

03-003

ADMINISTRATION OF GOVERNMENT: BOARDS – TREASURY BOARD.

Board approval is not required prior to issuance of debt to finance student housing project for state university if university has no actual or beneficial ownership in project and neither Commonwealth nor any agency or institution of Commonwealth pays, directly or indirectly, any of debt service on outstanding debt.

The Honorable Paul S. Tribble, Jr.
President, Christopher Newport College
January 9, 2003

Issue Presented

You ask whether the Treasury Board must approve, pursuant to § 2.2-2416(5) or (7), debt incurred by a private foundation to finance a capital project consisting of apartments and retail space, with the apartments offered as student housing by a state university.

Response

It is my opinion that the Treasury Board is not required to approve debt incurred by a private foundation to finance a capital project that will be included as part of a university's student housing program provided the project is not owned, to be acquired by, or leased by the university and neither the Commonwealth nor any agency or institution thereof is required or expected to provide any debt service, directly or indirectly, for the debt issued to finance the capital project.

Background

You relate that a private tax-exempt foundation desires to construct student housing facilities. The private foundation, a private management company, or the university's student housing offices, as management agent, will oversee daily operations of the facilities. A conduit issuer¹ will issue bonds on behalf of the private foundation secured wholly by rental payments received from student or commercial tenants and a deed of trust lien on the project or by a bank letter of credit collateralized by such rental payments and deed of trust lien to finance the project. Repayment of the bonds will not be secured by any obligation of the Commonwealth of Virginia or any agency or instrumentality of the Commonwealth, and no public funds will be pledged or are anticipated to be required for payment of debt service on the bonds. The university will enter into a support agreement, whereby it agrees to promote the project as part of its student housing system. The support agreement, however, will not obligate the university to make any payments or enter into any lease. You advise that no provision of the support agreement would constitute a debt, legal or otherwise, of the university or the Commonwealth.

Applicable Law and Discussion

Section 2.2-2416 provides that the Treasury Board shall have the following powers and duties:

5. Make recommendations to the Governor, notwithstanding any provisions to the contrary, on proposed bond issues or other financing arrangements; approve the terms and structure of bonds or other financing arrangements executed by or for the benefit of educational institutions and state agencies other than independent state authorities, including bonds or other financing arrangements secured by leases, lease purchase agreements, financing leases, capital leases or other similar agreements; and agreements relating to the sale of bonds;

....

7. Approve, notwithstanding any provisions to the contrary, the terms and structure of bonds or other financing arrangements executed by or for the benefit of state agencies, boards and authorities where debt service payments on such bonds or other financing arrangements are expected by such agency, board or authority to be made, in whole or in part, directly or indirectly, from appropriations of the Commonwealth, including bonds or other financing arrangements secured by leases, lease purchase agreements, financing leases, capital leases or other similar agreements, and agreements relating to the sale of bonds[.]

You ask whether § 2.2-2416(5) or (7) requires a private tax-exempt foundation to obtain Treasury Board approval prior to the issuance of bonds through a conduit issuer to finance a capital project for student housing under the circumstances described.

Section 2.2-2416(5) provides for the Treasury Board to evaluate debt issues "executed by or for the benefit of" state colleges and universities. The university will not execute any debt in connection with the project. Therefore, it must be determined whether the phrase "for the benefit of" should be interpreted to include the type of transaction you describe.

The phrase "for the benefit of" in § 2.2-2416(5) is subject to various interpretations.² Statutory construction requires that words be given their ordinary meaning, given the context in which they are used.³ Further, statutes should not be interpreted so as to produce absurd results or irrational consequences.⁴

In the context of § 2.2-2416(5), the phrase "for the benefit of" is used to refer to situations where a university derives an ownership interest from the financing arrangement required to be approved by the Treasury Board. The phrase "for the benefit of" may not be interpreted so broadly as to encompass a purely private transaction of the type described. To subject this type of purely private financial transaction to Treasury Board approval, absent an actual or beneficial ownership interest to the Commonwealth or any of its agencies or institutions, would require interpreting § 2.2-2416(5) so broadly as to produce an absurd result. In the facts you present, the state university will have no actual or beneficial ownership interest in the property financed. Instead, the project is purely a private transaction for which the university's only involvement is the agreement to offer the facility to its students for potential housing.⁵

To interpret § 2.2-2416(5) more broadly would insert the Commonwealth into financial transactions where it has no financial exposure. The described arrangement is a debt transaction to finance a capital project, and the debt is secured by private lease payments from private persons or entities to a private tax-exempt foundation and a deed of trust lien on the project.⁶ Neither the Commonwealth nor any of its agencies or institutions will be required to provide any debt service or lease payments for the project. There is no impact on the credit or debt capacity of the Commonwealth or any of its agencies or institutions. In addition, neither the Commonwealth nor any of its agencies or institutions will have any actual or beneficial ownership in the capital project or the land upon which the property is situated.

In *Citizens' Foundation of the Richmond Professional Institute, Inc. v. City of Richmond*, the Supreme Court of Virginia analyzed the relationship of the Foundation with the College of William and Mary and the Richmond Professional Institute.⁷ The Court observed that, while the Foundation held legal title to certain property, the College of William and Mary, and subsequently the Richmond Professional Institute, could request and receive conveyance of the property at any time.⁸ "Though bare legal title to property may rest in someone else, if the beneficial interest therein is vested in a public corporation created, managed and controlled by the state, then that property must be said to be owned indirectly by the Commonwealth."⁹ In the facts you present the university would not have any beneficial ownership interest in the capital project. At most, the university may serve in a ministerial capacity as property manager for the capital project. Even then, the university could only exercise control to the extent permitted by the tax-exempt private foundation. Absent an actual or beneficial ownership in the project by the university, the project is not "for the benefit of"¹⁰ the university.

Section 2.2-2416(7) requires Treasury Board approval for debt issues that "are expected ... to be made, in whole or in part, directly or indirectly, from appropriations of the Commonwealth." The financing you describe provides that debt service will be paid by the private tax-exempt foundation as it receives lease or rental payments from students or others leasing the apartments or office or retail space to be financed.¹¹ The only obligation of the university is to include the apartments in the student housing program. Neither the Commonwealth nor any of its agencies or institutions will make payments to the private tax-exempt foundation for the debt service on outstanding bonds. Accordingly, § 2.2-2416(7) does not require the Treasury Board to approve the transaction you describe.

Conclusion

Accordingly, it is my opinion that the Treasury Board is not required to approve debt incurred by a private foundation to finance a capital project that will be included as part of a university's student housing program provided the project is not owned, to be acquired by, or leased by the university and neither the Commonwealth nor any agency or institution thereof is required or expected to provide any debt service, directly or indirectly, for the debt issued to finance the capital project.

¹A "conduit user" generally is a redevelopment and housing authority or industrial development authority.

²See Black's Law Dictionary 149-52 (7th ed. 1990) (providing various definitions for "beneficial," "beneficiary," and "benefit," depending on context in which these terms are used); see also *West Virginia ex rel. Hardesty v. Aracoma-Chief Logan*

No. 4523, 129 S.E.2d 921, 924 (W. Va. 1963) (noting that "benefit" is generic word subject to many connotations).

³City of Virginia Beach v. Bd. of Supvrs., 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

⁴McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); 2001 Op. Va. Att'y Gen. 164, 165.

⁵Cf. City of Charlottesville v. DeHaan, 228 Va. 578, 588, 323 S.E.2d 131, 136 (1984) (observing that issuance of bonds providing incidental benefit to developer involved in city's redevelopment effort did not violate constitutional credit clause). In the context of § 2.2-2416, an incidental benefit to a state institution does not destroy the private nature of the transaction, just as an incidental benefit to the private developer in *DeHaan* did not offend the credit clause.

⁶In the alternative, the debt may be secured by a bank letter of credit collateralized by such lease payments and deed of trust lien.

⁷207 Va. 174, 148 S.E.2d 811 (1966).

⁸*Id.*

⁹*Id.* at 179, 148 S.E.2d at 815.

¹⁰Va. Code Ann. § 2.2-2416(5) (LexisNexis 2001 Repl. Vol.).

¹¹You relate that the project will consist primarily of apartments, and that a small portion of the space may be used for retail and/or office space.