

OPINION NO. 83-087**Syllabus:**

A county which issues industrial development bonds pursuant to Ohio Const. art. VIII, §13 and R.C. Chapter 165 may require that local labor be used in the construction of the project financed by the issuance of the bonds.

To: William L. Thomas, Belmont County Prosecuting Attorney, St. Clairsville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 16, 1983

I have before me your request for my opinion on a question concerning the interpretation of Ohio Const. art. VIII, §13 in light of the following facts. Belmont County (the "issuer" see R.C. 165.01(D)) and Red Roof Inns, Inc. entered into an Agreement to Issue Bonds in accordance with Ohio Const. art. VIII, §13 and R.C. Chapter 165. Revenue from the issuance of the bonds was to be used to finance the acquisition, construction, improvement, and equipping of a motel and related real property, improvements, equipment and furnishings within Belmont County. In your letter you note that "virtually none of the construction jobs created were given to residents of [the] issuer (Belmont County), although some 28-30 permanent employees will have jobs once the Inn is complete." The reason for the fact that construction jobs were not given to local residents, according to Red Roof Inns, Inc., was that "local contractors were not competitive in their bids, and therefore, out-of-county contractors had to be used." Your specific questions with regard to this matter are:

1. Does the language of the Agreement to Issue Bonds place upon Red Roof a binding and enforceable commitment to use only Belmont County labor?
2. If said language does not so require Red Roof to specifically use "local labor," could language be inserted in future transactions which could lawfully impose such a requirement within the purview of the Constitution?

I regret that I am unable to respond to your first question. I am without authority to render an opinion interpreting a particular agreement or contract. The determination of particular parties' rights is a matter which falls within the jurisdiction of the judiciary, which I, as an executive officer, am unable and unwilling to usurp.

Turning to your second question, whether language could be inserted in an agreement to issue bonds requiring local labor to be used in the construction of a project financed by such bonds, I find it necessary to first examine generally the standards which must be used in determining whether bonds may be issued pursuant to Ohio Const. art. VIII, §13.

Ohio Const. art. VIII, §13 authorizes the state and its political subdivisions to "issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment" of "property, structures, equipment and facilities" for "industry, commerce, distribution, and research." The stated purposes underlying this grant of authority are, inter alia, "[t]o create or preserve jobs and employment opportunities, [and] to improve the economic welfare of the people of the state." R.C. Chapter 165 was enacted in order to implement in part Ohio Const. art. VIII, §13 for the purposes specified above, see R.C. 165.02, and sets forth the procedures which must be followed in the issuance of industrial development bonds. See R.C. 165.01(D); R.C. 165.01(H); R.C. 165.02; R.C. 165.03.

In County of Stark v. Ferguson, 2 Ohio App. 3d 72, 440 N.E.2d 816 (Stark County 1981), the court held that "the proposed construction, operation and maintenance of [a] medical-dental-pharmacy-laboratory building constitutes 'commerce' within the meaning of Section 13, Article VIII of the Ohio Constitution." 2 Ohio App. 3d at 76, 440 N.E.2d at 820. The court found the facility to have a commercial purpose since it would "provide an on-going, continuing exchange of both services and goods; it will be a place where people go to do business. . . ." Id. In reliance on County of Stark v. Ferguson, my predecessor noted in 1981 Op. Att'y Gen. No. 81-095 at 2-361 that "commerce" as used in Ohio Const. art. VIII, §13 and R.C. Chapter 165 "encompasses the delivery of professional and personal services as well as the production or movement of tangible goods." The opinion concluded that a nursing home comes within the term "commerce," and thus, "a board of county commissioners may issue bonds under the authority provided in Ohio Const. art. VIII, §13 and R.C. Chapter 165 for the purpose of acquiring, constructing, enlarging, improving or equipping a nursing home." Id.

It is instructive to compare the case of State ex rel. Brown v. Beard, 48 Ohio St. 2d 290, 358 N.E.2d 569 (1976), wherein the court held that low and moderate income rental housing did not constitute industry or commerce and thus bonds could not be issued under art. VIII, §13 for the construction and rehabilitation of such housing. The court noted that even assuming that the construction of housing would create jobs and consequently "improve the economic welfare of the people of the state," the use of the state's credit under art. VIII, §13 must be for "industry, commerce, distribution, and research." The court concluded that housing was not sufficiently related to industry or commerce to justify the issuance of bonds under art. VIII, §13 for the construction of housing.

Although one purpose of art. VIII, §13 is to create employment within the state, see State ex rel. Burton v. Greater Portsmouth Growth Corp., 7 Ohio St. 2d 34, 218 N.E.2d 446 (1966), it is apparent that the pertinent inquiry in determining

whether bonds may be or have been properly issued under art. VIII, §13 for a particular project is whether the operation of the project constitutes industry, commerce, distribution, or research, and not whether the construction of the project would create employment. If the operation of a project constitutes industry, commerce, distribution, or research, then industrial development bonds may be issued for the purpose of acquiring, constructing, enlarging, improving, or equipping the project. If the operation of a project does not constitute industry, commerce, distribution, or research, then bonds may not be issued for its construction, even though such construction might create or preserve employment.

In this instance, I believe that the operation of a motel or hotel clearly constitutes commerce. As explained in County of Stark v. Ferguson and Op. No. 81-095, commerce includes the delivery of services for money, which is what the operation of a motel or hotel involves. See R.C. 3731.01 ("'[h]otel' means every structure kept, used, maintained, advertised, or held out to the public to be a place where sleeping accommodations are offered for pay to transient guests, in which five or more rooms are used for the accommodation of such guests. . ."). See generally R.C. Chapter 3731 (concerning the licensure and regulation of hotels); R.C. 5739.01(B)(2) and R.C. 5739.02(C) (concerning the imposition of the sales tax on transactions by which lodging by a hotel is offered to guests); State v. Norval Hotel Co., 103 Ohio St. 361, 133 N.E.75 (1921). Thus, industrial development bonds may properly be issued for the acquisition, construction, enlargement, improvement, or equipment of a hotel or motel.

As noted above, the crucial issues in determining whether industrial development bonds may be issued for the acquisition, construction, enlargement, improvement, or equipment of a particular piece of property, structure, piece of equipment or facility is first whether the construction of the project itself constitutes industry, commerce, distribution, or research, and only secondarily whether the project furthers the purposes of creating or preserving jobs and employment opportunities or otherwise improving the economic welfare of the people of the state. There is no express or implied requirement under art. VIII, §13 or R.C. Chapter 165 that a project create jobs in the private construction industry or that local labor be used in the construction of a project for which industrial development bonds are issued. Cf. State ex rel. Brown v. Beard (the fact that a project will preserve jobs in the private building industry is not sufficient to qualify the project for industrial development bond financing). It must be noted that the purpose of the issuance of bonds under art. VIII, §13 and R.C. 165.02 is "to improve the economic welfare of the people of the state" (emphasis added) rather than the welfare of the residents of the issuer.¹ I note that pursuant to R.C. 165.01(H), a project for which bonds may be issued must be "located within the boundaries of the issuer." There is no similar requirement concerning the residency of those who construct the project.

¹ R.C. 165.031 and R.C. 4115.032 require that prevailing rates of wages be paid to those people employed on projects for which industrial development bonds are issued. See 1982 Op. Att'y Gen. No. 82-096. Prevailing rates of wages are determined by the Department of Industrial Relations and are based upon the wages paid "for the class of work called for by the public improvement, in the locality where the work is to be performed." R.C. 4115.04. See R.C. 4115.05 (the wages to be paid to workmen upon projects covered under R.C. Chapter 4115 may not be less than the rate of wages "then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and [labor organizations] in force at the date the contract for the public work, relating to the trade or occupation, was made. . ."). It is my understanding that in this instance, the Agreement to Issue Bonds entered into between Belmont County and Red Roof Inns, Inc. contained an agreement that prevailing rates of wages determined in accordance with R.C. Chapter 4115 would be paid to laborers and mechanics employed on the project.

This is not to say, however, that an issuer may not properly require that local labor be used in the construction of a project as a condition for the issuance of bonds pursuant to art. VIII, §13 and R.C. Chapter 165. R.C. 165.02 and R.C. 165.03 set forth the authority of an issuer. R.C. 165.03(A) reads in part: "An issuer may issue bonds for the purpose of providing moneys to acquire by purchase, construct, reconstruct, enlarge, improve, furnish, or equip one or more projects or parts thereof, or for any combination of such purposes, including providing moneys to make loans to others for such purposes." See R.C. 165.01(H) (defining "project"). Thus, an issuer has discretion in determining whether to issue industrial development bonds for any particular project. See County of Stark v. Ferguson. See also Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "may" in a statute renders its provisions permissive or optional). Once the decision is made to issue bonds, certain requirements are imposed upon an issuer in the issuance of the bonds. For example, pursuant to art. VIII, §13 and R.C. 165.03(A), tax moneys may not be obligated or pledged for the payment of bonds. In other matters, including the initial decision to issue bonds, however, the issuer or issuing authority, see R.C. 165.01(E), is given wide discretion. See, e.g., R.C. 165.03(A) ("[t]he issuing authority shall determine the form of the bonds, fix their denominations and method of execution, and establish within or without the state a place or places for the payment of principal or interest"); R.C. 165.03(B) ("[t]he issuing authority may provide for sales of bonds at public or private sales as it deems most advantageous and for such prices, whether above or below the par value thereof, as it determines or within such limit or limits as it determines"); R.C. 165.14(B) ("[a] project shall be constructed, reconstructed, enlarged, improved, furnished, or equipped and shall be leased, sold, or otherwise disposed of in the manner determined by the issuing authority in its sole discretion. . ."). See State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 330 N.E.2d 454 (Franklin County 1974) (pursuant to R.C. 123.77, which was enacted under the authority of Ohio Const. art. VIII, §13 and permits the Department of Administrative Services to lease land belonging to a state university to a developer, the Director of Public Works has the implied power and authority necessary for the performance of his duty to evaluate plans of developers, in the absence of specific directions in R.C. 123.77 covering the manner and method of proceeding).

There is no indication in art. VIII, §13 or R.C. Chapter 165 that an issuer, in its discretion, may not require local labor to be used on a project financed by its bonds. This requirement complies with the purpose for which an issuer may issue bonds, found in art. VIII, §13 and set forth in R.C. 165.03, to provide "moneys to acquire by purchase, construct, reconstruct, enlarge, improve, furnish, or equip one or more projects or parts thereof, or for any combination of such purposes." In addition, this requirement meets the broader purpose set forth in art. VIII, §13 and R.C. 165.02 that bonds be issued for the purpose of creating and preserving jobs and employment opportunities and "to improve the economic welfare of the people of the state." See County of Stark v. Ferguson. Residents of the issuing county are of course "people of the state." Thus, a provision which would preserve jobs and improve the welfare of the residents of the issuer would further the purpose of improving the economic welfare of the people of the state.

In County of Stark v. Ferguson, the court noted that:

The determination of whether the authorization of [industrial development] bonds should be made in the public interest is essentially a political question, properly decided by the legislative and executive branches of government, not the judiciary. The purpose of judicial review is to determine whether the legislative and executive branches of government, in their action, were manifestly arbitrary or unreasonable. (Citations omitted.)

2 Ohio App. 3d at 77, 440 N.E.2d at 821. Similarly, I believe that an issuer or issuing authority has the discretion, in the absence of constitutional or statutory restrictions, to impose those conditions it deems appropriate on the issuance of its industrial development bonds. As a practical matter, counties are limited in the number of projects for which they may issue bonds. It does not seem unreasonable,

therefore, for a county to exercise its discretion in a manner which is advantageous to the county itself and to its residents, as long as constitutional and statutory requirements are met. See State ex rel. Burton v. Greater Portsmouth Growth Corp. (a provision which discriminates in favor of a certain class is not violative of equal protection if the discrimination is founded upon a reasonable distinction).

In conclusion, it is my opinion, and you are advised, that a county which issues industrial development bonds pursuant to Ohio Const. art. VIII, §13 and R.C. Chapter 165 may require that local labor be used in the construction of the project financed by the issuance of the bonds.