COUNTIES, CITIES AND TOWNS: VIRGINIA COALFIELD ECONOMIC DEVELOPMENT AUTHORITY -- INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

Board of Virginia Coalfield Economic Development Authority is appropriate body to consider whether Authority may make grant to Industrial Development Authority of Wise County which will pass money to prospective company willing to locate in county. Coalfield Authority may loan or grant funds to Wise County Authority, provided Board makes independent legislative determination that contemplated use of funds furthers one or more eligible public purposes. If Wise County Authority finds that prospective project meets public purposes of Act, financing of project is within its discretionary power. Contributing to capital of company does not violate Constitution, provided attending facts and circumstances support determination that use of funds furthers requisite public purpose.

The Honorable Terry G. Kilgore
Member, House of Delegates
May 17, 2000

You ask for guidance regarding the ability of the Virginia Coalfield Economic Development Authority to "pass monies on" to the Industrial Development Authority of Wise County ("Wise County Authority"), which will, in turn, "pass these monies on" to a prospective industry willing to locate in Wise County. Materials accompanying your request indicate that the development agreement between the prospective company and the Wise County Authority outlines the construction of a facility in Wise County which will be an information technology support center. The materials also provide that such company occupies such centers in other states and worldwide. Additionally, the materials provide that the project ultimately may create over 400 jobs in such center. These materials note that that the development agreement states that the monies are a "contribution to the capital" of the company.

Chapter 60 of Title 15.2, §§ 15.2-6000 through 15.2-6015 of the Code of Virginia, creates the Virginia Coalfield Economic Development Authority ("Coalfield Authority" or "Authority") and details its powers. The Coalfield Authority is created as a body politic to assist the Southwest Virginia coalfield region in achieving some degree of economic stability. All powers, rights and duties conferred ... upon the Authority" are exercised by its sixteen-member Board. Wise County is one of the localities participating in the Coalfield Authority, as specified in § 15.2-6002.
Chapter [60] is remedial in nature and is intended to address long-standing and intractable problems related to economic development and the absence of a diverse economic base in the coalfield region of Virginia. As a remedial statute, Chapter [60] should be liberally construed to accomplish this underlying legislative intent.\[3\]

Section 15.2-6011 authorizes the Authority to make loans and grants for the benefit of qualified private, for-profit enterprises; nonprofit industrial development corporations; or industrial development authorities.\[4\] Section 15.2-6011 also specifies the eligible uses and projects for which such Authority loans and grants may be made.\[3\] Specifically, § 15.2-6011 provides that the Authority is "empowered to pledge its funds, and make loans and grants to … industrial development authorities for financing"\[16\] certain enumerated purposes. Among such purposes are the "[p]urchase of real estate," "[c]onstruction … of buildings," and "[s]uch other improvements as the Authority deems necessary to accomplish its purpose."\[7\]

Quite clearly, the overriding purpose of the Coalfield Authority is to support the economic development of the coalfield region. To further such purpose, the legislation establishing and granting powers to the Coalfield Authority places few prohibitions on the Authority.\[8\] "The Board of the Authority is the appropriate body to consider all of the relevant facts" [and] "the decision whether to make the grant is within the discretion of the Board of the Authority."\[9\] Assuming the money will be used for one of the eligible purposes specified in § 15.2-6011, the Authority may make a loan or grant of funds.\[10\] Thus, the Authority may loan or grant the funds, provided it makes an "independent legislative determination that the contemplated use of the funds furthers the public purposes"\[11\] enunciated in § 15.2-6011. It is my opinion, therefore, that the Coalfield Authority has the discretion to make a loan or grant to the Wise County Authority so long as it is satisfied, based on all the relevant facts, that such loan or grant is for the financing of one or more of the purposes set forth in § 15.2-6011.

The Industrial Development and Revenue Bond Act, §§ 15.2-4900 through 15.2-4920, authorizes localities to create industrial development authorities.\[12\] The overall purpose for creating industrial development authorities is to promote trade and industry by inducing certain types of enterprises and institutions to locate and remain in the Commonwealth.\[13\] "Any activity by an industrial development authority must have a demonstrable public purpose. Whether a transaction is performed for a proper public purpose is a factual matter determined by the circumstances of each case. Generally, a transaction must benefit primarily the public and only incidentally private interests."\[14\]

Specifically, an industrial development authority "may make loans or grants from the authority's revenues to individuals or business entities for the purpose of promoting economic development."\[15\] Additionally, § 15.2-4901 provides that the Industrial Development and Revenue Bond Act is to be liberally construed in conformity with the stated intentions of the legislature.\[16\] Whether a transaction in which an industrial development authority is engaged comes within any of the express or implied powers of § 15.2-4905 will depend on the facts of the particular transaction.\[17\]
In making this determination, the industrial development authority acts in its legislative capacity. Section 15.2-4901 confines the discretionary power of an industrial development authority to that exercised "for the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity." If the authority finds that a proposed project meets the public purposes of the Industrial Development and Revenue Bond Act, then the financing of the project is within its discretionary power. Accordingly, it is my opinion that it is within the discretion of the Wise County Authority to engage in the transaction in issue upon its determination, based on all the relevant facts, that its proposed agreement with the company supports its public purposes.

Finally, you also raise the issue of whether a grant in the nature of a contribution to the capital of the corporation violates Article X, § 10 of the Constitution of Virginia (1971).

Article X, § 10 provides:

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; nor 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; nor 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; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.

The Supreme Court of Virginia has held that the three prohibitions contained in Article X, § 10, commonly referred to as the "credit clause," "stock or obligations clause," and the "internal improvement clause," are intended "to remedy the same evil"—"the use of the State's funds and credit to foster and encourage construction and operation of private enterprises." In interpreting and applying these three clauses, the Court consistently has held that "the moving consideration and motivating cause of a transaction are the chief factors by which to determine if it is prohibited." Thus, the Court repeatedly has found that transactions which involve extensions of public credit or expenditures of public funds that benefit private enterprises do not violate Article X, § 10, provided such transactions are motivated by a clearly defined public purpose. "It is the animating purpose of the transaction, and not its form or the extent to which it may benefit the private business involved, that determines its constitutionality."
Based on these principles, this Office has concluded, for example, that the animating purpose of the Commonwealth's acquisition of a private corporation's stock was to benefit the state retirement system rather than to aid the corporation and thus did not violate Article X, § 10. Additionally, this Office has concluded that an industrial development authority may acquire an industrial park through the purchase of stock of the private development corporation to accomplish the transfer of the ownership of the park from the corporation to the authority with the ultimate goal of attracting industrial clients to the area. Also, this Office has concluded that a county may advance funds to an industrial development authority so that such authority may make a loan to a private corporation, provided that the authority makes its independent legislative determination that the contemplated use of the funds furthers the public purposes of the Industrial Development and Revenue Bond Act. Similarly, it is my opinion that contributing to the capital of a corporation does not violate Article X, § 10, so long as the attending facts and circumstances support a determination that the use of the funds furthers a requisite public purpose.


31989 Op. Va. Att'y Gen. 132, 134 (citing Chapter 40, predecessor to Chapter 60) (citations omitted); see also § 15.2-6013 ("chapter … shall be liberally construed to effect the purposes thereof").


5Id.

6The term "finance" means, among other things, "to provide capital for." Needles v. Kansas City, 371 S.W.2d 300, 305 (Mo. 1963) (quoting 36A C.J.S. 410, 411 (1961)); see also Merriam webster's collegiate Dictionary 436 (10th ed. 1996) (defining "finance" as "obtaining of funds or capital").

7Section 15.2-6011(1), (5), (10).


9Id. at 100.

10Id. at 99 (citing § 15.1-1646, predecessor to § 15.2-6011).

12Section 15.2-4901.


15See 1999 Op. Va. Att'y Gen. 67, 68 (citing § 15.2-4905(13)).


20See id. at 199.

21Compare Gordon v. Fairfax County, 207 Va. 827, 834, 153 S.E.2d 270, 276 (1967) (county loan to airport authority promotes essential governmental functions, violates no public trust, and is not abuse of discretion); 1998 Op. Va. Att'y Gen. 96, 98 (concluding that (1) housing authority generally has broad discretion in control of its assets, provided discretion is exercised in accordance with underlying purpose of housing authority legislation and does not violate public trust impressed upon authority's assets; and (2) whether transaction is consistent with purpose of housing authority legislation is question of fact).


24See, e.g., City of Charlottesville v. DeHaan, 228 Va. at 578, 323 S.E.2d at 131 (under animating purpose test, city's appropriation of funds to redevelopment authority, which, in turn, lent funds to private hotel developer, served purposes of Housing Authorities Law and did not violate credit clause); Fairfax County v. County Executive, 210 Va. 253, 169 S.E.2d 556 (1969) (localities' guarantee of debts of metropolitan transit authority serves valid public purpose, notwithstanding benefit to bondholders and private contractors operating transit service); Development Authority v. Coyner, 207 Va. 351,
150 S.E.2d 87 (1966) (upholding authority's issuance of revenue bonds to finance facility for lease to private industry based on legislative finding that promotion of industrial development is for public purpose); United States Fidelity Co. v. Carter, 161 Va. 381, 406, 170 S.E 764, 773 (1933) ("credit clause" does not prohibit deposit of state or county funds in bank in usual course of business, unless deposit is made for specific purpose of aiding bank); Holston Corp. v. Wise County, 131 Va. 142, 157-58, 109 S.E. 180, 184 (1921) (county's guarantee of payment to quarry for crushed stone furnished to county road contractors does not violate "credit clause," because guarantee is motivated by need to ensure supply of stone at favorable price and not to aid credit of private business).


29 Note 1992 Op. Va. Att'y Gen., supra note 22, at 141-42 (expenditures must benefit governmental entity's public purpose; other possible public benefits are not to be considered).