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ECONOMIC DEVELOPMENT INCENTIVES

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11-1 INTRODUCTION

Virginia local governments have long been involved in the recruitment and retention of business and industry within their respective jurisdictions and regions. Engaging in economic development activity is recognized as inuring to a locality's benefit through the promotion of more and better job opportunities for its citizens and by increasing a locality's tax base and tax revenue. Historically, economic development has been primarily an information advocacy undertaking, with local government economic development professionals providing information on the availability of land and buildings, the availability and costs of utilities, the proximity to transportation infrastructure, and the services and characteristics of a local workforce. Increasingly, the provision of information has not been sufficient to attract or retain some businesses and industries. For these companies, the availability of incentives is critical to their decision to either come to or stay in a locality or to locate in another Virginia jurisdiction or another state.

The decision by a Virginia local government to offer incentives is laden with a mix of legal requirements and public policy considerations that occasionally conflict with one another. Public money and resources are required to be used for public purposes. But the fundamental nature of economic development incentives involves the transfer of public money and resources to the benefit of private business and industry. At times, incentives involve direct aid in the forms of grants, loans, tax credits, tax exemptions, and workforce development and training. In other instances, incentives involve indirect aid such as new or enhanced public utilities and roads that will serve a business or industry. Negotiating through the tension between public purpose and private benefit can be a complex undertaking, particularly since decisions on economic development incentives will be influenced by a locality's political environment and citizen concerns.

This chapter will identify and discuss some of the laws and public policy considerations that affect Virginia's local governments as they engage in the evaluation and provision of incentives to further their economic development objectives. The discussion that follows is designed to serve as a survey of these basic rules and public policy considerations and does not purport to provide an in-depth description and analysis of every economic development incentive.

¹ Significant portions of this chapter were derived from a paper titled *Economic Development Incentives in Virginia: A Local Practitioner's Handbook*, and this chapter is intended to be a condensed version of the *Handbook*. The authors of the *Economic Development Incentives* handbook constituted the membership of the LGA Economic Development Incentives Project Committee. The committee members were C. Dean Foster, Jr., Bonnie M. France, M. Seth Ginther, Roderick R. Ingram, John Kilgore, Christopher G. Kulp, Leslie L. Lilley, Paul S. McCulla, Sandra J. McNinch, John D. O'Neill, Jr., Sharon E. Pandak, Joseph P. Rapisarda, Jr., John Sternlich, Martha A. Warthen, and Roger C. Wiley. The authors also acknowledge the contributions of Daniel M. Siegel for his chapter in a previous edition of this handbook regarding special assessments and taxing districts in Virginia.

11-2 UNITED STATES CONSTITUTION

11-2.01 Fifth Amendment (the “Takings Clause”)

The Federal restraint on the taking of private property for public use is found in the “Takings Clause” of the Fifth Amendment to the United States Constitution: “[N]or shall private property be taken for public use, without just compensation”

11-2.02 *Kelo v. City of New London*

By its express terms, the Takings Clause states that private property acquired through the exercise of the power of eminent domain must qualify as a “public use.” The U.S. Supreme Court has interpreted the Takings Clause to mean that the property taken for “public use” does not necessarily need to be available for “use by the public,” but rather the taking itself must be for a “public purpose.” *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005). In *Kelo*, the Court found that the City of New London could acquire property using its powers of eminent domain for the purpose of redeveloping a portion of the economically distressed city. In so doing, the Court noted that the city had a carefully formulated plan of economic development intended to provide appreciable benefits to the community, that the plan consisted of a variety of “commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts,” and that the city was invoking a state statute that specifically authorized the use of eminent domain to promote economic development.

In finding that economic development is a “public use” within the meaning of the Takings Clause of the U.S. Constitution, the *Kelo* court noted that nothing in its opinion “precludes any State from placing further restrictions on its exercise of the takings power.” Such state restrictions can take the form of state constitutional provisions or eminent domain statutes limiting those purposes for which the power of eminent domain may be exercised. Virginia has done just that, see section [11-3.01](#).

11-3 VIRGINIA CONSTITUTION

11-3.01 Article I, Section 11

In response to *Kelo*, see section [11-2.02](#), Virginia’s Constitution was amended to provide that “a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.” The implementing statute is Virginia Code § 1-219.1.

11-3.02 Article X, Section 10

Article X, Section 10 of the Virginia Constitution contains four provisions, most notably the Credit Clause, that affect the involvement of the Commonwealth and local governments in promoting economic development.

11-3.02(a) “Credit Clause” (Applicable to Commonwealth and Localities)

“Neither the credit of the Commonwealth nor of any county, city, town or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation”

The Virginia Supreme Court has interpreted the Credit Clause several times. Despite the restrictive wording, the Court has held in almost every case that there was no violation of the Credit Clause.

The Court has established that if the “animating” or dominating purpose of a transaction was to benefit the Commonwealth, then there is no violation of the Credit Clause. *Almond v. Day*, 197 Va. 782, 91 S.E.2d 660 (1956) (“*Almond I*”). In that case, the

Court held that the investment of state retirement funds in bonds of public utilities and private corporations did not violate the Credit Clause where the underlying and activating purpose of the transaction and the financial obligation incurred by the Commonwealth were for its own benefit.

When the underlying and activating purpose of the transaction and the financial obligation incurred are for the State's benefit, there is no lending of its credit though it may have expended its funds or incurred an obligation that benefits another. Merely because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby does not bring the transaction within the letter or the spirit of the "credit clause" prohibition. *Almond I, supra*.

Similarly, the Credit Clause did not prohibit a county treasurer from depositing public funds in a commercial bank when the deposit was made in the usual course of business and for the convenience of the county. *U.S. Fid. & Guar. Co. v. Carter*, 161 Va. 381, 170 S.E. 764 (1933).

In upholding the State's grant of funding to a railroad for the construction of a rail/highway intermodal facility, the Court stated that a grant was not an extension of the Commonwealth's credit and thus the Credit Clause did not apply. *Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 719 S.E.2d 294 (2011).

The Court has also found that the Commonwealth or local government could make loans and guaranties when the credit of the Commonwealth or locality was being used for its own benefit rather than that of another. For instance, a county's guaranty of a fixed-price stone contract for materials supplied to a road contractor was found to be intended to ensure the lowest total contract price to the county for road work and was not found to be intended to benefit the contractor. *Holston Corp. v. Wise Cnty.*, 131 Va. 142, 109 S.E. 180 (1921). Likewise, the Court has found that the loan of Commonwealth funds to the Richmond Produce Market Authority, a political subdivision of the Commonwealth, did not violate the Credit Clause because the authority was established "to promote the agricultural and industrial development of the Commonwealth and the health, safety, welfare, convenience and prosperity of the inhabitants thereof" rather than the private interests of any party. *Harrison v. Day*, 200 Va. 750, 107 S.E.2d 585 (1959) ("Harrison I").

Under certain circumstances, authorities may acquire certain facilities for the purpose of leasing those facilities to private companies. In one case, the Court held that the acquisition of port facilities with proceeds of revenue bonds issued by a port authority, the leasing of those facilities to a private railroad, and the agreement to "urgently request" appropriations from the General Assembly to the extent of one-half of the rent due by the railroad under the lease did not violate the Credit Clause. *Harrison v. Day*, 202 Va. 967, 121 S.E.2d 615 (1961) ("Harrison III"). The Court found that the leasing of the port facilities to the railroad was for the benefit of the Commonwealth in the exercise of its governmental functions and served a public purpose. The Court concluded that contributions made by the Commonwealth were made to serve a public purpose and incidental benefits accruing to the railroad did not destroy that public purpose.

The Court has found that a port authority may also purchase port facilities and lease those facilities back to the seller without violating the Credit Clause. *Button v. Day*, 205 Va. 629, 139 S.E.2d 91 (1964) ("Button III"). In that case the Court also held that an agreement to request a portion of the rent due from the General Assembly and the agreement by the city to make certain payments under the lease did not violate the Credit Clause.

The Court has found that an industrial development authority may finance and construct facilities for the purpose of leasing the facilities to a private corporation in order

to stimulate industrial development without violating the Credit Clause. *Fairfax Cnty. Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 150 S.E.2d 87 (1966). In that case, because the county's financing and construction, as well as the county's appropriation of funds to assist the authority, were made for a public purpose and because the revenue bonds issued by the authority were not debt of the Commonwealth or the county, there was no violation of the Credit Clause. The legislative determination that the promotion of industrial development is for a public purpose and thus a proper governmental function was presumed to be correct. *Accord Indus. Dev. Auth. of Chesapeake v. Suthers*, 208 Va. 51, 155 S.E.2d 326 (1967); *Indus. Dev. Auth. of Richmond v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 217 S.E.2d 879 (1975).

In the only Virginia Supreme Court case to have found a Credit Clause violation, the Court ruled that the revolving fund created under the Virginia Industrial Building Authority Act and funded by an appropriation from the General Assembly to guarantee loans for industrial firms seeking financing for industrial projects constituted "a granting of the credit of the State to or in aid of any person, association, or corporation, in violation of [the Credit Clause]." *Button v. Day*, 208 Va. 494, 158 S.E.2d 735 (1968) ("Button IV"). In explaining its decision, the Court stated

It cannot be gainsaid that stimulation of the development of industry is a public purpose warranting governmental participation to achieve the desired objective of creating additional employment for the citizens of the State. It does not follow, however, that because the goal is meritorious, every method which might, in some way, aid its accomplishment is therefore constitutionally permissible; or to put it another way, that because the purpose is public, anything done in furtherance thereof becomes, *a fortiori*, a proper governmental function.

Id. After this case was decided, the Virginia Constitution was amended specifically to allow this form of economic aid.

11-3.02(b) "Stock or Obligations Clause" (Applicable to Commonwealth and Localities)

"[N]or shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work"

As in its Credit Clause cases, the Court has found that the investment of state retirement funds in bonds of public utilities and private corporations did not violate the Stock or Obligations Clause where the underlying and activating purpose of the transaction and the financial obligation incurred by the Commonwealth were for its own benefit. *See Almond I.* Neither does the loan of Commonwealth funds to the Richmond Produce Market Authority violate the Stock or Obligations Clause. *See Harrison I.*

11-3.02(c) "Internal Improvements Clause" (Applicable only to Commonwealth)

"[N]or shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work"

The Court has found that the Internal Improvements Clause was not intended to restrict the Commonwealth in the exercise of its police powers or governmental functions. *Shenandoah Lime Co. v. Mann*, 115 Va. 865, 80 S.E. 753 (1914). In *Shenandoah Lime*, the Court found that the Commonwealth may appropriate its funds for the purpose of providing equipment to be used by convicts in a lime grinding operation without violating the Internal Improvements Clause. *Id.* The Court reasoned that the term "internal improvement" was

never intended to include temporary structures that may be moved from place to place such as those in question and that to broaden the term in order to include them would deprive the Commonwealth of its police power and the exercise of its necessary governmental functions. *Id.* Rather, the constitutional term has for decades been understood to include channels of trade and commerce, such as turnpikes, canals, railroads, telegraph lines, telephone lines, and other works of a like quasi-public character. *Id.*

The Court in *Almond I* found that the state may invest retirement funds in bonds of public utilities and private corporations without violating the Internal Improvements Clause. The Court found that the clause was directed against the state becoming a party to or becoming interested in a company's work of internal improvement. *Id.* The prohibition was not meant to cover the purchase of securities in the ordinary course of business where the underlying and activating purpose of the transaction and the financial obligation incurred by the Commonwealth were for its own benefit. *Id.*

In addition, the Court found that the operation of a public bus service in connection with the operation of the Hampton Roads Bridge-Tunnel did not violate the Internal Improvements Clause because the operation of the bus service was incidental to the bridge-tunnel project, which was a proper governmental function. *Almond v. Day*, 199 Va. 1, 97 S.E.2d 824 (1957) ("Almond II"). The exercise of governmental functions does not fall within the constitutional prohibition of the Internal Improvements Clause.

The development and operation of port and harbor facilities is also a proper governmental function and therefore not prohibited by the Internal Improvements Clause. *Harrison v. Day*, 200 Va. 764, 107 S.E.2d 594 (1959) ("Harrison II"). Because such actions constitute a proper governmental function, they are undertaken for a public purpose and appropriations with respect to such actions are made for a public and not a private purpose.

The state's financing of a rail/highway intermodal facility, with an expressed purpose of relieving truck congestion on interstates, was pursuant to a governmental function and did not violate the Internal Improvements Clause. *Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 719 S.E.2d 294 (2011). The development of the facility was a governmental function despite private ownership of the facility. *Id.*

11-3.02(d) "Local Credit Clause" (Applicable only to Commonwealth)

"[N]or shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same."

There have been few cases addressing this clause. See *Troy v. Walker*, 218 Va. 739, 241 S.E.2d 420 (1978), and *Button v. Day*, 205 Va. 629, 139 S.E.2d 91 (1964), both addressing financing arrangements between the Virginia Port Authority and the City of Newport News.

11-3.03 "Public Purpose Clause" Article X, Section 8

The Virginia Constitution also contains another restriction on the use of public funds, known as the Public Purpose Clause: "No other or greater amount of tax or revenues shall, at any time, be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the Commonwealth."

This clause is generally interpreted to require that public money be used only for public purposes. In several cases the Court has approved certain undertakings as constituting public purposes. For instance, the Court has found that the eradication of slums and provision of decent homes, despite primarily benefiting only a particular class, are public purposes. *Mumpower v. Hous. Auth. of Bristol*, 176 Va. 426, 11 S.E.2d 732 (1940). Additionally, the development and operation of port and harbor facilities are a proper

governmental function and therefore are undertaken for a public purpose. *Harrison II*. It is also a public purpose to lease those port facilities to a private entity, since it would be to the Commonwealth's benefit to do so. *Harrison III*.

In *Fairfax County Industrial Development Authority v. Coyner*, 207 Va. 351, 150 S.E. 87 (1966), the Court found that a county's appropriation of funds to assist the authority was made for a public purpose; the legislative determination that the promotion of industrial development was for a public purpose was presumed correct and thus the appropriation was for a proper governmental function. *Accord Indus. Dev. Auth. of Chesapeake v. Suthers*, 208 Va. 51, 155 S.E.2d 326 (1967); *Indus. Dev. Auth. of Richmond v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 217 S.E.2d 879 (1975).

In another ruling, the Court found that it was appropriate for a city to agree to grant the Virginia Ports Authority (VPA) sums due on bonds and for operation, repair, and maintenance of the port facilities since the agreement was for the proper public purpose of assisting the VPA in carrying out its governmental functions. *Troy v. Walker*, 218 Va. 739, 241 S.E.2d 420 (1978).

Additionally, a political subdivision may make appropriations to promote low- and moderate-income housing for both single-family and multi-family housing because providing low- and moderate-income housing is a public purpose. *Infants v. Va. Hous. Dev. Auth.*, 221 Va. 659, 272 S.E.2d 649 (1980). The Court found that it was merely incidental that the General Assembly properly authorized financing for persons of other than low and moderate income.

The Court has found that redeveloping a blighted area is a public purpose. *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984). The Court in *DeHaan* held that a city may appropriate proceeds from the sale of general obligation bonds to a redevelopment and housing authority, which in turn may lend those proceeds to the developer of a hotel and convention center because the financing primarily advanced the city's interest in redeveloping a blighted area. Any private benefits that accrued to the private hotel developer were merely incidental to this public purpose.

11-3.04 "Uniformity Clause" Article X, Section 1

The Virginia Constitution contains a "Uniformity Clause" affecting how taxes can be levied: "All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax"

Unlike the Credit Clause and the Public Purpose Clause, the Uniformity Clause generally is not interpreted to impose a direct limitation on incentives. Rather, it is construed to form an implicit political basis for developing and implementing economic development incentives.

11-4 OTHER STATES

Virtually all states have some mechanisms to induce business and industry to locate or remain within their borders. The degree to which the various states allow public money and resources to be used for private benefit varies. These variations, and their usefulness in analyzing the legality of incentives in Virginia, are affected primarily by whether the state has a constitutional scheme that has a "public purpose" requirement of the type contained in Virginia's Public Purpose Clause. Several states have a public purpose provision similar to Virginia's, and such provisions have been the subject of court review. The following section discusses the cases most helpful in analyzing issues within the context of the Virginia Constitution.

11-4.01 North Carolina—*Maready v. Winston-Salem*

The State of North Carolina had established an economic development incentive grant program under which the State authorized its localities to make specific grants to private entities for the purpose of increasing property tax revenue to the locality, as well as increasing the population, taxable property, agricultural industries and business prospects of any city or county. In a challenge to the program brought by a taxpayer, the trial court found the statute unconstitutional under a North Carolina constitutional provision similar to Article X, Section 8 (the Public Purpose Clause) of the Virginia Constitution.

The North Carolina Supreme Court reversed the trial court's ruling, finding instead that the incentive grant program was sufficiently limited that it satisfied the public purpose language in the North Carolina Constitution allowing direct disbursement of public funds to private entities in order to accomplish a public purpose, provided there was statutory authority to make such appropriation. *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996). In doing so, the court noted that North Carolina was then facing a battle to secure manufacturing and similar jobs for the state, when its economy, historically agricultural, was no longer so. The court held that the legislature had leeway to deal with the situation. "[A]n expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose."

Viewed in this light, [the statute] clearly serves a public purpose. Its self-proclaimed end is to 'increase the population, taxable property, agricultural industries and business prospects of any city or county.' However, it is the natural consequences flowing therefrom that ensure a net public benefit. The expenditures this statute authorizes should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base and diversifying the economy.

* * *

The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected.

11-4.02 Oklahoma

The Supreme Court of Oklahoma has found plans of economic development to be constitutional under a Public Purpose Clause and a Credit Clause of the Oklahoma Constitution that are very similar to those of the Virginia Constitution.

11-4.02(a) *State ex rel. Brown v. City Warr Acres*

In *State ex rel. Brown v. City Warr Acres*, 946 P.2d 1140 (OK 1997), a corporation requested concessions to build a large facility in the city. As a result, the city bought the property and spent other funds to meet the corporation's requests. Taxpayers claimed that the expenditure of the funds was improper because it was not money spent to benefit the public but to benefit private entities. The Oklahoma Supreme Court found that the money was properly expended on a public purpose pursuant to the "Public Purpose Clause" (Article X, Section 14) and the "Credit Clause" (Article X, Section 17) of the Oklahoma Constitution because economic development was a legitimate public purpose for which public funds were properly expended.

11-4.02(b) *Burkhardt v. City of Enid*

An Oklahoma city developed an economic development plan to save a private university on the verge of failure through the passage of a .75 percent sales tax, the proceeds of which would be used to purchase the university's real and personal property. The plan provided that a portion of the purchase price would be used to pay off the university's creditors and the remaining funds would be placed in trust in perpetuity with the interest used to provide scholarships and to initially provide operating capital. After the sale was consummated, the purchased property was leased to the university for an annual payment and partial public use of the facilities. *Burkhardt v. City of Enid*, 771 P.2d 608 (OK 1989).

The court found that the purchase of the campus and subsequent lease back to the university at a below-market sum did not violate the state's public purpose restriction. "Public purpose," according to the court, should not be narrowly construed. A public purpose is one that "affects the inhabitants of the state or taxing district as a community, and not merely as individuals." *Id.* Thus, the public purpose test is satisfied if the plan benefits the public (as opposed to special interests or persons), and if consideration is given.

11-4.03 Maryland—*City of Frostburg v. Jenkins*

Although the Maryland constitutional provisions are not as similar to the corresponding provisions in the Virginia Constitution as those of the Oklahoma and North Carolina constitutions, a Maryland case is helpful to the general discussion of the use of public funds incidentally benefiting private entities.

In *City of Frostburg v. Jenkins*, 136 A.2d 852 (Md. 1957), the City of Frostburg wanted to issue municipal bonds in order to devote the proceeds to acquiring a site and contributing to the cost of constructing a building to be used by a privately-owned manufacturing company. In finding for the city, the court stated that the "location of new industry in a municipality furnishes employment and measurably increases the resources of the community and its financial well-being." In addition, the court found the relief of unemployment to be a legitimate public purpose: "[t]he fact that incidental benefits are passed on to the locating corporation is not fatal, if there are substantial public benefits to support the action taken."

11-5 MEANS OF IMPLEMENTING INCENTIVES

The Code of Virginia authorizes a number of entities that are useful in stimulating economic development activity. A number possess powers commonly used to administer and deliver economic development incentives. In addition, the Code of Virginia authorizes several financing and procurement structures that allow public infrastructure to be undertaken in a timelier and innovative manner. While these structures do not constitute direct economic development incentives, they do allow localities to offer facilities and services indirectly that may be essential to a business or industry being pursued. The following section describes these entities and structures, the manner in which they are created, their powers, and their usefulness in promoting economic development.

11-5.01 Industrial/Economic Development Authorities

Industrial development authorities and economic development authorities (IDAs/EDAs), authorized under the Industrial Development and Revenue Bond Act, Virginia Code § 15.2-4900 et seq. (the "IDA Act"), are among the oldest, most well-established vehicles for providing economic development incentives. Originally conceived to permit tax-exempt financing for certain private enterprises, their role has evolved in response to federal tax law changes that restricted the availability of tax-exempt financing. IDAs and EDAs are used to finance infrastructure, to serve as a conduit to pay incentives and to acquire, build, and lease or sell shell buildings and industrial parks. IDAs and EDAs have increasingly been used to facilitate development of non-profit and governmental facilities and housing. See Chapter

12, Financing Virginia’s Local Governments, section 12-7.01, for additional information on IDA/EDAs.

11-5.01(a) Powers

11-5.01(a)(1) Issuance of Bonds

An IDA/EDA is authorized to issue bonds in furtherance of its purposes, which may be construed as broader than the list of “authority facilities” described in Chapter 12, section 12-7.01(b). Virginia Code § 15.2-4901 provides that an IDA/EDA may exercise its powers with respect to the various authority facilities that are specifically named in such section in order to promote the “health, welfare, convenience, and prosperity of the inhabitants of the Commonwealth.”

11-5.01(a)(2) Serve as Conduit for Incentives

An IDA/EDA is authorized to acquire by purchase, exchange, gift, lease, or otherwise, and to improve, maintain, equip, and furnish authority facilities, including real and personal property, and to lease, sell, exchange, donate, and convey its facilities or properties. See Va. Code § 15.2-4905, ¶¶ 4, 5 and 6. Paragraphs 12 and 13 of Virginia Code § 15.2-4905 authorize IDAs and EDAs to borrow money and accept contributions, grants, and other financial assistance from federal and Commonwealth governmental entities for or in aid of authority facilities or in order to make loans and grants in furtherance of the purposes of the IDA Act, including for the purpose of promoting economic development. An IDA/EDA is also expressly authorized to forgive loans if it is deemed to further economic development. Virginia Code § 15.2-4917 authorizes a locality to acquire, but not by condemnation, a facility site and transfer it to an IDA/EDA. This section provides that the locality may transfer the site without regard to the requirements, restrictions, limitations, or other provisions contained in any other general, special or local law, presumably dispensing with the requirement of a public hearing before a locality may convey its property.

While a locality may not make direct loans of funds to private firms for development if no enabling legislation exists permitting such loans, Virginia Code § 15.2-953 expressly authorizes a locality to make gifts, donations, and appropriations of money to an IDA/EDA for the purpose of promoting economic development. 1983-84 Op. Va. Att’y Gen. 103.² Furthermore, Virginia Code § 15.2-1205 authorizes the governing body of a county to give, lend or advance funds or other county property to any authority created by it.

Taken together, the relevant law provides ample authority for a locality to use its IDA/EDA to provide funds or other property as an incentive for economic development. Court cases confirm this power. In a community development authority financing of Short Pump Town Center, Henrico County proposed to make incentive payments to its EDA, which would then make the payments to the developer. These incentive payments were challenged, along with the proposed community development authority financing. Judge Randall G. Johnson, sitting as Judge Designate for the Circuit Court of Henrico County, ruled against the community development authority financing but specifically upheld the County’s ability to make incentive payments through its EDA. *Short Pump Town Ctr. CDA v. Taxpayers*, 54 Va. Cir. 501 (Henrico Cnty. 2001). On appeal to the Virginia Supreme Court, the lower court ruling was vacated on grounds that did not address the question of the EDA incentives. *Short Pump Town Ctr. CDA v. Hahn*, 262 Va. 733, 554 S.E.2d 441 (2001); see also *Taubman Regency Square Assocs. v. Bd. of Sup’rs of the Cnty. of Henrico*, No. CH00-1304 (Henrico Cnty. Cir. Ct. May 10, 2002) and related discussion in section 11-5.02(e)(1).

² There is no right of action of a third party to challenge a locality’s appropriation under Va. Code § 15.2-953. *Charlottesville Area Fitness Club Operators Ass’n v. Albemarle Cnty.*, 285 Va. 87, 737 S.E.2d 1 (2013).

In addition to its ability to make grants and loans, an IDA/EDA may acquire property, expend funds on improvement of property, including roads, water, and sewer, and resell the property to private persons or corporations, provided the overriding purpose is to promote industrial development in the area. 1986-87 Op. Va. Att’y Gen. 106. An IDA/EDA also may acquire an industrial park through gift or purchase of stock from a private development corporation in order to transfer ownership of the park from the corporation to the locality for purposes of attracting industrial clients to the area. 1990 Op. Va. Att’y Gen. 88. Furthermore, local governments may transfer fee simple interest and improvements required for the construction of an industrial “shell” building to IDAs and EDAs where such buildings are to be leased to private industry in order to stimulate industrial development within the area. 1990 Op. Va. Att’y Gen. 51.

In 2022, the General Assembly made clear that IDAs are also empowered to make grants to facilitate the construction of affordable housing. Va. Code § 15.2-4901, ¶ 11.

11-5.01(b) Limitations on Powers

11-5.01(b)(1) No Power to Operate Facilities

An IDA/EDA does not have the power to operate any facility as a business other than as lessor, except that an IDA/EDA may operate an industrial park and may establish, operate, and maintain a foreign trade zone. See Va. Code §§ 15.2-4901 and 15.2-4905.

11-5.01(b)(2) No Power to Tax

An IDA/EDA does not have the power to generate revenue other than from rents and charges it may impose in connection with the sale or lease of authority facilities. Virginia Code § 15.2-4911 appears to give IDAs and EDAs authority to charge fees for “any other services furnished or provided by the authority.” An IDA/EDA does not have the power to impose or to request the locality to impose taxes or assessments.

11-5.01(b)(3) No Power of Eminent Domain

An IDA/EDA does not have the power of eminent domain. Virginia Code § 15.2-4917 prohibits a locality from using condemnation to acquire a site for conveyance to an IDA/EDA.

11-5.01(b)(4) No Power to Joint Venture

IDAs and EDAs do not have the power to become a member of a corporation, partnership, joint venture or other entity. *But see* Va. Code § 36-19 relating to Redevelopment and Housing Authorities.

11-5.01(c) Legal Issues

11-5.01(c)(1) Purposes

Many of the IDA/EDA’s powers are tied to its purposes. The IDA Act does not enunciate a general economic development purpose for IDAs and EDAs, except in Virginia Code § 15.2-4905, ¶13, relating to grants for economic development purposes. If an IDA/EDA is being used for a purpose that does not directly relate to an “authority facility,” care should be exercised to determine statutory authority. See 2015 Op. Va. Att’y Gen. 9 (IDA does not have authority to operate an airport).

11-5.01(c)(2) Limited Exemption From Procurement Act

Virginia Code § 2.2-4344(B) of the Virginia Public Procurement Act provides that an IDA/EDA may enter into contracts without competition with respect to an item of cost of an “authority facility” or “facility” as defined in §§ 15.2-4902 or 15.2-6400. The definition of “authority facility” in Virginia Code § 15.2-4902 specifically provides that any facility for use by a locality, the Commonwealth or its agencies or other public bodies subject to the Virginia Public Procurement Act is not exempt from competitive procurement requirements under

the exemption provided in Virginia Code § 11-45(D) (the predecessor to Virginia Code § 2.2-4344(B)).

11-5.02 Community Development Authorities

Community development authorities (CDAs), often called special tax districts in other states, were designed to allow public/private partnerships to be formed to finance and develop infrastructure and other improvements. A locality's willingness to create CDAs may allow development to occur on a more comprehensive or timely basis than could be accomplished by a locality pursuing a traditional development process. This arrangement may be a significant benefit to the locality because it may allow for the tax revenue and employment opportunities to be realized more quickly than might otherwise occur without the CDA.

11-5.02(a) Statutory Authority

CDAs are authorized under Virginia Code §§ 15.2-5152 to 15.2-5158. Legislation authorizing the creation of CDAs was first enacted in 1993 as part of the Virginia Water and Waste Authorities Act. Va. Code §§ 15.2-5100 through 15.2-5158.

11-5.02(b) Procedure to Create

The process to create a CDA is commenced by a petition from at least 51 percent of the landowners (measured by land area or assessed value) of the land in the proposed CDA district. The locality does not have the authority to instigate the creation of a CDA without the petition of the landowners. Virginia Code § 15.2-5152 designates eligibility to consider petitions as follows: (i) cities are automatically eligible; (ii) counties and towns are eligible if they so elect by ordinance following a public hearing. For a CDA to be located wholly within a town, Virginia Code § 15.2-5155 provides that the owner or owners need only petition the town and not the county in which the town is located and the town may create the CDA without action by the county.

Virginia Code § 15.2-5153 provides that the landowner of a tract of land of any size in any city, and the landowner of a tract of land of any size in a town or a county that has elected to consider such petitions, may petition for the creation of a CDA. Where the land to be included in a CDA district consists of multiple tracts that are not contiguous, the owner or owners of at least 51 percent of the land in each non-contiguous tract must sign the petition.

A public hearing is required before adoption of the ordinance or resolution by the governing body creating the CDA. Va. Code § 15.2-5152. Virginia Code § 15.2-5156 requires publication of the notice of public hearing once a week for three successive weeks, with the first notice appearing no more than twenty-one days before the hearing,³ and with the hearing to be held not sooner than ten days after completion of publication of notice. Arguably, the provisions of Virginia Code § 15.2-5104, relating to water and waste authorities also apply, requiring one publication to occur at least seven days before the hearing.⁴

After the public hearing and before the adoption of the ordinance creating the CDA, the governing body is required to mail a copy of the proposed ordinance to the petitioning

³ This notice requirement was added in the 2023 legislative session. It creates an impossibility in meeting its requirements with the existing requirement that the hearing be held not less than ten days following the final notice. In advance of the 2024 General Assembly, a Virginia local government working group is developing corrective amendments to resolve the conflicting provisions.

⁴ Although the statute allows for creation of a CDA by ordinance or resolution, other references in the statute to the "ordinance" creating the CDA lead some practitioners to conclude that an ordinance should be used.

landowners. A landowner then has thirty days to withdraw his signature from the petition. Virginia Code § 15.2-5156 allows petitioning landowners to waive the right to withdraw their signatures. A county may not permit petitioning landowners to withdraw their signatures from a petition seeking formation of a CDA subsequent to the adoption of the CDA by ordinance or resolution. 2008 Op. Va. Att’y Gen. 73.

The ordinance creating the CDA is filed in the land records for each tax map parcel in the district. Va. Code § 15.2-5157. The CDA’s articles of incorporation are filed with the State Corporation Commission. Va. Code § 15.2-5107.

11-5.02(c) Powers

11-5.02(c)(1) General

Virginia Code § 15.2-5158 authorizes a CDA to finance, fund, establish, acquire, construct, equip, operate and maintain infrastructure improvements enumerated in the ordinance establishing the district, as necessary or desirable for development or redevelopment within or affecting the district or to meet the increased demands placed upon the locality as a result of development or redevelopment within or affecting the district, including, but not limited to:

- roads, bridges, parking facilities, curbs, gutters, sidewalks, traffic signals, storm water management and retention systems, gas and electric lines, street lights;
- parks and facilities for indoor and outdoor recreational, cultural and educational uses, entrance areas, security facilities, fencing and landscaping;
- fire prevention systems and rescue vehicles;
- school buildings and related structures, when authorized by the locality and the school board; and
- infrastructure and recreational facilities for age-restricted active adult communities with a minimum population of 1,000 residents.

11-5.02(c)(2) Special Services

CDAs are authorized to provide special services, including garbage and trash removal and disposal, street cleaning, snow removal, extra security personnel and equipment, recreational management and grounds keeping. Va. Code § 15.2-5158(A)(4).

11-5.02(c)(3) Issuance of Bonds

CDAs are authorized to issue revenue bonds, subject to such restrictions as may be established in the ordinance creating the CDA, to pay the costs associated with the improvements described above. Bonds of the CDA are payable solely from revenues of the CDA, and the locality is prohibited from paying debt service on CDA bonds unless otherwise provided in the ordinance creating the CDA. See Va. Code § 15.2-5103(C).

11-5.02(c)(4) Special Tax

Virginia Code § 15.2-5158 authorizes a CDA to request annually that the locality levy and collect an annual special *ad valorem* real estate tax on property within the district. The tax is levied and collected by the locality, not the CDA. It is limited to twenty-five cents per \$100 of assessed value unless a greater tax is requested by all the landowners in the district. The taxes are collected and paid to the CDA by the locality, subject to appropriation. See Chapter 10, Collection of Delinquent Taxes, section [10-5.04](#), for a discussion of the requirements for the collection of delinquent special tax payments.

11-5.02(c)(5) Special Assessments

A CDA may finance the services and improvements it provides to abutting property within the district by special assessment imposed by the local governing body. The CDA statutes reference the procedures for levying assessments pursuant to Virginia Code § 15.2-2404 et seq. While there is no express limit on the amount of the assessment, it is subject to the statutory and constitutional requirements that it not exceed the benefit to the assessed property or the full cost of the improvements. Va. Code §§ 15.2-2404 and 15.2-5158. The assessment is levied at one time, up front, by the governing body, but may be collected in installments up to forty years. The assessments are collected by the locality and paid, subject to appropriation by the governing body, to the CDA. Assessments are treated as tax liens under Virginia Code § 58.1-3340. See Chapter 10, Collection of Delinquent Taxes, section 10-5.04, for a discussion of the requirements for the collection of delinquent assessment payments.

The Attorney General expansively construed the term “abutting” as used within the powers of a CDA to impose special assessments. The Attorney General opined that property that abuts a portion of a system of improvements may be taxed or assessed under the CDA Act to pay its allocable share of the cost of the entire system of improvements. 2006 Op. Va. Att’y Gen. 89. The opinion also holds that under the CDA Act, multiple tax parcels owned by a single landowner may all be considered to abut an improvement when at the time the assessment is levied at least one such parcel abuts the improvement, each parcel adjoins another such parcel, and each parcel derives some benefit from the infrastructure improvements. The sale of one or more such adjoining parcels to a different owner after the levy of the assessment does affect the validity of the assessment as such assessment may be apportioned subsequent to sale. The Attorney General also opined that a parcel abuts a financed improvement when it is proximate to the improvement, but physically separated by a public right of way, easement, or road. Ownership of an easement connecting property to beneficial services such as roads or water service renders the owner of such easement an abutting owner with respect to improvements to which the easement extends. The Attorney General distinguished the Supreme Court’s decision in *Taylor v. Board of Supervisors of Northumberland County*, 243 Va. 409, 416 S.E.2d 433 (1992), in which the Court defined “abutting property owner” to mean one whose land physically touches or borders the improvement, on the ground that the state secondary highway system statute at issue in *Taylor* required a strict construction of the concept of abutment and was distinguishable from the statutory framework of the Virginia Water and Waste Authorities Act (Va. Code §§ 15.2-5110 through 15.2-5123).

11-5.02(c)(6) Rates, Fees and Charges

In addition to financing its services and improvements from revenues derived from special taxes and special assessments, a CDA has the power to fix, charge and collect rates, fees and charges for the use of, or the benefit derived from, the services and/or facilities provided, owned, operated or financed by the CDA. Virginia Code § 15.2-5158(A)(6) further provides that such rates, fees and charges may be charged to, among others, users of such financed facilities and services such as tenants and customers of real property and improvements located within or benefiting from the CDA district.

11-5.02(c)(7) Development Rights

A CDA has the authority to purchase development rights to be dedicated as easements for conservation or open space. See Va. Code § 15.2-5158(A)(7).

11-5.02(c)(8) Acquisition of Land

A CDA has the authority to finance and fund the acquisition of land within the district. All financing authority and methods enumerated above may be used for the acquisition of land. See Va. Code § 15.2-5158(A)(8).

11-5.02(c)(9) Additional Powers Under Virginia Water and Waste Authorities Act; Eminent Domain

The CDA statute expressly incorporates the powers of water and waste authorities under Article 3 of the Virginia Water and Waste Authorities Act, Virginia Code §§ 15.2-5110 through 15.2-5123. These powers include the power to issue revenue bonds, the power of eminent domain, and the power to fix, charge and collect rates, fees and charges for services furnished by or for the benefit from any system operated by the CDA. However, many of these provisions reference only water, stormwater and waste “systems” and it is unclear whether these provisions extend to other types of facilities that a CDA is authorized to establish or finance. Furthermore, some of the provisions of the Virginia Water and Waste Authorities Act are made expressly applicable to CDAs (for example, Virginia Code § 15.2-5103(C)), leaving uncertainty as to whether provisions, outside of Articles 3 and 6 of the Water and Waste Authorities Act, are applicable to CDAs.

11-5.02(d) Limitations on Powers**11-5.02(d)(1) No Power to Grant Direct Incentives**

Because no express provision allows a CDA to make loans or grants in furtherance of economic development, the CDA’s statutory authority to provide direct incentives is unclear. A CDA can serve only as a vehicle for more advantageous financing and construction of infrastructure and to generate special tax or assessment revenues. A county may give or lend funds to a CDA that it has created under Virginia Code § 15.2-1205. There is no comparable provision for cities and towns. Virginia Code § 15.2-5114, ¶9 provides that any political subdivision that is a member of an authority may lend, advance, or give money to such authority. It is not clear that this provision would apply to a CDA, where the locality creates the CDA but the concept of “membership” in the CDA does not apply. Furthermore, this power may be limited by the provisions of the CDA statute restricting the ability of a locality to pay debt service on CDA bonds.

11-5.02(d)(2) No Independent Power to Tax or Levy Special Assessment

The CDA does not have the independent power to levy taxes or special assessments and depends on the locality to levy and collect such revenues. However, as discussed in section [11-5.02\(c\)\(6\)](#), a CDA does have the power to charge and collect user fees under Virginia Code § 15.2-5158(A)(6).

11-5.02(e) Legal/Practical Issues**11-5.02(e)(1) Statutory Limits on Nature of Infrastructure**

Although the statute details the types of infrastructure that a CDA may finance, construct, establish, operate, etc., the language of Virginia Code § 15.2-5158 describes this as “infrastructure improvements enumerated in the ordinance or resolution establishing the district, as necessary to meet the increased demands placed upon the locality as a result of development within the district” In *Short Pump Town Ctr. CDA v. Taxpayers*, 54 Va. Cir. 501 (Henrico Cnty. 2001) (“*Short Pump*”), the circuit court narrowly read this phrase and found that only improvements to be located in a public thoroughfare met the test. On appeal, the Virginia Supreme Court vacated the circuit court’s decision on different grounds. *Short Pump Town Ctr. CDA v. Hahn*, 262 Va. 733, 554 S.E.2d 441 (2001). Following the Supreme Court’s decision, the same issues were heard in a companion case before the Circuit Court of Henrico County. *Taubman Regency Square Assocs. v. Bd. of Sup’rs of the Cnty. of Henrico*, No. CH00-1304 (Henrico Cnty. Cir. Ct. May 10, 2002) (“*Taubman*”). In *Taubman*, the court reached the different conclusion that the proposed improvements were necessary to meet the increased demand on the locality. *Id.* The Virginia Supreme Court declined to hear an appeal of the *Taubman* case. *Short Pump* illustrates that courts generally will defer to legislative findings demonstrating compliance with statutory requirements. However, such judicial deference will occur only if care has been taken to document and

make the appropriate legislative findings that the improvements to be financed are necessary to meet the increased demands placed on the locality.

The *Short Pump* and *Taubman* cases may now have less significance following certain amendments in 2009. These amendments modify the opening language of Virginia Code § 15.2-5158(A)(1) that provides that a CDA may, among other activities, finance and maintain infrastructure improvements “. . . necessary to meet the increased demands” The amended language now makes clear that infrastructure improvements are permitted not just when they are necessary but also when they are “desirable for development or redevelopment within or affecting the district” (emphasis added). See 2022 Op. Va. Att’y Gen. 50 (retaining wall permitted CDA infrastructure as it is desirable and similar to a retention system referenced in the statute).

11-5.02(e)(2) Priority of Tax Liens

The special tax and special assessment imposed on behalf of a CDA constitute a lien on real estate ranking on parity with real estate taxes. Delinquent special taxes or delinquent special assessments may be collected in accordance with the procedures set forth in Virginia Code § 58.1-3965 et seq., provided the enforcement of the lien for any special assessment made subject to installment payments will be limited to the installment payments due or past due at the time the lien is enforced through sale, in accordance with Virginia Code § 58.1-3965 et seq. and Virginia Code § 15.2-5158(A)(9). It is unclear how proceeds from a tax lien sale will be apportioned between the locality’s ad valorem taxes and the CDA’s special taxes or assessments. Virginia Code § 58.1-3340 provides that there is a lien on real estate, prior to any other lien, for taxes and levies assessed thereon. While there is no provision for giving general taxes a priority over special taxes or assessments, there also is no provision indicating whether tax lien sale proceeds are to be applied first to one tax and then to others or whether such proceeds should be apportioned on a pro rata basis.

11-5.02(e)(3) Restrictions on Assessments

Virginia Code § 15.2-5158(A)(5) requires that the assessments be imposed on “abutting” property or land, which may later be subdivided, and that the assessment not exceed the full cost of the improvement. Virginia Code § 15.2-2404 provides that the assessment be on abutting property owners and that it not exceed the peculiar benefit resulting from the improvement. Article X, Section 3 of the Virginia Constitution provides that the General Assembly may authorize “taxes or assessments upon abutting property owners” provided that the taxes or assessments not exceed the peculiar benefits resulting from the improvements. These provisions dictate that care be exercised in documenting the benefits to abutting landowners and that the appropriate legislative findings be made. See *Cygnus Newport-Phase 1B, LLC v. City of Portsmouth*, 292 Va. 573, 790 S.E.2d 623 (2016) (rejecting challenge to special assessment lien that claimed it was invalid because, years later, the special assessments grossly exceeded the peculiar benefits of the improvements to the remaining portion of the tax parcel). See the discussion in section [11-5.08\(d\)\(2\)](#).

11-5.02(e)(4) Marketability of Bonds

As is the case with tax increment financing, the marketability of CDA bonds and the interest cost associated with them are impacted by the uncertainty created by the fact that a locality’s payments to the CDA are “subject to appropriation” and limited to a specific source. In addition, the special tax is hampered by additional uncertainty since it is dependent on increased real estate values. These factors mean that CDA financings are likely to be more expensive than general obligation infrastructure financings undertaken by the locality.

11-5.02(e)(5) Procurement Act

Virginia Code § 2.2-4344(C), which is in the Virginia Public Procurement Act, provides a limited exemption for contracts entered into by a CDA. To the extent, however, that public

money other than special taxes or assessments is used for payments under the contract, the exemption does not apply.

11-5.02(e)(6) Limitations on Activities of CDAs

If the locality would like to impose parameters or limitations on the CDA, the ordinance creating the CDA may or may not be the appropriate vehicle to do so. Such parameters may include the amount of bonds to be issued, the projects to be financed, the priority of completion of various phases, a restriction on the use of eminent domain, etc. However, if the parameters are set forth in the ordinance creating the CDA, to amend or modify the parameters may require the same procedure as required for the adoption of the ordinance (public hearing after thirty days' notice). Alternatively, the parties can enter into a memorandum of understanding or some other form of agreement setting forth any parameters or restrictions.

11-5.03 Redevelopment and Housing Authorities

Redevelopment and Housing Authorities (RHAs) were created under the Housing Authorities Law. Va. Code §§ 36-1 through 36-55.1 (the "Housing Act"), to clear, re-plan, and reconstruct areas with unsanitary or unsafe housing conditions, and to provide safe and sanitary dwelling accommodations for persons of low income. RHAs also have significant powers with respect to redevelopment/economic development within certain areas. See [Chapter 3, Redevelopment and Housing Authorities](#).

11-5.03(a) Powers**11-5.03(a)(1) Issuance of Bonds**

RHAs have the power to issue bonds from time to time, for any of their corporate purposes, and to issue refunding bonds for the purpose of prepaying or retiring bonds previously issued by the RHA or by another entity if the bonds could have been issued by the RHA. The obligations of an RHA are solely the debt of the RHA and not that of the locality, the Commonwealth, or any political subdivision thereof. Va. Code § 36-29.

11-5.03(a)(2) Power of Eminent Domain

Pursuant to Virginia Code § 36-27, an RHA is authorized to acquire by eminent domain any real property necessary for the purposes of the RHA. Certain provisions for eminent domain with respect to blight abatement, including a fairly elaborate public notice, public approval, and planning process, are included in Virginia Code § 36-49.1:1.

11-5.03(a)(3) Joint Venture

An RHA may, with the approval of the local governing body, form corporations, partnerships, joint ventures, trusts, or any other legal entity, on its own behalf or with any person or public or private entity. Va. Code § 36-19(12).

11-5.03(a)(4) General Powers

An RHA has general powers, such as the power to lease and operate housing projects, among others. Va. Code § 36-19; see [Chapter 3, Redevelopment and Housing Authorities](#), section 3-6.

11-5.03(b) Limitations on Power**11-5.03(b)(1) No Power to Tax**

An RHA does not have the power to generate revenue other than from rents and charges it may impose in connection with the sale or lease of any dwelling, houses, accommodations, lands, buildings, structures, or facilities in connection with any housing project. An RHA does not have the power to impose or to request the locality to impose taxes or assessments.

11-5.03(b)(2) Limitations on Redevelopment Powers

Many of the RHA's powers are limited to housing projects, to its area of operation, or to redevelopment or conservation projects that require certain findings and actions by the locality's governing body. Va. Code § 36-19.

11-5.03(c) Legal and Practical Issues

The first step in the creation of an RHA is the finding by the governmental body of the locality that an RHA is needed; however, such a finding may be politically unpopular. Va. Code § 36-4. Furthermore, a referendum is also required. Va. Code § 36-4.1. In addition, the Act is replete with requirements for public hearings and fairly specific planning reports, and these may prove to be cumbersome or politically unpopular as well.

11-5.04 Sanitary Districts

Sanitary Districts⁵ are authorized to provide certain infrastructure within a particular geographical district, including the construction, maintenance and operation of water supply, sewerage, garbage removal and disposal, heat, light, firefighting equipment, power and gas systems and sidewalks. Va. Code § 21-118. While not a vehicle to provide direct grants or loans, sanitary districts allow for the targeted development of infrastructure that could be critical to a prospective business or industry seeking to locate or remain in a locality.

The statutory scheme generally presupposes that the districts will be encompassed by a single jurisdiction. By operation of Virginia Code § 15.2-1300, which provides authority for joint agreements between jurisdictions, a sanitary district can operate outside the boundaries of the district if it reaches an agreement with another jurisdiction. 2010 Op. Va. Att'y Gen. 109.

11-5.04(a) Statutory Authority

Statutory authority for sanitary districts is found in Virginia Code §§ 21-112.22 through 21-140.3.

11-5.04(b) Procedure to Create

Upon the petition of fifty qualified voters of the proposed district, or if the proposed district has less than one hundred qualified voters, upon the petition of 50 percent of the qualified voters (or, for an enlargement, upon the petition of 25 percent of qualified voters), the governing body of a county or city⁶ may, after a hearing, create or enlarge a sanitary district and prescribe its boundaries by ordinance. At the hearing, the governing body must make findings of fact that the proposed district or enlargement is necessary, practical, fiscally responsible, and supported by at least 50 percent of persons who own real property in the proposed district or area to be included in the enlargement. All affected residents and landowners have a right to be heard. Notice of the hearing must be published once a week for three consecutive weeks in a newspaper of general circulation within the locality and the hearing may not be held until at least ten days after the completion of the publication. Va. Code §§ 21-113 through 21-116.

⁵ For further discussion of sanitary districts, see Chapter 12, Financing Local Governments, section 12-7.04 and Chapter 17, Public Utilities, section 17-4.

⁶ Note that although most of the sanitary district statutory provisions refer only to counties, by operation of Va. Code § 21-112.22, "county" also means "city."

11-5.04(c) Powers**11-5.04(c)(1) General Powers**

Sanitary districts are managed and operated by the governing body of the city or county in which they are located. Virginia Code §§ 21-118 and 21-118.4 authorize the actions of the governing body, which may include but are not limited to the following powers:

- to construct, maintain and operate water supply, sewerage, garbage removal and disposal, heat, light, firefighting equipment, power and gas systems and sidewalks (the "sanitation facilities") (Va. Code § 21-118(1));
- to acquire by gift, condemnation, purchase, lease or otherwise, and to maintain and operate such sanitation facilities (Va. Code § 21-118(2));
- to contract with any person, firm, corporation, or municipality to construct, establish, maintain, and operate any such sanitation facilities (Va. Code § 21-118(3));
- to require owners and tenants on any property in the district to connect with any such sanitation facilities (Va. Code § 21-118(4)); and
- to fix and prescribe or change the rates of charge for the use of any such sanitation facilities (Va. Code § 21-118(5)).

In addition, sanitary districts are authorized to acquire, construct, maintain, and operate dams, motor vehicle parking lots, community buildings, community centers, and other recreational facilities and to make charges for the use of such facilities. Va. Code § 21-118.4.

11-5.04(c)(2) Issuance of Bonds

The governing body of any city or county in which a sanitary district has been created has the power to issue bonds of the district. Va. Code § 21-122. Bonds issued by a sanitary district must be approved by the voters in the district, except for certain very limited types of issues, as described below. Va. Code §§ 21-123 to 21-125. The circuit court of the city or the county in which the sanitary district is located will order an election on the issuance of bonds upon the petition of a majority of the members of the governing body or fifty qualified voters residing in the district. Va. Code § 21-123. Bonds of a sanitary district may be issued by the governing body without voter approval to pay the cost of improvements to water or sewerage systems mandated by the State Water Control Board, pursuant to the Federal Water Pollution Control Act. Va. Code § 21-122.1. Such bonds may be paid only from revenues of the water or sewerage system to be improved and no tax may be levied on property in the district to pay these bonds. *Id.* Subject to certain limitations, temporary, one-year revenue and tax anticipation notes also may be issued by a sanitary district without voter approval. Va. Code § 21-118.4(k).

11-5.04(c)(3) Power to Tax

The governing body of the city or county in which the district is located is authorized to levy and collect an annual tax on all property in the district subject to local taxation to pay in whole or in part the expenses incident to constructing, maintaining, and operating any "sanitation facilities" of the district. The power to levy an *ad valorem* tax appears to be limited to financing the costs of construction, operation and maintenance of facilities described in section [11-5.04\(c\)\(1\)](#), as "sanitation facilities." Va. Code § 21-118(6). However, Virginia Code §§ 21-137.1, 21-137.2 and 21-138 authorize a tax to be levied to pay bonds issued for any of the district's purposes.

11-5.04(c)(4) Power of Eminent Domain

Virginia Code § 21-118 authorizes sanitary districts to acquire, by eminent domain, rights, title, interest, or easements in and to real estate within the sanitary district. If the property to be condemned is:

- for a waterworks system, the proceedings are required to be in conformity with the requirements of Virginia Code §§ 15.2-1908 through 15.2-1916 and Virginia Code §§ 25.1-200 through 25.1-251;
- for the construction of water or sewer lines, the proceedings are required to be in conformity with the requirements of Virginia Code §§ 25.1-200 through 25.1-251 or Virginia Code §§ 25.1-300 through 25.1-318; or
- for the construction of water and sewage treatment plants and facilities, the proceedings are required to be in conformity with the requirements of Virginia Code §§ 25.1-300 through 25.1-318.

11-5.04(d) Limitations on Powers**11-5.04(d)(1) Issuance of Bonds**

Pursuant to Virginia Code § 21-122, the aggregate amount of bonds outstanding at any time may not exceed 18 percent of the assessed value of all real estate in the district subject to local taxation. The 18 percent limitation does not apply if the bonds are to be issued for a specific revenue producing project. Va. Code § 21-122. However, if after a period determined by the governing body not to exceed five years from the date of the election authorizing the bonds, the project fails to produce sufficient revenue to pay principal of and interest on the bonds, operating and administrative costs of the project and the costs of insurance, the bonds for the project will be included in the limitation. *Id.* Except in the limited circumstances described above, sanitary district bonds must be approved in a referendum. Va. Code § 21-123.

11-5.04(d)(2) Power to Transfer Property

Sanitary districts have the authority to sell, lease, transfer or dispose of any real or personal property owned by the sanitary district, provided that a public hearing with at least seven days' notice is first held with respect to the disposition. Va. Code § 21-118(2).

11-5.04(e) Legal Practical Issues**11-5.04(e)(1) Conflicts with Water and Sewer Authorities**

Virginia Code § 21-121.6 prohibits the issuance of bonds of a sanitary district created after January 1, 1993 in counties that have created a water and sewer authority without the approval of the governing body of the county.

11-5.04(e)(2) Unification of Utility System

Although the creation of various sanitary districts allows the users in each service area to pay for their service, as more districts are created, the system becomes fragmented. Various districts in the same locality may be paying different rates for services. Ultimately, it may become more efficient to merge various districts into a unified system. Virginia Code § 21-118.5 contains authority to create a unified system.

11-5.05 Special Service Districts

Localities may create special service districts as a mechanism to provide certain additional services or infrastructure that will be paid for by those who benefit. Like sanitary districts, special service districts are not a vehicle to make direct grants or loans to an economic development prospect. However, they may be useful in economic development by enabling a locality to develop services and facilities within a targeted geographic area to serve the

needs of businesses and industries within the district. Va. Code § 15.2-2400.⁷ The Attorney General has opined that a service district is not intended to be a separate funding source for governmental services that benefit the entire locality, nor intended to be a replacement funding source for existing general services. A service district is intended to provide area-specific funding to pay for additional services for a discrete area or region of the locality. Accordingly, a county could not create a county-wide service district and levy a tax to pay for its contribution to a regional jail in order to avoid a general fund tax increase. 2014 Op. Va. Att’y Gen. 123.

11-5.05(a) Statutory Authority

Statutory authority for special service districts is found in Virginia Code §§ 15.2-2400 through 15.2-2403.3.

11-5.05(b) Procedure to Create or Amend

Any locality may create a special service district by ordinance. A public hearing following notice published once a week for three consecutive weeks, with the first notice appearing no more than 21 days before the hearing, is required. Va. Code § 15.2-2400. By majority vote, the governing body may amend the boundaries of an established service district wholly within its jurisdiction. If the service district involves more than one locality, then the boundaries may be amended upon a majority vote of each locality affected by the amendment. Va. Code § 15.2-2402.1. The notice and public hearing requirements of Virginia Code § 15.2-2400 must be followed.

11-5.05(c) Powers

11-5.05(c)(1) General

Virginia Code § 15.2-2403 grants a number of powers to the governing body of the locality for the provision of facilities and services with respect to a service district. The governing body may construct, maintain, and operate facilities and equipment necessary or desirable to provide additional governmental services within a service district, including, but not limited to, general government facilities; water and sewer facilities; dams; garbage removal and disposal; heat and light; firefighting equipment; power and gas systems; and sidewalks.

In addition, a governing body has the power to provide the following services within a service district: economic development services; promotion of business and retail development services; beautification and shoreline management and restoration; control of certain insect infestations; parking; security; street cleaning and snow removal; refuse collection; sponsorship and promotion of recreational and cultural activities; construction, maintenance and upkeep of streets and roads (but only upon petition of over 50 percent of the property owners who own not less than 50 percent of the property to be served); other services, events, or activities that will enhance the public use and enjoyment of and the public safety, public convenience, and public well-being within a service district; and transportation and transportation services (including roads to be operated or maintained by the Virginia Department of Transportation (VDOT)). In unserved areas, the service district may contract with a non-governmental broadband service provider to deliver last-mile

⁷ Similar to a service district is a “community improvement district,” which has all the powers of a service district with the added caveat that to the extent the governing body of a locality contracts for the provision authorized governmental services, the governing body must contract with a nonprofit corporation, a majority of whose board members own property in the community improvement district. Va. Code § 15.2-2403.4. In addition, statutory authority for “Tourism Improvement Districts” is found in Va. Code §§ 15.2-2413.1 to 15.2-2413.11, and statutory authority for “Business Improvement and Recruitment Districts” is found in Va. Code §§ 15.2-2413.12 to 15.2-2413.21.

broadband service. Va. Code § 15.2-2403(15). These services, events, and activities may not be undertaken for the sole or dominant benefit of any particular individual, business, or other private entity. Va. Code § 15.2-2403(1) and (2). The Attorney General has opined that the statute also authorizes a locality to create a service district to provide library and recreational related services. 2009 Op. Va. Att’y Gen. 44.

A locality may also acquire interests in real property in order to provide open-space land, but the locality may not use condemnation for such purpose. Va. Code § 15.2-2403(11).

11-5.05(c)(2) Levy of Taxes

The governing body is authorized to levy and collect an annual tax on property in the district to pay for the facilities and services authorized to be provided (specifically excluding taxes for schools, police or general government services not authorized by the statute). Additionally, a locality may contribute from its general fund any amount of funds it deems appropriate to pay for the authorized governmental services. Va. Code § 15.2-2403(6). Any town located within a stormwater service district is entitled to revenues collected within the town pursuant to Virginia Code § 15.2-2403(6) as long as the town maintains its own municipal separate storm sewer system (“MS4”) permit or maintains its own stormwater service district. Va. Code § 15.2-2403.3.

11-5.05(c)(3) Incentives

Virginia Code § 15.2-2403, ¶7 authorizes the governing body to accept contributions from any available source for any part of the costs of facilities in the district. There is no provision for a governing body to grant such funds to a private entity as an incentive in a district; however, the governing body can contract with any person to provide certain services (subject to applicable procurement laws).

11-5.05(d) Limitations on Powers

11-5.05(d)(1) No Independent Authority to Issue Bonds

The service district does not create a separate political subdivision and any debt secured by taxes from the district would be issued by the locality.

11-5.05(d)(2) Limitation on Special Assessment

Unlike the levy of special taxes, the levy of special assessments to finance services and facilities is not expressly authorized. However, the Attorney General has concluded that property within a service district may be assessed a fixed dollar amount per year to cover estimated costs for multiple projects. 2005 Op. Va. Att’y Gen. 62. In concluding that a fixed dollar amount, rather than an ad valorem tax, may be imposed, the Attorney General refers to Virginia Code § 15.2-2404, which provides the mechanism for apportioning the costs of improvements by assessments. *Id.* See also the discussion in section [11-5.08](#) for a more complete discussion of the law relating to special assessments.

11-5.05(e) Legal/Practical Issues

11-5.05(e)(1) Limits on Infrastructure/Services

The statute has been narrowly construed by at least one circuit court to authorize taxes to be levied only for those services and facilities expressly set forth. In *Nageotte v. Board of Supervisors of Stafford County*, Chancery No. 01-335 (Cir. Ct. Stafford Cnty. Nov. 23, 2001), the circuit court ruled that Virginia Code § 15.2-2403 did not grant the county the express authority to create a service district to pay for roads (which in this case were roads that would be under VDOT control and, therefore, not subject to the provisions for non-VDOT roads) and that the terms “transportation and transportation services” did not encompass such roads. The Virginia Supreme Court declined to hear an appeal of the

Nageotte case. Virginia Code § 15.2-2403(1) and (2) have since been amended to specifically authorize the construction of VDOT-operated roads in a service district.

11-5.05(e)(2) Marketability

The same considerations for tax increment financing, described in section 11-5.11(f)(2), and for CDAs, described in section 11-5.02(e)(4), apply as well to bonds backed solely by special taxes from a service district. The special taxes provide a limited source of revenue, dependent on fluctuations in real estate value and subject to appropriation by the governing body. As a result, these bonds tend to be relatively more expensive and less marketable than general obligation bonds.

11-5.06 Transportation Improvement Districts

The Transportation District Act of 1964, Virginia Code §§ 33.2-1900 through 33.2-1935, (the “Act”) was enacted to promote regional development of transportation systems. See Va. Code § 33.2-1900.

11-5.06(a) Statutory Authority

Statutory authority for transportation improvement districts is found in the Transportation District Act of 1964, Virginia Code §§ 33.2-1900 through 33.2-1935.

11-5.06(b) Procedure to Create

A transportation district is created by ordinance adopted by the governing bodies of any two or more counties or cities or any combination thereof. A single county or city may form a transportation district if there is no other contiguous county or city willing to form a district. Such ordinances must be filed with the Secretary of the Commonwealth. There is no public hearing requirement other than the public hearing applicable to the adoption of ordinances by a county. Va. Code § 15.2-1427. A county ordinance requires publication of notice once a week for two consecutive weeks, with the first notice appearing no more than fourteen days prior to the intended passage of the ordinance, and with the second publication not sooner than one calendar week after the first publication. The transportation district is managed by a commission whose members are appointed by the participating localities, if more than one. Va. Code § 33.2-1907.

11-5.06(c) Powers

11-5.06(c)(1) Powers of the Commission

Virginia Code § 33.2-1915 specifically authorizes the commission for the transportation district to prepare, revise and amend all transportation plans for the transportation district and to construct or acquire, by purchase or lease, any transportation facility specified in such transportation plan. The commission may operate the transportation facilities itself or may enter into an agreement or lease with private parties for the operation of the facilities. A transportation district commission is authorized to enter into contracts with the counties and cities within the transportation district or adjoining counties or cities in the same planning district or adjoining transportation district commissions to provide transit facilities and services. The commission may exercise exclusive control of matters of regulation of fares, schedules, franchising agreements and routing of transit facilities within the boundaries of the transportation district, with the exception of airport commissions.

Transportation facilities or transit facilities are defined as all those matters and things utilized in rendering transportation service by means of rail, bus, water, or air and any other mode of travel, including without limitation tracks, rights of way, bridges, tunnels, subways, rolling stock for rail, motor vehicle, marine and air transportation, stations, terminals, ports, areas for parking, buildings, structures and all equipment, fixtures, and business activities reasonably required for the performance of transportation service but not including any such facilities owned by any person, company, association or corporation, the major part of

whose transportation service extends beyond a transportation district. Va. Code § 33.2-1901.

11-5.06(c)(2) Issuance of Bonds

A transportation district is authorized to issue revenue bonds for any of its purposes. Bonds of a transportation district are not considered a debt of the Commonwealth or any political subdivision thereof. Va. Code § 33.2-1920.

11-5.06(c)(3) Power of Eminent Domain

Virginia Code §§ 33.2-1915(B)(5) and 33.2-1919(11) authorize transportation districts to institute and prosecute eminent domain proceedings to acquire any property authorized to be acquired under the Act in accordance with the provisions of Virginia Code §§ 25.1-200 through 25.1-251.

11-5.06(d) Limitations on Powers**11-5.06(d)(1) Specific Limitations**

The commission does not have the power to prepare a transportation plan or construct or operate transit facilities in a transportation district that is located within a metropolitan area which includes all or a portion of a state or states contiguous to Virginia. There are a number of other restrictions applicable to districts in specific geographic areas, primarily in Northern Virginia. Va. Code § 33.2-1915.

11-5.06(d)(2) Power of Taxation

A transportation district does not have the power to generate revenue other than fees and fares it may impose in connection with the transit facilities and services. Transportation districts do not have the power to impose or to request the city or county to impose taxes or assessments.

11-5.06(e) Legal Issues

Related Virginia Code sections include the Multicounty Transportation Improvement Districts (Va. Code §§ 15.2-4600 through 15.2-4618), the Transportation Improvement District in Individual Localities (Va. Code §§ 15.2-4700 through 15.2-4716), the Virginia Transportation Service District Act (Va. Code §§ 15.2-4800 through 15.2-4815), and the Northern Virginia Transportation Authority (Va. Code §§ 33.2-2500 through 33.2-2512). These statutes are related to the Transportation District Act but are specific to certain districts already in existence.

11-5.07 Other Special Purpose Authorities

A number of other special purpose authorities may have the power to administer economic development incentives or to issue bonds to finance economic development projects. A few of these of more general applicability are outlined below.

11-5.07(a) Public Recreational Facilities Authorities

Public Recreational Facilities Authorities, created under Virginia Code §§ 15.2-5600 through 15.2-5616, have the power to issue bonds to finance any auditorium, theater, concert or entertainment hall, coliseum, convention center, arena, field house, stadium, fairground, campground, land conservation project, including but not limited to the holding of conservation easements, sports facilities, including racetracks, amusement park or center, garden, park, zoo, and museum and parking, transportation, utility, and restaurant facilities and concessions in connection with any of the foregoing. See Va. Code §§ 15.2-5601 and 15.2-5607.

11-5.07(b) Authorities for the Development of Former Federal Areas

Authorities for the Development of Former Federal Areas are established under Virginia Code §§ 15.2-6300 through 15.2-6322 to foster the industrial, social, and other economic development of its area or operation, which includes the boundaries of land acquired from the federal government (generally, closed military bases). Within these boundaries, the authorities may acquire, renovate, or expand buildings and other infrastructure, and sell or lease any facilities to private entities and make gifts of properties. Such authorities may issue bonds to finance the development of any of their facilities. See Va. Code §§ 15.2-6308 and 15.2-6312.

11-5.07(c) Virginia Regional Industrial Facilities Authorities

Virginia Regional Industrial Facilities Authorities are created under Virginia Code § 15.2-6400 et seq. Localities may enhance the economic base for the members of the authority by developing, owning and operating one or more facilities on a cooperative basis. Authorities may acquire land, install infrastructure, construct, rehabilitate, or expand buildings and purchase machinery and tools. Such authorities may make loans or grants to others and may issue bonds to finance any of their facilities. The member localities may agree to direct to such an authority machinery and tools tax revenue collected from authority facilities and may enter into revenue and economic growth-sharing arrangements with respect to tax revenue and other revenue generated by the authority's facilities. See Virginia Code §§ 15.2-6405 through 15.2-6409.

11-5.07(d) 63-20 Corporations

Generally, the interest on obligations issued directly by a nonprofit corporation is taxable. A 63-20 corporation is a public-private hybrid that is formed under general state nonstock corporation laws, but has the power to issue tax-exempt bonds under federal tax law. The "63-20" comes from the IRS Revenue Ruling under which these corporations function. See Rev. Rul. 63-20, 1963-1 C.B. 24. The corporation must meet each of these requirements:

- it must engage in activities which are essentially public in nature;
- it must not be organized for profit;
- it must not have income that inures to any private person;
- the state or a political subdivision must have a beneficial interest in the corporation and must obtain full legal title to the financed property of the corporation once the bonds are retired; and
- the state or political subdivision must have approved the corporation and the specific bonds to be issued by the corporation.

These 63-20 corporations may be useful in situations where there is a multi-jurisdictional project and no other clear choice of governmental entity to hold the assets and issue the bonds, or when political considerations make it difficult for a locality to use an existing governmental entity to hold the assets and issue the bonds. For example, the Pocahontas Parkway in the Richmond area is owned by a 63-20 corporation. Care should be taken in creating the 63-20 corporation to frame the ownership interest of the locality in a way that will pass muster under Dillon's Rule. See, e.g., 2000 Op. Va. Att'y Gen. 49 (concluding that counties do not have the power to "create" corporations).

11-5.08 Local Governments—Assessments for Local Improvements

In order to make improvements and have them funded by those landowners who benefit from them, a locality may levy a special assessment tax on those landowners.

11-5.08(a) Statutory Authority

Statutory authority for special assessment taxes is found in Virginia Code §§ 15.2-2404 through 15.2-2413 and Article X, Section 3 of the Virginia Constitution.

11-5.08(b) Procedure to Levy

The levy of a special tax or assessment for local public improvements does not involve the creation of a special district. The provisions authorize the governing body of a locality to apportion the cost of certain improvements among “abutting landowners.” Va. Code § 15.2-2405. The assessment is levied pursuant to an agreement with the landowners, or in the absence of an agreement, upon petition of the landowners (at least 75 percent in cities and 60 percent in counties) or by a two-thirds vote of the members of the governing body. Notice is required to be given to abutting landowners. Procedures for giving notice are set forth in the statute.

11-5.08(c) Powers

Virginia Code § 15.2-2404 specifies that assessments may be levied for the following improvements:

- sidewalks on existing streets;
- improving and paving existing alleys;
- construction or use of sanitary or storm water management facilities;
- retaining walls;
- curbs and gutters;
- construction, replacement, or enlargement of waterlines;
- installation of street lights;
- construction or installation of canopies; and
- benches, waste receptacles, and other “permanent amenities.”

11-5.08(d) Limitations on Powers**11-5.08(d)(1) No General Taxing Power**

Virginia Code § 15.2-2404 authorizes taxes or assessments for specific improvements. The mechanism for levying the tax or assessment contemplates an assessment, where the cost of the improvement is allocated among the benefited properties in relation to the benefit. The statute apparently does not authorize some other taxing mechanism, such as an ad valorem tax. The types of facilities that may be financed using this special assessment are limited.

11-5.08(d)(2) Limitations on Assessment

Both the statute and the Virginia Constitution provide that the assessment is made on abutting landowners. See discussion of “abutment” in section [11-5.02\(c\)\(5\)](#). The assessment may not exceed the peculiar benefit to the property owners resulting from the improvements. See *Cygnus Newport v. City of Portsmouth*, 292 Va. 573, 790 S.E.2d 623 (2016) (rejecting challenge to special assessment lien that claimed it was invalid because, years later, the special assessments grossly exceeded the peculiar benefits of the improvements to the remaining portion of the tax parcel). Virginia Code § 15.2-2406 sets forth additional limits, including a requirement that in a city or town, unless otherwise agreed, the assessment may not exceed 50 percent of the total cost (except that in cities and towns having populations not exceeding 12,000, the amount assessed shall not exceed three-fourths of the total costs of such improvement).

11-5.08(e) Legal/Practical Issues

The amount of an assessment is limited to the peculiar benefit to the assessed property owner. As the special assessment tool has been broadened to include various types of services and improvements (such as recreational and educational facilities, fire stations, parking facilities and traffic signals under the Community Development Authorities Act discussed in section [11-5.02](#)), it becomes necessary to measure the concept of benefit in a variety of ways. The pro rata linear feet of an improvement touching a property (as for sidewalks or roads) is not an accurate measure of benefit when dealing with improvements such as lighting or some of the community development authority improvements. Other measures, such as usage or increased property value, may be more appropriate.

11-5.09 Public-Private Transportation Act of 1995**11-5.09(a) Overview**

The Public-Private Transportation Act (the “PPTA”), Virginia Code §§ 33.2-1800 through 33.2-1824, is used to supplement existing ways to acquire, construct or improve transportation facilities. The PPTA does not create a governmental entity but rather is a method to encourage public/private ventures for transportation facilities. These ventures may result in the availability of facilities in a timelier or less costly fashion and may facilitate the use of federal pooling and funding mechanisms to expand and accelerate transportation financings.

See also Chapter 25, Public Procurement Law, section [25-6.03](#) for a complete discussion of the Public-Private Education Facilities and Infrastructure Act.

11-5.09(b) Procedure to Act Under the PPTA

Any private entity seeking authorization to develop and/or operate a transportation facility or facilities pursuant to the PPTA is required first to obtain the approval of the responsible public entity. Va. Code § 33.2-1802. A responsible public entity is a public entity, including local governments and regional authorities, that has the power to develop and/or operate the qualifying transportation facility, such as VDOT⁸ or any county, city or town. Va. Code § 33.2-1800. Virginia Code § 33.2-1803 includes a listing of information that must be submitted with any proposal by a private entity. A responsible public entity may solicit proposals from private entities if it issues a finding of public interest pursuant to Virginia Code § 33.2-1803.1. Va. Code § 33.2-1803(B). A finding of public interest must contain, at a minimum, the following:

1. A description of the benefits expected to be realized by the responsible public entity through the development and/or operation of the transportation facility, including in the areas of traffic flow, congestion, safety, economic development, environmental quality, and land use;
2. An analysis showing the public contribution needed pursuant to Virginia Code § 33.2-1803.1:1, including the maximum that will be allowed;⁹
3. A description of the benefits expected to be realized through the use of this chapter compared with the development and/or operation of the transportation facility through other available options;

⁸ VDOT and the Department of Rail and Public Transportation have more stringent requirements.

⁹ As Va. Code § 33.2-1803.1:1 only applies to projects of VDOT and the Department of Rail and Public Transportation, it is possible that this provision only applies to such projects, but the legislative intent is not clear.

4. A statement of the risks, liabilities, and responsibilities to be transferred, assigned, or assumed by the private entity;
5. A determination of the level of project delivery risk; and
6. If the agreement is entered into through competitive negotiation, information and the rationale as to why that method is more beneficial than competitive sealed bidding.

Va. Code § 33.2-1803.1.

11-5.09(c) Approval Process

A responsible public entity may approve the development and/or operation of the transportation facility as a qualifying transportation facility if:

1. The private entity can develop and/or operate the transportation facility with a public contribution amount that is less than the maximum public contribution determined pursuant to subsection A of Virginia Code § 33.2-1803.1:1;
2. There is a public need for the transportation facility;
3. The plan for the transportation facility is anticipated to have significant benefits in the areas of traffic flow, congestion, safety, economic development, environmental quality, and land use;
4. The private entity's plans will result in the timely development and/or operation of the transportation facility or its more efficient operation; and
5. The risks, liabilities, and responsibilities assumed by the private entity provide sufficient benefits to the public to not proceed with the development and/or operation of the transportation facility through other means of procurement available to the responsible public entity.

Va. Code § 33.2-1803(C).

Prior to entering into the comprehensive agreement, the chief executive office must certify in writing to the Governor and the General Assembly that the finding of public interest is still valid and that the risks and responsibilities assumed by the private party have not materially changed. Va. Code § 33.2-1803(D).

11-5.09(d) Powers

11-5.09(d)(1) Qualifying Facilities

A qualifying transportation facility is any transportation facility developed and/or operated by a private entity, including any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility, or similar commercial facility used for the transportation of persons or goods, together with any buildings, structures, parking areas, appurtenances, and other property needed to operate such a facility. Va. Code § 33.2-1800.

11-5.09(d)(2) Financing

The responsible public entity and the private entity may use a variety of financing methods to pay for the costs of transportation projects. The parties may issue debt, equity or other securities or obligations, enter into leases and grant and loan agreements, access any designated transportation trust funds, borrow or accept grants from any state infrastructure bank, and secure any financing with a pledge of, security interest in, or lien on, any or all

of its property, including all of its property interest in the qualifying transportation facility. See Va. Code § 33.2-1812. The responsible public entity's full faith and credit cannot be used to secure any obligation created by a private entity. Va. Code § 33.2-1813(B). The Pocahontas Parkway was the first project built under the PPTA. The cost of the project was \$324 million, of which \$27 million was paid by public funds; the remainder was paid through private bonds. Toll revenue is being used to repay the bonds.

11-5.09(d)(3) Private Entity Powers

The private entity is the natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity or other business entity that is responsible for the operation and/or development of the qualifying transportation facility. The private entity's powers include:

- all power allowed by law generally to a private entity having the same form of organization as the private entity;
- the power to develop and/or operate the qualifying transportation facility and impose user fees and/or enter into service contracts in connection with the use thereof; and
- the power to own, lease or acquire any other right to use or develop and/or operate the qualifying transportation facility.

Va. Code § 33.2-1807.

In *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 749 S.E.2d 176 (2013), the Supreme Court held that the General Assembly may empower private entities to assist public entities in the exercise of constitutionally delegated legislative powers (such as the imposition of user fees), but the General Assembly cannot delegate such legislative powers directly to private entities. The Court found that the comprehensive agreement at issue appropriately made the private entity's role subordinate to VDOT's ultimate decision-making authority. Moreover, VDOT, having constitutionally been delegated the legislative power to impose and set the rates of user fees by the General Assembly, may subsequently empower a private entity, through contract, to establish those rates as long as VDOT exercises oversight.

11-5.09(d)(4) Responsible Public Entity Powers

The responsible public entity's powers include: (1) the authority to take any action to obtain federal, state, or local assistance for a qualifying transportation facility (Va. Code § 33.2-1811(A)); and (2) the authority, in the event of material default, to take over the transportation facility and succeed to all rights to the title and interest in the transportation facility or terminate the interim or comprehensive agreement (Va. Code § 33.2-1813(A)).

11-5.09(e) Limitations on Powers

11-5.09(e)(1) Notice

The private entity is required to provide notice to every jurisdiction affected by the private entity's proposal by furnishing a copy of the proposal. Each affected jurisdiction has sixty days after receipt of a request for comments from the responsible public entity to submit comments. Va. Code § 33.2-1805.

11-5.09(e)(2) Comprehensive Agreement

The private entity is required to enter into a comprehensive agreement with the responsible public entity setting forth various requirements with respect to the development and/or operation of the facility. Va. Code § 33.2-1808.

11-5.09(e)(3) Maximum Rate of Return

The comprehensive agreement between the private entity and the responsible public entity should designate the private entity's maximum rate of return on the private entity's investment. Any excess earnings must be distributed as designated in the comprehensive agreement. Excess earnings may be distributed to the Commonwealth's Transportation Trust Fund, to the responsible public entity, to the private entity for debt reduction or to appropriate public entities. Va. Code § 33.2-1808(E).

11-5.09(e)(4) Termination

The private entity's authority and duties cease on the date set forth in the comprehensive agreement, at which time the transportation facility or facilities are dedicated to the responsible public entity. Any facilities originally dedicated by a local jurisdiction to the private entity must be dedicated back to the local jurisdiction. Va. Code § 33.2-1817.

11-5.09(e)(5) Power of Eminent Domain

The private entity does not have the power of eminent domain and must act through the responsible public entity to have property condemned. Va. Code § 33.2-1814.

11-5.09(f) Legal Issues**11-5.09(f)(1) Procurement**

Actions taken under the PPTA are not subject to the Virginia Public Procurement Act, Virginia Code § 2.2-4300 et seq. However, certain competitive procedures are required under the PPTA. Va. Code § 33.2-1819.

11-5.09(f)(2) Advantages

The PPTA may allow private entities to start building transportation facilities on a faster schedule than traditional financing and procurement allows.

11-5.09(f)(3) Disadvantages

On PPTA projects, the responsible public entity cedes a significant amount of control over the construction, timing, cost and/or operation of transportation facilities. The traditional competitive process may result in a lower cost of the facility. Land acquisition, particularly when condemnation is involved, may eliminate any time savings.

11-5.10 Local Economic Revitalization Zones

Virginia Code §§ 15.2-1129.2 and 15.2-1232.2 allow cities, counties, and towns to establish economic revitalization zones to provide incentives to private entities to purchase real property and to assemble parcels suitable for economic development. Such zones must be reasonably compact, not encompass the entire locality, and constitute one or more tax parcels not commonly owned. In the zone, the locality may grant tax incentives and provide regulatory flexibility for a period up to ten years. Properties acquired through eminent domain, however, are not eligible for the incentives.¹⁰

11-5.11 Tax Increment Financing**11-5.11(a) Overview**

Often one of the goals in providing economic development incentives is to provide some assurance that the revenue generated by the development offsets the incentives provided by the locality. Tax increment financing (TIF) can be used as a mechanism to make sure that growth pays for itself. In concept, any incentive paid by the locality is derived solely from the incremental tax revenues generated by a project or by development within a

¹⁰ See similar provisions regarding the development of waterfront areas (Va. Code § 15.2-2306.1) and abandoned school sites (Va. Code § 15.2-941.1).

particular area. In Virginia, as in many other states, this concept is written into a statute designed to facilitate financing based on tax increment revenues. By providing a TIF mechanism, in theory a locality can borrow funds to provide the incentive up front and pay back the borrowing from tax increment revenues as they become available. For reasons described below, this financing mechanism may be of limited usefulness in Virginia.

11-5.11(b) Statutory Authority

Statutory authority for TIF is found in Virginia Code §§ 58.1-3245 through 58.1-3245.5.

11-5.11(c) Procedure to Create

Pursuant to Virginia Code § 58.1-3245.2, any locality may adopt TIF by ordinance. The ordinance is required to designate a “development project area” and provide that certain incremental increases in real estate taxes over the “base assessed value” will be deposited in a Tax Increment Financing Fund. The base assessed value is defined as the assessed value of real estate in the development project area as shown on the books of the assessing officer on January 1 of the year preceding the effective date of the ordinance.

The governing body is required to hold a public hearing on the need for tax increment financing. Notice of the public hearing is required to be published once each week for three consecutive weeks immediately preceding the public hearing in each newspaper of general circulation in the locality, with the first publication appearing no more than twenty-one days before the hearing. Va. Code § 58.1-3245.2(B). Despite the findings in Virginia Code § 58.1-3245.1, the locality is not required to make a finding of “blight.” TIF is available to encourage the provision of public facilities, including infrastructure and open-space use, as well as redevelopment.

11-5.11(d) Powers**11-5.11(d)(1) Issuance of Bonds**

Since the creation of a TIF development project area does not involve the creation of a separate political subdivision, the locality would be the issuer of any debt for a TIF district. Virginia Code § 58.1-3245.4 provides that any locality that adopts TIF may issue obligations and make “development project cost commitments” secured by the Tax Increment Financing Fund to finance the “development project costs.” “Development project costs” has the same meaning as “cost” under the Public Finance Act. See Va. Code § 15.2-2600 et seq. These costs include the costs of public improvements, property or undertakings for which the locality is authorized to appropriate money.

11-5.11(d)(2) Payment of Incentives

The statute expressly provides that a locality may make “development project cost commitments” secured by the Tax Increment Financing Fund. Va. Code § 58.1-3245.4. Development project cost commitment is defined as a determination by the local governing body of payment of a sum specific of development project costs from the tax increment and other available funds. Va. Code § 58.1-3245. This provision appears to allow the locality to pay incentives but only for “development project costs” which may be limited to the cost of public infrastructure.

11-5.11(d)(3) Qualified Redevelopment Bonds

TIF may possibly be used in conjunction with Section 144(c) of the Internal Revenue Code, which allows the issuance of tax-exempt qualified redevelopment bonds. These bonds may be issued to finance certain redevelopment projects in blighted areas that would not otherwise qualify for tax-exempt financing.

11-5.11(e) Limitations of Powers**11-5.11(e)(1) No Power to Tax**

The TIF statutes do not authorize any additional form of taxes or special assessments, but merely provide a mechanism for targeting certain existing taxes. Using the TIF revenues to repay debt will divert general fund revenues from other general fund expenses.

11-5.11(e)(2) No Additional Debt Powers

The TIF statute does not grant localities any additional borrowing powers. The power to borrow based on TIF revenue is limited to borrowing powers under the Public Finance Act. Va. Code § 58.1-3245.4.

11-5.11(f) Legal/Practical Issues**11-5.11(f)(1) Limits on Incurring Debt**

Subject to certain exceptions, a county may issue debt secured by a pledge of general fund monies only after approval at referendum. A city or town is generally not subject to the referendum requirement but would be required to count such debt against its debt limit. Debt that is secured by revenue derived from a particular source, such as user fees for water and sewer facilities, parking revenue, etc., falls into the “special fund” doctrine and may be issued without referendum or debt limit considerations. In theory, TIF revenue constitutes a “special fund” since the debt is secured only by a portion of the revenue generated by a particular project or area. However, in *Terry v. Mazur*, 234 Va. 442, 362 S.E.2d 904 (1987), the Virginia Supreme Court ruled that highway user revenue such as fuel taxes, motor vehicle registration and license plate fees, and motor vehicle sales taxes were not “special fund” revenue and could not be pledged to debt under the “special fund doctrine.” Although the *Terry* case did not specifically deal with local sources of revenue, until the issue is specifically addressed at the local level, a locality apparently cannot pledge TIF revenues without treating the pledge as a general obligation. In order to avoid the necessity of counting the pledge against a debt limit for cities and towns or going to referendum in a county, the TIF pledge would need to be subject to appropriation each year by the governing body.

11-5.11(f)(2) Marketability of TIF Bonds

An obligation secured by a pledge of TIF revenue that is subject to appropriation, as described above, may be very difficult to sell and may carry a high interest rate. In addition to the potential uncertainty created by the need to appropriate the revenue each year (in most cases for an economic development or redevelopment project that is not considered “essential”), the revenue is further limited to the increment, if any, generated. This arrangement will result in a financing that is expensive, at best.

11-5.11(f)(3) What Costs/Incentives Can Be Financed?

It is not entirely clear whether a locality can directly pledge and pay TIF revenue to a developer or whether the TIF statute merely contemplates that the locality will earmark TIF revenue for public projects that the locality will fund. Furthermore, the TIF statute provides for financing “development project costs,” defined as costs under the Public Finance Act, as described above. Va. Code § 58.1-3245. This provision limits the types of facilities and services that can be financed to any public improvement, property or undertaking for which the locality is authorized by law to appropriate money, except for current expenses. The use of an IDA/EDA can resolve these issues by having the locality appropriate TIF-generated funds to its IDA/EDA, which then has the power to make loans and grants to a private entity. See section [11-5.01\(a\)\(2\)](#), regarding an IDA/EDA’s ability to make loans and grants.

11-5.11(f)(4) Can Other Taxes in Addition to Real Estate Taxes Be Pledged?

Virginia Code § 58.1-3245.4 provides that a locality may pledge other available funds, including other taxes or anticipated revenue, but only to pay “development project costs.”

11-5.11(f)(5) Publication requirements

Virginia Code § 58.1-3245.2(B) describes the publication requirements for the required public hearing. These requirements contain several traps for the unwary. The statutory language requires publication for three weeks immediately preceding the public hearing, with the first publication appearing no more than 21 days before the hearing. Va. Code § 58.1-3245.2(B). It is not clear what timing is required by the word “immediately.” Furthermore, the publication is required in each newspaper of general circulation in the locality. *Id.* The use of the word “each” is unusual and goes beyond the typical publication requirements for a locality.

11-5.11(f)(6) Dilution of Available Revenue

Even though tax increment financing or incentives based on tax increments only divert the incremental increase in certain tax revenue, this revenue is not available to meet the other needs of the locality. If a locality’s planning process contemplates revenue increases based on increased tax bases, the tax increment pledged for other purposes should be netted out. Depending on how the incentives or debt are structured, it may be a long time before the locality recoups its investment.

11-5.12 Economic Growth-Sharing Agreements**11-5.12(a) Overview**

As a part of Title 15.2, Chapter 13 of the Virginia Code, §§ 15.2-1300 to 15.2-1310, relating to joint actions by localities, economic growth-sharing agreements are authorized to conduct joint economic development activity.

11-5.12(b) Statutory Authority

Statutory authority for economic growth-sharing agreements is found in Virginia Code § 15.2-1301. Other statutes with similar intent or effect may include Virginia Code § 15.2-1304 relating to appropriations to regional organizations; Virginia Code § 15.2-953(B) relating to appropriations to IDAs and EDAs for economic development; Virginia Code § 15.2-1108 relating to acceptance of gifts by towns and cities; Virginia Code § 15.2-1202 relating to appropriations by a county to towns within its boundaries; and Virginia Code § 15.2-1300 relating to joint exercise of powers by political subdivisions (including more general applicability to any political subdivision and not just a locality).

11-5.12(c) Procedure to Create

Any locality may enter into agreements with other localities to share economic growth under Virginia Code § 15.2-1301. Approval by the governing body of each locality following a public hearing is required. Notice of the public hearing must be published once a week for two successive weeks, with the first notice appearing no more than fourteen days before the hearing. The public hearing may not take place until the agreement has been submitted to the Commission on Local Government and it has issued its findings. *See also* 2017 Op. Va. Att’y Gen. 226 (if a town is not a party that is assuming obligations that affect its rights regarding revenue, tax base or economic growth, then it is not an “affected locality” that is required to be party to a revenue-sharing agreement between a county and a city).

11-5.12(d) Powers

Two or more localities are authorized to agree to share in the economic growth of the localities (that is, to agree to pay another locality a designated portion of tax revenue) pursuant to binding fiscal arrangements for fixed periods that exceed one year. Va. Code § 15.2-1301. Generally, any binding agreement to make payments from the general fund, unless it falls within a service contract exception, special fund exception or some other exception, or is subject to annual appropriation, is treated as general obligation “debt” for purposes of the Virginia Constitution. This requires that a county approve the arrangement at referendum and a city or town count it against its debt limit.

11-5.12(e) Limitations on Powers

Notwithstanding the statutory language that purports to authorize multi-year binding agreements, the agreement will still be subject to the constitutional provisions on debt. See Va. Const. art. VII, § 10.

All agreements must require that all localities that receive funds under the agreement report annually to the governing bodies of the other participating localities the amount transferred and the use of the funds. If an agreement has been in effect for at least ten years as of July 1, 2018, and annual payments under such agreement exceed \$5 million, then the reporting is required even if not required by the agreement, and an annual meeting must be held.

11-5.12(f) Legal Issues**11-5.12(f)(1) Creation of “Debt”**

Recognizing that the pledge of tax revenue probably creates debt, the statute contains a provision requiring counties to go to referendum pursuant to Virginia Code § 15.2-3401 (relating to referenda to be held regarding annexation payment agreements). Va. Code § 15.2-1301.

11-5.12(f)(2) Applies Only to Localities

The economic growth-sharing authority applies only to localities. However, other statutes described herein may be used to accomplish virtually the same result through IDAs and EDAs or other political subdivisions.

11-6 ESTABLISHING INCENTIVE GUIDELINES**11-6.01 Undertake the Legal Analysis and Develop Evidence of Public Purpose**

The Virginia Supreme Court has repeatedly reaffirmed that the stimulation and promotion of economic development is a valid public purpose. In doing so, however, the Court also has demonstrated that the mere legislative declaration that a particular program will serve a public purpose is not sufficient to sustain its legality. Despite the Court’s deferential review of legislative activities, it remains the province of the Court to strike down those activities that it determines are without reasonable relation to the public interest or welfare and are beyond the scope of legitimate government. For this reason, it is essential to demonstrate that in establishing particular incentive guidelines or policies the locality can evidence its “public purpose(s)” for granting incentives.

There are numerous ways to evaluate the cost of incentives and the commensurate public benefits that will accrue as a result of their use to demonstrate a valid public purpose. Yet the more tangible the public benefit, the easier it will be to sustain the use of financial incentives to stimulate and promote economic and industrial development. Similarly, the more tangible and objective the evidence demonstrating a public benefit, the more likely the incentive program will be sustained as furthering a public purpose.

As the local government attorney analyzes whether proposed economic development incentive guidelines or policies will be constitutionally sustainable under Virginia law, the local government attorney may wish to apply the following analytical framework. This discussion is based on the cases and Virginia Attorney General opinions summarized in this chapter.

11-6.01(a) Economic Development as Valid and Animating Public Purpose

In keeping with the standards enunciated by the Virginia Supreme Court, the locality and the IDA/EDA should analyze the proposed financial incentives in light of their dominant or animating purpose. As described above, the locality and, if applicable, the IDA/EDA should make legislative findings that the proposed incentives will support economic development

in the locality. These findings should further indicate that the proposed incentives are intended both to induce existing businesses to remain in the locality as well as to induce new businesses to locate in the locality. Adopting such a plan is consistent with the decision in *Industrial Development Authority of Chesapeake v. Suthers*, 208 Va. 51, 155 S.E.2d 326 (1967), where the Court rejected the argument that the public purpose is served only by inducing new industry to locate in the Commonwealth:

Public purpose may be as well served by inducing an industry whose continued existence is essential to the economy of a community to remain in this state as by inducing a new industry to enter. It is beside the point that some private interest may benefit incidentally from the action of an industrial authority in inducing an industry to remain in the state so long as such action promotes the “safety, health, welfare, convenience and prosperity” of the inhabitants of this Commonwealth.

Even in *Button v. Day*, 208 Va. 494, 158 S.E.2d 735 (1968) (“*Button IV*”), the one decision in which the Supreme Court found a violation of the Credit Clause, the Court reaffirmed its position that economic and industrial development is a legitimate public purpose warranting government participation: “It cannot be [disputed] that stimulation of the development of industry is a public purpose warranting governmental participation to achieve the desired objective of creating additional employment for the citizens of the State.”

In furtherance of this analysis, the Court in *Button IV* intimated, however, that a transaction could pass the animating purpose test and still fail a Credit Clause challenge:

It does not follow, however, that because the goal is meritorious, every method which might, in some way, aid its accomplishment is therefore constitutionally permissible; or, to put it another way, that because the purpose is public, anything done in furtherance thereof becomes, a fortiori, a proper governmental function.

Id.

In effect, the Court suggested that a purpose could be public, but the method utilized to accomplish this public purpose might be impermissible under the Credit Clause.

The Court pointed to two factors it believed distinguished the loan guarantee program in *Button IV* from the facts of its prior decisions: (1) the lack of public ownership of the facilities on which public funds were to be expended (at least for the period during which bonds issued to finance such facilities remained outstanding), and (2) that the debts guaranteed under the act were to “be discharged with State money from the guaranty fund upon default, are otherwise unobtainable loans secured from private sources by private firms to finance construction or improvement of privately owned industrial plants.” *Id.* (emphasis added). The Court found that it was “difficult, if not well-nigh impossible, to say that the benefit to private interests is merely incidental or, conversely, that the benefit to the State is paramount.” *Id.*

While the animating purpose test clearly requires a case-by-case analysis to determine if the transaction or obligation undertaken by the locality or the IDA/EDA is of public benefit, the locality needs to present facts to support this effort.

11-6.01(b) Specific Purposes for Use of Incentive Funds

In reviewing specific proposed incentives/expenditures for economic development purposes, the local government attorney can look to the history of cases, Virginia Attorney General

opinions, and other references for guidance in developing the public purpose analysis but will find little help with specific purposes. However, in providing for the Commonwealth's Development Opportunity Fund (Va. Code § 2.2-115), the Virginia General Assembly identified certain specific purposes for which incentive funds can be used. Those purposes are found in Virginia Code § 2.2-115(D) and are as follows:

[P]ublic and private utility extension or capacity development on and off site; public and private installation, extension, or capacity development of high-speed or broadband Internet access, whether on or off site; road, rail, or other transportation access costs beyond the funding capability of existing programs; site acquisition; grading, drainage, paving, and any other activity required to prepare a site for construction; construction or build-out of publicly or privately owned buildings; training; or grants or loans to an industrial development authority, housing and redevelopment authority, or other political subdivision for purposes directly relating to any of the foregoing. However, in no case shall funds from the Fund be used, directly or indirectly, to pay or guarantee the payment for any rental, lease, license, or other contractual right to the use of any property.

11-6.01(c) Presumed Constitutionality of Legislative Actions

The detailed legislative findings of a locality and, where applicable, its IDA/EDA supporting a public purpose for their incentives should enjoy deference unless clearly wrong. In decisions addressing these constitutional issues, the Virginia Supreme Court has acknowledged the strong presumption of constitutionality that attaches to legislative actions. For example, in *Shenandoah Lime Co. v. Mann*, 115 Va. 865, 80 S.E. 753 (1914), the Court stated that "[e]very presumption is made in favor of the constitutionality of an act of the legislature. A reasonable doubt as to its constitutionality must be solved in favor of the validity of the law, and the courts have nothing to do with the question whether or not the legislation is wise and proper [I]t is only in cases where the statute in question is plainly repugnant to some provision of the Constitution that the courts can declare it to be null and void." *Id.* (quoting *Ex parte Settle*, 114 Va. 715, 77 S.E. 496 (1913)). Even in a situation where the economic benefits expected to accrue from the proposed financial incentives may be criticized as "speculative," the Court has indicated that legislative findings should enjoy the deference of the courts. See *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984).

The Virginia Supreme Court has indicated that a similar presumption regarding the constitutionality of the actions of the Virginia General Assembly is applicable to legislative bodies at all levels of government. For example, in *Indus. Dev. Auth. of Richmond v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 217 S.E.2d 879 (1975), the Court indicated that, in the exercise of its powers under the Act, an IDA is acting in a legislative capacity and that the standard of review applicable to the exercise of such powers, therefore, is that generally applicable to legislative actions.

11-6.01(d) Incidental Benefit to the Private Sector

The Virginia Supreme Court has consistently held that if the animating purpose is to spur economic development and private benefits are merely incidental to the primary public goal, such private benefits will not cause a constitutional problem. Furthermore, the Court's decisions addressing the issue of private benefits have made it clear that the size or quantity of these benefits do not change their character. See *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984); *Fairfax Cnty. Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 150 S.E.2d 87 (1966).

One might argue that such private benefits unfairly give a competitive advantage to the recipients of the financial incentives. While the locality and the IDA/EDA should take into account such potential criticisms, the locality and the IDA/EDA should counter that such arguments are properly addressed at the legislative level and that such arguments do not jeopardize the constitutionality of the financial incentive program. See *Mayor of Lexington v. Indus. Dev. Auth. of Rockbridge Cnty.*, 221 Va. 865, 275 S.E.2d 888 (1981).

Furthermore, the locality's provision of financial incentives should demonstrate a means to achieve a public purpose that does not establish a guaranty for private business or provide a program "stamped indelibly with the purpose of granting credit in aid of private interests upon the faith of [government] funds" of the type rejected by the Court in *Button IV*. The locality and the IDA/EDA should seek to provide incentives to private businesses not for the purpose of granting credit in their aid but for the purpose of increasing the tax base of the locality and employment opportunities for local residents in accordance with the purposes of an industrial development authority as enunciated in the IDA Act.

Finally, the Virginia Attorney General has opined that public benefit outweighs private benefit in instances involving (a) the Commonwealth's acquisition of a private corporation's stock to benefit the state retirement system, (b) an IDA's acquisition of an industrial park through the purchase of a private developer's stock, (c) a county's appropriation of funds to its IDA to make a loan to a private corporation, or (d) an IDA's contribution to the capital of a corporation. 2000 Op. Va. Att'y Gen. 83.

One structuring factor that merits additional legal analysis is any proposal to make IDA/EDA-funded improvements to private property (on-site). In such instances, because the IDA/EDA will likely not exercise much control over the facilities or the improvements, the argument of merely incidental benefit may be more difficult to sustain. In the *Harrison II*, *Harrison III*, *Button IV* and *DeHaan* cases, the Court emphasized, without expounding in any great detail, the importance of public ownership of the facilities being financed in those cases. It apparently did not matter to the Court that in most of these cases a private party had the option of purchasing the facilities following the financing transaction, and that this option often bore no relation to the market value of the facilities at the time of purchase. In these cases, the Court apparently believed that public ownership reinforced the notion of public purpose. This is not to say that public ownership is or should be an absolute requirement. One could easily imagine scenarios where the public purpose of economic development would be hindered by public ownership. Similar to the Court's finding in *Harrison III* that the letting of port facilities to a private party would not cause an otherwise public purpose to become a private purpose, the Court could find that private ownership of a facility similarly does not destroy the public purpose. Subsequent to the decisions in these cases, the General Assembly enacted the Commonwealth's Development Opportunity Fund, which specifically authorizes the use of public funds for certain on-site and off-site improvements. See section 11-6.01(b).

11-6.01(e) Summary

As described above, although the Virginia Supreme Court has acknowledged that economic development is a valid public purpose and will attach a strong presumption of constitutionality to a locality's particular incentive program, a number of factors collectively will affect the validity of the proposed incentives.

The following table illustrates those factors that either are more helpful or less helpful in establishing the validity of incentives under the public purpose analysis:

More Helpful	Less Helpful
Grant of existing funds	Guaranty of private debt
Funds provided from nonbinding “moral obligation” pledge; subject to annual appropriation	Funds provided by general obligation debt
Public ownership (or reversionary interest) of improvements	Privately owned improvements
Redevelopment of blighted areas	Economic development
Economic distress, high unemployment, low tax base	Strong economy
Program of enunciated criteria for grant of incentives	Case-by-case incentives
General economic benefit	Benefit to specific identified business

11-6.02 Economic Development Incentive Plan

11-6.02(a) Legislative Findings/Declarations

A locality should make legislative findings/declarations, general as to incentive guidelines or policies and specific as to incentive recipient. That is, a locality should list public purposes underpinning incentive guidelines and policies, such as prevention of blight, needed infrastructure, job creation, increased tax base and capital investment in facilities and property.

11-6.02(b) Economic Study

A locality should undertake an economic impact study (whether prepared internally or with outside assistance) to provide objective additional support of value of economic development incentives.

11-6.02(c) Approve the Plan

A locality and an IDA/EDA should formally approve an economic development plan, setting forth goals and procedures and conformance with legislative findings/declarations; investment criteria; and legislative findings to be made by an IDA/EDA if an IDA/EDA is the conduit for providing incentives.

11-6.02(d) Memorandum of Understanding

A locality should consider entering into a Memorandum of Understanding with the IDA/EDA setting forth how the IDA/EDA will implement the policies and procedures under the plan. The IDA/EDA should make findings consistent with the plan.

11-6.02(e) IDA/EDA Findings

Examples of findings to be made by the IDA/EDA under the policies and procedures may include:

- the animating purpose of any proposed provision of incentive grants serves a valid public purpose and only incidentally benefits private interests;
- the proposed provision of incentive grants to a business is in furtherance of the purpose for which the IDA/EDA was created;
- without the stimulus of the incentive grant, it is unlikely that the business would relocate or remain in the locality; and
- the grant/incentive furthers the economic development strategy of the locality.

Where a locality has elected to stimulate development or redevelopment of underdeveloped, underimproved, blighted, vacant, abandoned properties or brownfields and greyfields, the following additional findings by the IDA/EDA may be appropriate:

- the property to be developed or redeveloped is located in an area recognized by the locality, either under its comprehensive plan or its economic development plan/strategy, as an area in need of development or redevelopment (i.e., brownfields, greyfields or vacant, abandoned or under-improved or underdeveloped property);
- the proposed development or redevelopment is consistent with the locality's comprehensive plan and/or economic development plan/strategy; and
- the scope and quality of the plan will serve to influence redevelopment and additional capital investment or adjacent or nearby properties.

11-6.03 Application Form for Business Prospect to Request Incentive Assistance

The policies and procedures adopted by the locality (and the IDA/EDA) should require the business prospect or property owner to make formal application to the locality (or the IDA/EDA as the case may be). The application should require the business prospect or property owner to provide the following information:

- Description of project—company name; type of operation;
- Location of project;
- Amount of private investment that adds to the local tax revenues;
- Jobs to be created—average salary level or total yearly payroll of jobs to be created;
- Amount of incentive requested;
- The purpose or purposes for which funds will be provided;

- Other public funds that have been or may be expended on the project; and
- A summary statement presenting the importance of the project to the locality and why support is being sought. Note: in the case of redevelopment, the summary statement should include information such as:
 - The expertise and experience of the business prospect or property owner in redeveloping brownfields, greyfields, blighted, under-improved and underdeveloped property;
 - The degree to which the proposed project may influence development or redevelopment or adjacent or nearby properties;
 - The extent to which the proposed project may serve to implement a change in use that is consistent with and/or furthers the goals of the locality's comprehensive plan and/or economic development plan/strategy; and
 - The extent to which the project incorporates mixed uses, provides open space and focuses on transportation and transit accessibility.

11-6.04 Agreement between IDA/EDA and Business Prospect

When writing the agreement with the business prospect, the IDA/EDA should consider the following issues.

11-6.04(a) Applicable Law

The agreement should address the applicable Virginia Code provisions, including the applicability of the Virginia Freedom of Information Act¹¹ (Va. Code §§ 2.2-3700 through 2.2-3714) and the State and Local Government Conflict of Interests Act¹² (Va. Code §§ 2.2-3100 through 2.2-3131). Any written contract an IDA/EDA enters into must contain provisions addressing the issue of whether attorney's fees shall be recoverable by the prevailing party in the event the contract is subject to litigation. Va. Code § 15.2-4905(3).

11-6.04(b) Financial

The Agreement should:

- Include a mechanism for controlling financial obligations to the business prospect for qualifying costs;
- Require annual appropriation to guard against reliance by the business prospect;
- Contain prevailing wage requirements and a competitive bid process that should be taken into account when negotiating with the business prospect; and

¹¹ Executive directors and members of industrial development and economic development authorities must receive training from the Freedom of Information Act Advisory Council regarding the Act's application within two months of assuming office and within every two years thereafter. Va. Code § 2.2-3704.3.

¹² Likewise, executive directors and members of industrial development and economic development authorities must receive training from the Conflict of Interest and Ethics Advisory Council within two months of assuming office and within every two years thereafter. Va. Code § 2.2-3132. They must also file, prior to taking office and annually thereafter, a disclosure of personal interests. Va. Code § 3115.

- If facilities are financed with tax-exempt bond proceeds to be conveyed or used by the business prospect, consider tax-related concerns for private business use.

11-6.04(c) Risk Management

The IDA/EDA should structure against the risk of the business prospect's failure to perform by including provisions that allow for termination of the agreement if critical events do not happen by a specified date.

11-6.04(d) Performance Guarantees and Clawback Provisions

The IDA/EDA should consider requiring a monetary guarantee, such as a letter of credit or performance bond; a first option to purchase for the locality; a reacquisition clause where public land was granted or purchased; and deed covenants. The IDA/EDA should also consider requiring a deed of trust and/or a security agreement from the business prospect, but the IDA/EDA must beware of potential bankruptcy issues and the locality's priority.

When an IDA/EDA provides a grant to a company before it has performed its obligations, the IDA/EDA should strongly consider a repayment provision if the company never performs. Awarding performance-based grants that are payable after the company has fully performed may be more palatable and allow the locality to pay the grant from tax revenues already received.

11-6.04(e) Remedies

The IDA/EDA should limit force majeure clauses in the agreement to provide for limited time periods and for limited causes and try to limit remedies against the IDA/EDA for specific performance; it should also consider liquidated damages.

11-6.04(f) Miscellaneous

- In the context of a public-private partnership where eminent domain or condemnation is being used to acquire a site (for the public portion of the proposed development) or to provide public infrastructure, it is best for the agreement to state that a completion date is not guaranteed.
- Legal opinions may be qualified in certain situations to limit professional liability.
- The use of a shell corporation by a developer has advantages and disadvantages; a locality should consider carefully each option.
- The acquisition of related licenses and permits should be provided for in the agreement.
- The amount of private investments, the number of new jobs created, and the wage levels provided by the business prospect in order to apply for incentives should be the same targets as provided in the agreement.

11-7 STATEWIDE DEVELOPMENT INCENTIVES/PROGRAMS

11-7.01 Virginia Economic Development Partnership Authority

11-7.01(a) Overview

The Virginia Economic Development Partnership Authority ("VEDP" or the "Authority") works to aggressively recruit and expand businesses in the Commonwealth and to develop international trade for Virginia based companies. The Authority establishes the Commonwealth's strategic economic plan and administers it through a variety of programs, including several large business incentive funds. VEDP is governed by a seventeen-member board of directors comprised of businesspersons and government officials. Eleven of the seventeen directors are appointed by either the Governor or the General Assembly based

on their expertise in a specified area of business, trade, finance, or a strategic industry. VEDP also employs a full-time president & chief executive officer and includes various subdivisions and advisory committees.

11-7.01(b) Statutory Authority

VEDP acts according to Virginia Code §§ 2.2-2234 through 2.2-2246.

11-7.01(c) Powers and Responsibilities

11-7.01(c)(1) Administer Economic Incentives to Attract Business

Virginia Code § 2.2-2237.3 establishes the Division of Incentives (DOI), a unit within VEDP responsible for “reviewing, vetting, tracking, and coordinating economic development incentives” administered by, or in conjunction with, VEDP. DOI must perform due diligence on all applications for grants or loans from the Commonwealth before such grants and loans are approved by the Governor. VEDP is authorized to enter into contracts with private companies requiring the companies to meet specified investment and job creation requirements as a condition to receipt of any incentives. VEDP can enforce these contracts via the Attorney General and require repayment of any incentives if the enumerated conditions are not satisfied.¹³ If a matter is referred to the Attorney General, any political subdivision that is a party to the incentive agreement must assign its rights to the Commonwealth.

11-7.01(c)(2) Develop and Implement Comprehensive Economic Strategy for the Commonwealth

Pursuant to Virginia Code § 2.2-2239, VEDP assists in the development of the Commonwealth’s comprehensive economic development strategy, which is produced within the first year of each new gubernatorial administration. Specifically, the Authority performs any background research in collaboration with other governmental and educational institutions and provides recommendations for the improvement of economic development in the Commonwealth. The Authority is further responsible for implementing the strategy and recommending any relevant legislative or executive actions to the Governor.

11-7.01(c)(3) Administer Virginia Business Ready Sites Program Fund

The Virginia Business Ready Sites Program Fund awards competitive grants to local governments for site characterization and development to create a portfolio of project-ready sites to promote economic development. See Va. Code §§ 2.2-2240.2:1 and 2.2-2260.

11-7.01(c)(4) Administer Virginia Jobs Investment Program and Fund

Virginia Code § 2.2-2240.3 establishes the Virginia Jobs Investment Program (VJIP), which consists of the Virginia New Jobs Program, Workforce Retraining Program, and Small Business New Jobs and Retraining Program. VJIP’s overall goal is to offer funding and programmatic assistance to offset recruiting, training, and retraining costs “incurred by companies that are either creating new jobs or implementing technological upgrades.” The specific requirements to qualify for VJIP assistance are outlined in section [11-7.02](#).

11-7.01(c)(5) Form a Nonprofit for Promotion of Economic Development

Virginia Code § 2.2-2240.1 permits VEDP to establish a nonprofit, nonstock corporation for purposes of promoting Virginia’s economic development and tourism efforts nationally and internationally. The nonprofit is permitted to raise money to pay for advertising and promotion of the Commonwealth and to raise non-state dollars to complement state and local economic development activities.

¹³ Most of the guidelines for the incentive programs administered by VEDP (and some other state organizations) are available [here](#).

11-7.01(c)(6) Acquire, Lease, and Manage Property

Virginia Code § 2.2-2237 empowers VEDP to “acquire, purchase, hold, use, lease or otherwise dispose of any property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the Authority.” Likewise, the statute authorizes VEDP to lease and sell property to any person. Virginia Code § 2.2-2246 further provides that any city or county within the Commonwealth may convey, lease, or sell property to VEDP, with or without consideration, “to provide for the construction, reconstruction, improvement, repair or management of [the] property.” VEDP is exempt from any taxes on property it acquires or uses, including sales and use taxes, though businesses operating on Authority land are not exempted from any taxes. See Va. Code § 2.2-2243.

11-7.01(c)(7) Receive and Accept Grants or Other Aid

VEDP is authorized to receive and accept any federal or private grants or aid for use on any economic development projects. Virginia Code § 2.2-2245 further authorizes VEDP to accept appropriations from any government for the acquisition, construction, improvement, maintenance or operation of property.

11-7.01(c)(8) Provide Programs and Services

One of VEDP’s central functions is to assist local and regional economic development entities, private firms, and government actors by providing services and programs. For example, VEDP provides business investment managers to help companies explore locations for growth or relocation throughout the Commonwealth. These managers provide tailored research to help companies find areas with suitable land and buildings, a qualified labor pool and access to infrastructure. VEDP also offers marketing and promotional programs (particularly for high unemployment areas), encourages coordination between various economic development efforts, and helps Virginia businesses expand into international markets. The Authority maintains a searchable catalogue of business development locations, including the resources and amenities available at each site. See Va. Code § 2.2-2238. In 2021, VEDP was tasked with establishing an Office of Education and Labor Market Alignment “to coordinate data analysis on workforce and higher education alignment” and provide resources regarding talent development. *Id.*

11-7.01(c)(9) Provide Catered Services to Rural Communities

Virginia Code § 2.2-2238.1 empowers VEDP to develop programs, upon request, that help rural and high-unemployment communities to: (1) review and evaluate existing industrial sites and infrastructure, (2) assess the existing workforce and tax incentives that may be available in a given area, (3) assist in identifying community resources, and (4) market the communities to expanding industries. The Authority is also required to work with various organizations in the areas of education, business, industry, and tourism to develop a strategic plan for economic development in rural communities. This plan must address education, infrastructure, business retention, recreational and cultural enhancement, and financial support for small businesses.

11-7.01(d) No Power to Tax

VEDP is not authorized to levy any special taxes or assessments on the property it owns, leases, maintains or operates. It may only accept appropriations, grants, and other aid to support its operations.

11-7.01(e) Accountability

The VEDP must report quarterly to the General Assembly and the Governor on the grants and loans awarded from the Development Opportunity Fund (Va. Code § 2.2-215), and annually regarding its strategic plan, progress toward its strategic goals, efforts to secure development opportunities for high-unemployment areas, and other information. Va. Code

§ 2237.1. Certain state agencies administering economic development programs are required to report to the Secretary of Commerce and Trade the amount of grants made available under the program, number of jobs created, actual average wages paid, amount of capital investment, and similar data.

11-7.02 Virginia Jobs Investment Program Fund

11-7.02(a)(1) Overview and VJIP Eligibility

VEDP administers the non-reverting Virginia Jobs Investment Program Fund (the “VJIP Fund”), from which it issues grants to VJIP-eligible businesses. To be VJIP eligible, a business must: (1) be a basic sector business that directly or indirectly derives more than 50 percent of its revenues from out-of-state sources; (2) pay a minimum entry-level wage of at least 1.2 times the federal minimum wage or the Virginia minimum wage, whichever is higher (though this may be waived in areas with unemployment 1.5 times the statewide average); and (3) meet additional criteria set forth by the Authority. Only full-time Virginia jobs eligible for benefits qualify for VJIP funding. Each of VJIP’s subprograms requires businesses applying for assistance to be VJIP eligible and to meet additional criteria for the specific subprogram (see below).

11-7.02(b) Virginia New Jobs Program

A subprogram of VJIP, the Virginia New Jobs Program (established by Virginia Code § 2.2-2240.4) permits the Authority to issue grants to companies seeking to expand to new facility locations so long as the expansion: (1) creates at least twenty-five net new full-time jobs, (2) results in a capital investment of at least \$1 million, and (3) includes Virginia as a competing state for the location of the project with at least one other state or country. The business must also be VJIP eligible. The Secretary of Commerce and Trade may waive these requirements with justification.

11-7.02(c) Workforce Retraining Program

A subprogram of VJIP, the Workforce Retraining Program (established by Virginia Code § 2.2-2240.5) authorizes VEDP to “provide consulting services and funding to assist companies and businesses with retraining their existing workforces to increase productivity.” To qualify for assistance, a business must, in addition to satisfying VJIP eligibility: (1) show that it is (a) undergoing integration of new technology into its production process, (b) making a change of product line in keeping with marketplace demands, or (c) making a substantial change to its service delivery process that requires new skills and technological capabilities; and (2) for each such integration, change of product, or substantial change to its service delivery, demonstrate (a) that no less than ten full-time employees are involved, and (b) that a minimum capital investment of \$500,000 will be made within a twelve-month period. The Secretary of Commerce and Trade may waive these requirements with justification.

11-7.02(d) Small Business New Jobs and Retraining Programs

A subprogram of VJIP, the Small Business New Jobs and Retraining Programs (established by Virginia Code § 2.2-2240.6) authorizes VEDP “to support the establishment or expansion of Virginia’s small businesses or to improve their efficiency through retraining.” To qualify for new job assistance, a small business must, in addition to being VJIP eligible: (1) create a minimum of five new, full-time jobs, and (2) make a capital investment of at least \$100,000. For retraining assistance, a small business must meet the same requirements as the Workforce Retraining Program, but for each integration, change of product, or substantial change to its service delivery the small business need only demonstrate that no less than five (not ten) full-time employees are involved and that a \$50,000 (not \$500,000) investment will be made within a twelve-month period. The Secretary of Commerce and Trade may waive these requirements with justification.

11-7.03 Commonwealth's Development Opportunity Fund

11-7.03(a) Overview

The Commonwealth's Development Opportunity Fund (COF), formerly known as the Governor's Development Opportunity Fund, was established as a discretionary, "deal-closing" fund to be used by the Governor to attract economic development projects and secure the expansion of existing industry in the Commonwealth. The COF is non-reverting and consists of appropriated funds and revenue from other private and public sources. Grants and loans from the COF are awarded to political subdivisions at the discretion of the Governor after vetting by VEDP. The political subdivisions may then give the funds directly to a business they wish to attract or may expend the funds themselves for permitted purposes.

11-7.03(b) Statutory Authority

Title 2.2, Subtitle I.A of the Code of Virginia, relating to the Office of the Governor, establishes the Commonwealth's Development Opportunity Fund. See Va. Code § 2.2-115.

11-7.03(c) Purpose of the COF

11-7.03(c)(1) Guiding Principles

Virginia Code § 2.2-115(C) provides that COF awards shall be granted based on the anticipated impact of the awards on (a) job creation, (b) private capital investment and (c) generation of additional state tax revenue. Typically, VEDP vets all applications for grants or loans and makes a recommendation to the Governor. Although interest-free loans are an option, most funding from the COF comes in the form of grants. Grants are intended to be performance based, and are not used as front-end financing for an economic development project.

VEDP will consider the following factors when determining whether to recommend a COF grant: (1) alignment of the project with state and local economic strategies; (2) potential community impact; (3) maximization of community wealth; (4) diversification of the job and tax bases; (5) whether the project solves a competitive need; (6) whether the project establishes a competitive advantage for the Commonwealth/locality; (7) whether the project will leverage other state resources; and (8) the project's impact on quality of life. See [VEDP Incentives and Administration Policy and Procedural Guidelines](#).

11-7.03(c)(2) One-Third Reserved for High Unemployment Localities

The authorizing statute mandates that at least one-third of the moneys appropriated from the COF in a given five-fiscal-year period shall be appropriated to counties and cities with an annual average unemployment rate that is greater than the statewide average for the preceding calendar year. However, if the one-third that is reserved for localities with higher-than-average unemployment is not expended because development prospects in those localities did not propagate over the preceding five-fiscal-year period, then any funds remaining in the COF at the end of the five-year period will be made available for awards in the next five-fiscal-year period.

11-7.03(d) Eligible Economic Development Projects

11-7.03(d)(1) Competitive, Basic-Sector Projects Only

Because the COF is intended to encourage lucrative economic development projects to come to the Commonwealth, grants from the COF will be awarded only to projects that provide new or additional income to Virginia and add to the gross state product. Specifically, the project must produce goods or services at least one-half of which will be sold outside the Commonwealth and will be paid for with funds outside the Commonwealth. The project must also be competitive, meaning the locality must be competing with at least one other state or country for the project.

11-7.03(d)(2) Capital Investment and Job-Creation Requirements

Virginia Code § 2.2-115(E) outlines the eligibility requirements for COF grants and loans. In most localities, there are three ways a project can become eligible. First, a project is eligible if it (1) involves a minimum capital investment of \$5 million, and (2) creates at least fifty new, full-time jobs “for which the average wage, excluding fringe benefits, is no less than the prevailing [local] wage.” Second, a project may become eligible if it (a) involves a \$100 million capital investment, and (b) creates at least twenty-five new, full-time jobs for which the average wage is no less than the prevailing local wage. The minimum capital investment amounts may be reduced or waived if at least 75 percent of the newly created jobs are new teleworking jobs (“teleworking job” being defined as a new job held by a Virginia resident for which the majority of the work is performed remotely and that pays at least 1.2 times the Virginia minimum wage). Va. Code § 2.2-115(A) and (E)(6). Finally, at the Governor’s discretion, a project may still be eligible if it creates between twenty-five and fifty new, full-time jobs for which the average wage is at least twice the prevailing wage of that locality or region. See Va. Code § 2.2-115(E)(1)(b).

11-7.03(d)(3) Eligibility in Localities with Above-Average Unemployment OR Poverty

The Code provides greater leniency for projects in (a) localities with an annual unemployment rate for the most recent calendar year that exceeded the statewide rate in the same year, or (b) localities with a poverty rate for the most recent calendar year that exceeded the statewide rate in the same year. In these localities, a project is eligible so long as it involves at least \$2.5 million in capital investment and creates at least twenty-five new, full-time jobs that pay at least 85 percent of the prevailing local wage. If the jobs created have an average wage that is less than 85 percent of the prevailing local wage, the Governor may still award funding if the Secretary of Commerce and Trade makes written findings that the local economic circumstances are sufficiently distressed such that “assistance to the locality to attract the project is nonetheless justified.” See Va. Code § 2.2-115(E)(4). However, the project must still involve at least \$2.5 million in private investment and create fifteen new, full-time jobs.

11-7.03(d)(4) Eligibility in Localities with Above-Average Unemployment AND Poverty

In localities with both above-average unemployment and above-average poverty, a project may receive funding from the COF so long as it involves \$1.5 million in private investment and creates at least fifteen new, full-time jobs for which the average wage, excluding fringe benefits, is no less than 85 percent of the prevailing local wage. The Governor may waive the 85 percent wage requirement with written justification from the Secretary of Commerce and Trade, though the minimum capital investment and job creation requirements remain.

11-7.03(d)(5) Grants for Qualified Companies in Fiscally-Stressed Qualified Localities

Grants or loans of up to \$2,000 per new job per year may be made to companies (which are qualified by the VEDP) who locate in a fiscally-stressed locality specified in Virginia Code § 15.2-958.2:01. Va. Code § 2.2-115(J). The company must not have had a presence in Virginia before 2018 and (i) must invest at least \$5 million in new capital investment in the qualified locality and create at least ten jobs paying at least 150 percent of the minimum wage or (ii) create at least fifty jobs paying at least 150 percent of the minimum wage. Va. Code § 58.1-405.1. At least half of the grant or loan must be distributed to the employees in jobs located in the qualified locality. Va. Code § 2.2-115(J).

11-7.03(e) Other Requirements for Funding**11-7.03(e)(1) VEDP Requirements**

In addition to the project eligibility requirements, Virginia Code § 2.2-115(F)(1) authorizes VEDP to “assist the Governor in developing objective guidelines and criteria that shall be used in awarding grants or making loans from the [COF].” Specifically, VEDP is authorized to require recipient companies to provide copies of quarterly payroll reports to verify the

employment status of any position included in the employment goal. VEDP may also require localities to provide matching funds, either cash or in-kind, at the discretion of the Governor. Finally, VEDP is authorized to cap the amount of funds from the COF that any one project can receive (current cap is \$1.5 million per project), though the Governor can waive the cap for cause.

11-7.03(e)(2) Business Beneficiary Contract Requirement

Pursuant to Virginia Code § 2.2-115(F)(2), any locality receiving a COF grant or loan is required to enter into a contract with each business that will benefit from use of the funds ("business beneficiary"). A business beneficiary is any person or entity who will receive funds from the COF directly from the political subdivision or for whose benefit the political subdivision uses the funds.

The business beneficiary contract must include seven key elements outlined at Virginia Code § 2.2-115(F)(2). The contract must also establish the date by which the requirements of the contract will be met, though political subdivisions may provide for up to a fifteen-month extension of this deadline. In the event the business beneficiary defaults, the contract must provide a formula to determine how much of the COF and matching funds must be repaid to the political subdivision. Before final execution, the contract must be reviewed by the Attorney General for enforceability.

11-7.03(e)(3) First Announcement by the Governor

COF grants or loans will not be awarded to projects that have been publicly announced prior to the Governor's approval and public announcement of a grant award. Neither the locality nor the company may announce the COF project before the Governor, and any announcement must include the capital investment and new jobs targets agreed to in the business beneficiary contract.

11-7.03(f) Application Process

11-7.03(f)(1) Community and Company Letters

Applications for funding from the COF require two documents: (1) a community letter sent by the chief appointed official of the locality in which the relevant project will be located; and (2) a letter from the company. Both letters are sent to the President and CEO of VEDP.

The community letter should include a summary of the project's importance; the amount requested; the expected use of the funds; a description of the project; the location of the project; details of the capital investment; job creation projections and details; descriptions of other public funds to be expended on the project; a notice to the Virginia community from which the company might be moving, if applicable; and other current background information that might be pertinent.

The company letter should provide an indication that without COF support there is a possibility the project could be located outside Virginia and that only one site in Virginia is under consideration. The letter should also include job creation projections; expected capital investments; affirmation that the project will not result in the closing of existing operations elsewhere in Virginia for the next twelve months; an affirmation that the company has not closed existing operations, or laid off employees, in Virginia in the twelve months prior to the application; and an acknowledgement of any political contributions made by the company to the Governor or his or her campaign/political action committees.

11-7.03(f)(2) VEDP Due Diligence and Final Approval

After receiving the community and company letters, the VEDP CEO will assign the application to a project manager. The project manager will obtain any remaining evidence or information that VEDP needs to conduct its Project Review and Credit Committee (PRACC)

process. The PRACC will review all elements of the project and consider its strategic, competitive, and financial benefits to the locality and the Commonwealth. The PRACC will also approve any conditions for the release of funds from the COF, such as any bonds the locality has agreed to issue. If approved by PRACC, a briefing memo, project information, and the return-on-investment analysis will be conveyed to the Secretary of Commerce and Trade for preliminary approval. The proposal will then be delivered to the company outlining any incentives and the requirements for those incentives. If the company accepts the incentives proposal, the Governor will be asked for final approval. If approved, the company will enter into a business beneficiary contract with the locality and its IDA/EDA. See section [11-7.03\(e\)\(2\)](#). Just as with local grants a locality may choose to award to a company, localities typically provide grants from the COF through their IDA/EDA to the company.

11-7.03(g) Grant/Loan Amounts

VEDP will consider several factors when determining grant or loan amounts, including the return on the Commonwealth's investment and the importance of the project relative to local and regional economic conditions.

11-7.03(h) Use of COF Grants and Loans**11-7.03(h)(1) Permitted Uses**

The Virginia Code permits awards from the COF to be used for: (1) public or private utility expansion or capacity development (including off-site development); (2) public and private installation, extension, or capacity development of broadband Internet access; (3) transportation access costs beyond the funding capability of existing programs; (4) site acquisition; (5) site preparation, including grading, paving and drainage; (6) construction or build-out of structures; (7) training; or (8) grants or loans to an industrial development authority, housing and redevelopment authority, or other political subdivision, for related purposes. Va. Code § 2.2-115(D).

11-7.03(h)(2) Prohibited Uses

COF awards may not be used "to guarantee payment for any rental, lease, license, or contractual right to the use of any property," or to support a development project where the "business relocates or expands its operations in one or more Virginia localities and simultaneously closes its operations or substantially reduces the number of employees in another Virginia locality." However, an otherwise eligible project may still receive funding from the COF despite statutory prohibitions if three of the five members of the Major Employment and Investment ("MEI") Project Approval Commission from the House of Delegates, and two of the three members of the Commission from the Senate, endorse the incentives package. See Va. Code § 30-310.

11-7.04 Virginia Growth and Opportunity (GO Virginia) Fund**11-7.04(a) Overview**

The Virginia Growth and Opportunity Fund (the "GO Virginia Fund") was created to facilitate regional collaboration on economic growth and diversification by incentivizing cooperation among business, education, and government entities on regional strategic economic and workforce development initiatives. The General Assembly created the GO Virginia Fund in the wake of deep federal budget cuts that highlighted Virginia's overreliance on public sector jobs and the need for economic diversification. The GO Virginia Fund consists of moneys appropriated by the General Assembly and revenues from private and public sources. The GO Virginia Fund is non-reverting and is administered by the Virginia Growth and Opportunity Board ("GO Virginia Board" or the "Board"). Grants are awarded to economic projects endorsed by a certified regional council and for which the regional council has matching funds.

11-7.04(b) Statutory Authority

The GO Virginia Board acts pursuant to Virginia Code §§ 2.2-2484 through 2.2-2490. The GO Virginia Fund is established at Virginia Code § 2.2-2487.

11-7.04(c) GO Virginia Organization**11-7.04(c)(1) GO Virginia Board**

Virginia Code § 2.2-2485 establishes the GO Virginia Board as “a policy board in the executive branch . . . to promote collaborative regional economic and workforce development opportunities and activities.” The Board is comprised of twenty-four members: seven legislative members, fourteen non-legislative citizen members, and three ex officio voting members from the Governor’s cabinet. Virginia Code § 2.2-2486 empowers the Board to designate and qualify regions and regional councils; administer the GO Virginia Fund; advise the Governor on regional economic development initiatives and best practices; and evaluate and report on the efficacy of GO Virginia Fund grants.

11-7.04(c)(2) Regional Councils

Pursuant to Virginia Code § 2.2-2488, the GO Virginia Board may establish and certify regional councils in any region identified by the Board. Thus far, the Board has designated nine regions. Each regional council is charged with soliciting, reviewing, and recommending regional projects to the Board for the receipt of competitive grants. Each council includes representatives from the education, economic, local government, community planning, and nonprofit sectors, as well as representatives from significant entities within the given region.

11-7.04(c)(3) GO Virginia Coalition

The Go Virginia Coalition (Coalition) is a collective of over 8,000 business and community leaders, sixty-five local, regional, and statewide organizations, and eighteen academic institutions. The Coalition supports the mission of the GO Virginia Board by advocating for state-level policies on innovation; investment in business; improvements in collaboration between government, business, and education; invention of new products and services; and infrastructure development.

11-7.04(d) Allocation of GO Virginia Funds

Moneys in the GO Virginia Fund are allocated to three primary purposes: (1) support for the initial organization of each regional council, including the development of regional economic growth and diversification plans; (2) a reserved portion for specific projects in each region based on a region’s share of the state population; and (3) competitive grants awarded on the basis of expected economic impact without regard to a region’s population.

11-7.04(e) Competitive GO Virginia Fund Grants**11-7.04(e)(1) Application Process**

Qualified regional councils may apply to the GO Virginia Board for competitive grants to support regional projects. To qualify, a regional council must have an economic growth and diversification plan that meets the criteria established by Virginia Code § 2.2-2489(B). The application for a grant must include: (1) the amount of funding requested and the number of years for which grants are sought; (2) the participating business, education, and government entities and their respective roles and contributions to the project; (3) the private, local, and other sources of non-state funding that the GO Virginia grant will assist in generating, including specific amounts pledged to date; (4) how the regional activity will address the skills gaps identified in the region’s economic plan; and (5) any other economic impacts that are reasonably expected to result from the proposed activity.

11-7.04(e)(2) Eligible Activities

Virginia Code § 2.2-2489(D) provides that GO Virginia Fund grants may be used for activities that:

[are] focused on high-impact, collaborative projects in a region that promote new job creation, entrepreneurship, and new capital investment; leverage nonstate resources to enhance collaboration; foster research, development, and commercialization activities; encourage cooperation among public bodies to reduce costs and duplication of government services; and promote other economic or workforce development activities . . . authorized by the Board.

Examples of GO Virginia-eligible projects include scale-ups, business-focused training and curriculum development in the education system, site development, research and development projects, startup collaborations, and bioscience/neuroscience cross-regional collaborations.

11-7.04(e)(3) Ineligible Activities

GO Virginia grants are not awarded to transportation projects, as incentive grants to private companies, or for economic marketing, trade missions, or quality of life projects. These projects are already covered by other economic development programs. See sections [11-7.01](#) and [11-7.02](#).

11-7.04(e)(4) Application Scoring

The GO Virginia Board scores applications to determine eligibility for, and the amount of, any grant. Scoring is based on: (1) the expected economic impact or outcome of the activity (with emphasis on the goals in the applicant-region's economic plan); (2) the non-GO Virginia Fund fiscal resources committed to the activity; (3) the number and percentage of political subdivisions and corporations involved, including the portion of the applicant-region's population that is represented; (4) the activity's compatibility with other projects, programs, or existing infrastructure in the applicant-region; (5) the complexity of the project relative to the size of the region; (6) the projected cost savings and other efficiencies generated; (7) the character of regional collaboration put into and resulting from the activity; (8) any interstate and interregional collaboration involved; (9) efficiency in the administration and oversight of the activity; and (10) other factors named by the Board. See Va. Code § 2.2-2489(E).

11-7.04(e)(5) Matching Funds Requirement

Virginia Code § 2.2-2489(K) requires that any GO Virginia grant be conditioned upon matching funds at least equal to the grant. The Board may reduce the matching requirement, however, to no less than half of the grant upon a finding of fiscal distress or exceptional economic opportunity in the applicant-region. Matching funds may be from any source, but cannot include state funds.

11-7.04(e)(6) Finality of Board Decisions

Decisions of the GO Virginia Board regarding competitive grants are final and not subject to appeal.

11-7.05 Economic Development Access Program

11-7.05(a) Overview

The Commonwealth Transportation Board (CTB) and the Virginia Department of Transportation (VDOT) oversee and administer the Economic Development Access Program and Fund (the "Access Program"), which assists localities in constructing, reconstructing, maintaining, or improving access roads to qualifying establishments. Funds may be used to finance road construction or improvement in all counties and cities, as well as certain towns that are part of the urban system.

11-7.05(b) Statutory Authority

Virginia Code § 33.2-1509 establishes the Access Program and the basic requirements for a locality to achieve funding.

11-7.05(c) Requirements for Funding**11-7.05(c)(1) Qualifying Establishments**

Qualifying establishments are those facilities to which Access Program roads may be built or improved. Examples of qualifying establishments include: manufacturing or processing plants, research and development facilities, distribution centers, regional service centers, corporate headquarters, government installations, and any other qualifying establishments determined by VEDP. Va. Code § 33.2-1509(A). Access Program funds may not be used for roads to schools, hospitals, libraries, airports, armories, shopping centers, speculative office buildings, apartment buildings, professional offices, residential developments, churches, hotels, and motels. See CTB, [Economic Development Access Fund Policy](#) (2024 Revision).

11-7.05(c)(2) Qualifying Investment

In addition to qualifying as an establishment, an economic development site must also demonstrate that it meets the qualifying investment criteria. See VDOT's [Economic Development Access Program Guide](#) (2022). A qualifying investment includes the cost of the land, building(s), and new equipment. Capital investments made from local government funds (not federal or state) are also included. Also eligible are the number of jobs created; for each new job created, a capital investment credit of \$5,000 is applied to the project. However, the qualifying investment amount does not include the cost of office equipment, computers, equipment transferred from another plant, legal fees, taxes, recording fees, and similar type expenses. Further, the CTB will normally disallow any costs incurred more than six months prior to the date of the local governing body's resolution to request funding.

11-7.05(c)(3) Environmental Requirements

Pursuant to Virginia Code § 10.1-1188, a project with an estimated cost of more than \$500,000 must go through the State Environmental Review Process ("SERP") prior to land disturbance activities. An applicant-locality must also obtain water quality (and other applicable) permits and ensure the project is in compliance with state and federal regulations.

11-7.05(c)(4) Ineligible Road Improvements

Intersection improvements, traffic signal installations and turn lane construction typically are not eligible for Access Program funding unless they are part of a larger project.

11-7.05(d) 11-7.05(d) Application Process**11-7.05(d)(1) When the Establishment is Known ("Regular Projects")**

After deciding to locate or expand on a particular site, a qualifying establishment should provide the locality (and the local VDOT manager) with: (1) a preliminary plan for the entire parcel of land, including nearby public roads and all other parcels in the economic development site; and (2) a letter of request to the local governing body outlining the business's intent to build, project start date, itemized capital investment, new jobs to be created, access road requests, and estimates of the number of additional vehicles and trucks that will use the requested road(s).

The local governing body should then vote on a resolution to request funding (for towns, the county board of supervisors must pass a concurrent resolution). The resolution should state that the right of way and utility relocation costs will be provided at no cost to VDOT and should provide the identity of the qualifying establishment. Finally, if the qualifying investment for the project is less than five times the estimated cost of access

road construction/improvement, the resolution should state that the locality will cover any additional costs.

11-7.05(d)(2) When the Establishment is Unknown (“Bonded Projects”)

If a locality wishes to construct an access road in anticipation of a qualifying establishment at a later date, such a request is made the same way as for a regular project, but the Access Program allocation will be based on an estimated qualified investment. As security for the CTB, the local governing body must post a five-year bond or other acceptable surety to cover the anticipated cost of road construction that is not yet justified by the qualifying investment. This surety may be reduced during the five years based on actual qualified investments at the site.

11-7.05(e) Funding Limitations

11-7.05(e)(1) Allocation Ratio

The total allocation to any given project is determined by the qualifying investment. Specifically, the allocation can be no more than 20 percent of the qualified investment in the project.

11-7.05(e)(2) Maximum Allocation for Non-MEI Sites

The Access Program limits funding to \$500,000 in unmatched allocations per locality per fiscal year. Beyond the \$500,000 unmatched limit, the Access Program allows localities to request up to \$150,000 in supplemental funds on condition that the funds are matched dollar-for-dollar by the locality. Supplemental funds are limited to 20 percent of however much of the qualifying investment exceeds \$2.5 million.

Notably, a locality may accept an allocation on behalf of a regional industrial authority without impacting its annual limit.

11-7.05(e)(3) Allocations for Major Employment and Investment (MEI) Sites

For projects estimated to generate at least \$250 million in capital investments and 400 jobs, the Access Program provides additional incentives. Specifically, for a design-only project, a locality requesting Access Program support for an MEI project can receive the maximum unmatched (\$500,000) and matched (\$150,000) allocations. For road construction projects, a locality may receive up to the maximum unmatched allocation (\$500,000) and an additional \$500,000 in matching funds each year for two years. All of these funding options are available to MEI projects that involve both design and construction phases, though CTB will not approve construction allocations within the same year as design-only allocations.

11-7.05(f) Time Limit to Complete Access Program Project

After the CTB approves funding for an access road construction or improvement project, the locality has two years to commit the project to a contract or otherwise commence construction. If the locality fails to begin construction within the two-year timeframe, the CTB may deallocate the funds unless the locality provides written justification for its delay.

For bonded projects, the locality has five years from the date of CTB approval of Access Program funding to obtain sufficient qualifying investments in the economic development site to justify the cost of the access road project. Any road construction costs that are not justified by qualified investments within the five-year bond period will be subtracted from the bond and remitted to VDOT. A locality has two years from the end of the five-year bond period to obtain qualified investments if it wishes to recoup a proportional part of the lost surety amount.

11-7.06 Virginia Enterprise Zone Program

The Virginia Enterprise Zone (VEZ) program is a partnership between state and local government that encourages job creation and private investment. VEZ accomplishes this by designating Enterprise Zones throughout the state and providing two grant-based incentives, the Job Creation Grant (JCG) and the Real Property Investment Grant (RPIG), to qualified investors and job creators within those zones, while the locality provides local incentives. See Va. Code §§ 59.1-538 through 59.1-549.

11-7.06(a) Administration

The Department of Housing and Community Development (the Department) manages the VEZ program. The Department establishes the criteria for determining what areas qualify as enterprise zones; monitors the implementation and operation of the VEZ program; evaluates and reports on the program; administers, enforces, and interprets the VEZ regulations; and allocates grant funds in accordance with the program. Va. Code § 59.1-540.

11-7.06(b) Enterprise Zone Designation

Upon the Department's announcement of periodic zone designation competitions, the governing body of any locality may apply to the Department to have an area or areas declared an enterprise zone. Such application must include a description of the area or areas to be included, the development potential of these areas, the need for special state incentives, the local incentives that will be provided to support new economic activity, and other information that the Department deems necessary to assess requests for designation. Va. Code § 59.1-542(A).

Two or more adjacent localities may file a joint application for an enterprise zone. Such application should demonstrate the regional need for the zone and the regional impact that could not be achieved through a single jurisdiction zone. Applicants for a joint zone should also specify what mechanisms will be used to ensure that the economic benefits of the joint zone are shared among the applicant localities. Va. Code § 59.1-542(B).

The Enterprise Zone Grant Act sets out specific requirements for the size of any area designated as an Enterprise Zone. See Va. Code § 59.1-542(C), (D).

Upon recommendation by the Director of the Department, the Governor may designate up to thirty enterprise zones in accordance with the Enterprise Zone Grant Act. The designations are made in coordination with the expiration of earlier designated zones and last for ten years, subject to renewal and early termination. See Va. Code §§ 59.1-542(E) and 59.1-546.

11-7.06(c) Local Incentives

Local governments submitting applications for enterprise zone designation should propose local incentives that address the economic conditions within their locality and that will help stimulate real property improvements and new job creation. Such local incentives include, but are not limited to: (i) reduction of permit fees; (ii) reduction of user fees; (iii) reduction of business, professional, and occupational license taxes; (iv) partial exemption from taxation of substantially rehabilitated real estate pursuant to Virginia Code § 58.1-3221; and (v) adoption of a local enterprise zone development taxation program pursuant to Article 4.2 (Va. Code § 58.1-3245.6 et seq.) of Chapter 32 of Title 58.1. The extent and duration of such incentives must conform to the requirements of the Virginia Constitution and the U.S. Constitution. The application for designation as an enterprise zone may also contain proposals for regulatory flexibility, including but not limited to: (i) special zoning districts; (ii) permit process reform; (iii) exemptions from local ordinances; and (iv) other

public incentives proposed in the application, which shall be binding upon the locality upon designation of the enterprise zone. See Va. Code § 59.1-543.

11-7.06(d) State Incentives

The following VEZ state incentives are available to businesses and zone investors that create jobs and invest in real property within the boundaries of enterprise zones.

11-7.06(d)(1) Job Creation Grant

The Job Creation Grant provides either (i) \$800 per year for up to five consecutive years for each grant-eligible position over a four-job threshold that during such year is paid a minimum of 175 percent of the minimum wage and that is provided with health benefits, or (ii) \$500 per year for up to five years for each grant-eligible position over a four-job threshold that during such year is paid less than 175 percent of the minimum wage, but at least 150 percent of the minimum wage, and that is provided with health benefits. Va. Code § 59.1-547(C)(1).

In areas with an unemployment rate that is one and one-half times or more than the state average, or for businesses that are certified under regulations adopted by the Director of the Department of Small Business and Supplier Diversity pursuant to subdivision 8 of Virginia Code § 2.2-1606, the business will receive \$500 per year for up to five years for each grant eligible position over a four job threshold that during such year is paid at least 125 percent of the minimum wage and that is provided with health benefits. Va. Code § 59.1-547(C)(1). Unemployment rates used to determine eligibility for the reduced wage rate threshold must be based on the most recent annualized unemployment data published by the Virginia Employment Commission. *Id.* A business may receive grants for up to a maximum of 350 grant eligible jobs annually. *Id.*

11-7.06(d)(2) Real Property Investment Grant

Grants are calculated at a rate of (i) 20 percent of the amount of qualified real property investment in excess of \$500,000 in the case of the construction of a new building or facility, or (ii) 20 percent of the amount of qualified real property investment in excess of \$100,000 in the case of the rehabilitation or expansion of an existing building or facility. Va. Code § 59.1-548(B). For any qualified zone investor making \$5 million or less in qualified real property investment, a real property investment grant shall not exceed \$100,000 within any five-year period for any individual building or facility. *Id.* For any qualified zone investor making more than \$5 million in qualified real property investment, a real property investment grant shall not exceed \$200,000 within any five-year period for any individual building or facility. *Id.*

11-7.07 Virginia Military Community Infrastructure Grant Program and Fund

This program was created in 2022 “to support military communities in the Commonwealth by awarding grants to aid the planning and design, construction, or completion of infrastructure projects that enhance military readiness, installation resiliency, or quality of life for military communities.” Va. Code § 2.2-233.1(B). A “military community” is a locality that derives more than 5 percent of its economy from military funding. Va. Code § 2.2-233.1(E). “Infrastructure” is:

any project that will (i) preserve, protect, and enhance military installations; (ii) support the state’s position in research and development related to or arising out of military missions and contracting; and (iii) improve the military-friendly environment for service members, military dependents, military retirees, and businesses that bring military-related and base-related jobs to the Commonwealth.

Va. Code § 2.2-233.1(E). The grantee must provide a 50 percent cash match from nonstate funds. Va. Code § 2.2-233.1(C). The Secretary of Veterans Affairs and Homeland Security is responsible for implementing the program. Va. Code § 2.2-231(20).

11-7.08 Special Tax Incentives

11-7.08(a) New Market Tax Credit Program

A federal program, the New Market Tax Credit (NMTC), channels investment capital into economically distressed areas through a Community Development Entity (CDE). Investors invest in a CDE, which in turn invests the capital it raises in distressed areas. Investors receive a credit against their federal tax liability equal to 39 percent of their investment over a seven-year period. The CDE then makes investments in qualifying businesses located within qualifying census tracts determined by the U.S. Department of the Treasury. See I.R.C. § 45D.

11-7.08(b) Port Volume Increase, International Trade Facility, and Barge & Rail Usage Tax Credits

Port Volume Increase Tax Credit (authorized by Virginia Code § 58.1-439.12:10) allows companies that increase usage of Virginia's port facilities by 5 percent in a single calendar year to claim a credit against their state corporate income tax liability. Similarly, the International Trade Facility Tax Credit (Va. Code § 58.1-439.12:06) benefits companies that create new jobs or capital investment in a trade facility by moving 5 percent more cargo through a public or private port facility in Virginia than in the preceding taxable year. Finally, the Barge & Rail Usage Tax Credit (Va. Code § 58.1-439.12:09) offers port-related companies a credit on their corporate income taxes for moving cargo by barge or rail rather than truck.

11-7.08(c) Refundable Research and Development Tax Credit

For tax years beginning after January 1, 2021, but before January 1, 2025, the Refundable Research and Development Tax Credit allows companies to credit qualified research and development expenses incurred in Virginia against their Virginia corporate income tax. Specifically, companies may credit 15 percent of the first \$300,000 (\$45,000) of qualified expenses or 20 percent of the first \$300,000 (\$60,000) if the qualified research is conducted in conjunction with a Virginia college or university. Qualified research is any research that is conducted in Virginia and meets the definition in § 41(d) of the Internal Revenue Code. See Va. Code § 58.1-439.12:08.

11-7.08(d) Worker Retraining Tax Credit

The Worker Retraining Tax Credit allows employers to claim credit for costs associated with the retraining of qualified employees. Specifically, employers may claim up to 30 percent of the cost to retrain employees at Virginia community colleges, certified private schools, or preapproved apprenticeships. If the retraining consists of courses conducted at a private school, the credit is limited to up to \$200 per employee, or \$300 per employee for retraining in a STEM or STEAM discipline. The statewide cap for retraining credits is \$2.5 million. Credits will be prorated if the cap is exceeded and unused credits may be carried forward for three years. See Va. Code § 58.1-439.6.