constitutional system of government in Florida, courts, not legislators or water control districts, are the ultimate "masters" of the constitutional meaning of such terms as "public purpose" in judicial proceedings.

. . .

It is perfectly clear to me that the District's bond project serves a simple, very private, purpose. It allows the owners of the proposed 2,384 residences within the Club to capitalize on a massive tax-break, intended for public projects, in financing the construction of a luxurious environment for their own private use. The undertaking smacks of state-sponsored, economic apartheid. I can conceive of few more private projects.<sup>149</sup>

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149. *N. Palm Beach Cnty.*, 604 So. 2d at 446–47 (Shaw, J., dissenting). The opinion reflects that there was to be a guardhouse on the road to deny public access and use. The dissent also offered a clear picture of the history and purpose of the prohibition against lending credit:

The purpose of section 10 [article VII, Florida Constitution] is to prevent state government from using its vast resources to monopolize, or otherwise "destroy," a segment of private enterprise, and also "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited." *Bannon v. Port of Palm Beach Dist.*, 246 So. 2d 737, 741 (Fla. 1971). To pass constitutional muster, a government bond issue must serve a truly public purpose, i.e., it must bestow a benefit on society exceeding that which is normally attendant to any successful business venture.

*Id.* at 446. Unfortunately, the dissent was mistaken in grounding its objection, in part, on Florida Constitution Article VII, section 10. This is because no public credit was pledged. The bonds were supported entirely by special assessments; the power to tax was not involved, so section 10 was not implicated. The quotes from Alice and Humpty Dumpty framed the real issue, which was simply whether the road served even that minimal level

## B. Sometimes a Bridge Must Be Crossed in Order to See It

In the 1980s, the City of Panama City Beach built a competitive sports venue.<sup>150</sup> Unfortunately, the park did not generate sufficient revenues to meet the growing demand, so the City attempted to start an investment bank by issuing taxable, non-recourse revenue bonds and lending the money to insurance companies through guaranteed income contracts.<sup>151</sup> The profit would fund the sports park. At the time, positive arbitrage was possible if the City invested the proceeds with an insurance company having a credit rating satisfactory to the bond buyers. In essence, the City proposed to serve as a conduit to connect a private borrower with the taxable muni-bond market.<sup>152</sup> The Court in 1988 found that the City had the home-rule authority to issue the bonds because the profit would be used for a valid municipal purpose.<sup>153</sup> In short order, three years later in 1991, the Court receded from its *Panama City Beach* decision:

We now conclude that borrowing money for the primary purpose of reinvestment is not a valid municipal purpose as contemplated by article VIII, section 2(b). A municipality exists in order to provide services to its inhabitants. As noted in then-Chief Justice McDonald's dissenting opinion in *State v. City of Panama City Beach*, we "see no valid public purpose in investing for investing's sake. Making a profit on an investment is an aspect of commerce more properly left to commercial banking and business entities."<sup>154</sup>

## V. TWO ACES IN THE HOLE

A local government and its lawyers have two great advantages in defining and proving that the use of a particular

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of public purpose needed to justify every governmental action, and whether the state legislature saying that it did made it so.

150. Frank Brown Park, 16200 Panama City Beach Parkway, Panama City Beach, Florida, 32413.

151. *State v. City of Panama City Beach*, 529 So. 2d 250, 250 (Fla. 1988).

152. *Id.* at 251 (discussing tax exempt and taxable arbitrage bond schemes available in 1988).

153. *Id.* at 255 (relying upon the reasoning in *State v. City of Sunrise*, 354 So. 2d 1206 (Fla. 1978), that no specific authorization to issue revenue bonds is required; the only limitation on a constitutional grant of home-rule power is that it must be for a "municipal purpose").

154. *State v. City of Orlando*, 576 So. 2d 1315, 1317 (Fla. 1991).



public asset as leverage in order to acquire private capital or expertise serves a public purpose or, where required, serves a predominate public purpose with only incidental private benefit. These are (1) deferential judicial review and (2) the validation suit.

### A. Deferential Judicial Review

It is better to be lucky than smart. But in these matters, a smart local government has the power to make its own luck. Short of criminal sabotage or a clean sweep at the ballot box, opponents of a project have only the courts to stop it. Separation of powers<sup>155</sup> gives a city or county an advantage if it will merely take the time, and expend the effort, to act smartly and be mindful that the “Court has held that ‘legislative declarations of public purpose are presumed valid and should be considered correct unless patently erroneous.’”<sup>156</sup> This can be done either:

- By relying upon an enabling statute where the state legislature has declared a sufficient public purpose<sup>157</sup> (and hopefully someone else has successfully litigated it<sup>158</sup>), or

155. *Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238, 244 (Fla. 2001).

This Court has consistently recognized that the judiciary has an obligation, pursuant to the separation of powers contained in article II, section 3 of the Florida Constitution, to construe statutory pronouncements in strict accord with the legislative will, so long as the statute does not violate organic principles of constitutional law.

*Id.* (internal citations omitted).

156. *Micosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 48 So. 3d 811, 819 (Fla. 2010) (quoting *Strand v. Escambia Cnty.*, 992 So. 2d 150, 156 (Fla. 2008)).

157. And they are becoming legion, but not all available to a city. See The Florida Legislature, *Annual Reports*, OFF. ECON. & DEMOGRAPHIC RES. (2016), [www.edr.state.fl.us/Content/local-government/reports/index.cfm#incentives-report](http://www.edr.state.fl.us/Content/local-government/reports/index.cfm#incentives-report) (listing a range of annual reports from Florida); The Florida Legislature, *Local Government Economic Development Incentives*, OFF. ECON. & DEMOGRAPHIC RES. (2016), <http://edr.state.fl.us/Content/local-government/economic-development-incentives> (listing information on incentives regarding economic development in Florida); STATE OF FLORIDA DEPARTMENT OF REVENUE, *Tax Incentives* (2016), [http://dor.myflorida.com/dor/taxes/tax\\_incentives.html](http://dor.myflorida.com/dor/taxes/tax_incentives.html) (listing a range of tax incentives and credits in Florida); FLORIDA GOVERNOR, *Financial Incentives* (2016), [www.flgov.com/financial-incentives](http://www.flgov.com/financial-incentives) (listing a range of financial incentives in Florida); ENTERPRISE FLORIDA, *Incentives*, [www.enterpriseflorida.com/why-florida/business-climate/incentives](http://www.enterpriseflorida.com/why-florida/business-climate/incentives) (listing a range of incentives for businesses); Robert L. Nabors, Nabors, Giblin & Nickerson, P.A., *Local Government Incentives for Economic Development* 55–61 (July 11, 1996) (transcript on file with the Author and *Stetson Law Review*).

158. See, e.g., *State v. Orange Cnty. Indus. Dev. Auth.*, 417 So. 2d 959, 962 (Fla. 1982).

- By using its own home-rule powers<sup>159</sup> and building a detailed record of competent substantial evidence supporting the public purpose.

In a seminal case on point, a local government did both.<sup>160</sup> It relied upon the Florida Housing Finance Authority Law<sup>161</sup> and also held a series of meetings and took testimony supporting a determination that there was a shortage of housing and capital available for investment in housing, and that the use of the bond proceeds to purchase mortgages of private residences served a public purpose.<sup>162</sup> To quote the Court in validating the non-recourse revenue bonds:

In the case *sub judice*, there existed a specific finding by the legislature, the Board of County Commissioners, and the Authority that the project is related to the health, safety, morals, and welfare of the residents of Polk County. What constitutes a public purpose is, in the first instance, a question for the legislature to determine, and its opinion should be given great weight. A legislative declaration of public purpose is presumed to be valid, and should be deemed correct unless so clearly erroneous as to be beyond the power of the legislature.

The findings by the legislature contained in section 159.602, Florida Statutes (1978), should not be disturbed. [The Court] find[s] that the issuance of the Authority's revenue bonds is adequately supported by a proper public purpose.<sup>163</sup>

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The legislature in essence codified the *City of Miami* decision by the 1980 amendment to the Florida Industrial Development Financing Act. The amendment, which is now under attack, provides that a hotel in connection with a convention center is an eligible project.

When the legislature makes a determination of public purpose, a party challenging such a legislative determination must show that such determination "was so clearly wrong as to be beyond the power of the Legislature."

*Id.*

159. *Strand*, 992 So. 2d at 159. See discussion at *supra* note 31 (confirming the county's home-rule authority to create a new tax-increment financing mechanism).

160. *State v. Hous. Fin. Auth. of Polk Cnty.*, 376 So. 2d 1158 (Fla. 1979).

161. FLA. STAT. §§ 159.601–623 (2016) ("Florida Housing Finance Authority Law").

162. *Hous. Fin. Auth. of Polk Cnty.*, 376 So. 2d at 1159.

163. *Id.* at 1160 (internal citations omitted).

The case also reinforces the fact that where there is no lending of public credit, a mere public purpose will suffice, as opposed to a predominate public purpose. The Court provided,

We have pointed out that the lending of credit means the assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit. Under the constitution of 1968, it is immaterial that the primary beneficiary of a project be a private party, if the public interest, even though indirect, is present and sufficiently strong. Of course, public bodies cannot appropriate public funds indiscriminately, or for the benefit of private parties, where there is not a reasonable and adequate public interest. An indirect public benefit may be adequate to support the public participation in a project which imposes no obligation on the public, and the qualification of the direct beneficiary complies with the principles of due process and equal protection.<sup>164</sup>

More recently, in another case and using modern language recognizable from land use caselaw, the Court said:

Dr. Strand next argues that the findings of fact contained in the circuit court's final judgment are not supported by competent, substantial evidence in the record. Specifically, Dr. Strand challenges the circuit court's findings that the District project is necessary and serves a public purpose; that there is a sufficient nexus between the property within the District and the benefits of the project to be financed by the bonds; and that the public improvements to be financed by the revenue bonds are necessary. Dr. Strand's argument is without merit.

In this case, the County offered into evidence the Ordinance and the Resolution, and presented testimony concerning the purpose of the project and the tax increment financing mechanism. In its final judgment, the circuit court relied primarily on the legislative findings contained in the Ordinance and the Resolution. This Court has held that "legislative declarations of public purpose are presumed valid and should be considered correct unless patently erroneous."

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164. *Id.* (internal citations omitted).

The findings in the Ordinance and the Resolution must be accorded great deference by the trial court, and Dr. Strand has not demonstrated the findings to be clearly erroneous.<sup>165</sup>

A word of caution for practitioners: in building the record, avoid taking shortcuts or being conclusory with the testimony and evidence presented to the governing body. Even though it may frustrate and try the patience of commissioners and staff, and even though it will run the meeting longer than anyone desires with seemingly repetitious testimony, do it. A great “public purpose” record will contain a number of closely related, but independent elements, each supported by its own underlying facts and logic:

- A concise statement of the problem;
- How the problem is affecting the public;
- Identification of the factors causing or contributing to the problem;
- Which factors the proposal will influence, including the ones that will not or cannot be affected;
- How the proposal will operate to influence the factors that will be affected; that is, the mechanics of the nexus between action and purpose;
- What the alternatives are; what has been tried that didn’t work or why this proposal is being suggested over alternatives;
- How the success of the proposed project will be measured and when;
- How the public will be protected if the project fails and rewarded if it succeeds; and
- What the city’s risks and upsides are, what the private party’s risks and upside are, and a comparison of the two.

The idea is to make it difficult or impossible for a court to later “substitute its judgment”<sup>166</sup> for that of the legislative body, because the record that the body built establishes beyond a doubt

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165. Strand v. Escambia Cnty., 992 So. 2d 150, 155–56 (Fla. 2008).

166. Sebring Airport Auth. v. McIntyre, 783 So. 2d 238, 245 (Fla. 2001); accord Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., 48 So. 3d 811, 818 (Fla. 2010).

that the critical issues are “fairly debatable”;<sup>167</sup> rule that the legislative findings were “arbitrary and, therefore, [not] entitled to a presumption of correctness by the trial court”;<sup>168</sup> or rule that the legislative findings were “patently erroneous.”<sup>169</sup> Often, in struggling through the nexus between the proposal and the problem, both are better defined and the public purpose more clearly stated.

Note that the logic of this approach assumes that the proposal always addresses a negative or a need. What about a proposal that is entirely positive and cumulative, that seizes a sterling opportunity to just make things better which are not all that bad in the first place? In that situation, the practitioner should be wary. This is a warning bell that a court could find that the government is unlawfully encroaching upon the private sector:

The constitutional prohibition against pledging public credit to private enterprise, article IX, section 10, Florida Constitution (1885) (now contained in article VII, section 10), was designed “to restrict the activities and functions of the State, county and municipality to that of government and forbid their engaging directly or indirectly in commercial enterprises for profit.” This prohibition is closely related to revenue bonds and to what constitutes a proper public purpose.<sup>170</sup>

Is it a public purpose for a city to finance the equipment needed to build a better mousetrap when there is a manufacturer

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167. *City of Miami Beach v. Hogan*, 63 So. 2d 493, 494 (Fla. 1953) (addressing a zoning decision).

168. *City of Winter Springs v. State*, 776 So. 2d 255, 258 (Fla. 2001) (regarding special assessment bonds).

169. *Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662, 665 (Fla. 2002); *Boschen v. City of Clearwater*, 777 So. 2d 958, 966 (Fla. 2001).

Generally, “legislative declarations of public purpose are presumed valid and should be considered correct unless patently erroneous.” Moreover, the wisdom or desirability of a bond issue is not a matter for our consideration. Indeed, we have recognized that so long as the Legislature does not exceed its constitutional authority, our review of legislative declarations is limited.

*Id.* (internal citations omitted).

170. *State v. City of Panama City Beach*, 529 So. 2d 250, 253 (Fla. 1988). But the next sentence in the quote above admits, “As with other aspects of bond law, the definition of public purpose has undergone changes.” *Id.* And the Court validated the city’s purpose—temporarily. *Id.*; see also *N. Palm Beach Cnty. Water Control Dist. v. State*, 604 So. 2d 440, 446–47 (Fla. 1992) (Shaw, C.J., dissenting) (emphasizing the Constitution’s safeguard against the State’s abuse of its power of eminent domain).

in the city already building mousetraps that work well enough? Probably not. But what if that mousetrap business is failing because its traditionally designed traps cannot compete with modern traps and hundreds of jobs are at risk? Perhaps. But even then, how is saving that private business, those private jobs, a legitimate public purpose or, more specifically, a “municipal purpose”? How does it relate to providing services to city residents? Perhaps it will preserve the tax base and general revenue for fire and police. Perhaps it will preserve the customer base for city utilities. Whether the city’s mousetrap debt will be validated, or survive a citizen challenge, will depend almost entirely upon the credibility and detail in the record of the city proceedings approving the developer agreements (the partnership) and authorizing the debt, a record made long before any suit is filed. Evidence developed or publicly offered after the fact is not as credible as concurrent legislative findings.<sup>171</sup> In addition, tedious and painful record building presents the opportunity to refine the project, the purpose, and the evidence.

In sum, if the record of the public purpose of a project that will leverage private capital with public assets is not stated to “serve a truly public purpose, i.e., it must bestow a benefit on society exceeding that which is normally attendant to any successful business venture,”<sup>172</sup> restate it. If it cannot be restated or feels like private financing, a local government should seriously consider walking away.

## B. Validation

The expedited judicial process to validate publicly traded bonds in order to enhance their credit worthiness is available for any form of debt<sup>173</sup> and only has three justiciable issues: “(1)

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171. See, e.g., *Strand v. Escambia Cnty.*, 992 So. 2d 150, 155–56 (Fla. 2008) (stating that legislative findings are presumed correct and relied upon heavily in holdings).

172. *Palm Beach Cnty.*, 604 So. 2d at 446 (Shaw, C.J., dissenting).

173. FLA. STAT. § 75.02 (2016).

Any county, municipality, taxing district or other political district or subdivision of this state . . . may determine its authority to incur bonded debt or issue certificates of debt and the legality of all proceedings in connection therewith . . . [by filing a complaint] in the circuit court . . . against the state and the taxpayers, property owners and citizens . . . [and] nonresidents owning property or subject to taxation therein.

whether the public body has the authority to issue bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issuance complies with the requirements of the law.”<sup>174</sup> Obviously the second justiciable issue creates the opportunity to determine, with judicial finality, whether a constitutionally allowed public purpose exists.<sup>175</sup>

The advantages of validation are certainty and speed. The question of whether the use of the debt will serve a public purpose, or a predominate public purpose with only an incidental private benefit (all potentially slippery, mixed questions of law and fact), are immediately resolved by the local trial court<sup>176</sup> with appeal lying directly with the Supreme Court.<sup>177</sup> Absent an appeal to the Court, the process may be completed in as quickly as three months or so, including expiration of the appeal period. Once final, the judgment is “conclusive” to all parties—effectively to the world.<sup>178</sup>

Making the question of public purpose a *res judicata* before the covenants of either the city or the private parties “go hard” reduces risk, makes private investors and operators more comfortable, and makes the project less expensive in the long run. If there is a need for public debt, or even just an opportunity to create public debt, then in most deals, and especially in long term deals, it is probably worth considering the relatively minor expense and delay of validation.

These two aces go hand-in-hand. *Validation* is the vehicle to bring *deferential review* into expedited play to advance a project at the precise time selected by the local government.

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174. *City of Winter Springs v. State*, 776 So. 2d 255, 257 (Fla. 2001).

175. *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 885–86 (Fla. 1980).

We note that this challenge to the legality of the project to be financed by the proposed bonds is proper in these proceedings because “validation proceedings involve a determination not only of the authority of an agency to issue bonds or revenue certificates, but also whether the agency may lawfully expend the proceeds for the contemplated purpose.”

*Id.* (quoting *State v. Suwannee Cnty. Dev. Auth.*, 122 So. 2d 190, 193 (Fla. 1960)).

176. FLA. STAT. § 75.07 (2016) (“At the hearing the court shall determine all questions of law and fact and make such orders as will enable it to properly try and determine the action and render a final judgment with the least possible delay.”).

177. *Id.* § 75.08.

178. *Id.* § 75.09.

## VI. PUBLIC-PRIVATE PARTNERSHIPS

Legally, public-private partnerships are nothing new.<sup>179</sup> In Florida we have been treated to a new statute,<sup>180</sup> presumably to create a standard appearance more readily accepted in the financial markets.

There is no consistently applicable definition of a public-private partnership. That is a very good thing, especially in a state such as Florida where local governments have been vested with broad, constitutional home-rule powers of self-government.<sup>181</sup> Public-private partnerships have been around a long time and mold themselves to fit infinitely variable needs and circumstances. They are not true partnerships in the common law or modern statutory sense. By statute today, a true partnership is “the association of two or more persons to carry on as coowners [of] a business for profit.”<sup>182</sup> “A partnership is an entity distinct from its partners.”<sup>183</sup> A public-private partnership is not, and cannot be either of those things. The city cannot be a “joint owner with” a private party.<sup>184</sup>

Though undefined, all public-private partnerships do have two things in common:<sup>185</sup>

- The public partner seeks to gain the benefit of private capital (and design or management expertise) by leveraging

179. Cowdery, *supra* note 17, at 38.

There is a long history of private sector involvement in providing water and wastewater utility service in this country.

. . .

Privatization, also referred to as “public-private partnership,” may be defined as an arrangement under which private firms become involved in financing, designing, constructing, owning, or operating public facilities or services.

*Id.*

180. FLA. STAT. § 287.057.

181. See discussion at *supra* notes 55–59 (summarizing Florida home rule).

182. FLA. STAT. § 620.8202(1).

183. *Id.* § 620.8201.

184. FLA. CONST. art. VII, § 10.

185. See generally Alexandru V. Roman, *A Guide to Public-Private Partnerships (PPPs): What Public Procurement Specialists Need to Know*, NIGP, at 1–5 (2015), available at [https://www.nigp.org/docs/default-source/New-Site/research-reports/guidetopublic-privatepartnerships\(ppps\)-whatpublicprocurementspecialistsneednowfinal.pdf?sfvrsn=4](https://www.nigp.org/docs/default-source/New-Site/research-reports/guidetopublic-privatepartnerships(ppps)-whatpublicprocurementspecialistsneednowfinal.pdf?sfvrsn=4) (providing a general overview of the various types of public-private partnerships).



private capital with limited public assets or publicly controlled opportunities; and

- The private partner seeks an investment opportunity with a profit motive in mind.

They typically have a variety of other commonalities as well:

- Both sides promise to do something of benefit to the other.
- Although the public and private partners may not co-own a single asset, there are frequently elements that are functionally equivalent to traditional, private business partnerships:<sup>186</sup>
  - They may own separate assets side by side in concerted and symbiotic uses.
  - The private partner may lease assets from the public one, inevitably creating tension between the following:
    - The practical necessity that the private party hold an asset that it can use and control to meet its for-profit needs (and which typically must be credit-worthy), and
    - The legal necessity that the public party retain sufficient control to ensure that the public purpose is served over the life-cycle of its investment.
  - The partners may share income or profit from any identified revenue stream, frequently back-loading the public share as an incentive for the private party to invest or manage or both, creating so-called income-partners.
  - And there are the usual suspects for any business arrangement:
    - Allocation of risk;
    - Performance requirements, benchmarks, and phasing; and
    - Remedies and exit strategies.

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186. See generally *Public Private Partnerships: Issues and Considerations*, PRAC. LAW COMPANY, available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwia2LzIm4jRAhVTziYKHdC3AEEQFgghMAA&url=http%3A%2F%2Fapps.americanbar.org%2Fwebupload%2Fcommupload%2FCL113000%2Fsitesofinterest\\_files%2FPublicPrivatePartnershipsIssuesandConsiderations.pdf&usg=AFQjCNF50VCdhXmS2RPvwFm\\_4cnJF7LJA&sig2=hvm7SWkmcYgqXmjmdQzM6Q&bvm=bv.142059868,d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwia2LzIm4jRAhVTziYKHdC3AEEQFgghMAA&url=http%3A%2F%2Fapps.americanbar.org%2Fwebupload%2Fcommupload%2FCL113000%2Fsitesofinterest_files%2FPublicPrivatePartnershipsIssuesandConsiderations.pdf&usg=AFQjCNF50VCdhXmS2RPvwFm_4cnJF7LJA&sig2=hvm7SWkmcYgqXmjmdQzM6Q&bvm=bv.142059868,d.eWE) (last visited Mar. 30, 2017) (discussing various public-private partnership structures and considerations).

There are two functional types of public-private partnerships:<sup>187</sup>

- Primarily for *economic development* or *re-development*, frequently in concert with a Community Redevelopment Agency and a Redevelopment Plan (Chapter 163, Part III). Promising to re-invest future tax increment as an incentive for private investment in a slum or blighted area is the soul of re-development (especially now that the ability to assemble properties through eminent domain for private development is gone).

- Primarily to acquire or facilitate the creation of *infrastructure* or the acquisition of a *service*, frequently of a type historically developed and owned or provided by the public sector alone. “Municipalities began chartering privately owned water companies before the signing of the Declaration of Independence.”<sup>188</sup> Roads<sup>189</sup> and most recently all sorts of “social infrastructure” such as schools and lighted parking lots have been the object of these partnerships.

In some fashion or another, by some name or another, cities and counties have been entering public-private partnerships ever since the first debate over whether a public project involving a private party served a sufficient public purpose. As discussed in an earlier Part of this Article, before the constitutional amendment of 1930 required a referendum to issue local government debt, there was no serious limit upon public-private deals and local governments had a “field day.”<sup>190</sup> After the 1930 amendment, local governments turned to non-recourse revenue bonds in order to continue to support private projects which, over time, led to the “mere public purpose” and “predominate public purpose/incidental private benefit” tests we have today. The development over the past fifty years of home-rule power for cities and counties has simplified the creation of public-private partnerships by eliminating the need for an express authorization of the type of project for which the local

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187. See Roman, *supra* note 185, at 3–4 (describing various types of public-private partnerships).

188. Cowdery, *supra* note 17, at 38.

189. FLA. STAT. § 334.30 (2016).

190. State v. City of Panama City Beach, 529 So. 2d 250, 252 (Fla. 1988).

government seeks private capital so long as a sufficient public purpose<sup>191</sup> is served, even to the extent of authorizing, for a brief moment, a city to become an investment banker.<sup>192</sup>

Public-private partnerships have not been widely used in Florida or the United States where tax exempt financing is prevalent.<sup>193</sup> However, not only do they provide opportunities for cash-poor governments to acquire infrastructure, but also, they can transfer certain risks that the private sector is more adept at managing, such as cost overruns and timing.<sup>194</sup> As of the spring of 2016, thirty-three states had enacted P3 legislation to remove uncertainty regarding the legality of these procurement structures.<sup>195</sup>

In 2013, the Florida legislature adopted a broad enabling statute authorizing cities, counties, and special districts to enter public-private partnerships and specifying detailed procedures and requirements to do so.<sup>196</sup> Several other states have enacted similar legislation, driven by national and even international capital that is looking for a secure home and seeks legal certainty and consistency from state to state.<sup>197</sup> It is not an accident that the enabling legislation specifies how a local government may deal with an unsolicited proposal.<sup>198</sup>

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191. Or, for a city, a "municipal purpose." FLA. STAT. § 166.021 (2016).

192. *State v. City of Orlando*, 576 So. 2d 1315, 1317 (Fla. 1991) (receding from *City of Panama City Beach*, 529 So. 2d 250).

193. Patrick O'Sullivan, *Enabling Public-Private Partnerships in New York*, N.Y. L.J. (May 5, 2016), available at <http://www.newyorklawjournal.com/id=1202756782781/Enabling-PublicPrivate-Partnerships-in-New-York?mcode=0&curindex=0&curpage=ALL>.

194. *Id.*

195. *Id.*

196. See generally FLA. STAT. § 287.05712 (2015), renumbered and amended by Ch. 2016-153 and Ch. 2016-254, Fla. Laws (2016), now § 255.065 (2016).

197. See *Public-Private Partnership (P3) Model State Legislation*, BIPARTISAN POLICY CENTER 3 (Dec. 2015), <http://bipartisanpolicy.org/wp-content/uploads/2015/12/BPC-P3-Enabling-Model-Legislation.pdf> ("The model legislation is a template that should be customized to suit each state's particular circumstances and needs. Yet providing some degree of standardization and promotion of best practices may encourage greater private infrastructure investment and establish clear rules of the road."). Thirty-three states have passed P3 enabling legislation to remove uncertainty regarding the legality of the procurement structure. O'Sullivan, *supra* note 193. Citations courtesy of David Cruz, Florida League of Cities, Tallahassee, Florida, who was involved in the passage of the Florida legislation.

198. "Since structuring such contractual arrangements [P3s] requires significant up-front resources, prospective private sector partners look to expend resources in jurisdictions where they know that the public sector does not need to seek additional legislative approval for a contract or procurement, which a statute typically addresses." O'Sullivan, *supra* note 193.

State agencies and local special districts in Florida do not have home-rule powers, so general or special legislative authorization to enter public-private deals benefits them. For example, decades ago the Florida Department of Transportation was authorized by statute to seek acquisition of transportation facilities through public-private contracts.<sup>199</sup>

Ironically, however, the new statute could limit the home-rule flexibility of Florida cities and counties if developers, bond buyers, and banks become so accustomed to the expressly authorized procedures that they require the statute to be followed in every detail. The new statute certainly will serve as a guide or checklist for home-rule deals, but cities and counties in Florida should be wary of relying upon it exclusively. To do so could begin to limit their flexibility. Moreover, to avoid having a strenuously negotiated deal invalidated by a court, the Author recommends that if a local government chooses to follow the statute for convenience, its record should reflect that the government is only using the statute as a guide and that every action it takes leading to and including the approval of the contracts creating the partnership were taken pursuant to its home-rule powers.<sup>200</sup> This may require taking the extra step of adopting an ordinance which parallels but extends state law to authorize the creation or use of public assets to leverage private capital before the government wades into putting together the actual partnership deal.<sup>201</sup>

To complicate matters further, the 2013 statute was not a model of clarity. It was a hybrid of laws from Virginia and other states.<sup>202</sup> Fortunately, baked into it was a call for an immediate

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199. FLA. STAT. § 334.30 (2016); see *Unsolicited Proposal Process*, FLA. DEP'T TRANSP., available at [http://www.fdot.gov/comptroller/PFO/P3\\_Unsolicited\\_Proposal\\_Process.shtm](http://www.fdot.gov/comptroller/PFO/P3_Unsolicited_Proposal_Process.shtm) (last visited Mar. 30, 2017) (explaining the Florida Department of Transportation's authority to seek acquisition of transportation facilities through public-private contracts).

200. See *Strand v. Escambia Cnty.*, 992 So. 2d 150, 159 (Fla. 2008) (validating a county's creation by ordinance of a home-rule tax increment financing program similar to Chapter 163, Part III, Florida Statutes (Community Redevelopment) but used to four-lane a road rather than address slum or blight).

201. *Id.* (unique, home-rule tax increment financing program); *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992), *modified sub nom.* *Collier Cnty. v. State*, 733 So. 2d 1012 (Fla. 1999), *holding modified by* *Sarasota Cnty. v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995) (unique, home-rule special assessment program).

202. See Elaine S. Povich, *Cash-Strapped States Turn to Public-Private Partnerships*, PEW CHARITABLE TRUSTS (Nov. 14, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/11/14/cashstrapped-states-turn-to-publicprivate-partnerships>.

task force review.<sup>203</sup> This review was expertly done and published on July 1, 2014; many sections were approved and changes were suggested to others.<sup>204</sup> The 2015 legislative session ended abruptly without these needed reforms being made. In 2016, two reform bills finally passed the legislature and the statute was amended, effective July 1, 2016.<sup>205</sup>

Of particular interest to cities and counties are two changes made by the 2016 amendments: (1) clarification that the statute is cumulative and does not limit a local government's home-rule power, and (2) an exemption from the public records laws.<sup>206</sup> In 2013, it would appear that the legislature intended the act to be cumulative and not mandatory, not to limit the home-rule power of cities and counties. But, as passed then, the legislation stumbled around to provide as follows:

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Other states, including Florida, have used Virginia's legislation as a model, according to Richard Norment, executive director of the National Council of Public-Private Partnerships. Florida expanded its P3 law this year to cover housing, water, and transportation projects, and to allow the use of P3s by other governmental entities, including counties, municipalities, school board and regional governments.

*Id.*; Albert E. Dotson, Jr., *P3 Legislation a Hot Topic at the Florida Logistics & Trade Conference*, BILZIN SUMBERG'S NEW MIAMI BLOG (May 23, 2014), <http://www.newmiamiblog.com/2014/05/23/2014-florida-logistics-trade-conference>.

Virginia, another state leader in P3s, in addition to passing P3 legislation in the 90s, established an Office of Transportation Public-Private Partnerships in 2011 to assist in creating an environment that encourages private investment and invites innovative solutions from the private sector. Florida has positioned itself similarly to Virginia by passing legislation to enable its government entities to get on the P3 path, establish P3 guidelines and signal to the private sector that Florida is "open for business."

Florida is still fashioning its P3 laws and will have the benefit of learning from states like Virginia, enabling it to eventually have one of the best and most effective P3 laws in the country.

*Id.* Citations courtesy of David Cruz, Florida League of Cities, Tallahassee, Florida, who was involved in the passage of the Florida legislation.

203. FLA. STAT. § 287.05712(3) (2013).

204. *See Task Force Final Report*, *supra* note 38 (establishing various guidelines and recommendations to House Bill 85).

205. 2016 Fla. Laws Ch. 2016-153, 2016-254 (2016).

206. 2016 Fla. Laws Ch. 2016-153; *see generally* FLA. STAT. ch. 119 (2016) (requiring government records to be open to the public).

## CONSTRUCTION.

This section shall be liberally construed to effectuate the purposes of this section. This section shall be construed as cumulative and supplemental to any other authority or power vested in or exercised by the governing board of a county, district, or municipal hospital or health care system including those contained in acts of the Legislature establishing such public hospital boards or [section] 155.40. . . .<sup>207</sup>

The Task Force in its final report recognized the problem and recommended a clean, strike-all amendment to this section.<sup>208</sup> The legislation proposed in 2015 provided a similar strike-all amendment and did not appear to be controversial but died in the abrupt ending of the regular session.<sup>209</sup> Effective July 1, 2016, the statute was amended in two regards of note here, and renumbered as Section 255.065, Florida Statutes.<sup>210</sup> An exception to the public records law was made for unsolicited proposals received by a local government.<sup>211</sup> In addition, the intent for the new, statutory authorizations to be cumulative and alternative to cities and counties' home-rule powers was confirmed:

## (14) Construction.—

(a) This section shall be liberally construed to effectuate the purposes of this section.

(b) This section shall be construed as cumulative and supplemental to any other authority or power vested in or exercised by the governing body of a county, municipality, special district, or municipal hospital or health care system including those contained in acts of the Legislature.

(c) This section does not affect any agreement or existing relationship with a supporting organization involving such governing body or system in effect as of January 1, 2013.

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207. FLA. STAT. § 287.05712(15) (2013).

208. *Task Force Final Report*, *supra* note 38, at 20.

209. An Act Relating to Public-Private Partnerships, CS/HB 63 (2015) 27–28:682–707 (Fla. 2015).

210. 2016 Fla. Laws ch. 2016-154 (2016).

211. *Id.* (codified at § 255.065(15)(b)1: “An unsolicited proposal received by a responsible public entity is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the responsible public entity provides notice of an intended decision for a qualified project.”).

(d) This section provides an alternative method and does not limit a county, municipality, special district, or other political subdivision of the state in the procurement or operation of a qualifying project pursuant to other statutory or constitutional authority.

(e) Except as otherwise provided in this section, this section does not amend existing laws by granting additional powers to, or further restricting, a local governmental entity from regulating and entering into cooperative arrangements with the private sector for the planning, construction, or operation of a facility.

(f) This section does not waive any requirement of [section] 287.055.<sup>212</sup>

## VII. CONCLUSION

A public-private partnership may be used to leverage private capital and expertise in many circumstances, including economic development projects, community redevelopment projects, the acquisition of publicly needed assets, the privatization of governmental services, or any of the limitless numbers and types of other projects, however labeled. And regardless of whether the partnership is effected through a city's home-rule power; the 2013 Florida P3 statute; a specific grant of community redevelopment power under Chapter 163, Part III; or through any of the myriad of economic incentive programs scattered throughout the statutes and regulations,<sup>213</sup> in the end a challenge by an economic competitor or a concerned citizen will inevitably question whether the deal serves a sufficient public purpose or disproportionately benefits the private partner and is therefore unconstitutional. The public purpose should be defined early and often! The path to an economically successful and constitutional public-private project is never linear. It evolves.

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212. FLA. STAT. § 255.065(14) (2016). Section 287.055 is the "Consultant's Competitive Negotiation Act" or, as it is known in the trade, the CCNA. *Id.* § 287.055. Regardless of whether a public-private project is developed under the new enabling legislation or home-rule powers, there will always be tension between the architects and engineers who rely upon the CCNA for a shot at business and the private party in the deal who will prefer to privately select its own familiar consultants.

213. *See supra* note 157 (listing incentive programs).

### VIII. A FULMINATING EPILOGUE AND POSTSCRIPT

A dissenting Justice in 1992 wrote that a “truly public purpose”<sup>214</sup> sufficient to support employing public assets to leverage private capital “must bestow a benefit on society exceeding that which is normally attendant to any successful business venture.”<sup>215</sup> His point, and one that was embraced by the entire Court prior to the 1968 Constitution, is that regardless of the good to come in the “passing moment,”<sup>216</sup> government participation in business conducted in the private sector “will lead inevitably to the ultimate destruction of the private enterprise system.”<sup>217</sup> If you subscribe to the philosophy that the best role of government in the economy of a society is to set the rules and serve as referee but not play the game, then you are likely to agree with those sentiments.

But that view of public purpose was abandoned decades ago. Modern projects are approved which, boiled down, truly provide only the immediate benefits attendant to any successful business venture. Yet we know that the Florida Constitution still prohibits the government from getting into business with private parties for a profit. So what do these modern projects have in common that makes them an exception? Perhaps it is simply that local governments have found a way, without burdening the future with debt or increased taxes, to jump-start a beneficial private project that is otherwise not financially feasible.

The Court may be willing to accept the argument that using a public asset as a catalyst to ignite private capital to achieve merely the benefits “normally attendant to any successful business venture”<sup>218</sup> does indeed serve a constitutionally sufficient public purpose if: (1) the public asset is not placed at risk, or conversely, only private capital and project income are risked; (2) the coercive power to impose a tax is not used; and (3)

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214. *N. Palm Beach Cnty. Water Control Dist. v. State*, 604 So. 2d 440, 446 (Fla. 1992) (Shaw, J., dissenting).

215. *Id.*

216. *State v. Town of N. Miami*, 59 So. 2d 779, 785 (Fla. 1952) (quoted in *State v. Clay Cnty. Dev. Auth.*, 140 So. 2d 576, 581 (Fla. 1962)).

217. *Id.*

218. *N. Palm Beach Cnty.*, 604 So. 2d at 446 (Shaw, J., dissenting).



the normally attendant social benefits are at least “of some substantial benefit to the public.”<sup>219</sup>

Perhaps this is a subliminal or coincidental trade-off to compensate the private sector for the regulatory burden that often makes a worthy, private project not financially feasible. For example, dedication of tax increment (if any is measured in a given year) to a private redevelopment project in silent exchange for the project being required to abate asbestos in the blighted structures, or public stormwater modeling and infrastructure construction in silent exchange for new, private construction being required to meet stormwater and flood plain management standards.

In many governmental regulations, society seeks to achieve goals that have the side effect of making development less profitable for private parties. Private capital will follow only the credible promise of a return on investment greater than the risk it perceives. Perhaps society is sensing or even beginning to recognize that there may be unseen, long term, ripple-effect costs of well-intentioned regulations and that these costs are frustrating needed private development by reducing returns below the feasibility point. In public-private partnerships of all ilks, Florida now allows private parties to use public assets to reduce development costs in order to make a private project financially feasible even though it will yield only the benefits normally attendant to any business venture.

The Author has observed that the threshold of public purpose for many needed and worthwhile projects in Florida has been lowered in practice, and in the caselaw, to permit public subsidies that increase investors’ returns, lessen their risks, or enhance a project’s credibility—or all three. Is this good or bad? That answer depends upon what we citizens agree is a sufficient public purpose. But that, in turn, would require us to agree upon the proper role of our state and local governments. Yet, the fact remains that local governments are stretched to their financial and operational limits by promising more and more services and benefits, while at the same time (along with the state and federal governments) increasing regulatory burdens that lessen the return on the very private investment needed to increase local ad

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219. *Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1095 (Fla. 2008) (quoting *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 866 (Fla. 1980)).

valorem and excise tax bases. And they are indeed acquiring private investment in their communities by subsidizing projects with public money for a “public purpose” that may mean little more than merely overcoming an ordinary, private project’s financial feasibility gap.

If nothing else is taken from this Article, it should be remembered that it was not always so.

### *Postscript*

This Article was written in the spring of 2016, before the November presidential election. Another, complementary approach to encourage private development and its ripple-effect benefits would be to reduce the financial feasibility gap by lowering the regulatory burdens upon it.

After casting his electoral vote for Donald Trump, Republican Party of Florida Chairman Blaise Ingoglia is reported to have stated: “So, while I do not agree with corporate welfare, I can understand [Trump’s] reasoning for [offering incentives for Carrier air-conditioning to stay in Indiana].”<sup>220</sup> Mr. Ingoglia is reported to have gone further to say:

Government is very good at building up all of these barriers of entry when it comes to business. But we build them so high that we have to subsidize them in order to help companies get along. . . . What I think a Donald Trump admiration is going to do, I think what we’re going to see, is a flattening and making it more fair of a business environment so everyone can succeed.<sup>221</sup>

Admittedly these comments were made in the context of the international trade and globalization debate, but they make the point that lowering barriers to private investment will complement and reduce the subsidies needed to overcome those barriers. In fact, the public purpose found insufficient by the Florida Supreme Court in *State v. Jacksonville Port Authority* (the proposed Lockheed Aircraft shipyard case decided just prior to the 1968 amendment of the state constitution that overturned

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220. Jim Turner, *House Speaker, Scott Spar over Recruitment, Marketing*, PANAMA CITY NEWS HERALD, A11 (Dec. 24, 2016), available at <http://www.newsherald.com/news/20161223/house-speaker-scott-spar-over-recruitment-marketing>.

221. *Id.*

it) was to bring jobs to Florida that were being drawn to other states that were offering subsidies.

Local governments in Florida are authorized to carefully, but broadly, invest public assets in private projects upon a well-documented showing that a public purpose, in the modern sense of the phrase, will be served. Only sixty-five years ago, the Court was confident that “[e]xperience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.”<sup>222</sup> It will be interesting to see whether the experiment of placing public and private economic interests into increasingly sophisticated, artificial “partnerships” over the past fifty years is a pendulum that has reached its progressive amplitude and will begin a return swing, or continue to progress.

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222. *State v. Town of N. Miami*, 59 So. 2d 779, 785 (Fla. 1952).