COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

June 2, 2017

The Honorable Aubrey L. Layne, Jr.
Secretary of Transportation
Post Office Box 1475
Richmond, Virginia 23218

Dear Secretary Layne:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the guarantee of a private loan to People Express Airlines ("PEX") by the Peninsula Airport Commission (the "Commission") is permitted under Virginia law.

Background

You have provided several documents, including: a loan commitment letter, a line of credit agreement, a line of credit note, and a commercial guarantee of a $5,000,000 loan to PEX by the Commission. The loan was made by TowneBank, a state-chartered bank (the "Bank"). You state that without the loan guarantee of the Commission, the Bank would not have made the loan to PEX.

You state that when the bank loan was called into default, the Commission, as the guarantor, repaid the Bank the entire loan amount. The Commission utilized certain airport entitlement funds to pay the bank balance. Those funds are public funds allocated to the airport from the Commonwealth.[1] You also state the Commission made several monthly interest payments on behalf of PEX (when PEX failed to make the payments due) from additional airport entitlement funds prior to the loan being called into default.

Applicable Law and Discussion

As a result of Virginia's long and troubled history of incurring debt by investing public money in private turnpike, canal, and railroad companies, the Commonwealth sought to curb such practices

---

[1] Section 58.1-638(A)(3) of the *Code of Virginia* creates in the Department of the Treasury from sales and use tax revenue "a special non-reverting fund which shall be part of the Transportation Trust Fund and which shall be known as the Commonwealth Airport Fund. . . . The funds shall be allocated by the Virginia Aviation Board to any Virginia airport which is owned by the Commonwealth, or a governmental subdivision thereof," in this case the Commission.

through various laws, including a provision of article X, section 10 of the Constitution of Virginia, commonly known as the "Credit Clause."[2] It provides as follows:

> 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 . . . .[3]

An exception to the Credit Clause provides that "[t]his section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority."[4]

The Supreme Court of Virginia has considered a number of cases involving the Credit Clause. They include cases involving the purchase of securities when the purchase was made in the Commonwealth's interest, namely, the Virginia Supplemental Retirement System;[5] the lease of Virginia Port Authority facilities by a private company;[6] the issuance of bonds by a public school authority;[7] and the loan and bond commitments with the City of Charlottesville designed to support a private hotel in the redevelopment of a blighted neighborhood.[8]

In each of these cases, the Court relied heavily on the "moving consideration and motivating cause of [the] transaction."[9] Illustrative of the Court's analysis is the case of the *City of Charlottesville v. DeHaan*, where the Supreme Court of Virginia held that "[w]hen the underlying and activating purpose of the transaction and the financial obligation incurred are for the State's benefit, there is no lending of its credit though it may have expended its funds or incurred an obligation that benefits another. Merely because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby does not bring the transaction within the letter or the spirit of the 'credit clause' prohibition."[10] However, the inverse also is true: if the obligation was incurred primarily to benefit a private enterprise rather than the public body, then the Credit Clause does apply. As the Attorney General opined in 1991:

---

[2] *See* The Honorable Stephen R. McCullough, *Modern Transportation Needs and the Prohibitions of Article X, Section 10 of the Virginia Constitution*, 47 U. RICH. L. REV. 441, 441-45 (2012).

[3] VA. CONST. art. X, § 10. I note that the Credit Clause is "applicable to all political subdivisions of the State." 1977-1978 Op. Va. Att'y Gen. 181, 182 (citing *Harrison v. Day*, 200 Va. 750 (1959)). As a political subdivision of the State, the Peninsula Airport Commission is therefore subject to the Credit Clause. *See* Cty. of York v. Peninsula Airport Comm'n, 235 Va. 477, 481 (1988).

[4] *Id.* This exception was added by amendment in 1969 in response to the case of *Button v. Day*, 208 Va. 494 (1968). *See* 2 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1127-29 (1974). That case held that under the then-current version of the Credit Clause, it was not constitutionally permissible for the Virginia Industrial Building Authority to guarantee loans for industrial projects. The crux of the Court's holding was that a fund designed "for the sole purpose of guaranteeing future payment of defaulted loans of private debtors" was invalid under the Credit Clause. *Button*, 208 Va. at 504. Despite the amendment in question, the analysis in *Button v. Day* remains a legal cornerstone in the application of the Credit Clause.

[5] *Almond v. Day*, 197 Va. 782, 783 (1956).

[6] *Harrison v. Day*, 202 Va. 967, 968-72 (1961).

[7] *Button v. Day*, 203 Va. 687, 688-89, 693-94 (1962).

[8] *City of Charlottesville v. DeHaan*, 228 Va. 578, 582, 592 (1984).

[9] *Id.* at 585 (quoting *Almond*, 197 Va. at 790).

[10] *City of Charlottesville*, 228 Va. at 586 (quoting *Almond*, 197 Va. at 791).

> "[T]he moving consideration and motivating cause of a transaction are the chief factors by which to determine if it is prohibited by [the Credit Clause]. Whether or not a transaction contravenes the 'credit clause' . . . depends upon its animating purpose and the object that it is designed to accomplish."
>
> [...]
>
> "[T]o state the matter another way, its purpose is to see that public money is used only for public purposes." If the purpose is clearly to foster and encourage the operation of a private enterprise, however, then the Supreme Court has not hesitated to declare the transaction violative of [the Credit Clause of the Constitution].[11]

Given your description of the facts at hand, the Court's analysis in *Button v. Day*, as discussed in the 1991 opinion of the Attorney General, is especially informative. Here, the Commission guaranteed the Bank loan of $5,000,000 to PEX. Without that guarantee, the Bank would not have provided the loan to PEX. While the loan to PEX was reportedly for operating expenses, the loan transaction documents also list significant debts of PEX for repayment. Indeed, based upon the information presently available, the loan appears to also largely refinance existing debt of PEX. Accordingly, the "moving consideration and motivating cause"[12] of the guarantee was to facilitate the refinancing of existing debt of PEX, in addition to providing some startup operating costs. That is, the loan guarantee was for the purpose of "[encouraging] the operation of a private enterprise,"[13] which brings it within the ambit of the Credit Clause prohibition.

Because the loan guarantee is subject to the prohibition in the Credit Clause, the precise question presented is whether the General Assembly has authorized the Commission to "insure and guarantee loans to finance industrial development and industrial expansion," acts which are permissible for Virginia public authorities under the exception to the Credit Clause.

The legal authority to insure and guarantee such industrial loans has been granted by the General Assembly only in limited circumstances using specific language. For example, the Virginia Small Business Financing Authority is empowered to provide "loans, *guarantees*, insurance and other assistance to small and other eligible businesses" as part of its mission to promote industrial development in the Commonwealth.[14]

---

[11] 1991 Op. Va. Att'y Gen. 213, 215-16 (quoting *Almond*, 197 Va. at 790, and *Button*, 208 Va. at 694).

[12] *See DeHaan*, 228 Va. at 585.

[13] 1991 Op. Va. Att'y Gen. 213, 216.

[14] VA. CODE ANN. § 2.2-2280(A) (2014) (emphasis added). Comparable authority has been granted by the General Assembly in a number of other situations. For example, see the Industrial Development and Revenue Bond Act (VA. CODE ANN. §§ 15.2-4900 to 15.2-4920 (2012 & Supp. 2016). Also, the Economic Development Authority of the City of Newport News created by the 1972 Acts of Assembly, ch. 726 (as the Oyster Point Development Corporation), as amended, has such specific powers under § 4(e) of their legislative authority. *See* http://law.lis.virginia.gov/authorities/economic-development-authority-of-newport-news/. The Virginia Port Authority has such powers under § 62.1-132.1(A)(6) of the *Code*. The Chesapeake Port Authority created by the 1987 Acts of Assembly, ch. 397, as amended, has such powers under § 6, paragraphs 21 and 22 of their legislative authority; and the City of Chesapeake under § 7 of that legislative authority may "make such appropriations and provide such funds for the operation and carrying out the purposes of the Authority as its Council may deem proper, either by outright donation or by loan." *See* http://law.lis.virginia.gov/authorities/chesapeake-port-authority/. Interestingly, the Portsmouth Port and Industrial Commission created by the 1954 Acts of Assembly, ch. 157, (as the

The General Assembly has not enacted comparable language for the Commission.[15] Without that specific grant of authority, I must conclude that the Commission is not authorized to utilize public funds to insure and to guarantee loans to a private airline.[16]

Conclusion

For the foregoing reasons, it is my opinion that the action of the Peninsula Airport Commission in guaranteeing a bank loan to People Express Airlines is an extension of public credit within the ambit of the prohibition in the Credit Clause contained in article X, section 10 of the Constitution of Virginia. As such, it is permissible only if the General Assembly has specifically authorized the Commission to insure or guarantee such extensions of public credit under the exception to the Credit Clause. It is my further opinion that the General Assembly has not so authorized the Commission.

With kindest regards, I am

Sincerely yours,

Mark R. Herring

Mark R. Herring
Attorney General

Portsmouth Port Commission), as amended, has the independent power "[t]o provide financing by leasing, selling, which shall include selling by pocket deeds, or making loans for facilities for a § 501(c)(3) organization, including all items of cost for such facilities and for working capital for use by such § 501(c)(3) organization, and to adopt such resolutions and to enter into indentures, contracts, instruments and agreements as may be expedient to issue qualified § 501(c)(3) bonds and to provide for such loans and any security therefor." Those powers are found at § 25(a) of their legislative authority. *See* http://law.lis.virginia.gov/authorities/portsmouth-port-and-industrial-commission/.

[15] The Commission is empowered to "do all things necessary or convenient to the purposes of this Act. Grant of regulatory authority by this Act, including regulations that displace, eliminate or limit competition by or among persons or entities, is based on the policy of the Commonwealth to provide for the safe, adequate, economical and efficient provision of air transportation and related facilities and services to the public." Peninsula Airport Commission Act, at § 3(r) (1946 Va. Acts ch. 22; 1964 Va. Acts ch. 270; 1968 Va. Acts ch. 777; 1989 Va. Acts ch. 270). This language cannot reasonably be interpreted to authorize the Commission to guarantee private credit, since doing so is not one of "the purposes of [the] Act." Further, the General Assembly could easily have given the Commission the explicit power to guarantee private debt as it did for the Virginia Small Business Financing Authority, yet it chose not to do so. When interpreting legislation, one must "assume that the legislature chose, with care, the words it used when it enacted the relevant statute." Alger v. Commonwealth, 267 Va. 255, 261 (2004) (internal quotation marks omitted). Further, under the doctrine of *expressio unius est exclusio alterius*, the "mention of specific item in a statute implies that omitted items were not intended to be included within the scope of a statute." GEICO v. Hull, 260 Va. 349, 355 (2000) (internal quotation marks omitted). The clause in question does authorize certain specific activities—such as limiting competition and providing safe air transportation—but it does not mention guaranteeing private debt.

[16] Nor does the Commission, as a political subdivision of the Commonwealth, have the implied authority under the Dillon Rule to insure or guarantee such a loan. *See* Commonwealth v. Cty. Bd. of Arlington Cty., 217 Va. 558, 562 (1977); 1985-1986 Op. Va. Att'y Gen. 91, 93.