

STATEMENT OF FACTS

This case challenges provisions of House Enrolled Act 1008 (the “Act”), 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. . . .” Def. Br. 22. In fact, legally, the Toll Road *must* be titled in the name of the State under Ind. Code § 8-15-2-5(5). *Id.*

The Governor signed the legislation on March 22. 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 limit for challenges to the lease. On April 12, 2006, Plaintiffs timely brought this case.

The amount the State will receive in the transaction is \$3.85 billion. However, there was evidence that, if the State kept the Toll Road and applied the same toll increases that the lease allows the operator to impose, the present value of the State’s interest would be more than \$11 billion.

While denominated a lease, the agreement specifies that it is to be treated as a sale. Lease Section 2.8. To secure its interest, the IFA receives a security interest in the Concessionaire’s Operating Agreement and Plans. *Id.* at Section 3.14. In order to permit the Concessionaire to create and cultivate a secondary market and thus recoup its capital investment, the IFA agrees to subordinate its security interest to leasehold mortgagees. *Id.* Although the transaction is characterized as a “lease” or “concession,” it is agreed to be a “sale” for Federal

taxation purposes. Moreover, the concessionaire must deliver a quit claim deed at the termination of the purported “lease.”

In addition, the Act contemplates a lengthy, seventy-five (75) year public-private partnership in which, for a fee, the State agrees to provide policing and such other services as required by the lessee. Particularly, to assist the owner in the successful marketing of its securities the IFA and the State have agreed to provide enhanced police protection, subordination of credit and to refrain from maintaining roads and highways that might be competitive with the owner as well as suspending the operation of the States’ prevailing wage legislation. *See, e.g.*, Lease Section 2.8, Section 1.1 (Definition of “Delay Event”) and Section 14.1 (e) and Section 15.1 (c); Section 9.1 (p); Section 3.16; Section 3.10 (Payment of Taxes) and 9.1(p); and Section 3.14 relating to IFA’s security interests.

The State also agrees throughout this period to facilitate such further financing as the lessee may from time to time need by, for example, by subordinating the State’s security interest in valuable assets of the lessee, and extending the moral authority of the State to the IFA’s obligations under the Agreement in order to permit the operator to create a secondary market, thus refinancing its investment in such a manner that the operator intends and represents that it will return gains of 12 to 15% for its investors.

The Act creates several “trust funds” which are directed to accept the proceeds from the sale/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 existing debt on the Toll Road itself, none of the proceeds will be used to pay public debt, and none will be deposited into the Common School Fund.

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. *See* Exs. 17 and 18, the Digest of HB 1008 and its Fiscal Impact

Statement and Ex. 37. By 2004, however, Steuben, LaGrange and Porter Counties no longer met the population criteria. Ex. 37.¹

The population classifications here no purpose other than to identify the seven counties traversed by the Toll Road. They do not, for example result in awarding the funds in proportion to population. Tiny Steuben county receives as much money (\$40,000,000) as does St. Joseph County, and more than Lake County and other counties that are a part of the Northwest Indiana Regional Development Authority.

The funds given to the counties may be used for purposes other than the construction of highways, roads, and bridges. The funds can also be used for virtually any economic development project that could otherwise be funded with county economic development taxes. I.C. 8-14-16-5(3).

In addition to specifying particular distributions of the money from the Toll Road Transaction, the Act contains provisions governing the construction and operation of proposed Interstate 69 south of Indianapolis. Sections 8, 23, 39, 40, 41 and 42 prohibit, absent enactment of specific legislative authorization, “Carrying out construction of Interstate Highway 69 in a township having a population of more than seventy-five thousand (75,000) and less than ninety-three thousand five hundred (93,500).” *See* Ind. Code §§ 8-15-2-1(d)(1); 8-15-3-9(e)(2); 8-15-5-1-2(c)(1); 8-15-7-1-5(b)(2); 8-23-7-22(b)(2); and 8-23-7-23(c)(1), as added by the Act. The same sections of the Act prohibit, absent further legislation, “Imposing tolls on motor vehicles

¹ While Plaintiffs submitted the population data at trial in paper form, the simplest way to see what counties (and other localities) met particular population ranges at a given time is to download that same data from http://www.census.gov/popest/cities/files/SUB-EST2004_18.csv, load the data into an Excel spreadsheet, and use Excel’s “data/sort” function to sort the data by the population column for the relevant dates.

for use of the part of an interstate highway that connects a consolidated city and a city having a population of more than eleven thousand five hundred (11,500) but less than eleven thousand seven hundred forty (11,740).” *See* Ind. Code §§ 8-15-2-1(b)(2); 8-15-3-9(e)(3); 8-15.5-1-2(c)(2); 8-15.7-1-5(b)(3); 8-23-7-22(b)(3); and 8-23-7-23(c)(2) , as added by the Act.

Both testimony and the census data showed that the only purpose of the population provisions in the I-69 Construction moratorium was to identify Perry Township, in Marion County, Indiana, which otherwise lies within the proposed I-69 route. Census data shows that Perry Township is the only township in Indiana, and certainly the only one within the proposed expansion of I-69 that fits the population classification. (Exhibit 37.). All witnesses acknowledged that Perry Township was the only township discussed by the legislature, and the population criteria were narrowed in the final version of the bill to ensure that only Perry Township fits the category. (Compare Exhibit 16, p. 18 with Exhibit 17, p. 23.)

Likewise the population classification in the provisions prohibiting tolls serves no purpose other than to identify Martinsville, so that the Legislature could declare the Indianapolis to Martinsville leg of the planned I-69 tollway to be toll free. The 2000 census figures show that Martinsville is the only city that falls within the enumerated population classification. (Exhibit 37.). Representative Moses testified that the provision was prompted by the Martinsville City Counsel’s communication to its representatives that it did not want a tollway. Moreover, in the Digest of House Enrolled Act 1008, and in the Fiscal Impact Statement, Martinsville is identified by name, not by population. (Exhibits 17, 18.)

Perry Township has no unique characteristics that are related to the purposes of the Act. There are many other areas of the State that have commercial and residential development that

could be disrupted by a road project, including areas along the proposed I-69 route. Comparable development continues all the way to Bloomington in Monroe County. Both Steve Bonney and Win Moses testified that, in Johnson County, just south of Perry Township, there is much the same landscape as is found in Perry Township, with the same type of developed neighborhoods, schools and businesses. (See also Exhibits 10, 11-13.) Moses testified that there would be the same property tax issues in Johnson County, as well as in all of the other counties and townships along the planned route. In addition, the I-69 route will travel through Washington, which has developed neighborhoods, businesses, etc. (Exhibits 12 and 27.)

The state's own witness, Ryan Kitchell, has acknowledged such conditions could and do exist anywhere along the planned I-69 expansion route where there are developed neighborhoods and area businesses. (Kitchell trial transcript p. 113.) In fact, these problems exist nearly anywhere a road is constructed. Tom Pietrzak testified that businesses located along existing State Road 31 will be adversely affected by the planned improvements to State Road 31 from Indianapolis to South Bend.

There are also no relevant circumstances unique to the Indianapolis-Martinsville leg of the planned I-69 expansion. Both Bonney and Moses testified that the existing highway over which I-69 will be built, State Road 37, continues on through Bloomington and the planned I-69 expansion would follow existing State Road 37 all the way through to south of Bloomington. In addition, the southern leg of the planned I-69 expansion will follow the route of another existing highway, State Road 57. And while there is an alternate route from Martinsville to Bloomington, there are other alternate routes that could see an increase in traffic if drivers take alternate routes to avoid toll increases. For example, motorists are traveling between Evansville and Indianapolis could use State Road 41 and Interstate 70.

The local funding provisions also address issues that are not limited to the seven counties to whom more than \$200 Million is given. Traffic diverted from the Toll Road will traverse numerous other counties. As trucker Randy Nace testified, his alternate route when traveling from New York to Chicago is U.S. 30. That road runs through Allen County, Whitley County, Kosciusko County, and Marshall County, and is likely to see a significant increase in traffic. Similarly, from the south, increased traffic may occur on I-65 or other north/south roads. Therefore, many counties will experience the same diversion that is anticipated in the Toll Road counties. It is 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.

There is no evidence in the record that the Toll Road is used more heavily by residents, say of Steuben or LaGrange counties than it is by residents Allen County, DeKalb County, Noble County, 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. (Exhibit 28, Toll Road Fact Sheet.) Randy Nace testified he is one of those in-state truck drivers who use the Toll Road. He does not live in a Toll Road county. It is only reasonable to infer that residents of DeKalb, Allen, Noble, Huntington, Whitley, Kosciusko, Starke, Marion, Wells, 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.

None of the special provisions were in the bill as introduced or passed by the House. The Perry Township Amendments and Local Major Moves Construction Funds were added in the Senate, and the Martinsville provisions were first added during the conference committee. (Moses testimony; Exhibits 14, 16, 17.).

Plaintiffs introduced evidence at the hearing of more than \$ 10 billion in “public debt.” Part of this evidence was Defendants’ own “State Debt Table,” that there is more than \$2 billion in formally denominated debt administered by the IFA. Exs. 4 & 5. The Chairman of Defendant IFA 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.”

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.” Ex. 1 at 116. The assets liable to pay this unfunded actuarial liability are not limited to any specific fund or revenue stream. Plaintiffs also introduced evidence of municipal debt, through the testimony of Tom Lewandowski. This debt, while perhaps payable from only a specific fund, is the direct obligation of the municipality involved

Plaintiffs also introduced evidence that IFA has entered into an unlimited indemnification obligation in the lease itself. Ex. A § 3.10. The indemnification obligation created by § 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 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, 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. . . .” Lease Section 9.1 (p). 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.

ARGUMENT

I. This Case is Not a Public Lawsuit Because It Does Not Involve a Municipal Corporation or the Acquisition of a Public Work, And Several Counts Do Not Challenge the Transaction as a Whole.

This Court should deny the Defendants’ request to certify this case as a “Public Lawsuit” under 34-13-5 for at least two reasons: (1) The statute only applies to public works projects of local, municipal governments, and (2) The statute only applies to the creation or acquisition of public works, not their disposition. This suit does not involve either circumstance. A third reason also applies to several counts of the complaint, which deal with the lawfulness of the disposition of the funds from the transaction and the lawfulness of special tax breaks and other State largesse showered on the concessionaire. None of those challenges would fall within the terms of the public lawsuit statute under any reading of that statute.

A. This Case Is Not a Public Lawsuit Because the Indiana Finance Authority is Not a Municipal Corporation

The Public Lawsuit statute does not apply to this case because that statute only applies to the acquisition of public improvements by municipal corporations, and IFA is a *State* finance authority. By its terms, the Public Lawsuit statute only applies to actions that qualify as a “Public Lawsuit.” Ind. Code § 34-13-5-1. Suits meeting that definition are those “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. . . .” Ind. Code § 34-6-2-124. The IFA, as a *State* finance authority, simply does not qualify under the statute. Rather,

non-local public bodies like the IFA are typically known as “public corporations.” McQuillin The Law of Municipal Corporations § 2.03.20 (Database updated October 2005). The common meaning of the term “municipal corporation” is a local corporation, like a city, town or county. 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. Citizens' Trust Co.*, 78 Ind.App. 487, 136 N.E. 49, 50 (Ind. App. 2d Div. 1922) (citations omitted); *see also In re Guardianship of M.K.*, 844 N.E.2d 555, 558 (Ind. App. 5th Dist. 2006). Here, it is anything *but* clear that the terms carry the unusual meaning that Defendants ascribe to them.

IFA’s attempt to stretch the definition of “municipal corporation” contained in Ind. Code § 34-6-2-86 ignores basic principles of statutory construction by reading general language in the statute without regard to the more specific examples given in it. As Indiana Courts have held in interpreting statutes, “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 1991) (citing *Frost v. Review Board of the Indiana Employment Security Division*, 432 N.E.2d 459, 461 (Ind.App. 1982); *see also Holmes v. Review Board of Indiana Employment Security Division* 451 N.E.2d 83, 85 (Ind. App. 4 Dist. 1983); 2A Sutherland, *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)

(quoting Black's Law Dictionary 517 (6th ed. 1990)); *see also* Sutherland, §47:17, *supra* (doctrine equally applicable regardless of the order of general and specific terms).

In the case of the public lawsuit statute, this established rule of statutory construction makes plain that Statewide entities such as the IFA are not “municipal corporations.” The statute defines a “municipal corporation” as:

(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.

Ind. Code § 34-6-2-86.

A review of this statutory language in light of the principles of statutory construction described above confirms what common sense first supposes – Statewide entities are not “municipal corporations.” The terms “public instrumentality or public corporate” are modified by what comes after them – both the list of specific local bodies and the general term “any other *local* public instrumentality or corporation.” Such bodies would include, for example, the Allen County Airport Authority established by Ind. Code § 8-22-3-1.1; other airport authorities established by Ind. Code § 8-22-3-1; the Port Authority created under Ind. Code § 8-10-5-2; and the St. Joseph County Board of Special Funds Managers created by Ind. Code § 6-9-1-2 to deal with convention center financing, among other things). They do not include Statewide entities.

A review of the cases cited by the IFA confirms that the Public Lawsuit Statute does not apply. For not a single one of those cases involves a Statewide entity. *See Hughes v. City of Gary*, 741 N.E.2d 1168, 1170 (Ind. 2001) (suit challenging financing of construction and/or renovation of convention center, hospital, baseball stadium and other local public improvements); *State ex rel. Haberkorn v. DeKalb Circuit Court*, 251 Ind. 283, 241 N.E.2d 62 (Ind. 1968) (suit to restrain construction of schools at particular site); *Johnson v. Tipton Community School Corp.*, 253 Ind. 460, 255 N.E.2d 92 (Ind. 1970) (suit challenging lease rental agreement for local school); *Bell v. State Board of Tax Commissioners*, 651 N.E.2d 816 (Ind. Tax 1995) (same); *Boaz v. Bartholomew Consolidated School Corp.*, 654 N.E.2d 320 (Ind. Tax 1995) (same). In fact, not one of the more than five dozen cases decided under the public lawsuit statute involves a State public improvement or a Statewide agency. Because the IFA is not a municipal corporation, this case does not fall within the public lawsuit statute. Accordingly, the Court should deny the IFA's motion.

B. This Case is Not a Public Lawsuit Because The Public Lawsuit Only Applies to Acquisition of Public Improvements, Not Their Disposition

The Court should also deny the IFA's motion because the Public Lawsuit statute applies only to activities by which a municipal corporation acquires a public improvement, not those by which it disposes of one. As noted above, the statute applies to actions "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. . . ." Ind. Code § 34-6-2-124. The IFA's superficial argument based on the term "leasing" 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 Court noted in *Travelers Insurance Co. v. Transport Insurance Co.*, 787 F.2d 1133, 1138 (7th Cir. 1986), “It 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 context 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 makes clear that it is the leasing of a public improvement “to a municipal corporation” that is protected. Ind. Code § 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.” Thus, when the statute is read “as a whole to determine legislative intent” as is required by Indiana law, *e.g.*, *Tippecanoe County v. Indiana Manufacturers Association* 784 N.E.2d 463, 465 (Ind. 2003), 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,” Ind. Code § 34-6-2-124, are both actions by which a municipality acquires a public improvement, not actions by which it disposes of one. Again, principles of statutory construction come into play and resolve the issue. As the Indiana Courts have held, “[t]he 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.App. 2000); (citing *State v. D.M.Z.*, 674 N.E.2d 585 (Ind. App. 1996) and *Lincoln National Bank v. Review Board of Indiana Employment Security Division*, 446 N.E.2d 1337, 1338-39 (Ind. App.1983)). As our Supreme Court has noted, 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) (quoting an early statutory treatise; internal quotation marks and citation omitted). Again, application of the rules of statutory construction demonstrates that the Public Lawsuit Statute does not apply.

Finally, the purpose of the statute, even as described by the IFA, shows that this case is not a Public Lawsuit. A statute should, of course, be interpreted in light of its purpose. *Heaton & Eadie Professional Services Corp. v. Corneal Consultants of Indiana, P.C.*, 841 N.E.2d 1181, 1186 (Ind. App. 2d Dist. 2006) According to the Defendants, “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.” IFA’s Memorandum at 5 (citing *Halberkorn*). Even that language 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 (or any other case under the Public Lawsuit statute) involved an attempt by a governmental entity to *dispose* of a public improvement.

C. The Parts of the Case Relating to Disposition of Funds and Tax Exemptions Do Not Fall Within the Public Lawsuit Statute Under Any Reading of the Statute

In addition to the fact that the Public Lawsuit statute applies neither to Statewide agencies nor to dispositions of public works, it does not apply to the claims or relief sought under several counts of the complaint. For example, Count I deals with the how the proceeds of the lease will

be used, and seeks an order requiring that they be used to pay the public debt and for the Common School fund. None of those requests questions “the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement.” Similarly, Count II asks that the lessee not be exempted from taxes, and that the IFA not indemnify it for any taxes that are imposed. Again, neither the provisions nor purposes of the Public Lawsuit Statute are implicated by that claim for relief. Count III seeks declaratory and injunctive relief to prevent the State from subordinating its security interest. Again, this relief does not question “the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement.”

At a minimum, those three counts fall outside the Public Lawsuit Statute, for reasons in addition to the statute’s general inapplicability to State entities or dispositions. Accordingly, no bond can or should be required on those counts. As the Court of Appeals held in *Irwin R. Evens & Sons, Inc. v. Board of the Indianapolis Airport Authority*, 584 N.E.2d 576, 582 n.4 (Ind. App. 4th Dist. 1992), an entire suit can be treated as a Public Lawsuit where it “is incapable of separate private and public treatment.” (citing *Pepinsky v. Monroe County Council*, 461 N.E.2d 128 (Ind. 1984) and *Gariup v. Stern*, 254 Ind. 563, 261 N.E.2d 578 (1970)). In *Gariup*, the Supreme Court approved combined treatment because “The causes were commingled in each pleading paragraph and as such were not susceptible of separate treatment by the trial court.” 261 N.E.2d at 567; accord *Pepinsky*, 461 N.E.2d at 133. Here, the counts in the complaint plainly *are* capable of separate treatment. Each is set forth separately and they seek different relief.

To put it another way, the Counts in the Complaint are severable, such that, even if the Public Lawsuit were to apply to some of them (and it does not for the reasons discussed in Parts A and B above), the balance of the suit could proceed without regard to the Public Lawsuit

statute.

On the other hand, Defendants have stated that severability *of portions of the statute* is not an issue the Court should decide at this point in the proceedings. Def Br. 7-8. Accepting Defendants' position, a "substantial issue" raised by the Plaintiffs as to any part of the statute defeats the request for a bond as to the entire case.

II. There Are Substantial Issues on Each of Plaintiffs Counts

In addition, no bond is required because the Plaintiffs have raised substantial issues. Under the Public Lawsuit Statute, no bond is required if the Plaintiffs "establish facts that would entitle the plaintiff to a temporary injunction." Ind. Code § 34-13-5-7(b). Because this statute was enacted in 1967 and the term "temporary injunction" predates the current Trial Rules the Indiana Supreme Court has held that under this statute the plaintiffs must demonstrate 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) (citing *Hughes v. City of Gary*, 741 N.E.2d 1168 (Ind. 2001); *Boaz v. Bartholomew Consolidated School Corp.*, 654 N.E.2d 320 (Ind. Tax 1995) and *Johnson v. Tipton Community School Corp.*, 253 Ind. 460, 255 N.E.2d 92 (1970)).

This is not a particularly onerous showing. Rather, Plaintiffs must merely show that the issues are "substantial" and "proper for investigation by a court of equity." *Hughes v. City of Gary*, 741 N.E.2d 1168, (Ind. 2001) (Rucker, J. concurring, quoting *Johnson v. Tipton Community School Corp.*, 253 Ind. 460, 464-65, 255 N.E.2d 92, 94 (1970)); *see also Hughes*, 741 N.E.2d at 1171 (also citing *Johnson* and stating the standard is whether there is a "substantial question"). Indeed, the Indiana Supreme Court has frequently stated that the 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) (quoting *Johnson*, 255 N.E.2d at 94); *City of Elkhart v. Curtis Realty Co.*, 253 Ind. 619, 624, 256 N.E.2d 384, 387 (Ind. 1970) (quoting *Johnson*). As shown below, Plaintiffs more than meet this minimum showing.

A. There is a Substantial Issue Under Article 4, §§ 22 and 23 of the Indiana Constitution Because the Act Creates Unjustified and Unconstitutional Special Legislation.

Several provisions of the Act violate Sections 22 and 23 of Article 4 of the Indiana Constitution because they apply only to specified counties, cities, or in one case, a township. Article 4, § 22 provides a list of subjects on which “local or special laws” are absolutely prohibited. Among these are laws providing for “laying out, opening, and working on highways” and for “vacating roads”. Section 23 prohibits special legislation in all of the subjects listed in § 22 and also “in all other cases where a “general law can be made applicable.” The “growing evil” of special legislation was one of the catalysts for the Constitutional Convention of 1850 and legislation concerning particular roads and streets was one of the growing evils §§ 22 and 23 were designed to prevent. *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296, 299 (Ind. 1993) (citing Frank E. Horak and Matthew E. Welsh, *Special Legislation: Another Twilight Zone*, 12 Ind. L.J. 109, 115-116 (1936).

The provisions that prohibit construction of I-69 through Perry Township without further legislation, and that likewise prohibit charging tolls on that part of I-69 that will run between Indianapolis and Martinsville violate *both* of those sections, because they relate to subjects on which “special legislation” is absolutely forbidden under Section 22. Those provisions of the Act giving a large part of the funds from the Toll Road transaction to specified counties violate Section 23 because a general law “can be made applicable.”

1. The Challenged Provisions Are Special Laws

A statute is “general” if it applies to “all persons or places of a specified class throughout the state.” The statute is “special” if it “pertains to and affects a particular case, person, place or thing, as opposed to the general public.” *Kimsey*, at 689 (quoting Black’s Law Dictionary, 890 (7th ed. 1999)). The first step in analyzing a challenge to a law under Article 4 is to determine whether the law is general or special. *Id.* at 690. The court must examine the “circumstances surrounding [the Act] including the language in the Act itself”. *Id.* (quoting *State v. Hoovler*, 666 N.E.2d 1229, 1234). A statute with a population category is a special law if it is designed to operate upon or benefit only a particular county or other local governmental unit and the Act’s subject matter is unrelated to the population classification. *Kimsey*, *supra* 781 N.E.2d 691. In other words, if the population limit serves no purpose other than to identify the affected locale, the Act may just as well have identified it by name. Either way, it is special legislation. *Id.*²

Sections 8, 23, 39, 40, 41 and 42 of the Act contain provisions that are “special laws” under the Constitution. Those provisions prohibit the governor, Department of Transportation, Indiana Finance Authority, or any operator under a public private partnership from “Carrying out construction of Interstate Highway 69 in a township having a population of more than seventy-five thousand (75,000) and less than ninety-three thousand five hundred (93,500).” *See* newly added Ind. Code §§ 8-15-2-1(d)(1); I.C. 8-15-3-9(e)(2); 8-15-5-1-2(c)(1); 8-15.7-1-5(b)(2); 8-23-7-22(b)(2); and 8-23-7-23(c)(1).

From the testimony of the witnesses, the facts surrounding the Act, and the census data, it is clear that the population classification serves no purpose other than to identify one township:

² In *Kimsey*, to simplify Article IV analysis, the Supreme Court urged lawmakers to identify the affected county or governmental unit by name and to provide legislative findings justifying the legislation’s limited territorial application. Here, the legislature did neither.

Perry Township, in Marion County, Indiana. Review of census data shows that Perry Township is the only township that fits the population classification. (Exhibit 37.) All witnesses acknowledged that Perry Township was the only township discussed by the legislature, and the population criteria were narrowed in the final version of the bill to ensure that only Perry Township fits the category. (Compare Exhibit 16, p. 18 with Exhibit 17, p. 23.) Thus, like the laws in *Kimsey*, *State v. Lake Superior Court*, 820 N.E.2d 1240 (Ind. 2005), and *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996), the law is a special law, exempting only one locale from the planned I-69 expansion. Defendants' claim that the provision is "general" lacks any support.

The same conclusion is required for provisions in the same sections of House Enrolled Act 1008 that prohibit the Department of Transportation, the IFA, the governor and any operator under a public-private agreement from "Imposing tolls on motor vehicles for use of the part of an interstate highway that connects a consolidated city and a city having a population of more than eleven thousand five hundred (11,500) but less than eleven thousand seven hundred forty (11,740)." See newly added Ind. Code §§ 8-15-2-1(b)(2); 8-15-3-9(e)(3); 8-15.5-1-2(c)(2); 8-15.7-1-5(b)(3); 8-23-7-22(b)(3); and 8-23-7-23(c)(2).

As with the population classification for the Perry Township exemption, the population classification in the above sections serve no purpose other than to identify Martinsville, so that the Legislature could declare the Indianapolis to Martinsville leg of the planned I-69 tollway to be toll free. Again, census figures show that Martinsville is the only city that falls within the enumerated population classification. (Exhibit 37.) Representative Moses testified that the provision was prompted by the Martinsville City Counsel's communication to its representatives that it did not want a tollway. Like the identification of Tippecanoe County in *Hoovler*, the identification of Martinsville is by such a narrow population range (the range is separated only

by 240 people) that the Legislature's intent to use the population range as a substitute for identification of Martinsville by name is apparent. In fact, the Digest of House Enrolled Act 1008 and its Fiscal Impact Statement both identify Martinsville by name, not population. (Exhibits 17, 18.). Thus, once again, these provisions are special legislation.

Similarly, the seven county-population descriptors that specify which counties receive substantial sums of money under the Act, one of which involves a range of only fifty people and another of which involves a range of only 400, serve no purpose other than to identify the seven counties traversed by the Toll Road. Indeed, the categories are so narrow that if the Court took seriously the Defendants' contention that they are "general laws," three of the counties, LaGrange, Steuben and Porter, would not, in fact, be described. For population categories in general laws must be "open" so that other counties or cities can move in and out of them. *See North Township Advisory Board v. Mamala*, 490 N.E.2d 725, 726 (Ind. 1986) (abrogated, to the extent it found a particularly narrow population range could describe a "general law," in *Kimsey*). By the time the Act was passed, the population in these counties had changed sufficiently from the 2000 census that they did not fall within the statutory range. Ex. 37.

Because the only counties who receive money for the Local Major Moves Construction Funds are the seven Toll Road counties, the statute is a special law. Although other counties in the state will receive money under the Act from the Motor Vehicle Highway Account, those are distributions in which the Toll Road counties will also share. The bottom line is that the seven Toll Road counties are to receive 34% of the proceeds from the Toll Road lease *on top of* proportionate distributions to all Indiana Counties, and the Toll Road counties are the only counties who receive these extra "Local Major Moves" funds.

2. The Special Provisions Prohibiting Construction of Interstate 69 Through Perry Township Violate Sections 22 and 23.

The Perry Township provisions are invalid because they fall within the categorical prohibition against special laws on subjects contained in Article 4, § 22. That section specifically prohibits special laws providing for “laying out, opening and working on highways” or “vacating roads.” The Perry Township provisions prohibit the “laying out”, the “opening” and any “work” on a “highway” (I-69) in one township only, Perry Township. If the law clearly fits into a § 22 prohibited category, it is *per se* invalid, and the inquiry ends there. *State ex rel Attorney General v. Lake Superior Court*, 830 N.E.2d 1240, 1248-49 (special law “for the assessment of taxes” in Lake County violated Article IV, § 22). As such, these provisions of the Act are *per se* unconstitutional special laws under § 22.

Defendants’ claim that the provisions do not violate § 22 because they do not “specify where or how the highway must be built,” but merely require a return to the legislature to approve any such further plan, Def. Br. 41, misses the point. By specifying where the highway may not be built, the Legislature has, in effect, specified where the highway may be built. And, contrary to Defendants’ assertion, the Legislature did not, and, indeed, cannot, determine where a highway will be built, as to do so is to violate § 22. Rather than the Legislature selecting the planned route for the I-69 expansion, that route was selected by INDOT, after years of extensive and thorough study, review and analysis, and was approved by the Federal Highway Administration (FHWA). (See Exhibits 30 and 31A.) Thus, the Legislature has forbidden the “laying out”, the “opening”, and the “working on” I-69 in Perry Township, despite the fact that Perry Township is within the selected I-69 route approved by INDOT and despite the fact that the Legislature cannot determine the route of a planned road via a special law. In fact, because Perry Township lies within the approved route for the Indiana-Evansville I-69 extension, these

provisions of the Act also have the effect of “vacating” the selected road, which is also *per se* unconstitutional under § 22.

Defendants’ claim that the provisions do not violate § 22 because they “only” require a return to the legislature to approve any further plan, also misses the mark. The fact that the Legislature could amend or repeal the prohibition sometime in the future does not change its current unconstitutionality. Indeed, the language “unless the general assembly enacts a statute authorizing that activity,” which prefaces the ban on Perry Township road construction, is entirely without meaning. The General Assembly can *always* enact a statute authorizing conduct it has previously prohibited, whether it expressly reserves the power to do so or not.

The General Assembly did *consider* the sort of “study” bill that Defendants describe. A variant of the Perry Township prohibition, which was introduced in the House by Legislator Frizzell, who is a representative for Perry Township, would have only required INDOT to further study the northern end of the I-69 expansion. (Exhibit 15.) However, the General Assembly instead passed a law specifically banning construction in a specific township. Had the legislature merely wanted to approve a “further plan” for I-69, it could have passed a general law doing so.

In addition to the fact that they fall squarely within the categorical ban on special legislation in § 22, the Perry Township provisions violate § 23 because there are no inherent characteristics peculiar to Perry Township that would justify the legislation and because, to the extent there are any such conditions, the legislation does not apply wherever those conditions are found. Even if a special law is not *per se* prohibited by § 22, it is unconstitutional under § 23 if a general law “can be made applicable.” If there is a lack of distinctive characteristics in the

specified locale or if the conditions are found in at least a variety of places in the State, a general law can be made applicable and is therefore required under § 23. *Kimsey, supra.*

Here, the supposed “distinctive characteristics” that Defendants suggest for routing I-69 around Perry Township obtain elsewhere in the State. In addition to the fact that INDOT and the Federal Highway Administration (FHWA) considered all of the factors relating to the impact of the road on homes and businesses that Defendants now suggest when those agencies selected and approved the I-69 route through Perry Township, Exhibits 30, 31A, 28, the state’s own witness, Ryan Kitchell, acknowledged, that these factors could and do exist anywhere along the planned I-69 expansion route where there are developed neighborhoods and area businesses. Kitchell trial transcript p. 113. In fact, this sort of development continues all the way to Bloomington in Monroe County. Both Steve Bonney and Win Moses testified that, in Johnson County, just south of Perry Township, there is much the same landscape as is found in Perry Township, with the same type of developed neighborhoods, schools and businesses. (See also Exhibits 10, 11-13.) Moses testified that there would be the same property tax issues in Johnson County, as well as in all of the other counties and townships along the planned route. In addition, the I-69 route will travel through Washington, which has developed neighborhoods, businesses, etc. (Exhibits 12 and 27.) In fact, these problems will exist anywhere a road is constructed near urban areas. Tom Pietrzak testified that businesses located along existing State Road 31 will be adversely affected by the planned improvements to State Road 31 from Indianapolis to South Bend.

Because these conditions are found in at least a variety of places throughout the State (indeed, even along the planned route), a general law can be made applicable and is required under § 23. If the legislature simply wanted to restrict I-69 from traversing developed neighborhoods, it could easily have passed a general law doing so. Instead, the legislature

passed a special law that applies only in Perry Township and does not apply in the other places where these characteristics exist. Thus, these provisions violate the Indiana Constitution.

3. The Provisions Exempting That Portion of Interstate 69 Between Indianapolis and Martinsville from Tolls are Unconstitutional Special Legislation.

The provisions prohibiting the construction of a tollway between Indianapolis and Martinsville also violate § 22 and are therefore also *per se* unconstitutional. They prohibit the “laying out”, “opening”, and “construction of” a tollway between Indianapolis and Martinsville. A tollway is a type of highway or road for which use a toll is collected. *Webster’s Ninth New Collegiate Dictionary*. Before a tollway can be “opened”, it requires particular “laying out” and “construction.” Toll booths must be erected, additional lanes may be erected at places where tolls are collected, travel plazas must be laid out and constructed, and special toll booths are erected at exits, etc. As such, this Act violates § 22 and the law is *per se* unconstitutional. Defendants’ assertions that these provisions merely restrict how the road can be administered, not how the road can be constructed, are incorrect. There is specialized layout and construction required for a tollway or toll road. Moreover, before the road can be administered, it must be laid out, constructed and opened.

Defendants’ claim that a law does not fall within the categorical prohibition on special laws for the “laying out, opening and work[ing] on highways,” unless all three elements are present is also incorrect. In the Supreme Court’s most recent case dealing with special legislation, *State v. Lake Superior Court*, the Supreme Court rejected precisely such a claim regarding § 22’s prohibition on special laws for the “assessment and collection of taxes.” In doing so, the Court noted that the history of the provision made clear that each of the problems it addressed was a moving concern that led to its adoption. Similarly, as the Court noted in

Mosely, one of the types of special legislation that concerned the delegates to the Constitutional Convention of 1850 were special laws related to “particular streams, roads, streets and alleys.” Therefore, it is equally incorrect to suggest that a special law providing for “laying out” a road is constitutional unless it also involves “opening” and “working” on the road.

The prohibition on a tollway from Indianapolis to Martinsville also violates § 23 because there are no “inherent and distinctive characteristics” to justify the special legislation and because the alleged distinctive characteristics are found in at a least of variety of places throughout the State. For example, just as there is an existing route from Indianapolis to Martinsville, which the legislation protects from becoming a tollway, Def. Br. 44, both Bonney and Moses testified that the *same* existing highway, State Road 37, continues on through Bloomington and the planned I-69 expansion would follow that route at least to Bloomington. There is no legislative prohibition on this “existing route” becoming a tollway.

Nor does the presence of an alternate route from Martinsville to Indianapolis make the situation unique. Likewise, there are existing alternate routes from Indianapolis to Evansville. If motorists seek to avoid the new toll road, they may use these routes, including Interstate 70 and U.S. 41. Indeed, Plaintiff Randy Nace, who is a truck driver, testified that this was a route he sometimes takes.

Defendants’ other suggested justification, that the area from Indianapolis to Martinsville is very developed and “by putting I-69 where a wider corridor and on and off ramps would be necessary, it could be a big disadvantage to either existing businesses that are currently along 37 that would not have access to I-69 or just disruptive to the general area,” fails to describe unique characteristics for multiple reasons. The statutory provision does *not* prevent a disruptive road,

even an interstate, from being built through that area, only the charging of tolls. In addition, the southern leg of the planned I-69 expansion will follow the route of another existing highway, State Road 57. Moreover, there are existing businesses all along 37, all the way to Bloomington and, one would presume there are existing businesses along State Road 57. Therefore, the alleged uniqueness of the Indianapolis to Martinsville planned leg of the tollway evaporates. Indeed, Defendants' reliance on the alleged disruption of businesses further along State Road 37 is an admission that there are no "unique circumstances" to justify the Perry Township construction ban.

In sum, the same characteristics that defendants rely upon to justify the "Indianapolis to Martinsville toll free zone" exist in other parts of the State. Were the General Assembly truly concerned that an existing highway should not become a tollway, it could have easily drafted a general law prohibiting just that. Instead, it enacted a special law. Because a general law could be made applicable, the legislation is unconstitutional special legislation under *Kimsey*.

4. The Special Distributions of Funds to Only a Few Counties Are Unconstitutional Special Legislation.

Defendants seem to suggest that, because the Toll Road traverses these seven (7) counties, no general law could be made applicable. Of course, a road cannot go everywhere. However, this situation is not like the situation in *Mosely*, where only certain counties could conduct riverboat gambling. Here, in contrast, there is no relationship between the special laws' grant of money to the Toll Road counties and the existence of the Toll Road in these counties. In other words, the fact that the Toll Road traverses these counties is no reason to give them monies for local purposes, unrelated to

the Toll Road. 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.

The Defendants offer one explanation to justify the subsection's application only to these select counties: "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." (Brief, p. 44; Schalliol trial transcript pp. 38-39). But, this justification (which is in no way inherent in the population ranges) does not turn on facts unique to the Toll Road counties, as the uncontroverted testimony of Randy Nace and Win Moses confirmed. Also, the monies given to the Counties are not rationally related to, and do not serve the purpose for which they are ostensibly given, i.e., to cope with the diversion of traffic from the Toll Road.

It is wholly illogical to believe that traffic will be diverted from the Toll Road onto local roads maintained by the counties. If there is a diversion of traffic, it will most likely be to U.S. 20 or State Road 120, both of which are roads parallel to the Toll Road. However, as Moses testified, these roads are not maintained by the counties, but are maintained by the state.

Moreover, if there is a diversion of traffic from the Toll Road, as toll rates increase, the diversion will not be unique to the toll road counties. As both Nace and Moses testified, traffic will also be diverted onto other roads located throughout the State, as truck drivers and other motorists adjust their routes to avoid the Toll Road. For example, U.S. 30, which runs through Allen County, Whitley County, Kosciusko County, and Marshall County, is likely to see a significant increase in traffic. Similarly, from the south, increased traffic may occur on I-65 or other north/south roads. Therefore, many counties will experience the same diversion that is anticipated in the Toll Road counties.

Thus, this case is like *Kimsey*, where the defendant tried to justify a special law for St. Joseph County 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) within the same county from annexing each other's land. As the Supreme Court observed, "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. The 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, the Court struck down 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.*

Finally, the local Major Move 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 that could otherwise be funded with county economic development taxes. I.C. 8-14-16-5(3). Thus, the grant of money is not related to the characteristic allegedly supporting the special law and it is, therefore, unconstitutional.

Nor can the special provisions be justified as an attempt to "mitigate" the toll increases by returning to the Toll Road counties some part of the increased tolls that the Legislature believed would be paid primarily by residents of the Toll Road counties. There is no evidence in the record that the Toll Road is used more heavily by residents, say of Steuben or LaGrange counties than it is by residents of, say Allen County, DeKalb County, Noble County, 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.

(Exhibit 28, Toll Road Fact Sheet.) Randy Nace, one of those in-state truck drivers, uses the Toll Road but does not live in a Toll Road county.

Moreover, the Local Major Moves payments are to the counties, not to the residents who pay the tolls, and there is no connection between the amount of money a Toll Road county receives under Local Major Moves, and the amount of increased tolls its residents pay. For example, tiny Steuben County receives the same amount of Local Major Moves money as does St. Joseph County, which is nearly ten times its size. Thus, the amount paid to each county is wholly unrelated to its population and the potential number of residents using the Toll Road, and the law is not reasonably related to this alleged “inherent characteristic” of the Toll Road counties.

Moreover, the payment of increased tolls will not be unique to the Toll Road counties, but will apply to all Indiana residents who use the Toll Road, no matter where they happen to reside. For example, Plaintiff Nace testified that he uses the Toll Road, yet he resides in a non Toll Road county, Carroll County. It is only reasonable to infer that residents of DeKalb, Allen, Noble, Huntington, Whitely, Kosciusko, Starke, Marion, Wells, 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. A general law plainly could be made applicable, and indeed the Senate version of the Act contained just such a general law, which would have given all Indiana residents a tax credit. (Exhibit 16, p. 7.).

These special laws, which inserted into the Act to obtain votes, are unconstitutional. These provisions of the legislation, and the provisions related to I-69 are logrolling, plain and simple. As the Indiana Supreme Court noted in *Kimsey*, log rolling was among the perceived

evils that Article 4, §§ 22 and 23 were designed to prevent. *Kimsey*, 781 N.E.2d at 685-686.

Accordingly, this court should find that the provisions are unconstitutional special legislation.

B. There is a Substantial Issue Under Article 10, § 1 of the Indiana Constitution Because the Act and the Lease Purport to Exempt the Interest of Defendants Statewide Mobility Partners and ITR Concession Company From Ad Valorem Taxation.

Plaintiff also demonstrated the existence of a substantial issue under Article 10, § 1 of the Indiana Constitution, which requires “a uniform and equal rate of property assessment and taxation,” with only limited exceptions, none of which applies here. Several provisions in the statute, including Section 39 of the Act, which adds Indiana Code § 8-15.5-7-1, and Sections 31 and 40, exempt the Concessionaire from Indiana Taxation. This special treatment violates Article 10, § 1’s mandate of equal taxation.

The framers of the Indiana Constitution 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, 322-324 (Ind.1996) (tracing adoption of the provision in the Constitutional Convention. The framers’ concern with equality was not, of course, limited to unequal assessments (such as those considered in *St John*), but extended to exemptions as well. As the author of the constitutional provision 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).

Thus, it is unsurprising that, fifty years after adoption of the constitution, the Indiana Supreme Court noted that “The decisions of this court 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*, 63 N.E. 25, 28 (Ind. 1902) (collecting cases)

The specifically enumerated exceptions to the general rule of equal taxation established by Article 10, § 1 do not include exemptions for privately held toll roads. Had the framers intended such an exemption, they surely would have been clear about the matter, as private toll roads were not unknown to the framers at the time the Indiana Constitution was adopted. As one historian notes, “the entire state of Indiana became dotted with private toll roads with their little toll houses and long poles for gates” in the 1850s. See Schmal, *Pioneer History – The Old Plank Road* (April 30, 2002 Lowell Tribune at 6), 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 relied upon by Defendants, that for “Property 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*, the Indiana Supreme Court carefully limited the case on which Defendants rely, *City of Louisville v. Babb*, 75 F.2d 162 (7th Cir. 1935), to its facts. As

our Supreme Court noted in *Chadwick*, the earlier case involved a situation where “The bridge property ***was not for private profit.***” 216 Ind. at 411, 24 N.E.2d at 943. Thus, the Court reasoned “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.*

The Indiana Supreme Court has followed this public/private distinction several times since *Chadwick*, including in several cases on which Defendants rely. For example, in *Steup v. Indiana Housing Finance Authority*, 273 Ind. 72, 91, 402 N.E.2d 1215, 1227 (Ind., 1980), the court stated that “Having 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. 10, § 1 of the Indiana Constitution.” Likewise, in *Ennis v. State Highway Commission*, 231 Ind. 311, 329, 108 N.E.2d 687, 696 (Ind. 1952), the Court upheld a tax exemption for the Indiana Toll Road commission “[s]ince we have found this not to be a private corporation. . . .” And *Orbison v. Welsh*, 242 Ind. 385, 408-409, 179 N.E.2d 727, 738 - 739 (Ind.1962), another case on which Defendants rely, made clear that its use of the terms “public or governmental purpose” were “as distinguished from private.”

In another early case under Article 10, § 1, the Indiana Supreme Court made plain that privately held property did not fall within the “municipal purposes” exemption. To allow such an exemption, according to the Court “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*, 150 N.E. 787, 788 (Ind. 1926) (collecting cases).

Nor is the argument that Defendants attempt to stitch together using cases decided under the “religious” or “charitable” exemptions persuasive. Indeed, one of the cases Defendants cite, *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 more of the cases on which Defendants rely, *Vink v. Work*, 158 Ind. 638, 64 N.E. 83 (Ind. 1902) and *College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905 (Ind. Tax 2006), deal solely with statutory issues. And of course, the “charitable,” “educational” and “religious” exemptions deal with fundamentally different types of entities. To put it simply, there are now, and always have been, private charities, schools and churches (indeed, churches can *only* be private). But municipalities are, at their very core public and governmental.

The Defendants’ “public purpose” argument also proves too much. For if a road, regardless of private ownership and operation is considered to be held for a public purpose, so too could 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. As the Illinois Supreme Court held, “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” *Lake Shore & M.S. Ry. Co. v. Chicago & W.I.R. Co.*, 1881 WL 10433, *5 (Ill. 1881). Likewise, the Pennsylvania Supreme Court held that a city could not assess the

property of landowners abutting a private toll road for improvements to that road because statutes allowing for assessment to defray the value of road improvements did “not comprehend a private company's chartered toll-road.” *Wilson v. City of Allegheny* 1876 WL 13769, *6 (Pa. 1875) According to the 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. *Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So.2d 834 (Ala. 2003) *Texas Turnpike Co. v. Dallas County* 153 Tex. 474, 480, 271 S.W.2d 400, 403 (Tex. 1954).

Indiana’s constitution strictly limits the exemptions which may be granted by the Legislature to those expressly set forth in Article 10, § 1. Private toll road operations are not among the exemptions permitted by Article 10, § 1 and, accordingly the tax exemption provisions of the Act contravene this section of Indiana’s Constitution. There is, at the very least, a substantial issue on this score.

C. There is a Substantial Issue Under Article 1, § 23 of the Indiana Constitution Because the Act Grants an Exclusive Franchise to a Private Company to Operate a Public Work.

The Act and Lease violate Article 1, § 23, of the Indiana Constitution because they create an exclusive franchise to a private company to operate a public work, contradicting the core values that animated the adoption of that section of the Indiana Constitution. Article 1, § 23 of the Indiana Constitution prohibits the General Assembly from granting “to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” This case involves state-granted monopolies, which, particularly those for public works built with public money, violate the core constitutional values that led to the adoption of Article 1, § 23. As the Indiana Supreme Court explained in the first of its modern cases interpreting the provision, “at the time of the adoption of Section 23 and its ratification as part of

the 1851 Indiana Constitution, the principal purpose was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity involving the state's participation in commercial enterprise.” *Collins v. Day*, 644 N.E.2d 72, 77 (Ind. 1994). A review of the debates confirms this purpose. As one delegate stated “the proposition is a plain one, that there shall be no exclusive monopolies.” *Debates*, at 1394 (Remarks of Delegate Biddle). Daniel Read, a delegate from Monroe County, was even more forceful: “Money making is not the business of the State. If the State claims a monopoly of any business she inflicts an injury upon her citizens which is little better than downright robbery. If she sells out a monopoly for a *bonus*, the robbery upon the citizens is ordinarily still worse, as being paid for and sanctified by a right purchased from government.” He decried such actions as “a most odious and anti-republican principle, and more worthy of the days of monopoly, in the reign of Queen Elizabeth, than of an American State.” *Debates*, at 645-46.

While the Court in *Collins* noted that its decisions “have expanded the function of Section 23” to “matters unconnected with the state’s involvement in commercial enterprise,” there is no need for an expansive reading here. Rather, the Act and Lease violate the core purpose of Section 23. The Act purports to grant an exclusive franchise to a private company to operate a public work, namely the Indiana Toll Road. Section 39 of the Act authorizes one and only one public/private agreement to operate a Toll Road, the one at issue in this case. The use of the singular indefinite article makes this plain, as does the provision prohibiting the Governor from entering into such an agreement after August 1, 2006. The lease also contains provisions granting the concessionaire exclusive rights, including provisions that prohibit the state from improving or even maintaining certain “competing roads.”

Because the legislation violates the core value animating the adoption of section 23, the

“rational basis” test of *Collins* does not apply, and the legislation is invalid. *Price v. State*, 622 N.E.2d 954 (Ind. 1993). In *Price* the Indiana Supreme Court held that, even though the Indiana Constitution’s “free speech” clause ordinarily provided protection for speech so long as laws restricting it were “rational,” laws that materially burdened the “core constitutional value” of political speech were not subject to such lax judicial scrutiny. *Clinic for Women, Inc.*, 837 N.E.2d at 983. The Indiana Supreme Court in *Price* declared that “[a] right is impermissibly alienated when the State materially burdens one of the core values which it embodies.” *Id.* at 960. “Material burden” analysis does not involve weighing nor is it influenced by the social utility of the state action at issue. *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 447 (Ind. 2001) (citing *Price*, 622 N.E.2d at 960 n. 7). If the right, as impaired, would no longer serve the purpose for which it was designed, the right has been materially impaired. *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 447 (Ind. 2001) (quoting *Price*, 622 N.E.2d at 960 n.7). In this case, a state granted monopoly will materially burden the very core value upon which Article 1, § 23 was originally enacted – the prevention of state created monopolies. This conclusion is supported by both the text and historical context of our Indiana Constitutional guarantee. Thus, there is at least a substantial issue that the Act and Lease violate Article 1, § 23 of the Indiana Constitution

D. There is a Substantial Issue Under Article 8, § 2 of the Indiana Constitution Because the Act Directs the Proceeds of the State’s Transfer of the Toll Road Into Special Highway Funds Instead of into the Common School Fund.

The Act does not direct any of the proceeds of the Toll Road transaction to the Common School Fund. Because the money from the transaction is proceeds from lands granted to the State, Article 8, § 2 requires that the proceeds be deposited in the Common School Fund.

Article 8, § 2 of the Indiana Constitution provides that the Common School Fund consists of, among other things “All lands that have been, or may hereafter be, granted to the State, where no special purpose is expressed in the grant, and the proceeds of the sales thereof” The Common School Fund was an integral part of our Constitution. As the Indiana Supreme Court recently pointed out in *Nagy ex rel. Nagy v. Evansville-Vanderburgh School Corp.*, 844 N.E.2d 481, 490 n.8 (Ind. 2006), “[t]he delegates devoted significant time to deliberations regarding a proper and practicable manner to manage and distribute resources committed to funding public education. (citing multiple passages from the *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* (A.H. Brown ed., 1850)).

The 1850 debates of the framers of our Constitution show the importance of funding and maintaining the Common School Fund. As one delegate stated, “Sir, it is a sacred fund which belongs not merely to the present, but to all future generations. Every child which now is, or which may hereafter be born in the State, is interested in its preservation, it is a fund which belongs to the orphan and the friendless equally with those whom circumstances have rendered independent of it.” *Debates*, at 1881 (Remarks of Delegate Bryant). According to another, “The education of every child in the State has become simply a political necessity. It is a necessary measure of defense and self-preservation. We *must* – yes, sir, I repeat it, we *must* have a better devised and more efficient system of general education. On this subject, there can be but one opinion in this body, and indeed, among the people of the State at large.” *Debates* at 1858 (Remarks of Delegate Read).

Here, under the Act, the proceeds of the sale of the Toll Road are not deposited in the Common School fund, but, rather, are used to fund a variety of construction and other projects

throughout the state. The text of the constitution and the intent of the framers and ratifiers make clear that these provisions of the Act are in direct contravention of Article 8, § 2.

Defendants contend that Article 8, § 2 does not apply to the transfer of land at issue in this case because the land underlying the Toll road was not “granted” to the State of Indiana. Instead, Defendants contend the property was acquired either through eminent domain proceedings or through “voluntary acquisition from individual landowners.” In either event, Article 8, § 2 applies in this case.

The term “granted” as used in Article 8, § 2 of the Indiana Constitution includes all conveyances of land to the State, whether by deed or judicial decree and whether for consideration or as a gift. Black's Law Dictionary defines the word “grant” as “1. An agreement that creates a right of any description other than the one held by the grantor. • Examples include leases, easements, charges, patents, franchises, powers, and licenses. 2. *The formal transfer of real property*. 3. The document by which a transfer is effected; esp., DEED. 4. The property or property right so transferred.” Black's Law Dictionary (8th ed. 2004) (emphasis added). This definition includes leases as well as deeds as long as a property right is transferred. In this case, even if the land was acquired through eminent domain proceedings or through a voluntary acquisition, the land was still acquired by a formal transfer of the property. Therefore Article 8, § 2 applies to the transfer of land in this case. Indeed, it is unlikely that the framers of our constitution would have understood the term “grant” as it related to land, in any other sense. Every land transaction has a grantor and a grantee, and every deed has a granting clause. It is in this broad sense that the constitutional provision should be understood.

Defendants' claim that they need not deposit the proceeds from State lands into the common school fund because the parcels of land were "dedicated for the 'special purpose' of containing the right-of-way of the Indiana East/West Toll Road" is also incorrect. Of the deeds introduced in evidence, only a few contain such a restriction *in the grant itself*. For example, the "Easement for Highway Purposes" granted by the New York, Chicago and St. Louis Railway, (found on the 5th page behind Tab 4 of Defendants Exhibit C, the Stipulated Title Documents), provides that the Grantor "does hereby grant unto the said Grantee, its successors and assigns forever, a Perpetual Easement and Right-of-Way for Public Highway and Road Purposes." This is the sort of "special purpose grant" that the framers had in mind. Other conveyances, however, were absolute and in fee simple, such as the deed from the Toll Road Commission to the State of Indiana (found on the 10th page behind Tab 5 in the same exhibit). While a number of the fee simple conveyances state that the land "will be" the right of way for the Toll Road, they do not contain a limiting purpose "expressed in the grant," as required to exempt them from the Common School fund. The absence of such limiting language indicates that those lands are part of the common school fund.

Finally, Defendants' suggestion that Article 8, § 2 does not apply because the IFA plans to lease the Toll Road, misses the point. Whether the land is sold or leased is irrelevant. What is relevant is that *proceeds* are gained by this transaction. Indeed, courts in other jurisdictions that have considered the question have concluded that proceeds from the lease of common school lands must be deposited in the common school fund, just as in the case of a sale. *Texas Pacific Coal and Oil Co. v. State*, 125 Mont. 258, 234 P.2d 452 (1951); *Short v. W.T. Carter & Brother*, 133 Tex. 202, 126 S.W.2d 953 (1938). As the Montana Supreme Court noted in *Texas Pacific*, excluding a long-term lease from the requirement would do "violence to the spirit and purpose of

the very grant itself--the common school fund.” Likewise, the Texas Supreme Court in *Short* held that “The leasing of public school land for mineral production is a sale” within the meaning of that State’s common school fund provision.

Here, undoubtedly there will be revenue or proceeds. Therefore under Article 8, § 2, these proceeds belong to the Common School Fund, not to the trust funds created by the Act. Accordingly, there are substantial issues under Article 8, § 2 of the Indiana Constitution.

E. There is a Substantial Issue Under Article 10, § 2 of the Indiana Constitution Because the Act Directs the Proceeds of the State’s Transfer of the Toll Road Into Special Highway Funds Instead of Paying the Public Debt.

Without question, the Act does not direct the proceeds of the disposition of the Toll Road to payment of the public debt, as the Constitution requires for State public works. Faced with this reality, Defendants assert that there is no “public debt” because IFA is a distinct entity and that no payment is due because the transaction is a lease rather than a sale. Those contentions are both incorrect. Plaintiffs introduced evidence at the hearing of more than \$ 10 *billion* in “public debt.” As both a matter of ordinary interpretation and sound policy, the term “public debt” as used in Article 10, § 2 is a broader term than “State debt,” as used in Article 10, § 5. In addition, under section 2, both the proceeds from any sale, *and* the income of a public work are required to be applied to reduce the public debt.

1. There is Public Debt That Can and Should Be Reduced With the Proceeds of the Disposition of the Toll Road

Defendants’ contention that there is no “public debt” is wrong. At the hearing in this case, Plaintiffs introduced evidence, in the form of the Defendants’ own “State Debt Table,” that there is more than \$2 billion in formally denominated debt administered by the IFA. Exs. 4 & 5. 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.” Ex. 1 at 116. Plaintiffs also introduced evidence of municipal debt, through the testimony of Tom Lewandowski. Finally, IFA has entered into an unlimited indemnification obligation in the lease itself. Ex. A § 3.10.

Each of those obligations is properly considered “public debt” within the meaning of Article 10 § 2. Indeed, the Chairman of Defendant IFA 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.” Defendants’ suggestion that these terms should be given a technical, legal meaning is incorrect. As the Indiana Supreme Court has held, “The words of the Constitution should be construed in a manner consistent with their ordinary sense and their common meaning should be attributed to them.” As our Supreme Court has said “We have 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.’ *Price v. State*, 622 N.E.2d 954, 968 (Ind. 1993) (quoting *Tucker v. State*, 218 Ind. 614, 670, 35 N.E.2d 270, 291 (1941); see also *Eakin v. State ex rel. Capital Improvement Board of Managers*, 474 N.E.2d 62, 65 (Ind. 1985); *Richardson v. State*, 717 N.E.2d 32, 39 (Ind. 1999); *Ajabu v. State*, 693 N.E.2d 921, 929 (Ind. 1998).

Defendants’ suggestion that the debt instruments issued by IFA are not public debt because the IFA “is not the State qua State” is likewise incorrect. The cases on which Defendants rely all involved the issue of whether particular obligations were “State debt” in violation of Article 10, § 5 of the Indiana Constitution. However, the relevant terms in section 2 are “public debt,” a term that is plainly broader than “state debt.” The fact that the framers chose differing language in section 2 than they used in section 5 indicates, under ordinary canons of construction, that a different meaning was intended. As the Indiana Supreme Court held in

Chadwick v. City of Crawfordsville 216 Ind. 399, 409, 24 N.E.2d 937, 942 (Ind.1940), it is error to interpret differing terms to mean the same thing and that “each word. . . must be given effect.”

Finally, the different considerations presented by the separate constitutional provisions informs their meaning. The prohibition on incurring State debt was designed to avoid a repeat of the disastrous “internal improvements” program of the 1830s and 40s. 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 v. State Office Bldg. Commission*, 149 N.E.2d 273, 288 (Ind. 1958) 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. . . .” 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.”

In addition to the broader meaning of “public debt,” the decisions on which Defendants rely concluded that financial obligations incurred by the State instrumentality through issuing revenue bonds did not create “State debt” only if *both* of two elements are present: (1) the instrumentalities are separate from the state in its sovereign capacity and (2) the bonds are to be paid solely from the revenues collected from the project which the bonds funded. Because several of the obligations for which Plaintiffs submitted evidence fail the second criteria, they do not fall within the exemption created by the caselaw, even for “State debt.”

Several of Defendants' cases establish the requirement that an obligation must "be paid solely from the revenue collected from a project." *Ennis v. State Highway Commission*, 108 N.E.2d 687, 699 (Ind. 1952). Thus, in *Steup v. Indiana Housing Finance Authority*, 402 N.E.2d 1215, 1219 (Ind. 1980), the Court emphasized statutory provisions that "The principal of, and the interest on, such bonds or notes shall be payable solely from the funds provided for such payment in this chapter." Likewise, in *Orbison v. Welsh*, 179 N.E.2d 727, 738 (Ind. 1962), the Court relied on provisions requiring that the obligations "shall be payable solely from the funds pledged for their payment. . . ." Under those circumstances, the court held that the statute before it "neither authorizes a debt to be contracted on behalf of the state, ***nor does it authorize a political corporation to contract debts in violation of Art. 10, § 5, or Art. 11, § 12*** of the Indiana Constitution." *Id.* Similarly, *Book v. State Office Bldg. Commission*, 149 N.E.2d 273, 284 (Ind. 1958) upheld the act before it because the obligations created were "payable solely and only from and secured exclusively by pledge of the income and revenue of the state office building" ***and*** "the real estate (the State Office Building and grounds) is not subject to attachment for the payment of principal and interest of such bonds or debentures. The pledge is of income and not of real property." Accordingly, the caselaw establishes a "limited funds" requirement in order to avoid Section 5's ban on State debt.

Another more recent case, not cited by defendants, establishes that ***both*** a special fund ***and*** a separate entity must be present to invoke the "separate fund doctrine." *American National Bank and Trust Co. v. Indiana Department of Highways*, 439 N.E.2d 1129 (Ind. 1982). In that case, the Indiana Supreme Court reversed a trial court and rejected the claim that a "limited fund" alone was enough. According to the Court, prior cases required "both a separate entity operating the special project and issuing the bonds of indebtedness as well as a provision for a

special fund from which to maintain the project and retire the bonded indebtedness.” 439 N.E.2d at 1135.

The evidence at trial showed that at least one of those two required elements was missing for several public obligations. Notably, the indemnification obligation created by § 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 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. Likewise, the unfounded actuarial liability of the Teachers’ Retirement Fund is not limited to any specific sum of money. In addition, the municipal debt proved at trial, while perhaps payable from only a limited fund, was the direct obligation of the municipality involved, and thus not exempt under *American National Bank*. Accordingly, even if “State debt” were the relevant terms, there is clearly debt that must be repaid under Article 10, § 2.

Defendants’ claim that the provision is merely a historical anachronism, and that it “fulfilled its purpose long ago” when the public debt was “paid in full” is inconsistent with at least one case that Defendants themselves cite. In *Orbison*, the Indiana Supreme Court found that the law before the Court did not violate Article 10, § 2. 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.” 179 N.E.2d at 744 (emphasis in original; citing *Ennis v. State Highway Commission, supra*). Likewise, *Ennis* upheld the statute before the Court because there was “no net income involved.” 108 N.E.2d at 697. If Defendants claim that the public debt was paid long ago were correct, these holdings would make no sense at all.

2. The Toll Road Belongs to the State of Indiana.

Defendants' claim that the Toll Road "does not belong to the State," Def. Br. 22, is also incorrect. Defendants themselves concede that "[t]he several thousand parcels of property that make up the Toll road are titled in the name of the State. . . ." Def. Br. 22. As they also concede, the Toll Road *must* be titled in the name of the state under Ind. Code § 8-15-2-5(5). *Id.* This requirement existed even before the passage of HEA 1008.

Defendants' suggestion that the Court should ignore formal ownership of the Toll Road finds no support in the constitutional text, history or caselaw. In fact, the Indiana Supreme Court held in *American National Bank* that the absence of a special entity as obligor was dispositive of the constitutional issue before it. Likewise here, ownership of the Toll Road by the State is not merely a "technical legal requirement," but is dispositive of the fact that the Toll Road is a public work "belonging to the State" under the plain meaning of Article 10, § 2. In addition, *Ennis* specifically held, with respect to the same asset, that "All property involved in the act here questioned *is property of the state.*" 108 N.E.2d at 696 (emphasis added). Accordingly, the Court should reject Defendants' claim that the Toll Road does not "belong to the State" within the meaning of Article 10, § 2.

3. Article 10, § 2 of the Indiana Constitution Controls Payment of Revenues Derived from the Sale and Derived From the Net Annual Income of Public Works.

Under the plain language of Article 10, § 2, the proceeds of the Toll Road transaction must be used to pay the public debt regardless of whether that transaction is viewed as a lease or a sale. That provision requires such payment of "All the revenues *derived from the sale* of any of the public works belonging to the State, *and from the net annual income thereof.*" The Indiana Supreme Court in *Orbison* interpreted the "net annual income" clause independently of

the “sale” clause. 179 N.E.2d at 743-44. Clearly, the provisions both limit how revenues from public works are to be spent.

Defendants’ suggestion that “[t]he State will not receive ‘net annual income.’” Def. Br. 28 ignores key parts of the constitutional text. First, it 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. And in this case, all of the evidence concerning the value that the State will receive, including Mr. Kitchell’s internal estimates, Crowe Chizek’s estimate, and the estimate by plaintiff’s economist, was derived from the net annual income of the road. Therefore, revenues that 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.

F. There is a Substantial Issue Under Article 11, § 12 of the Indiana Constitution Because the Act and the Lease Lend the State’s Credit to a Private Company.

The Act and Lease also violate Article 11, § 12 of the Indiana Constitution, which provides in pertinent part: “Nor shall the credit of the State ever be given, or loaned, in aid of any person, association or corporation...” The history underlying this provision shows that the framers were concerned with precisely the sort of “public/private” partnership that the Act and Lease contemplate.

In 1836 the Indiana legislature authorized the commissioners of the State’s Board of Internal Improvement to borrow up to \$10 million dollars at an interest rate of no higher than 5 percent to survey and construct a network of canals, roads, and railroads throughout the state.

These improvements were built using “tax free financing” with bond revenue employed to construct the improvements—principally canals. In the debates over the 1850 Constitution, delegate Smith of Ripley County recalled that “It was represented to the people of that day [1836], by the political leaders, that they might go on with that *gigantic* system of internal improvements without incurring any additional tax on themselves: in fact, the proposition was made that the State could borrow money to construct these public works, and never have to pay any taxes thereon out of their own pockets—that the debt would pay itself.” *Debates* at 663. Today, 170 years later, those comments sound eerily familiar.

To complete its Internal Improvement program, the state borrowed money in both national and international credit markets, engaging the services of several investment banks. The most important of these was the Morris Canal and Banking Company of New Jersey. The Morris Bank agreed to accept several million dollars of Indiana bonds on credit, repaying the state in installments. The state assumed liability for the bonds immediately, but was not to be repaid for several years. In the summer of 1839, the Morris Bank defaulted on about \$3,000,000.00 of its obligations to the state. Fatout, Paul, (1972), *Indiana Canals, 96-106* (West Lafayette, Indiana: Purdue University Studies). *See also*, Wallis, John Joseph, Arthur Grinath, and Richard Sylla, (1997), “Debt, Default, and Revenue Structure.” NBER Working Paper, and mimeo 2003.

This collapse and the depression of 1837 brought the State to its financial knees and precipitated the need for Constitutional reform. Indiana was not alone. In 1842, eight states and the Territory of Florida were in default on their debts. Three other states were in perilous financial condition. Wallis, John Joseph, “Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852.” Vol. 65, *Journal of Economic*

History, No.1 (March, 2005) at p. 212 Between 1842 and 1852, 11 states wrote new constitutions. Ten of these new state constitutions contained provisions directing legislatures to adopt new procedures for authorizing government borrowing. Eight of the ten states, Indiana among them, also required their legislatures to adopt general incorporation laws. *Id.*

However, the state was forbidden from extending credit to these corporations. Delegate Morrison of Marion County rose in support of the general ban against doing business with corporations:

I shall be found constantly voting against any proposition to connect the interests of the people with the interests of the corporations; for the reason that corporations always labor and scheme for their individual benefit, which is always antagonistic to the interests of the people. The proposition is so plain that it is unnecessary to elucidate by giving examples. Gentlemen have no interests to maintain here which should prevent them from reflecting the will of their constituents upon this subject, and the question narrows itself down to the simple proposition whether the State is to become a partner or a stockholder in any public enterprise—whether taxes shall be laid upon the people to raise capital; and then be appropriated by the State for the purpose of private speculation in any concern where individual interests are always militating against the interests of the State. The individual who stands in such a connection with the State, knows that the State will stand more shaving and speculation, and he will indulge more in this way than he would if he were acting in an individual partnership concern where his partner stands ever actively watching the operations of the concern. The State has been aptly compared to a goose, and according to the saying he was a fool who did not pluck here. And in view of what we have suffered heretofore, I think it is but the part of prudence that we should provide for the evil to come.

Debates at 652. According to economic historian John Joseph Wallis, “in the early 19th century, state debt issue and incorporation were closely linked both by a concern over corruption and by the history of state promotion of finance and transportation. Public debts and corporations were different facets of the same problem: how to prevent a democratic public from being captured by the interests of a narrow political elite.” *Constitutions, Corporations, and Corruption: American*

States and Constitutional Change, *supra* at 239-240. Wallis notes a close connection in the nineteenth century mind between corporation policy and state finances. It was not uncommon, for example, for state legislatures of the time to extend credit to private transportation corporations and the Gallatin report of 1808 documented many of these connections. *Id.* at 241.

It is more than passingly ironic, then, that these Defendants dismiss plaintiffs' Article 11, §12 challenges while defending their own version of "tax free financing"-- here dubbed "Major Moves." For purposes of constitutional analysis under Article 11, §12, "Major Moves" is a "Mammoth Internal Improvements Act" for the 21st century. On the face of the lease and given the nature of the Concessionaire as a transportation company, it is apparent that defendants are engaging in precisely the kind of partnering between the state and a private entity that was condemned by the Convention of 1850 and forbidden by the Constitution.

Specifically, IFA's agreement to indemnify and hold the Concessionaire harmless from taxes places the IFA and the State in the position of surety against obligations which would otherwise be owed by the Concessionaire. In an instrument which Defendant IFA continues to characterize as a "lease" it promises, for a period of seventy five (75) years, to (1) agree to characterize the transaction as a "sale" for purposes of allowing the Concessionaire full depreciation of the "assets," conveyed, Ex. A § 2.8; (2) to indemnify the concessionaire and its successors from tax liabilities, *Id.* § 3.10; (3) and, upon default, to subordinate its security interest in concessionaire's assets to "leasehold mortgagees," thus permitting the concessionaire to create and profit from a secondary market. *Id.* § 3.14. According to Budget Director Schalliol, Major Moves is the largest privatization in the country and it was accomplished with amazing speed. The indemnification liability has no limit. Among other things, the "lease" recognizes that the enabling legislation must "fully exempt 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 pursuant to this agreement...(and)...provide 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 pursuant to this Agreement...” Ex. A, § 9.1(p).

Indiana case law interpreting the scope and application of the “lending credit” portion of Article 11, § 12 is sparse. It appears that, in the few cases where “lending credit” has been a focus of constitutional litigation, the Court has been faced with either a *direct* use of bonding proceeds or the recipients were not *private*. See, e.g., *Hawkins v City of Greenfield* 230 N.E.2d 396 (Ind. 1967) finding the Municipal Economic Development Act of 1965 constitutional despite a challenge under Article 11 § 12 where bonds were payable directly from lessees and *Book v Board of Flood Control Com’rs, City of Indianapolis*, 156 N.E.2d 87 (Ind. 1959), Flood Control financing approved where it appeared that Commission lacked authority to give funds or property to any private individuals, firms, or corporations.

However, the Supreme Court has generally recognized the *purpose* of Article 11, § 12 is to restrict the State from partnering with private enterprise:

Historically, we recognize that *this* provision was placed in our Constitution to prevent the use of State tax money to support private enterprise and particularly public improvements financed through private corporations, such as railroads and canals, which brought upon the State such financial disaster at the time of the promotion of such public improvements.

Sendak v Trustees of Indiana University, 260 N.E.2d 601 (Ind. 1970). Likewise, in disapproving the investment by state agencies in common stock, the Court summarized the Constitutional history:

These comments, as well as the comments of other delegates during the course of the convention, show that the purpose of the 1st clause in Art. XI, § 12 was to prevent the State from being a speculative partner, as it had been in the internal improvement system.

Board of Trustees of the Public Employees' Retirement Fund of Indiana v. Pearson, 459 N.E.2d 715, 717 (Ind. 1984) (quoting *Northern Indiana Bank and Trust Co. v. State Board of Finance*, 457 N.E.2d 527, 530 (Ind. 1983)).

Indiana appears not to have considered what it means to “lend credit” to a private enterprise in the context presented by the case at bar, where the moral authority of the state is pledged against an indefinite promise of indemnity. However, as noted above, this ban is not unique to Indiana or those of the 48 states having similar restrictions and who revised their constitutions following the panic of 1837. In *Johns Hopkins Univ. v. Williams*, 86 A.2d 892 (Md. App. 1952), the court considered the history and meaning of a virtually identical provision of the Maryland constitution and noted of the common history underlying this and similar constitutional provisions from sister states:

During the second quarter of the 19th Century, these two states, as well as others, had given millions of dollars of state funds in the promotion of privately owned railroads and canals. It was a period of great expansion of internal improvements such as these, and what was done turned out to be a reckless and improvident use of public funds.

Id. at 895 After canvassing decisions from other jurisdictions the court concluded that “lending credit” prohibitions were, essentially, bans against *indirect* or *surety type* obligations undertaken by the state to assist private entities. *Id.* at 899-900 (quoting *Grout v. Kendall*, 192 N.W. 529 (Iowa 1923)).

In this case the defendant Concessionaire reserves the right, and apparently fully intends, to recapture its investment in the toll road via “leasehold mortgages.” Ex. A § 18.1. If the Concessionaire requests, the IFA must permit release of its own financial information regarding the toll road in connection with “the Concessionaire’s public or private offering of securities. *Id.* § 10.2. Moreover, the IFA must agree that “any assignment of the Operating Agreements and Plans to a Leasehold Mortgagee shall have priority over any assignment of the Operating Agreements and Plans to the IFA and the IFA shall cooperate with the Concessionaire and the Leasehold Mortgagee in connection with ensuring such priority...” *Id.* § 3.14. In order to further assist the concessionaire’s efforts to create a secondary market in toll road securities, the IFA (with the State as moral obligee) promises

the concessionaire shall not be liable for, and the IFA shall indemnify and hold the Concessionaire harmless from and against, any (A) property Tax imposed by the State, or any local, city or county government authority in the state, on the owner or lessee of the Toll Road Land or any fixtures or improvements thereto, (B) any sales, use or similar Tax imposed by the State or any local, city or county government authority in the State, on the Rent or the Toll Road Revenues or (C) any transfer, stamp, deed recording or similar tax payable by reason of the execution and delivery of this Agreement or the Short Form Lease or the recording of the Short Form Lease.

Id. § 3.10

The lease/concession runs for a period of seventy-five (75) years; state administrations will come and go during that period. The fiscal needs of the state and the manner of meeting them surely ebb and flow. Sometime during the near next century, the Concessionaire may be subject to a tax which, in turn, is subject to the IFA’s indemnification obligation. The indemnity obligation of the IFA/state is unlimited in amount and is, more importantly, *indirect*. This is precisely the sort of “invisible snare” from which Article 11, § 12 was crafted to protect Indiana taxpayers.

Recognizing the background of this Article, the Indiana Supreme Court duly noted: “Historically, we recognize that this provision was placed in our Constitution to prevent the use of State tax money to support private enterprise and particularly public improvements financed through private corporations, such as railroads and canals, which brought upon the State such financial disaster at the time of the promotion of such public improvements.” *Board of Trustees of Public Employees' Retirement Fund of Indiana v. Pearson*, 459 N.E.2d 715, 717 (Ind. 1984) (citing *Sendak v. Trustees of Ind. Univ.*, 260 N.E.2d 601, 602 (Ind. 1970) (citation omitted)). As the framers in 1850 constitutional debates fervently discussed:

The purposes for which money should be raised by the State, or its credit embarked, should be strictly limited by the Constitution. Let the State take the place of the merchant, the manufacturer, or the banker, or in any way become a partner with companies, no matter under what pretext done, it is sure in the final result to be the loser.

Debates, at 645-46 (statement of Mr. Daniel Read (Monroe and Brown Counties)).

I would prohibit the State from being a stockholder in any bank, or any other corporate association whatever. I can see nothing beneficial resulting to the State from any such association; and when we look at the results of the past experience in the State, in her connection with every work to which she has extended her credit, it is preposterous for any gentleman to get up here and ask that the State should again embark in such enterprises. There is no one case in which the State has taken hold of any public work, that she has not been stript of thousands. I hope, therefore, that some stringent measure will be adopted, by which the State shall not only be prohibited from embarking in works of internal improvement, but that her credit shall be wholly disconnected and withdrawn from the banks. I hope the great State of Indiana will no longer be found engaged in supporting and upholding as a partner, what I call a swindling machine.

Debates, at 651 (statement of Mr. Erastus Bascom (Adams and Wells Counties)).

What right has the State of Indiana to become a partner with any speculation? She has no more right to do this than she has a right to form a regular co-partnership with a merchant or manufacturer, in any speculation looking to a profitable result. I hope this Convention will take such action, upon this subject, as will forever silence the presumption that the State of Indiana may become a partner in any money making enterprise.

Debates, at 652 (statement of Mr. Alexander F. Morrison (Marion County)).

State debt, State road and canal making, the loaning of the State credit to companies, and State partnership with corporations, are either twin sisters or part and parcel of State Banking. They belong to the same ruinous system of public policy. The very first step towards a State Bank is a State debt. The very second step is State partnership with individuals.

Debates, at 674 (statement of Mr. Daniel Read (Monroe and Brown Counties)).

Here, the Act and Lease provide for the use of State tax money to support private enterprise – the very situation which the framers intently wanted to avoid by enacting Article 11, § 12. Defendants cannot reasonably dispute this fundamental fact. In fact, Defendants admit as much conceding that “Although the IFA must arrange for and *fund* policing, the Concessionaire must *reimburse* the IFA” It’s hard to imagine a clearer example of the State lending its credit than the one presented in this case.

The court has now heard how this administration intends to construct the I-69 extension and complete other road projects via the miracle of “tax free financing,” this time employing—not bonds—but the net proceeds of a seventy-five year “lease” between IFA and a private transportation company. This transaction neatly mirrors the failed infrastructure improvement transactions of the nineteenth century which necessitated our present constitutional reforms. It is clear from the history of that reformed Constitution that the “invisible snare” of suretyship is forbidden by Article 11, § 12. The lease/concession agreement extends the credit of the State to a private entity in contravention of the Constitution, and Plaintiffs have accordingly raised a substantial issue under Article 11, § 12.

III. The Defendants Have Not Shown That They Will be Damaged By the Mere Pendency of This Lawsuit.

It is likewise appropriate to set no bond because Defendants have failed to show any “damage and costs that may accrue to the defendants by reason of the pendency of the public lawsuit in the event the defendant prevails.” Ind. Code § 34-13-5-7 (b). While suggesting that all will be lost if this case remains pending on June 30, the date set for financial closure, defendants have presented no actual evidence to that effect. The lease/concession agreement provides that “the closing...shall take place on June 30, 2006 *or such other date agreed to in writing by the IFA and the Concessionaire.*” Agreement, § 2.2. Plaintiffs’ expert, Professor Roger Skurski, testified that the real net present value of the toll road is 11.38 billion dollars, eight billion dollars more than the price bid by CINTRA/Macquarie. It is reasonable to presume—without evidence to the contrary—that with such an enormous windfall at its disposal, the successful bidder would wait a month or two as it is permitted to do pursuant to the lease.

Applying conservative assumptions, Dr. Skurski estimated that the real net present value (NPV) of the Indiana toll road is 11.38 billion dollars. To arrive at this figure, Dr. Skurski used a toll road growth rate of 4.42%, a traffic growth rate of 1.10% a constant operating expense growth rate of 5.10% and a 4.8% discount rate. The 4.8% discount rate is the rate Dr. Skurski has testified to in numerous other cases around the country. No serious challenge was made to Dr. Skurski’s decision to adopt the 5.10% operating expense growth rate as a constant. The other factors are discussed below.

The traffic growth rate of 1.10% was derived from the Wilbur Smith Study on which both Crowe Chizek and the State Finance Director relied upon but without arbitrary “damping down” by 50%--the method employed by Crowe Chizek. When asked on cross examination whether

increased tolls might decrease traffic growth, Dr. Skurski explained that the Macquarie materials referenced the Ohio experience where raised tolls had *not* dampened traffic growth. Moreover, the Wilbur Smith study at page 4-4 states that “in October 1985, toll rates were increased 10 percent for the passenger cars and 25 percent for the commercial vehicles, for all movements which involve travel east of Milepost 24...Despite the toll rate increase, total transactions went up by 5.1 percent...” The Wilbur Smith study indicates that Indiana’s tolls are historically the lowest in the nation, supporting a reasonable inference that tolls could be raised and revenue generated through state ownership. In fact, director Shallice admitted that the IFA could raise tolls although, historically, it hadn’t. When asked, however, Director Shallice admitted that not only could he raise tolls—he was in the middle of doing so right now, some 72% for cars.

On cross examination Dr. Skurski also testified to the appropriateness of a 4.42% growth factor for toll increases. As he explained, it would in fact be inappropriate to employ historical toll road rate increases because, after all, the object of Major Moves is to use or allow some other entity to use the toll road as a revenue source to fund other projects — something that has not been done in the past in Indiana. The Wilbur Smith Toll-Rate Review and Revenue Projections, relied upon by Crowe Chizek and Professor Skurski, proposed enormous increases. For example, “A passenger car through-trip on the Toll Road would be charged \$8.00 under the proposed rate schedule. Currently the same trip is charged \$4.65. This represents an increase of 72 percent.” Review and Projections at 4-13.

The lease permits the concessionaire to use any of three indices for raising tolls. The annual increase in Gross Domestic Product per capita was one of the indices and furnishes the basis for Dr. Skurski’s projected allowable toll increases. On cross examination Dr. Skurski testified to the reliability of these figures.

The testimony of Professor Skurski represents the only credible net present value calculation of the income which could be generated from the toll road—viewed as a revenue source. Mr. Kitchell’s analysis was calculated in order to determine the “debt burden” of the road and the Crowe Chizek analysis, dated March 7, 2006, actually *follows* the decision to accept the winning bid. *See Ex. 29* (indicating that some three months before the Crowe Chizek analysis the private defendants had secured the concession).

It is well settled that a decision or finding must be based upon the proven facts and cannot be based upon mere guess, conjecture, surmise, possibility or speculation. *Darby v. Schoolcraft* 125 N.E.2d 812 (Ind. App. 1955). Apart from oblique references to “penalties” IFA might be faced with upon default, which will never materialize if the concessionaire stands by to wait for its \$ 8 billion windfall, Defendants presented no evidence that they will be damaged by the pendency of this suit.

Conclusion

Taken together, the provisions in Article 10 and 11 of the Indiana Constitution, together with Article 1, § 23, were designed to prevent precisely the sort of “public/private” partnership (or as the framers called it “corporation mongering”) involved in this case. These prohibitions were animated by a concern for the public fisc, and flowed from a belief that “The State . . . is an exceedingly bungling and unskillful [sic] manager of all business transactions. It is ever liable to be cheated. . . .” *Debates at 645* (Remarks of Daniel Read). With the State poised to enter a transaction worth more than \$11 billion, but to receive less than \$4 billion, Delegate Read’s comments seem particularly prescient. The provisions of Article 4, §§ 22 and 23 were designed to put an end to the trading of local favors for the passage of legislation, and again, the Act before the Court presents that very evil. Finally, the provisions requiring payment of the public

debt and preservation of the Common School Fund were designed to ensure that the State keeps its fiscal priorities straight by first paying what it owes and then investing in its future citizens, before passing out the pork on a mammoth public works project.

Each of these issues raises substantial questions for trial, so the Defendants' request for a cost-prohibitive bond, when it appears that the State will be better off without this "deal," should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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