RENDERED: June 11, 1987
TO BE PUBLISHED

Supreme Court of Kentucky

86-SC-918-TG
86-SC-1041-TG
86-SC-1042-TG

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

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HON. RAY CORNS, JUDGE
86-CI-0884

THE STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

This appeal is from a judgment which determined that Senate Bill 361 adopted by the Kentucky General Assembly and the actions taken by the State Property and Buildings Commission pursuant thereto were constitutional insofar as they related to certain incentives granted to the Toyota Motor Corporation.

We are called upon to review the constitutionality of the financial arrangements undertaken by the Governor, General Assembly, Commerce Cabinet and State Property and Buildings Commission. Acting through the executive and legisla-

tive branches of government, Kentucky has agreed with Toyota to convey a 1600-acre project site in Scott County which the Commonwealth will acquire and develop for $35 million. Kentucky was involved in a fierce competition with many of the other states of this nation regarding the location of a major automotive manufacturing plant by Toyota in the United States. The project site is part of a total package of inducements to Toyota to build a plant capable of producing up to 200,000 cars annually and employing up to 3,000 people. The Toyota agreement promises a total package of inducements which could have a direct cost to the state estimated at between $125 million and $268 million as presented in the evidence to the circuit court. Other incentives include state financing of comprehensive worker training programs, highway improvements, assistance to Toyota in securing foreign trade zone status, assistance with rezoning and other related matters. These estimates do not consider the indirect cost to the State. The sum needed to acquire and develop the site will be generated by a revenue bond issue from the State Property and Buildings Commission. The funds needed to pay the debt service on the bonds, principal and interest, will be provided by appropriations from the General Funds of the Commonwealth on a biennial basis as an expense item of the Commerce Cabinet.

The declaratory judgment action asked the circuit court to decide if SB 361, the project and the financing thereof

were consistent with Sections 3, 49, 50, 51, 59, 60, 171 and 177 of the Kentucky Constitution. These constitutional provisions relate to state action in general and the authority of the General Assembly in particular. The trial court approved the constitutionality of the financing arrangements and this appeal followed.

The parties of record are the State Budget Director and two private citizens who were permitted to intervene in order to challenge the constitutionality of the legislation, a special amicus curiae appointed to represent the public pursuant to the rules of this Court in such cases and the State Property and Buildings Commission and other constitutional and cabinet officers. In a practical sense, the parties who have a real interest are the people of this Commonwealth who have a right to a determination of whether the executive and the legislature have acted within the limitations of their constitutional power, the executive and legislative branches of government who sponsored and enacted the legislation, and Toyota, the industry induced to come to this Commonwealth.

As a general principle of jurisprudence, it is well established that duly adopted legislation is entitled to a presumption of validity. All statutes shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. KRS 446.080. Our constitution is a limitation on the broad exercise of power rather than

a grant of specific power to the legislature. The General Assembly may enact laws which are not expressly or impliedly prohibited by the Constitution of Kentucky and the Constitution of the United States. In this instance, the legislature working in conjunction with the executive, determined that it was proper to attempt to alleviate unemployment and develop economic strength in the state through the financing of an industrial development project pursuant to the act which constitutes the effectuation of a proper public purpose.

Initially, we must observe that the law is well settled that the wisdom of legislative and executive action may not be reviewed by the courts. Whether any project is based on sound economic theories is not within the scope of judicial review. Such considerations are matters of legislative and executive judgment and do not necessarily affect the constitutionality of the conduct. See Dalton v. State Property and Buildings Com., Ky. 304 S.W.2d 342 (1957). Our role is not that of a super legislature. Our only function is in the interpretation of the acts of the other branches of government in the light of the Constitution, existing legal precedents and the legislation itself.

The circuit court did not commit reversible error in determining that SB 361 does not violate Section 177 of the Kentucky Constitution.

The specific language of Section 177 involved is

that the credit of the Commonwealth shall not be given, pledged or loaned to any individual company or corporation, nor shall the Commonwealth make a donation to any company or corporation.

The act specifically provides by its terms that industrial development projects may be conveyed to industrial entities at the time of the issuance of revenue bonds by the Commission for the financing of such projects only if in addition to the fulfillment of other conditions precedent, the commission has made a written determination based on diligent investigation that the incremental taxes to be derived as a result of the development are reasonably expected to be at least equal to the principal amount of the proposed revenue bonds, and the industrial entity to which the project is conveyed undertakes and agrees that in the event of conveyance prior to the collection of the incremental taxes in an amount equal to the principal of the bond, the industrial entity will pay the Commonwealth the difference between the taxes collected to date and the principal amount of the bonds. No conveyance of publicly financed property without the receipt of fair market value compensation will occur in connection with the Toyota project. The Commission has made the necessary findings required by the statute. It would be economic madness for Toyota to expend up to $800 million for the plant and then fail to use it. Even standing idle, the development would generate additional property taxes.

Section 177 of the Constitution wisely prohibits the giving of the credit of the Commonwealth or the making of a donation to any private corporation or individual. However, as long as the expenditure of public money has as its purpose, the effectuation of a valid public purpose, Section 177 is not offended even in situations where the conveyance occurs without consideration. See Industrial Development Authority v. Eastern Regional Planning Com., Ky. 332 S.W.2d 274 (1960); Kentucky Livestock Breeders' Assn. v. Hagger, Ky. 85 S.W. 738 (1905).

The evidence in the record indicates that incremental taxes to be collected in order to constitute sufficient consideration for the conveyance of the property are estimated at $13 million per year.

Incremental taxes are those taxes which would never have existed but for the inducement of the facility to locate in Kentucky. See Grimm v. Maloney, Ky. 358 S.W.2d 496 (1962) and Watkins v. Fugazzi, 394 S.W.2d 594 (1965). The successful inducement of location of a revenue producing facility is an important element which provides a new source of tax revenue which did not previously exist. The overriding lesson of both Grimm and Watkins is that the inducement of the new facility provides new revenues which would not have existed but for the location of the plant.

Ultimately the state income tax is expected to benefit

in relation to a payroll in excess of $75 million in new wages resulting from an employment of up to 3,000 new jobs. There is clearly a difference in the taxable value of the previously rural farm land which now will become an industrial complex and there are undoubtedly new corporate taxes which will be assessed. In addition there is a ripple effect in that other plants will also produce new wages and new property and corporate taxes. The fair market value of the real estate itself is also enhanced by the development of the plant. All of this produces new sources of revenue for the state.

We are persuaded by the reasoning set out in Almond v. Day, Va. 91 S.E.2d 660 (1956), when the Virginia Supreme Court in interpreting the use of certain funds of the Virginia Retirement System, noted that Section 185 of the Virginia Constitution is very similar in its import to Section 177 of the Kentucky Constitution. The Virginia court stated that when the underlying purpose of the transaction and the financial obligation incurred are for the benefit of the State, there is no lending of credit even though it may have expended its funds or incurred an obligation that benefits another. Merely because the state incurs an indebtedness for its benefit and others may incidentally profit does not bring the action within the letter or the spirit of the prohibition of lending of state credit. Industrial Development Authority v. Eastern Kentucky Regional Planning Commission, Ky. 332 S.W.2d 274 (1960) provides that

it is clearly established in Kentucky that the relief of unemployment is a public purpose that would justify the outlay of public funds.

It should be noted that the two year financing agreement otherwise provided in Section 171 of this Constitution is totally subject to the actions of future legislatures in appropriating funds for the renewal of the agreement. This requirement complies in every respect with the previous case rulings by this Court. The credit provisions of Section 177 attempt to prevent transactions which might result in future liabilities against the general tax revenues of this state and thereby encroach on the freedom of future generations to utilize those resources as they deem appropriate. This is not the case.

It is the assurance that the legislature would provide for funding in future appropriations which has been most offensive to this Court. See McGuffey v. Hall, Ky. 557 S.W.2d 401 (1977); Greer v. Kentucky Health and Geriatrics Authority, Ky. 467 S.W.2d 340 (1971). This legislation does not commit any future funds to the Toyota project. It is significant to note that in Greer, supra, the transfer of title to the real estate occurs when the revenue bonds have been discharged. In that case this Court found that such transaction was not a lending or giving of the credit of the Commonwealth to a private corporation within the meaning of Section 177. The

difference here is that the transfer of title can occur initially but that provisions must be included in the financing transaction to assure receipt of fair market value by the State for the property in the event of premature disposition by the company.

The various arrangements provided by Senate Bill 361 and the finance agreement, require the Commerce Cabinet to include a request for an appropriation in its biennial budget to pay for the bond service. There is no guarantee that the General Assembly will affirmatively act on such request. Toyota is clearly at the mercy of the Kentucky legislature in a technical and legal sense. In no sense is this either a lending of the credit of the state or a misrepresentation. The bondholders and those executing the agreements for Toyota are clearly apprised of the risks involved in this transaction. Under no circumstances is the credit of the state the immediate financial foundation for the issue.

The obligation of Toyota to pay taxes in the future is significantly more than the obligation of any taxpayer on the semi-rural tract in question. The new taxes are incremental in nature and would not exist but for the establishment of the industrial complex. In no sense of the word is the conveyance of the project site a donation to a private corporation as prohibited by Section 177.

In contrast to the background of the Constitutional

Convention of 1890, there is no attempt to exempt any corporation from taxation but rather there is a commitment required by law to pay additional and new taxes and to thereby enhance the revenues of the Commonwealth as well as provide distinct benefits to the people of the Commonwealth. This is not a specious pretext of performing public services, but rather an intelligent, aggressive and thoroughly legal action by the executive and legislative branches.

A careful examination of the financial arrangements leads us to conclude that the subject legislation is indeed in keeping with both the letter and the spirit of constitutional provisions and no evasion of any fundamental law. Cf. Commonwealth v. O'Harrah, Ky. 262 S.W.2d 385, 389 (1953).

The court was correct in holding that SB 361 does not violate Sections 3 and 171 of the Kentucky Constitution. Section 3 of the Constitution prohibits separate privileges except in consideration of public services and Section 171 is closely related to it because it provides the taxes shall be collected and levied only for public purposes. These sections also are complimentary to Section 177.

SB 361 expressly declares that the authority granted and the purposes to be served are public in nature and the preamble indicates that it is the policy and purpose of the Commonwealth to encourage, promote and support economic development in order to alleviate and prevent unemployment and that

these goals constitute an essential public purpose.

We must first consider that Section 3 of the Constitution refers to public services while Section 171 speaks of taxes to be collected for public purposes only. The precise meaning of the two different words "public services" and "public purpose" should not be unduly troubling. There is an absence of exact general definition or definition in the context of the Constitution. Common sense dictates that the words are totally compatible. This Court has recognized previously that the sections are closely related. Nichols v. Henry, Ky. 191 S.W.2d 930 (1946).

If the purposes served by an action constitute public purposes for which tax revenues may be levied and expended under Section 171, the manner of the use and expenditure is also proper under Section 3, and is not a private use as distinct from a public use. See Hager v. Kentucky Children's Home Society, Ky. 83 S.W. 604 (1904); Kentucky Livestock Breeders Assn v. Haggar, supra.

The relief of unemployment is a public purpose within the purview of the case law and the constitution. The important point is whether the purpose is public and not whether the agency through which it is dispensed is public. The appropriation is not made for the agency or company but for the public purpose or object which is to be served.

Under no conditions is Toyota the beneficiary of

any double counting of future taxes. The taxes involved here are uniform on all property of the same class subject to taxation. There is no constitutional infirmity in providing for the use of future incremental taxes to buttress the issuance of revenue bonds. As has been previously discussed, the legislation is adopted in an effort to alleviate unemployment. Section 3 prohibits exclusive or public emoluments except in consideration of public service. The public service provided here is reduction of unemployment which would not occur but for the inducement to locate here and is a direct benefit to the people of this state which they should not be deprived of by any hypertechnical interpretation of the letter of the Constitution. The Constitution is to protect the people from their government and not to deprive them of the legitimate activities of government intended to provide public benefit and public service. The definition of public purpose when made by the legislature should be upheld by the court as long as it has some reasonable basis. The fulfillment of the intent of the law will undoubtedly accord private industry considerable profit yet the ultimate objective of the act and its declared purpose is not only to alleviate unemployment but also to foster the prosperity of the people of the State as a whole. Industrial Development Authority, supra.

Injection of the Arkansas decision of City of Hot Springs v. Creviston, Ark. 705 S.W.2d 415 (1986) is unpersuas-

ive. This foreign case provides no credible authority upon which this Court should overrule existing Kentucky precedent. We are equally unconvinced by the authority of City of Corbin v. Louisville & N.R. Co., Ky. 26 S.W.2d 539 (1930). There is no special privilege here. Toyota, as well as all other taxpayers have a right to expect certain governmental services for their taxes. The fact that utilization of the new taxes generated by an industry can be made so as to support the inducement of such development does not render the arrangement constitutionally infirm.

Dyche v. City of London, Ky. 288 S.W.2d 648 (1956) is not appropriate in this situation because that case clearly involved a voted general obligation bond. A comparison of constitutional Sections 170 and 171 is without merit. The fact that the General Assembly may authorize an incorporated city or town to exempt manufacturing establishment from municipal taxation for five years is not applicable to this situation in any manner. It could easily be said that this provision assumes that the State already possesses such authority. This section is clearly not an exception to the rule but the establishment of a rule. The court was correct in holding that SB 361 does not violate Sections 49 and 50 of the Kentucky Constitution.

Sections 49 and 50 of the Constitution strictly limit the power of the legislature to financially obligate future

legislatures without the permission of the people by means of a direct vote. These constitutional provisions were also part of the Constitution of 1850 and were adopted at the time when the Commonwealth was heavily in debt and the requirement of fiscal restraint on the legislature was considered to be in the best interests of the people. Except for the percentage of indebtedness, it is difficult to say that somewhat similar conditions did not exist in 1985. The Federal Constitution contains no such debt limitations and we are painfully aware of the fact that deficit spending is one of our largest national and international problems.

The State can incur debt by issuing either general obligation bonds or revenue bonds. General obligation bonds are backed by the full faith and credit of the Commonwealth and are payable out of the general revenues of the state. They are voted on by the people. Revenue bonds are not backed by the state but are secured by the revenues of the project which is being financed. Generally the security for the payment of the bonds has taken the form of rentals in building projects or tolls on certain highway projects. In order not to run afoul of the debt limitations found in Sections 49 and 50 of the Constitution, the so-called "serial" leases have been used. Under such a plan, revenue bonds are issued to finance the construction of a public improvement which is then leased by the state and the bonds are retired by lease payments made

by the state. Each lease period runs for two years and the lease automatically renews for another two years unless notice of cancellation is given. Generally these two-year lease renewals run until the bonds are retired. Such a program was allowed in Turnpike Authority of Ky. v. Wall, Ky. 336 S.W.2d 551 (1960) and later undisturbed by Blythe v. Transportation Cabinet, Ky. 660 S.W.2d 668 (1983).

The judge was correct in holding SB 361 does not violate Sections 49 and 50 of the Kentucky Constitution. As the trial judge observed in his opinion, beginning with the case of Waller v. Georgetown Board of Education, Ky. 273 S.W. 498 (1925) Kentucky courts have consistently held that financing projects similar to the one here does not constitute a debt within the meaning of Sections 49 and 50. The reason that no debt has been created is because the financial obligations of the Commonwealth are confined to a particular two-year period and the General Assembly appropriates general fund revenue for debt service accruing during that two-year period only. Blythe, supra, upheld a similar plan to issue revenue bonds financing toll road projects. SB 361 provides that the obligation of the Revenue Cabinet to pay debt service on the Toyota bonds is specifically incurred for only the current biennium during which the initial agreement is in effect and which funds have been appropriated for debt service by the legislature. No debt is created and consequently no

vote of the people is required under Section 50. Guthrie v. Curlin, Ky. 263 S.W.2d 240 (1953).

All such financing plans are within the scope of Sections 49 and 50 and insofar as they involve the two-year fiscal period of the Commonwealth as created by the Constitution. To the extent that there is any duty to pay debt service on special obligations issued by various agencies of the State, that duty is confined to a particular two-year period and the legislature during such time may make a valid appropriation of general fund money to pay debt service accruing during that particular two-year period only. Such financing plans have always been held to be constitutional by this Court. Efforts to impose any financial obligation on state units of government beyond the current two-year period have invariably been held as unconstitutional. See Curlin v. Weatherby, Ky. 275 S.W.2d 934 (1955).

An examination of the testimony offered by the executive director of the office of investment and debt management of the Finance and Administration Cabinet indicates that very few of the State Property and Buildings Commission's financing plans provide for revenue bonds secured by a lien or security interest on anything except the revenues derived from the two-year leases. In that regard, the Toyota bonds have basically the same security as all other bond issues of this State. That is, there is no lien or security interest on a financed

project, it is secured only by the revenues from the biennial financing agreement and subject to the decision of future legislatures to appropriate any debt service.

The development of the revenue bond concept can be traced through a series of significant cases starting with J.D. Van Hooser & Co. v. University of Kentucky, Ky. 90 S.W.2d 1029 (1936) which authorized state educational institutions to construct and finance buildings through the issuance of revenue bonds. Preston v. Clements, Ky. 232 S.W.2d 85 (1950) expanded the revenue bond idea to the financing of the Capitol Annex office building. Additional development was added by Turnpike Authority of Kentucky v. Wall, Ky. 336 S.W.2d 551 (1960) and later followed in Blythe v. Transportation Cabinet, Ky. 660 S.W.2d 668 (1983) which approved legislation providing for revenue bonds to cover economic development of road projects which would be secured by incomes derived from the leasing of such projects to the Department of Transportation with no tolls to be imposed.

The Toyota industrial expansion develops semi-rural land into a highly sophisticated automobile manufacturing complex. In view of the cases previously endorsed by this Court, it is difficult to say that the Toyota complex suddenly invokes constitutional wrath.

There must be stability to the law so that those who deal with it and rely upon it can have confidence that

it will not be changed except for compelling reasons. The previous decisions of this Court have literally interpreted the provisions of Sections 49 and 50 of the Kentucky Constitution in the many decisions which hold that the incurrence of an obligation under a lease or financing agreement which extends only through a single year and which depends solely on the will of a future legislature is not in violation of Sections 49 and 50 of the Constitution. The arguments presented provide no compelling reason to change that history of case law. The constitutional doctrine supporting the two-year renewal financing transaction method has a direct relationship to similar one-year renewable financing plans used by cities and counties which are governed by annual rather than a biennial fiscal period. The legal theory supporting both types of financing is very similar. Cases supporting such a concept may be found beginning with Hughes v. State Bd. of Health, Ky. 84 S.W.2d 52 (1935) and continuing and including White v. Common Council of Middlesboro, Ky. 414 S.W.2d 569 (1967).

Previous revenue bond issues have avoided the problems raised by the appellees because the bonds financed state-owned, state-operated projects that carried out functions performed by the State and consequently the biennial appropriation of tax money from the State Treasury to an operating department of state government, could qualify as rent to cover current operating expenses of the department. This type of rationale

justifies the use of the revenue bond technique in regard to the highway toll issues raised in Blythe and Wall.

Earlier revenue bonds upheld by this Court provide some security for the bondholder other than the promise of a department of the Commonwealth to seek payment in the form of biennial appropriations from the general fund. The continued existence of the public project which was paid for by the bonds can be considered as fulfilling the function of providing a type of security for the issue.

We do not believe there are truly significant problems in regard to the concept of incremental taxes as defined by the act. It is not necessary or relevant to take into consideration the extent to which taxes may increase from normal economic growth unrelated to Toyota or from inflation or from any other source. The mere fact that the concept of incremental taxes is innovative does not make it constitutionally infirm. It is merely an extension of the lessons learned from Grimm and Fugazzi.

SB 361 does not violate Section 51 of the Kentucky Constitution which prohibits legislation involving more than one subject in the title. Commonwealth of Kentucky, ex rel Armstrong, Attorney General v. Collins, Governor, Ky. 709 S.W.2d 437 (1986) states that the title of legislation need only furnish general notification of the general subject in the act. The act in question here is not at variance with

Section 51 when judged by that standard.

It was not reversible error for the trial court to hold that SB 361 does not violate Section 59 of the Kentucky Constitution which prohibits special legislation. The purpose of this section is to prevent special privileges, favoritism and discrimination in order to ensure equality under the law. This statute authorizes the financing of industrial development projects by the state for the use of industrial entities in order to provide for valid public purposes such as the elimination of unemployment. The law is not directed to the Toyota project although the availability of such a project obviously ignited interest in this method of financing. However, the language of the law is very general and is available for use in connection with any valid industrial development project now or in the future. The classification of industrial development projects is reasonable and the provisions of the act apply equally to any potential industrial development project.

There is a reasonable basis to justify the classification established by the legislature and it should be upheld. Meredith v. Ray, Ky. 166 S.W.2d 437 (1942).

The law is available to any industrial entity which agrees to construct and install a facility which satisfies the standards provided by the Buildings Commission and otherwise meets the requirements of the act. Consequently it would be available to every industrial concern even those now operat-

ing within the Commonwealth of Kentucky in connection with any expansion of existing enterprises. The public purpose on which all industrial development legislation has been founded has been the inducement of the location of a project which performs the public purpose of providing employment to Kentucky citizens and alleviating any conditions of unemployment.

The judge was correct in determining that the Commission had complied with the provisions of SB 361 in regard to the various standards. The national unemployment rate at the time the Toyota resolution was adopted by the Buildings Commission was 6.8 percent while the unemployment rate in the state was more than 10 percent and was well above 11 percent during January 1986, the month immediately following public announcement of the project. The decision of the circuit judge to deny the intervening defendant's motion to amend their answer in certain respects so as to raise additional constitutional questions did not amount to reversible error. The trial court's decision to refuse to compel production of the work product of counsel for the commission was not reversible error.

It is the holding of this Court that Senate Bill 361 is constitutional. The decision of the circuit court is affirmed.

Stephens, CJ., Gant, Lambert and Wintersheimer, JJ. concur. Leibson, Stephenson and Vance, JJ., dissent and each

files a separate dissenting opinion. Stephenson J., also joins in the dissents of Leibson and Vance, JJ.

ATTORNEYS FOR APPELLANTS:

William E. Scent
Scent and Scent, P.S.C.
209 Executive Inn
P.O. Box 1095
Paducah, Kentucky 42002
(for Larry Hayes)

Kyle T. Hubbard
William J. Nold
Nold, Miller, Mosley, Clare,
Hubbard & Townes
Fifth Floor, Hart Block Bldg.
730 West Main Street
Louisville, Ky. 40202
(for Charles Hoffmaster and Jerry Hammond)

R. Scott Plain
Wilson,Wilson & Plain
414 Masonic Building
P.O. Box 852
Owensboro, Kentucky 42301
(Special Amicus Curiae)

ATTORNEYS FOR APPELLEE:

Spencer E. Harper, Jr.
William W. Davis
Harper, Ferguson & Davis
310 West Liberty Street
Louisville, Kentucky 40202

Charles Wickliffe
General Counsel
Finance & Administration Cabinet
Capitol Annex Building
Frankfort, Kentucky 40601

Patrick Abell
General Counsel
Commerce Cabinet of Kentucky
24th Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

ATTORNEYS FOR APPELLEE(Continued)

David L. Armstrong
Attorney General of Kentucky
Capitol Building
Frankfort, Kentucky 40601

RENDERED: June 11, 1987
TO BE PUBLISHED

Supreme Court of Kentucky

86-SC-918-TG
86-SC-1041-TG
86-SC-1042-TG

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

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
HON. RAY CORNS, JUDGE
86-CI-0884

THE STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent.

One can only hope that in the future this case will be viewed as a fact specific legal aberration, and not a precedent; a decision that our Court was not prepared to hold that the Toyota project offended the Constitution, and nothing more.

If this case becomes a precedent in future cases, it will be a watershed opinion in constitutional law, confirmation that so long as the Governor and General Assembly perceive the need, there are no constitutional restraints on the power of state government to raise and spend money for the benefit of a private business. Although the economic activity generated by Toyota will, hopefully, confer a

public benefit as an incident to carrying out its private purpose, Toyota will perform no function of government. Its future contribution to the general welfare, if any, will be only indirect in the same sense that the public benefits more or less from the economic activity generated by every successful private business, the by-products of which are taxes, employment and a general increase in the level of economic activity.

The General Assembly has enacted SB 361 as enabling legislation behind one part of the Toyota Project, the agreement to convey to Toyota cost free a 1,600 acre project site in Scott County, Kentucky. The sum needed to acquire and develop this project will be generated by a bond issue from the State Property and Buildings Commission. The money to pay the debt service on these bonds, principal and interest, will be provided for by appropriations from the general funds of the Commonwealth, raised through taxation, and will flow through to the State Property and Buildings Commission as an expense item in the biennial budget of the Commerce Cabinet. SB 361 designates these bonds as "revenue bonds" and designates the appropriations needed by the Commerce Cabinet to pay the debt service on these bonds as "rent." There is no explanation, and indeed no way to understand, what is being "rented." The "rent" is deemed in SB 361 as generated by the "incremental tax" benefits to the Commonwealth which are anticipated from Toyota's location in Kentucky. The legislation is scripted in this jargon to avoid constitutional limitations on the power of the General Assembly to contract debt. Unfortunately, the question is not whether the

terminology applies to concepts which have passed constitutional scrutiny in previous cases, but whether the terminology is appropriate for this case.

In Fannin v. Williams, Ky., 655 S.W.2d 480 (1983), we recognize that it is the substance of the legislation that determines constitutionality, not the label. Legislative incantation, no matter how clever, in itself cannot change the result:

> "We cannot sell the people of Kentucky a mule and call it a horse, even if we believe the public needs a mule." Id. at 484.

Ky. Const. §§ 49 and 50 describe limitations on the General Assembly's power to contract debts which foreclose the present legislation unless the financing scheme presented can avoid being classified as a debt contracted on behalf of the Commonwealth. Ky. Const. §§ 3 and 171 foreclose payment of public money to or for the benefit of a private individual or corporation except in consideration of public services and also provide that taxes shall be levied and collected only for public purposes. Ky. Const. § 177 forbids gift, pledge or loan of the credit of the Commonwealth to any individual, company or corporation, and also forbids the Commonwealth from making a donation to any private individual or corporation. It is the substance of these various constitutional fiscal restraints which are violated, and the labels should not change the results.

In Commonwealth v. O'Harrah, Ky., 262 S.W.2d 385, 389 (1953), when faced with a statute that violated the terms of the constitution although arguably of great public benefit, we said:

> "Constitutional provisions, . . . are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

We stated that we "may not countenance an evasion . . . of our fundamental law" no matter how popular the decision would be. Id.

We have succumbed to powerful nonjudicial arguments advanced to uphold this legislation in the face of the constitutional challenge. The proponents of SB 361 and the Toyota Agreement urge that we "breathe life" into the 1891 Kentucky Constitution. The benefits to our state to be derived from economic development and job opportunities are represented to us as so great that the constitution must be judicially amended to accommodate the present financing arrangements. It is represented that since construction at the job site is already underway, this project is a fait accompli, and the consequences that will flow from declaring this Act unconstitutional are so grave, we have no choice but to go along. Pressure on the judiciary to find some way around the constitution in the name of political expediency has proved to be overwhelming.

But in my view the Governor, Toyota and the General Assembly should be presumed to have acted with their eyes wide open to the fact that the constitutionality of their financial arrangements was subject to judicial review. Indeed, it is clear from the terminology utilized in both their agreement and in the legislation, terminology carefully crafted from previous decisions of our Court deciding on the constitutionality of past bond issues, that the

Governor, Toyota, and the General Assembly understood from the outset that their agreement and the legislation was contingent upon constitutional scrutiny.

If the language of the Constitution is to be rewritten, it should be done by constitutional amendment, by vote of the people, and not as a matter of judicial expediency. Where the words and meaning of the constitution are reasonably in doubt, we can think in terms of contemporaneous construction. But when called upon to approve a transparent evasion of the plain meaning of the constitutional provisions, we should do so without regard to whether the decision will be unpopular. In Fannin v. Williams, supra, we were faced with the onerous duty of declaring unconstitutional a statute supplying text books in the state's nonpublic schools. We stated:

> "The people of Kentucky specified by the language of the Constitution in terms that are clear and unmistakable that the type of expenditure authorized by the statute in question should be unconstitutional. If the people of Kentucky wish to change their position in this matter, it is their right to do so.
>
> . . . Section 184 of the Kentucky Constitution provides that public money can be expended for education other than in common schools when a majority of the legal voters approve the expenditure by public referendum. [A provision not unlike that for bond issues in § 50.] If the legislature thinks the people of Kentucky want this change, they should place the matter on the ballot." 655 S.W.2d at 484.

In this dissenting opinion I will take up those constitutional provisions, previously cited, which are in direct conflict with the legislation and financing arrangements. Broadly grouped, there are three: (1) § 49 and 50; (2) §§ 177; and (3) §§ 3 and 171. These