

**MULLETT, POLK & ASSOCIATES, LLC**

ATTORNEYS AT LAW

Old Trails Building, Suite 233

309 West Washington Street

Indianapolis, Indiana 46204-2721

Tel:(317) 636-5165 / Fax: 317-636-5435

---

*Michael A. Mullett, Senior Counsel*

*Jerome E. Polk, Lead Counsel*

*Jeffrey B. Hyman, Counsel*

March 9, 2006

John Smith

*COUNT US!*

RR3 Box 486

Solsberry, IN 47459

Dear Mr. Smith:

In response to your request, we have prepared a legal analysis as to whether the provisions of HB 1008, and the Indiana Toll Road Concession and Lease Agreement (“Agreement”) that may be authorized by the legislation, violate Article 10, Section 2 of the Indiana Constitution. Our analysis shows that HB 1008 and the Agreement do appear to violate Article 10, § 2 of the Indiana Constitution.

Key provisions of the legislation and Agreement provide that the “net annual income” derived from the Indiana Toll Road, a public works belonging to the State, shall be retained by the private entity, and that a significant portion of the lump-sum payment shall go to fund transportation projects rather than being placed in the State General Fund to be applied to reducing the public debt. Article 10, § 2 of the Indiana Constitution prohibits such an arrangement and mandates that net annual income from public works to be used to pay down public debt. This analysis is born out by a textual and historical review of the constitutional provision as well as a review of Court cases interpreting the provision.

A detailed analysis with Executive Summary is attached. Please let me know if you have questions.

Sincerely,

---

Jeffrey B. Hyman

MULLETT, POLK & ASSOCIATES LLC

## **Executive Summary**

HB 1008 as amended by the Senate authorizes toll road agreements between the Indiana Finance Authority (“IFA”) and private entities through the addition of Article 15.5 to Title 8 of the Indiana Code and establishes various funds through the addition of new chapters to the Code. Article 15.5 authorizes agreements whereby a private entity operates and manages toll roads, and authorizes the private entity to charge and collect user fees and to retain the revenues collected. Article 15.5 also establishes a toll road fund to disburse the money the IFA receives from the private entity under a public-private agreement, to fund, among other things, transportation projects.

The Indiana Toll Road Concession and Lease Agreement (“Agreement”) is ostensibly authorized by HB 1008. The Agreement states that it leases to a private consortium the Indiana Toll Road land and facilities; grants to the consortium an exclusive franchise and license to operate, manage, maintain, rehabilitate, and toll the Toll Road; and assigns to the consortium existing Toll Road contracts as well as the personal property of the IFA used in connection with operations of the Toll Road. Under the Agreement, the private entity has the right, title, entitlement, and interest in revenues collected in tolls and generated by agreements with vendors providing goods or services. In exchange for this right, the private entity will make a lump-sum payment to the State.

Article 10, § 2 was introduced into the Indiana Constitution during the Constitutional Convention of 1850, and states in relevant part:

All the revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof . . . shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.

A textual analysis of the language of Article 10, § 2 reveals that net revenues derived from public works must be used to pay down the public debt. Constitutional history and case law support this analysis. The common purpose and intent of the framers of Article 10, § 2 was to apply income derived from the public works of the State to pay down the public debt. Article 10, § 2 was introduced into the Indiana Constitution for straightforward reasons. It was introduced as part of an overall response to the disastrous experience of the State with public-private agreements to finance, build, and operate public works. The fiscal disasters and insolvency of the 1830’s and 1840’s resulted in the adoption of various restrictions on State debt and State financing of public works and, with respect to Article 10, § 2 in particular, the delegates to the 1850 Constitutional Convention did not want public works revenues risked in future speculations – they wanted them to be applied to reduce the public debt.

Court decisions further support this analysis. Early Court opinions conclude that the delegates to the 1850 Constitutional Convention wanted both annual general fund surpluses and public works revenues applied to reduce the public debt. Modern Court decisions interpreting Article 10, § 2 say that the net annual income from a public works project, after repayment of funds borrowed to finance the project, should go into the State General Fund.

The Toll Road Agreement is conflicted as to whether it is a “lease” of a public works or a “sale.” However, constitutional infirmities of HB 1008 do not depend on whether the Agreement is a “lease” or a “sale” of a public works. Ultimately, the constitutional violation cannot be cured by amending the legislation or by construing the resulting statutes.

In conclusion, the plain language and constitutional history of Article 10, § 2, as well as Court decisions interpreting § 2, all point to the conclusion that the main provisions of HB 1008 and the Toll Road Agreement are in violation of Article 10, § 2. Such violation cannot be cured by amending the proposed legislation or construing the resulting statutory provisions, because the constitutional infirmity goes to the heart and purpose of the legislation. Article 10, § 2 requires that the “net annual income” of the Toll Road, after repayment of the cost of the money borrowed to finance the Toll Road, be placed in the State General Fund to be applied to reducing Indiana’s public debt. Moreover, the lump-sum payment paid to the State must be applied to reducing the public debt. The State cannot sidestep the intent and mandate of Article 10, § 2 by arranging with a private entity to take the stream of “net annual income” from a public works owned by the State as a lump-sum payment.

**DO THE PROVISIONS OF HB 1008, AND THE INDIANA TOLL ROAD  
CONCESSION AND LEASE AGREEMENT, VIOLATE  
ARTICLE 10, SECTION 2 OF THE INDIANA CONSTITUTION?**

**I. INTRODUCTION**

The following analysis responds to concerns regarding whether HB 1008 (Public-Private Agreements for Toll Road Projects) and the Indiana Toll Road Concession and Lease Agreement violate Article 10, § 2 of the Indiana Constitution. Article 10, § 2 states:

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

HB 1008, authorizes toll road agreements between the Indiana Finance Authority (“IFA”) and private entities through the addition of Article 15.5 to Title 8 of the Indiana Code and establishes various funds through the addition of new chapters to the Code. Article 15.5 authorizes agreements whereby a private entity operates and manages toll roads, and authorizes the private entity to charge and collect user fees and to retain the revenues collected. Article 15.5 also establishes a toll road fund to distribute money the IFA receives from the private entity under a public-private agreement. These distributions go to fund, among other things, transportation projects, by way of the Major Moves Construction Fund.

HB 1008 also appears to authorize the Indiana Toll Road Concession and Lease Agreement (“Toll Road Agreement” or “Agreement”) under the new Article 15.5. The Agreement states that it leases to a private consortium the Indiana Toll Road land and facilities; grants to the consortium an exclusive franchise and license to operate, manage, maintain, rehabilitate, and toll the Indiana Toll Road; and assigns to the consortium existing Toll Road contracts as well as the personal property of the IFA used in connection with operations of the Toll Road. Under the Agreement, the private entity has the right, title, entitlement, and interest in revenues collected in tolls and generated by agreements with vendors providing good or services. In exchange for this right, the private entity will make a lump-sum payment to the IFA.

HB 1008 and the Toll Road Agreement are inconsistent with Article 10, § 2 because the key provisions of the legislation and Agreement provide that the “net annual income” derived from the

Indiana Toll Road shall be retained by the private entity, and that a significant portion of the lump-sum payment representing an estimate of the present value of this income shall fund transportation projects, rather than being “annually applied, under the direction of the General Assembly, to the payment of the principal of the public debt.”

## **II. ANALYSIS OF ARTICLE 10, § 2 REVEALS A CONSTITUTIONAL MANDATE TO USE NET REVENUES FROM PUBLIC WORKS TO PAY DOWN THE PUBLIC DEBT.**

The Indiana Supreme Court has set forth the method for construing provisions of our Constitution:

Our standard of review of state constitutional claims is well established. It requires: a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the constitution, we look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy.

Embry v. O’Bannon, 798 N.E.2d 157, 160 (Ind. 2003). See also Mishler v. MAC Systems, Inc., 771 N.E.2d 92, 97 (Ind. Ct. App. 2002) (“Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it.”).

Although many of the rules of statutory construction apply generally to the interpretation of constitutional provisions, see Kirkpatrick v. King, 91 N.E.2d 785, 788 (Ind. 1950), these rules of construction are applied with less strictness to constitutional provisions because the powers and restraints dealt with in constitutions are unlimited. The Indiana Supreme Court explained:

Although many rules of statutory construction are equally applicable to constitutional construction, we do not apply them with as much rigidity. The objective of both is to arrive at the intent; but constitutional objectives are customarily broad and general, whereas statutory objectives tend to be narrow and specific.

In Ellingham v. Dye, (1912) 178 Ind. 336, 379, 99 N.E. 1, 16, we said:

“It would not be practicable, if possible, in a written constitution, to specify in detail all its objects and purposes, or the means by which they are to be carried into effect. Such prolixity in a code designed as a frame of government has never been considered necessary nor desirable. Therefore, constitutional powers are often granted or restrained in general terms, from which implied powers and restraints may necessarily arise.”

State v. Nixon, 384 N.E.2d 152, 156 (Ind. 1979).

The primary goal in statutory construction is to determine, give effect to, and implement the intent of the drafters. Vasquez v. Phillips, --- N.E.2d ----, 2006 WL 463861, 2 (Ind. Ct. App. 2006). The best evidence of such intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless otherwise indicated by the statute. Id. The usual meaning of non-technical words in a statute is defined by their ordinary and accepted dictionary meaning, unless the legislature has defined the word. Board of Directors of Bass Lake Conservancy Dist. v. Brewer, 839 N.E.2d 699, 702 (Ind. 2005). “The statute is examined and interpreted as a whole and the language itself is scrutinized, including the grammatical structure of the clause or sentence at issue. . . . Within this analysis, we give words their common and ordinary meaning, without overemphasizing a strict literal or selective reading of individual words.” Cliff v. Indiana Dept. of State Revenue, 660 N.E.2d 310 (Ind. 1995) (citations omitted). In addition, courts seek to give a statute practical application by construing it in a way favoring public convenience and avoiding absurdity, hardship, and injustice. Merritt v. State, 829 N.E.2d 472, 475 (Ind. 2005).

**A. Textual Analysis of the Language of Article 10, § 2 Reveals that Net Revenues Derived from Public Works Must Be Used to Pay Down the Public Debt.**

Giving the section its plain meaning given proper sentence syntax and grammatical construction results in breaking the text of Article 10, § 2 into two parallel parts:

All the revenues derived from the sale of any of the public works belonging to the State, and from the net annual income [of any of the public works belonging to the State] . . . shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the public debt.

and

[A]ny surplus that may at any time remain in the treasury, derived from taxation for general State purposes, after the payment of the ordinary expenses of the government, and of the interest on the bonds of the State, other than the Bank bonds; shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the public debt.

The first part of the provision is the portion most directly applicable and pertinent to HB 1008 and the Indiana Toll Road Concession and Lease Agreement.

### **1. Construction of the relevant language.**

The rules of textual construction can be applied to each separate word or phrase within the first part:

1. “All the revenues” – The plain meaning of the word “all” means no exceptions or “totality.” Webster’s Third New International Dictionary 54-55. The plain meaning of “revenues” means broadly “the total income produced by a given source,” or with respect to governments, “the annual or periodical yield of taxes, excises, customs, duties, and other sources of income that a nation, state, or municipality collects and receives into the treasury for public use.” Webster’s Third New International Dictionary 1942. Ind. Code § 8-15-2-4 (the Toll Roads Act) defines “Revenues” to mean “all tolls, rentals, gifts, grants, money, and all other funds and property coming into the possession or under the control of the authority by virtue of the terms and provisions of this chapter, except the proceeds from the sale of bonds issued under the provisions of this chapter and earnings thereon.
2. “Derived” – The plain meaning of the word “derive” is to “take or receive esp. from a source” or to “originate” or “emanate” from a source. Webster’s Third New International Dictionary 608.
3. “From the sale” – “sale” means transfer of the ownership interest or the “transfer of property or title for a price.” Black’s Law Dictionary (8th ed. 2004).
4. “From the net annual income” – The Indiana Supreme Court in Orbison v. Welsh, 179 N.E.2d 727, 744 (Ind. 1962), citing Ballentine’s Law Dictionary and Webster’s Third New International Dictionary, defined “net annual income” as follows: “The

generally accepted definition of the term [net annual income] is the amount obtained by deducting from the gross receipts for the year all the expenses, charges, outlays and losses incurred in carrying on the business; in other words, it is the amount which remains clear of, or free from, all charges and deductions.”

5. “Public Works” – “Public works” is generally defined as: “Structures (such as roads or dams) built by the government for public use and paid for by public funds.” Black’s Law Dictionary. Indiana Code § 4-13.6-1-13(a) defines “Public works” as either: “The process of altering, building, constructing, demolishing, improving, or repairing a public building or structure;” or “A public improvement to real property owned by, or leased in the name of, the state.” The Indiana Toll Road is a public works.
6. “Belonging to the State” – The plain meaning of this phrase is that the public works in question is property owned by the State.
7. “Shall” – The word “shall” typically means: “Has a duty to” or more broadly, “is required to.” Black’s Law Dictionary. This is the mandatory sense that drafters typically intend and that courts typically uphold.
8. “Annually” – The plain meaning of this word is “every year.” The State does not accumulate the “net annual income” in a fund; rather, it applies the “net annual income” on an “annual” basis.
9. “Be applied . . . to the payment” – The plain meaning of this phrase is to “pay down”
10. “Under the direction of the General Assembly” – The plain meaning of this phrase, in light of the Constitutional powers of the General Assembly as the legislative branch to control state finances, is that the General Assembly decides how best to “pay down” the State’s debt on an annual basis.
11. “The principal” – The plain meaning of “principal” is “the amount of a debt, investment, or other fund, not including interest, earnings, or profits.” Black’s Law Dictionary.

12. “Public debt” – The general definition of this phrase is: “A debt owed by a municipal, state, or national government.” Black’s Law Dictionary.

The plain meaning of the relevant portion of Article 10, § 2 is that the Indiana Constitution prohibits net proceeds or income from public works belonging to the State being spent on anything other than reducing the public debt.

**2. In addition to textual construction, the text must be considered in light of constitutional history and case law.**

The textual analysis of Article 10, § 2 does not answer all the pertinent questions about the meaning of the provision in the current context. Thus, the inquiry into the meaning of Article 10, § 2 does not end with a literal reading of the provision.

The plain text of Article 10, § 2 refers to two forms of revenues derived from public works: first, revenue derived from the “sale” of public works belonging to the State, and second, the “net annual income” derived from public works belonging to the State. HB 1008 and the Toll Road Agreement authorize that the stream of net annual income derived from a public works be retained by a private entity in exchange for a lump-sum payment to the State. The plain language of Article 10, § 2 does not set forth the various possible financial arrangements for reaping “net annual income” from public works belonging to the State. As discussed in part B below, however, the constitutional history of Article 10, § 2 strongly indicates that the precise form in which the revenue from a public works is received is not the critical consideration. Rather, the constitutional history reveals an intent of the framers of Article 10, § 2 that any form of revenue derived from public works is to be used to “pay down” the public debt on an annual basis.

HB 1008 authorizes and the Toll Road Agreement represents a public-private agreement between the IFA and a private entity. Article 10, § 2 applies to public works “belonging to the State.” As discussed in part C below, the case law interpreting Article 10, § 2 makes clear that the Toll Road at issue belongs to the State of Indiana, and thus that Article 10, § 2 applies to HB 1008 and the Toll Road Agreement.

**B. The Common Purpose and Intent of the Framers of Article 10, § 2 Was to Apply Income Derived from the Public Works of the State to Pay Down the Public Debt.**

**1. Article 10, § 2 was introduced into the Indiana Constitution for straightforward reasons.**

Article 10, § 2 was introduced into the Indiana Constitution during the Constitutional Convention of 1850. Constitutional Convention delegate Douglass Maguire of Marion County submitted the following resolution on October 26, 1850:

That the committee on the State debt and public works be directed to inquire into the propriety of inserting in the new Constitution, a clause providing that the proceeds of the State's interest in any of the public works shall be devoted to the payment of the principal of the public debt; and also, that any surplus in the Treasury, at any time hereafter, arising from taxes for general State purposes, shall be set apart for the same purpose.

Journal of the Convention of the People of the State of Indiana to Amend the Constitution, 139 (1851). Mr. Maguire explained to the Convention the object of his resolution:

With regard to the resolution itself, and the amendments, ([Maguire] continued,) the resolution contemplates that the proceeds of the public works of the State – such as the Madison Railroad, the Central Canal, or the Wabash and Erie Canal, (if it should ever be redeemed by the State, which is not very probable,) may be appropriated for the payment of the public debt. It is well known that the debt was contracted for the purpose of making internal improvements for the State, and, therefore, it seems but right and proper that their proceeds should be appropriated to its payment.

Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850, 228 (1850).

**2. Article 10, § 2 was introduced as part of an overall response to the disastrous experience of the State with public-private agreements to finance, build and operate public works.**

Article 10, Section 2 was adopted in a particular historical context which was heavily influenced by the disastrous experience of the State in the 1830's and 1840's with respect to the

financing, construction, and operation of public works, primarily roads and canals, both directly and through private companies. During 1835 the State internal improvement movement gained momentum, bolstered by the popular sentiment that “[o]ur state needs nothing but outlets, by means of canals and rail roads, to make her a populous, wealthy, and influential member of the confederacy.” Donald F. Carmony, Indiana, 1816-1850: The Pioneer Era 192 (1998) (quoting Indianapolis Indiana Journal, Aug. 28, 1835). Reports and surveys regarding the various possible canals, railroads, and turnpikes were presented to the General Assembly in December of 1835. Carmony at 192. Governor Noble told the legislators that they “may safely expend the amount of ten millions [sic] without calling on the present or future generations for the payment of any portion of the principal under the process of taxation.” Id. at 193.

These canals and projects were disastrous from the beginning. Labor costs were higher than expected, and bonds used to fund the projects were issued on credit to private companies of questionable solvency, resulting in the non-payment of principal. Carmony at 212-13, 230. Adding fuel to the fire was the related fraud and corruption. In the 1837-38 legislative session, the internal improvement board and fund commissioners gave “ominous signs of fiscal disaster ahead.” Id. at 207. The rush to urge the internal improvement projects forward “before the people . . . became acquainted with its extent and the burdens it would bring upon them, is to be attributed to the embarrassed and deranged condition of the financial affairs of the state.” Id. at 213. A House Committee estimated the debt incurred from the Wabash and Erie Canal project alone was \$13,148,452.09; \$3,500,000 of that amount was ultimately lost from bonds sold to finance internal improvements, which the House Committee on State Debt believed was caused by selling bonds on credit to businesses of doubtful solvency, contrary to law. Id. at 212-213. The state tax revenue average between 1831-1837, when the Wabash and Erie Canal and the other various projects were commenced, which was a mere \$51, 546.94 annually. Id. at 212. Although Indiana had pledged to liquidate the bonds and fulfill its obligations, the state was without any revenue from the items in the internal improvements system, and only negligible revenue from the Wabash and Erie Canal. Id.

In the 1840 legislative session, the situation was so dire that the General Assembly passed an act that divided the projects into classes and declared that all unfinished works in the second and third class should go to private companies, and their finished portions as well, provided that the requirement that profits from them must go toward liquidation of the public debt could be removed. Id. at 226; see also General Laws of Indiana 1840 3 (1840). As originally authorized, the Legislature stated that for punctual payment of the interest and principal of all sums of money which may be borrowed under the act, “there shall be and hereby irrevocably pledged and appropriated the canals, rail and turnpike roads, [the corresponding land], and the rents and profits of the water power

thereof, together with the nett [sic] proceeds of tolls collected thereon, the sufficiency of which . . . the state of Indiana doth hereby irrevocably guarantee.” Revised Statutes of the State of Indiana 1838, chpt. LV, §§ 9 (1838).

The act authorized corporations or individuals to complete unfinished portions of the projects and enjoy the use and profit from them. Under the plan, within ten years the State could take over such works by paying the amount the private companies had spent upon them, plus interest. The legislation of 1840 was devoid of any commitment toward the ultimate payment of the debt which the State had pledged when the internal improvement system was approved just three years before. Carmony at 227; Compare Chpt 55 §§ 9, 10, 11. (Indiana Revised Statutes 1938) with Revised Statutes of the State of Indiana 1938, chpt 1, §1 (referred to as “Public Works surrendered to private companies”).

The fiscal disasters and insolvency of the 1830’s and 1840’s resulted in the adoption of various restrictions on State debt and State financing of public works in the 1851 Constitution; for example, Article 10, § 3 (currently providing “No money shall be drawn from the Treasury, but in pursuance of appropriations made by law.”); Article 10, § 5 (currently providing “No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: to meet casual deficits in the revenue; to pay the interest on the State Debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense.”); and Article 11, § 12 (currently providing in part “The State shall not be a stockholder in any bank; nor shall the credit of the State ever be given, or loaned, in aid of any person, association or corporation; nor shall the State become a stockholder in any corporation or association.”).

At the 1850 Convention, Daniel Read of Monroe County, a staunch Jacksonian Democrat and Indiana University Professor, commented to his fellow delegates: “If there is a single proposition settled beyond all manner of controversy, . . . it is this, that government should not in its own capacity, nor by a partnership with individuals, become an agent in business operations, except so far as required for the mere purposes of government.” Whenever the state becomes “entangled in any such operations, it . . . is sure, sooner or later, to be cheated, plundered, victimized.” Carmony at 435.

**3. Early Court opinions support the conclusion that the delegates to the 1850 Constitutional Convention wanted both annual general fund surpluses and public works revenues applied to reduce the public debt.**

In 1863, the Indiana Supreme Court considered in State of Indiana v. Ristine whether Article 10, § 2 constituted a direct appropriation of funds to pay interest upon parts of the public debt. The Court stated:

As to the particular section of the Constitution now under consideration, it appears to have been framed as a direction to control the future disposition of any surplus that might remain in the treasury, derived from named sources, after the discharge of the ordinary expenses of the government, and payment of interest on the debt, namely, that it should be paid on the principal of said debt, that is, that it should not be risked in future, in speculations, or loaned, &c. This was the leading idea involved in said section, the disposition of the surplus. The other matters are mentioned only as incidental to the main idea.

20 Ind. 345, 1863 WL 1971 (Ind. 1863). Obviously, this is a discussion of the second part of Article 10, § 2 providing for disposition of treasury surpluses, but given the grammatical parallelism developed above, the discussion still has relevance for the portion of Section 2 providing for disposition of revenues of public works. The delegates to the 1850 Constitutional Convention did not want either annual general fund surpluses or public works revenues risked in future speculations, loaned, etc. – they wanted them to be applied to reduce the public debt. See also Ristine v. State of Indiana, 20 Ind. 328, 1863 WL 1970 (Ind. 1863).

**C. The Toll Road Belongs to the State.**

In Ennis v. State Highway Commission, 108 N.E.2d 687, 697 (Ind. 1952), the Indiana Supreme Court interpreted Chapter 281 of the Acts of 1951, which provided for the establishment of toll roads and the creation of the Indiana Toll Road Commission. The Act is the precursor to Indiana Code § 8-15. The Ennis Court concluded: “All property involved in the [Acts of 1951] here questioned is property of the state.” Id. at 696. The Court therefore ruled that granting of a tax exemption to the Toll Road Commission was not a violation of the constitutional provision relating to tax legislation. Moreover, Ind. Code §§ 8-15-2-5 and-2-7 authorize the IFA to acquire property necessary for the construction and operation of any toll road project “in the name of the state.”

In addition, and despite its independence, the IFA exercises state authority. The Ennis Court considered the status of the Toll Road Commission, and concluded the “toll road commission here created is a commission of the state created for a public purpose” so that “[d]espite the fact that the commission is given the characteristics of a corporation, it is still a commission of the State of Indiana.” 108 N.E.2d at 694. Like the Toll Road Commission, the Indiana Finance Authority also is an instrumentality of the State created for public purposes. As set forth in Ind. Code § 4-4-11-4: “There is created for the public purposes set forth in section 2.5 of this chapter a body politic and corporate, not a state agency but an independent instrumentality exercising essential public functions, to be known as the Indiana finance authority. The authority is separate and apart from the state in its corporate and sovereign capacity, and though separate from the state, the exercise by the authority of its powers constitutes an essential governmental, public, and corporate function.”<sup>1</sup> Moreover, the Director of the Indiana Office of Management and Budget has authority over the IFA and the IFA must report to the Director and administer its office in compliance with the policies and procedures related to fiscal management that are established by the OMB and approved by the governor. Ind. Code § 4-3-22-4.

**D. Modern Court Decisions Interpreting Article 10, § 2 Say that the Net Annual Income From Public Works, After Repayment of Funds Borrowed to Finance the Project, Should Go Into the State General Fund.**

The Indiana Supreme Court has interpreted specifically the “public works” portion of Article 10, § 2. The Court found that net revenues derived from public works remaining after expenses, including repayment of money borrowed to finance the public works project, are to be paid into the State General Fund. Any diversion of net revenues to funds other than the State General Fund would therefore be in violation of Article 10, § 2.

In Orbison v. Welsh, for example, the Court considered whether utilization of income from a public work pursuant to section 17 of the Indiana Port Commission Act was contrary to Art. 10, § 2. Section 17 of the Indiana Port Commission Act authorized the Commission to fix, charge and

---

<sup>1</sup>In Moss v. Calumet Paving Co., 201 F. Supp. 426, 429-31 (S.D. Ind. 1962), the district court considered Ennis and other cases and concluded that the Indiana Toll Road Commission and similarly created commissions are separate corporate bodies created as instrumentalities of the state for public purposes. But the district court also concluded that these commissions were not considered as the State of Indiana in its corporate sovereign capacity and thus a lawsuit against the Commission is not one against the State. This latter conclusion does not, however, affect the conclusion of the Ennis Court that the toll roads belong to the State.

collect fees, tolls, rentals and other charges for the use of the port and its facilities and services, and provided the aggregate shall provide sufficient revenues to pay the cost of operation, etc., including the administration expense of the Commission and the interest and principal on bonds financing the project and reserves. 179 N.E.2d 727, 743 (Ind. 1962). Section 17 also provided: "After such bonds have been fully paid and discharged and all obligations under any trust agreement securing the same have been performed or satisfied, any remaining surplus net revenues and all surplus net revenues thereafter derived from the operation of such port shall be paid into the state general fund." *Id.* at 743-44. In concluding that § 17 of the Indiana Port Commission Act did not violate Art. 10, § 2, the Court stated:

It will be noted that Art. 10, § 2 of the Indiana Constitution for our purposes here only refers to [the net annual income] of the public works belonging to the state. The generally accepted definition of the term [net annual income] is the amount obtained by deducting from the gross receipts for the year all the expenses, charges, outlays and losses incurred in carrying on the business; in other words, it is the amount which remains clear of, or free from, all charges and deductions. See: Ballentine's Law Dictionary, p. 866; Webster's Third New International Dictionary, p. 1520.

The Toll Road Act, *supra*, containing similar provisions to those in question here was held by this Court not to provide for an improper disposition of the net income from any toll road project contrary to the Indiana Constitution. See: Ennis v. State Highway Commission (1952), *supra*, 231 Ind. 311, 332, 108 N.E.2d 687, 697. The Act there, as here, provided for the paying of all expenses and costs of the project, including the bonds.

Therefore, beyond question, in determining its net annual income, the Port Commission is entitled to deduct from its gross annual income all costs of operating, maintaining and repairing the facility. The repayment of the cost of the money borrowed to finance the project is also a legitimate cost to the Commission, which can be deducted before determining net income. Under the terms of the Act, any remaining surplus net revenues, after the payment of these expenses, are to be paid into the State General Fund.

179 N.E.2d at 744. Under Orbison, then, any net revenues derived from public works remaining after expenses, including repayment of money borrowed to finance the public works project, are to be paid into the State General Fund. Any diversion of net revenues to funds other than the State General Fund would therefore be in violation of Article 10, § 2.

### III. The Key Provisions of HB 1008 and the Toll Road Agreement Violate Article 10, § 2.

The text of the Toll Road Agreement states that it leases the Indiana Toll Road land and facilities, grants an exclusive franchise and license to operate, manage, maintain, rehabilitate, and toll the Indiana Toll Road, and assigns existing Toll Road contracts as well as personal property used in connection with operations of the Toll Road. Section 2.1. Under the Agreement, the private consortium has the right, title, entitlement, and interest in revenues collected in tolls and generated by agreements with vendors providing good or services. Section 7.3. This arrangement, by which the private consortium is allowed to retain the “net annual income” derived from the Toll Road in exchange for a lump-sum payment, is authorized by provisions in the proposed Toll Road legislation.<sup>2</sup> In addition, a significant portion of the lump-sum payment to the IFA is slated to be used to fund other transportation projects. The plain language and constitutional history of Article 10, § 2, as well as Court decisions interpreting § 2, all point to the conclusion that the key provisions of HB 1008 and the Toll Road Agreement are in violation of Article 10, § 2.

#### A. The Toll Road Agreement is Conflicted as to Whether it is a “Lease” of a Public Works or a “Sale.”

The language in the Toll Road Agreement refers to the transaction as a “lease.” However, whether or not the transaction is legally a “lease” or a “sale” does not depend on the characterization of the Agreement as a lease or even on whether legal title has passed, Bill Becom Service T.V., Inc. v. Jones, 503 N.E.2d 1246, 1248-49 (Ind. Ct. App. 1987) (“In Indiana, under a typical land sale contract, the vendor retains legal title until the total contract price is paid by the vendee.”), but rather on the extent to which the Agreement transfers the incidents of ownership. Id. (“When the parties enter into the [sale of property] contract, all incidents of ownership accrue to the vendee.”); see also Rhoades v. State, 70 N.E.2d 27 (Ind. 1946) (the chief incidents of ownership of property are possession, the rights of use and enjoyment, and of disposition); Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 633 N.E.2d 359 (Ind. Tax Ct. 1994) (same); United Leaseshares, Inc. v. Citizens Bank & Trust Co., 470 N.E.2d 1383 (Ind. Ct. App. 1984) (sale of automobiles by dealership to leasing company and leaseback of automobiles to dealership created a “security lease” (a financing devise) requiring filing of a financing statement, where lessee

---

<sup>2</sup>The Toll Road Agreement states that it is authorized by the Toll Road legislation and represents that the legislation does not contain any provision that is materially adverse to the rights of the private entity pursuant to the Toll Road Agreement. See Toll Road Agreement, Recitals and Section 9.1(p).

disposed of most of incidents of ownership), Meridian Mortg. Co., Inc. v. State, 395 N.E.2d 433 (Ind. Ct. App. 1979) (three primary indicia of ownership of personal property are title, possession and control, which includes right to sell, dispose of, or transfer).

The type of analysis of the incidents of ownership required to distinguish a sale from a lease was summarized in In re Noack, 44 B.R. 172 (U.S. Bankruptcy Court, E.D. Wisc. 1984):

The true intention of the parties can only be ascertained from a careful analysis of the language of the entire instrument, in the light of those particular incidents of ownership which are consistent with a proprietary interest in the property. . . . If, upon a balancing of these factors, the proprietary interest in the property is weighted in favor of the party designated as lessee, then the document is in reality a security agreement. If, on the other hand, the balance of incidents of ownership tips toward the party designated as lessor, then the document is a true lease.

A lease is defined as a contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usually rent. Black's Law Dictionary (8th ed. 2004). The lease term can be for life, for a fixed period, or for a period terminable at will, and may be assignable. Id.

Some considerations suggest that the Agreement may legally be a lease. Primarily, the Agreement does not appear to transfer all of the incidents of ownership to the private consortium, particularly the right of disposition. Also, Section 2.1 of the Agreement sets the term of the contact at 75 years, although that term can be lengthened by the occurrence of a Delay Event. See Section 15.1.

As indicated above, however, some sections in the Agreement suggest that the Agreement is, in fact, a sale of at least some Toll Road property. Section 2.8 the Toll Road Agreement states: "This Agreement is intended for U.S. federal and state income tax purposes to be a sale of the Toll Road Facilities and Toll Road Assets to the Concessionaire." Toll Road Assets are defined in the Agreement as the personal property of the Indiana Finance Authority used in connection with operations of the Toll Road. The Toll Road Facilities are defined as any building, structure, facility, or other improvement constructed or placed on the Toll Road land. (The Agreement separately defines the Toll Road Land as parcels of real property currently titled to the IFA (Section 2.4(a)(iv)), and any land used for expansion, including all parcels of real property required for toll toad operations.) Second, the Agreement transfers costs and liabilities, including applicable tax liabilities, incurred in the operation of the Toll Road to the private entity. Sections 3.2(b) and (c),

3.10. Third, the private entity is entitled to revenues derived from toll receipts and toll road contracts. Section 7.3(a) and (d).

In addition, another main provision of Agreement that potentially signifies a lease, namely, the reversion of property at the expiration of the Agreement, is not clearly spelled out in the Agreement. The Agreement provides for reversion of property interests upon termination of the Agreement:

Section 16.4. Consequences of Termination or Reversion. Upon the termination of this Agreement prior to the end of the Term . . .

- (i) the Concessionaire shall, without action whatsoever being necessary on the part of the IFA, well and truly surrender and deliver to the IFA the Toll Road (including all improvements on the Toll Road Land comprising the Toll Road Facilities), the Toll Road Assets and all tangible and intangible personal property (including inventories) located on the Toll Road or used in connection with the Toll Road Operations . . . in good order, condition and repair (reasonable wear and tear excepted) . . .

\* \* \*

- (iii) the IFA shall, as of the Reversion Date, assume full responsibility for the Toll Road Operations . . .

Section 16.4. The Agreement does not set forth clearly the reversion of property interests upon the expiration of the term of the Agreement.

**B. But The Constitutional Violation Does Not Depend On Whether the Toll Road Agreement is a “Lease” or a “Sale” of a Public Works.**

Whether the Toll Road Agreement is a lease or a sale of a public works does not change the conclusion that the Agreement and the Toll Road legislation that would authorize it violate Article 10, § 2. First, a significant portion of the “net annual income” derived from the Indiana Toll Road would be paid to the private consortium rather than to the State General Fund, in violation of Article 10, § 2. Second, a significant portion of the lump-sum payment received by the State in exchange for granting the “net annual income” to the consortium goes to fund other transportation projects

rather than to reduce the public debt as Article 10, § 2. The State is, in effect, proposing to take the “net annual income” that would be earned from the Toll Road over the course of many years as a one-time, lump-sum payment. This arrangement does not change the fact that the “net annual income” from the public works is being diverted away from the purpose to which Article 10, § 2 says it must be used – namely, to pay down the public debt. The State cannot sidestep the intent and mandate of Article 10, § 2 by making such an arrangement with a private entity.

**C. The Constitutional Violation Cannot be Cured by Amending the Legislation or Construing the Resulting Statute.**

The violation of Article 10, § 2 by HB 1008 and the Toll Road Agreement cannot be cured by amending the proposed legislation or construing the resulting statutory provisions. The constitutional infirmity goes to the heart and purpose of the legislation. Namely, in exchange for authorizing a private entity to retain the “net annual income” stream generated by a public works belonging to the State, the State, through the IFA, proposes to take a lump-sum payment – essentially an estimate of the present value of that stream of “net annual income” – and apply a significant portion of that payment to fund other transportation projects. Article 10, § 2 requires, however, that the “net annual income,” after repayment of the cost of the money borrowed to finance the Indiana Toll Road, is to be placed in the State General Fund to be applied to reducing the public debt.

The definition in the Orbison opinion of the term “net annual income” in Article 10, § 2 definitely distinguishes HB 1008 from the Port Commission Act, which the Orbison Court found to be constitutional. This is because under Major Moves a significant portion of the “net annual income” of the Indiana Toll Road would be paid to the contracting consortium rather than to the State General Fund. Indeed, the whole point of Major Moves as it relates to the Toll Road is to transfer the right to the “net annual income” of the Toll Road from the State to the consortium in exchange for a lump-sum payment. Furthermore, a significant portion of the lump-sum payment received in exchange for relinquishing the “net annual income” goes to fund other transportation projects rather than to reduce the public debt as Article 10, § 2, says it must.

**IV. CONCLUSION**

Even if Major Moves theoretically allows Indiana to pay off a portion of the public debt by ultimately saving money, as claimed by its proponents, this arrangement still violates the Indiana Constitution. In fact, this type of hopeful forecasting of the benefits of State-private collaborations is precisely the type of reasoning that led to the State’s financial failures of the 1840’s and its

adoption of Article 10, § 2 in 1851. See State of Indiana v. Ristine, 20 Ind. 345, 1863 WL 1971, 5 (Ind. 1863).

The plain language and constitutional history of Article 10, § 2, as well as Court decisions interpreting § 2, all point to the conclusion that the main provisions of HB 1008 and the Toll Road Agreement are in violation of Article 10, § 2. Such violation cannot be cured by amending the proposed legislation or construing the resulting statutory provisions, because the constitutional infirmity goes to the heart and purpose of the legislation. Article 10, § 2 requires that the “net annual income” of the Toll Road, after repayment of the cost of the money borrowed to finance the Toll Road, be placed in the State General Fund to be applied to reducing Indiana’s public debt. Moreover, the lump-sum payment paid to the State must be applied to reducing the public debt. The State cannot sidestep the intent and mandate of Article 10, § 2 by arranging with a private entity to take the stream of “net annual income” from a public works owned by the State as a lump-sum payment.