

IN THE
INDIANA SUPREME COURT

CAUSE NO. 71S00-0606-CV-00204

STEVE BONNEY, JOHN GIBSON,)	
ANITA GIBSON, TOM PIETRZAK,)	
RANDY NACE, CLARINDA NACE,)	
JUNE NACE, and THE CITIZENS)	Appeal from the St. Joseph Superior Court
ACTION COALITION OF INDIANA,)	
INC, an Indiana not for profit)	
corporation;)	
)	The Honorable Michael P. Scopelitis, Judge
Appellants/Plaintiffs,)	
)	
v.)	
)	Lower Court Cause No.
INDIANA FINANCE AUTHORITY;)	71D07-0604-PL-00144
STATEWIDE MOBILITY PARTNERS,)	
LLC; ITR CONCESSION COMPANY,)	
LLC; THE INDIANA DEPARTMENT)	
OF TRANSPORTATION; MITCHELL)	Court of Appeals Cause No.
E. DANIELS, Governor of Indiana; TIM)	71A03-0606-CV-239
BERRY, Treasurer of Indiana;)	
)	
Appellees/Defendants.)	

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Indiana Finance Authority (“IFA”) is a “municipal corporation” under the Public Lawsuit Statute, Ind. Code § 4-13-5-1, *et seq.*
2. Whether the Public Lawsuit Statute applies to both the disposition of a public improvement as well as its acquisition.
3. Whether Plaintiffs presented evidence raising substantial questions as to whether HEA 1008 (“Major Moves”) violates provisions of the Indiana Constitution where (1) the Act contains unconstitutional special legislation expressly granting monies only to the seven Toll Road counties; (2) the revenues derived from the net annual income of the Toll Road will not be applied to the Public Debt; (3) and the Act exempts the Toll Road lessee from all ad valorem taxation.

II. STATEMENT OF THE CASE

The Plaintiffs initiated this case on April 12, 2006, seeking a declaratory judgment and a permanent injunction invalidating House Enrolled Act (“HEA”) 1008. Appendix to the Brief of the Appellants (“App.”) at 1.

On April 19, 2006, Defendants filed a Petition to Certify the Complaint as a Public Lawsuit and to Establish Surety Bond and/or in the Alternative to Dismiss (the “Petition”). App. at 641. On May 8, 2006, Plaintiffs filed their Brief in Opposition. App. at 673. On May 10, 2006, the IFA filed a Pre-Hearing Brief and Reply in Support of the Petition. App. at 695.

A hearing was held on the Petition on May 11 and May 15, 2006. App. at 92. As the trial court permitted, on May 17, 2006, Plaintiffs submitted additional exhibits. App. at 754. On

May 19, 2006, both parties filed post-hearing memoranda and proposed findings of fact, conclusions of law and orders. App. at 863, 923.

On May 26, 2006, the St. Joseph Superior Court entered its Findings of Fact and Conclusions of Law and Order (“Order”), ruling (1) that the case was a public lawsuit under the terms of the Public Lawsuit Statute; (2) that two of Plaintiffs’ claims were not part of the public lawsuit; (3) that Plaintiffs had not raised substantial issues as to the remaining claims; and (4) ordering all the remaining claims dismissed if the Plaintiffs did not post a bond in the amount of \$1.9 Billion. This appeal followed.

III. STATEMENT OF FACTS

This case challenges provisions of House Enrolled Act 1008 (the “Act”), also known as “Major Moves” which was passed by the Indiana General Assembly in the waning hours of the 2006 Legislative session, and a 75-year lease of the Indiana Toll Road entered into pursuant to that Statute. As Defendants acknowledge, “[t]he several thousand parcels of property that make up the Toll Road are titled in the name of the State. . . .” App. at 717. In fact, legally, the Toll Road *must* be titled in the name of the State under Ind. Code § 8-15-2-5(5). *Id.*; *see also* Order at 44.

The Governor signed the legislation on March 22, 2006. Less than a week later, the Indiana Finance Authority (“IFA”) announced the selection of the company that would obtain and operate the Toll Road, triggering a 15-day limitations period for filing any challenges to the Lease. On April 12, 2006, Plaintiffs timely brought this case. Order at 2-3.

The amount the State will receive in the transaction is \$3.85 Billion. Order at 9. The Act creates several “trust funds” which are directed to accept the proceeds from the lease of the Toll

Road and to disburse them to various specific interests. Section 5 of the Act establishes the “Major Moves Construction Fund,” Section 6 establishes the “Next Generation Trust Fund” and Section 7 establishes seven “Local Major Moves Construction Funds.” The Act requires that a specified portion of the proceeds from the disposition of the Toll Road be deposited in each of those funds, and Sections 39 and 47 further specify disposition of the proceeds. With the exception of payment of the IFA’s incurred expenses and the existing debt on the Toll Road itself, Order at 13-14, none of the proceeds will be used to pay other debt.

The “Local Major Moves Construction Funds” are established for seven counties that are described in the Act by population. Specifically, funds are given to counties falling in the following population ranges: (1) more than thirty-three thousand two hundred (33,200) but less than thirty-three thousand six hundred (33,600); (2) more than thirty-four thousand nine hundred (34,900) but less than thirty-four thousand nine hundred fifty (34,950); (3) more than one hundred ten thousand (110,000) but less than one hundred fifteen thousand (115,000); (4) more than one hundred eighty-two thousand seven hundred ninety (182,790) but less than two hundred thousand (200,000); (5) more than two hundred thousand (200,000) but less than three hundred thousand (300,000); (6) more than one hundred forty-five thousand (145,000) but less than one hundred forty-eight thousand (148,000); and (7) more than four hundred thousand (400,000) but less than seven hundred thousand (700,000). Ind. Code § 8-14-16-1, *as added by* Section 7 of the Act. The funds are to be used for construction of highways, roads, and bridges and to provide funding for economic development projects.

According to census data introduced at trial, only a single county met each of the seven categories at the time of the 2000 census. Those counties were (1) Steuben County; (2)

LaGrange County; (3) LaPorte County; (4) Elkhart County; (5) St. Joseph County; (6) Porter County; and (7) Lake County. App. at 1567-1656, 1675-1746.

Section 5 of HEA 1008 adds a new chapter, Chapter 14, to I.C. 8-14, *et seq.*, creating the Major Moves Construction Fund. In Section 8-14-14-6(a)(3), the state auditor is directed to distribute from the Major Moves Construction Fund, the following sums for deposit in the local Major Moves Construction Funds given to the counties described under I.C. 8-14-16:¹

(3) The following amounts to each of the following counties on or before September 15, 2006 for deposit in local Major Moves Construction Funds under I.C. 8-14-16:

(A) Forty Million Dollars (\$40,000,000.00) to each county described in I.C. 8-14-16-1(1) through I.C. 8-14-16-1(5). However, if a county described in I.C. 8-14-16-1(3) becomes a member of the northwest Indiana regional development authority, the distribution to that county is Twenty-Five Million Dollars (\$25,000,000.00) instead of Forty Million Dollars (\$40,000,000.00);

(B) Twenty-five Million Dollars (\$25,000,000.00) to each county described in I.C. 8-14-16-1(6);

(C) Fifteen Million Dollars (\$15,000,000.00) to each county described in I.C. 8-14-16-1(7).

The population classification's only purpose is to identify the seven counties traversed by the Toll Road. The funds awarded to the counties are not in proportion to their population. More sparsely populated Steuben and LaGrange Counties receive as much money as Elkhart and St. Joseph Counties. Lake and Porter, the two western counties that are a part of the Northwest Indiana Regional Development Authority ("RDA"), receive less money, but the RDA will receive a separate distribution under the Act. Order at 14.

The funds given to the counties may be used for purposes other than the construction of highways, roads, and bridges. Indeed, they may be used for virtually any economic development

¹ Section 5 (the Major Moves Construction Fund) also gives a substantial amount of the lease proceeds to INDOT for the Motor Vehicle Highway Account. INDOT will, in turn, distribute money to all counties, including the Toll Road counties, to fund its ten-year transportation plan. Order at 14.

project that could otherwise be funded with county economic development taxes. I.C. 8-14-16-5(3).

The trial court found there was one reason for the express grant of monies to the Toll Road counties: The legislature was concerned that planned Toll Road increases would cause traffic to be diverted onto local roads and the legislature wanted to put aside money to be used to build additional lanes and bypasses to discourage diversion off the Toll Road. Order at 15. However, possible traffic diversion will not be limited to the seven counties to whom more than \$200 Million is given. Traffic diverted from the Toll Road will traverse numerous other counties. Plaintiff Randy Nace testified, his alternate route when traveling from New York to Chicago is U.S. 30. Tr. at 234. That road runs through Allen, Whitley, Kosciusko, and Marshall Counties, and is likely to see a significant increase in traffic. Therefore, many counties will experience the same diversion that is anticipated in the Toll Road counties. Indeed, in their post-trial brief, IFA concedes that “some drivers may (and in many cases, already do) use alternate routes to avoid paying tolls” App. at 1066. Moreover, it is highly unlikely that traffic will be diverted from the Toll Road onto local roads, but rather onto U.S. and State highways. As Representative Moses testified, these roads are not maintained by the counties, but are maintained by the State. Tr. at 274-75.

There is no evidence in the record that the Toll Road is used more heavily by residents of Steuben or LaGrange Counties than it is by residents of Allen, DeKalb, Noble, or other non-Toll Road Counties. The only statistics in the record are that 66% of the 2004 toll revenue was derived from out-of-state vehicles; 18% from in-state cars; and 16% from in-state trucks. App. at 1658-59. Randy Nace testified he is one of those in-state truck drivers who uses the Toll Road. He does not live in a Toll Road county. Tr. at 233-34. It is only reasonable to infer that

residents of DeKalb, Allen, Noble, Huntington, Whitely, Kosciusko, Starke, Marion, Wells Counties, and virtually every other county in the state use the Toll Road when traveling to Elkhart, South Bend, Hammond, Gary, Michigan City, East Chicago, or Chicago.

These special provisions were not in the bill as introduced or passed by the House. *See* App. at 1483-1530. Thereafter, the Local Major Moves Construction Funds were added in the Senate, and the amounts given to the Toll Road counties were increased. Tr. at 363-65; App. at 1483-1530, 1533-66, 1567-1636.

Plaintiffs introduced evidence at the hearing of more than \$10 Billion in debt. Part of this evidence was the IFA's own "State Debt Table," identifying more than \$2 Billion in formally denominated debt administered by the IFA. App. at 1466-67, 1468. The Chairman of the IFA testified that he considered "public debt" to be "debt issued by a public entity, federal, state or local," and that the IFA was a "public entity." Tr. at 97-99.

In addition, Plaintiffs introduced evidence of more than \$8 Billion in pre-1996 State Teachers' Retirement Fund pension liabilities that are "considered to be an obligation of . . . the State of Indiana." App. at 1465. Plaintiffs also introduced evidence of municipal debt, through the testimony of Tom Lewandowski. Tr. at 373-76; App. at 1656EE-FF.

In addition, Plaintiffs introduced evidence that the IFA has entered into an unlimited indemnification obligation in the Lease itself. App. at 1152. The indemnification obligation created by Section 3.10 of the Lease itself, potentially in the millions of dollars, is not limited to any specific fund. Thus, all of the public assets owned by the IFA, including roads and bridges around the State, and public buildings and facilities in the State capital are at risk for payment of that obligation.

Under the terms of the Lease, the IFA indemnifies ITR Concession Company and State Mobility Partners in the event they become liable to pay such taxes or other taxes specific to Toll Road Operators. Specifically, the IFA broadly warrants in the Lease that the Toll Road legislation “fully exempts the Concessionaire from the payment of any property Taxes that are attributable to ownership of all or any part of the Toll Road or its rights . . . [and] . . . provides a moral obligation on the part of the State to provide the funds necessary in order to enable the IFA to comply with its payment obligations . . .” App. at 1169, 1172. Section 3.10 of the Lease specifically obligates the IFA to indemnify the Concessionaire from imposition of property tax, sales tax, and other taxes enumerated therein. App. at 1152.

IV. SUMMARY OF ARGUMENT

The trial court erred in ruling that this case is a Public Lawsuit under the Public Lawsuit Statute. It erroneously concluded that the IFA, a statewide public corporation, is a “municipal corporation” as defined by I.C. 34-6-2-86, and that the Public Lawsuit Statute applies to both the disposition of a public improvement as well as its acquisition.

The trial court erred in ruling that Plaintiffs failed to present sufficient evidence as to whether the provisions of HEA 1008, which expressly distribute substantial Major Moves revenues only to the seven counties through which the Indiana Toll Road passes, did not constitute unconstitutional special legislations in contravention of Article IV, § 23 of the Constitution. Identical sums are distributed to the five eastern Toll Road counties despite their widely divergent populations, and the two western Toll Road counties are granted even greater sums of money. The monies provided to these seven counties may be used for any public purpose; their use is not limited to the constructing of improved roads to ameliorate the feared

traffic diversion from the Toll Road, the sole justification offered by the defenders of the legislation. Further, there is uncontroverted evidence in the record that other counties will suffer similarly from potential diversion of traffic from the Toll Road, and therefore a general law could have been made applicable.

The trial court also erred in ruling that the Plaintiffs failed to present a substantial question as to whether the provisions of HEA 1008 contravened Article X, § 2 of the Constitution, requiring that the revenues derived from the net annual income of any public works “belonging to the state” be applied to the Public Debt. The Toll Road is titled “in the name of the State,” the transaction generates revenues from the net annual income (“rent”) of the Toll Road, and Article X, § 2 restricts the disposition of any such revenues without regard to whether the recipient is the state or the IFA. There exists Public Debt within the meaning of the Constitution, whether it be the billions of dollars of IFA debt, the liabilities of the Public Employees and Teachers Retirement Funds, or the debts of local municipalities.

The trial court erred in ruling that the Plaintiffs had failed to present a substantial issue as to whether HEA 1008’s grant of an exemption from ad valorem taxation to the Concessionaire as “Lessee” contravenes Article X, § 1 of the Constitution. That section requires the uniform taxation of all property. The trial court holding that the constitutional exemption for “[p]roperty being used for municipal...purposes” applied to such property in the hands of a private for-profit entity is contrary to law.

V. ARGUMENT

A. STANDARD OF REVIEW.

The standard of review in this appeal is *de novo* as to virtually all issues.

First, the underlying facts in the case are largely undisputed or arise from documentary evidence. In a recent filing with this Court, the Appellees agreed that as to two issues, namely whether the IFA is a “municipal corporation” within the meaning of the Public Lawsuit Statute and whether there is “Public Debt” within the meaning of Article X, § 2 of the Indiana Constitution, the facts are “almost entirely undisputed.” Appellees’ Verified Emergency Motion for the Supreme Court to Accept Jurisdiction, Shorten Appellate Deadlines, Expedite Briefing, and Hold Pre-Appeal Conference (filed June 5, 2006) at 5 n.2.

In addition, Plaintiffs’ position is that at least three of the four issues presented on appeal involve facts which are essentially undisputed and present solely issues of law. Whether the Public Lawsuit Statute applies to this case involves purely legal questions as to whether the IFA is a “municipal corporation” and whether that statute applies to a lease of a public improvement to a private party. Whether HEA 1008 violates Article X, § 2 of the Indiana Constitution turns on three purely legal issues: whether the Toll Road “belongs” to the State; whether there is “Public Debt” within the meaning of the Constitution; and whether this constitutional provision is triggered where the IFA rather than the State receives the revenues derived from the net annual income of the Toll Road.

The remaining issue presented involves determining whether Sections 5 and 7 of HEA 1008 violate the prohibition of special legislation contained in Article IV, § 23 of the Indiana Constitution. As to this issue, very nearly all of the facts are not in dispute.

The trial court's decision to certify this matter as a public lawsuit presents an issue of law. *See, e.g., Horseman v. Keller*, 841 N.E.2d 164, 168 (Ind. 2006) (statutory interpretation is a question of law). As such, this Court's review is *de novo*. *See, e.g., Grandview Lot Owners Ass'n v. Harmon*, 754 N.E.2d 554, 57 (Ind. Ct. App. 2001). Moreover, the trial court's legal conclusions as to the constitutionality of HEA 1008 are also matters of law subject to *de novo* review. *See, e.g., Logan v. State*, 836 N.E.2d 467, 470 (Ind. 2005).

To the extent that any factual issues exist, the general rule is that if the trial court has made special findings of fact, its judgment is clearly erroneous (1) if its findings do not support its conclusions of law, or (2) if its conclusions of law do not support its judgment. *See, e.g., Dunson v. Dunson*, 769 N.E.2d 1120, 1123 (Ind. 2002). However, where as here several of the issues were decided based purely on documentary evidence, an appellate court is in as good a position as the trial court to determine the force and effect of the documents and such review should be *de novo*. *Cf. Aetna Cas. & Surety Co. v. Crafton*, 551 N.E.2d 893, 894 (Ind. Ct. App. 1990) (citing *Indiana Bank & Trust Co. v. Lincoln Nat'l Bank & Trust Co.*, 137 Ind. App. 546, 553, 206 N.E.2d 879, 884 (1965)).

Furthermore, any trial court findings in this case are matters of "constitutional fact" which should be subject to *de novo* review. Indiana courts have recognized this principle where issues have arisen under the United States Constitution, *see Bennett v. State*, 369 N.E.2d 949, 953 n.8 (Ind. Ct. App. 1977) (double jeopardy); *Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E. 2d 446, 455 (Ind. 1999) (First Amendment), and there is no reason why the same standard of review should not apply to "constitutional facts" arising under the Indiana Constitution.

Finally, the trial court's ruling as to whether Plaintiffs introduced sufficient evidence to avoid the bond requirement presents an issue as to the sufficiency of the evidence. This is

properly considered a question of law subject to *de novo* review. *See, e.g., Grandview Lot Owners*, 754 N.E.2d at 557 (pure question of law gives rise to *de novo* review).

B. THE TRIAL COURT ERRED IN CERTIFYING THIS ACTION AS A PUBLIC LAWSUIT.

A threshold question of law before the trial court and this Court is whether this is a public lawsuit under Ind. Code § 34-13-5-1, *et seq.* Contrary to the trial court’s Order, the Public Lawsuit Statute has no application whatsoever here because (1) the IFA is not a “municipal corporation”; and (2) this suit does not involve a challenge to the creation of a “public improvement” (the Toll Road).

1. The IFA Is Not a “Municipal Corporation.”

One linchpin of a “Public Lawsuit” is that the IFA must establish that it is a “municipal corporation” protected by the Public Lawsuit Statute. For purposes of the Statute, a “Public Lawsuit” is

(1) any action in which the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement by a municipal corporation is questioned directly or indirectly, including but not limited to suits for declaratory judgments or injunctions to declare invalid or to enjoin the construction, financing, or leasing; and

(2) any action to declare invalid or enjoin the creation, organization, or formation of any municipal corporation.

I.C. 34-6-2-124(a) (emphasis added). Accordingly, the IFA must be a “municipal corporation” for the statute to apply. For purposes of the Public Lawsuit Statute, “municipal corporation” means:

- (1) a:
 - (A) local subdivision of the state; or

(B) public instrumentality or public corporate body created by state law; including but not limited to cities, towns, townships, counties, school corporations, special taxing districts, conservancy districts, and any other local public instrumentality or corporation that has the right to sue and be sued;

(2) a corporate or other entity that leases a public improvement to a municipal corporation; or

(3) the governing body of a municipal corporation and its members and officers in their official capacity.

I.C. 34-6-2-86. The trial court erred in concluding the IFA is a “municipal corporation” within this statutory definition, Order at 26-28, because the IFA is a statewide body.

It is well established that where a statute, such as the Public Lawsuit Statute, is in derogation of the common law, it must be strictly construed against limitations on a claimant’s right to bring suit. *See, e.g., Tuttle v. Mahan*, 582 N.E.2d 796, 800 (Ind. 1991). The definition of a public lawsuit must be strictly construed. *See Fuller v. Town of Vevay*, 713 N.E.2d 318, 319-20 (Ind. Ct. App. 1999) (citation omitted) (“[T]he Public Lawsuit Statute should be strictly construed to require both a proper legal status *and* type of lawsuit before a plaintiff is required to bring his action exclusively under the provisions of the Public Lawsuit Statute”) (emphasis in original).

Non-local bodies such as the IFA, a *State* finance authority, are typically known as “public corporations,” not as “municipal corporations.” MCQUILLIN, *LAW OF MUNICIPAL CORPORATIONS* § 2.03.20 (2005). The common meaning of the term “municipal corporation” is a *local* corporation. *See, e.g., BLACK’S LAW DICTIONARY* (8th ed. 2004) (“A city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state’s local affairs.”); *WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY* 1487 (1993) (something “usu[ally] endowed with powers of local self-government” and “a public corporation created by law to act as an agent of administration and local self-government”).

Under ordinary principles of statutory construction, terms are to be given their ordinary meanings “unless from the statute as a whole it is clear that the Legislature intended that certain words should be taken in a different sense.” *Johnson v. Citizen’s Trust Co.*, 78 Ind. App. 487, 126 N.E. 49, 50 (1922) (citations omitted); *see also In re Guardianship of M.K.*, 844 N.E.2d 555, 558 (Ind. Ct. App. 2006). Here there is no clear indication that “municipal corporation” should carry the unusual meaning adopted by the trial court.

The trial court’s interpretation of “municipal corporation” is also inconsistent with basic principles of statutory construction because it reads general language in the statute without regard to the more specific examples provided. It is well-settled that “when specific terms follow general terms, the general terms are restricted to things similar to those specifically enumerated.” *Caylor-Nickel Clinic, P.C. v. Indiana Dept. of State Revenue*, 569 N.E.2d 765, 771 (Ind. Tax Ct. 1991) (citation omitted); *see also Holmes v. Review Board*, 451 N.E.2d 83, 85 (Ind. Ct. App. 1983); 2A Norman J. Singer, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47:17 (6th ed. 2005). The position of the general and specific words in the series is not crucial; for conversely “where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.” *J.A.W. v. State, Marion County Dept. of Public Welfare*, 687 N.E.2d 1202, 1211 n.21 (Ind. 1997) (citation omitted); *see also Singer, supra*, § 47:17 (doctrine equally applicable regardless of the order of general and specific terms). In the case of the Public Lawsuit Statute, this established rule of construction demonstrates that Statewide entities such as the IFA are not “municipal corporations.”

Cases cited by the trial court also confirm that the Public Lawsuit Statute does not apply, for not a single one of those cases involved a Statewide entity held to be a “municipal corporation.” See *Lawson v. South Bend Pub. Transport. Corp.*, 256 Ind. 552, 270 N.E.2d 746 (1971) (city’s transportation corporation); *Datisman v. Gary Pub. Library*, 241 Ind. 83, 170 N.E.2d 55 (1960) (local public library); *Bailey v. Evansville-Vanderburgh Airport Auth. Dist.*, 166 N.E.2d 520 (1960) (local airport authority); *Becker v. Albion-Jefferson Sch. Corp.*, 235 Ind. 204, 132 N.E.2d 269 (1956) (local school). Moreover, there is no decision in Indiana in which a statewide entity was held to be a municipal corporation.

Indeed, two of the cases cited by the trial court actually undermine its conclusion that the IFA is a “municipal corporation.” The trial court cites *Ind. State Toll-Bridge Comm’n v. Minor*, 236 Ind. 193, 139 N.E.2d 445 (1957), as “holding that Indiana State Toll-Bridge Commission was [a] valid municipal corporation.” Order at 27. Yet the term “municipal corporation” appears nowhere in that decision.

The trial court also cites *Book v. State Office Building Commission*, 238 Ind. 120, 149 N.E.2d 273 (1958), as “holding that State Office Building Act validly created municipal corporation called State Office Building Commission,” Order at 27. However, far from holding that the Commission was a “municipal corporation,” this Court recognized the common law and common sense distinction between such a “municipal corporation” and a state entity:

In *Ennis v. State Highway Commission, supra*, 1952, 231 Ind. 311, 108 N.E.2d 687 . . . we held that the Toll Road commission, was not a corporation within the meaning of Art. 11, § 13 of the Constitution of Indiana, and at page 325 of 231 Ind., at page 694 of 108 N.E.2d said:

‘The constitutional debates on the Constitution as adopted in 1851 show the intent to restrict Section 13, Article 11 to private corporations only. *This court has extended this section to cover municipal corporations. We will not further extend the section to cover boards or commissions of the state.*’

Book, 149 N.E.2d at 282 (emphasis added) (citations omitted).

It has long been settled that “when the legislature enacts a statute in derogation of the common law, the Court presumes that the legislature is aware of the common law, and does not intend to make any change therein beyond what it declares in express terms or by unmistakable implication.” *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 10 (Ind. 1993). Decisions such as *Book* and *Ennis* establish that under Indiana’s common law, the term “municipal corporation” does not embrace statewide public bodies “corporate and politic” such as the IFA. I.C. 4-13.5-1-1.5.² In order to bring entities such as the IFA within the Public Lawsuit Statute and its definition of a “municipal corporation,” the legislature was required to use language far more express than it employed in I.C. 34-13-5-1(b).

The trial court also stated that “at least five times, the Public Lawsuit Statute has been used to challenge actions of the State Board of Tax Commissioners (now the Department of Local Government Finance).” Order at 28. However, it cited only two cases, and neither supports the conclusion that the IFA is a “municipal corporation.” See *Graber v. State Bd. of Tax Comm’rs*, 727 N.E.2d 802 (Ind. Tax Ct. 2000); *Boshart v. State Bd. of Tax Com’rs.*, 672 N.E.2d 499 (Ind. Tax Ct. 1996). Neither case holds that the State Board of Tax Commissioners is a “municipal corporation.” Rather, they hold that local entities were municipal corporations. See *Graber*, 727 N.E.2d at 804 (local school corporation and building corporation); *Boshart*, 672 N.E.2d at 499-500 (local school corporation).

Finally, the Public Lawsuit Statute permits Plaintiffs to sue in their capacity either as citizens or taxpayers of the municipal corporation. I.C. 34-13-5-2. There are no “citizens” or

² The Office Building Commission at issue in *Book* has now been merged into the IFA. See I.C. 4-4-11-4.

“taxpayers” of the IFA. This further undermines the trial court’s conclusion that the IFA is a municipal corporation.

Since the IFA is not a “municipal corporation,” the Public Lawsuit Statute has no application and the trial court’s certification of a Public Lawsuit should be reversed.

2. *This Case is Not a Public Lawsuit Because the Public Lawsuit Statute Only Applies to the Acquisition of Public Improvements, Not Their Disposition.*

The Court should also reverse the trial court because the Public Lawsuit Statute applies only to proceedings by a municipal corporation to acquire a public improvement, not dispose of one. The trial court’s conclusion that the term “leasing” in I.C. 34-6-2-124 includes a lease by the IFA to the Concessionaire ignores the inherent ambiguity in the word. Specifically, the term “lease,” when used as a verb, means either “[t]o grant the possession and use of (land, buildings, rooms, movable property, etc.) to another in return for rent or other consideration” or “[t]o take a lease of; to hold by a lease.” BLACK’S LAW DICTIONARY (8th ed. 2004). As the Seventh Circuit noted in *Travelers Insurance Co. v. Transport Insurance Co.*, 787 F.2d 1133, 1138 (7th Cir. 1986), “[i]t is an oddity of semantics that the same verb, ‘lease,’ is used to refer to the activities of both lessor and lessee.” Although *Travelers* found that the verb meant activities of a lessor in the case before it, here, the balance of the statutory language and purpose makes clear that it is a municipal corporation’s activities as lessee that are covered.

First, the statutory language defining the municipal corporations and activities protected by the statute clarifies that it is the leasing of a public improvement “to a municipal corporation” that is protected. I.C. 34-6-2-86. In fact, the definitional sections of the statute use complementary prepositions. Under Section 86, “a corporate or other entity . . . leases a public improvement to a municipal corporation,” and under Section 124, that same public improvement

may be leased “by a municipal corporation.” *Compare* I.C. 34-6-2-86 *with* I.C. 34-6-2-124. Thus, when the statute is read “as a whole to determine legislative intent” as is required by Indiana law, *Tippecanoe County v. Indiana Mfgts Ass’n*, 784 N.E.2d 463, 465 (Ind. 2003), and when the rule of strict construction is applied, it becomes even more clear that this case is not a public lawsuit.

Second, the other municipal activities protected by the statute, “construction” and “financing,” I.C. 34-6-2-124, are both actions by which a municipality *acquires* a public improvement. Again, principles of statutory construction resolve the issue. “The canon of construction known as *noscitur a sociis* provides that the meaning of a doubtful word may be ascertained by reference to the meaning of other words associated with it. This maxim means ‘it is known from its associates’ and in practical application means that a word may be defined by an accompanying word, and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense. *Wiggins v. State*, 727 N.E.2d 1, 7 (Ind. Ct. App. 2000) (citations omitted). Words grouped together in a statute “take, as it were, their color from each other; that is, the more general is restricted to a sense analogous to the less general.” *Hyland v. Rochelle*, 179 Ind. 671, 100 N.E. 842, 849 (Ind. 1913) (citations omitted). Again, application of the rules of statutory construction demonstrates that the Public Lawsuit Statute does not apply to the disposition of a public work.

Finally, the purpose of the Statute, even as the IFA describes it, demonstrates that this case is not a Public Lawsuit. A statute should, of course, be interpreted in light of its purpose. *Heaton & Eadie Prof. Svs. Corp. v. Corneal Consultants of Ind., P.C.*, 841 N.E.2d 1181, 1186 (Ind. Ct. App. 2006). According to the Defendants themselves, “The Public Lawsuit Statute was designed to protect municipal corporations . . . seeking to *implement* public improvement

projects from harassing and meritless litigation that has the intended or unintended effect of obstructing or delaying those projects.” App. at 695, 700 (citation omitted). Thus, even IFA’s formulation makes clear that it is the *acquisition* of public improvements by a municipal corporation, not their *disposition*, that is protected by the Statute. And again, not a single one of Defendants’ cases (nor any other case under the Public Lawsuit Statute) involved action by a governmental entity to *dispose* of a public improvement.³

As discussed above, the Public Lawsuit Statute must be “strictly construed to require . . . a proper . . . *type of lawsuit* before a plaintiff is required to bring his action exclusively under the provisions” of the statute. *Fuller*, 713 N.E.2d at 319-20 (citation omitted) (emphasis added). Employing such strict construction, it is clear that the statute applies only to the *acquisition* of public improvements, not their disposition. For this reason alone the trial court’s certification of as a Public Lawsuit should be reversed.

C. PLAINTIFFS SUBMITTED SUBSTANTIAL EVIDENCE THAT HEA 1008 WAS UNCONSTITUTIONAL.

A bond is not required if the Plaintiffs “establish facts that would entitle the plaintiff to a temporary injunction.” I.C. 34-13-5-7(b). Because this statute and the term “temporary injunction” predate the current Trial Rules, this Court has held that the statute requires plaintiffs to demonstrate only that there is “a substantial issue to be tried.” *Marshall County Tax Awareness Committee v. Quivey*, 780 N.E.2d 380, 383 n.4 (Ind. 2002) (citations omitted).

³ A decision cited by the trial court, Order at 29, is not to the contrary. In *Huber v. Franklin City Comm. Sch. Bd. of Trustees*, 507 N.E.2d 233 (Ind. 1987), the school board created a separate building corporation which would lease the school from the school board. *Id.* at 234. Thus, the case involved the lease of the school *to* a municipal corporation and the acquisition of a public improvement, not its disposition.

Accordingly, the Plaintiffs here needed only to “introduce sufficient evidence” that the issues to be tried are “substantial,” *Hughes v. City of Gary*, 741 N.E.2d 1168, 1171 (Ind. 2001), and “proper for investigation by a court of equity,” *id.* at 1175 (Rucker, J., concurring). This is not an onerous standard. Indeed, this Court has stated that the Public Lawsuit Statute is designed to eliminate “merely harassing suits or completely non-meritorious litigation.” *Pepinsky v. Monroe County Council*, 461 N.E.2d 128, 131 (Ind. 1984) (citation omitted). Plaintiffs meet this burden.

1. There Is Sufficient Evidence that Sections 5 and 7 of HEA 1008 Violate Article IV, § 23

The trial court erroneously concluded that Plaintiffs did not raise a substantial issue whether Sections 5 and 7 of HEA 1008 violate Article IV, § 23’s prohibition on special legislation. It first erred in concluding that HEA 1008 is general legislation because “each of the 92 counties will receive a direct economic benefit under Sections 5, 7, and 39 as well as other provisions of HEA 1008.” Order at 60. Review of Sections 5 and 7 shows that only the Toll Road counties are specifically allocated money by the legislature. I.C. 8-14-14-6(a)(3) and I.C. 8-14-16-1. The largest portion of the money is given to INDOT, which will determine what distributions will be made and to which counties. Order at 14.⁴ However, only the Toll Road counties are statutorily guaranteed 35% of the lease proceeds and only they receive the extra “local Major Moves funds.”

A statute with a population classification is a special law if it is designed to operate upon or benefit only a particular local governmental unit and the statute’s subject matter is unrelated to the population classification. *City of South Bend v. Kimsey*, 781 N.E.2d 683, 691 (Ind. 2003). If

⁴ Appellants do not challenge as special legislation the provisions giving money to INDOT.

the population limit serves no purpose other than to identify the affected locale, the Act may as well have identified it by name. Either way, it is special legislation. *Id.*⁵

The trial court's conclusion that the general nature of the unchallenged INDOT provisions, by which all counties will receive highway funds, somehow insulates other special provisions from challenge is erroneous. The provision found unconstitutional in *Kimsey* was, after all, a sub-section of a general statute that otherwise applied throughout the state. The challenged special sub-section, although part of an otherwise general law, was still neither general nor constitutional. *Id.* at 684.

The trial court also erred in concluding that, because the Toll Road only traverses these seven counties, no general law could be made applicable. Order at 66. Of course, a road cannot go everywhere. However, this case is not like *Indiana Gaming Comm'n v. Moseley*, 643 N.E.2d 296 (Ind. 1994), a case involving riverboat gambling and therefore limited by geography in its application. Here, the mere fact that the Toll Road traverses these counties is no reason, in and of itself, to give monies for local purposes to these counties. The Toll Road does not belong to the counties. It is a State asset and, therefore, proceeds from the disposition of the Toll Road belong to the entire state.

Finally, the trial court erred in concluding that circumstances unique to the Toll Road counties justify the legislation even if Sections 5 and 7 are special laws. Order at 62, 66. It concluded that: "Because of the rate increase as well as potential future rate increases, traffic would be diverted off of the Toll Road onto local roads. Funds would be needed to be given to those local units to help maintain those roads." *Id.* But this justification does not turn on facts

⁵ In *Kimsey*, to simplify Article IV analysis, this Court urged lawmakers to identify the affected governmental unit by name and to provide legislative findings justifying the legislation's limited territorial application. *Kimsey*, 781 N.E.2d at 691. Here, the legislature did neither.

unique to the Toll Road counties. Moreover, the monies given to the Counties are neither rationally related to, nor serve the purpose for which they are ostensibly given, *i.e.*, to cope with the diversion of traffic from the Toll Road.

It is illogical to believe that much, if any, traffic will be diverted from the Toll Road onto local roads maintained by the counties. Any traffic diversion will most likely be to U.S. 20 or State Road 120, both of which parallel the Toll Road and are maintained not by the counties, but by the state. Tr. at 274-75.

Moreover, the local Major Moves Construction Funds given to these counties may be used for purposes *other than* the construction of highways, roads, and bridges. The funds can be used for virtually any economic development project, I.C. 8-14-16-5(3). Thus, the money is not reasonably related to the characteristic purportedly supporting the special law and is therefore unconstitutional.

Even assuming the law is reasonably related to “inherent characteristics” of the affected counties, the trial court failed to apply the second part of the *Kimsey* test: whether the law applies wherever those characteristics exist. The uncontroverted evidence is that it does not. Indeed, the IFA has conceded that drivers may use alternate routes such as U.S. 30. App. at 1066. Thus, if there is a diversion of traffic from the Toll Road as rates increase, the diversion will not be unique to the Toll Road counties. Traffic will also be diverted onto other roads located throughout the State, as motorists adjust their routes to avoid the Toll Road. For example, U.S. 30, which runs through Allen, Whitley, Kosciusko, and Marshall Counties, is just as likely to experience a significant increase in traffic. *See* Tr. at 275-76. Therefore, many counties will

experience the same diversion that is anticipated in the Toll Road counties.⁶ As such, a general law could have been made applicable authorizing, for example, INDOT to disburse monies to any county adversely affected by increased traffic and needing money for additional lanes on roads, etc.

In *Kimsey*, the defendant tried to justify a special law by citing the need to preserve rural land around South Bend, an urban area, and the need to prevent competing cities (South Bend and Mishawaka) from annexing each other's land. The trial court found that these characteristics made St. Joe County unique, thereby saving the legislation from the Constitutional challenge. As this Court observed, when it reversed the trial court, "none of these justifications are inherent in the population range and none turn on facts unique to St. Joseph County." *Kimsey*, 781 N.E.2d at 694. This Court noted that the urban/rural dichotomy was also "true of Lake and Allen Counties" and that "[s]everal counties have multiple municipalities capable of exercising annexation powers." *Id.* Accordingly, this Court condemned the law: "In short, we are directed to nothing in the record and no relevant facts susceptible of judicial notice that are unique to St. Joseph County. According, this legislation is unconstitutional special legislation." *Id.*⁷ The same result should obtain here.

⁶ The trial court's finding that Rep. Moses described the Toll Road counties as "unique" is not supported in the Record and is clearly erroneous. Order at 17. Moses testified to just the opposite. Tr. at 275-76.

⁷ In their Post-Hearing Brief, Defendants appear to confuse Article I, § 23's reasonableness analysis with Article IV, § 23 analysis, App. at 1067-69, when they argue that the legislature may have believed that the Toll Road counties will experience more increased traffic than other counties. However, as this Court stated in *Kimsey*, the analysis is in fact different. *Kimsey*, 781 N.E.2d at 692. Under Article IV, § 23, "if the conditions the law addresses are found in at least a variety of places throughout the state, a general law can be made applicable and is required by Article IV, and special legislation is not permitted." Therefore, even if the Toll Road counties

2. ***There Is Sufficient Evidence That HEA 1008 Violates Constitutional Restrictions on the Disposition of Public Works “Belonging To The State”***

The Constitution provides:

All the revenues derived from the sale of any of the public works belonging to the State and from the net annual income thereof, and any surplus that may, at any time, remain in the Treasury, derived from taxation for general State purposes, after the payment of the ordinary expenses of the government, and of the interest on bonds of the State, other than Bank bonds; shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.

IND. CONST. ART. X § 2. Under this provision, if (1) the Toll Road is a public work “belonging to the State”; and if (2) revenue is derived (by anyone) from the “net annual income” of the Toll Road; and if (3) there is “Public Debt,” then HEA 1008 is unconstitutional since it is undisputed that its revenues are not applied to the Public Debt but to other purposes. Plaintiffs have raised a “substantial issue” as to such a violation; indeed, the evidence is overwhelming.

The framers of the 1851 Constitution, shaken as they were by the State’s earlier financial collapse as a result of major canal and road-building projects, carefully crafted a Constitution so as to ensure that such a catastrophe would not happen again. In upholding “Major Moves,” the trial court disregarded the framers’ clear intent. For example, it ignored the indisputable fact that the Toll Road “belongs” to the State, misread the Constitution as applying only to revenues received by the State (where the provision applies without regard to the recipient), and ignored the framers’ careful distinction between “State Debt” and “Public Debt,” conflating the two terms and thereby impermissibly treating the term “Public Debt” as meaningless surplusage.

will experience more increased traffic than other counties, which is not supported by the evidence, a general law could still be made applicable.

(a). *The Toll Road belongs to the State*

The trial court noted that when Toll Road property is acquired by the IFA it must “take title thereto in the name of the state.” Order at 44. Indeed, I.C. 8-15-2-7(1) requires that the IFA “take title in the name of the state[.]” In addition, I.C. 8-15-2-5(5) provides that the IFA may “acquire [property] in the name of the state by purchase or otherwise.” Moreover, the Defendants conceded below that “[t]he several thousand parcels of property that make up the Toll Road are titled in the name of the State” App. at 717.

The trial court’s conclusion that formal ownership of the Toll Road should be ignored has no support in the text of the Constitution, history, statute, or case law. In *Ennis*, this Court specifically held as to the Toll Road itself that “all property involved in the act herein questioned is property of the state.” *Ennis*, 108 N.E.2d at 696 (emphasis added). Here, the State’s ownership of the Toll Road, far from being a mere technicality as the IFA has argued, firmly establishes that the Toll Road “belongs” to the State under Article X, § 2’s plain meaning.

Dismissing the record titleholder, the trial court concluded: “But, the IFA actually owns the Toll Road by statute.” Order at 44 (citing I.C. 8-9.5-8; I.C. 8-14.5-5; I.C. 8-15-2-5(5), *as amended* by HEA 1008 9; I.C. 8-15-2-7(1); I.C. 8-15-2-8; I.C. 8-15-2-9). However, none of the cited statutes contains any provision transferring title to the IFA or otherwise providing that the IFA “owns” the Toll Road. Indeed, the very existence of HEA 1008 refutes this contention, since if the IFA actually did own the Toll Road, it presumably could have entered into the Lease without any legislative enactment.

Finally, the trial court argues that the phrase “belonging to the State” should be construed as “requiring practical day-to-day control,” because such a construction would uphold Major Moves, described as a “much needed and publicly-desired” project. Order at 44. Of course, to

construe “belonging to” as “practical day-to-day control” would mean that much state property has been alienated *sub rosa*. It would also mean that there is no question that HEA 1008 effects a “sale” to the Concessionaire, since it will have practical and day-to-day control of the Toll Road for 75 years; but IFA denies any such “sale.” In any event, it would stretch the language of the 1851 Constitution beyond recognition to conclude that the ordinary meaning of “belonging to” means “operational control.” Finally, it is simply not the province of the judiciary to review legislation based on its perception of the public’s desires, whatever they may be.

(b). *There is Public Debt That Can and Must Be Reduced With the Proceeds of the Disposition of the Toll Road*

The trial court’s conclusion that there is no “public debt” is contrary to the Record. At the hearing in this case, Plaintiffs introduced evidence, in the form of the IFA’s own “State Debt Table,” documenting more than \$2 Billion in formally-denominated debt administered by the IFA. App. at 1466, 1468. In addition, Plaintiffs introduced evidence of more than \$8 Billion in pension liabilities that are “considered to be an obligation of . . . the State of Indiana.” *Id.* at 1457, 1465. Plaintiffs also introduced evidence of substantial municipal debt. Tr. at 373-76, App. at 1656EE-FF. Finally, IFA has entered into an unlimited indemnification obligation in the Lease itself. App. at 1152.

Each of these obligations is properly considered “public debt” within the meaning of Article X, § 2. Indeed, the IFA’s Chairman admitted that he considered “public debt” to be “debt issued by a public entity, federal, state or local,” and that IFA was a “public entity.” Tr. at 97-99. Defendants’ suggestion that these terms should be given a technical, legal meaning is incorrect. This Court has long recognized as a “cardinal principle of constitutional construction that words are to be considered as used in their ordinary sense; and that their ordinary and

common meaning is to be attributed to them.” *Tucker v. State*, 218 Ind. 614, 670, 35 N.E.2d 270, 291 (1941).

The trial court’s conclusion that the IFA’s debt instruments are not Public Debt because the IFA “is not the State” is likewise incorrect. The cases on which the court relied all involved the issue of whether particular obligations were “State Debt” in violation of Article X, § 5 of the Indiana Constitution. Order at 42 (citing *American National Bank and Trust Co. v. Indiana Department of Highways*, 439 N.E.2d 1129 (Ind. 1982) (citing *Steup v. Indiana Housing Finance Authority*, 273 Ind. 72, 402 N.E.2d 1215 (Ind. 1980); *Orbison v. Welsh*, 179 N.E.2d 727 (Ind. 1962); *Book*, 149 N.E.2d at 237; *Ennis*, 108 N.E.2d at 687)). However, the relevant term in Section 2 is “Public Debt,” a term that is plainly broader than “State Debt,” and would conclude the debt of a public instrumentality like the IFA, even though it is separate from the state itself. Public debt would also include the unfunded liability of the Teacher Retirement Fund. After all, the common meaning of debt is something that is owed, whether it is currently due or not. In fact, synonyms for debt are “obligation,” and “liability.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 583 (1983). The fact that the framers chose language in Section 2 different from that employed in Section 5 indicates, under ordinary canons of construction, that a different meaning must have been intended. *See Chadwick v. City of Crawfordsville*, 216 Ind. 399, 409, 24 N.E.2d 937, 942 (Ind. 1940) (noting it is error to interpret differing terms to mean the same thing since “each word . . . must be given effect”).

Finally, different considerations presented by the separate constitutional provisions inform their meaning. The prohibition on incurring State debt was designed to avoid a repeat of a disastrous “internal improvements” program. Accordingly, consistent with that purpose, courts have allowed the State to use special purpose entities and limited funds to avoid the provision for

the limited purpose of securing needed public improvements. Thus, the Court in *Book* allowed the General Assembly to avoid the ban on State debt in order to “obtain for the State, after a period of years, a State Office Building, instead of a stack of rent receipts” *Book*, 149 N.E.2d at 288 (footnote omitted). It is one thing to permit avoidance of a ban on State debt to allow the government to acquire public buildings, but quite another to hold that the debt incurred in order to obtain those buildings need not be paid when public assets are disposed of. Accordingly, Defendants’ “State Debt” cases are not authority for the meaning of the term “Public Debt.”

The Defendants’ assertion that Article X, § 2 is merely a historical anachronism, and that it “fulfilled its purpose long ago,” when the “public debt” was “paid in full,” App. at 695, 715, is inconsistent with at least one case Defendants themselves have cited. In *Orbison*, this Court found no violation, but the Court did not do so on the theory that no public debt existed. Rather, the Court held that the provision was valid because it did not “provide for an improper disposition of the *net income* from any Toll Road project contrary to the Indiana Constitution.” *Orbison*, 179 N.E.2d at 744 (emphasis in original) (citing *Ennis*, 108 N.E.2d at 697). Likewise, the statute in *Ennis* was upheld on the ground that there was “no net income involved.” *Ennis*, 108 N.E.2d at 697. If as Defendants claim, any public debt was paid long ago, these holdings would make no sense.

(c). *Revenues Derived From the Net Annual Income of Public Works Must Pay Public Debt.*

Under the plain language of Article X, § 2, the proceeds of the Toll Road transaction must be used to pay public debt regardless of whether that transaction is viewed as a lease or a sale. *See* Ind. Const. Art. X, § 2 (requiring payment of “[a]ll the revenues *derived from the sale* of any of the public works belonging to the State, *and from the net annual income thereof*”)

(emphasis added). The “net annual income” clause is independent of the “sale” clause, *Orbison*, 179 N.E.2d at 743-44, and separately limits how revenues from public works are to be spent.

The trial court’s conclusion that Article X, § 2 does not apply because “[t]he State will not receive ‘net annual income’ under the lease,” Order at 49, overlooks key parts of the constitutional text. First, the issue does not turn on *which entity* receives the revenue. Rather, it requires payment of the relevant revenues to reduce the public debt *regardless* of which entity receives them. Second, the revenues must merely be “derived . . . from the net annual income” of the public work. In this case, all of the evidence concerning the value that the State will receive, including the IFA’s internal estimates, App. at 1465A, Tr. at 134-35, Crowe Chizek’s estimate, App. at 1656C, *et seq.*, and the estimate by Plaintiffs’ economist, Tr. 312-39; App. at 1656R, *et seq.*, were derived from the net annual income of the road. Therefore, revenues which will be received in the form of a lump-sum payment under the Agreement are “derived from . . . the net annual income” of the Toll Road over the term of the Agreement.

Since it is undisputed that revenues from the transaction are not applied to the Public Debt, HEA 1008 contravenes Article X, § 2, or at the very least, the Plaintiffs have raised a substantial issue.

3. *There is Sufficient Evidence that the Act and Lease Unconstitutionally Exempt the Concessionaire from Ad Valorem Taxation.*

Article X, § 1 of the Indiana Constitution requires “a uniform and equal rate of property assessment and taxation,” with only limited inapplicable exceptions. Several of the Act’s provisions, including Section 39, which adds I.C. 8-15.5-7-1, -31, and -40, exempt the

Concessionaire from Indiana taxation. This special treatment violates Article X, § 1's mandate of equal taxation.

The framers believed that correcting the then-existing system of unequal tax assessments and exemptions was a paramount purpose of the constitutional convention. *See Boehm v. Town of St. John*, 675 N.E.2d 318, 322-24 (Ind. 1996) (tracing adoption of this provision). The framers' concern with equality was not limited to unequal assessments, but extended to exemptions as well. As the author himself stated, "no provisions are more proper for a Constitution, than those requiring equality of assessment for purposes of taxation. The duty of the Legislature to devise a system which will secure such equality *and which will cause all the property of the State to be brought under taxation*, should be held forth in the Constitution." Comments of Delegate Read, in 1 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 941 (Indiana Historical Collections Reprint 1935) ("*Debates*"), *quoted in St. John*, 675 N.E.2d at 322 (emphasis added). Another delegate expressed the hope "that a provision will be inserted in the Constitution requiring every species of property to be subject to taxation at its real value, except in the isolated cases of the property of religious and charitable institutions." 1 *Debates* 945 (Comments of Delegate Borden). Fifty years later, this Court noted that its decisions "have thoroughly committed it to the proposition that legislative enactments that purport to grant exemptions not falling within the class of exemptions mentioned in the constitution are void." *State ex rel. Lewis v. Smith*, 158 Ind. 543, 63 N.E. 25, 28 (1902) (collecting cases).

The specifically-enumerated tax exceptions established by Article X, § 1 do not include any exemption for privately held Toll Roads. Had the framers intended such an exemption, they surely would have been clear about the matter, since private Toll Roads were common in 1851.

As one historian notes, “the entire state of Indiana became dotted with private Toll Roads” in the 1850s. See Schmal, *Pioneer History – The Old Plank Road* (April 30, 2002 Lowell Tribute at 6), available online at <http://www.lowellpl.lib.in.us/s2002apr.htm>. There are also several references to unreasonable tolls in the debates. *E.g.*, 1 *Debates* 696.

Nor does the only constitutional exception found applicable by the court, the one for “[p]roperty being used for municipal, educational, literary, scientific, religious or charitable purposes,” apply to privately held Toll Roads. See *Chadwick v. City of Crawfordsville*, 216 Ind. 399, 410, 24 N.E.2d 937, 942 (1940). In *Chadwick*, this Court carefully limited the decision on which the trial court relied, *City of Louisville v. Babb*, 75 F.2d 162 (7th Cir. 1935), to its facts. As this Court noted, *Babb* involved a situation where “[t]he bridge property *was not for private profit.*” *Chadwick*, 24 N.E.2d at 943 (emphasis added). Thus, this Court reasoned that “since the bridge in question serves a public purpose within this state, *and is owned and operated, not privately, but by a municipal corporation of another state*, for the benefit of the public of both states, no constitutional reason can be seen for denying legislative power to exempt it from taxation. It is within the purpose and spirit of the constitutional provision and does not violate its letter.” *Id.* (emphasis added).

Although the trial court treated it as immaterial, Order at 53-54, this Court has followed the public/private distinction several times since *Chadwick*, including in several cases on which Defendants and the trial court relied. For example, in *Steup*, this Court stated that “[h]aving determined that the Authority is not a private corporation, but a state instrumentality operating for a legitimate public purpose, we hold that the tax exemption is not a violation of Art. X, § 1 of the Indiana Constitution.” *Steup*, 402 N.E.2d at 1227. Likewise, in *Ennis*, this Court upheld a tax exemption for the Indiana Toll Road commission “[s]ince we have found this not to be a

private corporation” *Ennis*, 108 N.E.2d at 696. *Orbison* made clear that its use of the terms “public or governmental purpose” were “as distinguished from private.” *Orbison*, 179 N.E.2d at 738-39. In another early case under Article X, § 1, this Court made plain that privately held property did not fall within the “municipal purposes” exemption. To allow such an exemption, “would be an exemption for private gain, and a perversion of the enlightened purposes had in view by the framers of the Constitution.” *Spohn v. Stark*, 197 Ind. 299, 150 N.E. 787, 788 (1926) (collecting cases).

Nor is the trial court’s contrary reasoning based upon cases decided under the “religious” or “charitable” exemptions persuasive. Order at 53-54. Indeed, *State ex rel. Tieman v. City of Indianapolis*, 69 Ind. 375 (1879), holds that the property in question could *not* be exempted from taxation under the Indiana Constitution. Two other cases on which trial court relied, *Vink v. Work*, 158 Ind. 638, 64 N.E. 83 (Ind. 1902), and *College Corner, L.P. v. Dep’t of Local Gov’t Finance*, 840 N.E.2d 905 (Ind. Tax Ct. 2006), deal solely with statutory issues. Moreover, “charitable,” “educational” and “religious” exemptions deal with types of entities which are fundamentally different. Simply put, there have always been private charities, schools and churches, but municipalities are, at their very core, public and governmental, an understanding which the framers would have shared.

The Defendants’ “public purpose” argument also proves too much. For if a road regardless of private ownership and operation is held for a public purpose, so too is a utility company. Under *Chadwick*, a utility in the hands of a municipality *is* tax exempt. But it makes no sense to apply that same tax exemption to a for-profit business. Likewise the owners of airlines, railroads, bus companies and telecommunications companies could claim “public purposes” under the same theory as the private operators of the Toll Road. Courts have indeed

faced such arguments, and squarely rejected them. *See, e.g., Lake Shore & M.S. Ry. Co. v. Chicago & W.I.R. Co.*, 1881 WL 10433, at *5 (Ill. 1881) (“A private citizen may own a line of coaches--used by him in his business as a common carrier--and thus in public use, but such coaches are, nevertheless, private property. So the boat of a ferry proprietor, although in use upon a public ferry, is the private property of the owner. It has never been doubted, that the property of a railroad company is liable to taxation as private property”); *see also Wilson v. City of Allegheny*, 1876 WL 13769, at *6 (Pa. 1875) (holding city could not assess for improvements to Toll Road because statutes allowing for assessment to defray the value of road improvements did “not comprehend a private company's chartered toll-road”). According to the Pennsylvania Supreme Court, “[i]n no proper sense . . . can this plank-road be viewed as a public street” *Id.* Other courts have explicitly held private toll road property to be taxable. *See, e.g., Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So. 2d 834 (Ala. 2003); *Texas Turnpike Co. v. Dallas County*, 271 S.W.2d 400, 403 (Tex. 1954).

Indiana’s constitution strictly limits the tax exemptions which may be granted by the legislature to those expressly set forth in Article X, § 1. Because private Toll Road operations are not among them, the tax exemption provisions of HEA 1008 contravene Indiana’s Constitution. Accordingly, there is at the very least a substantial issue on this point.

VI. CONCLUSION AND PRECISE RELIEF SOUGHT

For the above and foregoing reasons, Plaintiffs pray that this Court will reverse the Order of the trial court, remand the matter to that court for further proceedings, and grant Plaintiffs all other and proper relief.

Respectfully submitted,

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