

OP. NO. 03-060

COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT — PRIVATE ACTIVITY BONDS.

Industrial development authorities may enter into contracts with prospective borrowers that include provision to receive payment for loss of private activity bond allocation.

Mr. Donald D. Litten
Town Attorney for the Town of Bridgewater
August 8, 2003

Dear Mr. Litten:

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 Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective persons or entities ("borrowers") seeking tax-exempt bond financing to require borrowers to make payment to the Authority for private activity bond allocations not used by borrowers.

Response

It is my opinion that the Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective borrowers that require payment to the Authority for private activity bond allocations unused as a result of the prospective borrowers not proceeding with the transaction.¹

Applicable Law and Discussion

Sections 15.2-4900 through 15.2-4920 comprise the Industrial Development and Revenue Bond Act. The Act authorizes local governing bodies to create industrial development authorities by ordinance.² The intent of the General Assembly in authorizing the creation of industrial development authorities is to allow such authorities to "make loans^[3] ... to promote industry and develop trade by inducing manufacturing, industrial, governmental, nonprofit and commercial enterprises and institutions of higher education to locate in or remain in this Commonwealth."⁴ Section 15.2-4905 authorizes industrial development authorities "[t]o make loans ... to any person, partnership, association, corporation, business, or governmental entity in furtherance of the purposes of [the Industrial Development and Revenue Bond Act],"⁵ and "[t]o enter into contracts"⁶ and issue bonds.⁷ Section 15.2-4901 provides that the Act is to be liberally construed in conformity with the stated intentions of the legislature.⁸ Finally, § 15.2-4901 expresses the intent of the General Assembly to vest industrial development authorities with all powers necessary to enable them to accomplish the purposes for which they are created. Such "powers shall be

exercised for the benefit of the inhabitants of the Commonwealth"⁹ through the increase of commerce.

You relate that the Industrial Development Authority of the Town of Bridgewater, in the exercise of its powers, issues tax-exempt bonds and lends the proceeds to private businesses,¹⁰ subject to certain conditions. You further relate that, as a condition precedent to obtaining tax-exempt status for certain private activity bonds,¹¹ the Authority must obtain an allocation.¹² Finally, you indicate that because allocations are limited,¹³ the Authority is concerned that it may forfeit an opportunity to expand commerce where an allocation is obtained for a prospective borrower that fails to utilize it, while another potential borrower is unable to gain access to tax-exempt bonds because the necessary allocation is not available.

You ask whether the Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective borrowers that require a payment for obtaining an allocation that remains unused and unavailable. Section 15.2-4905 specifically provides the Authority with the power to enter into contracts. Such contracts must be within the Authority's powers and purposes as set forth in §§ 15.2-4901 and 15.2-4905. Section 15.2-4905 provides that the Authority may issue bonds and lend the proceeds of such bonds.¹⁴ Finally, § 15.2-4901 provides that the Authority should exercise its powers to promote commerce for the benefit of the Commonwealth's populace. It is well settled that where the language of a statute is clear and unambiguous, it is unnecessary to resort to rules of statutory construction.¹⁵ It is clear that the Authority may enter into contracts regarding the issuance of bonds and the lending of bond proceeds. Further, commerce is promoted by ensuring that a borrower is sufficiently committed to a particular project. The Authority may ascertain this commitment based on the willingness of prospective borrowers to enter into contracts that require payment¹⁶ of any unused private activity bond allocations. Therefore, it is my opinion that the Authority may enter into contracts with prospective borrowers related to the issuance of bonds and lending of bond proceeds that require payment for lost allocation.

Conclusion

Accordingly, it is my opinion that the Industrial Development Authority of the Town of Bridgewater may enter into contracts with prospective borrowers that require payment to the Authority for private activity bond allocations unused as a result of the prospective borrowers not proceeding with the transaction.

¹This opinion is limited to state law considerations and does not consider any limitation that local law may place on the Industrial Development Authority of the Town of Bridgewater. See § 15.2-4903(A), (B) (LexisNexis Repl. Vol. 2003) (authorizing ordinance creating industrial development authority to limit number of facilities authority may finance).

²See *supra* note 1.

³"*Loans*" means any loans made by the authority in furtherance of the purposes of [the Industrial Development and Revenue Bond Act] from the proceeds of the issuance and sale of the authority's bonds" Section 15.2-4902 (LexisNexis Repl. Vol. 2003).

⁴Section 15.2-4901 (LexisNexis Repl. Vol. 2003).

⁵Section 15.2-4905(13) (LexisNexis Repl. Vol. 2003).

⁶Section 15.2-4905(3).

⁷Section 15.2-4905(7).

⁸See 1999 Op. Va. Att'y Gen. 65, 66.

⁹Section 15.2-4901.

¹⁰Pursuant to the Internal Revenue Code of 1986, as amended, only certain private business activities qualify to use tax-exempt financing. See I.R.C. §§ 141-147 (West 2002 & Supp. 2003) (federal laws governing private activity bonds).

¹¹See §§ 15.2-5000 to 15.2-5005 (LexisNexis Repl. Vol. 2003) (statutory scheme governing private activity bonds).

¹²See § 15.2-5000 (defining "private activity bond" as "part or all of any bond ... required to obtain an allocation from the state's volume cap pursuant to § 146 of the Internal Revenue Code of 1986, as amended, in order to be tax exempt"); see *also* Va. Dep't of Bus. Assistance, Va. Small Bus. Fin. Auth., Virginia Private Activity Bond Allocation Guidelines, *available at* <http://www.dba.state.va.us/financing/bondallocation/guidelines> [hereinafter Guidelines].

¹³See § 15.2-5000 (defining "state ceiling" as maximum amount of private activity bonds that may be issued in calendar year as limited by § 146 of Internal Revenue Code of 1986, as amended); Guidelines § 3.4, *supra* note 12.

¹⁴Section 15.2-4905(7), (13).

¹⁵Crown Cent. Petroleum Corp. v. Hill, 254 Va. 88, 91, 488 S.E.2d 345, 346 (1997); Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982); 1999 Op. Va. Att'y Gen. 57, 57.

¹⁶Most industrial development authorities impose fees in connection with the issuance of bonds where the bond proceeds are loaned to a private borrower. See *Indus. Dev. Auth. v. Bd. of Supvrs.*, 263 Va. 349, 559 S.E.2d 621 (2002) (discussing application of fee upon refinancing when facility is located in one jurisdiction and bonds for refinancing are issued by industrial development authority of separate jurisdiction).

[Back to August 2003 Index](#)