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## Should the City of Tulsa Develop an Export Trading Company

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# COMMENTS

## SHOULD THE CITY OF TULSA DEVELOP AN EXPORT TRADING COMPANY?

### I. INTRODUCTION

The United States is confronting a record \$150 billion trade deficit, which has increased nearly four times the amount of the trade deficit in 1981.<sup>1</sup> More than 200 bills are currently in Congress which would curb imports;<sup>2</sup> this legislative activity is evidence of Congress' perception that the trade deficit is a particularly troublesome problem. In the face of this protectionist legislation,<sup>3</sup> the President has "flatly threatened to 'veto measures that I believe will . . . diminish international trade.'"<sup>4</sup> President Reagan's position is that major curbs on imports "would invite retaliation by our trading partners abroad, would in turn lose jobs for those American workers in [export] industries that would be the victims of such retaliation, would rekindle inflation [by raising prices of imports and the domestic products that compete against them], [and] would strain international relations."<sup>5</sup>

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1. Church, *The Battle over Barriers*, TIME, Oct. 7, 1985, at 22. A trade surplus or deficit is determined when "exports and imports are netted to obtain the balance of trade. This balance of trade is positive when exports exceed imports and is known as a balance of trade *surplus*. On the other hand, if imports exceed exports, there is a balance of trade *deficit*." A. WILLIAMS, INTERNATIONAL TRADE AND INVESTMENT, A MANAGERIAL APPROACH 166 (1982).

2. See Church, *supra* note 1, at 23. This trade deficit is considered a problem for the United States economy as a whole. This proposition is explained as follows: "[I]nternational economic expert Fred Bergsten [states]: 'An increasing trade deficit is an enormous reduction in GNP. When the trade deficit swings from \$30 billion [the 1981 level] to \$100 billion, it takes 2% off the GNP.' He adds that the shift translates into an additional 2 million-to-3 million unemployed." Hershman & Sender, *Dangers of the Burgeoning Trade Deficit*, DUN'S BUS. MONTH, Sept. 1983, at 37.

3. Protectionism is an effort by government to restrict the importation of goods into its territory to shield or *protect* domestic industries from foreign competition. These measures take many forms, ranging from tariff barriers, such as import quotas which absolutely limit the quantity of imported goods, standards and classifications systems which require that foreign goods meet domestic laws, and a variety of bureaucratic and administrative procedures designed to slow down import shipments and increase the costs of administering the importation of these shipments. See A. WILLIAMS, *supra* note 1, at 45-77; Sender, *Sagging Service Exports: What Happened to America's Competitive Edge?*, DUN'S BUS. MONTH, Sept. 1983, at 39.

4. See Church, *supra* note 1, at 23.

5. *Id.* at 27.

In spite of the deficit, "the U.S. is still the world's biggest exporter by 27% over runner-up West Germany . . ."<sup>6</sup> Additionally, the percent of exports compared to United States Gross Domestic Product has increased from 4.40% in 1952 to 7.03% in 1982, while the percent of imports to United States Gross Domestic Product has increased from 3.39% in 1952 to 8.44% in 1982.<sup>7</sup>

While a trade deficit is generally considered to be a problem,<sup>8</sup> most economists do not favor protectionism as a solution, since it does not promote a worldwide increase in wealth or resource allocation efficiency.<sup>9</sup> In fact, the current trade deficit is exacerbated by factors which the United States actively promotes, such as integration of the free world's economies under the General Agreement on Tariffs and Trade (GATT),<sup>10</sup> the high value of the dollar,<sup>11</sup> technology transfer,<sup>12</sup> and politically beneficial rather than commercially beneficial trade deals.<sup>13</sup>

Another factor contributing to America's current trade deficit is the

6. *Id.* at 24.

7. Beshouri, *The Global Economy: A Closer Look*, ECON. REV., Aug. 1985, at 49, 52.

8. See A. WILLIAMS, *supra* note 1, at 182. "Balance-of-payments problems are usually symptomatic of problems in the economy as a whole." *Id.* "Countries with a surplus in their balance of payments are in a position to increase their international reserves which, in turn, strengthens the country's currency vis-a-vis other foreign currencies. Deficits in the balance of payments have the opposite effect, draining the country's international reserves and weakening the currency." *Id.* But see Hershman, *The Virtuous Circle*, DUN'S BUS. MONTH, Sept. 1983, at 40 (discussing the concept that a trade deficit is not always disadvantageous).

9. The belief that free trade is desirable is based on the doctrine of comparative advantage. This doctrine was "[d]eveloped more than a century ago by David Ricardo, John Stuart Mill, and other followers of Adam Smith . . ." P. SAMUELSON, *ECONOMICS* 645 (8th ed. 1970). The principle of comparative advantage is that "[w]hether or not one of two regions is absolutely more efficient in the production of every good than is the other, if each specializes in the products in which it has a comparative advantage (greatest relative efficiency), trade will be mutually profitable to both regions." *Id.* at 649; see also A. WILLIAMS, *supra* note 1, at 25-27; Beshouri, *supra* note 7, at 49-53. It has been noted that "[t]he effect of a tariff that 'protects' against imports is to raise the price to the domestic consumer." P. SAMUELSON, *supra*, at 653.

10. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. "The steady liberalization of . . . trade restrictions by the General Agreement on Tariffs and Trade (GATT) [has] helped break down these [market] divisions over the past two decades . . . Integration offers many benefits. Most important, scarce global resources are used more efficiently." Beshouri, *supra* note 7, at 49.

11. Church, *supra* note 1, at 24. It has been pointed out that:

The reputation of the U.S. as a "safe haven" for investments that will not be ravaged by inflation or undercut by leftist politicians certainly has been a factor in the dollar's rise, but . . . [g]overnment borrowing to cover the . . . [\$200 billion budget deficit] has kept "real" (that is, inflation-adjusted) interest rates in the U.S. well above comparable rates abroad, pulling in much foreign capital from investors who seek the highest possible return on their savings.

*Id.*

12. Smart, *Trade is Getting the Highest Priority*, BUS. AM., Sept. 16, 1985, at 1.

13. *Id.*

lack of export awareness and interest by United States businessmen.<sup>14</sup> It is estimated that only ten percent of the United States' 250,000 to 300,000 manufacturing firms export.<sup>15</sup> Yankelovich, Skelly and White prepared a study for the Missouri Department of Commerce which "found that nearly 1/3 of small businesses have not even considered exporting."<sup>16</sup> In response to this problem in American trade, Congress sought to create a trading vehicle similar to European and Japanese trading companies,<sup>17</sup> with the passage of the Export Trading Company Act of 1982 (Act).<sup>18</sup>

In the Act's findings and declaration of purpose, Congress declared that:

(1) United States exports are responsible for creating and maintaining one out of every nine manufacturing jobs in the United States and for generating one out of every seven dollars of total United States goods produced;

....

(7) the United States needs well developed export trade intermediaries which can achieve economies of scale and acquire exper-

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14. See PRICE WATERHOUSE & THE COUNCIL FOR EXPORT TRADING COMPANIES, THE EXPORT TRADING COMPANY GUIDEBOOK 1 (1984)[hereinafter cited as ETC GUIDEBOOK]. "Unfortunately, many U.S. firms, having historically relied upon the vastness of the domestic market, have not looked to exporting as a growth area and have failed to pursue the opportunities of foreign markets." *Id.*

15. S. RHINE, THE IMPACT OF REGULATIONS ON U.S. EXPORTS v (1981).

16. H.R. REP. NO. 1036, 98th Cong., 2d Sess. 2 (1984). "[T]he Smaller Business Association of New England (SBANE) found that more than 75 percent of nonexporting small businesses have not bothered to attend even a simple seminar on the benefits of exporting." *Id.*

17. S. REP. NO. 27, 97th Cong., 2d Sess. 10, 11, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2433. See generally *Export Trading Companies and Trade Associations: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 96th Cong., 1st Sess. 1 (1979) [hereinafter cited as 1979 Senate ETC Hearings] (general discussion and analysis of international export trading companies); *Export Trading Companies: Hearings and Markup Before the House Comm. on Foreign Affairs and the Subcomm. on International Economic Policy and Trade*, 96th Cong., 2d Sess. 1 (1980)[hereinafter cited as 1980 House ETC Hearings] (testimony of export management company presidents, international consultants and parties involved in international trade); Dziubla, *International Trading Companies: Building On The Japanese Model*, 4 NW. J. INT'L L. & BUS. 422 (1982).

18. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at scattered sections of 12 U.S.C., 15 U.S.C., and 30 U.S.C.). For a general discussion of the Export Trading Company Act, see Garvey, *Exports, Banking and Antitrust: The Export Trading Company Act—A Modest Tool for Export Promotion*, 5 NW. J. INT'L L. & BUS. 818 (1983); Golden & Kolb, *The Export Trading Company Act of 1982: An American Response to Foreign Competition*, 58 NOTRE DAME L. REV. 743 (1983); Note, *The Export Trading Company Act of 1982: Export Trade Comes of Age in the United States*, 34 S.C.L. REV. 757 (1983). See generally ETCs, NEW METHODS FOR U.S. EXPORTING (L. Welt ed. 1984) (AMA Management Briefing, available through American Management Ass'n, 135 W. 50th St., New York, N.Y. 10020); INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, EXPORT TRADING COMPANIES, A HANDBOOK FOR PROFESSIONALS (1985); ETC GUIDEBOOK, *supra* note 14.

tise enabling them to export goods and services profitably, at low per unit cost to producers;

. . . .  
 (9) those activities of State and local governmental authorities which initiate, facilitate, or expand exports of goods and services can be an important source for expansion of total United States exports, as well as for experimentation in the development of innovative export programs keyed to local, State and regional economic needs . . . .<sup>19</sup>

Consistent with this congressional finding, state and local governmental authorities have launched a multitude of export initiatives.<sup>20</sup> These include state offices of international trade,<sup>21</sup> publications and seminars,<sup>22</sup> trade missions or trade fairs,<sup>23</sup> export finance authorities,<sup>24</sup> overseas trade offices,<sup>25</sup> and state advisory councils.<sup>26</sup>

On the local level, cities have conducted seminars,<sup>27</sup> held trade missions,<sup>28</sup> been represented abroad by a state department foreign service officer,<sup>29</sup> and developed sister city ties.<sup>30</sup> Some cities have taken a more aggressive approach and established mayor's councils and task forces on international trade.<sup>31</sup> In particular, the City of Newport News, Virginia, has established its own export company.<sup>32</sup>

19. 15 U.S.C. § 4001(a) (1982) (emphasis added).

20. *House Comm. on Small Business, State, Local and Private Sector Small Business Export Initiatives*, H.R. REP. NO. 1036, 98th Cong., 2d Sess. 1 (1984) [hereinafter cited as 1984 HOUSE REPORT ON EXPORT INITIATIVES]; see also Graham, *Sources of Export Financing*, 14 GA. J. INT'L & COMP. L. 455, 461 (1984) ("In the past two years eight states' governments have established export finance organizations, most of which resemble the Eximbank in form."); Pilcher, *State Roles in Foreign Trade*, BUS. AM., May 27, 1985, at 12-13 ("Despite concern about the overvalued dollar, state legislators have been vigorously exploring ways to help small and medium-sized businesses export."); Note, *Multistate Export Trade Promotion Under the Export Trading Company Act of 1982*, 14 GA. J. INT'L & COMP. L. 155, 162 (1984); cf. A. POSNER, STATE GOVERNMENT EXPORT PROMOTION, AN EXPORTER'S GUIDE (1984).

21. 1984 HOUSE REPORT ON EXPORT INITIATIVES, *supra* note 20, at 5. "[E]very State has an office, or at least one section of the State Commerce Department devoted to international trade." *Id.*

22. *Id.* at 6.

23. *Id.*

24. Graham, *supra* note 20, at 461; see also CAL. GOV'T CODE §§ 15390-15396 (West 1985) (illustrative Export Finance Authority).

25. Pilcher, *supra* note 20, at 13. "According to NASDA [National Association of State Development Agencies], at least 27 states operate 52 overseas trade offices in 10 countries. In addition, California and Oklahoma are discussing opening overseas offices for the first time." *Id.*

26. *Id.*; see also CAL. GOV'T CODE §§ 15364.1-15364.8 (West 1986) (creating the California State World Trade Commission, a nonprofit public benefit corporation, and an advisory council composed of government and industry leaders).

27. 1984 HOUSE REPORT ON EXPORT INITIATIVES, *supra* note 20, at 8.

28. *Id.*

29. *Id.*

30. *Id.* at 9.

31. *Id.*

32. *Id.* at 8; Ward, *International Trade Development, The Newport News Export Trading System*, COMMENTARY, Summer 1985, at 7.

Oklahoma has also been in the process of developing its international trading capability.<sup>33</sup> Oklahoma's international trade exports rank it thirtieth among the other fifty states.<sup>34</sup> Oklahoma's exports of manufactured goods totaled \$1.5 billion in 1981, an increase of 137 percent from 1977.<sup>35</sup> Also, "Oklahoma's share of U.S. agricultural exports in fiscal year 1982 . . . totaled an estimated \$781 million."<sup>36</sup> It is estimated that over 54,000 Oklahoma jobs are related to exports of goods manufactured in Oklahoma.<sup>37</sup> Finally, foreign investment in Oklahoma is estimated at \$2.6 billion and provides over 24,000 jobs.<sup>38</sup>

Tulsa, the second largest city in Oklahoma,<sup>39</sup> is the leading export area in Oklahoma according to United States Department of Commerce statistics.<sup>40</sup> Tulsa's exports of manufactured goods were valued at \$310 million in 1977 and accounted for more than one-half of Oklahoma's exports.<sup>41</sup> Tulsa has also been the beneficiary of a unique federal/state cooperative effort: a shared export promotion office.<sup>42</sup>

In spite of these encouraging statistics, the Tulsa economy is afflicted with several trade related problems. Among the problems besetting Tulsa are "convulsive energy markets, employment volatility in Tulsa's energy-oriented manufacturing economy, mounting trade deficits . . . [and] intensifying overseas competition . . ."<sup>43</sup> As a response to these problems, the City of Tulsa has initiated a plan to create a city-level international trade development strategy.<sup>44</sup>

As part of that strategy, the City of Tulsa is considering creating a Tulsa area export trading company (ETC).<sup>45</sup> This Comment will analyze

33. Christensen, *Oklahoma's Foreign Trade: Baiting A Complicated Hook*, OKLA. BUS., Sept. 1985, at 44. The development of an international trading capacity at the state level is important according to Christensen, because "mastering the import/export balance may mean the difference between economic feast or famine." *Id.* at 43.

34. U.S. Dep't of Commerce, *State Export Series, Oklahoma*, BUS. AM., Apr. 1, 1985, at 17.

35. *Id.*

36. *Id.*

37. *Id.* at 18.

38. Pilcher, *supra* note 20, at 14.

39. See THE WORLD ALMANAC & BOOK OF FACTS 1985, 278 (H. Lane ed. 1984).

40. Dunlap, *Learning to Speak Their Language*, TULSA, July 1983, at 22, 23.

41. *Id.* at 23.

42. *AITS Program To Link State Businesses With U.S. Embassies in 67 Foreign Countries*, OKLA. BUS., Dec. 1982, at 35; see Bonebrake, *New Export Offices Blend Bureaucracy, Efficiency*, TULSA BUS. CHRON., Oct. 25, 1982, at 4, col. 1.

43. Letter from Ray Pearcey, Manager of Strategic Planning, City of Tulsa, Department of City Development, to Tulsa Business Leaders (Aug. 12, 1985) (soliciting corporate contributions for initiating a Tulsa international trade development strategy).

44. *Id.*

45. The City of Tulsa, Planning & Research Division, Working Paper: Tulsa International Trade Development Strategy 9 (Aug. 1985) [hereinafter cited as Tulsa Trade Strategy]. Compare

the legal basis for creation of such an entity under both the Export Trading Company Act of 1982<sup>46</sup> and Oklahoma law. Provisions of the Oklahoma Constitution and applicable case law will be specifically analyzed in order to determine those problems which may exist in the implementation of Tulsa's proposal.<sup>47</sup>

## II. THE EXPORT TRADING COMPANY ACT: PUBLIC ETC FORMATION

### A. *Legislative Goals of the Act*

Congress recognized the role state and local governments may play to facilitate "experimentation in the development of innovative export programs."<sup>48</sup> The legislative history of the Act specifically states that there is no intention to restrict or prevent local governments, individuals, and corporations from creating or participating in ETCs.<sup>49</sup> In fact, Congress recognized that "nothing in the current law directly precludes formation of export trading companies."<sup>50</sup> Thus, it is clear that the Act was intended neither to create a new class of company nor to constrict current rights.<sup>51</sup>

Instead, the law sought to encourage the formation of more ETCs and export trade services, increase investment in, and the financing capability of, these companies, and modify some perceived short-comings in antitrust laws which may negatively affect trade.<sup>52</sup> The Act's focus is considered by some commentators to be permissive rather than mandatory since it merely removes regulatory obstacles of export trade rather than forcing compliance with regulations.<sup>53</sup>

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this approach with that taken by the City of Newport News, Virginia. Ward, *supra* note 32, at 7. The City of Tulsa is planning a strategy similar to the working strategy of the City of Newport News, Virginia.

46. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at scattered sections of 12 U.S.C., 15 U.S.C., and 30 U.S.C.).

47. Tulsa Trade Strategy, *supra* note 45, at 9.

48. 15 U.S.C. § 4001(a)(9) (1982); see *supra* text accompanying note 19.

49. S. REP. NO. 27, 97th Cong., 2d Sess. 16, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2431, 2438. "Nothing in H.R. 1799 [The Export Trading Company Act of 1982] is intended, therefore, to restrict or prevent such entities [local governments] from organizing, owning, or otherwise participating in or supporting export trading companies consistent with local and State laws." *Id.*

50. *Id.*

51. *Id.* at 9, 1982 U.S. CODE CONG. & AD. NEWS at 2432. The Export Trading Company Act represents a bold step "[b]y encouraging exporters to form ETCs with the financial participation of banking institutions, to seek the limited exemption from antitrust liability available through the certificate of review process, or to rely on the clarified antitrust provisions of a new section of the Sherman Act . . ." Golden & Kolb, *supra* note 18, at 790.

52. 15 U.S.C. § 4001(b) (1982).

53. Golden & Kolb, *supra* note 18, at 756.

## B. *Applying the Act to a Municipality-Based ETC*

### 1. Goal: Encouragement of ETCs and Export Services

Since Congress intended the legislation to be permissive rather than mandatory, it is within the discretion of each state and local governmental authority to determine the feasibility of establishing an ETC. It has been stated: "States and cities are in a superb position to form their own ETCs. . . ." <sup>54</sup> The Department of Commerce has helped to perform its responsibility under the Act by establishing offices to promote export trading around the country. <sup>55</sup> Also, the Department of Commerce has commissioned a study of the ETC concept. This study provides much of the business planning, organization, and consulting work for the creation of these entities, thus encouraging the formation of public sector, as well as private sector, ETCs. <sup>56</sup>

### 2. Goal: Improvement of Investment and Financing Capabilities of ETCs

The legislative history of the Bank Export Services Act provides that:

[T]he Board of Governors of the Federal Reserve System should pursue regulatory policies that—

(1) provide for the establishment of export trading companies with powers sufficiently broad to enable them to compete with similar foreign-owned institutions . . . .

. . . .

(4) facilitate the formation of joint venture export trading companies between bank holding companies and nonbank firms . . . . <sup>57</sup>

It is clear that Congress was attempting to spur bank investment and involvement in ETCs. Furthermore, the Export-Import Bank of the United States (EXIM) is authorized to create a program whereby loans made by *public* or private creditors to ETCs are guaranteed, thereby encouraging further collaboration between the public and private sector. <sup>58</sup>

The Bank Export Services Act does not specifically mention the in-

54. 1984 HOUSE REPORT ON EXPORT INITIATIVES, *supra* note 20, at 14.

55. See U.S. Dept. of Commerce, *Trade Contacts*, BUS. AM., Aug. 5, 1985, at 4.

56. ETC GUIDEBOOK, *supra* note 14, at 31, 59-63 (Hub Model focusing on port authorities and local governments creating ETCs). "Virtually all States and cities with jurisdiction over a major port are reviewing, or already have reviewed, the possibilities presented by the ETC Act." *Id.* at 59. "[T]he Port Authority of New York and New Jersey, the Virginia Port Authority and the Port of Portland, Oregon are actively developing trading entities." *Id.* at 31.

57. Bank Export Services Act, Pub. L. No. 97-290, § 202, 96 Stat. 1235 (1982) (codified at 12 U.S.C. § 1843 note (1982)).

58. 12 U.S.C. § 635a-4 (1982).



volvement of banks with municipalities.<sup>59</sup> However, it appears that, subject to the strictures of the Act, bank holding companies are free to invest up to "5 per centum of the bank holding company's consolidated capital and surplus"<sup>60</sup> in shares of an ETC (which may be majority-owned by a municipality).

A bank holding company is restricted under the Act to investing in ETCs that do not exceed the permitted securities trading activities as regulated by applicable federal and state banking laws and relevant agency regulations.<sup>61</sup> A bank holding company also may not invest in an ETC which engages in agricultural production or manufacturing, except for *de minimus* repackaging, reassembling, or extracting efforts which are necessary to enable the sale of United States goods or services in other countries.<sup>62</sup> Finally, a bank holding company is limited to investing in an ETC which is narrowly defined in the statute to include only a company which is "exclusively engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States . . . ."<sup>63</sup>

Accordingly, an ETC organized by a municipality may solicit bank holding company investment and assistance under the Act, subject to the regulatory constraints of both federal and state law on bank holding companies.

### 3. Goal: Antitrust Uncertainty Eliminated By Export Trade Certificates of Review

Title III of the Act provides an exemption from criminal and civil liability for antitrust actions brought against persons<sup>64</sup> who have an Export Trade Certificate of Review and who have complied with the terms of the statute.<sup>65</sup>

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59. Bank Export Services Act, Pub. L. No. 97-290, 96 Stat. 1235 (1982) (codified at 12 U.S.C. §§ 372, 635a-4, 1843 (1982)) (The Bank Export Services Act is Title II of Pub. L. No. 97-290. Title I is the Export Trading Company Act of 1982).

60. 12 U.S.C. § 1843(c)(14) (1982) (investments are subject to Federal Reserve Board disapproval); see Golden & Kolb, *supra* note 18, at 761-69.

61. 12 U.S.C. § 1843(c)(14)(C)(i) (1982).

62. *Id.* § 1843(c)(14)(C)(ii).

63. *Id.* § 1843(c)(14)(F)(i).

64. 15 U.S.C. § 4021(5) (1982). Under the statute, "person" is defined broadly to include "a State or local government entity." *Id.*

65. 15 U.S.C. § 4016(a) (1982). Persons who have been damaged by a certificate holder's failure to comply with the statute may sue for injunctive relief, actual damages, loss of interest on actual damages, and the costs of the suit, including reasonable attorney's fees. *Id.* § 4016(b)(1). This is a

This exemption is potentially one of the most beneficial sections of the Act for a municipality-based ETC. The goal of Congress was to allow companies to enter into cooperative agreements without having to deal with the uncertainties and complexities of the United States anti-trust laws, thereby stimulating collaborative efforts to increase export trade.<sup>66</sup> Since many municipalities (such as Tulsa) have a concentration of businesses which cater to one particular industry, the protections afforded under the Act should enable and encourage export cooperation among similar businesses.

Briefly stated, persons, companies, or groups<sup>67</sup> wishing to engage in export activities may apply for an Export Trade Certificate of Review if the activities or methods of operation will not reduce competition, unreasonably affect domestic prices of goods, constitute unfair competition, or create a "boomerang" sale whereby goods destined for export return to the United States for sale or resale.<sup>68</sup>

A municipality-owned ETC could file an Export Trade Certificate of Review for a group of locally based businesses which the ETC was representing internationally. This concerted export effort would create "[e]conomies of scale [which] can lower costs and increase [American companies'] competitiveness in the world marketplace. The risk associated with embarking on a new venture is [thus] distributed among many participants . . . ."<sup>69</sup>

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significant reduction of potential liability when compared with the treble damages provisions of the Sherman and Clayton Acts. See Golden & Kolb, *supra* note 18, at 771.

66. S. REP. NO. 27, 97th Cong., 2d Sess. 10, 11, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2431, 2434. See generally Bruce & Peirce, *Understanding the Export Trading Company Act and Using (or Avoiding) Its Antitrust Exemptions*, 38 BUS. LAW. 975 (1983).

67. See *supra* note 64.

68. 15 U.S.C. § 4013(a) (1982). The statute provides that an Export Trade Certificate of Review will be granted if the applicant establishes that export trade, export trade activities, and methods of operation will:

- (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,
- (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
- (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and
- (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

*Id.*

69. ETC GUIDEBOOK, *supra* note 14, at 4. For a thorough discussion of the antitrust provisions of the Export Trading Company Act of 1982, see generally Garvey, *supra* note 18, at 832-42 (discussion of antitrust improvements, certificates of review, implementation, limitations, and pitfalls); Golden & Kolb, *supra* note 18, at 769-85 (discussion of certification procedure and clarified

In meeting its legislative goals, the Act offers significant opportunities to local governments. The Act directly encourages local ETC formation, participation of financial institutions in these companies, and provides protection against antitrust actions.

### III. ANALYSIS

The City of Tulsa is currently examining four major types of ETC organizations in its international trade strategy.<sup>70</sup> These are the Hub Model,<sup>71</sup> the Single or Allied Product Collaborative Model,<sup>72</sup> the Regional Multi-Product Model,<sup>73</sup> and the Services Collaborative Model.<sup>74</sup> These organizational types will be analyzed in the context of relevant law and suggestions for implementation will be made.

#### A. *Hub Model*

In this model, the Port of Catoosa would "hold a large equity share in the [trading] entity while a variety of other private investors including 'user' firms, the City and general-investors would own subordinate shares . . . ."<sup>75</sup>

The "Hub Model" of an ETC is based upon a Department of Commerce model which is centered around a port authority.<sup>76</sup> In the Commerce Department's hypothetical, the "port authority ETC is organized to provide comprehensive services to small- and medium-sized manufacturers and agricultural producers from regions serviced by the port."<sup>77</sup> The major benefits from this approach are the direct involvement of the community and the local benefit to area businesses in providing these

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antitrust immunity); Zarin, *The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade*, 17 GEO. WASH. J. INT'L L. & ECON. 297 (1983); Note, *supra* note 18, at 781-84 (brief discussion of the Export Trading Company Act antitrust provisions). For guidelines and administrative procedures to be followed in applying for an Export Trade Certificate of Review, see Export Trade Certificates of Review (Final Rule) 50 Fed. Reg. 1,804 (1985) (to be codified at 15 C.F.R. § 325); Guidelines for the Issuance of Export Trade Certificates of Review (2d. ed.), 50 Fed. Reg. 1,786 (1985); 15 C.F.R. § 325.1-14 (1985).

70. Tulsa Trade Strategy, *supra* note 45, at 14-15.

71. *Id.* at 14.

72. *Id.*

73. *Id.* at 15.

74. *Id.*

75. *Id.* at 14; see also *infra* note 160 (a description of the Port of Catoosa).

76. ETC GUIDEBOOK, *supra* note 14, at 59. There are two benefits to this approach: "[1] port authorities have a vested interest in promoting the flow of goods through their facilities and [2] State or local governments, which . . . [usually] own the port authority, actively pursue . . . economic advantage . . . by encouraging exports from their region." *Id.*

77. *Id.*

services.<sup>78</sup>

One of the obvious advantages of operating the trading entity via the Hub Model is that money has already been spent to set up the Tulsa—Rogers County Port Authority.<sup>79</sup> Adding a trading entity would conserve resources and effectively piggyback off the previous investment. Another advantage is that specialized expertise in export promotion would serve as a community resource housed at the port facility.

One disadvantage of the Hub Model is that the Port of Catoosa is located a considerable distance from the major businesses of Tulsa. Therefore, a natural barrier exists against maximizing port traffic. This obstacle could be overcome by developing a separate entity which would be receptive to all forms of traffic and trading.

Additionally, Tulsa's plan of direct investment in an entity which would have both private and public shareholders would very likely be prohibited by the Oklahoma Constitution's interdiction of municipal investment in any company or association.<sup>80</sup> This prohibition could be avoided, however, if the trading entity were operated as a public utility, with the City or the Port of Catoosa granting a franchise to private individuals to operate some or all of the functions.<sup>81</sup> The goal of economic development would suffice as a public purpose<sup>82</sup> and would be consistent with other provisions of Oklahoma law guaranteeing municipalities the right to engage in any business or enterprise.<sup>83</sup>

The City of Tulsa and the Port of Catoosa could avoid direct invest-

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78. *Id.* at 60. The characteristics of the model include the development of exporting business in the Port Authority locale, orientation towards a regionally produced product mix, and trading with any region of the world which trades through the Port of Catoosa. The trading entity would be formed by a consortium of local banks and the port authority, with \$200 thousand seed capital, and would achieve an estimated \$3 million in sales in the first year, growing to \$50 million by the fourth year of operations. *Id.*

79. *See infra* note 160. "The Tulsa Port of Catoosa is self supporting. The initial public investment in 1971 of \$21.2 million by the City of Tulsa and Rogers County has been followed by a private sector investment of over \$140 million . . . . Port revenues and tonnage exceeded the tenth year projection before the fifth year of operations." City of Tulsa—Rogers County Port Authority, *Port Facts and Figures 7* (1986) (marketing brochure available from the City of Tulsa—Rogers County Port Authority, 5350 Cimarron Road, Catoosa, OK. 74105) [hereinafter cited as Tulsa Port Authority Brochure].

80. OKLA. CONST. art. X, § 17.

81. OKLA. STAT. tit. 11, § 22-104 (Supp. 1984). The Port of Catoosa, through private companies, already supplies the following services: general dry cargo operations, public warehousing and storage, a foreign trade zone, dry bulk operations, a grain elevator, a barge cleaning service, liquid bulk cargo operations, railroad connections, and utilities. Tulsa Port Authority Brochure, *supra* note 79, at 6.

82. *See infra* notes 159-66 and accompanying text.

83. OKLA. CONST. art. XVIII, § 6; *see also infra* notes 164-72 (discussing Oklahoma's interpretation of the "public purpose" justification for the development of an enterprise).

ment in the trading entity and seek a cooperative industrial development role by developing a *facility*, rather than the entity itself, with bond money.<sup>84</sup> This approach would avoid a *direct* managerial involvement by the City, but would enable Tulsa to invest indirectly in a trading entity and exert some financial control over the enterprise through the administration of the facilities.<sup>85</sup> Of course, bond development would require voter approval.<sup>86</sup>

Finally, to avoid these problems, the City of Tulsa could operate or finance an export trading authority as part of the Tulsa Industrial Authority Public Benefit Trust<sup>87</sup> or as a separate public benefit trust.<sup>88</sup> Any such trust would have to be for the public benefit<sup>89</sup> and be approved by a two-thirds vote of the city council.<sup>90</sup>

### B. *The Single or Allied Product Collaborative Model*

In this model, several Tulsa firms would collaborate to form a "bundle of shared trade services, including . . . foreign market intelligence capacity, . . . transportation logistics, collaborative receivables financing, a credit pool . . . [and an] umbrella insurance policy."<sup>91</sup>

The Allied Product Model, also based on the Commerce Department's research,<sup>92</sup> involves the creation of a trading entity which focuses on trade with a particular region, such as the Pacific Basin.<sup>93</sup> This model is based upon collaborating to sell allied product lines and is somewhat dependent upon receiving antitrust protection under an Export Trade Certificate of Review.<sup>94</sup>

In this model, special marketing agreements were developed for each of the participants, based upon products to be sold and ancillary services to be provided by the trading entity. Plans for a central office in Singapore were developed, and also for a future second office in Tokyo.<sup>95</sup>

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84. OKLA. STAT. tit. 62, § 654 (1981).

85. *Id.* § 652.

86. *Id.* § 654.

87. TULSA, OKLA., REV. ORDINANCES tit. 39, ch. 10, exhibit A, art. 1 (1985).

88. OKLA. STAT. tit. 60, § 176 (1981).

89. *See infra* notes 204-08 and accompanying text.

90. OKLA. STAT. tit. 60, § 176(a) (1981).

91. Tulsa Trade Strategy, *supra* note 45, at 14.

92. THE ETC GUIDEBOOK, *supra* note 14, at 68.

93. *Id.* The Pacific Basin consists of Australia, Burma, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, New Zealand, Philippines, Singapore, Taiwan, and Thailand. *Id.*

94. *Id.* at 69.

95. *Id.* at 72. The characteristics of this model are local industry or product orientation with potential nationwide expansion, and the marketing of oil industry products, services, and equipment, focused on a major region, such as the Pacific Basin. Major manufacturers would band together to

Applying this model to Tulsa, several local manufacturers in the oil and gas business would form a trading entity to supply drilling equipment, supplies, and services to a particular region, such as the Pacific Basin. Other major oil producing regions, such as Africa or South America, could be added at a later date. The benefits of sharing information and market development costs offer a solid targeted approach to develop trade for Tulsa area businesses.

The drawback to this model, however, is that such an entity would narrowly focus on the oil industry and one world region. This focus will not serve to broaden the Tulsa economy and may sacrifice more diverse business in favor of oil and gas related products and services.

This model would not require city involvement, except that Tulsa could work to develop it along traditional industrial development channels by providing facilities or subsidized financing,<sup>96</sup> as discussed earlier in the Hub Model. The antitrust provisions of the Act should also be invoked to help local businesses avoid antitrust liability.<sup>97</sup> Such protection would enable Tulsa's similar businesses to work together to develop international trade.<sup>98</sup>

### C. *Regional Multi-Product Model*

In this model, the Port of Catoosa would "spearhead" a regional product marketing effort.<sup>99</sup> Either an ETC would be formed, or local governments would work together to build export trading resources.<sup>100</sup> If this approach were used, formation of a multiproduct ETC would follow the same analysis as the Hub Model in that it could be operated as a public utility, either privately via industrial development bond money or

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form the entity, contributing \$10 million in equity, with expected first year sales of \$75 million and \$250 million by the fourth year. *Id.* at 69. The City of Tulsa sees this approach as highly beneficial because of (1) antitrust immunity, (2) good product choice, and (3) compatibility with Tulsa's foreign trade zone and industrial district plans for the University Center of Tulsa. Tulsa Trade Strategy, *supra* note 45, at 14.

96. OKLA. STAT. tit. 62, § 652 (1981).

97. 15 U.S.C. §§ 6a, 4011-4021 (1982); *see also supra* notes 64-68 and accompanying text (discussing the effect of the antitrust provisions of the Act on criminal and civil liability).

98. Tulsa Trade Strategy, *supra* note 45, at 14. ETC antitrust immunity "would allow firms . . . to legally 'collude' for the greater glory of Tulsa [and] their stockholders." *Id.*

99. *See id.* at 15.

100. *See id.* The City Planning Department sees the trading entity as sub-state or regional in scope, possibly as broad as Indian Nations Council of Governments (INCOG), a quasi-public association of municipal governments in and around Tulsa County. "The agency [INCOG] has a substantial profession [sic] staff in a host of fields including economic development, planning, management services and land use administration." *Id.*

as a public benefit trust.<sup>101</sup> If the facility operates as a cooperation of local governmental units, care should be taken to avoid public investment in private enterprise in contravention of the Oklahoma Constitution.<sup>102</sup> If the governmental activities were limited to a purely cooperative local information and resource collection agency, it would not violate the state constitution. For example, Indian Nations Council of Governments (INCOG) avoided a constitutional challenge<sup>103</sup> because it was "an agency of local governments participating in its membership."<sup>104</sup> The benefits to be derived from instituting a trading entity as a piggyback or cooperative function, even in potential association with INCOG, are great.<sup>105</sup> Since most of exporting is information and service related, the currently substantial local investment in planning and economic development could be expanded and internationalized with a minimum of difficulty.

A potential drawback to such an approach is the lack of an industry or business-driven focus to control the direction of the entity. With no businesses as participants in the formation and operation of the entity, there is a risk of it becoming a tax drain on the local economy. One way to offset this potential drain is to establish a service-oriented fee schedule and to direct the activities of the entity towards those areas of greatest business need in the local area.

#### D. *Services Collaborative Model*

In this model, "a channel to the world for Tulsa's growing advanced services economy"<sup>106</sup> would be developed. "[A] batch of jointly managed 'trade' utilities would create an enormous simplification of the trade 'act'. . . ."<sup>107</sup>

The Services Collaborative Model would not require the City of Tulsa to establish an ETC but would involve the ability of the City to contract with others to supply export services to the public.<sup>108</sup> Coopera-

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101. See *supra* notes 75-90 and accompanying text.

102. *Pease v. Board of County Comm'rs*, 550 P.2d 565, 567 (Okla. 1976). "We therefore hold payment of dues to INCOG by member cities and counties does not violate the Oklahoma State Constitution." *Id.* at 568 (citing OKLA. CONST. art. X, § 17) (INCOG is a cooperative planning association of local Northeastern Oklahoma counties, cities, towns, and governments).

103. *Id.*; see OKLA. CONST. art. X, § 17.

104. *Pease*, 550 P.2d at 568.

105. Tulsa Trade Strategy, *supra* note 45, at 15.

106. *Id.*

107. *Id.*

108. OKLA. STAT. tit. 11, § 22-104(6) (Supp. 1985) (establishing the power of municipalities to contract to supply goods and services).

tion between individuals, governments, corporations, and municipalities in providing export services and general services sold for export is given substantial antitrust protection under the terms of the Act.<sup>109</sup>

Any economic development activity could be effected under the Services Collaborative Model as discussed under the Hub Model; for example, facilities could be purchased and funded through bond money.<sup>110</sup> The City of Newport News, Virginia developed a Services Collaborative Model, calling it the "Newport News Export Trading System."<sup>111</sup>

In this approach, the City of Newport News and several companies representing distinct export services signed a general agreement.<sup>112</sup> The parties to the agreement included an export management company, a freight forwarding company, a bank, and the City of Newport News.<sup>113</sup> In the Newport News Export Trading System, the city "coordinates the provision of local, state and federal trade development programs."<sup>114</sup>

If the City of Tulsa develops a trading system along these lines, it will merely need to examine its ability to contract<sup>115</sup> and coordinate federal, state, and local programs.<sup>116</sup> Such a system would not be an ETC, but instead a contractual agreement among the participants, and therefore antitrust protection may be required.<sup>117</sup>

This arrangement is advantageous in many respects. First, other governments, such as the City of Newport News, have already developed a working model.<sup>118</sup> Second, each participant in the program concentrates on providing the service which it performs best. Finally, the contractual arrangement provides a facility or framework to "create an

109. 15 U.S.C. §§ 6a, 4016 (1982). "The purpose of . . . [the Act] is to increase exports . . . by encouraging and facilitating the provision of export trade services . . . [and to permit] associations formed for the purpose of exporting services to enjoy the same exemptions from U.S. antitrust restrictions . . . [as currently exempted exporters of goods enjoy] . . ." S. REP. NO. 27, 97th Cong., 2d Sess. 9-10, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2431-32.

110. *See supra* notes 75-90 and accompanying text.

111. *Ward, supra* note 32, at 7.

112. *Id.* at 8.

113. *Id.*

114. *Id.* at 9.

115. OKLA. STAT. tit. 11, § 22-104(6) (Supp. 1985).

116. OKLA. STAT. tit. 74, § 1001 (1981) (Interlocal Cooperation Act). The Act's purposes are "to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage . . ." *Id.* Agreements of Oklahoma local governments with other states or the federal government are specifically authorized. *Id.* § 1004. Agreements must be filed to be valid. *Id.* § 1005.

117. *See supra* notes 64-68 and accompanying text. *See generally Newport News Resolution on International Trade Development*, COMMENTARY, Summer 1985, at 8.

118. *Ward, supra* note 32, at 8.



enormous simplification of the trade 'act' . . ."<sup>119</sup> This simplification will encourage local businesses to engage in trading and may stimulate the formation of smaller companies to resell the services and tailor-make packages for local businesses which are not inclined to actively participate.

A drawback to this arrangement is that a true trading entity will not be created. As a result, the domestic manufacturing or marketing companies will be responsible for most of their export trading activities. Since these companies have been characteristically ignorant of the opportunities available in export trading,<sup>120</sup> no direct involvement or stimulus will be created for these companies to trade more actively. Therefore, the local governmental entity will need to aggressively promote the concept to local businesses in order to facilitate trade.

#### IV. PUBLIC ETC FORMATION

##### A. Federal Law

It is well established that states can create and operate business enterprises.<sup>121</sup> Any such enterprise must engage in its activity for "public purposes" to avoid a fourteenth amendment challenge that such a law would amount to the taking of property without due process of law.<sup>122</sup> Generally, the United States Supreme Court gives substantial deference to state supreme court rulings that business activities carried on by states and municipalities are for a public purpose<sup>123</sup> even when the activities engaged in are merely to promote the general welfare.<sup>124</sup>

119. Tulsa Trade Strategy, *supra* note 45, at 15.

120. See *supra* note 16 and accompanying text.

121. See Barnett, *The Constitution and State Powers of Export Limitation*, 13 TULSA L.J. 229, 238-41 (1977).

122. *Jones v. City of Portland*, 245 U.S. 217, 221 (1917).

The contention is that the establishment of [a] municipal wood yard is not a public purpose, that taxation to accomplish that end amounts to the taking of the property . . . without due process of law . . . It is well settled that . . . exertion of the taxing power for merely private purposes is beyond the authority of the State.

*Id.* The Court ultimately held that the City of Portland, Maine's operation of a municipal coal and fuel yard at cost was a "public purpose" and gave substantial deference to the Supreme Judicial Court of Maine's opinion that such activity was for a public purpose. *Id.* at 225.

123. *Id.* at 221, 222 (citing *inter alia* *Union Lime Co. v. Chicago & N.W. Ry. Co.*, 233 U.S. 211 (1914); *Hairston v. Danville & W.R. Co.*, 208 U.S. 598 (1908); *Clark v. Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896)); see also *Green v. Frazier*, 253 U.S. 233, 242 (1920), *aff'g* 44 N.D. 395, 176 N.W. 11 (1920); *Common Cause v. State*, 455 A.2d 1, 26 (Me. 1983).

124. *Green*, 253 U.S. at 241, 242 (The State of North Dakota created a Home Building Association whose responsibility was to provide housing for North Dakota residents to promote the general welfare).

The modern judicial trend is that economic development is a public purpose, even though it may only confer indirect benefits to the economy of the state.<sup>125</sup> Any due process challenge will hinge upon a determination of whether *any* appropriation is for the benefit of the public welfare (such as economic development), distinguished from purely private interests,<sup>126</sup> since the Supreme Court has clearly permitted local economic experimentation in public enterprises.<sup>127</sup>

Similarly, economic development by states and municipalities has been held not to violate the equal protection clause of the fourteenth amendment.<sup>128</sup> Granting economic benefits so that some members of a class are favored is permitted where there is no invidious discrimination,<sup>129</sup> and where there is some reasonable basis for the classification and discrimination.<sup>130</sup> Such classifications carry a presumption of constitutionality when the classifications are rationally based on "whether facts can reasonably be conceived which would justify the distinctions or differences in state policy as between different persons . . . ."<sup>131</sup> In some instances, "[t]he presumption of constitutionality may justify discriminations . . . even without actual evidence demonstrating a rational basis for

125. *Common Cause*, 455 A.2d at 24. "In other jurisdictions, it is widely accepted that economic development is a public purpose." *Id.*; see Lawrence, *Constitutional Limitations on Governmental Participation in Downtown Development Projects*, 35 VAND. L. REV. 277, 281-82 (1982); see, e.g., *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970); *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 368 N.E.2d 915 (1977); *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 131 N.W.2d 5 (1964); *City of Frostburg v. Jenkins*, 215 Md. 9, 136 A.2d 852 (1957); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981); *City of Pipestone v. Madsen*, 287 Minn. 357, 178 N.W.2d 594 (1970); *McKinney v. City of Greenville*, 262 S.C. 227, 203 S.E.2d 680 (1974). As the Court of Appeals of Kentucky stated:

The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classed as involving a public purpose . . . . It reaches perhaps its broadest extent under the view that economic welfare is one of the main concerns of the city, state and federal governments.

*Faulconer v. City of Danville*, 313 Ky. 468, 472, 232 S.W.2d 80, 83 (1950).

126. *Baker v. Matheson*, 607 P.2d 233, 241-42 (Utah 1979).

127. *Common Cause*, 455 A.2d at 26. As is explained by the case:

In *Citizens Savings Bank & Loan Association v. City of Topeka*, 87 U.S. (20 Wall.) 655, 22 L. Ed. 463 (1874), the city of Topeka issued bonds as a donation to encourage a company to expand in the city. In an opinion that did not link the public-purpose doctrine to any particular provision of the United States Constitution, the Supreme Court struck down the arrangement as not being for a public purpose . . . . [However, more recently,] *Topeka* has been substantially undermined by later Supreme Court decisions making clear that the Court will defer to the states in the area of taxation as to permit local economic experimentation.

*Id.* (citations omitted).

128. *Baker*, 607 P.2d at 243.

129. *Id.* at 243-44 (citing *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)).

130. *Id.* at 244 (citing *Weinberger v. Salfi*, 422 U.S. 749, 769 (1975)).

131. *Id.* (citing *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911)).

the distinctions made."<sup>132</sup>

The United States Supreme Court has even dismissed an appeal from the Supreme Court of Mississippi concerning the "validity of a statute authorizing the use of municipal funds to finance the construction of facilities for a private corporation . . . 'for want of a substantial federal question.'"<sup>133</sup>

Thus, a state or a municipality could develop an ETC without a challenge under federal law where there was a clear public purpose, such as economic development through export trading. Such a trading entity would be permitted since a rational basis would exist for the unequal conferring of economic benefits.

## B. *Oklahoma Law*

### 1. Oklahoma Constitution

The Oklahoma Constitution grants many rights to Oklahoma cities.<sup>134</sup> These rights include: (1) freedom from special or local legislation;<sup>135</sup> (2) protection of municipal revenue and assets;<sup>136</sup> (3) municipal exemption from taxation;<sup>137</sup> (4) *freedom from involvement with private enterprise*;<sup>138</sup> (5) autonomy in taxation;<sup>139</sup> (6) freedom from state control over the granting of franchises;<sup>140</sup> (7) *the right to engage in enterprise*;<sup>141</sup> and (8) *the right to engage in industrial development*.<sup>142</sup> Some of these

132. *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)).

133. *Common Cause*, 455 A.2d at 26-27 (citing *Albritton v. City of Winona*, 303 U.S. 627 (1938)).

134. Merrill, *The Constitutional Rights of Oklahoma Cities*, 21 OKLA. L. REV. 251, 279 (1968).

135. OKLA. CONST. art. XVIII, § 1. "Municipal corporations shall not be created by special laws . . ." *Id.*

136. *Id.* art V, § 53. "[T]he Legislature shall have no power to release or extinguish . . . the indebtedness, liabilities, or obligations of any corporation or individual, to this State, or any county or other municipal corporation thereof." *Id.*

137. *Id.* art. X, § 6. "All property . . . of counties and of municipalities of this State . . . shall be exempt from taxation . . ." *Id.*

138. *Id.* art. X, §§ 14, 17. Section 14 states: "Taxes shall be levied and collected by general laws, and for public purposes only . . ." *Id.* art. X, § 14. Section 17 states: "The Legislature shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association, or individual." *Id.* art. X, § 17.

139. *Id.* art. X, § 20. "The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes." *Id.*

140. *Id.* art. XVIII, § 5(a). This freedom is implicit in that the procedure for the granting of municipal franchises must be put to a vote in that municipality.

141. *Id.* art. XVIII, § 6. "Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said corporation." *Id.*

142. *Id.* art. X, § 35(a). "Any incorporated town and any county may issue . . . bonds . . . for the

rights are pertinent to the suggestion that the City of Tulsa create an ETC and are discussed below.

*a. Freedom from involvement with private enterprise*

The Oklahoma Constitution contains two restrictions on the state, or any agency of the state, which limit involvement in private enterprise.<sup>143</sup> The first of these, article X, section 14, states: "Taxes shall be levied and collected by general laws, and for public purposes only . . ." <sup>144</sup> In Oklahoma, this "provision has been held to mean that public funds may not be used to assist individuals or private organizations in their business functions."<sup>145</sup>

The second restriction is contained in article X, section 17, which states: "The Legislature shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association or individual."<sup>146</sup> This provision has been construed to be a "limitation and was adopted for the purpose of preventing the investment of public funds in private enterprises."<sup>147</sup>

The Oklahoma Supreme Court considered these two constitutional provisions when it decided, in *State ex rel. Lacy v. Jackson*,<sup>148</sup> whether a town may appropriate public funds for the printing and distribution of a newspaper by a private entity.<sup>149</sup> The court acknowledged that the line separating public purposes from private purposes was not clear,<sup>150</sup> but declined to extend the public purpose doctrine to the publishing of a newspaper.<sup>151</sup> The *Lacy* court cited the seminal federal case, *Citizens Savings & Loan Association v. City of Topeka*,<sup>152</sup> as instructive in making

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purpose of securing and developing industry within or near the said municipality . . . or within the county . . ." *Id.*

143. *Id.* art. X, §§ 14, 17; *see supra* note 138.

144. OKLA. CONST. art. X, § 14.

145. *State ex rel. Lacy v. Jackson*, 682 P.2d 218, 220 (Okla. 1983) (citing *Veterans of Foreign Wars v. Childers*, 197 Okla. 331, 171 P.2d 618 (1946); *Vette v. Childers*, 102 Okla. 140, 228 P. 145 (1924)).

146. OKLA. CONST. art. X, § 17.

147. *Lawrence v. Schellstede*, 348 P.2d 1078, 1082 (Okla. 1960) (City of Tulsa was not prohibited from purchasing insurance which would make it a stockholding member of a mutual insurance company).

148. 682 P.2d at 218 (Okla. 1983).

149. *Id.* at 220.

150. *Id.* at 221.

151. *Id.* at 220.

152. 87 U.S. (20 Wall.) 655 (1874); *see supra* note 127 and accompanying text.

this distinction.<sup>153</sup>

However, *Topeka* has been cited infrequently by courts only to justify their conclusion that the expenditure of tax funds was not for a public purpose.<sup>154</sup> In applying *Topeka*, the United States Supreme Court has exercised restraint, and has explained that: “[O]therwise, a state’s power to legislate for the public welfare might be seriously curtailed . . . .”<sup>155</sup>

In deciding *Lacy*, the Oklahoma Supreme Court focused on the concept of “public purpose,” and stated, “[t]he term ‘public purpose’ is synonymous with government purpose.”<sup>156</sup> The supreme court found no valid government purpose in publishing a newspaper since the activity directly infringed upon the first amendment guarantee of a free press.<sup>157</sup> In fact, it characterized the effect of publishing this newspaper as “bound to have an alarming if not disastrous political effect on our system of government.”<sup>158</sup>

Despite this recent ruling, the Oklahoma Supreme Court found a

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153. *Lacy*, 682 P.2d at 221.

154. *Everson v. Board of Educ.*, 330 U.S. 1, 6 (1947). “It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one.” *Id.*

155. *Id.* The Court stated: “Changing local conditions create new local problems which may lead a state’s people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people.” *Id.* at 6-7; *see also* *Americans United for Separation of Church & State v. School Dist.*, 546 F. Supp. 1071, 1078 (W.D. Mich. 1982) (discusses conferring an unequal benefit through use of religious school facilities by public school district, thus subject to the public purpose doctrine).

156. *Lacy*, 682 P.2d at 220 (citing *Board of Councilmen v. Commonwealth*, 26 Ky. 957, 82 S.W. 1008 (1904)). In *Board of Councilmen*, Kentucky’s highest court ruled that 40 bonds owned by the City of Frankfort, Kentucky, were not exempt from taxation under the public purpose doctrine. The revenue from the bonds, some \$2,400 per year, was used exclusively for lighting the streets of the city. The court stated:

“[F]or public purposes” had been held by this court to mean, in that connection, the same as the words “for governmental purposes”; and so property used by a city for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens individually or collectively was held to be subject to taxation.

*Id.* at \_\_\_, 82 S.W. at 1009. The court distinguished this property, some \$40,000 of income-producing assets, from a public park from which no revenue was derived. *Id.*

157. *Lacy*, 682 P.2d at 220. The court stated: “[T]he government has no business carrying on a newspaper business. To do so serves no legitimate public purpose but, on the contrary, bears considerable and grave potential for abuse, corruption and self-aggrandizement inimical to the general welfare.” *Id.*

158. *Id.* at 221. Regarding the legality of the newspaper, the court stated: “[T]he newspaper, instead of accenting a public purpose by encouraging robust public debate on the serious issue raised, quite clearly endeavors to justify its existence and to smother, if not completely crush, the views of what it characterizes as ‘a tiny minority’ of opposing taxpayers.” *Id.*; *see also* *Phillips Petroleum Co. v. Cabot Carbon Co.*, 210 F.2d 841, 847 (10th Cir. 1954) (Pickett, J., dissenting). The dissenting judge pointed out: “The police power must at all times be exercised with scrupulous regard for private rights guaranteed by the constitution, and then only in the public interest and not for the benefit of a private company.” *Id.* (citing *Oklahoma Natural Gas Co. v. Choctaw Gas Co.*, 205 Okla. 255, 261, 236 P.2d 970, 977 (1951)).

valid public purpose when economic development concerns were involved under these two provisions of the Oklahoma Constitution in *Sublett v. City of Tulsa*.<sup>159</sup> In the *Sublett* case, the City of Tulsa—Rogers County Port Authority<sup>160</sup> sought to upgrade the terminal facilities and create an industrial park at the Port of Catoosa, Oklahoma,<sup>161</sup> by issuing municipal bonds to finance the construction.<sup>162</sup> The supreme court held that industrial development, as contemplated under the proposal, fell within the legal definition and requirements of a public purpose.<sup>163</sup> The court relied upon precedent from other jurisdictions, and reasoned: “[T]hese decisions typically demonstrate the modern theory of approving publically [sic] financed industrial development programs as constituting a public use or purpose for municipal development which justifies special treatment because of obvious public need.”<sup>164</sup> The Oklahoma Supreme Court accordingly held that financing such development did not violate article X, sections 14, 15, and 17 of the Oklahoma Constitution.<sup>165</sup>

Therefore, under current Oklahoma law it appears that the prohibitions against state involvement in private enterprise embodied in article X, sections 14 and 17 only apply to activities which clearly have no “public purpose,” and not to activities which have valid public purposes under the modern definition, such as economic development. “Public purpose” in Oklahoma has been defined broadly enough to include municipal de-

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159. 405 P.2d 185 (Okla. 1965).

160. The City of Tulsa and Rogers County created a joint jurisdiction port authority to develop and manage the Port of Catoosa, Oklahoma. *Id.* at 191. “Since the Port opened in 1971, it has come to represent an ideal partnership between public and private sectors. It has attracted over 40 industries that have invested over \$140 million.” Tulsa Port Authority Brochure, *supra* note 79, at 1.

161. *Sublett*, 405 P.2d at 191. “The Authority propose[d] to include 1753 [sic] acres within the port [of Catoosa] area for terminal facilities and creation of an industrial park. Acquisition costs . . . [were] estimated at one million dollars, and development of approximately 300 acres in the industrial park entails expenditure of an additional one and one-half million dollars.” *Id.*

162. *Id.* at 190. An election was to be called to approve the issuance of \$2.5 million of general obligation bonds to finance the project. *Id.*

163. *Id.* at 197. The court found that the acquisition of the land and its industrial development were necessary to successful development of the Port of Catoosa and constituted a public purpose. *Id.*

164. *Id.* at 194. The Oklahoma Supreme Court quoted *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137 (Tex. Civ. App. 1954), which stated that when legislatures declare a public purpose, this declaration “is entitled to great weight and respect in arriving at a final [judicial] decision of the question.” *Sublett*, 405 P.2d at 195. The Oklahoma Supreme Court adopted this approach, stating that whether an activity is public use or not is a judicial question in the absence of a clear legislative declaration. *Id.* at 196. The court found an explicit statutory declaration in Oklahoma law that the acquisition and development of port authorities is a public purpose. *Id.* The court also stated: “It is sufficient to note that many other states such as Maine, Massachusetts, Mississippi, Missouri, Nebraska, Tennessee and Vermont, within the last three decades have enacted some form of . . . publicly financed assistance for industrial development programs.” *Id.* at 193.

165. *Id.* at 197. The supreme court explicitly found that the expenditures contemplated in this case “will be expended for a public purpose within the meaning or intent of our Constitution.” *Id.*

velopment even where part of the public development has been leased to private individuals.<sup>166</sup> Thus, the creation of a municipal ETC would not be prohibited under these Oklahoma constitutional provisions.

*b. The right to engage in enterprise*

The right of the state<sup>167</sup> and municipalities<sup>168</sup> to engage in enterprise has also been broadly interpreted.<sup>169</sup> In a specific grant to Oklahoma municipalities, the Oklahoma Constitution, article XVIII, section 6, states: "Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said corporation."<sup>170</sup> This particular provision has been interpreted to allow municipal corporations to operate public utilities,<sup>171</sup> to lease and pay rent for water and sewer lines to private individuals,<sup>172</sup> to lease part of an airport and airport facilities to aviation companies,<sup>173</sup> to lease its lands for oil and gas and to collect royalties.<sup>174</sup>

The term "franchise" has been held not to limit the right of a state agency, such as a municipality, to engage in "any business for public purposes."<sup>175</sup> Thus, a municipality would be able to operate an ETC, since export trade from local industries would increase jobs, taxes paid, and local economic development. Such trade would benefit the commu-

166. *Id.* (citing *Fischer v. Oklahoma City*, 198 Okla. 22, 174 P.2d 244 (1946)). The supreme court "held that where land was acquired by eminent domain for airport use, the city properly could lease a part of the airport facilities to *private corporations and individuals* and such action did not violate [the Okla.] Const., Art. X, Sec. 17." *Id.* (emphasis added).

167. OKLA. CONST. art. II, § 31.

168. *Id.* art. XVIII, § 6.

169. Merrill, *supra* note 134, at 265; Miers, *The Governmental Exemption To The Windfall Profit Tax—Could 'Going Public' Take On A New Meaning?*, 52 OKLA. B.J. 937, 941 (1981). "In Oklahoma, the State and its agencies appear to have unqualified constitutional authority to pursue business enterprise." Miers, *supra*, at 941 (footnote omitted). "In this state cities are given wide powers of engaging in business or enterprises." *State ex rel. Woods v. Cole*, 178 Okla. 567, 569, 63 P.2d 730, 733 (1936).

170. OKLA. CONST. art. XVIII, § 6; *see also* Merrill, *supra* note 134, at 265.

171. *In re* Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma, 534 P.2d 3, 8 (Okla. 1975).

172. *City of Wewoka v. Billingsley*, 331 P.2d 949, 952 (Okla. 1958).

173. *Fischer v. Oklahoma City*, 198 Okla. 22, 22, 174 P.2d 244, 245 (1946), *cert. denied*, 331 U.S. 824 (1947).

174. *Woods*, 178 Okla. at 569, 63 P.2d at 733.

175. *Harrison v. Claybrook*, 372 P.2d 602, 605 (Okla. 1962) (citing OKLA. CONST. art. II, § 31) (emphasis in original). The City of Wewoka, through the Wewoka Municipal Improvement Authority, sought to acquire land, construct a plant upon it, and lease it to a clothing manufacturing company. The Oklahoma Supreme Court found no conflict between these actions and Oklahoma law. *Id.* Any business does *not* include the alcoholic beverage trade. *See* OKLA. CONST. art. XXVII, § 8; Merrill, *supra* note 134, at 276.

nity, and thereby provide evidence of a valid public purpose.<sup>176</sup> Such a public purpose would be valid and permitted under these provisions of the Oklahoma Constitution.

*c. The right to engage in industrial development*

In a 1962 referendum election, Oklahoma voters approved an amendment to the Oklahoma Constitution which authorized municipalities and counties to issue bonds "for the purpose of securing and developing industry within or near the said municipality . . . or . . . county."<sup>177</sup> Soon thereafter, the Oklahoma Supreme Court upheld this amendment and ruled that there was no conflict between this provision and article X, sections 16 and 17 of the Oklahoma Constitution.<sup>178</sup>

In *Sublett*,<sup>179</sup> the Oklahoma Supreme Court issued a definitive opinion which construed the right of industrial development, the public purpose doctrine, and its integration with Oklahoma constitutional rights. The City of Tulsa sought to submit an ordinance to a vote for authorization to issue \$2.5 million of limited tax general obligation bonds for industrial development.<sup>180</sup> These bond appropriations were intended to finance water terminal facilities and an industrial park,<sup>181</sup> complementing the federal government's development of the Arkansas River.<sup>182</sup> The supreme court examined industrial development legislation from other jurisdictions<sup>183</sup> and noted that the modern judicial trend supports the legality of these activities.<sup>184</sup> Furthermore, the court reaffirmed the

176. See *supra* notes 122-28 and accompanying text.

177. OKLA. CONST. art. X, § 35.

178. *McVickers v. Zerger*, 389 P.2d 977, 981 (Okla. 1964). The City of Anadarko, Oklahoma sought to sell general obligation tax bonds with the object of securing and developing industry. The Oklahoma Supreme Court found the city had every right to proceed under the Oklahoma Constitution. *Id.*

179. 405 P.2d at 185 (Okla. 1965); see *supra* notes 159-66 and accompanying text.

180. *Sublett*, 405 P.2d at 190.

181. *Id.* at 191.

182. *Id.* at 190-91.

183. *Id.* at 193 (the court indicated that the following states have enacted legislation which permits industrial development to be publically financed: Me., Mass., Miss., Mo., Neb., Tenn., and Vt.).

184. *Id.* at 194. The court listed the following factors to be weighed in determining whether industrial development is for public purposes:

- (1) public importance of the project;
- (2) *obvious public need*;
- (3) vital economic stimuli in view of rational economic considerations;
- (4) and, as involves control and development of ports and similar installations, governmental interest therein by reason of the vital importance to economic development and national defense.

*Id.* (emphasis added).



right of the people of an Oklahoma municipality<sup>185</sup> to issue bonds, by popular election, in order to finance development of local industry.<sup>186</sup>

In *Sublett*, the Oklahoma Supreme Court cleared the way for public involvement in industrial development in Oklahoma, and held that such developments do not violate the Oklahoma Constitution.<sup>187</sup> In fact, it is now generally recognized, in the constitutional sense, that such developments are for public purposes.<sup>188</sup> Thus, under the specific Oklahoma constitutional grant of power to secure and develop industry, the City of Tulsa is empowered to issue bonds and participate in the creation of an ETC.

## 2. Oklahoma Statutes

### a. Powers of cities and towns

Oklahoma Statute, title 11, section 22-104, reaffirms the constitutional right of cities and towns to engage in business.<sup>189</sup> This authorization includes the right of municipalities to "engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from the municipality . . . ."<sup>190</sup> Municipalities are further authorized under this statute to acquire and own real estate for public utilities, ports, and "for any plant for the manufacture of any material for public improvement purposes . . . ."<sup>191</sup>

Moreover, municipalities are permitted to exercise the right of eminent domain for municipal purposes.<sup>192</sup> Municipalities are also authorized to manufacture, barter, or exchange any material for public improvement purposes.<sup>193</sup> To accomplish these ends the municipality may issue and sell bonds.<sup>194</sup> The municipality may also sell or lease, to a consumer or corporation, commodities or services supplied by a municipi-

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185. *Id.* at 201.

186. See generally Note, *Municipal Corporations: The Constitutionality of Oklahoma's Central Business District Redevelopment Act*, 35 OKLA. L. REV. 821 (1982) (discusses the use of special obligation bonds to finance redevelopment); Note, *Taxation: Public Purpose and Tax-Exempt Industrial Development Revenue Bonds To Finance Pollution Abatement Facilities*, 29 OKLA. L. REV. 233 (1976) (examines the tax-exempt status of bonds which finance pollution abatement facilities for industries).

187. *Sublett*, 405 P.2d at 197.

188. Miers, *supra* note 169, at 941.

189. OKLA. STAT. tit. 11, § 22-104 (Supp. 1984).

190. *Id.* § 22-104(1); see OKLA. CONST. art. XVIII, § 6.

191. OKLA. STAT. tit. 11, § 22-104(2) (Supp. 1985).

192. *Id.* § 22-104(3).

193. *Id.* § 22-104(4).

194. *Id.* § 22-104(5).

pally-controlled utility,<sup>195</sup> or lease any public improvement or utility from anyone, so long as the municipality reserves an option to purchase the public improvement or utility in the future.<sup>196</sup> Should an Oklahoma municipality wish to operate an ETC as a public utility, including contractual and leasing arrangements, it is empowered to do so under this statute.

*b. Local Industrial Development Act*

The Local Industrial Development Act<sup>197</sup> authorizes municipalities and counties to own and dispose of lands, buildings, and facilities that can be used in developing or securing industry.<sup>198</sup> More significantly, this act permits the creation of public trusts.<sup>199</sup> Once the public trust is created, municipalities may issue tax-exempt<sup>200</sup> revenue bonds to finance it.<sup>201</sup> The issuance of such bonds must be approved by a majority of qualified electors of the municipality.<sup>202</sup> This mechanism may be used by a municipality to create a hybrid public-private ETC, where funding for the *facility* or some other developmental aspect of the company is obtained by bond money, without a direct investment in the enterprise.<sup>203</sup>

*c. Public benefit trusts*

A public benefit trust<sup>204</sup> is an express trust created to issue obligations and provide funds for the furtherance of any public functions of the state, county, or municipality.<sup>205</sup> If the public benefit trust is meticulously limited to "public functions other than industrial development, . . . then the indebtedness may be approved without vote of the people, but by a two-thirds vote of the governing body of the beneficiary."<sup>206</sup>

Moreover, any authorized state function is a proper subject for a

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195. *Id.* § 22-104(6).

196. *Id.* § 22-104(7).

197. OKLA. STAT. tit. 62, §§ 651-64 (1981).

198. *Id.* § 652 (Supp. 1985).

199. *Id.* § 653.

200. *Id.* §§ 654, 660; *see also* I.R.C. § 103(b) (1983 & West Supp. 1985).

201. OKLA. STAT. tit. 11, § 660 (1981); I.R.C. § 103(b) (1983 & West Supp. 1985); Treas. Reg. § 1.103-7 (1972) (industrial development bonds); Treas. Reg. § 1.103-1 (1960) (state and local general obligation bonds).

202. OKLA. STAT. tit. 62, § 654 (1981).

203. *See* Rogers, *Practical Suggestions for Oklahoma Municipal Trusts*, OKLA. B.J.Q. q-333, q-337 (1972).

204. *See, e.g.*, OKLA. STAT. tit. 60, § 176 (1981).

205. *Id.* § 176(a).

206. *Id.*; *see* Rogers, *supra* note 203, at q-338.

public trust.<sup>207</sup> For example, “[t]rusts for the benefit of the public may be established with a broad field of objectives as long as the objectives encompass a benefit to a large class of the public or lessen the burdens of government.”<sup>208</sup> Thus, an Oklahoma municipality could utilize a public benefit trust to accomplish the development of a municipality-based ETC.<sup>209</sup>

### 3. City of Tulsa Ordinances

#### a. *Municipal services and franchises*

The Tulsa City Charter<sup>210</sup> expressly reserves the power “to manufacture, make, mine and produce any material for public improvement purposes.”<sup>211</sup> The City may also engage in any business or enterprise by virtue of a franchise from the City of Tulsa.<sup>212</sup> The City also reserves the right to acquire<sup>213</sup> and sell<sup>214</sup> property for public utility purposes. Finally, the City also has the power to grant franchises for the performance of any public service.<sup>215</sup>

No franchise may be granted, however, without a majority vote of the qualified voters of Tulsa.<sup>216</sup> The Tulsa City Ordinances also provide for a franchise cancellation procedure<sup>217</sup> and a tax on non-franchise

207. *Shotts v. Hugh*, 551 P.2d 252, 255 (Okla. 1976) (holding invalid a trust which was not accomplishing its purported public purpose).

208. *Id.* at 254 (citing *Board of County Comm’rs v. Warram*, 285 P.2d 1034 (Okla. 1955)).

209. *Miers*, *supra* note 169, at 941. “The utilization of public trusts pursuant to 60 O.S. § 176 et seq. for the benefit of the state or a municipality, through which revenue bond financing is made available for industrial development, has also found judicial approval as involving a public purpose.” *Id.*

210. TULSA, OKLA., CHARTER OF THE CITY OF TULSA, art. II, § 6(1) (1908) (as amended) (section 6 is a positive enumeration of city powers relating to municipal service).

211. *Id.* art. II, § 6(1) (a positive statement of the City of Tulsa’s power to produce materials for public improvement purposes).

212. *Id.* Typical businesses or enterprises enumerated in the ordinance include: public utilities, public parks, public plants, public improvements, public transmission and transportation plants, water-ways, water-lines, pipelines, power lines, telephone and telegraph lines, electric lines, transmission and *transportation systems*, terminals, buildings, and stations. *Id.* (emphasis added).

213. *Id.* art. II, § 6(3) (the city may acquire property both within and without the city limits for public utility purposes).

214. *Id.* art. II, § 6(2) (the city may dispose of property freely if it was acquired for public utility purposes).

215. *Id.* art. II, § 7(2). “The City of Tulsa shall have power . . . to confer upon any person or corporations [sic], the franchise or right, . . . [to furnish] to the public *any general public service*, including heat, light, power, telephone service, . . . or the carriage of passengers or *freight* within the said city, or for any other purposes . . .” *Id.* (emphasis added).

216. *Id.* art. II, § 7(4) (this vote shall occur in any general or special election upon 30 days notice).

217. TULSA, OKLA., REV. ORDINANCES tit. 15, ch. 1, § 2 (1985). This procedure requires notice to the franchise holder by way of a city resolution, that he has substantially failed to exercise his

holders.<sup>218</sup> The Tulsa Revised Ordinances show that thirty-three franchises have been granted, which include natural gas, cable television, water, steam, and steam condensate franchises.<sup>219</sup>

To extend the notion of a public utility<sup>220</sup> to an entity franchised to provide export trading services to the greater Tulsa public is possible under the broad construction of the Tulsa Municipal Ordinances. A public utility devotes private property in order to provide a public service and is subject to regulation by the government.<sup>221</sup> Along with providing services, the public utility has "the duty to serve the public and treat all persons alike . . ."<sup>222</sup> However, the difficulty of regulating this activity and potential conflicts with federal regulation of interstate commerce render this approach less feasible.<sup>223</sup> Nevertheless, the Tulsa Revised Ordinances enable the City of Tulsa to operate an ETC as a municipally-owned utility, or to grant a franchise to operate an ETC as a public utility.

#### *b. Trusts and beneficial interests*

The Tulsa Revised Ordinances contain the acceptance and authorization for seventeen municipal trusts.<sup>224</sup> These municipal trusts operate: utilities,<sup>225</sup> a geriatric authority,<sup>226</sup> an airport,<sup>227</sup> a parking authority,<sup>228</sup>

franchise in accordance with its terms. A hearing date is set and notice is served. *Id.* § 5. Upon a finding of default, the franchise is annulled by city ordinance. *Id.* § 13.

218. *Id.* tit. 15, ch. 2. This is a 2% tax on power, light, heat, gas and electricity.

219. *Id.* tit. 15, chs. 1-12. These franchises range from simple rights-of-way to detailed franchises, such as the Tulsa Cable Television grant. *Id.* ch. 11.

220. 73B C.J.S. *Public Utilities* § 2 (1983) states: "A 'public utility' has been described as a business organization which regularly supplies the public with some commodity or service . . ." *Id.*

221. *Id.*

222. *Id.* "The term ["public utility"] is sometimes used in an extended sense to include a great many matters of general welfare to the state and its communities." *Id.*; see also *State ex rel. Utilities Comm'n v. Simpson*, 295 N.C. 519, \_\_\_, 246 S.E.2d 753, 756 (1978) (definition of public utility depends upon circumstances of the case); *Baker v. Public Serv. Co.*, 606 P.2d 567, 571 (Okla. 1980) (construing what is a public utility where landlord resold electrical power to tenants).

223. U.S. CONST. art. I, § 8, cl. 3. See generally *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237 (1984) (Alaska's sale of state-owned timber included a clause requiring in-state timber processing which violated the commerce clause of the U.S. Constitution). *But cf. id.* at 2243-46; Note, *South-Central Timber Development, Inc. v. Wunnicke: The Dormant Commerce Clause Fells Alaska's Primary Manufacture Requirement for the Sale of State-Owned Timber*, 5 N. ILL. U.L. REV. 155, 162-66 (1984) (discussion of the "market participant doctrine" which permits states to engage in private commerce as traders or manufacturers without violating the commerce clause).

224. TULSA, OKLA., REV. ORDINANCES tit. 39, chs. 1-16 (1984); the seventeenth is uncodified, TULSA, OKLA. ORDINANCE 1-462 (July 26, 1985) (University Center at Tulsa Authority). These chapters record the city's acceptance of these seventeen trusts and incorporate, either expressly or by reference, the trust terms and provisions.

225. *Id.* tit. 39, chs. 1, 3, 11 (chapter 1 is the Tulsa County Utility Services Authority Trust; chapter 3 is the Tulsa Metropolitan Water Authority Trust; chapter 11 is the Regional Metropolitan Utility Authority).

a public market authority,<sup>229</sup> a police and fire academy,<sup>230</sup> a metropolitan transit authority,<sup>231</sup> an industrial authority,<sup>232</sup> a theater authority,<sup>233</sup> and a public facilities authority.<sup>234</sup>

The Tulsa Industrial Authority Trust<sup>235</sup> was created on March 7, 1969.<sup>236</sup> The "emergency clause" states that the Industrial Authority was created to promote the development of industry, and to benefit and strengthen the city's economy.<sup>237</sup> The Industrial Authority's trust indenture specifically states that it is a public benefit trust "under the provisions of Title 60, Oklahoma Statutes 1961, Sections 176 to 180, inclusive . . . ."<sup>238</sup> The purposes of the trust include acquisition and operation of property for the municipality or private corporations,<sup>239</sup> leasing or providing property to business,<sup>240</sup> and carrying out the industrial development statutes.<sup>241</sup>

In subsequent amendments, the trust indenture has been expanded to include pollution control facilities,<sup>242</sup> sports, cultural and trade show facilities,<sup>243</sup> mass transit facilities,<sup>244</sup> parks, business districts and urban

226. *Id.* tit. 39, ch. 2 (Tulsa Geriatric and Infirmary Authority Trust).

227. *Id.* tit. 39, ch. 4 (Tulsa Municipal Airport Trust).

228. *Id.* tit. 39, ch. 5 (Tulsa Parking Authority Trust).

229. *Id.* tit. 39, ch. 6 (Tulsa Public Market Authority Trust).

230. *Id.* tit. 39, ch. 7 (Tulsa Police and Fire Academy Trust).

231. *Id.* tit. 39, ch. 9 (Metropolitan Tulsa Transit Authority Trust).

232. *Id.* tit. 39, ch. 10 (Tulsa Industrial Authority Trust).

233. *Id.* tit. 39, ch. 12 (Tulsa Municipal Theater Authority Trust).

234. *Id.* tit. 39, ch. 16 (Tulsa Public Facilities Authority).

235. *Id.* tit. 39, ch. 10.

236. *Id.* tit. 39, ch. 10, § 251 (created by trust indenture in 'Exhibit A' of the ordinance).

237. *Id.* tit. 39, ch. 10, § 254. The clause states:

It appearing that an Industrial Authority is urgently needed to promote the development of industry within and without the territorial limits of the City of Tulsa, Oklahoma, and to provide additional employment which will benefit and strengthen the economy of the city of Tulsa, Oklahoma, . . . this Ordinance shall be in . . . effect immediately . . . .

*Id.*

238. *Id.* tit. 39, ch. 10, exhibit A, art. I; *see also supra* note 206.

239. TULSA, OKLA., REV. ORDINANCES tit. 39, ch. 10, exhibit A, art. III(2) (1984). This ordinance empowers the Industrial Authority Trust to engage in activities necessary to carry out its purpose.

240. *Id.* tit. 39, ch. 10, exhibit A, art. III(3). This is a positive statement of the trust's powers to lease or provide properties for industrial development purposes.

241. *Id.* tit. 39, ch. 10, exhibit A, art. III(4).

242. *Id.* tit. 39, ch. 10, exhibit B, First Amendment (2) (expansion of trust purposes to include pollution control facilities).

243. *Id.* tit. 39, ch. 10, exhibit B, First Amendment (3) (expansion of trust purposes to include sports, entertainment, cultural, convention and trade show facilities).

244. *Id.* tit. 39, ch. 10, exhibit B, First Amendment (4) (expansion of trust purposes to include mass transit facilities).

renewal,<sup>245</sup> industrial parks,<sup>246</sup> and health care facilities.<sup>247</sup> It appears from the rather broad list of powers granted to the trustees that an ETC could easily be added. Such a facility would be consistent with the current thrust of the Tulsa Industrial Authority to carry out the industrial development statutes.

## V. CONCLUSION AND RECOMMENDATIONS

The Export Trading Company Act of 1982<sup>248</sup> offers new opportunities for local governments and groups of companies to export more effectively. Due to a shortage of private sector managerial awareness and interest in international trade, the supply of international trade services to help spur local development may constitute a legitimate local government purpose.

The City of Tulsa has many different approaches available which would enable it to supply these needed services. These range from the creation of a public utility ETC, a public trust managed ETC, a services "partnership" in a contracted for local alliance, to a subsidized industrial facility under ordinary notions of municipal development. Probably the most beneficial arrangement would be a combination of all of the alternatives. Ideally, the Port of Catoosa could be utilized more, and the creation of a trading entity based at the Port would entail a lower development cost.

The inclusion of Tulsa area businesses in a trading entity will help keep its focus on tradeable goods and services produced from this area, and make the entity profit-oriented. Government could support these endeavors by gathering and providing information at low cost through INCOG or an allied organization. Government could also spur the creation of an entity by contracting for and building a trading system similar to that of the City of Newport News.<sup>249</sup>

Bundling and purchasing blocks of services for resale, such as freight forwarding, customs, legal work, and banking, should greatly facilitate trading. The City of Tulsa could create an office to coordinate

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245. *Id.* tit. 39, ch. 10, exhibit B, First Amendment (5) (expansion of trust purposes to include parks, business districts and community development efforts).

246. *Id.* tit. 39, ch. 10, exhibit B, First Amendment (6) (expansion of trust purposes to include industrial parks).

247. *Id.* tit. 39, ch. 10, exhibit C, art. III, Second Amendment (7) (expansion of trust purposes to include medical, surgical and other health care facilities including hospitals).

248. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at scattered sections of 12 U.S.C., 15 U.S.C., and 30 U.S.C.).

249. Ward, *supra* note 32, at 8.

these services in cooperation with governmental agencies such as EXIM bank, the Department of Commerce, and the Oklahoma Industrial Authorities. Certainly, antitrust relief should be sought under the ETC Certificate of Review procedure.<sup>250</sup>

Finally, Tulsa government should not neglect developing the building blocks for international trade. This includes the creation of a library or database of accurate trade information. This information could be obtained in conjunction with the United States Department of Commerce and provided in the city library or in a local public college, such as Tulsa Junior College.<sup>251</sup>

Another important building block is the development of a world trade oriented business curriculum through local colleges and universities. Such curricula would help educate young entrepreneurs in developing international businesses. To the extent that residents of Tulsa utilize these programs and are benefitted, the economy of greater Tulsa will be similarly benefitted, once the lessons learned are implemented.<sup>252</sup>

The method of trade development that is ultimately selected for Tulsa depends on economic, political, and social factors, but each approach represents an improvement over the current situation. Oklahoma law is clear concerning what can be accomplished once the organizational form of a trading entity has been decided. All that is needed is a plan of organization and an integration of the federal law, which encourages ETC formation, with Oklahoma state and local laws.

*Jeffrey Fleischhauer*

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250. See *supra* notes 64-69 and accompanying text.

251. Tulsa Trade Strategy, *supra* note 45, at 8.

252. *Id.*