

COUNTY OF ALBEMARLE



MEMORANDUM

TO: Albemarle County Board of Supervisors
Albemarle County Economic Development Authority

FROM: Greg Kamptner, County Attorney

DATE: July 6, 2016

RE: *Albemarle County Economic Development Authority; history, legal status, general powers, tools to accomplish the County's economic development goals, and other issues*

This memorandum examines the history of the Albemarle County Economic Development Authority (EDA), its legal status, general powers, and the tools available to ensure that it accomplishes the County's economic development goals and objectives, and other issues.

1. The history of the Economic Development Authority

The EDA¹ was created in 1976. The original creating ordinance provided that the EDA's powers were "solely and exclusively" limited to the powers to finance "industrial pollution control facilities" and "industrial plant expansion" for industries located in the County. The ordinance also limited the number of bond issuances "in existence at any one time" to three. Between 1976 and 1992, the County's EDA regulations were amended several times, expanding both the type and number of facilities the EDA could finance.

In 1994, the County's EDA regulations were amended to eliminate the specific types and number of facilities that could be financed and to provide a broader grant of power by referring to the powers conferred upon economic development authorities in the Industrial Development and Revenue Bond Act. Other sections of the County's EDA regulations were also amended at that time. The regulations adopted in 1994 are, in all material respects, the regulations that are in effect today, and are codified in County Code § 2-600 *et seq.*

2. The legal status of the Economic Development Authority

The EDA was established by the Board of Supervisors under the Industrial Development and Revenue Bond Act (Virginia Code § 15.2-4900, *et. seq.*). The EDA is governed by a seven-member board of directors. *Virginia Code* § 15.2-4904. The directors are appointed by the Board of Supervisors to four year terms. *Virginia Code* § 15.2-4904.

An economic development authority is a *political subdivision*. *Virginia Code* § 15.2-4902. An economic development authority also is a *separate and distinct legal entity* from the city or county that creates it. *Industrial Development Authority of the City of Chesapeake v. Suther*, 208 Va. 51 (1967). Lastly, an economic development authority is "independent of the [city or county] in its operations, its incurment of debt, and its ownership of property." *Suther*, 208 Va. at 57.

¹ The EDA was originally established as the "Albemarle County Industrial Development Authority," and its name was changed in 2008. Under Virginia Code § 15.2-4903, an authority may be named an "industrial development authority" or an "economic development authority." However named, its powers and duties are the same.

As a public authority, an economic development authority is a limited purpose, public corporation, and it has only those powers conferred upon it by the General Assembly. *See Vepco v. Hampton Redevelopment & Housing Authority*, 217 Va. 30 (1976).

3. The enabled powers of the Economic Development Authority

Under Virginia Code § 15.2-4903(A), there are, for lack of a better term, two classes of economic development authorities that may be established by cities and counties under Virginia law:

The governing body of any locality in this Commonwealth is hereby authorized to create by ordinance a political subdivision of the Commonwealth, with such public and corporate powers as are set forth in this chapter. Any such ordinance may *limit the type and number of facilities that the authority may otherwise finance* under this chapter, which ordinance of limitation may, from time to time, be amended. *In the absence of any such limitation, an authority shall have all powers granted under this chapter.* (emphasis added)

In short, any economic development authority is either subject to limitations on the type and number of facilities that may be financed or it is not. Until 1994, the EDA was in the former class; since then, it has been in the latter class. The distinction between the two classes is significant, as explained in the following three opinions by the Virginia Attorney General.

A. Any limitations on an economic development authority imposed by a local governing body under the Industrial Development and Revenue Bond Act are confined to those limitations in Virginia Code § 15.2-4903(A)

In a 1977 opinion², the Virginia Attorney General stated that the “sole source of authority granted the local governing body to impose limits upon the activities of its industrial development authority is [what is now Virginia Code § 15.2-4903(A)].” *1977-78 Va. Op. Att’y Gen. 187 (1977)*. Therefore, the Attorney General opined that a local governing body’s power to restrict the type and number of facilities that may be financed did not extend to dictating “the terms of financial arrangements made by the Authority, which are, by statute within its province alone.”

In 2015, the Virginia Attorney General was asked whether the Louisa County board of supervisors may limit the Louisa County economic development authority’s power to incur debt by limiting the type and number of economic development authority facilities. The Attorney General stated that the board “may, by ordinance, constructively limit the [economic development authority’s] ability to incur debt by limiting the number and type of facilities that it may finance.” Relying on the 1977 opinion discussed above, the Attorney General also concluded that the board “may not, however, require that the [economic development authority] secure the board’s approval of the amount financed for a particular project.”

B. A local governing body may impose conditions on any gifts, loans, or advances of funds to an economic development authority

In a 1983 opinion, the Virginia Attorney General concluded that when a board of supervisors gives, loans, or advances funds to an economic development authority under Virginia Code § 15.2-1205³, the board “may condition its advancement of funds to the authority in any way that it chooses, pursuant to the language of [what is now

² Although opinions of the Attorney General are not binding on a court or on a locality, the Virginia Supreme Court has said that an opinion of the Attorney General is “entitled to due consideration” by the courts. *Twietmeyer v. City of Hampton*, 255 Va. 387, 393 (1998). “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.” *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-162. There have been no corrective amendments to Virginia Code § 15.2-4903(A).

³ Virginia Code § 15.2-1205 states: “The governing body of any county may give, lend or advance in any manner that it deems proper funds or other county property, not otherwise specifically allocated or obligated, to any authority created by such governing body pursuant to law.”

Virginia Code § 15.2-1205].” 1983-84 Va. Op. Att’y Gen. 103 (1983).

C. A local governing body may not expressly require that an economic development authority comply with the locality’s economic development goals

Returning to the 2015 opinion of the Virginia Attorney General discussed in subsection 3(A), the Attorney General also was asked whether the Louisa County board of supervisors could ensure that the activities and projects of Louisa County’s economic development authority would serve the county’s economic development goals. The Attorney General repeated the principle that the governing body’s authority is limited to the type and number of facilities that may be financed, and then concluded that “whether doing so will serve the County’s economic development goals is a matter for the Board to determine. There is no statutory authority to specifically require compliance with economic development goals.” 2015 WL 10438450 (Va. A.G. Jan. 30, 2015).

4. Legal and practical tools by which the activities of the Economic Development Authority may remain aligned with the County’s economic development and other policies, goals, and objectives

There are a number of legal and practical tools available to ensure that the activities of the EDA remain aligned with the County’s economic development and other policies, goals, and objectives.

A. Any activities of the Economic Development Authority must serve a public purpose

The powers of the EDA must “be exercised for the benefit of the inhabitants of the Commonwealth, for the increase of their commerce, and for the promotion of their safety, health, welfare, convenience and prosperity.” *Industrial Development Authority of City of Richmond v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 279-282 (1975) (holding that, to effectuate the “obvious intention of the Legislature,” the three requirements though stated in the conjunctive would be construed in the disjunctive).

These are the public purposes that must be served by the activities of the EDA. A public purpose is essential, because it is only then that an activity of the EDA “constitutes a proper function of government.” *Mayor & Members of City Council of City of Lexington v. Industrial Development Authority of Rockbridge County*, 221 Va. 865, 868-69 (1981).

B. The Board of Supervisors may impose limitations on the type and number of facilities that may be financed

At any time, the Board of Supervisors may amend County Code § 2-600 *et seq.* under the authority in Virginia Code § 15.2-4903(A) and limit the type and number of facilities that the EDA may finance. This could curtail the activities of the EDA, as explained in Section 3.

C. Many Economic Development Authority-related matters are required by state or federal law to be approved by the Board of Supervisors

Many EDA-related matters are required by state or federal law to also be approved by the Board of Supervisors, such as certain bond issues and grant programs.

For example, when federal tax laws require public hearings and public approval as a prerequisite to obtaining a federal tax exemption for the interest paid on industrial development bonds, the public hearing is held by the EDA, but the Board of Supervisors must provide the “public approval” of the financing for any facility recommended by the EDA. *Virginia Code § 15.2-4906*. The Board provides evidence of public approval by adopting a resolution. *Virginia Code § 15.2-4906*.

With respect to grants that the EDA has recently been involved with, the Board of Supervisors had to approve and be involved with a grant received from the state under the Commonwealth’s Development Opportunity Fund (COF) (formerly known as the Governor’s Opportunity Fund) (Virginia Code § 2.2-115) because the required local matching funding was provided by the County’s Economic Opportunity Fund. Therefore, the Board appropriated

the matching funding from the County's Economic Opportunity Fund to the EDA and entered into a pass-through agreement with the EDA that established the conditions for providing the matching funding. Grants received under the Governor's Agriculture and Forestry Industries Development Fund (AFID) (Virginia Code § 2.2-303 *et seq.*) have worked the same way.

Note, however, that COF and AFID grants may be awarded to "political subdivisions" (*Virginia Code §§ 2.2-115 and 2.2-304, respectively*) such as the EDA. Thus, but for the fact that the matching funding is provided by the Board of Supervisors, the Board would not have to approve participating in COF and AFID grants.

D. The Board of Supervisors may place conditions on gifts, loans, and advances of funds to the Economic Development Authority

When the Board of Supervisors gives, loans, or advances funds to the EDA under its authority in Virginia Code § 15.2-1205, it may impose conditions on the gift, loan, or advance. There is no limitation on the scope of a condition.

The Board has placed conditions on the County funds it has provided to the EDA in the past. For example, when the Board provided funds to the EDA for the EDA to loan to the Lewis and Clark Exploratory Center, one of the conditions it imposed was that the Board had to approve any extension of the deadline to repay the loan.

Conditions may be imposed by the Board in a proactive way that specifies the purpose for which the County funds are to be used. For example, if the County continues to provide the matching funding for COF and AFID grants from the County's Economic Opportunity Fund, the Board could appropriate a block amount of funds from that Fund to the EDA on a periodic basis, and condition the appropriation on the funds being used only to provide matching funding for a COF or AFID grant. This would expedite the grant process, even if the Board may be required to be involved at other steps in the COF or AFID grant process.

E. The County's Comprehensive Plan and the pending County's Economic Development Strategic Plan will provide clear direction

The Board of Supervisors' clear articulation of its economic development goals and objectives in the Comprehensive Plan can guide the activities of the EDA. These economic development policies, goals, and objectives extend beyond the Economic Development chapter in the Comprehensive Plan. Following are some examples from the Comprehensive Plan.

The Growth Management Policy in the Comprehensive Plan is to direct "development into specific, identified areas while conserving the remainder of the County for rural uses, such as agriculture, forestry, resource protection, and others that rely on these uses." *Comprehensive Plan, page 3.3*. The stated goal of the Policy is to ensure that "Albemarle County's Development Areas will be attractive, vibrant areas for residents and businesses, supported by services, facilities, and infrastructure. Growth will be directed to the Development Areas and the County's Rural Area, with its agricultural, forestal, historic, scenic, and natural resources will be preserved for future generations." *Comprehensive Plan, page 3.1*.

The County's goal for economic development is stated as follows: "[The County's] economy will be diverse, strong, and sustainable, and retain and benefit County citizens, existing businesses, and new local ventures." *Comprehensive Plan, page 6.1*. One of the objectives for economic development is to "[p]romote economic development activities that help build on the County's assets while recognizing distinctions between expectations for the Development Areas and the Rural Area." *Comprehensive Plan, page 6.5*. One of the strategies is to "[e]xplore opportunities to assist with redevelopment of underutilized commercial and industrial zoned properties." *Comprehensive Plan, page 6.11*.

The goal for the County's Development Areas is for them to be "vibrant active places with attractive neighborhoods, high quality, mixed-use areas, thriving business and industry, all supported by services, infrastructure, and multimodal transportation networks." *Comprehensive Plan, page 8.1*. Redevelopment is a strategy

that can: (1) “improve and take advantage of existing investment in the Development Areas” (*Comprehensive Plan, page 8.23, Strategy 20*); and (2) promote “the re-use of buildings or areas to improve the functionality and appearance of underutilized sites.” (*Comprehensive Plan, page 8.23*)

When it is completed, the County’s Economic Development Strategic Plan will likewise, and more directly, guide the activities and decisions of the EDA.

Lastly, the Board of Supervisors and the EDA may consider entering into a memorandum of understanding that expresses the expectations for economic development arising from the relevant policies, goals, and objectives in the County’s Comprehensive Plan and from the Economic Development Strategic Plan.

F. Ongoing communications and meetings between the Board of Supervisors and the Economic Development Authority will ensure that the County’s economic development policies, goals, and objectives are implemented

Ongoing communications, either between individual members of the Board of Supervisors and the EDA, or during meetings between the two bodies, will play a significant role in ensuring that the County’s economic development policies, goals, and objectives are being implemented by both the County and the EDA. The meetings will allow the two bodies to receive and discuss new information and ideas from staff at the same time, and allow both bodies to discuss needs and wants, impediments to success, and other issues.

Communications also can be fostered by having one or two Board members attend EDA meetings on a regular basis.

G. County staff, which also serves as staff to the Economic Development Authority, can ensure that the County’s economic development policies, goals, and objectives are implemented

For now, staff from the County’s Department of Economic Development and the County Attorney’s Office also serve as staff to support the EDA. This staff, at the very least, will play an ongoing role in ensuring that the County’s economic development policies, goals, and objectives are being implemented.

5. Conclusion

The County’s economic development initiatives have been evolving and intensifying over the past several years through various studies, the creation of the Economic Development Office, the inclusion of an Economic Development chapter in the Comprehensive Plan, and the work currently underway to develop an Economic Development Strategic Plan. The ability of the EDA to play a key role in economic development has been constrained, at least in part, by the current County regulations and the EDA’s operating documents, which require virtually everything the EDA does to be first approved by the Board of Supervisors. These constraints hinder the work of the EDA.

These constraints can be removed to allow the EDA to operate nimbly and flexibly in order to better achieve its purposes. At the same time, there are legal and practical tools discussed in Section 4 that are available to ensure that the activities of the EDA may remain aligned with the County’s economic development policies, goals, and objectives.