

ECONOMIC DEVELOPMENT INCENTIVES IN VIRGINIA: A LOCAL PRACTITIONER'S HANDBOOK

LGA Committee on Issues Affecting the Development and Interpretation of Local Government Law — Economic Development Incentives Project

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Note: All references in this Outline to the "Virginia Code" are references to the Code of Virginia of 1950, as amended, and, unless specified to the contrary, all references to particular Code Sections are references to particular Sections of the Virginia Code.

PART ONE

THE WHAT, WHY AND HOW OF INCENTIVES

I. Economic Development 101

A. *What is Economic Development?*

Economic development involves attracting and retaining business and industry in a community. Such development is critical for the health and viability of a community and is also important for individual citizens. Economic development affects job opportunities, the community's tax base, population growth and even the number of stores where citizens can shop. The goal of economic development is to increase the tax base and provide better jobs, thus enhancing the well-being and prosperity of the citizens of the Commonwealth of Virginia. Adding to the tax base helps lower the tax burden on each taxpayer, improves property values and encourages both homeowners and business owners to maintain and improve their properties. A larger tax base can provide the funds to support essential government services. Economic development is an investment in economic prosperity.

Economic development encompasses much more than doling out incentives. For a large percentage of prospects assisted by an economic development organization, incentives will neither be requested nor provided. These prospects will mostly be interested in the information available from economic development organizations for topics ranging from available sites and buildings, the availability and cost of utilities, the proximity to transportation hubs and the size and educational status of the local workforce. For certain prospects, however, the availability of an appropriate set of incentives may mean for a locality the difference between millions of dollars in capital investment and hundreds of jobs staying in the locality or going elsewhere.

B. *The Role of Public Policy and the Keys to Developing an Effective Public Policy*

Underlying any successful economic development program is public policy. The decisions made by political leaders to invest in education, transportation, natural resources, utility infrastructure, health care, social programs, tourism and cultural programs all can have an impact on a community's ability to attract and retain companies. These public policy choices go to the core of the nature of a particular community and how that community wishes to be perceived.

Public policy choices made by governmental entities drive the business climate that determines the attractiveness of a particular community to business prospects. A pro-business climate, fostered by all levels of government, is essential to continued success in promoting economic development.

An effective economic development public policy will reflect the community's vision of itself and will mirror the community's strengths, weaknesses, opportunities and threats. Some communities will want to offer encouragement only to tourism and crafts businesses. Some communities will eagerly seek out heavy industry. Some communities will be able to offer abundant and inexpensive land, water and workforce while others will not. Some communities will be able to afford to offer a diverse and extensive set of incentives while others will not.

Some communities will be most interested in jobs; some will be most interested in tax revenues; some will be most interested in reviving blighted areas; and some will be most interested in protecting the environment, the watershed and the viewshed.

Beyond making the decisions to invest in the proper infrastructure to attract and retain companies, politicians in office must be prudent and responsible with regard to their successors and the community by balancing the temptation of immediate political gain in announcing a new plant or major expansion of an existing company against any longer-term incentive costs for the locality.

The most effective policies will be carefully and thoughtfully crafted, will include "buy-in" from elected officials and community leaders and will be articulated frequently to staff and citizens by those elected officials and community leaders. If one were to ask of each elected official and key community leader what are the economic development goals of the community and if each provides about the same answer, then the community probably has an effective economic development policy.

Having no economic development policy can also be viewed as itself a type of policy. This "lack-of-a-policy" may suggest that the community has no clear vision of where it is today, where it wants to be in the future or how it might utilize its assets to get there. Conversely, a detailed, written policy may come back to haunt a community. If a prospect that is marginally acceptable can point to a written policy that suggests that a significant level of incentives may be available, the community may be hard-pressed to withhold those incentives from that prospect.

C. Primary Roles of Economic Development Professionals

Governmental entities serve a fundamental role in facilitating job creation and capital investment by supporting the two most important economic development activities: product development and marketing.

1. *Creating a Competitive Product.* One important role for an economic development professional is to provide appropriate education in the importance of providing a competitive product and assistance in creating that competitive product. Business prospects cannot locate in a community unless the necessary infrastructure is in place or can be put in place to serve the prospect. In its most basic form, this includes properly zoned land with adequate access to transportation, water and sewer connections, as well as modern telecommunication infrastructure and service. This is the "product." As in any marketing environment, a community must have a desirable product that will entice and meet the needs of its customers. It is important to ensure that the product is ready and available to show to prospects when they have a need to relocate or expand their businesses.
2. *Marketing.* Another important role for economic development professionals is the aggressive marketing of the competitive product by identifying potential business prospects, developing relationships, packaging proposals and closing deals that lead to job creation and capital investment. A good marketing effort involves a comprehensive, holistic approach that encompasses community, regional and/or statewide assets such as

transportation, education, business climate, environment, taxation, quality of life, community infrastructure, skilled and competitive work force, etc. The ability to offer an incentives package tailored to the needs of an economic development prospect can be important to the success of a marketing program.

Source: Virginia Economic Developers Association website at www.vedanet.org.

D. Role of Local Government Attorney

When it comes to economic incentives, local government attorneys are often put in the awkward position of ensuring that their jurisdictions comply with the legal restrictions placed on localities in using public money, while at the same time finding creative ways to provide the incentives to induce business to locate in their jurisdictions. When pushed to find a way to make a deal happen, local government attorneys are challenged to find a legal way to do indirectly that which may not be accomplished directly. Local government attorneys therefore need to take a proactive role in the formulation of an economic development philosophy for their jurisdiction. This may include protecting the locality by the use of performance agreements with claw back provisions (i.e., repayment) and other financial security arrangements in the event the business fails or does not achieve the goals on which an economic development incentive was based. Having a philosophical approach identified in an adopted policy statement may be helpful in setting parameters, but it also needs to be flexible to accommodate changing interests. What may work for one business may not work for another. The philosophical approach developed in one jurisdiction, with its own political environment and citizen concerns, may not work in another jurisdiction.

Source: "The Business of Getting Business" Handout, Leo Rogers, James City County (Fall 2000 LGA Conference).

E. Role of Financial Personnel

Financial advisors and a locality's finance department personnel can aid both the local government attorney and the economic development professional in structuring an economic incentive package that will attract the best industry suited to the locality yet ensure a positive payback for the locality's investment through the wise use of incentives. Economic incentives cannot become the end game itself. Offers of real estate, grants, loans, tax rebates, etc. should not be so great that the economic benefit of landing the new business or the expansion of an existing business is outweighed by the cost of the financial incentives offered. A business that needs such expensive financial incentives may be a business that is so thinly capitalized that it is doomed to fail. Prudent number crunching by financial personnel can serve as a reality check to the overly enthusiastic economic development professional and elected official wishing to land a "big one" at any cost.

F. What are Economic Development Incentives? Why Bother Providing Them?

An economic development incentive is an effort to affect the investment decision of a business to locate or expand in a particular location through the offering of grants, loans, loan guarantees, tax credits, tax exemptions, workforce development or other economic tools used to partially or totally offset the costs to the business of machinery, tools, buildings, land and worker training. In addition to offsetting costs, public funds may be offered to build or expand infrastructure, such as water, sewer and telecommunication facilities, rail and road access or preparation of sites or any combination of the foregoing. All states have some mechanism by which economic development incentives are offered to firms as inducements to locate or expand.

As confirmed by a 2001 study by the Joint Legislative Audit and Review Commission of the Virginia General Assembly ("JLARC"), the Virginia Economic Development Partnership has calculated that the Commonwealth's average payback for economic development incentives is 2.4 years, on average. The study found that the annual rate of return on incentives is 14% and the benefit-to-cost dollar ratio is 13:1. JLARC further found that eliminating incentive programs may result in a short-term benefit to the Commonwealth's bottom line, but would result in long-term adverse consequences, such as fewer jobs, lower levels of capital investment, fewer taxes paid and a reduction in indirect economic activity.

For example, economic development efforts in Southwestern Virginia have been successful at transforming communities by developing sites and buildings for commercial and industrial development. Although there has been a decline in the number of coal industry jobs in the Virginia Coalfield Economic Development Authority ("VCEDA") region, there has been a net increase in total jobs within the region over the past ten years. The increase can be credited to government jobs (such as prisons), retail, some modest increase in manufacturing and in the service sector. The communities in the VCEDA region have developed strategies for diversification in order to succeed in the future.

Source: Assessing the Impacts of Incentives to Attract New Businesses: A Case Study of the Scrap Recycling Industry, Preliminary Report, pursuant to House Joint Resolutions 124 and 156, Virginia General Assembly, Session 2001-2002 by Jeffrey Alwang and others (October 23, 2001).

G. Addressing Regional Concerns

Although public officials' first obligation in considering an economic development policy or individual project must always be to the jurisdiction they represent, they must also consider the impact those efforts will have on the metropolitan area or region of which their locality is a part.

Even the most beneficial new project will create some new burdens along with the benefits. Large projects will frequently have an impact on water supplies, sewage treatment capacity, roads and other transportation facilities, air quality measurements, housing supply and other concerns that reach beyond the immediate boundaries of the locality.

In most areas of Virginia, at least some public services associated with these concerns are provided through some type of multi-jurisdictional effort. For example, if a locality participates in a regional sewage treatment system, a new business with large treatment requirements may not be welcomed by other participating jurisdictions if it will absorb too much of the regional capacity.

State and federal highway funding is also dependent on regional transportation planning. Consequently, the impact of a large project on the adopted regional transportation plan can become an issue for other localities within the region.

Public officials who have worked hard to obtain a commitment from an economic development prospect may not be eager to involve their neighboring jurisdictions in discussions, especially if the other jurisdictions have been competing to attract the same prospect. However, if the proposed project is large enough to impact regional concerns, it will probably also be large enough to generate opposition. Ignoring adverse impacts on regional facilities and services is likely to make that opposition stronger and to increase the possibility that the project will not come to fruition.

H. Potential Obstacles (Pitfalls)

A major impact of locating a new company in a particular locality is its effect on existing business. While the fortunes of some individuals and firms may improve as a result of the entry of a new company or major expansion of an existing business, the fortunes of others may decline. The local labor market may be impacted by forcing existing businesses to increase wages just to retain their existing employees. If existing businesses purchase certain raw materials that are also used by the new business, the prices to these businesses of obtaining the same raw materials may increase. Other costs may include environmental pollution, closure of competing existing businesses with resulting job losses, loss of tax revenue and political fall out within a community. For example, a new big box discount retailer may push existing small, family-owned businesses into economic extinction. Economic development therefore is a process which by its nature creates winners and losers. Public policy should seek to avoid these potential pitfalls by maximizing gains while ensuring that losers in the process can adjust to the new environment.

II. Current Types of Available Incentives

Localities, regional economic development groups, the Commonwealth and the federal government all may offer economic development incentives. Listed below are the most common types of economic development incentives offered. The Virginia Economic Development Partnership ("VEDP") has available on its websites a publication called "A Virginia Guide to Business Incentives." The Guide offers additional information about some of the programs described below. The VEDP's websites are www.yesvirginia.org and www.virginiaallies.org.

A. *Local-Level Incentives*

1. *Good Government.* The best local incentive of all is good government. A knowledgeable business person will recognize the value of good infrastructure and good schools provided at fair tax rates. That business person will also look for a fairly consistent level of services and a stable tax structure.
2. *Cash Grants.* By providing moneys to be administered through the local industrial development authority or economic development authority (an "IDA/EDA") or other conduit, a locality can provide indirectly what it could not provide directly, i.e. cash grants to a private entity for economic development purposes. See Code Sections 15.2-953, 15.2-1205 and 15.2-4905 13. Often, the cash grant is stated as being a percentage of the local taxes paid by the business over the course of a few years. If it is stated this way, the business must pay its taxes, then the locality may choose to pay the cash to the IDA/EDA, then the IDA/EDA may choose to pay the cash to the business, for the purpose of promoting economic development in the locality.
3. *Land Grants/Sales.* A locality may acquire and give land to an IDA/EDA for economic development purposes without regard to the usual requirements for the disposition of surplus property. The acquisition may not be by condemnation. See Code Section 15.2-4917. The IDA/EDA may sell, lease or give that land to a private entity for economic development purposes. See Code Sections 15.2-4905 5. and 6.

The sale of the land to the private entity need not be at fair market value. An IDA/EDA may give the land to the private entity or may negotiate for any sales price, so long as that gift or sales price is being negotiated for economic development purposes. See Code Section 15.2-4905 6. Similarly, the scheduled lease payments from any private entity leasing facilities from an IDA/EDA need not reflect fair market rental values. See Code Section 15.2-4905 5.

Under Code Section 15.2-1802, a town may acquire, lease or sell land within its boundaries or within three miles of its boundaries to be used for the development of business and industry. The town must follow the typical procedures for acquiring land and must hold a public hearing, but may not acquire such land by condemnation.

4. *Industrial Parks and Shell Buildings.* An IDA/EDA may own, develop and manage an industrial park and shell buildings. It may sell, lease or give lots in the park or the shell buildings to private entities for economic development purposes. See Code Sections 15.2-4901 (ninth paragraph) and 15.2-4905 5. and 6.

Code Section 15.2-941 authorizes localities and other political subdivisions to participate in the "Virginia Shell Building Initiative." Generally, under this program administered by VEDP, a loan is made to a locality to develop a shell building to be held available for sale to an economic development prospect. The interest on the loan is paid by the program until the maturity of the loan, generally five years, by which time it is hoped that the locality would be able to sell the shell building. There are limited, if any, funds currently available for this program.

5. *Loan Programs.* Many IDA/EDAs and regional economic development organizations have loan programs and loan guarantee programs for businesses locating to or growing in their communities. See a partial listing in the Capital Resources Directory compiled by the Virginia Small Business Financing Authority, which can be found at www.dba.state.va.us/financing. Taxable and tax-exempt industrial development bond ("IDB") financing is also available through IDA/EDAs or the VSBFA for qualifying businesses. See Code Sections 15.2-4908 and 2.2-2287. An IDA/EDA may forgive loan payments for economic development purposes. See Code Sections 15.2-4905 13. and 15.2-4908.
6. *Local Enterprise Zones; Earmark Funds for Economic Development.* A locality may create a local enterprise zone. The local enterprise zone can be a State enterprise zone or a technology zone. The increase in machinery and tools taxes in the zone over a base amount may be diverted into a fund to be used to enhance, among other things, economic development efforts in the zone. See Code Section 58.1-3245.6 *et seq.* See also Part One, Section III.E. below.
7. *Technology Zones.* A locality may create a technology zone, which may also be a local enterprise zone, in which it may grant tax incentives for up to ten years, may provide regulatory flexibility on zoning and permitting and may provide other incentives. There is no requirement that the only businesses taking advantage of the incentives be technology companies. See Code Section 58.1-3850.
8. *Special Tax Classifications.* Levels of machinery and tools taxes and other tax classifications can be created that will benefit a particular type of taxpayer. Any business falling within the classification will qualify for the benefit. See Article X, Section 1 of the Constitution of Virginia (hereinafter, the "Virginia Constitution") and Code Section 58.1-3008. Different classifications are permitted for different types of property. See Chapter 35, Title 58.1 of the Virginia Code. VEDP keeps information on the tax classifications and rates used by Virginia localities and by other states. See the VEDP website at www.yesvirginia.org.
9. *Special Utility and Other Fee Classifications.* Levels of utility fee and other local fee classifications can be created that will benefit a particular type of user. Any user falling within the classification should qualify for the benefit. *Caution:* If the user is a significant user of the utility or other local service, creating a special fee classification may have an impact on the tax-exempt status of any bonds issued to finance the utility or other service assets.
10. *Infrastructure -- Utilities and Telecom.* A common incentive is an obligation to extend publicly owned/operated water, wastewater, natural gas, telecommunications/fiber, stormwater management and other utility lines to the project site and, in some cases, onto the project site. For utility systems that are not publicly owned/operated, the undertaking by the locality may be to cooperate with the private utility company to smooth the way for the utility company's expansion of its system.

A locality may acquire, establish, operate and extend water, wastewater, natural gas, electric and other public utilities within or outside the limits of the locality. See Code Section 15.2-2109 *et seq.* Many localities offer water, wastewater, stormwater and refuse services through their public service authorities. See Articles 1 through 5, Chapter 51, Title 15.2 of the Virginia Code.

There are significant restrictions on the ability of localities to provide cable services. See Code Sections 15.2-2108.3 and 15.2-2108.4. Localities that operate electric distribution systems are authorized to provide telecommunications systems. See Code Section 15.2-2160.

11. *Zoning/Land Use Actions.* Local governments can adopt overlay districts in their zoning ordinances which may provide for uses that are desirable to targeted businesses or preclude uses which a targeted business would find undesirable as an adjoining use. These districts can also have setbacks and other standards which encourage targeted uses. The locality must be mindful of the constraints of land use law on the creation of such districts, such as being consistent with the comprehensive plan; avoiding making the zoning landowner-specific so that it becomes illegal spot zoning; and providing uniform regulations for each class or kind of buildings and uses in a district. Notwithstanding those constraints, the locality has substantial flexibility. The locality would be wise to include an economic development chapter or plan as a part of its comprehensive plan to provide a foundation for such a district and other economic development initiatives.

Also the locality can choose to expedite the processing of land use applications, i.e. zoning and special use applications, preliminary and final subdivision and site plans and building permits. A locality would be prudent to develop a policy identifying a class of targeted businesses which could take advantage of such expedited processing. Obviously, statutory requirements of planning commission review or public hearings must be met.

The locality should not waive development fees for a targeted business but can use one of the other tools available, e.g., a pass through the IDA/EDA, to fund said fees. The locality could provide for an installment payment of fees by the targeted industry but again this should be pursuant to a policy.

The targeted industry may be interested in expediting the construction of its facilities through the use of outside (third party) plan reviewers and inspectors to handle those reviews and inspections which are required by the locality's development regulations and the building code. The locality can accommodate this but should do so pursuant to a policy which requires adequate certifications of the outside inspectors and filing of certified reports for review by the locality's inspectors and reviewers. (For example, Fairfax County has specific authority for establishment of a broad program in this regard. See Code Section 15.2-851).

12. *Tax Exemption for Renovation of Commercial/Industrial Structures.* Under Code Section 58.1-3221, localities may provide for the partial exemption from taxation of real estate on which any structure or other improvement no less than twenty years of age, or fifteen

years of age if the structure is located in a state enterprise zone, has undergone substantial rehabilitation, renovation or replacement for commercial or industrial use. The partial exemption may not exceed an amount equal to the increase in assessed value resulting from the rehabilitation, renovation or replacement of the structure as determined by the commissioner of revenue or other local assessing officer or an amount up to fifty percent of the cost of rehabilitation, renovation or replacement as determined by ordinance.

These structures may be on land in need of brownfields remediation. See Part One, Section II.B.13. below regarding brownfields programs offered by the Virginia Department of Environmental Quality.

B. State-Level Incentives

1. *Good Government.* As with localities, the best incentive that can be offered by the Commonwealth is good government. A knowledgeable business person will recognize the value of good infrastructure and good schools provided at fair tax rates. That business person will also look for a fairly consistent level of services and a stable tax structure.
2. *State Enterprise Zones.* Businesses located in state-level enterprise zones created by the Governor qualify for a range of tax incentives and credits. See Code Section 59.1-270 *et seq.* and the regulations and guidelines governing enterprise zones promulgated by the Department of Housing and Community Development, which can be found on the Community Development section of the DHCD website at www.dhcd.virginia.gov. *Caution:* The tax incentives and credits seem to change with each session of the General Assembly, so the reader should refer back often to the current status of the Virginia Code. Qualifying businesses in the zone may qualify for tax incentives based upon the amount of capital investment made and the number of jobs created. Localities may increase the incentives available to businesses in the enterprise zone by offering regulatory relief and other local tax and fee relief. For examples of local benefits offered by localities, see the listing of enterprise zones found on the Community Development section of the DHCD website listed above.
3. *Governor's Opportunity Fund.* The Governor's Opportunity Fund ("GOF") provides cash to help a locality "close a deal" for a business coming to Virginia. Typically, the cash grant must be matched by a cash grant or other in-kind benefit offered by the locality in which the business will be locating. There are certain job creation and capital investment thresholds. The grant moneys will go to the locality and may be used for such things as public and private utility extensions on or of site, transportation access, site acquisition and preparation, construction or build-out of publicly-owned buildings, grants to IDA/EDAs, training costs and other costs permitted by law. See Code Section 2.2-115 and the GOF Guidelines, which can be found at the VEDP website for its economic development allies at www.virginiaallies.org.

As will be noted in Part Three, when determining whether to provide a cash grant or other type of discretionary incentive, it will be important to find that such a grant or incentive is being provided for a valid public purpose. In a GOF transaction, the locality

will be asked to make the determination that the desire to give the grant is animated by a valid public purpose.

4. *Virginia Investment Partnership.* The Virginia Investment Partnership ("VIP") program provides cash grants to entice a significant existing Virginia business to grow or remain in Virginia. There are certain job creation and capital investment thresholds. The grant moneys will go to the business some years after those thresholds are crossed. See Code Section 2.2-5100 *et seq.* and the VIP Guidelines, which can be found at the VEDP allies website at www.virginiaallies.org.
5. *Grants for Projects Located in Tobacco Dependent Areas.* The Virginia Tobacco Indemnification and Community Revitalization Commission administers grant programs for economic development projects located in southside and southwest Virginia. Some grants can be used by the localities to prepare for economic development and some grants can be targeted to particular businesses coming to or growing in the region. See Code Section 3.1-1106 *et seq.* and the TICR Guidelines at www.vatobaccocommission.org.
6. *State Income Tax Credits.* Virginia offers a host of income tax credits to individuals and corporations involved in different types of businesses, such as manufacturers of clean fuel vehicles, or taxpayers that have made certain types of expenditures, such as the acquisition of recycling equipment. See Code Sections 58.1-331 *et seq.* and 58.1-430 *et seq.* and the Virginia Department of Taxation website at www.tax.state.va.us. *Caution:* The tax credits seem to change with each session of the General Assembly, so the reader should refer back often to the current status of the Virginia Code.
7. *Sales and Use Tax Exemptions.* Virginia offers a host of exemptions to the requirement to pay sales and use taxes to certain taxpayers, such as nonprofit entities, and to taxpayers that have purchased or used certain items, such as research and development equipment. See Code Section 58.1-600 *et seq.* and the Virginia Department of Taxation website at www.tax.state.va.us. *Caution:* The sales and use tax exemptions seem to change with each session of the General Assembly, so the reader should refer back often to the current status of the Virginia Code. A January 1999 Opinion of the Virginia Attorney General provides that sales and use tax cannot be avoided by having an IDA/EDA purchase construction materials for subsequent use by a private manufacturer. See 1999 Va. A.G. @67.
8. *Workforce Services.* Various Virginia state agencies provide a patch work of programs and grants for training and retraining employees. The Virginia Department of Business Assistance offers the premiere workforce services program, which offers technical assistance and cash grants. See the DBA website at www.dba.state.va.us/workforce. The Virginia Employment Commission also offers assistance with hiring and training employees. See the VEC website at www.vec.state.va.us. The Virginia Community College System offers specialized training programs tailored to the needs of particular employers. See the VCCS website at www.vccs.edu. A number of other state agencies offer other workforce services programs. As this outline is being drafted, the General Assembly is considering measures to combine those programs or to provide common oversight to avoid duplication of services.

9. *GIS/Database.* VEDP provides a wealth of information on available sites and buildings across the Commonwealth, nationwide and statewide economic conditions impacting economic development, demographic information on localities and listings of the transportation infrastructure, utility and educational resources in Virginia. See the VEDP websites at www.yesvirginia.org and www.virginiaallies.org.
10. *Road Access Funds and Rail Access Funds.* The Virginia Department of Transportation provides funds for constructing, reconstructing, maintaining or improving access roads to industrial sites on which manufacturing, processing or other establishments will be built. Similarly, the Virginia Department of Rail and Public Transportation provides funds for rail access to certain industrial and commercial sites through the Industrial Access Railroad Tracks Program. See the websites for VEDP, VDOT and VDRPT at www.yesvirginia.org, www.virginiaallies.org, www.virginiadot.org and www.drpt.state.va.us.
11. *Financing Programs.* The Commonwealth, through the Virginia Small Business Financing Authority, the Center for Innovative Technology and the Department of Minority Business Enterprise, offers a variety of loan programs and loan guarantee programs for Virginia businesses. For a listing, see the Capital Resources Directory at www.dba.state.va.us/financing and see the CIT and DBME websites at www.cit.org and www.dmbe.state.va.us.
12. *Business Assistance Programs.* The Small Business Development Centers, the Center for Innovative Technology, the Department of Business Assistance, the Department of Housing and Community Development, the Department of Minority Business Enterprise and VEDP, among other state agencies and entities, provide assistance to businesses in ways to grow, operate and manage their businesses. VEDP's assistance includes help with exporting Virginia goods and services to foreign countries. See the websites for SBDCs, CIT, DBA, DHCD, DBME and VEDP at www.virginiاسبdc.org, www.cit.org, www.dba.state.va.us (search for Virginia Business Information Center), www.dhcd.virginia.gov/CD, www.dmbe.state.va.us and www.yesvirginia.org.
13. *Department of Environmental Quality.* The Virginia Department of Environmental Quality offers a Small Business Assistance Program through which small businesses receive free and confidential technical assistance on air quality and related environmental requirements. The program's mission is to help small businesses comply with the Clean Air Act and Virginia's air regulations, not to enforce their compliance.

DEQ also offers several programs for brownfields redevelopment and remediation, including amnesty and immunity programs for businesses undertaking brownfields projects in good faith. See Code Section 10.1-1230 *et seq.* and the DEQ website at www.deq.state.va.us.

For localities and governmental authorities engaging in brownfields remediation projects, the Virginia Resources Authority offers special financing programs. See the VRA website at www.virginiareources.org.

14. *Virginia and Federal Historic Rehabilitation Tax Credits.* Code Section 58.1-339.2 provides a Virginia income tax credit for 25% of the eligible expenses of rehabilitating a certified historic structure. The certification will come from the Virginia Department of Historic Resources, which also determines the amount of eligible rehabilitation expenses. See the DHR website at www.dhr.state.va.us or www.dhr.virginia.gov.

The federal government also has rehabilitation tax credit for federal income taxes in an amount equal to 20% of the qualifying costs of rehabilitating a certified historic structure. See Section 48 of the Internal Revenue Code and the IRS website (search for Rehabilitation Tax Credit) at www.irs.gov.

In the case of both the state and federal credits, care should be taken to receive the appropriate certifications and approvals of rehabilitation plans before rehabilitation commences.

C. *Federal-Level Incentives*

1. *Foreign Trade Zones.* Foreign trade zones allow businesses to defer paying U.S. Customs duties on imported goods held within the zones until the goods enter the U.S. for domestic consumption. A foreign trade zone will typically house storage, distribution and light assembly operations. See the Virginia Guide to Business Incentives at VEDP's website at www.yesvirginia.org or contact the National Association of Foreign Trade Zones at www.naftz.org. Localities and IDA/EDAs have the power to apply for, establish, operate and maintain foreign trade zones. See Code Sections 62.1-159 *et seq.* and 15.2-4905 13.
2. *Community Development Block Grants.* Community Development Block Grants ("CDBG") are available to localities to provide funding for public infrastructure improvements, such as utility extensions or treatment facilities, transportation improvements and central business district revitalization. Moneys may also be used for improvements on the site of a particular business, but those moneys will be provided through loans, rather than grants. The general purpose of the CDBG program is to improve communities by providing decent housing and a suitable living environment and by expanding economic opportunities, principally for low- and moderate-income persons. For smaller communities, the CDBG program is administered by the Virginia Department of Housing and Community Development. For larger communities, the CDBG program is administered by the U.S. Department of Housing and Urban Development. See the DHCD and HUD websites at www.dhcd.virginia.gov/CD and www.hud.gov.
3. *Federal Home Loan Bank of Atlanta.* The Federal Home Loan Bank of Atlanta, directly or indirectly through its member banks located in Virginia, offers low interest loans and grants to economic and community development projects. See the FHLBA website at www.fhlbatl.com.
4. *Appalachian Regional Commission.* For communities located in the Appalachian region, the Appalachian Regional Commission offers a variety of grant and assistance programs. See the ARC website at www.arc.gov.

5. *Financing Programs and Business Assistance.* Rural Development offers a variety of loan programs to communities to finance infrastructure improvements. See the RD website at www.rurdev.usda.gov. Rural Development and the Small Business Administration offer a variety of loan programs and loan guarantee programs and business assistance programs for businesses. Virginia's A.L. Philpott Manufacturing Extension Partnership helps small and medium-sized manufacturers increase productivity, lower costs, identify growth opportunities, improve technology application and strengthen their production teams. See brief descriptions of the financing programs in the Capital Resources Directory at www.dba.state.va.us/financing and see the RD, SBA and VPMEP websites at www.rurdev.usda.gov, www.sba.gov and www.vpmep.org. *Caution:* If you plan to feed at the federal trough, get ready for a ton of paperwork and red tape.
6. *Business Research Grant Programs.* A number of federal agencies offer grants to research companies, particularly through the Small Business Innovative Research Program, the Small Business Technology Transfer Program and the Advanced Technology Program. In Virginia, assistance in applying for these grants is offered by the Center for Innovative Technology. See the CIT website at www.cit.org.
7. *Economic Development Administration.* The U.S. Department of Commerce, through its Economic Development Administration, offers grants for community development programs. See the EDA website at <http://12.39.209.165/xp/EDAPublic/Home/EDAHomePage.xml>.
8. *Other Grants.* Although the primary grant opportunities for economic development are listed above, the federal government offers a cornucopia of grant opportunities. A fairly comprehensive listing can be found at www.grants.gov. Private foundations also offer grants for community development and economic development-preparedness purposes. A partial listing of private foundation grant opportunities can be found at www.fdncenter.org. Happy hunting.
9. *Historic Rehabilitation Tax Credits.* The federal government offers a 20% tax credit for qualifying costs of rehabilitating a certified historic structure. See Part One, Section II.B.14. above.

III. Means of Implementing Incentives

Different types of economic development incentives can be administered through different governmental entities, structures or practices. Listed below in alphabetical order are some of the most common means of administering and delivering incentives.

See Appendix A for a matrix comparing in summary form some of the major means of implementing incentives described below.

A. Assessments for Local Improvements

1. *Statutory Authority.* Code Sections 15.2-2404 – 15.2-2413 and Article X, Section 3 of the Virginia Constitution.

2. *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." 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% in cities and 60% 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 spelled out in the statute.
3. *Powers.* The statute specifies certain improvements for which assessments may be levied. These consist of:
 - sidewalks on existing streets;
 - improving and paving existing alleys;
 - construction or use of sanitary or storm water management facilities;
 - retaining walls;
 - curbs, gutters;
 - construction, replacement or enlargement of waterlines;
 - installation of street lights;
 - construction or installation of canopies; and
 - benches, waste receptacles and other "permanent amenities."
4. *Limitations on Powers.*
 - (a) No General Taxing Power: The statute 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 does not seem to authorize some other taxing mechanism, such as an *ad valorem* tax.
 - (b) Limited Facilities: The list of facilities that may be financed using this special assessment is limited.
 - (c) Limitations on Assessment: Both the statute and the Virginia Constitution provide that the assessment is made on abutting landowners. The assessment may not exceed the peculiar benefit to the property owners resulting from the improvements. Code Section 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% of the total cost.
5. *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 Part One, Section III.B. below), 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.

B. Community Development Authorities

Community development authorities (hereinafter, "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 on a more comprehensive or timely basis than could be accomplished by a locality pursuing a traditional development process.

1. *Statutory Authority.* Code Sections 15.2-5152 – 15.2-5158. Legislation authorizing the creation of CDAs was first enacted in 1993 as part of the Virginia Water and Waste Authorities Act. Code Section 15.2-5100 *et seq.*
2. *Procedure to Create.* The process to create a CDA is commenced by a petition from at least 51% 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. Code Section 15.2-5152 designates eligibility to consider petitions as follows: (i) cities are automatically eligible; (ii) towns are eligible if they so elect by ordinance following a public hearing; (iii) counties are automatically eligible if they have (A) a population of at least 75,000, (B) a population of less than 50,000 and an interstate highway passes through the county, or (C) a population between 50,000 and 75,000 and an interstate highway passes through the county. Any county not automatically eligible may so elect by ordinance following a public hearing.

Code Section 15.2-5153 outlines certain minimum acreage requirements as follows:

- tract of any size in a city or town;
- tract of at least 250 acres in a county with a population of at least 75,000;
- tract of at least 250 acres, a portion of which lies within two miles of the center line of an interstate highway in any county with a population of less than 50,000; and
- tract of at least 250 acres in any county with a population between 50,000 and 75,000 through which an interstate highway passes.

A public hearing is required before adoption of the ordinance or resolution by the governing body creating the CDA. Code Section 15.2-5156 requires publication of the notice of public hearing once a week for three successive weeks with the hearing to be held not sooner than ten days after completion of publication of notice. Arguably, the provisions of Code Section 15.2-5104, relating to water and waste authorities also apply, requiring one publication to occur at least 30 days before the hearing. Although the statute allows for creation of a CDA by ordinance or resolution, other references in the statute to the "ordinance" creating the CDA suggest that an ordinance should be used.

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 landowners. A landowner then has 30 days to withdraw his signature from the petition.

Code Section 15.2-5156 allows petitioning landowners to waive the right to withdraw their signatures.

The ordinance creating the CDA is filed in the land records for each tax map parcel in the district. The CDA Articles of Incorporation are filed with the State Corporation Commission.

3. *Powers.*

(a) General: Code Section 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 to meet the increased demands placed upon the locality as a result of development within 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.

(b) 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 groundskeeping.

(c) 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 Code Section 15.2-5103 C.

(d) Special Tax: Code Section 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 \$0.25 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. For the reasons described in Part One, Section III.K.

below, "Tax Increment Financing" relating to the *Terry v. Mazur* case, payments of special taxes from the locality to the CDA are subject to appropriation.

- (e) Special Assessments: A CDA may finance the services and improvements it provides to abutting property within the district (see discussion of abutting property in Part One, Section III.A. above "Assessments for Local Improvements") by special assessment imposed by the local governing body. The CDA statutes reference the procedures for levying assessments pursuant to Code Section 15.2-2404 *et seq.* There is no limit on the amount of the assessment; it is subject only to the statutory and constitutional requirements that it not exceed the benefit to the assessed property or the full cost of the improvements. The assessment is levied at one time, up front, by the governing body, but may be collected in installments up to 40 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 Code Sections 58.1-3340 and 58.1-3965 *et seq.*
- (f) Development Rights: A CDA has the authority to purchase development rights to be dedicated as easements for conservation or open space. See Code Section 15.2-5158(6).
- (g) 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 (Code Sections 15.2-5110 – 15.2-5124). These include the power to issue revenue bonds, 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.

4. *Limitations on Powers.*

- (a) No Power to Grant Incentives: The CDA's statutory authority to provide incentives is unclear, at best. There is no express provision that allows a CDA to make loans or grants in furtherance of economic development. 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 Code Section 15.2-1205. There is no comparable provision for cities and towns. Code Section 15.2-5114, paragraph 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 would apply to a CDA, where the locality creates the CDA but the concept of "membership" in the CDA does not apply. Further, this authority may be limited by the provisions of the CDA statute restricting the ability of a locality to pay debt service on a CDA's bonds.
- (b) 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. A CDA may, however, have the power to charge and collect user fees under Code Section 15.2-5114, paragraph 10.

5. *Legal/Practical Issues.*

- (a) Statutory Limits on Nature of Infrastructure. The *Short Pump Town Center v. Taxpayers* case described in Part One, Section III.D. below on "Industrial Development Authorities" raised issues regarding the statutory authority of CDAs. Although the statute details infrastructure that a CDA may finance, construct, establish, operate, etc., the language of Code Section 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...." The court imposed a very restrictive reading of that provision in the *Short Pump* case. The case was subsequently vacated by the Virginia Supreme Court on different grounds. The same issues were heard in a subsequent case before the Circuit Court of Henrico County (*Taubman Regency Square Assocs. v. Board of Supervisors of the County of Henrico*, No. CH00-1304 (Henrico Cty. Cir. Ct. May 10, 2002)) where a less restrictive reading was approved and the proposed improvements were found to be within the scope of the statute. The Virginia Supreme Court declined to hear an appeal of the *Taubman* case. Care should be taken in the process of creating a CDA to carefully document and make the appropriate legislative findings with respect to the nature of the improvements to be financed, particularly in a redevelopment context.
- (b) Incorporation of general powers set forth in Virginia Water and Waste Authorities Act: A CDA is expressly granted the powers enumerated in Article 3 of the Virginia Water and Waste Authorities Act. However, many of these provisions are drafted with water, stormwater and waste "systems" in mind and it is not clear if their provisions extend to the various other types of facilities that a CDA is authorized to establish or finance. Further, some of the provisions of the Virginia Water and Waste Authorities Act are made expressly applicable to CDAs (for example, Code Section 15.2-5103 C.) while it is not clear to what extent other provisions, outside of Articles 3 and 6, apply.
- (c) Priority of tax liens: The taxes or assessments imposed on behalf of a CDA constitute tax liens. There is a question though as to how proceeds from a tax lien sale will be apportioned between the locality's ad valorem taxes and the CDA special taxes or assessments. Code Section 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.

- (d) Restrictions on Assessments: Code Section 15.2-5158, paragraph 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. Code Section 15.2-2404 provides that the assessment shall 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 the discussion in Part One, Section III.A. above, "Assessments for Local Improvements."
- (e) Marketability of Bonds: As is the case with tax increment financing, the marketability of CDA bonds and the interest cost associated with them, is impacted by the uncertainty created by the fact that payments to the CDA by the locality 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 dictate that CDA financing is more expensive than infrastructure financing undertaken by the locality. Under the appropriate circumstances, however, a special assessment can create a marketable financing tool.
- (f) Procurement Act: Code Section 2.2-4344C, 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 moneys other than special taxes or assessments are used for payments under the contract, the exemption does not apply.
- (g) Ordinance Creating CDA/MOU: To the extent there are parameters or limitations the locality would like to impose on the CDA, the ordinance creating the CDA may or may not be the appropriate vehicle to accomplish this. 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, it is possible that in order to amend or modify the parameters, it will be necessary to follow the same procedure as required for the adoption of the ordinance (public hearing after 30 days notice). Alternatively, the ordinance creating the CDA can require that the CDA enter into a Memorandum of Understanding with the locality setting forth any parameters or restrictions.

C. Economic Growth-Sharing Agreements

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

1. *Statutory Authority.* Code Section 15.2-1301. Other statutes with similar intent or effect may include Code Section 15.2-1304 relating to appropriations to regional organizations; Code Section 15.2-953B relating to appropriations to IDA/EDAs for economic development; Code Section 15.2-1108 relating to acceptance of gifts by towns and cities; Code Section 15.2-1202 relating to appropriations by a county to towns within its boundaries; and Code Section 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).
2. *Procedure to Create.* Any locality may enter into agreements with other localities to share economic growth under Code Section 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. 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.
3. *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 revenues) pursuant to binding fiscal arrangements for fixed time periods that exceed one year. 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.
4. *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.
5. *Legal Issues.*
 - (a) Creation of "Debt": Recognizing that the pledge of tax revenues probably creates debt, the statute contains a provision requiring counties to go to referendum pursuant to Code Section 15.2-3401 (relating to referenda to be held regarding annexation payment agreements).
 - (b) Applies only to Localities: The economic growth sharing authority applies only to localities. There are, however, probably other statutes as described above that could be used to accomplish virtually the same thing through IDA/EDAs or other political subdivisions.

D. Industrial Development/Economic Development Authorities

Industrial Development Authorities or Economic Development Authorities ("IDA/EDAs") are one of 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. IDA/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. IDA/EDAs have increasingly been used to facilitate development of non-profit and governmental facilities and housing.

1. *Statutory Authority.* the Industrial Development and Revenue Bond Act, Code Section 15.2-4900 *et seq.* (hereinafter, the "IDA Act").
2. *Procedure to Create.* An IDA/EDA is created by ordinance of the governing body of the locality. There is no public hearing requirement other than the public hearing applicable to the adoption of ordinances by a county. The county ordinance requirement requires publication of notice once a week for two consecutive weeks with the second publication not sooner than one calendar week after the first publication. See Code Section 15.2-1427.
3. *Powers.*
 - (a) Issuance of Bonds: An IDA/EDA is authorized to issue bonds for any of its purposes including payment of the cost of "authority facilities." Authority facilities are defined as:
 - Medical facilities (including, but not limited to, office and treatment facilities);
 - Pollution control facilities;
 - Industrial facilities;
 - Facilities for the residence or care of the aged;
 - Multi-state regional or national headquarters offices or operations centers;
 - Facilities for private, accredited and nonprofit institutions of collegiate, elementary or secondary education whose primary purpose is not to provide religious training or theological education;
 - Parking facilities;
 - Facilities for use as office space by nonprofit, nonreligious or nonsectarian organizations;
 - Facilities for museums and historical education, demonstration and interpretation, for use by nonprofit organizations;
 - Facilities for use by an organization (other than an organization organized and operated exclusively for religious purposes) which is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

- Facilities for use by a locality, the Commonwealth and its agencies or other governmental organizations;
- Facilities devoted to the staging of equine events and activities (other than racing events) owned and operated by a governmental or nonprofit, nonreligious or nonsectarian organization;
- Facilities for commercial enterprises;
- Commercial enterprises consisting of the following must be financed on a taxable basis: private or commercial golf course; country club; massage parlor; tennis club; skating facility; racquet sports facility; suntan facility; racetrack; any facility the primary purpose of which is one of the following: retail food and beverage service (excluding grocery stores); automobile sales and service; recreation or entertainment; or banks, savings and loan institutions or mortgage loan companies;
- Enterprise zone facilities; and
- Facilities used primarily for single or multi-family residences (but only if the locality creating the IDA/EDA has not activated its housing authority pursuant to Code Sections 36-4 and 36-4.1).

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 above. Code Section 15.2-4901 provides that an IDA/EDA may exercise its powers with respect to various authority facilities as are specifically named in such section in order to promote the "health, welfare, convenience and prosperity of the inhabitants of the Commonwealth."

- (b) Serve as Conduit for Incentives/Provide Shell Buildings or Industrial Parks: 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 Code Section 15.2-4905, paragraphs 4, 5 and 6. Paragraphs 12 and 13 of Code Section 15.2-4905 authorize IDA/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 in furtherance of the purposes of the IDA Act and to make loans or grants in furtherance of the purposes of the IDA Act, including for the purposes of promoting economic development. An IDA/EDA is also expressly authorized to forgive loans if it is deemed to further economic development. Code Section 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.

Code Section 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. Code Section 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. The foregoing seems to provide ample authority for a locality to use its IDA/EDA to provide funds or other property as an incentive for economic development. In the Short Pump Town Center financing in Henrico County, the County proposed to make incentive payments to its Economic Development Authority, 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 Center v. Taxpayers*, 54 Va. Cir. 501 (City of Richmond 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 Center v. Hahn*, 262 Va. 733, 554 S.E.2d 441 (2001)).

4. *Limitations on Powers.*

- (a) 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 Code Sections 15.2-4901 and 15.2-4905.
- (b) No Power to Tax: An IDA/EDA does not have the power to generate revenues other than from rents and charges it may impose in connection with the sale or lease of authority facilities. Code Section 15.2-4911 appears to give IDA/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.
- (c) No Eminent Domain: An IDA/EDA does not have the power of eminent domain and Code Section 15.2-4917 prohibits a locality from using condemnation to acquire a site for conveyance to an IDA/EDA.
- (d) No Power to Joint Venture: IDA/EDAs do not have the power to become a member of a corporation, partnership, joint venture or other entity. See, by contrast, Code Section 36-19 relating to Redevelopment and Housing Authorities.

5. *Legal Issues.*

- (a) Purposes: Many of the IDA/EDAs powers are tied to its purposes. The Act does not enunciate a general economic development purpose for IDA/EDAs, except in

Code Section 15.2-4905, paragraph 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.

- (b) Governmental Facilities: IDA/EDAs are increasingly being used to finance governmental facilities. The applicable definition is usually "facilities for use by a locality, the Commonwealth and its agencies or other governmental organizations...." The concept of "use" was used to avoid a requirement that the facilities be owned by the governmental entity. However, could it be construed to limit this category of authority facility to office buildings and other facilities actually occupied by the governmental entity? A strict construction could preclude financings for governmental facilities such as parks, roads, water and sewer and other infrastructure.
- (c) Limited Exemption from Procurement Act: Code Section 2.2-4344B 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." The definition of "authority facility" in Code Section 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 Code Section 11-45D (the predecessor to Code Section 2.2-4344B).
- (d) Limitation on Power to Operate Facilities: Code Section 15.2-4905 provides that an IDA/EDA may not operate any facility as a business other than as lessor. Does this mean that an IDA/EDA can operate a facility that is "governmental," such as a public park, or a parking facility if it is not a "for profit" business? May an IDA/EDA contract with an operator pursuant to a management contract for the operation of a facility as long as the IDA/EDA is not responsible for the day-to-day operations of the facility?
- (e) Liberal Construction Clause: The IDA Act contains a liberal construction clause at the end of Code Section 15.2-4901. It is not clear how much latitude that affords in interpreting some of the less clear areas of the IDA Act.
- (f) Dilution of Available Revenues: Even though tax increment financing or incentives based on tax increment only divert the incremental increase in certain tax revenues, these revenues are 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 period of time before the locality recoups its investment.

E. Local Enterprise Zone Development Taxation Program

This program is available only to localities with enterprise zones designated by the Governor under Code Section 59.1-274 or with technology zones. It operates similarly to the Tax Increment Financing program described in Part One, Section III.K. below.

1. *Statutory Authority.* Code Sections 58.1-3245.6 – 58.1-3245.11.
2. *Procedures to Create.* The governing body of any locality may, by ordinance, adopt a local enterprise zone development taxation program, but only with respect to an enterprise zone within its boundaries designated by the Governor under Code Section 59.1-274 or a technology zone. Before adoption of the ordinance, a public hearing is required with notice published once a week for three consecutive weeks immediately preceding the public hearing in each newspaper of general circulation in the locality.
3. *Powers.* The creation of a local enterprise zone development taxation program allows the locality to designate all or a specified percentage of the increase in real estate taxes or machinery and tools taxes or both, within the zone measured against a base year to be paid into a Local Enterprise Zone Development Fund. Increases attributable to increases in tax rate or assessed value (unless it is related to improvements or enhancements) are not includable. The moneys in the Fund may be used:
 - to provide enhanced law enforcement and other governmental services, including funding transportation projects, as may be appropriate to secure and promote private investment in the zone;
 - to make grants to chambers of commerce and similar organizations to promote economic development within the zone; or
 - to make grants to any IDA/EDA created by the governing body in order to promote economic development within the zone.
4. *Limitations on Powers.* This program is limited to areas that have already been designated as enterprise zones by the Governor or have been designated as technology zones. See Code Sections 58.1-3245.12 and 58.1-3850 (D). It does not authorize any form of financing. There is no new or additional power to tax or assess property in the district.
5. *Legal/Practical Issues.* The same issues described in Part One, Section III.K. below, "Tax Increment Financing" relating to the publication of notice and the marketability of any bonds secured by Fund revenues are applicable.

F. Local Technology Zones

These provisions, along with related provisions for a tax increment program, are designed to assist localities in providing incentives targeting technology.

1. *Statutory Authority.* Code Sections 58.1-3850 and 58.1-3245.12.

2. *Procedure to Create.* The procedure to create a technology zone under Code Section 58.1-3850 is not entirely clear. The statute provides that a locality may establish one or more technology zones by ordinance. There is no public hearing requirement. The term "technology" is not defined. There is no requirement that businesses in the zone be technology-related.

The procedure for creating a local enterprise zone development taxation program for a technology zone pursuant to Code Section 58.1-3245.12 appears to follow the same procedure as for a local enterprise zone development taxation program for enterprise zones, except that a technology zone and a technology zone taxation program may be created regardless of whether the zone has been designated an enterprise zone pursuant to Code Section 59.1-274.

3. *Powers.* Creation of a technology zone under Code Section 58.1-3850 authorizes a locality to grant tax incentives and provide regulatory flexibility. Tax incentives may be provided for up to ten years and may include, without limitation:

- reduction of permit fees;
- reduction of user fees; and
- reduction of any type of gross receipts tax.

Details are scarce, except that the statute states that any incentives will conform to the requirements of the Constitutions of Virginia and the United States.

Regulatory flexibility may include, without limitation:

- special zoning for the district;
- process reform;
- exemption from ordinances; and
- any other incentive adopted by ordinance, which shall be binding upon the locality for a period of up to ten years.

Again, details on regulatory flexibility are scarce.

Code Section 58.1-3245.12 provides that a local development taxation program for a technology zone shall be governed by the provisions relating to a local enterprise zone development taxation program for enterprise zones. See Code Sections 58.1-3245.6 – 58.1-3245.11. Again, details are scarce.

G. Public-Private Transportation Act of 1995

The Public-Private Transportation Act (the "PPTA") does not create a governmental entity but rather is a method to encourage public/private ventures for transportation facilities which may result in the availability of facilities in a more timely or less costly fashion and to facilitate the federal pooling and funding mechanisms so to expand and accelerate transportation financings. The PPTA is used to supplement existing ways to acquire, construct or improve transportation facilities.

1. *Statutory Authority.* Public-Private Transportation Act of 1995, Code Section 56-556 *et seq.*
2. *Procedure to Act Under the PPTA.* Any private entity seeking authorization to acquire, construct, improve, maintain and/or operate a transportation facility or facilities pursuant to the PPTA shall first obtain the approval of the responsible public entity. A responsible public entity is a public entity that has the power to acquire, construct, improve, maintain and/or operate the applicable transportation facility, such as the Virginia Department of Transportation or any county, city or town. The statute 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.
3. *Approval Process.* A responsible public entity may approve the acquisition, construction, improvement and/or operation of the transportation facility as a qualifying transportation facility if:
 - there is a public need for the transportation facility;
 - the transportation facility, the proposed interconnection with existing transportation facilities and the plans of operation of the qualifying transportation facility are reasonable and compatible with the state transportation plan and with the local comprehensive plans;
 - the estimated cost is reasonable in relation to similar facilities; and
 - the private entity's plans will result in the timely acquisition, construction or improvement of the transportation facility or its more efficient operation.
4. *Powers.*
 - (a) Qualifying Facilities: A qualifying transportation facility is any transportation facility acquired, constructed, improved, maintained 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.
 - (b) Financing: Private entities may use a variety of financing methods to pay for the costs of transportation projects. The available financing arrangements include: issuance of debt, equity or other securities or obligations, the imposition of user fees or service payments or federal, state or local assistance. The responsible public entity's full faith and credit shall not be used to secure any obligation created by a private entity. 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. A toll is being used to repay the bonds.
 - (c) Operator Powers: The operator is the private entity that is responsible for the acquisition, construction, improvement, maintenance and/or operation of a

qualifying transportation facility. The operator's power shall include the authority to:

- own, lease or acquire any other right to use or operate the qualifying transportation facility;
 - issue debt, equity or other obligations and secure any financing with a pledge of, security interest or lien on any or all of its property; and
 - charge service fees for transportation services provided to public entities, which fees are to be established in the comprehensive agreement at a level allowing the operator a reasonable rate.
- (d) Responsible Public Entity Powers: The responsible public entity's powers shall include the following:
- the authority to take any action to obtain federal, state or local assistance for a qualifying transportation facility; and
 - 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, exercise the power of condemnation to acquire the transportation facility or terminate the comprehensive agreement.

5. *Limitations on Powers.*

- (a) Notice: The private entity shall provide notice to every local jurisdiction affected by the private entity's proposal by furnishing a copy of the proposal. Each affected local jurisdiction has 60 days after receipt of notice to submit comments.
- (b) Comprehensive Agreement: The operator is required to enter into a comprehensive agreement with the responsible public entity setting forth various requirements with respect to the construction or operation of the facility.
- (c) Maximum Rate of Return: The comprehensive agreement, between the operator and the responsible public entity, will designate the operator's maximum rate of return on the operator's investment. Any excess earnings shall 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 operator for debt reduction or to affected local jurisdictions.
- (d) Termination: The operator's authority and duties shall cease on the date set forth in the comprehensive agreement, at which time the transportation facility or facilities shall be dedicated to the responsible public entity. Any facilities originally dedicated by a local jurisdiction to the operator shall be dedicated back to the local jurisdiction.

- (e) Remedies: The responsible public entity shall not exercise any of the remedies for default until the State Corporation Commission has conclusively found that a default has occurred and is continuing unless otherwise agreed to by the operator.
- (f) Power of Eminent Domain: The operator does not have the power of eminent domain and must act through the responsible public entity to have property condemned.

6. *Legal Issues.*

- (a) Procurement: The actions under the PPTA are not subject to the Virginia Public Procurement Act, Code Section 2.2-4300 *et seq.* However, certain competitive procedures are required under the Act.
- (b) Advantages: The PPTA allows private entities to start building transportation facilities on a faster time schedule than traditional financing and procurement allows. The Pocahontas Parkway, the Commonwealth's first PPTA project, is believed to have been built 15 years sooner than if it had been financed with public funds alone.
- (c) Disadvantages: 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 lower cost of the facility.

H. *Redevelopment and Housing Authorities*

Redevelopment and Housing Authorities ("RHAs") were created to clear, re-plan and reconstruct areas with unsanitary or unsafe housing conditions 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.

- 1. *Statutory Authority*. Housing Authorities Law, Code Section 36-1 *et seq.* (the "Housing Act").
- 2. *Procedure to Create*. Technically, the Housing Act has created a RHA in each county and city. However, no RHA is "activated" until the voters of the locality voting in a referendum indicate a need for the RHA to function. To call for a referendum, the governing body of the city or county must find (a) that unsanitary or unsafe inhabited dwelling accommodations exist in the locality, (b) that there is a shortage of safe and sanitary dwelling accommodations in the locality available to persons of low income or (c) that there is a blighted or deteriorated area which needs redeveloping. Alternatively, a referendum shall be called by the governing body upon filing of a petition by 100 freeholders.

3. *Powers.*

- (a) 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 shall be solely the debt of the RHA and not that of the locality, the Commonwealth or any political subdivision thereof.
- (b) Power of Eminent Domain: Pursuant to Code Section 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 spot blight abatement, including a fairly elaborate public notice / public approval / planning process, are included in Code Section 36-49.1:1.
- (c) 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.
- (d) General Powers: An RHA has the following general powers, among others (Code Sections 36-19, 36-27, 36-50, 36-50.1 and 36-52.3):
 - Within its area of operation (area of operation consists of the boundaries of the locality that created the RHA), to prepare, to carry out, acquire, lease and operate housing projects or residential buildings and to provide for the construction, reconstruction, improvement, alteration or repair of any such project;
 - Within its area of operation, to construct, remodel or renovate any public building or other facility used for public purposes, provided the RHA is requested to do so by the local governing body.
 - In connection with any housing project:
 - (1) to lease or rent any dwelling, houses, accommodations, lands, buildings, structures or facilities embraced in any project;
 - (2) to own, hold and improve real or personal property;
 - (3) to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise or otherwise any real or personal property or any interest therein; and
 - (4) to sell, lease, exchange, transfer, assign, pledge or dispose of any real or personal property or any interest therein.
 - Additional powers with respect to "redevelopment projects" are spelled out in Code Section 36-49, including powers of eminent domain, to make loans or

grants to assist in reconstruction, to acquire and convey land. Redevelopment projects are subject to the approval of a "redevelopment plan" as set forth in Code Section 36-51.

- The governing body of the locality may, by resolution, declare that a portion of the real estate within the locality is deteriorating and declare such area eligible for "conservation." Certain additional powers are set forth in Code Section 36-49.1 for a conservation project.
- RHAs are given the power to purchase or lease any real property, without the exercise of the power of eminent domain, for improvement and development for sale or lease as industrial sites, scientific research laboratory sites and educational institution sites (Code Section 36-49.2).
- To make loans or grants for the prevention and elimination of slum or blighted areas and for assistance in housing construction or rehabilitation by private sponsors of any and all funds received through federal programs and any and all funds received from other sources, public or private (this important power is not limited to the RHA's area of operation).
- Within its area of operation, to make loans or refinance loans made by others for assistance in planning, development, acquisition, construction, repair, rehabilitation, equipping or maintenance of commercial, residential or other buildings, with the approval of the local governing body if the building is not located within a housing, redevelopment or conservation project or a rehabilitation district.
- To make payments to the Commonwealth or any political subdivision.
- With respect to a redevelopment project, conservation project or rehabilitation project area, to make loans or grants of funds received from any public or private resources to facilitate the development of housing or other improvements and to encourage the prevention and elimination of blight (Code Sections 36-49, 36-49.1 and 36-52.3).
- Before undertaking a redevelopment project or a conservation project, the RHA must prepare a redevelopment plan or a conservation plan, which must be approved by the local governing body (Code Sections 36-51 and 36-51.1). A rehabilitation project does not require a formal plan, but must be located next to a conservation project and must be approved by the local governing body (Code Section 36-52.3).
- A locality has the power to dedicate, sell, convey or lease any of its interest in property to an RHA.
- A locality has the power to lend or donate money to an RHA (the locality must be located in whole or in part in the RHA's area of operation) and to issue bonds to provide funds therefor.

4. *Limitations on Power.*
 - (a) No Power to Tax: An RHA does not have the power to generate revenues 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.
 - (b) 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.
5. *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. Further, a referendum is required. 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.

I. Sanitary Districts

Sanitary Districts are authorized to provide certain infrastructure within a particular district, including the construction, maintenance and operation of water supply, sewerage, garbage removal and disposal, heat, light, fire-fighting equipment, power and gas systems and sidewalks.

1. *Statutory Authority.* Code Section 21-112.22 *et seq.*
2. *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, the circuit court of any city or county may after a hearing enter an order creating a sanitary district and prescribe its boundaries. Upon receipt of such a petition, the court is to set a date for a hearing at which interested persons may appear and show cause why the affected property should or should not be included in the proposed district. 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.
3. *Powers.*
 - (a) General Powers: Sanitary districts are managed and operated by the governing body of the city or county in which they are located. Code Sections 21-118 and 21-118.4 authorize the actions of the governing body, which include but are not limited to the following powers:
 - to construct, maintain and operate water supply, sewerage, garbage removal and disposal, heat, light, fire-fighting equipment, power and gas systems and sidewalks (the "sanitation facilities");

- to acquire by gift, condemnation, purchase, lease or otherwise, and to maintain and operate such sanitation facilities;
 - to contract with any person, firm, corporation or municipality to construct, establish, maintain and operate any such sanitation facilities;
 - to require owners and tenants on any property in the district to connect with any such sanitation facilities; and
 - to fix and prescribe or change the rates of charge for the use of any such sanitation facilities.
 - In addition, Sanitary Districts are authorized to acquire, construct, improve and operate motor vehicle parking lots, community buildings, community centers and other recreational facilities and certain utility and fire-fighting systems and to make charges for the use of such facilities.
- (b) 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 (Code Section 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. 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 50 qualified voters residing in the district. 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. 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. Subject to certain limitations, temporary, one-year revenue and tax anticipation notes also may be issued by a sanitary district without voter approval.
- (c) 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 paragraph 3(a) above as "sanitation facilities." (Code Section 21-118, paragraph 6). However, Code Sections 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.
- (d) Power of Eminent Domain: Code Section 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 shall be in conformity with the requirements in Code Sections 15.2-1908 *et seq.* and 25.1-200 *et seq.*;

- for the construction of water and sewer line, the proceedings shall be in conformity with the requirements in Code Sections 25.1-200 *et seq.* or 25.1-300 *et seq.*; or
- for the construction of water and sewage treatment plants and facilities, the proceedings shall be in conformity with the requirements in Code Section 25.1-300 *et seq.*

4. *Limitations on Powers.*

- (a) Issuance of Bonds: Pursuant to Code Section 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. 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. Except in the limited circumstances described above, sanitary district bonds must be approved at referendum. Except in certain limited circumstances, sanitary districts may only issue tax-secured bonds, not revenue bonds.
- (b) 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 a public hearing is first held with respect to the disposition and at least 10 days notice is given before the public hearing is held (Code Section 21-118, paragraph 2).

5. *Legal Practical Issues.*

- (a) Conflicts with Water and Sewer Authorities: Code Section 21-121.6 prevents the issuance of bonds of a sanitary district created after January 1, 1993, in counties which have created a water and sewer authority, without the approval of the governing body of the county.
- (b) Fragmentation 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 becomes more efficient to merge various districts into a unified system. Code Section 21-118.5 contains authority to create a unified system.

J. *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.

1. *Statutory Authority.* Code Sections 15.2-2400 – 15.2-2403.
2. *Procedure to Create.* 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 hearing occurring no sooner than ten days after the second notice) is required.
3. *Powers.* Code Section 15.2-2403 grants a number of powers to the governing body of the locality with respect to a service district, including the following.
 - (a) Facilities: "To construct, maintain and operate such facilities and equipment as may be necessary or desirable to provide additional, more complete or more timely governmental services within a service district, including, but not limited to":
 - water and sewer facilities;
 - garbage removal and disposal;
 - heat and light;
 - fire-fighting equipment;
 - power and gas systems; and
 - sidewalks.
 - (b) Services:
 - 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 roads not under VDOT control or maintenance (but only upon petition of not less than 50% of the property owners served);
- other services, events or activities which 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 VDOT).

Paragraph 11 also authorizes a locality to acquire interests in real property in order to provide open-space land, but the locality may not use condemnation for such purpose.

Services, events and activities may not be undertaken for the sole or dominant benefit of any particular individual, business or other private entity.

- (c) 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 excludes levying taxes for schools, police or general government services not authorized by the statute).
- (d) Incentives: Code Section 15.2-2403, paragraph 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).

4. *Limitations on Powers.*

- (a) 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.
- (b) No Special Assessment: The levy of special assessments is not authorized in a service district; just *ad valorem* taxes.

5. *Legal/Practical Issues.*

- (a) 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* (Cir. Ct., Chancery No. 01-335, 11.23.01), the Circuit Court ruled that Code Section 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. The 2004 General Assembly adopted a bill to specifically authorize the construction of VDOT-operated roads in a service district.

- (b) Marketability: The same considerations described in Part One, Section III.K. below for "Tax Increment Financing" below and Part One, Section III.B. above for CDAs apply 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 that are subject to appropriation by the governing body, resulting in a relatively expensive and less marketable financing.

K. Tax Increment Financing

Often one of the goals in providing economic development incentives is to provide some assurance that the revenues generated by the development offset the incentives provided by the locality. Tax increment financing 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 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 tax increment financing 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, the financing mechanism may be of limited usefulness in Virginia.

1. *Statutory Authority*. Code Sections 58.1-3245 – 58.1-3245.5.
2. *Procedure to Create*. Pursuant to Code Section 58.1-3245.2, any locality may adopt tax increment financing ("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. Despite the findings in Code Section 58.1-3245.1, there is no requirement that the locality make a finding of "blight" and tax increment financing is available to encourage the provision of public facilities, including infrastructure and open-space use, as well as redevelopment.

3. *Powers*.
 - (a) 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 with respect to a TIF district. Code Section 58.1-3245.4

provides that any locality which 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 Code Section 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.

- (b) Payment of Incentives: The statute expressly provides that a locality may make "development project cost commitments" secured by the Tax Increment Financing Fund. See Code Section 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. This appears to allow the locality to pay incentives, but only for "development project costs" which may be limited to the cost of public infrastructure. Also, it is not entirely clear that such payments can be made directly to a developer. See the discussion below under "Legal/Practical Issues."
- (c) Qualified Redevelopment Bonds: It may be possible to use tax increment financing 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.

4. *Limitations of Powers.*

- (a) No Power to Tax: The TIF statute does not authorize any additional form of taxes or special assessments, but merely provides a mechanism for targeting certain existing taxes. Using the TIF revenues to repay debt will divert general fund revenues from other general fund expenses.
- (b) No Additional Debt Powers: The TIF statute does not grant localities any additional borrowing powers. The power to borrow based on TIF revenues is limited to borrowing powers in the Public Finance Act.

5. *Legal/Practical Issues.*

- (a) Limits on Incurring Debt: Subject to certain exceptions, a county may issue debt secured by a pledge of general fund moneys 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 revenues derived from a particular source, such as user fees for water and sewer facilities, parking revenues, etc. fall into the "special fund" doctrine and may be issued without referendum or debt limit considerations. In theory, TIF revenues constitute a "special fund" since the debt is secured only by a portion of the revenues generated by a particular project or area. However, in *Terry v. Mazur*, 234 Va. 442 (1987), the Virginia Supreme Court ruled that revenues generated by highway user revenues such as fuel taxes, motor vehicle registration and license

plate fees and motor vehicle sales taxes were not "special fund" revenues and could not be pledged to debt under the "special fund doctrine." Although the *Terry v. Mazur* case did not specifically deal with local sources of revenue, until the issue is specifically addressed at the local level, it does not appear that a locality can 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.

- (b) Marketability of TIF Bonds: An obligation that is secured by a pledge of TIF revenues 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 revenues each year (in most cases for an economic development or redevelopment project that is not considered "essential"), the revenues are further limited to the increment, if any, generated. This will result in a financing that is expensive, at best.
- (c) What costs/incentives can be financed? It is not entirely clear whether a locality can directly pledge and pay TIF revenues to a developer or whether the TIF statute merely contemplates that the locality will earmark TIF revenues for public projects that the locality will fund. This issue can be resolved by making payments to the IDA/EDA which then has the authority to make loans or grants to a private entity.

Further, the TIF statute provides for financing "development project costs." These are defined as costs under the Public Finance Act, as described above. This limits the types of things 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. Again, the use of an IDA/EDA may resolve this issue if the locality is authorized to appropriate funds to its IDA/EDA, it may use the TIF tool to generate those funds.

- (d) Can other taxes in addition to real estate taxes be pledged? Code Section 58.1-3245.4 provides that a locality may pledge other available funds, including other taxes or anticipated revenues, but only to pay "development project costs."
- (e) Publication requirements: Code Section 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. It is not clear what timing is required by the word "immediately." Further, the publication is required in each newspaper of general circulation in the locality. The word "each" is unusual and goes beyond the typical publication requirements for a locality.

L. Transportation Improvement Districts

The Transportation District Act of 1964 was enacted to promote regional development of transportation systems.

1. *Statutory Authority.* Transportation District Act of 1964, Code Section 15.2-4500 *et seq.*
2. *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. Such ordinances shall 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 (Code Section 15.2-1427). The county ordinance requirement requires publication of notice once a week for two consecutive weeks with the second publication not sooner than one calendar week after the first publication. A single county or city may form a transportation district if there is no other contiguous county or city willing to form a district. The transportation district is managed by a commission whose members are appointed by the participating localities.
3. *Powers.*
 - (a) Powers of the Commission: Code Section 15.2-4515 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 shall not include any such facilities owned by any person, company, association or corporation, the major part of whose transportation service extends beyond a transportation district.
 - (b) Issuance of Bonds: A transportation district is authorized to issue revenue bonds for any of its purposes. Bonds of a transportation district shall not be a debt of the Commonwealth or any political subdivision thereof.

- (c) Power of Eminent Domain: Code Sections 15.2-4515(5) and 15.2-4518(11) authorize transportation districts to institute and prosecute any eminent domain proceedings to acquire any property authorized to be acquired under Code Section 15.2-4500 *et seq.* in accordance with the provisions of Code Section 25.1-200 *et seq.*
- 4. *Limitations on Powers.*
 - (a) Specific Limitations: The Commission shall not prepare a transportation plan nor 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 Northern Virginia.
 - (b) Power of Taxation: A transportation district does not have the power to generate revenues other than from 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.
- 5. *Legal Issues.* Related Virginia Code sections include the Multicounty Transportation Improvement Districts Code, Section 15.2-4600 *et seq.*; the Transportation Improvement District in Individual Localities, Code Section 15.2-4700 *et seq.* and the Virginia Transportation Service District Act, Code Section 15.2-4800 *et seq.* These statutes are related to the Transportation District Act but are specific to certain districts already in existence.

M. Other Special Purpose Authorities

There are other authorities that 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 include:

- Public Recreational Facilities Authorities, which are created under Chapter 46, Title 15.2 of the Virginia Code, 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 Code Sections 15.2-5601 and 15.2-5607.
- Authorities for the Development of Former Federal Areas, are established under Chapter 63 of Title 15.2 of the Virginia Code 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 its properties. It may issue bonds to finance the development of any of its facilities. See Code Sections 15.2-6308 and 15.2-6312.

- Virginia Regional Industrial Facilities Authorities are created under Chapter 64 of Title 15.2. Localities in Planning Districts 3, 4, 5, 10, 11, 12, 13, 14 and 19 (generally, southside and central Virginia) 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. It may make loans or grants to others and may issue bonds to finance any of its facilities. The member localities may agree to direct to the authority machinery and tools taxes collected from authority facilities and may enter into revenue and economic-growth sharing arrangement with respect to tax revenues and other revenues generated by the authority's facilities. See Code Sections 15.2-6405 to 15.2-6409.
- 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. The Pocahontas Parkway 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 the Dillon Rule. See, for example, a January 2000 Opinion of the Attorney General (2000 Va.A.G. @ 49) that concludes that counties do not have the power to "create" corporations.

PART TWO

THE LEGAL ISSUES SURROUNDING THE USE OF INCENTIVES

The establishment and implementation of a particular economic development incentive program raises a number of Virginia constitutional issues for a local government attorney to analyze. Part Two outlines the pertinent constitutional provisions that a local government attorney typically must address, as well as summarizes the major Virginia Supreme Court cases, Virginia Attorney General opinions and related Federal court cases that interpret such provisions. In addition, Part Two discusses case law from other jurisdictions where the analysis of economic incentives or the public purpose doctrine may be helpful to the Virginia context.

Finally, Part Two outlines five provisions of the Virginia Code that may impact the manner in which a locality establishes and implements its particular economic development incentive program.

I. Virginia Constitution

A. Article X, Section 10

This provision is best known for the "Credit Clause," but also contains related restrictions:

1. "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;"
2. "Stock or Obligations Clause" (Applicable to Commonwealth and Localities)-- ". . . 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;"
3. "Internal Improvements Clause" (Applicable only to Commonwealth)-- ". . . 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;"
4. "Local Credit Clause" (Applicable only to Commonwealth)-- ". . . nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same."

B. Article X, Section 8

This provision contains the "Public Purpose Clause" or the "Necessary Expenses Clause" (Applicable to the Commonwealth and Localities):

". . . 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 as requiring that public money be used only for public purposes.

C. *Article X, Section 1*

This provision contains the "Uniformity Clause" applicable to taxes:

"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,...." (emphasis added).

This clause does not directly impose a constitutional limitation on incentives (other than tax incentives mentioned in Part One, Section II above) but rather forms an implicit political basis for considering and applying economic incentives.

II. **Virginia Supreme Court**

Although there is no decision by the Virginia Supreme Court directly addressing the provision of economic development incentives as a specific legal issue in the manner in which the North Carolina Supreme Court has addressed the issue (see the discussion of the *Maready* case below), there are a number of cases in which the Virginia Supreme Court has addressed the constitutionality of certain types of economic incentives.

A. *Cases*

1. *Shenandoah Lime Co. v. Governor*, 115 Va. 865 (1914) ("*Shenandoah Lime*"). Appropriation of State funds for the purpose of providing equipment to be used by convicts in lime grinding operation does not violate the Internal Improvements Clause and is not an unconstitutional appropriation of public funds for a private purpose. Internal Improvements Clause does not restrict the State in the exercise of its governmental functions.
2. *Holston Corp. v. Wise County*, 131 Va. 142 (1921) ("*Holston*"). County's guaranty of fixed price stone contract for materials supplied to road contractor was intended to ensure lowest total contract price to the county for road work and was not intended to benefit contractor. The credit of the county was used for its own benefit and not that of the contractor.
3. *United States Fidelity & Guar. Co. v. Carter*, 161 Va. 381 (1933) ("*Fidelity*"). Credit Clause does not prohibit county treasurer from depositing public funds in commercial bank. Deposit was in the usual course of business and for the convenience of the county.

4. *Mumpower v. Housing Authority*, 176 Va. 426 (1940) ("*Mumpower*"). Purpose of the Authority includes eradication of slums and providing of decent homes. Fact that the project might primarily benefit only a particular class did not take away the character of a public use.
5. *Almond v. Day*, 197 Va. 782 (1956) ("*Almond I*"). Investment of state retirement funds in bonds of public utilities and private corporations does not violate Credit Clause, Internal Improvements Clause or Stock or Obligations Clause where the underlying and activating purpose of the transaction and the financial obligation incurred by the State are for its own benefit. The fact that incidental benefits may accrue to private parties as a result of such investment does not cause the transaction to fall within the constitutional prohibition.
6. *Almond v. Day*, 199 Va. 1 (1957) ("*Almond II*"). Operation of a public bus service in connection with the operation of the Hampton Roads bridge-tunnel does not violate the Internal Improvement Clause. Operation of the bus service is incidental to the bridge-tunnel project which is a proper governmental function. Exercise of governmental functions does not fall within the constitutional prohibition.
7. *Harrison v. Day*, 200 Va. 750 (1959) ("*Harrison I*"). Loan of State funds to Richmond Produce Market Authority, a political subdivision of the State, violates neither the Credit Clause nor the Stock or Obligations Clause. 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.
8. *Harrison v. Day*, 200 Va. 764 (1959) ("*Harrison II*"). Development and operation of port and harbor facilities is a proper governmental function and therefore not prohibited by the Internal Improvements Clause. Because such actions constitute a proper governmental function they are undertaken for a public purpose. Appropriations with respect to such actions are made for a public and not a private purpose.
9. *Harrison v. Day*, 202 Va. 967 (1961) ("*Harrison III*"). Acquisition of port facilities with proceeds of revenue bonds issued by 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 does not violate Credit Clause. Letting of the port facilities to the railroad was for the benefit of the State in the exercise of its governmental functions and served a public purpose. Contributions made by the State will serve a public purpose and incidental benefits accruing to the railroad do not destroy this public purpose.
10. *Button v. Day*, 205 Va. 629 (1964) ("*Button III*"). Purchase by port authority of port facilities and the leasing of those facilities back to the seller does not violate Credit Clause. In addition, agreement to request the General Assembly for a portion of the rent due and the agreement by the City of Newport News to make certain payments under lease do not violate the Credit Clause. However, the city's agreement to be directly liable

on the debt constituted a present debt, not a contingent obligation, and was unconstitutional because the amount of liability exceeded the city's debt limit.

11. *Fairfax County Ind. Dev. Auth. v. Coyner*, 207 Va. 351, 357 (1966) ("*Coyner*"). Industrial development authority's financing and construction of facilities to be leased to private corporation in order to stimulate industrial development serve primarily a public purpose. County's appropriation of funds to assist the authority are similarly made for a public purpose. Because the revenue bonds issued by the authority are not debt of the State or the county, there is no violation of the Credit Clause. "[L]egislative determination that the promotion of industrial development is for a public purpose and thus a proper governmental function is presumed to be correct." See also, *Industrial Dev. Auth. of the City of Chesapeake v. Suthers*, 208 Va. 51 (1967) ("*Suthers*"); *Industrial Dev. Auth. of the City of Richmond v. La France Cleaners and Laundry Corp.*, 216 Va. 277 (1975) ("*La France*") (similarly finding that industrial development authorities serve primarily a public purpose).
12. *Button v. Day*, 208 Va. 494 (1968) ("*Button IV*"). 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 credit of the State to or in aid of any person, association, or corporation, in violation of [the Credit Clause]." In explaining its decision, the Court stated that "[i]t 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 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." After this case was decided, the Virginia Constitution was amended specifically to allow this form of economic aid.
13. *Troy v. Walker*, 218 Va. 739 (1978) ("*Troy*"). City may 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 is for the proper public purpose of assisting VPA in carrying out its governmental functions.
14. *Infants v. Virginia Hous. Dev. Auth.*, 221 Va. 659 (1980) ("*Infants*"). Appropriations to promote low and moderate income housing for both single family and multi-family housing met public purpose requirement. Merely incidental that General Assembly properly authorized financing for persons of other than low and moderate income.
15. *City of Charlottesville v. DeHaan*, 228 Va. 578 (1984) ("*DeHaan*"). City's appropriation of proceeds from sale of general obligation bonds to redevelopment and housing authority which in turn were lent to developer of a hotel and convention center to be located in a redevelopment area primarily advanced the city's interest in redeveloping a blighted area and thus constituted a public purpose. Private benefits accruing to the private hotel developer were merely incidental to this public purpose.

B. Animating Purpose Test

The Supreme Court has consistently held that, despite its literal language, Article X, Section 10 is not intended to apply to programs where "animating purpose" ("underlying and activating purpose") was a "public purpose" and where benefits to private parties were merely "incidental".

The word "incidental" has not been interpreted to mean "insignificant" or "inconsequential" but rather occurring as a result of the locality's efforts to serve public interest.

C. Supreme Court Concerns

1. "Economic Development" - The Court has stated that stimulation and promotion of economic development is a valid public purpose, but since the term is a broad term, the Court views its invocation as suspect. Thus, the mere legislative determination that a particular program will serve a public purpose is not sufficient to the Court without a reasonable relation to the public interest and a means of implementing that is within the scope of legitimate government. See Coyner.
2. The Court is concerned that "economic development," if construed too broadly as public purpose under Article X, Section 10, could serve as justification for permitting the very programs that the Court in *Almond I* said the provision was intended to prohibit.
3. The Court has often invoked a rule of interpretation that it will defer to policies and legislation of General Assembly — unless General Assembly has gone too far See Button IV.
4. Conclusion - A particular program might pass the "public purpose" test, but the program's means might still fail the Credit Clause test.
5. The Court will examine the character of the Public Purpose Served or the Public Benefit Derived:
 - not all public purposes seem to be considered equal;
 - more favorable public purpose projects include those undertaken to support low and moderate housing, port facilities, other infrastructure projects (roads, bridges, water and sewer), redevelopment of blight; and
 - less favorable public purpose projects include those undertaken purely for economic and industrial development purposes.

III. Virginia Attorney General Opinions

The following includes a summary of pertinent formal Opinions of the Virginia Attorney General related to economic development.

2003 Va. A.G. @ 5

Treasury Board is not required to approve debt incurred by a private foundation and financed through the issuance of bonds by a local industrial development authority 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 university nor the Commonwealth or any of its agencies or institutions are required or expected to provide any debt service, directly or indirectly, for the debt issued to finance the capital project.

2003 Va. A.G. @ 34

Industrial development authority may enter into contracts with prospective borrowers that include provisions that require payment to the authority for private bond allocations unused as a result of the prospective borrowers not proceeding with the transaction.

2000 Va. A.G. @ 49

As a Dillon Rule matter, the Attorney General opined that counties do not have the ability to create corporations. This may have an impact on how a locality participates in the formation of a 63-20 corporation. See the discussion of 63-20 corporations in Part One, Section III.M. above.

2000 Va. A.G. @ 83

Virginia Coalfield Economic Development Authority is the appropriate body to consider a grant or loan to a county's industrial development authority, which would pass the money to a prospective company willing to locate in the county. The Board of the Coalfield Authority must make an independent legislative determination that the contemplated use of funds furthers an eligible public purpose. If the county IDA then finds that the prospective project meets the public purposes of the Act, then the financing is within its discretionary power. Contributing to the capital of a company via a grant of funds does not violate the Virginia Constitution, provided that the attending facts and circumstances support a determination that the use of funds furthers a requisite public purpose.

1999 Va. A.G. @ 65

Industrial Development and Revenue Bond Act authorizes industrial development authority to make loans to private corporations to promote development of facilities that provide graduate education in the Commonwealth.

1999 Va. A. G. @ 67

Without an express or implied language in the Industrial Development and Revenue Bond Act that may be interpreted to authorize such transaction, an industrial development authority may not be designated

as general contractor for construction of manufacturing plant to enable manufacturer to construct plant without paying State sales and use tax construction materials.

1997 Va. A. G. @ 57

Governing body of locality must determine whether proposed use of land for a family park featuring attractions such as a cinema, arcade, miniature golf, outdoor stage, restaurants, etc., is a public purpose where land is to be conveyed to an industrial development authority and leased to a private party with intentions of promoting trade industry through construction and lease of facility. Determination of whether a particular use of facility constitutes a municipal purpose is a question of fact considering all features of the facility.

1995 Va. A. G. @ 77

Industrial development authority is not prohibited from issuing bonds to finance private residential housing for Section 501(c)(3) organization so long as the organization is not organized and operated exclusively for religious purposes. Voter referendum is not required to authorize industrial development authority to issue bonds to finance acquisition and improvement of low income rental housing by such organization.

1990 Va. A.G. @ 51

Local governments are authorized to transfer fee simple interest and improvements required for the construction of an industrial "shell" building to industrial development authorities where such buildings are to be leased to private industry in order to stimulate industrial development within the area.

1990 Va. A.G. @ 88

Industrial development authority may acquire an industrial park through gift or purchase of stock from private development corporation in order to transfer ownership of park from corporation to city for purposes of attracting industrial clients to area.

1987-88 Va. A.G. @ 192

Industrial development authorities have power to make loans to local radio stations for the purchase of equipment to permit emergency communication network systems for the locality. The authority may also purchase the necessary equipment and then either lease or sell the equipment to the radio station given that the necessary public purpose exists.

1986-87 Va. A.G. @ 106

The Industrial Development and Revenue Bond Act permits industrial development authorities to acquire property, to expend funds on improvement of property, including roads, water and sewer and to resell the property to private persons or corporations provided the over-riding purpose is to promote industrial development in the area.

1983-84 Va. A. G. @ 103

The county and town may not make direct loans of funds to private firms for industrial development if no enabling legislation exists permitting such loans. Industrial development authorities may, however, make loans to private firms provided a necessary public purpose exists. The counties and towns may make grants or loan money to industrial development authorities under the Act.

1980-81 Va. A.G. @ 194

Industrial development authorities may not use bond proceeds to refinance the previous independent financing obligations of a private business.

1979-80 Va. A.G. @ 72

Industrial development authorities may make loans to private developers for the acquisition and rehabilitation of national registered historical landmark hotels as preservation of historic buildings is a proper public purpose.

IV. Federal Court Interpretations

Three federal district court cases have addressed economic development incentives within the Virginia context.

A. *Norfolk Federation of Business Districts v. Department of Housing and Urban Development*, 932 F. Supp. 730 (E.D. Va. 1996).

- Plaintiff, Norfolk Federation of Business Districts (representing businesses and merchant associations within the City of Norfolk) filed complaint against the Department of Housing and Urban Development, the Norfolk Redevelopment & Housing Authority ("NRHA") and the City of Norfolk with respect to the defendants' proposed actions in the development of the MacArthur Center (the "Center") in Norfolk.
- The City of Norfolk proposed to provide a number of economic development incentives to ensure the development of the Center: (1) the City would authorize the issuance of up to \$50 million in parking revenue bonds for garage construction and up to \$13.5 million in general obligation bonds for Center infrastructure improvement; (2) the City would contribute \$97 million of public funds to the \$297 million project; (3) the City would agree to Dillard's demands that it move its fire station at a cost to the City of \$6.1 million and (4) the City would fund with public monies almost all of the \$36 million costs of constructing the Nordstrom department store.
- The Court ruled that the City and the NRHA did not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment by favoring business competitors because the Center bears a rational relation to the legitimate governmental purpose of eliminating blight.
- The Court ruled that there is no substantive due process violation where there is a rational relationship between the redevelopment project plan and the legitimate governmental interests of economic development and eliminating urban blight.

- Applying the reasoning of the Virginia Supreme Court in the *DeHaan* case, the Court found that the Redevelopment Plan proposed by the NRHA demonstrated that the animating purpose behind the Center was a legitimate public purpose.
- The Court concluded that the City and the NRHA did not violate the Internal Improvements Clause through their involvement with the Center, because when the "legislature created housing and redevelopment authorities to accomplish the redevelopment...[it] also contemplated that the cities would be inexorably tied into the redevelopment" (quoting from the *Reasor* decision discussed below).

B. Reasor v. City of Norfolk, 606 F. Supp. 788 (E.D. Va. 1984).

- Plaintiffs, partners of a realty firm, filed suit against the City of Norfolk, the Norfolk Redevelopment and Housing Authority ("NRHA") and GSH, a rival realty corporation. Plaintiffs claim the City violated the Sherman Act and the Virginia Antitrust Act when the City entered into an agreement with GSH for the development of the Virginia World Trade Center. Agreement provided that for a period of time not to exceed two years from the start of construction, the City would not construct, permit the construction of or provide financial support for the construction of any hotel or office building of a certain size on land or within air space owned by either the City or the NRHA within a certain portion of downtown Norfolk.
- Sherman Act Claim - may be refuted either by the State Action Doctrine or the Noerr-Pennington Doctrine.
- State Action Doctrine - In order for a private entity to qualify for state action immunity, it must show (1) a "clearly articulated state policy" and (2) that there was active or "ongoing state supervision."
- Clearly articulated policy is in the form of the legislation that gave Housing and Redevelopment Authorities and cities powers to buy, clear and redevelop land in order to fight urban blight.
- State supervision may be performed by the City; State empowered the City to carry out the policy. Court looks to the agreement to see if City performed supervision - construction deadlines, leasing conditions and square footage requirements enforced by City fulfill the state supervision requirement.
- Noerr-Pennington Doctrine - Genuine efforts by private parties to influence governmental action constitute immune activity under the federal antitrust laws. Private entities can inform and attempt to influence the government of their wishes with regard to actions which the government has the power to take, even though the actions taken by the private entities are intended to restrain competition. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).
- Challenged activities of GSH are essentially successful efforts to induce the City to take lawful state action. Under the Noerr-Pennington Doctrine, such activities are beyond the scope of the Sherman Act.

- Virginia Antitrust Claims - the State Action Doctrine and the Noerr-Pennington Doctrine also foreclose liability under State laws. In addition, the Virginia Antitrust Act excludes any activity which is authorized by a Virginia statute, as this behavior was.

V. Other States

If the need arises in litigation or otherwise to find support for a particular program, it may be helpful to examine how economic development has been addressed in other states and to determine whether any such cases are useful for analyzing issues within the context of the Virginia Constitution.

A. North Carolina

Maready v. Winston-Salem, 342 N.C. 708 (1996).

- State program of economic development grant incentives challenged. State authorized its localities to make specific grants which were to be measured in terms of (1) jobs and (2) increased property tax revenue to the locality.
- Appeal from Circuit Court decision: Statute unconstitutional under a NC constitutional provision similar to Article X, Section 8 of the Virginia Constitution.
- Held: Program was sufficiently limited that it satisfied the public purpose language in NC's Constitution allowing grants to private parties for public purposes.
- Court noted that NC was today facing a battle to secure manufacturing and similar jobs for the State, when its economy, historically agricultural, was no longer so. The Court felt the legislature had leeway to deal with the situation.
- "An 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."
- Usefulness to Virginia context - Public purpose provision in the North Carolina Constitution is similar to the Public Purpose Clause contained in the Virginia Constitution.

B. *Oklahoma*

State ex rel. Brown v. City Warr Acres, 1997 OK 117 (Okla. 1997).

- Facts: 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.
- Held: Money was properly expended on a public purpose pursuant to the "Public Purpose Clause" and "Credit Clause" of the Oklahoma Constitution (*which are similar to the corresponding clauses of the Virginia Constitution*) because economic development was a legitimate public purpose for which public funds were properly expended.
- Usefulness to Virginia context - Oklahoma's constitutional public purpose and credit clauses are similar to the corresponding provisions contained in the Virginia Constitution.

Burkhardt v. City of Enid, 1989 OK 45 (Okla. 1989)

- Facts: City developed an economic development plan to save a private university that was on the verge of failure through the passage of a .75% 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.
- Held: The purchase of the campus and subsequent lease back to the university at below-market sum, did not violate the state's public purpose restriction. "Public purpose" 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." 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.
- Usefulness to Virginia context – Oklahoma's constitutional public purpose and credit clauses are similar to corresponding provisions contained in the Virginia Constitution.

C. *Maryland*

City of Frostburg et al. v. Jenkins, 215 Md. 9 (1997).

- Facts: City wanted to issue municipal bonds and 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.
- Held: Court found that the county's enabling act and the city ordinance were valid and constitutional and that the circuit court's entry of a permanent injunction against appellants from holding a special election to obtain authority to issue municipal bonds and 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 was invalid.

- "The location of new industry in a municipality furnishes employment and measurably increases the resources of the community and its financial well-being."
- "The relief of unemployment is a legitimate public purpose. The 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."
- Usefulness to Virginia context - Although the Maryland constitutional provisions are not as similar to the corresponding provisions in the Virginia Constitution, the Maryland case law is helpful to the general discussion of the use of public funds incidentally benefiting private entities.

D. *Origins of the Public Purpose Doctrine*

Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).

- Facts: State legislature authorized City to purchase stock in a railroad company. Citizen sought an injunction.
- Held: Although public stock purchase would bring injury to the people, because the state constitution does not prohibit public stock purchases, the injunction must fail.
- The Court then set forth for the first time the Public Purpose Doctrine: "Neither has the legislature any constitutional rights to create public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose . . . Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder."
- In applying the doctrine to the facts, the Court recognized that public monies would wind up in the treasury of a private corporation. Nevertheless, the Court stated that it is not "the nature or character of the person or corporation" who is employed to achieve the public purpose, rather, it is the "ultimate use, purpose and object for which the fund is raised" that determines public purpose.
- The Court concluded that construction of a railway is a public purpose: "To aid, encourage, and stimulate commerce . . . is a duty of the sovereign . . ."
- Many states have followed the *Sharpless* holding, but the Iowa Supreme Court, in an opinion authored by Chief Justice John F. Dillon (also author of the "Dillon's Rule"), struck down state legislation authorizing localities to tax for railroad aid, despite "the incidental advantage to the community" because to do so would "unsettle the foundation of private rights." *Hanson v. Vernon*, 27 Iowa 28 (1869). If a resident is taxed for "incidental advantage to the community, "who indeed, could define the logical mechanic arts . . . [E]very industrial pursuit" could be included since they all advance the "public prosperity."
- Similarly, the Michigan Supreme Court held in *People ex rel. Detroit & Howell R.R. v. Township Bd.*, 20 Mich. 452 (1870), that an indirect and incidental benefit to the public could not permit the court to uphold the issuance of public bonds to be used as a loan to a railroad

because "an incidental benefit which any enterprise may bring to the public, has never been recognized as sufficient of itself to bring the object within the sphere of taxation."

Opinion of the Justices, 58 Me. 590 (1871).

- Facts: Maine's legislature asked the court whether it had authority to pass enabling legislation so that towns could "assist individuals or corporations to establish or carry on manufacturing of various kinds" by grants or loans of public funds.
- Held: Such grants or loans are impermissible. "The general benefit to the community resulting from every description of well-directed labor is of the same character, whatever may be the branch of industry upon which it is expended. All useful laborers, no matter what the field of labor, serve the State by increasing the aggregate of its products, --it's wealth. There is nothing of a public nature any more entitling the manufacturer to public gifts than the sailor, the mechanic, the lumberman, or the farmer."

Loan Association v. Topeka, 87 U.S. 655 (1874).

- Facts: The Kansas legislature authorized localities to issue bonds, the proceeds of which would be donated to private corporations to build bridges and to aid railroads, water power development and other internal improvements.
- Held: The tax was not for a public purpose.

Source: Bryce S. Kennedy, "Economic Development and the Public Purpose Doctrine" (undated paper).

E. Other Helpful Cases

See also the following cases with helpful analysis on "public purpose" and "incidental" private benefits:

California - *County of Alameda v. Janssen*, 106 P.2d 11, 20 (1940) (county's release of liens held against the property of indigent recipients of aid is for the general public welfare and therefore not prohibited by state constitutional provision prohibiting the legislature from making or authorizing a gift of public money to any individual or corporation).

Illinois - *City of Salem v. McMackin*, 53 Ill. 2d 347; 291 N.E.2d 807 (1972) (private benefit resulting from the city's acquisition and construction of a new manufacturing plant to be leased to a private company under the Industrial Project Revenue Bond Act is incidental to the public purpose of alleviating unemployment and attracting economic development to the state).

Nevada - *Nevada v. Clark County*, 89 Nev. 330; 512 P.2d 1321 (1973) (city's assistance in the acquisition and construction of pollution control facilities for a private plant encourages industry to either locate or remain in the State and, thereby, aids in relieving unemployment and maintaining a stable economy).

New Jersey - *Dworman v. Town of Morristown*, 370 F. Supp. 1056 (D. N.J. 1974) (city's agreement to build parking garage under shopping mall upheld because it replaced an

economically depressed area with an active business, created new jobs and provided substantial additional tax revenues for town).

Colorado – *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986) (city's amendment to lease with private company in which city agreed to reduce share of bridge tolls serves a valid public purpose).

South Carolina – *Wopler v. City of Charleston*, 287 S.C. 209 (1985) (tax increment financing law authorizing cities to incur indebtedness to revitalize blighted and deteriorating areas was for public purpose even though private individuals incidentally benefit).

Minnesota – *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978) (city's construction of parking facility to induce developer to construct hotel and trade mart complex was permissible).

Wisconsin – *State ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis. 2d 32 (1973) (statute authorizing municipalities to issue revenue bonds to finance industrial projects was valid because development of projects would place state on competitive basis with neighboring states).

North Carolina – *Dennis v. City of Raleigh*, 253 N.C. 400 (1960) (city may pay a private corporation, from available surplus funds that were not derived from taxes, for advertising advantages of the city in an effort to secure location of a new industry within the city).

Illinois – *Marshall Field & Co. v. Village of South Barrington*, 92 Ill. App. 3d 360 (1981) (issuance of revenue bonds to finance construction of retail facilities served public purpose, because of goals sought to be furthered by the public fund expenditure).

Source: Bryce S. Kennedy, "Economic Development and the Public Purpose Doctrine" (undated paper).

VI. Other Applicable Laws

The following Virginia laws may indirectly affect how economic incentive programs are authorized or implemented.

A. *The Virginia Freedom of Information Act ("FOIA"), Code Section 2.2-3700 et seq.*

1. *Discussion of economic development prospects or possible incentives.* Generally, the FOIA requires that all discussions of the public body be public. There are provisions allowing for closed meetings of public bodies for the discussion of certain items; nevertheless, decisions of the governing body culminating from closed discussions must be made in public session.

Frequently, the governing body does not feel comfortable in having public discussion regarding an economic development prospect and airing publicly its negotiation of incentives. Often the prospect does not want to have its interest made known until an arrangement can be made with the locality or the business has completed its due diligence on whether to locate in the jurisdiction. Code Section 2.2-3711.A.5. permits a public

body to hold a closed meeting to discuss "a prospective business or industry or the expansion of an existing business or industry where no previous announcement has been made of the business' or industry's interest in locating or expanding its facilities in the community." When an announcement has been made, this exemption is no longer available; however, depending on the nature of the development incentives being considered, the governing body may be able to go into closed meeting (a) to discuss acquisition or disposition of real property pursuant to Code Section 2.2-3711.A.3., (b) for consultation with legal counsel pursuant to Code Section 2.2-3711.A.7., (c) for discussion regarding investing of public funds where bargaining is involved and, if made public initially, the financial interest of the government would be adversely affected pursuant to Code Section 2.2-3711.A.6 or (d) for the discussion of the award, terms or scope of a public contract involving the expenditure of public funds where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the government pursuant to Code Section 2.2-3711.A.30.

2. *Dissemination of government records regarding prospects and possible incentives.* FOIA requires that all official records be made public upon request unless a specific exemption from dissemination exists. Code Section 2.2-3705.A.22 of FOIA protects from dissemination confidential proprietary records provided by private business to certain State agencies, including the Virginia Economic Development Partnership. Until recently, this exemption was not available to local governments. Senate Bill 394, enacted during the 2004 General Assembly Session broadens that exemption to include the records prepared by localities. Documents regarding an economic development prospect could be exempt from disclosure, depending on their origin, as correspondence or working papers of the mayor or chief executive officer of the political subdivision (Code Section 2.2-3705.A.6) or written legal advice or documents protected by the attorney-client privilege (Code Section 2.2-3705.A.7) or other work product compiled specifically for use in litigation (Code Section 2.2-3705.A.8).

B. State and Local Governments Conflict of Interests Act, Code Section 2.2-3100 et seq.

Local government officials who have a "personal interest" in an economic development prospect will have to make disclosure or disqualify themselves pursuant to the Conflict of Interests Act (Code Section 2.2-3115). Such officials should be mindful of and reject the occasional offer by economic development prospects of "opportunities" under the guise of educating themselves about the prospect. Code Section 2.2-3103 prohibits acceptance of value for services performed within the scope of officials duties other than approved compensation and acceptance of money or any other thing of value in consideration of use of the official's public position to obtain a contract or which otherwise reasonably tends to influence the official in the performance of the official's duties.

C. Virginia Public Procurement Act, Code Section 2.2-4300 et seq.

Where the locality is acquiring goods or services in order to address an economic development prospect, the locality must be mindful of the requirements of the Public Procurement Act and any local regulations adopted pursuant to the Act. It may be that the locality will choose to provide

cash incentives through appropriate statutory vehicles instead of using its "purchasing auspices" in order to legally avoid the Act's requirements.

A subset of the Procurement Act is the Ethics in Public Contracting Act, Code Section 2.2-4367 *et seq.*, which is also incorporated by reference into the Conflict of Interests Act. This act reaffirms in a procurement context the provisions of the Conflict of Interests Act regarding an official's personal interest (defined as "pecuniary interest arising from the procurement") and generally precludes such official's participation in the contracting.

D. Requirements for Disposition of Public Real Property.

Localities should be mindful of the statutory requirements for disposition of public real property or an interest therein. This includes a requirement for advertisement and a public hearing pursuant to Code Sections 15.2-1800 and 15.2-1813. There is no such requirement for disposition of personal property (See Code Section 15.2-951).

E. Expenditures for Promoting Resources and Advantages of Locality.

Code Section 15.2-940 permits localities to expend general funds for promoting their resources and advantages to include "without limiting the generality thereof, watershed projects and expenditures in connection therewith."

PART THREE

ESTABLISHING INCENTIVE GUIDELINES FOR YOUR LOCALITY

In establishing substantive incentive guidelines or policies, the locality should engage in a systematic analysis that focuses first on the expected public benefits and the cost to the locality of providing economic development incentives, then on the legal support for the incentive program and methods by which the locality's public purpose is documented and implemented and finally on the drafting of the incentive guidelines or policies. The following discussion addresses each of these steps and offers analyses based on existing law.

I. Questions to Ask Before Establishing Incentive Guidelines

A. *Conceptual Questions to Ask*

1. What goals does your locality wish to achieve? For example:
 - Increase number of job opportunities (increase total number of available jobs within locality vs. retention of existing job opportunities and prevention of employer relocation outside of locality)?
 - Diversify job types and types of businesses or industries (e.g. industrial, technology, service industry) and increase income level of employees?
 - Increase revenues in locality's taxes and user fees (sales tax, property taxes, business license tax, utility fees)?
 - Redevelop special areas (e.g. brownfield remediation, greyfields, eradication of abandoned or blighted areas); consistent with locality's comprehensive plan and economic development strategy?
 - Invest in land and infrastructure to benefit future economic growth?
 - Maximize the return of economic development efforts?
2. Does your locality want to support a particular type of business development?
 - Sometimes a locality wishes to encourage only particular type of development: retail, industrial, commercial, residential development, technology or others.
 - Is there a need to emphasize attracting new business vs. expansion of existing business? This raises political issues of fairness.
 - Consider concerns about preferences and giving one entity/business a competitive advantage over another.

3. How much can your locality afford financially?
4. How is your locality's economic vitality affected by the incentives offered by neighboring jurisdictions?
 - Consider the effect of competition from neighboring localities (i.e., "we have to keep up with our neighboring localities that are offering incentives in order to avoid adverse effects to the locality's economic development efforts").
5. To what extent does your locality want to audit or enforce incentive policies?
6. Will your locality want to insert claw-back provisions if the business does not produce expected results?
7. Would proposed economic development occur in your locality without an incentive?
8. Who will own the property or facilities upon which public funds are to be expended?
 - Public/Private ownership concerns

B. Practical Questions to Ask

1. What type of incentive to provide - grant, loan, other?
2. Should assistance be direct or indirect - utilize conduit such as IDA/EDA?
3. Is there a valid public purpose in discriminating (i) between one type of business and another and (ii) between a new business and an existing business?
4. Has the locality anticipated the potential political issues and concerns?
5. Should the incentives be paid upfront or paid out over time as reimbursement for qualifying expenditures?
6. How shall the arrangements be documented?
7. How compatible is the local IDA/EDA with the stated development objectives of the locality's governing body?
8. What is the likelihood of a successful legal challenge?

See also "A Blueprint for Elected Officials" form under "Community Assistance Tools" on page entitled "Economic Development Resources" at www.virginiaallies.org.

II. Establishing Incentive Guidelines

A. *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 enough to sustain it. 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 the incentive.

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 it will be that an 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 "Part Two, The Legal Issues Surrounding the Use of Incentives."

1. *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 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 *Suthers* decision 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 the 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. *Suthers*, 208 Va. at 59.

Even in *Button IV*, the one decision in which the 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." *Button IV*, 208 Va. at 503.

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. *Button IV*, 208 Va. at 503.

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 so 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." 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." *Button IV*, 208 Va. at 504 (emphasis added).

While it is clear that the animating purpose test 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 will need to present facts to support this effort.

2. *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, Attorney Generals opinions and other references for guidance in developing the public purpose analysis, but will find little help with specific purposes. However, in adopting the Governor's Development Opportunity Fund (Code Section 2.2-115) in 1996, the Virginia General Assembly identified certain specific purposes for which incentive funds can be used. Those purposes are found in Code Section 2.2-115(C) and are as follows:

[P]ublic and private utility extension or capacity development on or off site; road, rail, or other transportation access cost 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 owned buildings; grants or loans to industrial development authority, housing and redevelopment authority, or other political subdivision pursuant to its duties or powers; training; or anything else permitted by law.

As referenced at the conclusion of the enumerated permissible purposes, the list is not conclusive. But the list does provide legislative authority for some of the more frequently used incentive purposes and seemingly permits additional purposes that can be qualified through legal analysis.

3. *Presumed Constitutionality of Legislative Actions.*

The detailed legislative findings of a locality and/or 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*, the Court stated that "every 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 null and void." *Shenandoah Lime*, 115 Va. at 868-69 (quoting from *Ex Parte Settle*, 114 Va. 715, 77 S.E. 496, 497 (1913)). Even in a situation where the economic benefits expected to accrue from the proposed financial incentives may be criticized as "speculative" (similar to arguments that one might assert against the third proposed incentive), the Court has indicated that legislative findings should enjoy the deference of the courts. See *DeHaan*, 228 Va. at 590.

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 *La France*, the Court indicated that, in the exercise of its powers under the Act, an industrial development authority 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. See *La France*, 216 Va. at 281.

4. *Incidental Benefit to the Private Sector.*

The 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. Further, 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 *DeHaan*, 228 Va. at 588; *Coyner*, 207 Va. at 357.

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 should not jeopardize the constitutionality of the financial incentive program. See *Mayor of Lexington v. Industrial Development Authority of Rockbridge County*, 221 Va. 865, 869 (1981).

Furthermore, the locality's provision of financial incentives should demonstrate a means to achieve a public purpose that does not involve the locality and the IDA/EDA in establishing a guaranty for private business or providing 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*. *Button IV*, 208 Va. at 503. 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 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 industrial development authority's acquisition of an industrial park through the purchase of a private developer's stock, (c) a county's appropriation of funds to its industrial development authority to make a loan to a private corporation or (d) an industrial development authority's contribution to the capital of a corporation. Op. Atty Gen. Va. (May 17, 2000 Letter to Terry G. Kilgore).

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, it is more likely that the IDA/EDA will not exercise much control over the facilities or the improvements. As a result, it may make the argument of merely incidental benefit 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 did not appear to 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* with respect to the letting of port facilities to a private party not causing 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 has enacted the Governor's Development Opportunity Fund which specifically authorizes the use of public funds for certain on-site as well as off-site improvements.

5. *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, nevertheless a local government attorney must analyze a number of factors that 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:

<u>More Helpful</u>	<u>Less Helpful</u>
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

B. Prepare the Plan

1. *Economic Development Incentive Plan.*

- (a) Locality should make legislative findings/declarations – general as to incentive guidelines or policies and specific as to incentive recipient – i.e., 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.
- (b) Locality should undertake economic study/impact (whether prepared internally or with outside assistance) to provide objective additional support of value of economic development incentives.

- (c) Locality and IDA/EDA should formally approve economic development plan – setting forth goals and procedures and conformance with legislative findings/declarations; investment criteria; legislative findings to be made by IDA/EDA if IDA/EDA is the conduit for providing incentives.
- (d) Consider having Locality and IDA/EDA enter into a Memorandum of Understanding setting forth how the IDA/EDA will implement the policies and procedures under the plan. IDA/EDA shall make findings consistent with the plan.
- (e) Examples of findings to be made by the IDA/EDA under the policies and procedures may include:
 - (i) the animating purpose of any proposed provision of incentive grants serves a valid public purpose and only incidentally benefits private interests;
 - (ii) the proposed provision of incentive grants to a business is in furtherance of the purpose for which the IDA/EDA was created;
 - (iii) that without the stimulus of the incentive grant, it is unlikely that the business would relocate or remain in the locality; and
 - (iv) the grant/incentive furthers the economic development strategy of the locality.
- (f) Where a locality has elected to stimulate development or redevelopment of underdeveloped, under-improved, blighted, vacant, abandoned properties or brownfields and greyfields, the following additional findings by the IDA/EDA may be appropriate:
 - (i) 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);
 - (ii) the proposed development or redevelopment is consistent with the locality's comprehensive plan and/or economic development plan/strategy; and
 - (iii) that the scope and quality of the plan will serve to influence redevelopment and additional capital investment or adjacent or nearby properties.

2. *Application Form for Business Prospect to Request Incentive Assistance.*

- (a) 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).
- (b) Application should require the business prospect or property owner to provide the following information:
 - (i) Description of project - company name; type of operation;
 - (ii) Location of project;
 - (iii) Amount of private investment that adds to the local tax revenues;
 - (iv) Jobs to be created - Average salary level or total yearly payroll of jobs to be created;
 - (v) Amount of incentive requested;
 - (vi) The purpose or purposes for which funds will be provided;
 - (vii) Other public funds that have been or may be expended on project; and
 - (viii) 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:
 - (A) The expertise and experience of the business prospect or property owner in redeveloping brownfield, greyfields, blighted, under-improved and underdeveloped property;
 - (B) the degree to which the proposed project may influence development or redevelopment or adjacent or nearby properties;
 - (C) the extent to which the proposed project may serve to implement a change in use which is consistent with and/or furthers the goals of the locality's comprehensive plan and/or economic development plan/strategy; and
 - (D) and the extent to which the project incorporates mixed uses, provides open space and focuses on transportation and transit accessibility.

See also the "Project Data Sheet" form found under "Forms You Can Use" under page entitled "Economic Development Resources" at www.virginiaallies.org.

3. *Agreement between IDA/EDA and Business Prospect.*

- (a) Applicable Law – Address applicable Virginia Code provisions, including applicability of FOIA and Conflict of Interest Act
- (b) Financial
 - (i) Include mechanism for controlling financial obligations to business prospect for qualifying costs;
 - (ii) Require annual appropriation to guard against reliance by business prospect;
 - (iii) Prevailing wage requirements and competitive bid process should be taken into account when negotiating with business prospect; and
 - (iv) If facilities financed with tax-exempt bond proceeds to be conveyed or used by business prospect, need to check on tax-related concerns for private business use.
- (c) Risk Management - Structure against risk of business prospect's failure to perform, including provisions that allow for termination of an agreement if critical events do not happen by specified date
- (d) Clawback Provisions
 - (i) Monetary guarantee, such as letter of credit or performance bond;
 - (ii) First option to purchase given to locality/reacquisition agreements where public land was granted or purchased;
 - (iii) Deed covenants; and
 - (iv) Deed of trust, security agreement from business prospect; however, beware potential bankruptcy issues and locality's priority.
- (e) Remedies
 - (i) Limit *force majeure* clauses to provide for limited time periods and for limited causes; and
 - (ii) Try to limit remedies against locality for specific performance; consider liquidated damages.
- (f) Miscellaneous
 - (i) 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, then best for agreement to state that a completion date is not guaranteed;

- (ii) Legal opinions may be qualified in certain situations to limit professional liability;
- (iii) Use of shell corporation by developer has advantages and disadvantages for locality; consider carefully each option;
- (iv) Acquisition of related licenses and permits should be provided for in agreement; and
- (v) The amount of private investments, new jobs created and wage levels provided by the business prospect to apply for incentives, should be the same targets that are provided in the Agreement.

C. Examples

Attached to this Handbook are the following examples of economic development incentive programs and related documents:

Appendix B- City of Virginia Beach: Economic Development Investment Program Policy and Procedure; and Sample Application.

Appendix C - City of Danville: Resolution approving an Economic Stimulus Grant Program; Grant Guidelines; and Sample Grant Agreement.

Appendix D- Prince William County: Sample Agreement between County Board of Supervisors and IDA; Sample Technology Incentive Agreement between IDA and Business Prospect; Sample Agreement of Sale between County and Business Prospect.

Appendix E- Virginia Economic Development Partnership: Sample Performance Agreement.

APPENDIX A

MATRIX OF VARIOUS ENTITIES

MATRIX OF VARIOUS ENTITIES

	Create Separate Political Subdivision?	Receive Cash Donations?	Acquire/ Grant Cash Incentives?	Grant Interests In Land?	Issue Bonds?	Levy Taxes or Assessments?	Charge User Fees?	Condemnation?	Limits on Types of Improvements?
Assessment For Local Improvements	No	No	No	No	No	Yes – (Assessments)	No	No	Yes – limited types of infrastructure
CDA	Yes	Yes – some restrictions	No	No	Yes	Yes	Yes	Probably	Fairly broad list of infrastructure
IDA/EDA	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Very broad authority
Local Enterprise Zone Development Taxation Program	No	Yes (limited to incremental increase in taxes)	Yes (through IDA/EDA or chamber of commerce)	No	No	No	No	No	Yes – certain governmental services/economic development
Local Technology Zone	No	No	No – permits reduction in certain fees	No	No	No	No	No	Not clear
Redevelopment & Housing Authority	Yes (Requires referendum to create)	Yes	Yes	Yes	Yes	No	Rents Only	Yes	Primarily residential; broader powers in redevelopment or conservation areas
Sanitary District	No	Not clear	No	Yes	Yes (subject to referendum)	Yes	Yes	Yes, for limited purposes	Limited to certain infrastructure and services
Special Service District	No	Yes	No	Yes	No	Yes (<i>ad valorem</i> only)	No	No	Limited to specific infrastructure and services
Tax Increment Financing	No	No	Not clear	No	TIF bonds are issued by locality	No	No	No	Limited to public improvements
Transportation Improvement District	Yes	Yes	No	No	Yes	No	Yes	Yes	Limited to transportation facilities

APPENDIX B

CITY OF VIRGINIA BEACH

ECONOMIC DEVELOPMENT INVESTMENT PROGRAM POLICY AND PROCEDURE

SAMPLE APPLICATION

**ECONOMIC DEVELOPMENT
INVESTMENT PROGRAM
POLICY AND PROCEDURE**

WHEREAS, the City of Virginia Beach Development Authority (the "Authority") was created pursuant to Chapter 643 of the Acts of Assembly of 1964, as amended (the "Act");

WHEREAS, one of the primary purposes of the Act is to enable development authorities "to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises to locate in or remain in the Commonwealth....";

WHEREAS, pursuant to § 6 of the Act, the Authority has the power, *inter alia*, "to sell, exchange, donate and convey any or all of its facilities or other properties whether realty or personalty whenever the Authority shall find any such action to be in furtherance of the purposes for which the Authority was organized";

WHEREAS, pursuant to § 7 of the Act, "the Authority may foster and stimulate the development of industry in the area within its jurisdiction... [and] may accept, and expend for the purposes stated above, money from any public or private source....";

WHEREAS, pursuant to § 10 of the Act, the City of Virginia Beach (the "City") "is authorized and empowered to make appropriations and to provide funds for the operation of the Authority and to further its purposes";

WHEREAS, the economic development goals and objectives of the City include achieving a higher ratio of nonresidential to residential real estate assessments, investing in land and infrastructure to benefit future economic growth, and maximizing the return of economic development efforts through the development and implementation of programs and strategies that facilitate new business investment and encourage retention and expansion activities thereby improving the overall quality of life in the City;

WHEREAS, the City has established the Economic Development Investment Program ("EDIP") as part of its overall effort to enhance the City's ability to accomplish these goals and objectives;

WHEREAS, pursuant to the authority and empowerment set forth in § 10 of the Act, City Council has determined that it would be in the best interests of the City to provide EDIP appropriations to the Authority to enable the Authority to more effectively

continue its efforts to foster and stimulate economic development by (i) inducing businesses to locate or remain in the City; and (ii) providing incentives to qualifying developers and property owners for the development or redevelopment of under improved or underdeveloped properties, or brownfields, grey fields, or abandoned or blighted properties in areas of the City which have been designated as “Strategic Growth Areas” or “Economic Redevelopment Areas”, including infill development within such areas; and

WHEREAS, the City and the Authority have agreed that the provision of funds in the EDIP account to the Authority for economic development purposes, and the subsequent provision of such funds by the Authority to qualifying recipients, should be subject to policies and procedures which will ensure that the expenditure of such funds is in the public interest and is in furtherance of the purposes for which the EDIP was established;

NOW, THEREFORE, the City of Virginia Beach and the City of Virginia Beach Development Authority hereby adopt the following Economic Development Investment Program Policy and Procedures (the “Policy”):

PART A: POLICY AND PROCEDURE FOR THE PROVISION OF EDIP FUNDS TO QUALIFYING BUSINESSES.

1. **PURPOSE AND INTENT.** The animating purpose of Part A of the Economic Development Investment Program shall be to enhance the ability of the City of Virginia Beach Development Authority to foster and stimulate economic development in the City by inducing new businesses to locate in the City, and existing businesses to remain in the City or to expand their operations.

2. **INVESTMENT CRITERIA.** Except as otherwise provided in paragraph 4 of this Part A, EDIP funds may be awarded pursuant to Part A of this Policy where the Director of Economic Development (the “Director”) has determined, and has advised the Authority that one or more of the following criteria have been met:

- a. The net amount of direct tax revenues returned to the City by a business to which EDIP funds are provided will exceed the amount of EDIP funds so provided no later than thirty (30) months from the date on which the business commences operations at a new or renovated facility;
- b. For every one dollar (\$1) in EDIP funds provided, the business to which such funds are provided will spend twenty-five dollars (\$25) or more in new capital investment, including buildings, furnishings, and/or equipment; and/or

c. Every one thousand dollars (\$1,000) in EDIP funds provided will yield at least one (1) new "full-time equivalent" employment opportunity in the business to which such funds are provided. However, for businesses paying an average annual salary of \$70,000 (excluding benefits) the criteria shall be up to two thousand dollars (\$2,000) in EDIP funds provided will yield at least one (1) new "full-time equivalent" employment opportunity in the business to which such funds are provided.

These criteria shall be reviewed by the Director and the Director of the Department of Management Services on a bi-annual basis. The Director shall recommend any appropriate revisions to the City Council and the Authority for further consideration and action.

In addition to the foregoing criteria, it is the goal of the Authority to approve EDIP funds to businesses that pay an average annual salary of \$35,000 (excluding benefits). However, the Authority reserves the right to deviate from this goal in exceptional cases and for good cause shown.

3. **APPLICATION FOR EDIP AWARD.** A business who desires EDIP funds to locate, relocate or expand its business in the City of Virginia Beach may make application for that purpose through the Department of Economic Development. The applicant shall submit such information and documentation concerning its application as may be required by the Director. The Director shall review the application and information submitted and may, if the Director finds that the application meets the requirement of this Part A, recommend to the Authority that it award EDIP funds to the business.

4. **COUNCIL APPROVAL OF CERTAIN EDIP AWARDS.** If the Director, acting on behalf of the Authority, determines the need to provide EDIP funds to a specific business, but the criteria set forth in paragraph 2 of this Part A have not been met, the Authority shall obtain specific approval from City Council prior to its approval of the provision of EDIP funds for such purpose.

5. **AUTHORITY FINDINGS AND ACTION.** Based upon the recommendation of the Director, the Authority shall either approve or disapprove the proposed provision of EDIP funds to the business. The Authority shall not be required to approve the Director's recommendation, but shall exercise its legislative discretion in determining whether, and to what extent, the application satisfies Part A of this Policy and the Authority's objective of fostering and stimulating the development of industry in the City. Provided, however, that prior to approval, the Authority must make the following findings:

- a. That the animating purpose of the proposed provision of EDIP funds to the business is to serve the public purpose of fostering and stimulating economic development in the City of Virginia Beach, and that the expenditure of such funds will only incidentally enure to the benefit of private interests, if at all;
- b. That the proposed provision of EDIP funds to the business is in furtherance of the purposes for which the Authority was created;
- c. That without the stimulus of the EDIP award, it is unlikely that the business would locate or remain in the City; and
- d. That as of the date of approval of the EDIP award, the business had not yet commenced construction of the proposed improvements.

6. **APPROVAL OF AWARD OF EDIP FUNDS.** Approval by the Authority of the provision of EDIP funds to a specific business pursuant to this Part A shall be in the form of a resolution which shall include the following information:

- a. The name, location, and nature of the business to which the funds will be provided;
- b. The amount of funds that will be provided;
- c. The purpose or purposes for which the funds will be provided;
- d. A statement that the criteria set forth in paragraph 2 of this Part A have been met; or, in the alternative, that City Council has specifically approved provision of EDIP funds for such purpose pursuant to paragraph 4 of this Part A; and
- e. A statement that the findings set forth in paragraph 5 of this Part A have been made by the Authority.

PART B: POLICY AND PROCEDURE FOR THE PROVISION OF EDIP FUNDS TO QUALIFYING DEVELOPERS AND PROPERTY OWNERS FOR THE DEVELOPMENT OR REDEVELOPMENT OF PROPERTIES IN STRATEGIC GROWTH AREAS OR ECONOMIC REDEVELOPMENT AREAS.

1. **PURPOSE AND INTENT.** It is recognized that within the City there are areas that are currently brownfields, greyfields or vacant, abandoned, under

improved or underdeveloped with improvements or land uses which are not economically viable but, if developed, should stimulate industry and economic development within the City. Moreover, such properties and areas, if developed or redeveloped, may reasonably be expected to (i) generate additional tax revenue as a result of capital investment; (ii) create additional job opportunities; (iii) influence similar redevelopment and additional investment in nearby properties; (iv) further the goals of the Comprehensive Plan and be consistent with the City's Economic Development Strategy and good zoning principles; and (v) lead to the establishment of safe and convenient neighborhoods and workplaces. Accordingly, it is the animating purpose of the Economic Development Investment Program under Part B of this Policy to enhance the ability of the City of Virginia Beach Development Authority to foster and stimulate economic development in the City by providing incentives for the development or redevelopment of properties described herein.

2. **ECONOMIC REDEVELOPMENT AREAS AND STRATEGIC GROWTH AREAS.** The Directors of the Departments of Economic Development and Planning shall identify areas of the City (i) that are currently brownfields, greyfields, or vacant, abandoned, under improved or underdeveloped, and (ii) which should be considered for redevelopment or special development opportunities, but may lie outside of the Strategic Growth Areas as set forth in the City's Comprehensive Plan. Such areas shall be known as "Economic Redevelopment Areas". Once identified, an Economic Redevelopment Area must be submitted to the City Council for designation as such by ordinance. To qualify for EDIP funds under Part B of this Policy, a developer or owner of property must demonstrate that the subject property is located within a Strategic Growth Area which has been designated as such in the Comprehensive Plan or has been designated an Economic Redevelopment Area as defined herein by ordinance of the City Council. For purposes of this Policy, the term "brownfields" means vacant, abandoned or under improved real property large enough to support significant expansion, redevelopment or reuse, but for which such expansion, redevelopment or reuse is complicated by the presence of a substantial amount of hazardous substances, pollutants, or contamination. The term "greyfields" means underperforming, declining or vacant real estate.

3. **QUALIFYING LAND USES.** EDIP funds under Part B of this Policy may be provided for office, industrial, retail, hotel and mixed use development (including high density and multi-family residential uses).

4. **INVESTMENT CRITERIA.** EDIP funds may be awarded pursuant to Part B of this Policy in such instances where the Director has determined, and has advised the Authority, that both of the following criteria have been met:

- a. The net amount of direct tax revenues returned to the City as a result of the development or redevelopment for which the EDIP

funds are provided will exceed the amount of the EDIP funds provided no later than 48 months following the payment of the EDIP award; or where flexibility for tax abatement has been granted by the City, the amount of direct tax revenues not abated as a result of the development or redevelopment for which EDIP funds are provided will exceed the amount of the EDIP funds provided no later than 48 months following the payment of the EDIP award; and

b. For every one dollar (\$1) in EDIP funds provided, the owner or developer of the development or redevelopment for which such funds are provided will spend twelve and 50/100 dollars (\$12.50) or more in new capital investment, including buildings, furnishings, and/or equipment.

The foregoing investment criteria and required return to the City shall be interpreted as being a threshold for consideration for the award of EDIP funds. No award of such funds may be made unless all other requirements of Part B of this Policy are satisfied and all findings stated in Part B of this Policy are made.

5. **AVAILABILITY OF FUNDS.** EDIP funds may be authorized for use pursuant to Part B of this Policy only to the extent that they have been appropriated by the City Council. Further, provided that in any given fiscal year, the Authority shall not award more than fifty percent (50%) of its appropriation for EDIP use for that year for development or redevelopment purposes pursuant to Part B of this Policy without authorization of the City Council.

6. **APPLICATION FOR EDIP AWARD.** A qualifying developer or owner of land who desires EDIP funds for use in the development or redevelopment of property located in a Strategic Growth Area or an Economic Redevelopment Area may make application for that purpose through the Department of Economic Development. The applicant shall submit such information and documentation concerning its application as may be required by the Director. The Director shall review the application and information submitted and may, if the Director finds that the development or redevelopment of the property described in the application satisfies all requirements of this Part B, recommend to the Authority that it award EDIP funds to the applicant. In determining whether to recommend that EDIP funds be awarded to an applicant, the Director shall find as follows:

a. Whether the provision of EDIP funds is necessary to stimulate the development or redevelopment of the property/area; and

b. Whether the development or redevelopment satisfies the investment criteria set forth in paragraph 4 of this Part B.

Additionally, the Director may consider the following:

- c. The amount of EDIP funds remaining and available for use pursuant to this Policy for the fiscal year.
- d. The economic return to the City generated by the development or redevelopment in addition to the criteria set forth in paragraph 4 of this Part B .
- e. The expertise and experience of the developer or property owner in redeveloping brownfields, greyfields, abandoned, blighted, under improved and underdeveloped properties.
- f. The degree to which the redevelopment may influence development or redevelopment within the Strategic Growth Area or the Economic Redevelopment Area and adjacent or nearby properties.
- g. The extent to which the development or redevelopment may serve to implement a change in use which is consistent with and/or furthers the goals of the Comprehensive Plan and the City's Economic Development Strategy.
- h. The number and types of jobs which the development or redevelopment may expect to generate.
- i. The amount of the applicant's capital investment in the development or redevelopment of the property.
- j. The extent to which the plan of development or redevelopment incorporates mixed uses, provides open space and focuses on transportation and transit accessibility.

7. **AUTHORITY FINDINGS AND ACTION.** Based upon the recommendation of the Director, the Authority shall either approve or disapprove the award of EDIP funds to the applicant. The Authority may attach conditions to the approval of the award of EDIP funds. In the case of a brownfield property, the Authority shall attach the condition that prior to receiving EDIP funds, the recipient of EDIP funds shall provide to the Authority evidence of all permits or approvals as required by state, federal and local regulatory agencies and compliance therewith. The Authority shall not be required to approve the Director's recommendation, but shall exercise its legislative discretion in determining whether, and to what extent, the

applicant's proposed development or redevelopment satisfies Part B of this Policy and the Authority's objective of fostering and stimulating the development of industry in the City. Provided, however, that prior to approval of the award of EDIP funds to an applicant, the Authority must make the following findings:

- a. That the animating purpose of the proposed provision of EDIP funds to the applicant is to serve the public purpose of fostering and stimulating economic development in the City of Virginia Beach, and that the expenditure of such funds will only incidentally enure to the benefit of private interests, if at all;
- b. That the proposed provision of EDIP funds to the applicant is in furtherance of the purposes for which the Authority was created;
- c. That without the stimulus of the EDIP award, it is unlikely that the property would be developed or redeveloped to the extent proposed, or at the current time;
- d. That as of the date of approval of the EDIP award, the applicant had not yet commenced construction of the proposed development or redevelopment;
- e. That the property has been designated (or is in an area which has been designated) as a Strategic Growth Area by the Comprehensive Plan or an Economic Redevelopment Area by ordinance of the City Council;
- f. That the proposed development is consistent with the City's Comprehensive Plan and the City's Economic Development Strategy; and
- g. That the scope and quality of the plan of development or redevelopment as proposed, will serve to influence redevelopment and additional capital investment in adjacent or nearby properties.

8. **APPROVAL OF THE AWARD OF EDIP FUNDS.** Approval by the Authority of the provision of EDIP funds pursuant to this Part B shall be in the form of a resolution which shall include the following information:

- a. The name of the owner or developer of the property, and the location and a brief description of the development or redevelopment;
- b. The amount of funds that will be provided;
- c. The purpose or purposes for which the funds are to be provided;

- d. A statement that the criteria set forth in paragraph 4 of this Part B have been met;
- e. A statement that the findings set forth in paragraph 7 of this Part B have been made by the Authority; and
- f. Any conditions to the approval of the award of the EDIP funds by the Authority.

9. ALTERNATIVE USES OF PART B FUNDS BY THE AUTHORITY TO PURCHASE AND IMPROVE PROPERTY IN A STRATEGIC GROWTH AREA OR AN ECONOMIC REDEVELOPMENT AREA.

The Authority may use EDIP Funds to purchase and improve property within a Strategic Growth Area or an Economic Redevelopment Area. Prior to the approval of the use of EDIP funds for such acquisition, the Authority must find that:

- a. The property is located within a Strategic Growth Area or an Economic Redevelopment Area; and
- b. The acquisition and/or improvement of the property by the Authority and its subsequent development or redevelopment will be in conformity with and/or furthers the goals of the City's Comprehensive Plan, the City's Economic Development Strategy and Part B of this Policy.

In addition to any property purchased using EDIP funds pursuant to paragraph 9 of this Part B, the Authority may also use EDIP funds for the following improvements to such property: (i) the installation of infrastructure; (ii) the demolition of existing structures; or (iii) the remediation or cleanup of adverse environmental conditions. The Authority may dispose of such property in accordance with state law and may subsequently sell such property to a private party for development or redevelopment. In the event of such sale, the Authority shall attach appropriate conditions to assure that the development or redevelopment is in conformity with and/or furthers the goals of the City's Comprehensive Plan, the City's Economic Development Strategy, and is in furtherance of the objectives of Part B of this Policy.

The proceeds of any property purchased by the Authority and sold pursuant to paragraph 9 of this Part B shall be returned to the EDIP fund account.

PART C: GENERAL PROVISIONS APPLICABLE TO BOTH PARTS A AND B.

1. **SEPARATE ACCOUNT FOR EDIP FUNDS.** EDIP funds shall be maintained by the Authority in a separate account and shall not be commingled with other Authority funds.

2. **EDIP FUND EXPENDITURES.** All expenditures of EDIP funds shall be in keeping with this Policy and may enure only incidentally to the benefit of private interests. In addition to the use of EDIP funds pursuant to Parts A and B of this Policy, EDIP funds may also be utilized to conduct appraisals, financial and market studies, and architectural and engineering studies directly related to specific economic development initiatives and/or projects being conducted by the Authority on behalf of the City.

3. **PAYMENT OF EDIP FUNDS.** When EDIP funds are awarded pursuant to either Part A or Part B this Policy, they shall be paid to the authorized business or the owner or developer at such time as the Director shall (i) obtain copies of invoices/receipts from the business, or owner or developer showing the actual costs incurred for the purpose or purposes for which the funds are to be provided; (ii) determine that the development or redevelopment is in conformity with the plan of development presented to the Authority and with all conditions which may have been attached to the approval of the award of the funds by the Authority; and (iii) where required by the Authority, the business, or owner or developer shall execute and deliver to the Authority an EDIP Recapture Agreement in a form acceptable to counsel for the Authority.

4. **SPECIFIC PURPOSES FOR THE USE OF EDIP FUNDS.** When EDIP funds are awarded to an applicant pursuant to this Policy, such funds shall be used for the purposes set forth in § 2.2-115(C) of the Code of Virginia. These purposes are as follows:

Public and private utility extension or capacity development on and off-site; road, rail, or other transportation access costs beyond the funding capability of existing programs; training costs; site acquisition; grading, drainage, paving, and any other activity required to prepare a site for construction; construction or build-out of publicly owned buildings; or anything else permitted by law.

5. **REPORTING.** The Authority shall provide City Council semi-annual reports, on or before June 30 and December 31 of each year, outlining, in detail, the manner in which the funds were provided. Such reports shall include, at a minimum, the information required by subsections a, b, and c of paragraph 6 of Part A, subsections

a, b, and c of paragraph 8 of Part B, and information demonstrating compliance with the provisions of this Policy and Procedure.

6. **AMENDMENTS TO POLICY.** The provisions of this Policy shall not be amended without the prior consent and approval of the City Council and the Authority.

7. **APPLICATION OF POLICY.** This Policy is specifically applicable to the expenditure of EDIP funds. This Policy is not intended to be, nor shall it be deemed to be, applicable to the use of public funds from any source other than the EDIP.

8. **EFFECTIVE DATE OF POLICY.** This Policy shall become effective immediately upon its approval by the City of Virginia Beach and the City of Virginia Beach Development Authority, which approval shall be evidenced by signature of the Mayor of the City of Virginia Beach and the Chair of the City of Virginia Beach Development Authority acting by, and on behalf of, the City and the Authority, respectively.

Mayor, City of Virginia Beach

**Chair, City of Virginia Beach
Development Authority**

Virginia Beach Development Authority
Economic Development Investment Program
Fund
Consideration Application

Application

(All questions must be answered)

1. ***Name of Company.***

Name, address and telephone number of the project contact.

Year company was established.

2. ***Project Site, Building and/or Lease/Purchase Details.***

Lease ☐ Lease Term

Purchase ☐ Existing Building ☐ New Construction ☐

Project Parameters

Site acreage

Building size (SF)

Type of Facility

Address of Project

3. ***Capital Investment*** (within the next 30 months)

New Real Estate Investment \$

New Investment in Furniture, Fixtures and Equipment \$

Existing Investment in Furniture, Fixtures and Equipment \$

New Investment in Machinery and Tools \$

Existing Investment in Machinery and Tools \$

4. ***Employment*** (within the next 30 months)

Current employment in Virginia Beach

New employment in Virginia Beach

Total payroll generated in Virginia Beach \$

Average wage per employee (not including benefits) \$

5. **Business Organization**

Corporation ☐
Limited Liability Company ☐
Partnership ☐
Sole Proprietorship ☐
Other ☐ Explain:

Company NAICS/SIC Designation

6. **Public Company**

Yes ☐ Symbol and exchange

No ☐ Any plans for an IPO within the next 5 years? Yes ☐ No ☐

7. **Certified and Audited Financial Statements**

Enclose for the past 3 years (required for consideration) ☐ Attached

8. **Disclosure Statement**

List all officers and directors of the corporation. If not incorporated, indicate the names of all partners.

9. **Use of EDIP Funds**

State code only allows EDIP funds to be used for the following purposes. Check all potential uses for this project.

- ☐ Off-site utility improvements/upgrades
- ☐ Public road improvements
- ☐ Traffic light improvements
- ☐ Regional BMPs
- ☐ Site preparation (applies only to site purchased from the VBDA)
- ☐ Training costs

10. ***Please list or attach any other information that may assist in the evaluation of this application.***

I acknowledge that the City of Virginia Beach Department of Economic Development and the Virginia Beach Development Authority will rely upon the accuracy of the information contained herein in reaching a determination of whether, and to what extent, my company/business may qualify for EDIP assistance. Therefore, I agree that, should the facts or information provided herein subsequently change, or should I learn any error in the information provided, I will immediately correct or supplement the information provided in this document.

Name

Signature _____

Title

Date

APPENDIX C

CITY OF DANVILLE

RESOLUTION APPROVING AN ECONOMIC STIMULUS GRANT PROGRAM

GRANT GUIDELINES

SAMPLE GRANT AGREEMENT

PRESENTED: _____

ADOPTED: _____

RESOLUTION NO. 2001-____.____

A RESOLUTION APPROVING AN ECONOMIC STIMULUS GRANT PROGRAM FOR CAPITAL INVESTMENT AND APPROVING THAT SUCH GRANT PROGRAM BE ADMINISTERED THROUGH THE INDUSTRIAL DEVELOPMENT AUTHORITY.

WHEREAS, the City of Danville needs to be competitive in the recruitment and expansion of economic development; and

WHEREAS, in order to create an incentive to assist our existing businesses to expand their operations within the City of Danville, it is beneficial to create a grant program; and

WHEREAS, in order to better facilitate and promote the health, safety and welfare of the citizens of the City of Danville, the Industrial Development Authority and the City Administration proposes a grant stimulus package to assist in the expansion of our existing companies and industries; and

WHEREAS, both the IDA and City Administration have proposed these grant guidelines as a tool to promote economic expansion within the City of Danville.

THEREFORE, BE IT RESOLVED by the City Council of the City of Danville, Virginia that it does hereby approve the attached grant guidelines and does hereby authorize and instruct the Industrial Development Authority of the City of Danville, Virginia to enter into such agreements as its deems necessary in order to administer the proposed grant program as outlined in these guidelines.

APPROVED:

MAYOR

ATTEST:

CLERK

Approved as to
Form and Legal Sufficiency:

City Attorney

Local Industry Expansion Grant Program Guidelines

Overview

The grant guidelines outlined below create a five (5) year grant incentive to promote the expansion of existing businesses and industries within the city limits of the City of Danville, Virginia. Further, the grant program outlined by these guidelines will make our local industries more competitive within their respective corporate structure for future expansion of their Danville facilities. It is believed by the Industrial Development Authority of the City of Danville, Virginia, that this grant program will help promote the health, safety, and welfare of the citizens of Danville, Virginia, by creating an incentive to expand economic development within the City of Danville, Virginia. This grant program will further benefit the citizens of Danville through the possible creation of new jobs during construction and/or permanent employment at the expanded Danville facilities. One of the major goals of the Industrial Development Authority is to facilitate economic growth in the City of Danville. The grant program outlined herein helps to achieve that goal.

Grant Guidelines

In order to qualify for the Local Industry Expansion Grant Program an applicant must satisfy the following guideline requirements:

1. Any local business and/or industry intending to participate in this Local Industry Expansion Grant Program must complete an application prior to any public announcement regarding the proposed expansion.
2. The local business applicant must be located within the city limits of the City of Danville, Virginia
3. The local business applicant must make new capital improvements to their facility located within the city limits of the City of Danville, Virginia, in one calendar year in the amount of at least \$10,000,000.
4. Any new capital improvements in the amount of at least \$10,000,000 must be verified by the annual filing of the machinery and tools tax schedule filed with the Commission of Revenue of the City of Danville, Virginia, before any grant proceeds are disbursed.
5. The local business applicant agrees to use its best efforts to maintain its current employment levels for any calendar year in which the grant proceeds are issued.

6. The local business applicant shall maintain the new capital investment value listed in the applicant's machinery and tools tax schedule for each of the five-years in order to be entitled to the full grant payment payable after a five-year period.

7. "The Local Industry Expansion Grant Payment" shall be defined as 0.1% of the new capital investment made in the capital investment calendar year provided such new capital investment is between \$10,000,000 and \$25,000,000. However, should the new capital investment made within the capital investment calendar year be greater than \$25,000,000, then the grant payment shall be defined as 0.15% of such new capital investment.

8. The local business applicant must enter into a grant agreement approved by the Industrial Development Authority.

**CITY OF DANVILLE
ECONOMIC STIMULUS
GRANT PROGRAM**

THIS GRANT AGREEMENT, made as of this _____ day of _____, 20____, by and between the INDUSTRIAL DEVELOPMENT AUTHORITY of the City of Danville, Virginia, a political subdivision of the Commonwealth of Virginia (the "IDA") and _____, a corporation under the laws of the state of _____, ("_____"). .

WHEREAS, the City of Danville, through the IDA, has an expansion grant program to act as an incentive for local businesses who employ at least 100 full time employees; and make at least Ten Million Dollars (\$10,000,000) in new machinery and tools investment to their Danville facility in any one calendar year during the grant period, where no previous announcement has been made concerning such expansion; and

WHEREAS, _____ has agreed to expand its manufacturing process, within the City limits of the City of Danville, Virginia (the "Plant"); and

WHEREAS, _____ has proposed to make equipment acquisitions for use in the Plant in the City of Danville and is planning on making an estimated capital expenditure in the amount of at least Ten Million Dollars \$10,000,000 in new machinery and tools investment during the 20____ calendar year.

WHEREAS, the IDA has a grant program which allows for a grant in the amount of 0.15% of the new machinery and tools investment for each of the next five (5) years upon proof that _____ has made and maintained at least Ten Million Dollars (\$10,000,000) in new machinery and tools investment in its Danville facility during the grant period; and

WHEREAS, the IDA finds that the provisions of this Grant Agreement, and the commitments herein will expand and/or retain jobs by making _____ a more competitive company, promote expansion of industry within the City of Danville, and expand the City's tax base by inducing manufacturing and industrial development within the City limits, and that such new development will promote the safety, health, welfare, convenience, and prosperity of the citizens of the City of Danville.

NOW, THEREFORE, the IDA and _____ agree as follows:

I. DEFINITIONS:

1. Calendar Year or Tax Year - Calendar year or tax year shall mean from January first to December thirty-first of each year.

2. New Machinery and Tools Investment - New Machinery and Tools Investment shall mean the increased investment listed on the 20____ tax schedules filed by _____ with the Commissioner of Revenue and subject to machinery and tools tax for the tax year 20____.

3. Equipment - Under the terms of this Agreement the word equipment shall refer only to such equipment, machinery, or tools subject to Machinery and Tools Tax under Virginia Law as adopted by the City of Danville.

4. Existing Machinery and Tools Investment - Existing Machinery and Tools Investment shall mean the value of the equipment listed on the tax year 20__ Machinery and Tools Tax Schedule filed with the Commissioner of Revenue.

5. Grant Payment - Grant payment shall be defined as 0.15% of the New Machinery and Tools Investment listed on the 20__ tax year schedule provided such New Machinery and Tools Investment for that tax year is at least Ten Million Dollars (\$10,000,000) more than the Existing Machinery and Tools Investment listed the previous year.

6. Grant Period - Grant period shall be defined as calendar years 20__ through 20__.

7. Maintenance of Machinery and Tools Investment - Maintenance of Machinery and Tools investment shall mean that _____ shall maintain the New Machinery and Tools Investment listed on the 20__ Machinery and Tools Tax Schedule through the grant period.

8. Maintenance of Existing Machinery and Tools Investment - Maintenance of Existing Machinery and Tools Investment shall mean that _____ shall use its best efforts to maintain the Existing Machinery and Tools Investment listed on the 20__ Machinery and Tools Tax Schedule.

II. TERMS OF INCENTIVE GRANT:

1. Plant Operation: _____ agrees to use its best efforts to expand its operations through new capital expenditures at the Danville Plant and to maintain its already increased operations at the Plant through the 20__ calendar year.

2. Capital Expenditures: _____ agrees, that within the 20__ calendar year _____ will make new machinery and tools investment (by order, purchase or relocation, new and/or used equipment) with a new tax value of at least Ten Million Dollars (\$10,000,000), and to install such equipment at the Danville Plant within the 20__ calendar year.

_____ further agrees that it will maintain such new machinery and tools investment in their Danville Plant through the grant period as verified by the filing of the annual machinery and tools tax schedule with the Commissioner of Revenue.

3. Job Requirements: _____ understands that it must maintain at least 100 full time employees through the grant period to qualify for any grant payment.

_____ further agrees to use its best efforts to maintain the current employment levels of _____ employees through the grant period.

4. Funds Extended to _____ :

a. After review of the schedule for Machinery and Tools tax filed annually with the Commissioner of Revenue, the IDA and/or the City's

Director of Economic Development shall verify that _____ has made and maintained the new machinery and tools investment in the City of Danville of at least Ten Million Dollars (\$10,000,000). If _____'s new machinery and tools investment in the City of Danville is at least Ten Million Dollars, the IDA shall extend grant funds in the amount of 0.15% of _____'s new machinery and tools investment as listed on the 20____ tax schedule filed with the Commissioner of Revenue. The initial grant payment shall be made no later than August 1, 20____.

b. For each successive calendar year of the grant period, the IDA and/or the City's Director of Economic Development will review the schedule for Machinery and Tools Tax filed with the Commissioner of Revenue to ensure that _____ has maintained the new machinery and tools investment as listed on the 20____ Machinery and Tools Tax Schedule. If _____ has maintained the new machinery and tools investment, then the IDA shall make the grant payment on or before August 1st of the following year in accordance with the schedule set forth in the paragraph above.

c. In order for _____ to be eligible to receive its annual grant payment as described in this Agreement, _____ must be current on all of its obligations due to the City. These obligations

shall included but not be limited to all utility payments, taxes, licensing fees, and/or permit fees.

d. It is expressly understood that if all of the grant terms are satisfied in accordance with this Grant Agreement, then all grant funds shall be irrevocably deemed non-refundable upon payment.

5. Grant Payment Terms:

a. The Grant will not bear interest except as provided in section b. below. If _____ has installed and maintained the new machinery and tools investment during the grant period; used its best efforts to maintain the existing machinery and tools and employment levels (also maintaining at least 100 full time employees), then all grant funds are conveyed to _____ shall be irrevocably deemed non-refundable.

b. However, if for any year of the grant period, _____ fails to maintain the new machinery and tools as shown on the schedule filed for the 20___ tax year with the Commissioner of Revenue, fails to use its best efforts to maintain the existing machinery and tools, fails to use its best efforts to maintain employment levels of _____ full time employees or at anytime during the grant period fails to maintain at least 100 full time employees; then the IDA shall be under no obligation to make any future grant payments under this agreement.

6. Retention of New Capital Investment of Machinery and Tools:

a. _____ agrees to keep and retain the new machinery and tools investment in the Danville Plant through the grant period.

b. _____ agrees to use its best efforts to maintain the existing machinery and tools investment in the Danville Plant through the grant period.

c. If _____ fails to maintain its new capital investment of machinery and tools or use its best efforts to maintain its existing machinery and tools investment through the grant period, then the IDA shall be under no obligation to make any future grant payments under this agreement.

7. Equipment Report: _____ agrees to provide a certificate to the IDA and/or the City's Director of Economic Development that it has complied with the terms and conditions of this Agreement and to provide a copy of its annual filing of the Machinery and Tools Tax Schedule with the Commissioner of Revenue to the IDA and/or the City's Director of Economic Development, verifying that _____ has made and/or maintained sufficient new machinery and tools investment within the City of Danville to qualify for this grant.

8. Audit Requirements: _____ agrees to cooperate with the IDA and/or the City's Director of Economic Development in meeting any audit requirements necessary to

verify the investment of new machinery and tools in the City of Danville.

III. MISCELLANEOUS:

1. Official Approval: This form of this agreement was approved by a vote of Ayes ___, Nays ___, Absent ___, by the City, at a regularly called and convened meeting, with a quorum present, on the ___ day of _____, 20__.

2. Governing Law: This agreement shall be construed in accordance with the laws of the Commonwealth of Virginia.

3. Annual Appropriations: It is expressly understood by the parties that this Agreement does not create a debt upon the City of Danville and that any grant amounts referenced in this Agreement are contingent upon the annual appropriations of the City of Danville, by its City Council.

4. Execution: This agreement is signed in duplicate, each of which shall constitute an original.

WITNESS the following signatures and seals:

INDUSTRIAL DEVELOPMENT AUTHORITY OF
THE CITY OF DANVILLE, VIRGINIA

By: _____
Chairman

(SEAL)

ATTEST:

Secretary

COMPANY NAME _____

By: _____
Its: _____

(SEAL)

ATTEST:

Secretary

COMMONWEALTH OF VIRGINIA

CITY OF DANVILLE

The foregoing instrument was acknowledged before me
this _____ day of _____, 20____, by
_____, in his capacity as Chairman for the
Industrial Development Authority of the City of Danville,
Virginia.

Notary Public

My commission expires: _____

STATE OF _____

CITY/COUNTY OF _____

The foregoing instrument was acknowledged before me
this _____ day of _____, 20____, by
_____, in his capacity as _____ of
_____, on behalf of the corporation.

Notary Public

My commission expires: _____

APPENDIX D

PRINCE WILLIAM COUNTY

**SAMPLE AGREEMENT BETWEEN COUNTY BOARD
OF SUPERVISORS AND IDA**

**SAMPLE TECHNOLOGY INCENTIVE AGREEMENT
BETWEEN IDA AND BUSINESS PROSPECT**

**SAMPLE AGREEMENT OF SALE
BETWEEN COUNTY AND BUSINESS PROSPECT**

AGREEMENT

THIS AGREEMENT made this _____ day of _____, 2003, by and between the **BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA** (hereafter referred to as "Board"), a body politic and corporate, and the **INDUSTRIAL DEVELOPMENT AUTHORITY OF THE COUNTY OF PRINCE WILLIAM** (hereafter referred to as "IDA"), a political subdivision.

WITNESSETH:

WHEREAS, the Board is vitally interested in promoting economic development to enhance the tax base in Prince William County, and economic development is the primary goal in the Board's Strategic Plan; and

WHEREAS, the IDA has been organized by the Board pursuant to Sections 15.2-4900 *et seq.*, VA Code Ann., to promote economic development; and

WHEREAS, the IDA has the authority under Virginia law to promote economic development and attract new industry to the County through a variety of different methods; and

WHEREAS, the Board intends to foster economic development incentive programs with the IDA to induce targeted industries or businesses to locate or expand in the County.

WHEREAS, the Board and the IDA desire to work together in developing and implementing creative and innovative mechanisms for attracting desirable businesses to locate in certain high priority areas in the County consistent with the Board's targeted industry or business program and the Strategic Plan.

WHEREAS, the Board and the IDA have approximately five (5) years of successful cooperative experience working together pursuant to an earlier Agreement between the parties hereto ("Prior Agreement"), executed on July 28, 1998, on this subject; and

WHEREAS, the Board and the IDA wish to use this extensive experience to refine their cooperative relationship by executing this new Agreement between the parties to clarify and amplify the understanding and responsibilities of the parties hereto and to continue the successful implementation of incentive programs in the public interest.

NOW, THEREFORE, the Board and the IDA hereby agree as follows:

1. The Board will use the IDA to successfully implement and carry out economic development incentive programs for targeted industries or businesses from time to time as the Board deems necessary and expedient to meet the Board's Strategic Plan goals and objectives, to increase the tax base, to attract new industry to the County and to provide jobs for residents.

2. The Board will provide funding, property or other assets (collectively "assets") to the IDA for programs which the Board initiates in order to permit the IDA to accomplish economic development incentive programs in accordance with the Board's instructions. The IDA will hold the assets transferred to it by the Board separate and apart from any other asset of the IDA pending transfer to the beneficiary specified by the Board in its instructions to the IDA. The IDA will disburse the assets to the beneficiary only in accordance with the specific written instructions furnished by the Board or its designee. The IDA may rely on instructions to disburse assets to the beneficiary when the instructions come in the following forms: (1) a Board resolution, certified by the

Clerk to the Board, (2) a letter or memorandum, signed or initialed by the Chairman of the Board, the County Executive, or designee, or the Director of Economic Development, or (3) a draft agreement between the IDA and the beneficiary, which agreement has been negotiated and prepared by the County Executive, the County Attorney, and/or the Office of Economic Development. Where the IDA receives instructions in the form of a draft agreement, the IDA shall not disburse any assets until all parties sign the agreement. If the Board's instructions make the disbursement of assets contingent upon the occurrence of certain facts, the IDA shall delay disbursement until the IDA receives instructions, by any one of the three methods described above, that the facts have occurred.

3. The IDA agrees to timely address all Board requests for cooperative participation on specific programs and to cooperate with the County Executive, or designee, and the Department of Economic Development to facilitate implementation of programs.

4. The IDA agrees to handle and process economic development incentive programs funded by the Board in accordance with the Board's instructions, as given by the Board, the County Executive, or the Economic Development Director in accordance with paragraph 2 of this Agreement. The IDA's obligations under this Agreement are limited to the assets provided by the Board and nothing herein shall result in any pecuniary liability of the IDA.

5. The IDA will not charge the Board a fee for the handling of economic development incentive programs funded by the Board. The Board understands that the IDA may continue to charge a fee for industrial development or revenue bond projects.

6. The Board will pay the actual out-of-pocket expenses as incurred by the IDA with respect to any development incentive program funded by the Board through the IDA upon submission of a properly authenticated invoice. The Board acknowledges that the individual IDA members and officers, which officers are also County employees, will be covered by the County's indemnification policy. The IDA will not be liable to the Board for any outstanding commitments to an economic development incentive program that the Board does not fund.

7. Upon receiving assets from the County for economic development incentive programs, the IDA will disburse said assets for the specified goals and objectives set forth in the Board's or its designee's written instructions to the IDA. In its instructions, the Board may establish certain conditions or requirements (collectively "requirements"), such as employment and investment requirements, which the beneficiary is required to meet in order to receive or retain the assets. The Board will transmit to the IDA the instructions regarding requirements by any of the three methods described in paragraph 2 of this Agreement, and the IDA may rely on instructions so transmitted. In all instances, the transfer of assets to a beneficiary and the establishment of requirements will be the subject of a written agreement between the IDA and the beneficiary. The IDA will consult with the Board, the County Executive and/or the Director of Economic Development regarding non-compliance with the requirements, breach of an agreement, or a beneficiary's filing for bankruptcy, and will take such action as is mutually agreed upon by the IDA and the Board to enforce any agreement. Paragraph 6 of this Agreement will apply to any IDA actions to enforce compliance with an agreement or to pursue a bankruptcy claim.

8. This Agreement is intended to be ongoing, and to foster a cooperative, flexible and continuing working relationship between the Board and the IDA to permit proper and expeditious response to the Board's economic development requirements as the Board implements programs and makes funding available to the IDA.

9. This Agreement may be modified in writing by the mutual consent of both parties hereto. In the event this Agreement is modified or terminated, any incentive programs in progress through the IDA and funded by the Board will be completed by the IDA in accordance with the Board's stated directions at such time.

10. This Agreement may be terminated by either party with written notice given ninety (90) days in advance of the termination date.

11. The parties mutually agree that this Agreement supercedes the July 28, 1998 Agreement between the parties and hereby agree to waive the 90 day advance notice provision in paragraph 10 therein. The parties also agree that the July 28, 1998 Agreement remains applicable with respect to all economic incentives furnished by the IDA between that date and the date of this Agreement.

12. This Agreement authorizes certain actions to be taken by the Chairman of the Board and the County Executive or designee. Authority for taking these actions may respectively be delegated as deemed appropriate by the Chairman or County Executive,

provided such delegation of authority is in writing and signed by the Chairman of the Board and/or the County Executive and such writing is furnished to the IDA.

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA

ATTEST:

CLERK TO THE BOARD

BY: _____
CHAIRMAN

INDUSTRIAL DEVELOPMENT AUTHORITY
OF THE COUNTY OF PRINCE WILLIAM

ATTEST:

SECRETARY

BY: _____
CHAIRMAN

w:\jlh\ida bocs agreement

AGREEMENT

THIS AGREEMENT made this ____ day of _____, ____, by and between the **INDUSTRIAL DEVELOPMENT AUTHORITY OF THE COUNTY OF PRINCE WILLIAM**, (hereinafter referred to as "IDA"), a political subdivision, and _____ (hereinafter referred to as "_____"), a _____ corporation.

WITNESSETH:

WHEREAS, the IDA has been created to promote the economic development of Prince William County, Virginia (the "County") pursuant to enabling legislation under Section 15.2-4900 *et seq.*, VA Code Ann.; and

WHEREAS, the IDA has authority to make grants of money or property for the purposes of economic development pursuant to Section 15.2-4905, VA Code Ann., and

WHEREAS, _____ is seeking to locate a certain technology facility in Prince William County, Virginia; and

WHEREAS, _____ desires to purchase land and to construct and equip a technology facility in Prince William County to permit its new technology facility to be located in the County and its staff of employees to be expanded; and

WHEREAS, _____ desires certain financial assistance in order to finalize its location to the County; and

WHEREAS, the Prince William County Board of County Supervisors has included technology facilities among the list of targeted industries on which the County's economic development efforts are focused; and

WHEREAS, this Agreement is consistent with the agreement entered into by and between the IDA and the Board of County Supervisors for granting incentives to targeted industries locating in the County and for promoting long term economic development in the County; and

WHEREAS, it is in the public interest of the citizens of Prince William County for the IDA to assist with the location of the _____ new technology facility in the County, which will benefit the County through an increase in the tax base and the availability of additional employment opportunities for its citizens, thereby promoting the health, safety, welfare, convenience and prosperity of the citizens of the County; and

WHEREAS, it is anticipated that _____ will construct and occupy a new technology facility consisting of approximately _____ square feet of floor space with an estimated construction value of \$ _____ located in the County by approximately _____, and will create at least _____ new jobs in Virginia, including _____ jobs located in Prince William County, by approximately _____; and

WHEREAS, the Board of County Supervisors has appropriated \$ _____ to the IDA for use in assisting _____ with land acquisition, site development and infrastructure costs as an incentive for _____ to locate its new technology facility in the County pursuant to resolution adopted _____; and

WHEREAS, the IDA and _____ desire to enter into this Agreement to memorialize the understandings and conditions under which financial incentives will be provided to _____ by the IDA for _____ to use in connection with its locating in Prince William County, and to set forth the obligations and responsibilities of the parties in connection therewith;

NOW, THEREFORE, in consideration of the mutual promises of the parties and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby state and agree as follows:

1. The IDA agrees to grant to _____ the total sum of \$ _____ in County funds to be used by _____ for land acquisition, site development and infrastructure improvements in accordance with the disbursement provisions contained in paragraph 8 hereafter.

2. _____ agrees to construct a new technology facility on the Innovation @ Prince William property consisting of approximately _____ square feet of floor space, with an estimated construction value of approximately \$ _____, and to occupy the new technology facility located in Innovation @ Prince William by approximately _____. _____ agrees to enter into a construction contract and to initiate construction of the new technology facility by _____.

_____ agrees to create a minimum of _____ new jobs in Virginia, including _____ jobs located in the County, by approximately _____.

3. _____ agrees that it will install equipment in its new technology facility in the County having a total value of \$ _____, all of which equipment will be installed in its new technology facility by approximately _____.

4. If _____ abandons this project without completing the construction of the new _____ square foot technology facility by _____, or fails to create a minimum of _____ new jobs in Virginia, including _____ jobs located in the County by _____, or fails to install at least \$ _____ in programmable computer equipment and peripherals by _____, then _____ agrees to repay the IDA the entire

\$ _____ in County funds granted to _____ by _____. Any refund paid by _____ to the IDA under this provision shall be repaid to the County.

5. If _____ fails to have ninety percent (90%) of the \$ _____ in equipment installed by _____, _____ shall reimburse the IDA the part of the \$ _____ in County funds that is proportional to the shortfall in the capital investment as set forth above. The amount of the County funds to be refunded to the IDA will be equal to the product obtained when the percentage of _____ shortfall is multiplied by the County funding of \$ _____. Any refunds paid by _____ to the IDA under this provision shall be repaid to the County.

6. In order to retain the \$ _____ in County funding, _____ agrees that it will maintain its new technology facility, equipment and employees in Prince William County for a minimum of two (2) full calendar years after the occupancy of the new technology facility to be constructed in the County. If the _____ technology facility, equipment or employees are relocated outside of the County before _____, _____ agrees to repay to the IDA the entire \$ _____ in County funds granted to _____ within thirty (30) days of its relocation. If _____ relocates its technology facility, equipment or employees outside the County after _____, but before _____, _____ agrees to repay to the IDA \$ _____ of the funds granted to _____ within thirty (30) days of the relocation. If _____ relocates its technology facility, equipment or employees outside the County after _____, _____ has no obligation for the repayment of any of the County grant funds hereunder.

7. _____ represents that it is a _____ corporation in good standing with the Virginia State Corporation Commission, and is authorized to conduct business in Virginia, that its Board of Directors has approved the transaction contemplated by this Agreement under its corporate policies and procedures through formal resolution, that the undersigned is authorized to sign this Agreement on behalf of _____, and that this Agreement will be binding on _____ and its successors and assigns. _____ agrees to provide proper documentation of the foregoing to the IDA prior to the disbursement of the grant of funds to _____.

8. The disbursement of the funds to _____ under this Agreement shall be in accordance with this paragraph. The IDA agrees to disburse to _____ the \$ _____ of County funding upon receipt of a copy of the recorded deed in the name of _____ evidencing the acquisition of at least _____ acres of land at Innovation @ Prince William, or upon receipt of a copy of the signed construction contract for the construction of an approximately _____ square foot technology facility on the Innovation @ Prince William property, together with a letter from the President or designee of _____ certifying that construction has been started on the new technology facility on said property. No IDA funds are obligated to be paid under this Agreement should the IDA fail to receive the necessary funding from the County.

9. At the IDA's written request, _____ agrees to report, document and verify to the IDA the actual employment levels and the price and value of

the computer equipment in its technology facility in the County as of _____. This report shall be filed within thirty (30) days after the receipt of the written request.

10. This Agreement shall be construed in accordance with the laws of the Commonwealth of Virginia.

11. This Agreement may be signed in duplicate, and each of said duplicates shall constitute an original.

12. This Agreement constitutes the full agreement between the parties and neither party shall be bound by any terms, conditions or representations not contained herein. This Agreement may be modified only by written agreement signed by both parties hereto with the same formality.

IN WITNESS WHEREOF, the parties hereto have hereafter set their signatures and seals by their respective duly authorized representatives.

ATTEST:

INDUSTRIAL DEVELOPMENT AUTHORITY
THE COUNTY OF PRINCE WILLIAM

Secretary/Treasurer

BY: _____
Chairman

BY: _____

COMMONWEALTH OF VIRGINIA

County of Prince William, to wit:

I, the undersigned Notary Public in and for the jurisdiction aforesaid, hereby certify that _____ and _____ Chairman and Secretary/Treasurer, respectively, of the Industrial Development Authority of the County of Prince William, whose names are signed to the foregoing Agreement, appeared and acknowledged the same before me this _____ day of _____, _____.

Notary Public

My Commission expires: _____

COMMONWEALTH OF VIRGINIA

County of _____, to wit:

I, the undersigned Notary Public in and for the jurisdiction aforesaid, hereby certify that _____ whose name is signed to the foregoing Agreement, appeared and acknowledged the same before me this _____ day of _____, _____.

Notary Public

My Commission expires: _____

AGREEMENT OF SALE

THIS AGREEMENT OF SALE, made this _____ day of _____,
_____, by and between the **BOARD OF COUNTY SUPERVISORS OF PRINCE
WILLIAM COUNTY, VIRGINIA** (hereinafter referred to as "Seller" or "County") and
_____, a _____ corporation (hereinafter referred to as "Purchaser" or
"_____").

WITNESSETH:

WHEREAS, the County is the owner of approximately 500 acres of land known
as **INNOVATION @ Prince William**, which the County has acquired for economic
development purposes for targeted industries, including high technology industries; and

WHEREAS, Purchaser desires to locate its technology business at
INNOVATION @ Prince William through the purchase of approximately _____
acres of land upon which it will construct its office and technology facilities, and
Purchaser further desires to have the ability to purchase an adjacent parcel consisting of
approximately _____ acres of land for future expansion of its business; and

WHEREAS, the County is willing to sell a portion of its property to Purchaser to
permit Purchaser to locate its technology business in Prince William County, in
furtherance of the County's Strategic Plan goals for economic development; and

WHEREAS, the parties desire to enter into this Agreement of Sale to
memorialize the agreements of the parties, the terms and conditions for the sale of the
land and for the ability to purchase additional land, and to set forth the responsibilities of
the parties hereto.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which the parties hereto acknowledge, including the mutual covenants and undertakings expressed herein, the County agrees to sell and the Purchaser agrees to purchase certain hereinafter described real estate, all in accordance with the terms and conditions set forth herein.

1. **PROPERTY:** The property which is the subject of this Agreement consists of approximately _____ acres of land in the property known as INNOVATION @ Prince William, generally located between Route 28, the Route 234 Bypass and University Boulevard, in the Brentsville Magisterial District, and being a portion of the property the County acquired from TMB Service Corp., by deed recorded in Deed Book 2428 at Page 219 among the land records of Prince William County. The involved _____ acres of land will be subdivided from the foregoing County property, and currently does not have an address or GPIN assigned by the County. A Metes and Bounds Description of the involved _____ acres of land (hereinafter referred to as the "Subject Property") is attached to this Agreement for a description of the Subject Property, entitled "Exhibit 1". The County will be responsible for subdividing the Subject Property.

2. **PROPOSED USE:** Purchaser intends to use the Subject Property to construct a _____ square foot building to house its corporate headquarters offices and technology facilities. Purchaser currently has ___ full time employees and anticipates hiring an additional _____ employees in the next year. The estimated cost of construction of the new building is \$ _____. In addition, _____ will install equipment in the new facility having an estimated initial cost of \$ _____. The County is selling the

Subject Property under these terms, conditions and understandings as an economic development measure in the public interest to enhance the tax base of the County and its employment opportunities. _____ meets the County requirements for consideration as a targeted industry.

3. **PURCHASE:** The County agrees to sell and the Purchaser agrees to purchase the Subject Property as described in Exhibit 1.

4. **PURCHASE PRICE:** Purchaser agrees to pay _____ (\$____) per raw square foot for the Subject Property, based upon a final boundary survey of the Subject Property performed by a surveyor licensed in Virginia, to be hired and paid by the County. The full purchase price (less the Deposit specified in Paragraph 5 of this Agreement) shall be paid by Purchaser to County at settlement, as hereafter set forth. Based on the initial survey of the Subject Property, consisting of _____ acres of land, or _____ square feet of land, the purchase price to be paid by Purchaser to the County amounts to a total of \$_____.

5. **DEPOSIT:** Purchaser shall pay to the County a deposit in the amount of Five Thousand Dollars (\$5,000.00) upon signature of this Agreement. The deposit shall be applied toward the purchase price at settlement.

6. **OTHER CONDITIONS OF SALE:**

A. **STUDY PERIOD:** Purchaser shall have a study period of forty-five (45) days from the date of the approval of this Agreement by the County to inspect and test the Subject Property to confirm its acceptability and feasibility for Purchaser's purposes. Purchaser shall be entitled to enter upon the Subject Property to conduct any and all such tests as it deems necessary. The County shall provide Purchaser a copy of

any and all tests it may have in its possession or control dealing with the Subject Property. Within the study period Purchaser shall have the opportunity to notify the County in writing in the event the Subject Property does not meet its requirements for any reason, and to terminate this Agreement. If Purchaser notifies the County in writing before the expiration of the study period that the Agreement is being terminated, the deposit shall be returned to Purchaser.

B. **RIGHT OF ENTRY:** Purchaser and its agents shall have the right, at their own risk, cost and expense, at any reasonable time or times prior to settlement, with reasonable advance notice to Seller, to enter upon the Property for the purpose of making surveys and/or studies, or of performing soil test borings or engineering or such other work as may be deemed desirable or necessary and does not result in a change in the present character of the Property; provided, however, that Purchaser shall indemnify and hold Seller harmless from any and all causes of action, claims, damages and expenses, including attorney's fees and costs, arising from Purchaser's entry, or the entry of its agent, on the Property. Purchaser agrees to return the Property to its original condition and shall be responsible to Seller for any and all damages caused upon the Property as a result of its entry thereupon.

C. **PROPERTY TO BE CONVEYED "AS-IS":** The sale of the Subject Property is made on an "AS-IS" basis with no warranties whatsoever being made by Seller. Purchaser acknowledges and agrees that the Subject Property is to be conveyed and Purchaser will receive and accept the Subject Property and any structures, buildings, improvements, appurtenances, equipment and personal property located on the Subject Property or relating to the Subject Property in an "AS-IS, WHERE-IS" condition, with

all faults, and that Purchaser is not relying upon any warranty, representation, statement or communication whatsoever by the County or any of its officers, agents, employees or volunteers in connection with entering into this Agreement of Sale or consummating the transaction hereunder or otherwise acquiring title to the Subject Property hereunder.

D. **NO ENVIRONMENTAL WARRANTIES :** The County makes no warranties, and hereby specifically disclaims any and all warranties relating to the current or prior physical, environmental and/or structural condition of the Subject Property and/or any structures or improvements located on the Subject Property, any hazardous material and/or adverse environmental conditions upon or in the vicinity of the Subject Property, the effect of environmental laws upon the Subject Property and the current status of the Subject Property thereunder and/or the fitness of the property and/or any structures or improvements on the Subject Property for any particular purpose.

E. **REPRESENTATIONS OF SELLER:** The County represents it is a political subdivision of the Commonwealth of Virginia. The County has full authority to enter into and perform its obligations under this Agreement. The parties executing this Agreement on behalf of the County have the authority to do so. The County is the record owner of the Subject Property and has the right to sell and assign title to the Subject Property to Purchaser in accordance with Virginia law. The County represents that it had a Phase I Environmental Study done on the Subject Property prior to its acquisition. This study is available to Purchaser for review at any time upon request. The County has not deposited any hazardous materials or hazardous substances on the Subject Property during the time it has owned the Subject Property. The County has no

actual knowledge of any hazardous substances or hazardous material being located on the Subject Property other than what may be reflected in the Phase I Environmental Study.

F. **REPRESENTATIONS OF PURCHASER:** _____ represents that it is a corporation in good standing with the Virginia State Corporation Commission; that its board of directors has authorized the purchase of this property in accordance with all corporate policies and regulations; that the signing of this Agreement has been duly approved; that this Agreement when executed will be binding on the corporation; and that it will provide satisfactory evidence of same to the County at settlement.

G. **ZONING:** The parties acknowledge and understand that the County has initiated a comprehensive rezoning of all property in INNOVATION, including the Subject Property. Both the current zoning of the Subject Property and the proposed zoning will allow the technology uses involved in Purchaser's current business. The rezoning of the Subject Property will be accomplished at Seller's expense. All requirements of the County Zoning Ordinance are applicable to the Subject Property.

H. **DEED AND TITLE:** At settlement, County shall convey title to the Subject Property to Purchaser by Special Warranty Deed. Title shall be good and marketable, subject only to standard exceptions taken by title companies, and shall be free of all liens, mortgages and deeds of trust. Purchaser may obtain a title examination at its expense. Any exceptions to the title taken by the title company may be cured by Purchaser. The County shall not be responsible for paying for the curing or removal of any exceptions to the title, other than liens, mortgages and deeds of trust. In the event there are title defects Purchaser decides to cure, then the settlement will be extended for thirty (30) calendar days at Purchaser's written request. Any real estate taxes due on the

Subject Property as of the date of settlement shall be paid by the County. Conveyance of the Subject Property shall be subject to any and all easements, covenants, restrictions and all other matters of record.

I. TAKING BY EMINENT DOMAIN OR DEDICATION

REQUIREMENTS: If prior to settlement on the Property, all or any portion of the Property is taken by eminent domain, or all or any portion of the Property is required to be dedicated by any governmental authority, Purchaser may, at its sole option, choose to terminate this Agreement, whereupon all rights and responsibilities hereunder shall be null and void, and the deposit shall be refunded to the Purchaser. Purchaser may elect to make settlement on all of the property other than that which is the subject of such condemnation proceeding, in accordance with the terms of this Agreement and the purchase price shall be adjusted on a pro rata per square foot basis.

J. COUNTY'S RIGHTS TO REPURCHASE: Purchaser

acknowledges and understands that the County is entering into this Agreement in order to further economic development in the County, by having _____ corporate offices and technology facility constructed on the Subject Property on an immediate basis. Purchaser agrees to enter into a construction contract for construction of its new corporate offices and technology facilities by _____. In the event Purchaser does not initiate construction of its new office facilities on the Subject Property within one (1) year of settlement, the County shall have the right, but not the obligation, to repurchase the Subject Property at the same price paid by Purchaser. Purchaser agrees to convey the Subject Property to the County by special warranty deed, upon the County paying Purchaser the purchase price. The County shall pay all settlement charges, including the

grantor's tax. Purchaser shall have the affirmative obligation to convey the Subject Property back to the County if the County desires to reacquire the Subject Property, and pays Purchaser the involved purchase price. For the purposes of this section, initiation of construction shall be deemed to be satisfied by the execution of a valid, binding construction contract by _____ for the construction of a _____ square foot building on the Subject Property, the mobilization of the construction contractor on site on the Subject Property, and the completion of the pouring of footers for the building on the Subject Property. It is the intention of the parties that the Subject Property be used for economic development purposes through the construction of a building to house technology uses meeting the County's targeted industry definition, and not that the property be purchased by _____ for resale without the construction of a new building to house its targeted industry technology facilities. Therefore, the parties agree that the County shall have the right to repurchase the Subject Property if Purchaser does not initiate construction of the _____ square foot building within one (1) year of settlement as described herein.

K. COVENANTS, CONDITIONS AND RESTRICTIONS:

Purchaser acknowledges and agrees that the Subject Property will be conveyed subject to covenants, conditions and restrictions as required by the proffers under the zoning of the Subject Property. A copy of the existing covenants is attached hereto as Exhibit 2.

As part of the comprehensive rezoning of the INNOVATION property referred to in paragraph 6.G of this Agreement, the County will impose new covenants applicable to all property in INNOVATION, including the Subject Property. A draft copy of the new proposed covenants is attached hereto as Exhibit 3. In the event settlement on the Subject

Property has been completed prior to the recordation of the new proposed covenants on the land at INNOVATION, Purchaser agrees to join with the County and other owners in the Declaration for the new proposed covenants to apply said covenants to the Subject Property. The County agrees, and the new proposed covenants indicate, that Purchaser and the Subject Property will be grandfathered under the existing covenants concerning its use and building approvals under the existing covenants to the extent Purchaser's plans are approved prior to the recordation of the new proposed covenants. It is the intent of the parties that the same covenants apply to all of the property within INNOVATION for future purposes in order to maintain the consistency of the quality of development throughout the business park.

L. ROAD ACCESS AND UTILITIES: The County agrees to construct a construction haul road to provide initial access to the Subject Property, at its own cost in sufficient time to permit Purchaser to start construction upon issuance of a building permit. The County agrees not to withhold an occupancy permit for the building on the basis that the final access road serving the Subject Property has not been completed by the County. The County agrees to maintain the construction access road until the final access road has been completed. All utilities, including electric, natural gas, water and telephone, will be brought to the edge of the property boundary line of the Subject Property by or behalf of the County, at the County's expense. All utilities will be available at the Subject Property by the final completion of construction of Purchaser's building.

7. OPTION TO PURCHASE ADDITIONAL LAND: The County hereby grants the Purchaser an exclusive option to purchase the parcel of land directly adjacent to

the Subject Property, consisting of approximately _____ acres of land, as shown on the Metes and Bounds Description attached hereto as Exhibit 4 (the "Option Property"). The term for this exclusive option shall be for a period of _____ months from the date of settlement on the Subject Property to the extent allowed by law. _____ shall pay the County an option deposit of Ten Thousand Dollars (\$10,000) at settlement on the Subject Property, which deposit shall be applied against the purchase price if _____ exercises the option during the term. The price for the purchase of the Option Property shall be \$_____ per square foot. In the event _____ does not exercise the option by notifying the County in writing of its election to do so within the foregoing term, the County shall retain the option deposit and _____ will have no further rights hereunder. If _____ exercises the option and acquires the Option Property, the County shall have the same repurchase rights as to the Option Property as it has with respect to the Subject Property, under the same terms and conditions as set forth in paragraph 6.J heretofore. The option granted herein is not assignable by _____.

8. **NO MERGER:** The terms and provisions of this Agreement of Sale shall survive settlement and the recording of the deed, and shall be binding upon the parties hereto, their successors in interest and assigns thereafter.

9. **NOTICE:** All notices, requests, consents and other communications hereunder shall be in writing and shall be personally delivered or mailed by first class, registered or certified mail, return receipt requested, postage prepaid:

(a) If to the Purchaser: _____, or to such other address as may have been furnished by the Purchaser to the Seller in writing.

(b) If to the Seller: Board of County Supervisors of Prince William County, c/o Bern Ewert, County Executive, 1 County Complex Court, Prince William, Virginia 22192; with a copy to Sharon E. Pandak, Esq., at the same address (fax #703-792-6633) or to such other address as may have been furnished by the Seller to the Purchaser in writing.

Any notice, request, consent or other communication shall be deemed received when it is personally delivered, faxed or on the second business day after it is deposited in the United States mail, as the case may be.

10. **SETTLEMENT:** Settlement of this real estate transaction shall be made at the office of an attorney licensed to practice law in Virginia selected by Purchaser, said settlement to occur by _____.

11. **CHARGES:** Examination of title, conveyancing, notary fees, settlement fees and recording charges, and other customary charges associated with finalizing this transaction, including attorneys fees, shall be paid by the Purchaser. The County shall be responsible for payment of any Grantor's Tax and the release of any liens as set forth in paragraph 6.H. heretofore.

12. **MISCELLANEOUS:**

(a) This Contract shall be binding upon and inure to the benefit of the parties hereto, their successors in interest and assigns. Purchaser shall have no right to assign this Agreement of Sale without the written permission of the County.

(b) Failure by the Purchaser or the Seller to insist upon or enforce any of their respective rights hereunder shall not constitute a waiver thereof, except as

provided for herein. Purchaser may, at its sole discretion, waive any breach by Seller of any of Seller's representations, warranties and/or covenants hereunder, or any failure of a condition precedent to closing hereunder.

(c) This Agreement shall be governed by, and construed under the laws of the Commonwealth of Virginia.

(d) The Section headings as herein used are for convenience or reference only and shall not be deemed to vary the content of this Agreement or the covenants, agreements, representations and warranties herein set forth or to limit the provisions or scope of any Section.

(e) To facilitate execution, this Agreement may be executed in as many counterparts as may be required, and it shall be necessary that the signature of, or on behalf of, each party, or that the signatures of the persons required to bind any party, appear on more than one counterpart. All counterparts shall collectively constitute a single agreement.

(f) Time shall be of the essence with respect to this Agreement.

13. **ENTIRE AGREEMENT:** This Agreement, when executed by the parties, contains the final and entire agreement between them. No parties shall be bound by any terms, conditions, statements or representations, oral or written, not herein contained.

WITNESS the following signatures and seals:

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA

By: _____
Chairman

ATTEST:

Clerk to the Board

By: _____

COMMONWEALTH OF VIRGINIA;
County of Prince William, to wit:

I, the undersigned Notary Public of and for the jurisdiction aforesaid, do hereby
certify that _____ and _____ Chairman and Clerk,
respectively, whose names are signed to the foregoing Agreement of Sale, have appeared
before me and acknowledged the same this ____ day of _____, ____.

Notary Public

My Commission expires: _____

APPENDIX E

VIRGINIA ECONOMIC DEVELOPMENT PARTNERSHIP

SAMPLE PERFORMANCE AGREEMENT

DRAFT

PERFORMANCE AGREEMENT

This Performance Agreement made and entered this _____ day of _____, 2002, by and between the COUNTY OF _____, VIRGINIA, a municipal corporation, hereinafter called "COUNTY" and _____, a _____ corporation, hereinafter called "COMPANY."

WITNESSETH:

That whereas COUNTY has received a grant of and expects to receive the sum of \$100,000.00 from the Governor's Opportunity Fund through the Virginia Economic Development Partnership for the purpose of inducing Company to locate in the COUNTY OF _____, VIRGINIA, build a facility, and employ a significant number of persons, and

Whereas the COUNTY is willing to provide the funds to Company provided Company meets certain criteria relating to employment projections and capital investment, and

Whereas the COUNTY is required to return all or a portion of the funds so received to the Commonwealth of Virginia if the performance criteria of Company are not met,

Now the parties hereto, in consideration of the foregoing, and the disbursement of funds, hereafter provided, agree as follows:

1. COUNTY will disburse the entire amount of funds provided to it from the Governor's Opportunity Fund, expected to be the sum of \$100,000.00, to Company to be used by Company in the preparation of the site upon which Company shall construct and operate a facility in the COUNTY OF _____, VIRGINIA.

2. Company will construct and operate a facility on the site in the COUNTY OF _____, VIRGINIA, with an investment of at least \$10,000,000.00 in improvements, machinery, and equipment, and will create 400 jobs at said facility, all over a 30-month time period measured from the date the funds from the Governor's Opportunity Fund are received by Company.

3. If Company does not meet 90 percent of its capital investment and new jobs commitment set forth in paragraph 2 above, Company shall repay to COUNTY that part of the Governor's Opportunity Fund grant that is proportional to the shortfall, as provided by the following example:

The grant of \$100,000.00 is considered to be \$50,000.00 for the capital investment commitment by Company and \$50,000.00 for the employment commitment. If, after 30 months the capital investment of Company is at least \$9,000,000.00 and the number of new jobs created by Company is at least 360, no refund is required. If, after 30 months the capital investment is only \$5,000,000.00, and the new jobs created is 264, the Company shall refund to the COUNTY 50 percent of the fund related to capital investment; i.e., the sum of \$25,000.00 and 33 percent of the fund related to job creation--i.e., the sum of \$16,500.00.

Any refunds by Company to COUNTY hereunder shall be repaid by COUNTY to the Governor's Opportunity Fund.

4. If Company has met 90 percent of the investment and employment goals set forth in paragraph 3 hereof within the 30-month period, then and thereafter Company is no longer obligated to repay any portion of the grant provided to it hereunder.

5. The Company agrees to provide the COUNTY and the Commonwealth whatever documentation may be required to verify the investment and employment figures

Witness the following signatures and seals the day and year first above written.

THE COUNTY OF ____, VIRGINIA

By _____ (Seal)
County Administrator

Commonwealth of Virginia, at large

The day _____, County Administrator of the County of _____, Virginia, appeared before me, a notary public for the State of Virginia, at large, and did acknowledge his signature above fixed all in my state aforesaid.

My commission expires _____.

Given under my hand this _____ day of _____, 2001.

Notary Public (Seal)

Company

By _____ (Seal)
Title

This day _____, of _____, appeared before me,
a notary public for the State of Virginia, at large, and did acknowledge his signature
above fixed all in my state aforesaid.

My commission expires _____.

Given under my hand this _____ day of _____, 2001.

Notary Public (Seal)