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HON. DONALD C. WINTERSHEIMER  
JUSTICE SUPREME COURT  
P.O. BOX 387  
COVINGTON, KENTUCKY 41012

86-SC-918-T6  
86-1041  
~~86-SC-918-T~~  
86-SC-1042

FILED  
DEC 11 1986  
JOHN C. SCOTT  
CLERK  
SUPREME COURT

LARRY HAYES, State Budget  
Director, R. SCOTT PLAIN,  
SPECIAL AMICUS CURIAE, CHARLES  
HOFFMASTER and JERRY HAMMOND

APPELLANTS

VS

THE STATE PROPERTY and  
BUILDINGS COMMISSION OF  
KENTUCKY, etc.

APPELLEE

ON APPEAL FROM FRANKLIN CIRCUIT COURT  
Honorable Ray Corns, Judge  
No. 86-CI-0884

BRIEF FOR APPELLANT R. SCOTT PLAIN  
SPECIAL AMICUS CURIAE

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By R. Scott Plain  
Special Amicus Curiae

*It is the duty of the courts  
to review the sufficiency of the consideration  
as*

CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief of Appellant R. Scott Plain, Special Amicus Curiae, has been served upon the Hon. Ray Corns, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky 40601; Hon. William E. Scent, SCENT & SCENT, 209 Executive Inn, P.O. Box 1095, Paducah, Kentucky 42002, attorney for Appellant Hayes; Hon. Kyle T. Hubbard, NOLD, MILLER, MOSLEY, CLARE, HUBBARD & TOWNES, 5th Floor, Hartblock Building, 730 West Main Street, Louisville, Kentucky 40202, attorney for Appellants Hoffmaster and Hammond; Hon. Charles Wickliffe, General Counsel Finance and Administration Cabinet, Capitol Annex Building, Frankfort, Kentucky 40601; Hon. Patrick Abel, Commerce Capitol Plaza Tower, Frankfort, Kentucky 40601; Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601; and Hon. Spencer E. Harper, HARPER, FERGUSON & DAVIS, 310 West Liberty, Louisville, Kentucky 40202, as counsel for Appellee, by mailing a true and correct copy on this 9th day of December, 1986.

R. Scott Plain  
Special Amicus Curiae

## INTRODUCTION

This is an appeal from a Judgment of the Franklin Circuit Court entered on October 17, 1986, holding that Senate Bill 361, the Toyota Agreement and the Bond issue do not violate Sections 3, 49, 50, 51, 59, 60, 171, or 177 of the Kentucky Constitution. The action in the Franklin Circuit Court was commenced by Appellee herein seeking declaratory judgment as to the constitutionality of Senate Bill 361, the Toyota Agreement and the Financing Plan. The Supreme Court of Kentucky, by its Order of November 19, 1986, granted the Motion to transfer appeal.

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6. APPENDIX

1. Motion for transfer with its attached Opinion and  
Judgment entered in the Franklin Circuit Court

SUPREME COURT OF KENTUCKY

86-SC-918-T

LARRY HAYES, State Budget  
Director, R. SCOTT PLAIN,  
SPECIAL AMICUS CURIAE, CHARLES  
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APPELLEE

BRIEF OF APPELLANT R. SCOTT PLAIN,  
SPECIAL AMICUS CURIAE

✓ STATEMENT OF THE CASE

This is an appeal from a Judgment of the Franklin Circuit Court entered on October 17, 1986, holding that Senate Bill 361, the Toyota Agreement and the Bond issue do not violate Sections 3, 49, 50, 51, 59, 60, 171, or (177) of the Kentucky Constitution. The action in the Franklin Circuit Court was commenced by Appellee herein seeking a declaratory judgment as to the constitutionality of Senate Bill 361, the Toyota Agreement and the Financing Plan. Numerous exhibits were attached to the Complaint seeking the declaration of rights and numerous exhibits added to the record as well as numerous depositions having been taken. A Joint Motion to transfer the appeal from the Kentucky Court of Appeals to the Supreme Court of Kentucky was made by Appellee herein and the Appellants Larry Hayes, State Budget Director,

and the Special Amicus Curiae, which Motion was granted by an Order entered on November 19, 1986.

Counsel believes that the statements of material facts recited in the Motion to transfer adequately sets forth the facts necessary for use in disposition of this appeal, and attaches as Appendix I a copy of said Motion along with its attached Opinion and Judgment entered in the Franklin Circuit Court. Therefore, counsel will not restate material facts in this portion of the Brief, and relies upon the material facts as stated in the attached Motion beginning at page 4 thereof through page 12.

ARGUMENT I ✓

THE COURT ERRED IN FINDING THAT SENATE BILL 361  
AND THE TOYOTA AGREEMENT DID NOT VIOLATE  
SECTION 177 OF THE KENTUCKY CONSTITUTION

The Trial Court in its Opinion and Judgment, at page 10, found a perplexing issue being presented under Section 177 of the Kentucky Constitution since the Commonwealth would transfer the project premises to Toyota at the inception of the financing without receiving concurrent tangible financial consideration. Section 177 of the Kentucky Constitution provides:

✓ "The Commonwealth not to extend credit nor become stockholder in corporation, nor build railroad or highway. - The credit of the Commonwealth shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State; nor shall the Commonwealth become an owner or stockholder in nor make donation to any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway."

In finding that Section (177) of the Constitution was not violated by Senate Bill 361, the Toyota Agreement or the financing of the project, the Court relied primarily upon McGuffey vs. Hall, Ky., 557 S.W. 2d 401 (1977), Greer vs. Kentucky Health and Geriatric Authority, Ky., 467 S.W. 2d 340 (1971), and Industrial Development Authority vs. Eastern Kentucky Regional Planning Commission, Ky., 332 S.W. 2d 274 (1960). In McGuffey, supra, the Court determined that legislation creating a Patient's Compensation Fund was unconstitutional under both Sections 50 and 177. In construing Section 177, the Court found at page 410 that Section 177 does not permit the State's credit to be given or lent for any purpose, public or otherwise. The commitment of funds to be derived from future tax revenues was construed as being a surety, and therefore in violation of the Constitution. Section 50 of the Constitution prohibits the legislature of creating a debt of the Commonwealth against general funds otherwise available for appropriation and expenditure by a future legislature. In Greer, supra, the Court found legislation creating the Kentucky Health and Geriatric Authority Revenue Bond Guaranty Fund did not violate the Constitutional provision of Section 51 or 177. As discussed by the Court at page 342, the legislation was found to be constitutional and meeting the requirements of Section 177 since the Guaranty Fund would have protection by retaining title to real estate through appropriate contractual provisions. In Industrial Development Authority, supra, the Court upheld the constitutionality of the legislation creating the Industrial Development Finance

Authority. In considering that legislation and whether it met the requirements of Section 177, the Court found that the legislation authorized making a loan of State funds, thereby becoming a creditor, ↗ thus not being in violation of Section 177.

As found by the Trial Court under the Toyota package, the Commonwealth would transfer the project site to Toyota at the inception of the financing without concurrent tangible financial consideration. At that time there is no value received by the Commonwealth. The Appellee contended below and is expected to contend herein, that the incremental taxes which may be realized in the future would constitute adequate consideration for the transfer of the project. Counsel would submit that the receipt of incremental taxes in the future should not be used so as to permit Senate Bill 361, the Toyota Agreement, or the Bond issue to satisfy Section 177, even though the act provides as does the Agreement that Toyota would pay the difference in the shortfall of the incremental taxes and the principal amount of the Bonds.

ARGUMENT II ✓

THE COURT ERRED IN FINDING THAT SECTION 3 OF THE  
CONSTITUTION WAS NOT VIOLATED BY SENATE BILL 361,  
THE TOYOTA AGREEMENT, AND THE FINANCING PLAN

The Trial Court found at page 9 that the reduction of employment was the sole objective of Senate Bill 361 and that reduction of unemployment is a valid public purpose within the reasonable exercise of legislative discretion. Section 171 of the Constitution requires that taxes be levied and collected only for public purposes. The court concludes that Section 171 of the Constitution is not

"public service"  
Sec. 3 of Const.



violated by the Toyota package. However, Section 3 of the Constitution of Kentucky provides in part "...no grant of exclusive, separate, public emoluments or privileges shall be made to any man or set of men, except in consideration of public services;..."

Even though Section 3 and Section 171 are closely akin, the satisfaction of one provision would not necessarily mean that the other provision would also be satisfied. The term "public service" in Section 3 would have a different meaning from the term "public purpose" in Section 171. Section 13 of the Constitution uses the term "public use", and that term has been found to have a separate and distinct meaning from "public purpose". City of Owensboro vs. McCormick, Ky., 581 S.W. 2d 3 (1979). The term "public service" has been construed to be for services which had been performed rather than for contemplated services to be rendered. Talbott vs. Thomas, 286 Ky. 786, 151 S.W. 2d 1, at page 5 and 8 (1941), and Ferguson vs. Landram, 64 Ky. 548, 1 Bush 548 (1866). Counsel submits that even though a public purpose as required by Section 171 would be satisfied with legislation seeking to reduce unemployment, such legislation does not satisfy the requirements of Section 3 requiring public service, and therefore the Toyota package fails to satisfy the requirements of Section 3 of the Constitution.

### ARGUMENT III ✓

THE COURT ERRED IN FINDING THAT SECTION 49 AND 50  
OF THE CONSTITUTION WAS NOT VIOLATED BY SENATE BILL 361,  
THE TOYOTA AGREEMENT, AND THE FINANCING PLAN

It is generally recognized that Section 49 and 50 of the Kentucky Constitution are to prevent a single session of the

legislature from binding future legislatures without the permission of the people. Sections 49 and 50 provide as follows:

Section 49. "Power to contract debts-Limit.-The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed five hundred thousand dollars, and the moneys arising from loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, or to repay such debts: Provided, the General Assembly may contract debts to repel invasion, suppress insurrection, or, if hostilities are threatened, provide for the public defense."

Section 50. "Purpose for which debt may be contracted-Tax to discharge-Public vote.-No act of The General Assembly shall authorize any debt to be contracted on behalf of the Commonwealth except for the purposes mentioned in section 49, unless provision be made therein to levy and collect an annual tax sufficient to pay the interest stipulated, and to discharge the debt within thirty years; nor shall such act take effect until it shall have been submitted to the people at a general election, and shall have received a majority of all the votes cast for and against it: Provided, The General Assembly may contract debts by borrowing money to pay any part of the debt of the State, without submission to the people, and without making provisions in the act authorizing the same for a tax to discharge the debt so contacted, or the interest thereon."

These constitutional provisions place limitations on the amount of debt that can be incurred, the purposes for which debt may be incurred and restricts the legislature in authorizing debt. The State can incur debt by utilizing "revenue" bonds and "general obligation" bonds. It is generally stated that revenue bonds are secured by revenues from a project which is being financed by the bond with the

assurance of payment of the bond indebtedness being from certain payments realized from the project such as rentals or tolls. The general obligation bonds are backed by the full faith and credit of the State, and most generally are payable out of general unencumbered revenues of the State. The bonds proposed in the Toyota Financing Plan give the appearance of general obligation bonds and also give the strong implication of being revenue bonds since the concept of incremental taxes are interposed by Senate Bill 361. Essentially the incremental taxes is the increase in revenue derived from advalorem taxes, income taxes and corporate license taxes determine from a prior year. The increase of tax revenues, if any, are not set aside to any special fund, nor are they believed to repay the Toyota bonds, however under Senate Bill 361, the incremental tax increase, if any, would be used to determine if the Commonwealth received fair market value for the gift of the project site as improved to Toyota. The Financing Plan requires the Commerce Cabinet to include in its request for biennial appropriations sufficient amounts to enable the Commerce Cabinet to pay "rent" to the Commission. In that way, the Commission would have adequate funds for payment of the bonds as they mature. It would appear that the Commerce Cabinet would have nothing in return for the payment of rent since the project would have been conveyed to Toyota. In Blythe v. Transportation Cabinet of the Commonwealth of Kentucky, ✓ Ky., 660 S.W. 2d 688 (1983) the Turnpike Authority leased to the Department of Transportation the project with the Department in turn making lease payments from various sources, including appropriations

not extending beyond the biennium. The Turnpike Authority had something to lease, whereas in the Toyota financing the Commerce Cabinet has nothing for which to pay rent. In Blythe, supra, as well as in Turnpike Authority of Kentucky v. Wall, Ky., 336 S.W. 2d 551 (1960) there was something to lease for which payment of rent can be expected, while in the Toyota project, the site and improvements would have been conveyed to Toyota. The insertion of incremental taxes in Senate Bill 361 as being the item for consideration to determine if the fair market value is paid by Toyota for the project, or more specifically for the principal only, is an effort to use that concept for two purposes. A taxpayer is obligated by law to pay taxes, and the sum so paid as taxes should not be permitted to be considered as payment of consideration by Toyota to the Commonwealth. This concept amplifies the gift of the project site by the Commonwealth to Toyota in violation of Section 177 of the Constitution. It is submitted that both Sections 49 and 50 of the Kentucky Constitution are violated by the Financing Plan of the Toyota project. As stated by Representative Joe Clark, a future legislature in effect would have no choice but to appropriate funds from general revenues for payment of both the principal of the Bond issue as well as accruing interest.

#### CONCLUSION ✓

Briefs filed in the Franklin Circuit Court by the parties as well as the Opinion and Judgment of the Trial Court recite presumptions as to constitutionality of legislation and duties upon the Courts in determining constitutionality of legislation. The Toyota Agreement was

signed on February 25, 1986, and Senate Bill 361 was passed by the legislature on March 10, 1986, thus appearing to give legislative approval of the pre-existing agreement and the Financing Plan. It seems clear from various cases that the Court is to scrutinize legislation and determine if it meets the constitutional test as the Court may determine. For the foregoing reasons the Special Amicus Curiae asserts to the Court that Senate Bill 361, the Toyota Agreement and the Financing Plan thereof are in violation of one or more provisions of the Kentucky Constitution, and therefore the Court should so adjudge and enter its findings and order reversing the Opinion and Judgment entered by the Franklin Circuit Court.

RESPECTFULLY SUBMITTED,

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