

when agencies designate nonblighted areas of the city for redevelopment in order to capture tax increments. TIF can therefore best benefit needy persons and neighborhoods by controlling discretion in project and district selection.

#### D. *Summary*

Ready access to national bond markets and the authority to levy property taxes enables states to stimulate housing markets. HFAs, property tax abatements, and TIF will play greater roles in housing finance as budget cuts lessen federal involvement. These state and local housing programs, however, must utilize financially innovative techniques in order to withstand fluctuations in the economy.

Used properly, these programs can provide an important stimulus to urban renewal. The public purpose of community revitalization, as well as the property interests of private developers, must always be taken into account. Greater cooperation between the public and private sectors is needed if these programs are to reach their maximum potential.

## II. PROVIDING FINANCIAL INCENTIVES FOR INDUSTRY TO REMAIN AT ITS URBAN LOCATION

Attracting business and industry to urban areas and providing them with the incentive to remain has become increasingly difficult. Numerous programs have been enacted at the federal, state, and local levels in an attempt to remedy this situation.<sup>81</sup> This section will examine developments in the field of corporate construction financing and analyze proposed labor law restrictions which attempt to alleviate the problems causing industrial relocation.

### A. *Pollution Control Facilities and the Use of Industrial Development Bonds*

Environmental regulations which require an industry to construct pollution control facilities place prohibitive financial demands upon

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81. See generally Goldberg, *Tax Increment Financing Redevelopment Alternative for American Cities*, 2 HOUS. & DEV. REP. (BNA) 221; Hegg, *Tax Increment Financing of Urban Renewal-Development Incentive Without Federal Assistance*, 2 REAL EST. L. J. 575 (1973).

it.<sup>82</sup> As a result, many industries are forced to close down their plants. Recent changes in the tax code<sup>83</sup> may alleviate this problem. Businesses can now finance their compliance with costly environmental regulations by utilizing low-cost tax-exempt bonds.<sup>84</sup> These bonds are known as Industrial Development Bonds (IDBs).

The sale of IDBs<sup>85</sup> provides states and municipalities with an effective and popular method of stimulating industrial development and attracting new businesses.<sup>86</sup> These bonds provide private business enterprises with a means of low-cost financing<sup>87</sup> while avoiding some

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82. The cost of compliance with pollution control standards is substantial. The Council on Environmental Quality estimates approximately \$194.8 billion will be spent by the private sector from 1973 through 1982 on ecological improvements mandated by legislation. COUNCIL ON ENV'T'L QUALITY ANN. REP. 173 (1974).

83. See I.R.C. § 103(b)(2).

84. See generally I.R.C. § 103.

85. Historically, federal income tax laws have recognized a tax exemption for interest earned on the obligations of a state or political subdivision. The tax exemption first appeared in the Tariff Act of 1913 as follows:

Provided further, That there shall not be taxed under this section any income derived from any public utility or from the exercise of any essential governmental function accruing to any State, . . . or any political subdivision of a State, Territory, or the District of Columbia. . . .

Tariff Act of 1913, Pub. L. No. 63-16, § IIG(a), 38 Stat. 114, 172 (1913). Tax exemption of interest earned on government obligations was specifically provided for by the Revenue Act of 1916 as follows: "The following income shall be exempt from the provisions of this title: . . . interest upon the obligations of a State or any political subdivision thereof or upon the obligations of the United States or its possessions. . . ." Revenue Act of 1916, Pub. L. No. 64-271, §§ 4, 39, Stat. 756, 758 (1916). Similar provisions have been carried forward in subsequent revenue acts. See I. J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 8.21a (rev. ed. 1974).

86. Typically, the proceeds from the sale of bonds are used to finance construction or acquisition of facilities which are ultimately used by private enterprise. The terms of the contract between the municipality and a business entity are calculated to sustain the municipality's debt service on the bonds. Because of this arrangement, Industrial Development Bonds are unlike general obligation bonds. They are not backed by the full faith and credit and taxing ability of the government entity issuer. The holder of the bonds must depend on the ability of the business to generate revenues sufficient to meet payments. See Note, *The Importance of Assessing Business Transactions for Their Impact Upon the Tax-Exempt Status of Industrial Development Bonds*, 30 SYRACUSE L. REV. 705 (1979).

In 1979, the amount of small issue IDBs exceeded \$7 billion. This is nearly double the amount of small issue IDBs in 1978. Hertzberg, *Use of Tax-Exempt Financing for Stores and Other Business Loans, Stirring Critics*, Wall St. J., Oct. 8, 1980, at 46, col. 1.

87. In Rev. Rul. 590, 1968-2 C.B. 66, 67-68 the Internal Revenue Service maintained that "[t]he substance of a transaction, rather than its legal form, is controlling for Federal income tax purposes . . . the substance of the agreements between the corporation and the political subdivision, . . . is clearly that of a financing arrange-

of the restrictive costs attributed to other securities. Additionally, the issuers may be eligible for benefits provided by the investment tax credit<sup>88</sup> and energy credit,<sup>89</sup> while bondholders receive tax-free interest payments.<sup>90</sup>

Low-cost IDB financing is well suited to the needs of small- and medium-sized businesses. The bonds were designed to enable small businesses to meet expanding capital requirements while assisting local governments in achieving their objectives of obtaining a sound industrial base and reducing unemployment. As a result, this method of financing is readily utilized by municipalities and businesses in their efforts to meet these goals.

For years, critics have argued that extensive use of IDBs to finance private ventures results in erosion of the federal tax base by removing a substantial portion of the return on capital from taxation.<sup>91</sup> In response to this criticism, Congress curtailed the tax-exempt status of IDBs except for those bond issues used to finance projects within the scope of specifically designated exceptions.<sup>92</sup>

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ment." This is reinforced in Rev. Rul. 543, 1972-2 C.B. 87 as well as Rev. Rul. 134, 1973-1 C.B. 60.

The political subdivision assumes no risk of loss and has no opportunity for gain. Rev. Rul. 590, 1968-2 C.B. 66. Therefore, the bond issuing business is entitled to the incidents of ownership and consequential tax treatment as owner of the property. Rev. Rul. 185, 1975-1 C.B. 43. See Karmel, *Legislative Proposals Regarding Industrial Development Bonds*, in ROBINSON, *MUNICIPAL BONDS 1980* (227-43) (1980).

88. I.R.C. § 38.

89. I.R.C. § 46.

90. I.R.C. § 103.

91. See McDaniel, *Federal Income Taxation of Industrial Bonds: The Public Interest*, 1 *URB. LAW.* 157, 159 (1969). The exemption also created a tax shelter for high income taxpayers, thereby frustrating the progressive structure of the tax system.

92. Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, § 107(a), 82 Stat. 251, 266 (codified at I.R.C. § 103(b)). The legislation provides tax exempt status for certain issues including small issues not exceeding \$1,000,000, I.R.C. § 103(b)(6), or, in certain instances, \$10,000,000. I.R.C. § 103(b)(6)(D). The \$10,000,000 limitation applies to obligations issued after December 31, 1978 and also to capital expenditures made after December 31, 1978 with respect to obligations issued before January 1, 1979. Revenue Act of 1978, Pub. L. No. 95-600, § 331(c)(1)(A), (B), 92 Stat. 2840 (1978).

These small issues can be used to finance private industrial development and are not restricted to facilities specified in I.R.C. § 103(b)(4). The small issue exception provides a means by which to encourage expansion of small businesses. See McDaniel, *supra* note 91, at 166-67.

### B. *Investment and Energy Tax Credits*

Businesses financing with Internal Revenue Code section 103 tax-exempt bonds have traditionally been denied the advantages of section 46, the investment tax credit. The logic for withholding this tax credit was simple. The businesses were obtaining inexpensive financing through the issuance of IDBs and therefore did not deserve any additional advantages. Changes in section 46, however, now allow one-half of the normal investment credit of ten percent<sup>93</sup> of the qualified investment in eligible property<sup>94</sup> for section 103-financed facilities.

Proper use of tax-exempt financing can provide industries with the equivalent of the maximum amount of the investment tax credit.<sup>95</sup> Section 46(a)(9) allows the energy tax credit to be offset against any unused portion of the investment credit. This enables a business to maximize tax credit advantages while receiving low-cost financing. The Internal Revenue Code, therefore, attempts to meet complementary goals by allowing the equivalent of the maximum 10% credit. Tax credits for IDB financing of pollution control facilities encourage investment, promote energy efficient use of facilities, and allow industry to obtain less expensive financing for compliance with pollution standards. These factors are incentives for industry to remain at its present location.

As stated above, an investment credit is allowable in an amount equal to ten percent<sup>96</sup> of the qualified investment in "eligible property."<sup>97</sup> Eligible section 38 property includes tangible personal property<sup>98</sup> and "other tangible property."<sup>99</sup> A "qualified investment" is the percentage of the investment to be considered<sup>100</sup> for investment credit purposes multiplied by the basis of new or used section 38

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93. I.R.C. § 46(a)(2).

94. Section 38 investment property is defined in I.R.C. § 48(a).

95. I.R.C. § 46(a)(2)(B) specifies this amount to be 10% of the qualified investment.

96. *See* note 93 *supra*.

97. *See* note 94 *supra*.

98. I.R.C. § 48(a)(1)(A).

99. *See generally* I.R.C. § 48(a)(1)(B) which describes "other tangible property" as not including a building and its structural components unless such property is used as an integral part of manufacturing or of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services. I.R.C. § 48(a)(1)(B)(i).

100. I.R.C. § 46(c)(2).

property.<sup>101</sup> In the case of pollution control facilities, the applicable percentage is one hundred percent if an election is made under Internal Revenue Code section 169 and the useful life is at least five years.<sup>102</sup>

Under section 169, a taxpayer can elect to amortize, for a period of sixty months, certain new pollution control facilities<sup>103</sup> used in connection with a plant or other property in operation prior to January 1, 1976.<sup>104</sup> The applicable percentage of qualified investment is reduced by fifty percent upon making an election under section 169 when the facility is financed with tax-exempt bonds.<sup>105</sup> A qualified investment also includes a "qualified progress expenditure"<sup>106</sup> on certain long-term projects for the construction of new section 38 property. The maximum amount of used section 38 property for which any credit is available in a single taxable year is \$100,000.<sup>107</sup>

The energy credit is an additional and separate investment tax credit that provides a ten percent credit for qualified investments in energy property.<sup>108</sup> Property eligible for this credit<sup>109</sup> includes pollu-

101. The applicable percentage depends on the useful life of the property. I.R.C. § 46(c)(2).

If the useful life is: the applicable percentage is:	
3 to 5 years	33½
5 to 7 years	66½
7 years or more	100

102. I.R.C. § 46(c)(5).

103. These facilities are funded by Industrial Development Bonds issued pursuant to I.R.C. § 103(b)(4)(F) and all the rules covering issuance of such bonds.

104. *Id.* § 169(d)(1).

105. *Id.* § 46(c)(5)(B).

106. *Id.* § 46(d)(2) defines qualified progress expenditures as money spent upon "any property which is being constructed by or for the taxpayer" and which "has a construction period greater than two years and whose completion will yield new section 38 property having a useful life of seven or more years in the service of the taxpayers."

107. *Id.* § 48(c)(2)(A). For years ending after 1979, the maximum investment credit which may be taken equals \$25,000 plus the tax liability in excess of \$25,000 multiplied by the following percentages:

Taxable years ending in:	Percentage:
1980	70%
1981	80%
1982 or thereafter	90%

*See id.* § 46(a)(3).

108. *Id.* § 46(a)(2)(C) dictates that the 10% rate is applicable from October 1, 1978 until December 31, 1982 and that the rate is zero with respect to any other period.

tion control facilities,<sup>110</sup> alternative energy property,<sup>111</sup> solar and wind energy property,<sup>112</sup> specifically defined energy property,<sup>113</sup> recycling equipment,<sup>114</sup> and qualified inter-city buses.<sup>115</sup>

Public utilities generally are ineligible for the energy credit<sup>116</sup> except when utilizing certain hydroelectric energy property,<sup>117</sup> shale oil equipment,<sup>118</sup> and equipment for producing natural gas from geopressured brine.<sup>119</sup> The energy credit is reduced or eliminated if the property in question is financed in whole or in part by tax-exempt bonds.<sup>120</sup> The extent to which the credit is reduced depends on the type of energy property in question and the year for which the credit would be available.<sup>121</sup>

The energy credit is generally available for energy property placed in service between October 1, 1978 and December 31, 1982.<sup>122</sup> Credit

109. *Id.* § 48(1)(2) defines energy property.

110. *Id.* §§ 48(h)(12), (1)(3)(A)(iv).

111. *Id.* § 48(1)(3)(vi) includes necessary pollution control equipment installed in connection with energy property in this category.

112. *Id.* § 48(1)(4).

113. *Id.* § 48(1)(5). The conference committee report on the Windfall Profit Tax Act states that specially defined energy property will not qualify for the energy credit. H. Rep. 96-817, 96th Cong., 2d Sess. 133 (1980). However, that class of property is not among those listed in I.R.C. § 48(1)(17) as being ineligible for the credit.

114. I.R.C. § 48(1)(6).

115. *Id.* § 48(1)(16).

116. *Id.* § 48(1)(17).

117. *Id.* § 48(1)(13).

118. *Id.* § 48(1)(7).

119. *Id.* § 48(1)(8).

120. *Id.* § 103(b)(2).

121. In the case of property qualifying for the credit on or before December 31, 1982 and described in I.R.C. §§ 48(1)(4)-(8), when financed in whole or in part with tax-exempt IDBs, the energy credit is reduced to 5% (one half the normal rate). When energy property is installed in conjunction with specific other property (e.g., pollution control facilities), however, financed with tax-exempt IDBs, the energy property is not considered to be financed in whole or part by the Industrial Development Bonds. H. Rep. No. 96-117, 96th Cong., 2d Sess., 137 (1980).

For property described in I.R.C. §§ 48(1)(4)-(8) that otherwise becomes eligible for the energy credit after December 31, 1982, the credit is reduced by an amount which is proportionate to the extent of the tax-exempt financing. In the case of property described in I.R.C. §§ 48(1)(13)-(14), (16), the rules described above are effective beginning January 1, 1980.

122. I.R.C. § 48(a)(2)(C).

is available for qualified progress expenditures<sup>123</sup> made during the applicable period,<sup>124</sup> pollution control facilities acquired and placed in service during the period,<sup>125</sup> and energy property completed after its first day. Additionally, the taxpayer may use the energy credit to offset one hundred percent of the liability remaining after reduction by the regular investment credit.<sup>126</sup>

The investment and energy credits provide additional benefits to those corporations that finance facilities with section 103 bonds. For tax purposes, corporations completing facilities financed with IDBs receive "taxpayer" treatment even if the financing is in the form of leasing the facilities from bond issuers.<sup>127</sup> As tax owners of the bond-financed projects, corporations can avail themselves of both the investment and energy credits to the extent that facilities qualify for these credits under the above explanations.<sup>128</sup>

### C. *Proposed Legislation*

Since World War II, the United States has experienced an exodus of economic resources from older industrialized cities to new regions.<sup>129</sup> Plant shutdowns have occurred with alarming frequency and there is little reason to expect this trend will abate in the foreseeable future. While the tax code sections cited above and financing with section 103 bonds can mitigate these problems, they cannot eliminate them entirely.

Once a business locates in an urban area, the primary objective is keeping that entity from becoming a "runaway plant."<sup>130</sup> Courts

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123. *Id.* § 46(d).

124. *Id.*

125. *Id.*

126. *Id.* § 46(a)(9).

127. *See* Rev. Rul. 73-134, 1973-1 C.B. 60 which amplifies the holding of Rev. Rul. 68-590, 1968-2 C.B. 66.

128. A business may also depreciate facilities and deduct interest on the Industrial Development Bonds that finance the facility. The Internal Revenue Service, however, will no longer issue private letter rulings on tax ownership or interest deductions when formal ownership of property or liability for debt rests with another party. Rev. Proc. 80-22.

129. *Hearings on Plant Closings and Relocations Before the Committee on Labor and Human Resources*, 96th Cong., 1st Sess. 1 (1979) (statement of Senator Harrison A. Williams, Jr.).

130. A "runaway plant" is one that announces it will close its doors, and "sends a shock wave through the community. The impact on a community and its workers can

have attempted to confront this problem<sup>131</sup> and Congress has recently considered legislation to remedy it.<sup>132</sup> Exemplary legislation includes the National Employment Priorities Act of 1979<sup>133</sup> and the Employee Protection and Community Stabilization Act of 1979.<sup>134</sup>

These bills represent "the first shot in a major battle to bring to Congress and the nation the appropriate kind of remedy for the devastation of runaway plants and factory closeups."<sup>135</sup> Although the bills differ in detail, they both require employers to give advance notice of planned closings and relocations.<sup>136</sup> They also provide employee or community groups with the opportunity to purchase a local facility with federal assistance.<sup>137</sup>

Employers would be required to file economic impact statements,<sup>138</sup> detailing the social and economic consequences of relocating their plants. The Secretary of Labor would have the power to investigate the circumstances surrounding a shutdown.<sup>139</sup> The bills would give displaced workers the right to transfer to a new facility at company expense,<sup>140</sup> participate in federal job training programs,<sup>141</sup> receive severance pay equal to eighty-five percent of their annual wage,<sup>142</sup> and receive continued health insurance coverage and protec-

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be devastating with the costs being borne almost exclusively by those least capable of responding." *Id.*

131. *See, e.g.,* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 271-74 (1965).

132. This trend includes numerous efforts such as the proposed National Employment Priorities Act of 1979, the Economic Security Acts of 1977, 1978, and 1979, and the Voluntary Job Preservation and Community Stabilization Act of 1978. These acts, focusing upon the social costs of plant closings, deal with the situation where employees attempt to purchase facilities that have announced their closing.

133. S. 1608, 96th Cong., 1st Sess. (1979).

134. S. 1609, 96th Cong., 1st Sess. (1979).

135. Press release of Senator Harrison A. Williams, Jr. (July 31, 1979).

136. S. 1608, 96th Cong., 1st Sess. § 4 (1979); S. 1609, 96th Cong., 1st Sess. § 4 (1979).

137. S. 1609, 96th Cong., 1st Sess. § 7 (1979).

138. S. 1608, 96th Cong., 1st Sess. § 5 (1979); S. 1609, 96th Cong., 1st Sess. § 5 (1979).

139. S. 1608, 96th Cong., 1st Sess. § 5 (1979); S. 1609, 96th Cong., 1st Sess. § 5 (1979).

140. S. 1609, 96th Cong., 1st Sess. § 8 (1979).

141. S. 1608, 96th Cong., 1st Sess. § 13 (1979); S. 1609, 96th Cong., 1st Sess. § 11 (1979).

142. S. 1608, 96th Cong., 1st Sess. § 8 (1979).



tion against pension loss.<sup>143</sup>

The Williams "priorities" bill (S. 1609) relies on the courts to enforce the law,<sup>144</sup> while the Riegle-Ford "protection" bill (S. 1608) empowers the Secretary of Labor to hold hearings<sup>145</sup> and impose penalties for noncompliance.<sup>146</sup> The Riegle-Ford Bill would also require large employers to give up to two years notice of a plant closing to employees and the local community.<sup>147</sup> In contrast, the Williams measure requires a one year notice period regardless of the company's size.<sup>148</sup>

These bills, while constituting efforts at helping to cover the social costs of plant closings, also serve as incentives to prevent businesses from leaving their communities. The costs in terms of benefits conferred on employees and notice requirements to the community add to the total costs of the company becoming a "runaway plant."

Whether a bill of either sort is enacted is not the important point. Emphasis and note should be given to the fact that Congress has finally recognized the existence of the "runaway plant" problem. These pieces of legislation are indicative of efforts to remedy its consequences.

### III. THE CONSTITUTIONAL DEVELOPMENT OF RENT CONTROL AND THE GOOD CAUSE EVICTION REQUIREMENT

Although Americans in general enjoy comparatively high quality housing, many low- and moderate-income tenants have difficulty finding decent, safe, and affordable dwellings. The problem is intensified by the current rebuilding of inner cities, where large numbers of poor and elderly residents are congregated. When rehabilitation of buildings and neighborhoods attracts higher-income persons, the former residents are often financially unable to compete for the restored shelter. Reductions in federal housing assistance will further exacerbate the housing shortage. The budget cuts will force state and

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143. *Id.* § 12; S. 1609, 96th Cong., 1st Sess. § 8 (1979).

144. S. 1609, 96th Cong., 1st Sess. § 13 (1979).

145. S. 1608, 96th Cong., 1st Sess. § 31 (1979).

146. *Id.*

147. *Id.* § 4(b)(3)(A)(i).

148. S. 1609, 96th Cong., 1st Sess. § 4 (1979).