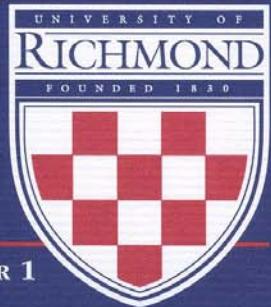


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COMMUNITY DEVELOPMENT AUTHORITIES

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COMMUNITY DEVELOPMENT AUTHORITIES

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I. INTRODUCTION

Governed under current Virginia Code section 15.2-5152 *et seq.*¹ (jointly, “CDA Statutes”), Community Development Authorities (“CDAs”) were first authorized by the General Assembly in 1993 under the provisions of the Virginia Water and Waste Authorities Act (“WWAA”) “to provide an additional method for localities to finance infrastructure associated with development and redevelopment in an authority district.”² Given that Virginia’s localities have increasingly considered CDAs as a way to cope with revenue shortfalls and growing infrastructure demands³ and considering that many jurisdictions have yet to enact policies concerning their use,⁴ this article endeavors to provide an over-

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1. VA. CODE ANN. §§ 15.2-5152 to -5159 (Repl. Vol. 2008 & Cum. Supp. 2010).

2. 2006 Op. Va. Att'y Gen. 89, 90; Act of Mar. 29, 1993, ch. 850, 1993 Va. Acts 1234 (codified as amended in scattered sections of VA. CODE ANN. tit. 15.1 (Cum. Supp. 1993)). Stafford County established Virginia’s first CDA in 1997 to finance transportation improvements associated with planned development along the Widewater Peninsula. Cf. Stafford County, Va., Ordinance 097-16 (Apr. 1, 1997). Loudoun County created the first bond-issuing CDA in 1998 to provide roads and road improvements around the planned Dulles Town Center Shopping Mall. See LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03 (2009); Kenneth E. Powell, Managing Dir., Stone & Youngberg, Presentation to the VGFOA Fall Conference: CDAs: The Good, The Bad, and the Opportunity 6 (Oct. 31, 2008), <http://www.vgfoa.org/2008%20Fall%20Conference/powerpoints/powell.pdf> (indicating that Loudoun County was the first to issue bonds in 1998).

3. See Rob Walker, *Mass Construction Projects Are Going Up with the Help of Tax-Exempt Bonds*, VA. BUS., Mar. 1, 2008, <http://www.virginiabusiness.com/index.php/news/article/mass-construction-projects-are-going-up-with-the-help-of-tax-exempt-bonds/>.

4. See, e.g., *infra* note 164 and accompanying text (identifying only five counties that have enacted such policies).

view of the current status of CDA law in Virginia, including attendant considerations as to CDA legislative development, establishment, governance, and powers.

Much has changed in the nearly two decades since CDAs were first authorized by the General Assembly, and several advancements have been made in response to a variety of legal and practical deficiencies encountered since that time. As discussed below, CDA governing documents have become increasingly standardized; many localities have formalized administrative procedures related to the evaluation of CDA proposals, while others have adopted policies seeking to preserve their financial reputations and to establish priorities for the use of CDAs.⁵

Additionally, the CDA Statutes themselves have undergone significant revisions with a trend toward expansion of CDA powers and easing of the procedural requirements for their establishment.⁶ Early CDA statutory provisions were obscurely included in several existing WWAA statutes that were more generally applicable to waste and water authorities, with intermittent carve-outs for the establishment of CDAs and their powers.⁷ Many of these provisions were relocated in 1997 to title 15.2 during the General Assembly's recodification of Virginia Code title 15.1⁸ and, by 1998, CDAs enjoyed increasing statutory separation within a separate article at the end of the WWAA.⁹ Impor-

5. See *infra* Part II.

6. The CDA Statutes have been amended in nine of the past seventeen years. See Act of Mar. 27, 2009, ch. 473, 2009 Va. Acts 756 (codified in scattered sections of VA. CODE ANN. tit. 15.2 (Supp. 2009)); Act of Mar. 22, 2005, ch. 547, 2005 Va. Acts 728 (codified as amended at VA. CODE ANN. §§ 5.1-5152, -5153, -5158 (Cum. Supp. 2005)); Act of Apr. 12, 2004, ch. 637, 2004 Va. Acts 925 (codified as amended at VA. CODE ANN. § 15.2-5158 (Cum. Supp. 2004)); Act of Mar. 19, 2003, ch. 712, 2003 Va. Acts 950 (codified as amended at VA. CODE ANN. §§ 15.2-5152, -5155 (Repl. Vol. 2003)); Act of Apr. 8, 2000, ch. 747, 2000 Va. Acts 1551 (codified as amended at VA. CODE ANN. § 15.2-5158 (Cum. Supp. 2000)); Act of Apr. 8, 2000, ch. 724, 2000 Va. Acts 1461 (codified as amended at VA. CODE ANN. § 15.2-5150 (Cum. Supp. 2000)); Act of Apr. 1, 1998, ch. 188, 1998 Va. Acts 304 (codified as amended at VA. CODE ANN. § 15.2-5156 (Cum. Supp. 1998)); Act of Mar. 20, 1997, ch. 587, 1997 Va. Acts 976 (codified as amended in scattered sections of VA. CODE ANN. tit. 15.2 (Repl. Vol. 1997)); Act of Apr. 10, 1996, ch. 897, 1996 Va. Acts 1667 (codified as amended at VA. CODE ANN. § 15.1-1241 (Cum. Supp. 1996)); Act of Mar. 18, 1995, ch. 402, 1995 Va. Acts 576 (codified as amended at VA. CODE ANN. §§ 15.1-1241, -1250.03 (Cum. Supp. 1995)); Act of Mar. 29, 1993, ch. 850, 1993 Va. Acts 1234 (codified as amended in scattered sections of VA. CODE ANN. tit. 15.1 (Cum. Supp. 1993)).

7. See, e.g., VA. CODE ANN. § 15.1-1241 (Cum. Supp. 1996).

8. Act of Mar. 20, 1997, ch. 587, 1997 Va. Acts 976, 1333-35 (codified as amended at VA. CODE ANN. §§ 15.2-5152 to -5158 (Repl. Vol. 1997)).

9. See §§ 15.2-5152 to -5158 (Repl. Vol. 1997 & Cum. Supp. 1998). Further compe-

tantly, the legal status of CDAs as political subdivisions was clarified in 2003 in response to a Virginia Supreme Court case when the General Assembly amended Virginia Code section 15.2-5155(A) to state that CDAs exist as “a public body politic and corporate and political subdivision of the Commonwealth.”¹⁰

Today, CDAs of varying sizes and purposes have been authorized by at least fourteen Virginia localities, and approximately twenty have issued bonds.¹¹ Despite progress, CDAs occupy an area of Virginia law largely in its infancy. Case law directly related to their use remains limited, and many localities remain uncertain about their use since the unique marriage of private development and public power inherent in the CDA process has, at times, fostered controversy and apprehension.¹² While this article does not directly address the public policy implications of using CDAs to finance infrastructure, the author hopes this review will generate further ideas for policies governing CDAs, with an eye toward ensuring their success for all entities involved in their creation.

hensive changes were made to the CDA Statutes during the 2009 legislative session. *See* Act of Mar. 27, 2009, ch. 473, 2009 Va. Acts 756 (codified as amended at VA. CODE ANN. §§ 15.2-5152 to -5155, -5158, -5159 (Supp. 2009)).

10. Act of Mar. 19, 2003, ch. 712, 2003 Va. Acts 950 (codified as amended at VA. CODE ANN. § 15.2-5155(A) (Repl. Vol. 2003)); *see* Short Pump Town Ctr. Cmty. Dev. Auth. v. Hahn, 262 Va. 733, 742-46, 554 S.E.2d 441, 445-47 (2001) (invalidating a bond issued by a CDA because the enabling statute lacked “political subdivision” in its grant of authority).

11. Because CDAs are continually being created, and because some have not issued bonds, calculating their exact number is imprecise. *See generally* Jesse E. Todd Jr., *Community Development Authorities: Financing Tool Gaining Popularity*, VA. TOWN & CITY, May 2008, at 6, 10, *available at* <http://www.vml.org/VTC/08VTC-PDFIVTC08May-Web.pdf>; Mary M. Bathory Vidaver, *A Brief Summary of the Status of Community Development Authorities in Virginia* 1 (Apr. 21, 2010) (unpublished manuscript), <http://www.loudoun.gov/Default.aspx?tabid=312&fmpath=/Press%20Releases/Supervisor%20Burton/> (follow “CDA’s--A Primer” hyperlink; then follow “CDA Summary Sheet” hyperlink).

12. Among other things, controversy may sometimes be driven by real or perceived concerns over the method of CDA financing, failure to comply with a locality’s land use plan, transparency in the CDA establishment process, dislike over surcharges for retail goods, etc. *See* Doug Craig, *Something Smells Bad in Spotsylvania County*, FREE-LANCE STAR (Fredericksburg), Nov. 30, 2008, <http://fredericksburg.com/News/FLS/2008/112008/News/FLS/2008/112008/11302008/426333> (discussing homeowners’ concerns over having to pay a tax to cover the developers’ re-zoning proffers); Kim Douglass, *Widewater Worries Pour Out at Hearing*, FREE-LANCE STAR (Fredericksburg), Feb. 19, 1997, at C1 (discussing homeowners’ concerns over having to pay a fee to subdivide their lots); Cody Lowe, *Real Estate Tax Rates Won’t Rise in Roanoke County*, ROANOKE TIMES, Feb. 24, 2010, <http://www.roanoke.com/news/roanoke/wb/237682> (discussing the boards’ skepticism of a CDA Petition’s twenty-year term and heavy reliance on taxes).

II. ESTABLISHING A CDA: PROCEDURAL CONSIDERATIONS

Establishing a new bond-issuing authority through a CDA requires negotiations between private parties and local government.¹³ While most proposals to establish a CDA tend to occur in conjunction with the zoning entitlement process,¹⁴ the special manner in which infrastructure improvements associated with land development are proposed to be funded subjects CDAs to additional evaluation involving a host of actors not typically involved in the traditional land use process.¹⁵ These actors include a locality's budget personnel, attorney, and economic development staff, as well as outside financial advisors, bond counsel, underwriters, appraisers, and others.¹⁶ Though CDA creation is a relatively straightforward process from a statutory perspective, the use of supplemental authorization agreements to address a host of intricate structural considerations has also gained notoriety in recent years as the complexity of CDA transactions has increased.¹⁷ Given the political, financial, and deliberative realities of CDA negotiation and formation, the time between CDA proposal and CDA establishment may take more than a year.¹⁸

13. See generally STONE & YOUNGBERG, *Foreword* to THE STONE & YOUNGBERG GUIDE TO LAND-SECURED FINANCE i (2004 & Supp. 2008), available at http://www.syllc.com/Templates/media/userfiles/2008%20rev.%20Land-Secured%20Guide_11-08.pdf ("This Guide is intended to assist elected officials, managers of local government agencies, developers, lenders, and others as they consider the benefits and costs of land-secured municipal debt for financing infrastructure.").

14. See Janice C. Griffith, *Recent Developments in Public Finance Law: Special Tax Districts to Finance Residential Infrastructure*, 39 URB. LAW. 959, 960-61 (2007) ("The enabling legislation often calls for the filing of a petition by landowners in the geographical area of the proposed district to originate it, but the formation of a special district may also be instituted by a local entity on its own initiative.").

15. STONE & YOUNGBERG, *supra* note 13, at 9-21.

16. *Id.*

17. See *infra* Part II.B.

18. The Loudoun County Board of Supervisors approved its "Kincora" CDA on July 12, 2010, three years after it was initially proposed in April 2007. See Erika Jacobson Moore, *Kincora Village Approved by Divided Board*, LEESBURG TODAY, July 13, 2010, <http://www.leesburg2day.com/articles/2010/07/13/news/9644kincora071310.txt>; Memorandum from Mike Scott, NA Dulles Real Estate Investor L.L.C., to John Merrithew, Loudoun Cnty. Dep't of Planning (Apr. 23, 2007) (on file with author).

A. *Statutory Procedure*

1. Beginning the Process: Petitions for Creation of a CDA

CDAs may exist for a single term of fifty years as a corporation, and for further periods as subsequent resolutions by the jurisdiction(s) which created the authority provide.¹⁹ They may only be established upon the request-in the form of a petition (“CDA Petition”)-of at least 51% of the landowners of a proposed district, as measured by land area or by assessed value.²⁰ Parcels of land within a proposed district need not be contiguous, but at least 51% of the landowners in each noncontiguous tract must sign the CDA Petition.²¹ Landowners must submit CDA Petitions to the locality or localities in which the parcels of land proposed to comprise the CDA are located.²² If the proposed CDA is located wholly within a town's corporate limits, landowners must petition the town-rather than the county in which the town is situated-to create the CDA, and the town may do so without any action by the county.²³

While the Virginia Code previously placed significant restrictions on the categories of local governments that were eligible to establish CDAs, in 2005 the General Assembly removed many of the limitations placed on counties.²⁴ Today, cities may automatically consider CDA Petitions; however, counties and towns may consider petitions only after adopting an ordinance permitting the locality to assume the power to do so.²⁵

19. VA. CODE ANN. § 15.2-5114(1) (Cum. Supp. 2010).

20. *Id.* §§ 15.2-5152 to -5154 (Cum. Supp. 2010). To gauge initial local government reaction, property owners (usually developers) typically submit a CDA proposal to a jurisdiction and/or conduct initial exploratory meetings with staff to review the concept. *See, e.g.*, Memorandum from Mike Scott, *supra* note 18.

21. § 15.2-5153 (Cum. Supp. 2010).

22. *Id.*

23. *Id.* § 152-5155(A) (Cum. Supp. 2010).

24. Act of Mar. 22, 2005, ch. 547, 2005 Va. Acts 728 (codified as amended at Va. Code Ann. §§ 15.2-5152, -5153, -5158 (Cum. Supp. 2005)). Virginia Code section 15.2-5152 previously distinguished eligibility based on minimum and maximum population and whether an interstate highway passed through the jurisdiction. *See* § 15.2-5152 (Repl. Vol. 2003).

25. § 15.2-5152(A)-(B) (Cum. Supp. 2010). Spotsylvania County has adopted such an ordinance. *See, e.g.*, SPOTSYLVANIA COUNTY, VA., CODE art. XIV, § 21-350 (Supp. 2010).

Virginia Code section 15.2-5154 sets forth the minimum contents of CDA Petitions²⁶ and though they vary in length depending on the complexity of the proposal, drafters frequently opt to include only the minimum information required by the CDA Statutes.²⁷ Standard sections include: (1) recitals introducing the proposed CDA,²⁸ (2) delineation of the CDA's geographical limits,²⁹ (3) an acknowledgment of standing and jurisdiction to file the CDA Petition,³⁰ (4) a brief review of the proposed plan for financing improvements (including which entity will issue bonds and whether the locality requests any financing assistance),³¹ (5) general statements concerning the anticipated public benefits of the CDA,³² and (6) information about the lifespan of the authority.³³

CDA Petitions also include information concerning the CDA's structural composition, and typically reference an attachment that includes a description of the infrastructure, facilities, and/or services the proposed authority will undertake.³⁴ The CDA Petition may also provide information concerning any additional authority of the CDA (i.e., right-of-way acquisition, easement acquisition, permitting, relocation of public utilities, etc.).³⁵ There exists no requirement that CDA Petitions include signatures from the owners of all parcels proposed to be located within a district as long as the requisite fifty-one percent of the landowners signed the CDA Petition.³⁶

26. § 15.2-5154 (Cum. Supp. 2010).

27. *See, e.g.*, Petition for the Creation of the Dulles Town Ctr. Cnty. Dev. Auth. Assessment Dist. to the Bd. of Supervisors of Loudoun Cnty., Va. (Nov. 5, 1997) [hereinafter DTC Petition] (on file with author); York County, Va., Ordinance 06-34, Exhibit C: Petition for the Creation of the Marquis Cnty. Dev. Auth. (Oct. 30, 2006), (Dec. 19, 2006) [hereinafter Marquis Petition] (on file with author).

28. *See* DTC Petition, *supra* note 27, at 1; Marquis Petition, *supra* note 27.

29. *See* DTC Petition, *supra* note 27, at 2-3; Marquis Petition, *supra* note 27, at Exh. A-1.

30. *See* DTC Petition, *supra* note 27, at 2; Marquis Petition, *supra* note 27.

31. *See* DTC Petition, *supra* note 27, at 3-4; Marquis Petition, *supra* note 27.

32. *See* DTC Petition, *supra* note 27, at 6; Marquis Petition, *supra* note 27.

33. *See* DTC Petition, *supra* note 27, at 5.

34. *See id.* At 3, Marquis Petition, *supra* note 27.

35. *See* DTC Petition, *supra* note 27, at 3.

36. *See* VA. CODE ANN. § 15.2-5153 (Cum. Supp. 2010). Failure to procure the support of owners whose lands are included within a proposed CDA may lead to opposition or, in some cases, legal challenges. *See* Tait v. Board of Supervisors, CL08-1422 (Cir. Ct. May 27, 2010) (Spotsylvania County) (dismissed with prejudice). In Tait, a nonpetitioning property owner whose lands were included in a CDA challenged the validity of an

2. Ordinance Establishing the CDA

Upon receipt of the CDA Petition, those localities wishing to proceed must hold a public hearing to consider the passage of an ordinance or resolution (“CDA Ordinance”) creating the proposed CDA.³⁸ Notice of the public hearing must be publicized at the expense of the petitioners for three consecutive weeks in a local newspaper.³⁹ The locality must hold a hearing at least ten days following the final publication of notice.⁴⁰ A CDA district proposed to be located within more than one locality may be formed by concurrent ordinances of each locality following the requisite public hearings in each jurisdiction.⁴¹

As with CDA Petitions, CDA Ordinances vary in length. Some, including the CDA Ordinance establishing Fairfax County’s Mosaic District CDA, are remarkably short;⁴² others, such as the CDA Ordinance forming Lancaster County’s Hill’s Quarter CDA, incorporate a wide range of provisions and multiple exhibits.⁴³ In

approved CDA Ordinance that permitted the Board of Supervisors to release or exclude district parcels from the CDA after the CDA Ordinance’s adoption. *See* Dan Telvock, *Suit Attempts to Stop Mall Road Project*, FREE-LANCE STAR (Fredericksburg), Nov. 25, 2008, <http://fredericksburg.com/News/FLS/2008/112008/11252008/427462>; *see also* Craig, *supra* note 12 (discussing Spotsylvania homeowners’ concerns over being designated as part of a CDA Ordinance for which they received no notice).

37. § 15.2-5156(A) (Repl. Vol. 2008). Such hearings have been mandated since 1996 when the General Assembly amended former Virginia Code section 15.1-1241 to require hearings prior to the adoption of an ordinance creating the authority. *See* Act of Apr. 10, 1996, ch. 897, 1996 Va. Acts 1667, 1669 (codified as amended at VA. CODE ANN. § 15.1-1241 (Cum. Supp. 1996)). Because the CDA Statutes use the term “ordinance” more frequently than “resolution,” (sixteen versus twenty-three times, respectively), some CDA document drafters prefer CDA establishment by ordinance rather than resolution. *See* §§ 15.2-5152 to -5159 (Repl. Vol. 2008 & Cum. Supp. 2010); John D. O’Neill, Jr. & Martha A. Warthen, *Economic Development Incentives*, in *HANDBOOK OF VIRGINIA LOCAL GOVERNMENT LAW* § 11-5.02(b), at 11-11 n.1 (Randi Hicks Rowe ed., 6th ed. 2009) [hereinafter HANDBOOK].

38. § 15.2-5156(A) (Repl. Vol. 2008).

39. *Id.* It is unclear whether WWA notice provisions under Virginia Code section 15.2-5104 also apply to CDAs. *See* John D. O’Neill, Jr. & Martha A. Warthen, *Economic Development Incentives*, in *HANDBOOK*, *supra* note 37, at 11-11.

40. § 15.2-5155(A) (Cum. Supp. 2010). Localities may contract with one another for administration of the authority. *Id.* At the time of this writing, such issues are being considered in the proposed “Blenheim Park” project to establish a CDA straddling the Virginia Beach/Chesapeake city border. *See* Sandra J. Pennecke, *Metroplex Adds Office Space Near Regent University*, VIRGINIAN-PILOT, Mar. 1, 2009, at P7; Mike Gruss, *Robertson, CBN Plan Massive Retail Housing Project Near I-64*, VIRGINIAN-PILOT, July 19, 2006, at A1.

41. FAIRFAX COUNTY, VA., CODE app. P (Supp. 2010).

42. LANCASTER COUNTY, VA., CODE OF ORDINANCES ch. 2, art. II (Supp. 2009).

creasingly, however, such ordinances are relatively simple enactments that include only the minimum information necessary to meet statutory requirements.⁴³ An examination of multiple CDA Ordinances illustrates a tendency to include the CDA's public purpose,⁴⁴ verification that the jurisdiction has complied with public hearing and notice requirements,⁴⁵ the name of the authority,⁴⁶ facilities and services to be financed,⁴⁷ a reference to the CDA's articles of incorporation,⁴⁸ capital cost estimates,⁴⁹ membership of the CDA board,⁵⁰ and a plan of finance.⁵¹

Frequently, CDA Petitions include either a statement waiving the petitioners' right to withdraw their signatures from the CDA Petition, or a statement that a waiver will be provided subsequent to the submission of the CDA Petition.⁵² If all petitioning landowners waive their right to withdraw their signatures, then the jurisdiction may adopt the CDA Ordinance immediately following the public hearing.⁵³ However, if any of the petitioning landowners have not previously waived their right to withdraw, then, following the public hearing-but prior to the adoption of the proposed CDA Ordinance-the locality must mail a copy of the ordinance to all petitioning landowners.⁵⁴ The Virginia Code does not require the locality to provide additional or particularized notice to nonpetitioning landowners whose properties may

43. §§ 15.2-5152 to -5159 (Repl. Vol. 2008 & Cum. Supp. 2010); see, e.g., HAMPTON, VA., CODE § 2-377 (2008); LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03; Prince William County, Va., Ordinance 05-28 (Apr. 19, 2005).

44. HAMPTON, VA., CODE § 2-377(a); LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(c).

45. HAMPTON, VA., CODE § 2-377(a).

46. *Id.*; LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(a).

47. HAMPTON, VA., CODE § 2-377(d); LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(c).

48. HAMPTON, VA., CODE § 2-377(e); LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(k).

49. HAMPTON, VA., CODE § 2-377(f).

50. *Id.* at § 2-377(8); LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(e).

51. HAMPTON, VA., CODE § 2-377(h); LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(h).

52. See, e.g., Petition Pursuant to Va. Code section 15.2-5153 for the Creation of the Mosaic Dist. Cnty. Dev. Auth. to the Bd. of Supervisors of the Cnty. of Fairfax, Va. (Feb. 10, 2009) [hereinafter Mosaic Petition].

53. VA. CODE ANN. § 15.2-5156(B) (Repl. Vol. 2008). The General Assembly approved this expedited process in 1998. Act of Apr. 1, 1998, ch. 188, 1998 Va. Acts 304, 304 (codified as amended at VA. CODE ANN. § 15.2-5156(B) (Cum. Supp. 1998)).

54. § 15.2-5156(B) (Repl. Vol. 2008).

be included in the district.⁵⁵ If, within thirty days of the mailing of the proposed CDA Ordinance, any petitioning landowners' signatures are withdrawn, then the locality may approve the CDA Ordinance only upon certification by the petitioners that the petition continues to meet the minimum land area and value requirements of Virginia Code section 15.2-5152.⁵⁶

Insofar as a CDA's geographic limits are concerned, the General Assembly amended section 15.2-5155(A) in 2009 to permit a locality, subsequent to the adoption of the CDA Ordinance, to exclude certain land from the CDA.⁵⁷ This may occur provided that the CDA Petition and the initial CDA Ordinance permitted such changes and upon the condition that those owners who initially petitioned for the CDA's creation comprised at least fifty-one percent of the land area or assessed value of land remaining in the CDA district following the boundary adjustment.⁵⁸ This change was precipitated by a 2008 Spotsylvania County Circuit Court case and a related opinion of the Attorney General, the latter of which concluded that jurisdictions were prohibited from enacting ordinances "that permit[ted] the subsequent release or withdrawal of land from the [CDA] district" under the version of section 15.2-5155 then in effect.⁵⁹

3. Post-Ordinance Activities

Following the adoption of the CDA Ordinance and creation of the CDA, the locality must file a copy of the CDA Ordinance in the land records for each tax map parcel included in the newly

55. *Id.* Failure to provide additional notice to landowners whose properties are proposed to be included within a CDA can lead to opposition. See Craig, *supra* note 12.

56. § 15.2-5156(B) (Repl. Vol. 2008).

57. Act of Mar. 27, 2009, ch. 473, 2009 Va. Acts 756, 762 (codified as amended at VA. CODE ANN. § 15.2-5155(A) (Supp. 2009)).

58. *Id.*

59. 2008 Op. Va. Att'y Gen. 73, 77; Complaint, Tait v. Bd. of Supervisors, No. CL08-1422 (Cir. Ct. Nov. 19, 2008) (Spotsylvania County). While not directly related to the exclusion of land, the 2009 amendment was also preceded by a 2005 legal dilemma faced by Prince William County concerning a proposed expansion of the existing Virginia Gateway CDA boundaries in the absence of statutory guidance. Faced with two competing procedural alternatives, Prince William opted to follow the standard public hearing and notice provisions as though a new CDA was being formed. See Prince William County, Va., Ordinance 05-42 (June 28, 2005); Prince William County, Va., Agenda Item 4-J for the Regular Meeting of the Prince William County Board of County Supervisors, May 17, 2005, available at <http://www.pwcgov.org/documents/bocs/agendas/2005/0517/4-J.pdf>.

adopted districts⁶⁰ Additionally, the locality typically makes appointments to the CDAs Board of Directors (“CDA Board”), finalizes and executes any supplemental authorization documents,⁶¹ and an authorized agent files the approved CDAs articles of incorporation with the State Corporation Commission.⁶² Additionally, the CDA must obtain final pricing estimates for the infrastructure that it will finance and must issue the necessary bonds.⁶³

B. *Supplemental Authorization Documents*

While CDA Petitions and CDA Ordinances have remained relatively uncomplicated as to form and substance since the 1990s, the structural minutiae of CDAs have largely been relegated to a variety of supplemental authorization agreements used expansively in recent years.⁶⁴ CDA Ordinances frequently reference these agreements, and they are typically executed between bond pricing and bond closings.⁶⁵ They have grown increasingly sophisticated; this is perhaps a reflection of both the evolution of CDAs as well as local governments’ increased reluctance to establish new bond-issuing authorities without imposing appropriate control or oversight by the locality.

The relative ease of modification makes these supplemental agreements particularly advantageous to petitioning landowners and government officials alike.⁶⁶ Though CDA Ordinances and CDA Petitions must be approved and amended through a statutorily governed legislative review process, most modifications to

60. § 15.2-5157 (Repl. Vol. 2008).

61. See *infra* Part ILB.

62. § 15.2-5107 (Repl. Vol. 2008).

63. Id. §§ 15.2-5108,-5158(A) (Cum. Supp. 2010).

64. See, e.g., HAMPTON, VA., CODE § 2-377(h)(4) (incorporating a memorandum of understanding into the CDA Ordinance for the purpose of addressing issues that may arise regarding financial obligations).

65. See Ken Powell, Stone & Youngberg, L.L.C., et al., Virginia Community Development Authorities/Tax Increment Financing Webinar 14 (Apr. 27, 2010), http://www.sylle.com/Templates/media/userfiles/file/CDATIFWebinarSession2_4.27.10.pdf [hereinafter Stone & Youngberg Webinar].

66. See, e.g., Memorandum of Understanding Between the Cnty. of Fairfax, Eskridge L.L.C., and the Mosaic Dist. Cnty. Dev. Auth. 18 (May 12, 2010) [hereinafter Mosaic MOU]; Memorandum of Understanding Between the City Council of the City of Hampton, Va., Hampton Mall Assocs., and the Peninsula Town Ctr. Cnty. Dev. Auth. 8 (Apr. 25, 2006) [hereinafter Peninsula MOU].

supplemental agreements require endorsement by signature of the parties.⁶⁷

1. Memorandum of Understanding (“MOU”)

Approval of most CDAs today entails a corresponding “Memorandum of Understanding” (“MOU”). While MOUs were initially used to evidence landowners’ consent to special *ad valorem* property taxes or assessments or both, they have developed into complex, critically important documents that serve as repositories for a variety of CDA covenants, powers, and restrictions.⁶⁸ MOUs set forth multilateral agreements, address competing interests, and memorialize the expectations of the CDA, its governing jurisdiction, and any other entities involved in the project (e.g., developers, treasurers, and commissioners of revenue).⁶⁹

Development of an MOU typically includes a tedious negotiating process.⁷⁰ Though an MOU’s content varies with the factors and players involved in each CDA, most include detailed commitments related to bond issuance and revenue development, ultimate ownership of improvements, debt service, descriptions of the infrastructure to be financed, and more.⁷¹ From a financial transparency and stability perspective, MOUs may require the appointment of fiscal agents and counsel to a CDA.⁷² They tend to obligate the CDA and developer to comply with Securities and Exchange Commission continuing disclosure requirements (re-

67. See § 15.2-5102 (Reel. Vol. 2008 & Cum. Supp. 2010); *see, e.g.*, Mosaic MOU, *supra* note 66, at 18. Some agreements may also permit the ratification of immaterial amendments or interpretations administratively. See VA. CODE ANN. § 15.2-5114(2) (Cum. Supp. 2010).

68. *See generally* Mosaic MOU, *supra* note 66; Peninsula MOU, *supra* note 66; Memorandum of Understanding Between the Cnty. of New Kent, New Kent Partners, L.L.C., and the New Kent Cnty. Dev. Auth. (2006).

69. See Stone & Youngberg Webinar, *supra* note 65, at 14-18. Due to the proliferating up-front costs associated with planning and proposing a major land development project that incorporates a CDA, some CDA practitioners predict a further evolution of the use of MOUs that include a preliminary MOU between the locality and the developer prior to the establishment of a CDA, as well as a subsequent MOU between the jurisdiction and the CDA following establishment. See *id.* at 19-20.

70. See Author Notes to Stone & Youngberg Webinar, *supra* note 65 (on file with author).

71. See, *e.g.*, Mosaic MOU, *supra* note 66, at 7-9.

72. See, *e.g.*, *id.* at 8-9.

gardless of any applicable exemption),⁷³ and they can require the establishment of debt service reserve funds to assist the CDA and developer during stress periods.⁷⁴ Additionally, some localities concerned about the physical design characteristics of a planned CDA project may desire the inclusion of an MOU provision requiring the developer to deliver a “quality project” by referencing desirable projects located elsewhere,⁷⁵ specifying the timeframe for development,⁷⁶ referencing minimum square footage for various uses, or other project-specific design requirements.⁷⁷

2. Rate and Method of Apportionment

A “Rate and Method of Apportionment” document (“RMA”) may be prepared detailing the apportionment of the CDA’s costs to individual properties within the CDA district.⁷⁸ The constitutional and judicial limitations of such apportionment are described below.⁷⁹ RMAs may also discuss the manner of imposing and collecting the annual assessment, as well as the rights of landowners to appeal administratively their annual assessment to the CDA Board.⁸⁰ Calculations for such things as road and utility improvements, as well as miscellaneous engineering and other “soft costs” associated with project construction, are typically based upon the best-known estimates of other public improvements and

73. See, e.g., *id.* at 16; Peninsula MOU, *supra* note 66, at 7. 17 C.F.R. § 240.15c2-12 exempts certain primary offerings of municipal securities from continuing disclosure rules. Municipal Securities Disclosure Rule, 17 C.F.R. § 240.15c2-12 (2010).

74. See, e.g., Mosaic MOU, *supra* note 66, at 12-13.

75. Often, these provisions are concerned about things other than infrastructure. Participants in a CDA project may also desire the crafting of a “Development Agreement,” executed between the CDA, developer, and locality concerning commitments related to a project’s quality and construction. See Dev. and Acquisition Agreement Between the City of Chesapeake, Va., the S. Norfolk Belharbour Waterfront Cnty. Dev. Auth., and Truxton Dev., L.L.C. 2, 12 (Jan. 22, 2008) [hereinafter Truxton Agreement].

76. *Id.* at 19.

77. *Id.* at 11.

78. See, e.g., Loudoun County, Va., Dulles Town Ctr. Cnty. Dev. Auth., Rate and Method of Apportionment of Assessments (Jan. 28, 1998) [hereinafter DTC RMA]; New Kent County, Va., Ordinance 0-03-06, Exhibit A: Rate and Method of Apportionment of Special Assessment (May 9, 2006) [hereinafter New Kent RMA]; Henrico County, Va., Ordinance Establishing a Special Assessment for the Short Pump Town Center Community Development Authority and Authorizing Certain Agreements, Exhibit A: Rate and Method of Apportionment of Special Assessments (Oct. 24, 2000) [hereinafter Henrico RMA].

79. See *infra* section IV.C.2.

80. New Kent RMA, *supra* note 78, at 7-8.

costs at the time CDA bonds are issued.⁸¹ Financing that involves contributions of sales tax revenue to the CDA, or an assessment based on retail sales that adheres to the guidelines of an RMA, may require the disclosure of otherwise confidential retail sales information maintained by commissioners of revenue.⁸² It may be necessary for CDA district property owners and tenants to waive their right to confidentiality, or to provide sales tax information to the locality.⁸³

III. CDA GOVERNANCE

A. *CDA Board*

Once the CDA is established, the locality's governing body appoints the CDA Board, which exercises the powers of a CDA, pursuant to the more general provisions for establishing authority boards under the WWAA.⁸⁴ The role of a CDA Board varies depending on the complexity of the CDA, but it generally encompasses safeguarding the use of CDA bond proceeds as well as serving as a liaison between a jurisdiction's officials and staff, the developer, and bondholders.⁸⁵ From an administrative perspective, the CDA Board may, among other things, adopt and amend bylaws, rules, and regulations; adopt an official seal; maintain an office; enter into contracts; and sue and be sued.⁸⁶ A resolution of the locality's governing body fixes the compensation for CDA Board members and establishes that CDA Board members are to be "reimbursed for any actual expenses necessarily incurred in the performance of their duties."⁸⁷

81. See, e.g., *id.* at 4.

82. VA. CODE ANN. § 58.1-3(D) (Cum. Supp. 2010).

83. See Stone & Youngberg Webinar, *supra* note 65, at 18; Author Notes to Stone & Youngberg Webinar, *supra* note 65 (on file with author); *see also* § 58.1-3(E) (Cum. Supp. 2010) (requiring a locality to disclose information to the Tax Commissioner in order to fulfill the Tax Commissioner's duties required by the Department of Taxation).

84. §§ 15.2-5114, -5154 (Cum. Supp. 2010).

85. See Author Notes to Stone & Youngberg Webinar, *supra* note 65 (on file with author).

86. § 15.2-5114 (Cum. Supp. 2010).

87. *Id.* § 15.2-5113(C) (Cum. Supp. 2010).

1. Membership

While a CDA Board consisting of five members governs a CDA located within one jurisdiction, the CDA Ordinance often specifies the number of members; however, the Virginia Code permits counties to provide for additional membership that mirrors the number of positions on the county's board of supervisors.⁸⁸ Additionally, pursuant to legislation passed by the General Assembly in 2008, any CDA Board created by the City of Richmond shall consist of seven members.⁸⁹ For CDAs located within two or more localities, the CDA's articles of incorporation should specify the number and membership, but a CDA Board must include a minimum of five members, with at least one appointee from each participating locality.⁹⁰

CDA Petitions, which frequently make recommendations for appointments to the CDA Board, may propose that members consist of a majority of the petitioning landowners or their designees.⁹¹ Because Virginia Code section 15.2-5113(A), which speaks to the powers and appointment of authorities under the WWA, is silent as to residency requirements, CDA Board members need not reside within the CDA district, nor must a CDA Board's membership encompass one or more signatories of the CDA Petition.⁹² Additionally, one or more members of the locality's governing body, local economic development authority, or industrial authority may be appointed to the CDA Board.⁹³ Indeed, members of the jurisdiction's governing body may appoint themselves as the sole members of a CDA Board.⁹⁴ CDA Board members are subject

88. *Id.* § 15.2-5113(A) (Cum. Supp. 2010); *see, e.g.*, HAMPTON, VA., CODE § 2-377(g)(1) (2008) (specifying that the CDA Board will consist of five members).

89. Act of Mar. 27, 2008, ch. 730, 2008 Va. Acts 1296 (codified at VA. CODE ANN. § 15.2-5152 note (Repl. Vol. 2008)).

90. § 15.2-5113(A) (Cum. Supp. 2010); *see also* Lee Cnty. v. Town of St. Charles, 264 Va. 344, 348-49, 568 S.E.2d 680, 683 (stating that Virginia Code section 15.2-5113(A) requires "at least one person from each participating locality [to] be included among the appointees to such an authority board").

91. § 15.2-5154 (Cum. Supp. 2010); DTC Petition, *supra* note 27, at 4.

92. *See* § 15.2-5113(A) (Cum. Supp. 2010). "When the General Assembly has intended to impose a residency requirement for service on boards, authorities, and commissions in the Commonwealth, it has done so explicitly." *Lee Cnty.*, 264 Va. at 349, 568 S.E.2d at 683 (citing VA. CODE ANN. § 15.2-4203(B) (Repl. Vol. 2008)) (holding that the WWA did not require that each person appointed to a water and sewer authority board reside within that authority's service area).

93. § 15.2-5113(A) (Cum. Supp. 2010).

94. *See* Wilkie Chaffin, *P.E. Supervisors Stop Appointment of Citizens to Citizens'*

to the Virginia State and Local Government Conflict of Interests Act.⁹⁵

Once appointed, CDA Board members must elect a chairman, secretary, and treasurer.⁹⁶ CDA Board members may serve for a maximum term of four years, though the CDA Ordinance or other governing document may provide for a shorter time.⁹⁷ CDA Board members “hold office until their successors have been appointed and may succeed themselves.”⁹⁸ In the event “of the death, disqualification, or resignation of a [CDA Board] member, the governing body ... shall appoint a successor to fill the unexpired term.”⁹⁹

Alternate CDA Board members may be selected in the same manner and with the same qualifications as regular members.¹⁰⁰ The terms of alternate members mirror those of the regular members “for whom each serves as an alternate; however, the alternate’s term shall not expire because of the board member’s death, disqualification, resignation, or termination of employment with the member’s political subdivision.”¹⁰¹

2. Meetings

The Virginia Code does not place a limitation on the frequency or location of CDA Board meetings, though the CDA Ordinance or other governing documents may specify both.¹⁰² A majority of a CDA Board constitutes a quorum, and a majority vote by board members is necessary for the CDA Board to take any action.¹⁰³ Vacancies on the CDA Board do not impair the right of a quorum

Committee, SOUTHSIDE MESSENGER (Keysville), Jan. 15, 2010, http://www.southsidemesenger.com/articles/2010/01/15/news/top_stories/ts2.txt.

95. §§ 2.2-3100 to -3131 (Repl. Vol. 2008 & Cum. Supp. 2010).

96. *Id.* § 15.2-5113(A) (Cum. Supp. 2010). “The offices of secretary and treasurer may be combined.” *Id.*

97. *Id.*

98. *Id.*

99. *Id.* § 15.2-5113(C) (Cum. Supp. 2010).

100. *Id.* § 15.2-5113(C) (Cum. Supp. 2010).

101. *Id.*

102. See *id.* § 5113 (Cum. Supp. 2010); see, e.g., LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(1) (2009) (indicating that the CDA must provide seven days’ notice prior to conducting any meeting).

103. § 15.2-5113(B) (Cum. Supp. 2010). “An authority may, by bylaw, provide a method to resolve tie votes or deadlocked issues.” *Id.*

to exercise any rights or duties of a CDA.¹⁰⁴ If a member is not present at a meeting of the authority, the member's alternate is vested with all rights of the absent regular member and "shall be counted for purposes of determining a quorum."¹⁰⁵ Activities of the CDA Board are subject to the provisions of the Virginia Freedom of Information Act ("FOIA").¹⁰⁶ While "authorities" as a category have long been included in the definition of "public body" under Virginia Code section 2.2-3701, the General Assembly's 2003 declaration that CDAs constitute "political subdivisions" only strengthened the inclusion of CDAs within the context of FOIA.¹⁰⁷

B. *CDA Administrator*

The CDA Board may appoint an administrator to "serve at the pleasure of the board members. He shall execute and enforce the orders and resolutions adopted by the board members and perform such duties as may be delegated to him by the board members."¹⁰⁸ CDA Boards often charge administrators with the task of overseeing the authority's financial affairs, preparing an annual financial report for bondholders, performing an annual audit, determining annual revenue requirements, fulfilling responsibilities called for in the bond indenture, as well as informing the locality of the amount to be billed to each parcel in the CDA.¹⁰⁹ A CDA director may enter into contracts on behalf of the CDA only when a majority vote of its members authorize the director to do so.¹¹⁰

104. *Id.* § 15.2-5113(C) (Cum. Supp. 2010).

105. *Id.* § 15.2-5113(D) (Cum. Supp. 2010).

106. *Id.* §§ 2.2-3700 to -3714 (Repl. Vol. 2008 & Cum. Supp. 2010).

107. *Id.* § 2.2-3701 (Cum. Supp. 2010); Act of Mar. 19, 2003, ch. 712, 2003 Va. Acts 950 (codified as amended at VA. CODE ANN. §§ 15.2-5152(A), -5155(A) (Repl. Vol. 2003)). While the Virginia Freedom of Information Advisory Council has not issued an advisory opinion specifically concerning CDAs as of the date of this writing, it has discussed whether a committee established by a board of supervisors to review a CDA proposal must comply with FOIA. *See Advisory Op. Va. Freedom of Info. Advisory Council 10* (2007).

108. § 15.2-5113(E) (Cum. Supp. 2010).

109. *See, e.g.*, Mosaic MOU, *supra* note 66, at 16-17; New Kent RMA, *supra* note 78, at 1,6.

110. *See Cnty. of Campbell v. Howard*, 133 Va. 19, 59, 112 S.E. 876,888 (1922) (holding that a board of supervisors could obligate a county "only at authorized meetings duly held, and as a corporate body, by resolution duly adopted").

IV. CDA POWERS

CDA Boards may exercise a variety of powers in addition to those accorded to waste and water authorities under the WWAA.¹¹¹ The WWAA vests in authorities established pursuant to its provisions certain powers specifically related to the operation of water and waste systems, and such powers are to be "liberally construed to effect the purposes" of the WWAA.¹¹² The 2009 amendments to the WWAA clarified that most powers of waste and water authorities—including eminent domain in certain instances—are available to CDAs with respect to CDA facilities as well.¹¹³ The General Assembly also expanded the definition of "system" to include CDA facilities as well as water and waste facilities.¹¹⁴

A. Power to Finance Infrastructure Improvements and Provide Certain Services

The General Assembly has permitted CDAs to fund, acquire, and operate at least thirty kinds of public infrastructure improvements under a nonexclusive, broadly construed list in Virginia Code section 15.2-5158.¹¹⁵ The most popular infrastructure that CDAs finance includes roads (i.e., acquisition, construction, bridges, curbs, gutters, sidewalks, signals, etc.), public water/sanitary sewer lines, storm water management, parking, streetscape, landscaping, and signage.¹¹⁶ Additionally, CDAs may

111. §§ 15.2-5110 to -5124 (Repl. Vol. 2008 & Cum. Supp. 2010); *id.* § 15.2-5158 (Cum. Supp. 2010). The exercise of such powers by the CDA Board is a legislative function. *See, e.g.*, *Mayor of Lexington v. Indus. Dev. Auth.*, 221 Va. 865, 867, 871, 275 S.E.2d 888, 891 (1981) (holding that an industrial development authority was considered a legislative body); *Indus. Dev. Auth. v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 281, 217 S.E.2d 879, 883 (1975) (holding that an industrial development authority's "powers are legislative powers and [its] exercise is a legislative function").

112. § 15.2-5100 (Repl. Vol. 2008).

113. Act of Mar. 27, 2009, ch. 473, 2009 Va. Acts 756 (codified as amended at scattered sections of VA. CODE ANN. § 15.2 (Supp. 2009)); *see* VA. CODE ANN. §§ 15.2-5110 to -5124, (Repl. Vol. 2008 & Cum. Supp. 2010); John D. O'Neill, Jr. & Martha A. Warthen, *Economic Development Incentives*, in *HANDBOOK*, *supra* note 37, at 11-13.

114. Ch. 473, 2009 Va. Acts at 757 (codified as amended at VA. CODE ANN. § 15.2-5101 (Supp. 2009)).

115. Act of Mar. 29, 1993, ch. 850, 1993 Va. Acts 1234, 1235 (codified at VA. CODE ANN. § 15.1-1250.03 (Cum. Supp. 1993)); Act of Mar. 18, 1995, ch. 402, 1995 Va. Acts 576, 577 (codified as amended at VA. CODE ANN. § 15.1-1250.03 (Cum. Supp. 1995)).

116. *Id.*; *see, e.g.*, *Mosaic Petition*, *supra* note 52, at 2. Additionally, CDAs may fund infrastructure for active adult age-restricted communities with a population of at least one

provide certain special management services related to the operation of the district, including garbage collection, street cleaning, security, grounds keeping, etc.¹¹⁷ The CDA Ordinance must enumerate any infrastructure or services that the CDA proposes to undertake or provide.¹¹⁸

1. Public Purpose of CDA Infrastructure

Virginia's localities enjoy broad discretion in determining whether or not a proposed improvement satisfies the public purpose hurdle of Virginia Code section 15.2-5158.¹¹⁹ Establishing the public purpose of CDA infrastructure and creating a public entity "end user" following completion of the improvements may also be beneficial in distinguishing CDA bonds from "private activity bonds" and permit the exclusion of interest on CDA bonds from the gross income of bondholders.¹²⁰

Economic development has long been recognized as a legitimate public purpose, and there exists a series of Virginia cases that hold that incidental private uses will not necessarily negate an otherwise valid public purpose.¹²¹ Additionally, infrastructure items and services specifically listed under Virginia Code section 15.2-5158 represent an express declaration by the General Assembly that such items constitute a public use, and as such, it

thousand, including security systems. *Id.* § 15.2-5158(A)(1)(e) (Cum. Supp. 2010).

117. *Id.* § 15.2-5158(A)(4) (Cum. Supp. 2010). The author is unaware of CDAs which have constructed school facilities.

118. *Id.* § 15.2-5111 (Repl. Vol. 2008); *id.* § 15.2-5158(A)(1) (Cum. Supp. 2010).

119. See *Short Pump Town Ctr. Cnty. Dev. Auth. v. Taxpayers*, 54 Va. Cir. 501, 509-12 (2001) (construing VA. CODE ANN. § 15.1-5158 (Cum. Supp. 2010)), *vacated sub. nom. on other grounds*, *Short Pump Town Ctr. Cnty. Dev. Auth. v. Hahn*, 262 Va. 733, 554 S.E.2d 441 (2001). Although the circuit court recognized the broad discretion of Virginia localities to define what constitutes a valid public purpose, it acknowledged that the proposed improvement must also be necessary to qualify for public financing under Virginia Code section 15.2-5158. *Id.*

120. See 26 U.S.C. §§ 103 & 141 (2006).

121. See, e.g., *Taxpayers*, 54 Va. Cir. at 508-09; *City of Charlottesville v. DeHaan*, 228 Va. 578, 585-86, 323 S.E.2d 131, 134-35 (1984) (holding that private benefit is irrelevant so long as the jurisdiction's animating purpose is to encourage economic development); *Fairfax Cnty. Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 357, 150 S.E.2d 87, 93 (1966) (holding that industrial development and creating jobs is a public purpose which is not destroyed by incidental private benefit); *Harrison v. Day*, 202 Va. 967, 974, 121 S.E.2d 615, 620 (1961) (citations omitted) (holding that private benefit does not destroy a public purpose); *Hunter v. Norfolk Redev. Hous. Auth.*, 195 Va. 326, 337, 78 S.E.2d 893, 900 (1953) (same).

may not be necessary for local governments to make individual findings that those improvements are “public” in nature.¹²²

In recent years, the General Assembly has reduced the statutory limitations governing the public purposes of CDA infrastructure projects. Prior to 2009, improvements to be financed by CDAs were limited to those which were “necessary to meet the increased demands placed upon the locality as a result of development within the [CDA] district.”¹²³ While this generally had been viewed as a fairly broad expression, the General Assembly expanded Virginia Code section 15.2-5158 in 2009 to also include those improvements which are “desirable for development or redevelopment within or affecting the district.”¹²⁴

Virginia’s courts generally give weight to legislative determinations that a proposed improvement satisfies a public purpose.¹²⁵ Reasonable doubts as to the constitutionality of legislative enactments have historically been resolved in favor of their legality, and local legislative declarations that a contemplated use is a public one are presumed to be correct by courts.¹²⁶ Further, a court will not substitute its judgment for that of the locality unless the action is arbitrary, unreasonable, and without a “substantial relation to the health, safety, morals or general welfare.”¹²⁷ As noted above in Section II.A.1 and as mandated by Virginia Code section 15.2-5154, a statement of public benefit is often included in the CDA Petition and Ordinance to document

122. § 15.2-5158 (Cum. Supp. 2010); *see Stanpark Realty Corp. v. City of Norfolk*, 199 Va. 716, 719-20, 101 S.E.2d 527, 530 (1958); *see, e.g.*, *Andrews v. Warren Cnty. Bd. of Supervisors*, 37 Va. Cir. 128, 133 (Cir. Ct. 1995) (Warren County) (finding that municipality does not need to own infrastructure to issue public purpose bonds).

123. § 15.2-5158(A)(1) (Repl. Vol. 2008).

124. Act of Mar. 27, 2009, ch. 473, 2009 Va. Acts 756, 762 (codified as amended at VA. CODE ANN. § 15.2-5158(A)(1) (Supp. 2009)).

125. *Taubman Regency Square Assocs., L.L.C. v. Bd. of Supervisors*, No. CH00-1304, at 12 (Cir. Ct. May 10, 2002) (Henrico County).

126. *See Hoffman Family, L.L.C. v. City of Alexandria*, 272 Va. 274, 287, 634 S.E.2d 722, 729 (2006) (citing *Infants v. Va. Hous. Dev. Auth.*, 221 Va. 659, 669, 272 S.E.2d 649, 655 (1980); *City of Richmond v. Dervishian*, 190 Va. 398, 405, 57 S.E.2d 120, 123 (1950)).

127. *Infants*, 221 Va. at 671, 272 S.E.2d at 656 (citing *W. Bro. Brick Co. Inc. v. Alexandria*, 169 Va. 271, 288, 192 S.E.2d 881, 888 (1937)). In *Infants*, the court discusses the legislative actions of the General Assembly, but its holding presumably applies to all legislative bodies. *Cf. id.* at 669, 192 S.E.2d at 655 (“[L]egislative judgment may not be vetoed by the judicial branch” (citing *Mumpower v. Housing Auth.*, 176 Va. 426, 444, 11 S.E.2d 732, 738 (1940))).

the public benefits which will accrue from the financed improvements.¹²⁸

2. Deciphering the Necessity of CDA Infrastructure through the *Short Pump Town Center* Cases

Often, the pertinent question in deciphering the acceptability of CDA-financed infrastructure has been whether the proposed improvements are actually necessary to meet increased demands placed on a locality by new development. This was a major issue in the *Short Pump* line of cases-to date the only family of CDA-related cases to be heard by the Supreme Court of Virginia.¹²⁹

In *Short Pump Town Center Community Development Authority v. Taxpayers*, the Short Pump Town Center CDA brought a 2001 bond validation proceeding (discussed below in Section IV.A.2) in the Henrico County Circuit Court under Code section 15.2-2651.¹³⁰ Several taxpayers—including the owner of a competing shopping center—filed grounds of defense to oppose the issuance of bonds, alleging that the CDA statutes did not authorize the financing arrangement for the proposed improvements.¹³¹ While the circuit court rejected some of the taxpayers' claims, it determined that the proposed improvements, with two exceptions, were only useful in meeting the needs of the developer.¹³² Accordingly, the circuit court ruled that the CDA's planned bond issue did not meet the public purpose requirements of Virginia Code section 15.2-5158, and was therefore invalid.¹³³

The Short Pump Town Center CDA, joined by the Henrico County Board of Supervisors and the Henrico County Economic Development Authority, subsequently appealed the circuit court's decision to the Supreme Court of Virginia.¹³⁴ In *Short Pump Town Center Community Development Authority v. Hahn*, the supreme

128. § 15.2-5154 (*Cum. Supp.* 2010); LOUDOUN COUNTY, VA., CODIFIED ORDINANCES tit. 10, § 260.03(d) (2009); *see* DTC Petition, *supra* note 27, at 3; Marquis Petition, *supra* note 27.

129. *Short Pump Town Ctr. Cnty. Dev. Auth. v. Taxpayers*, 54 Va. Cir. 501 (Cir. Ct. 2001) (Henrico County), *vacated sub nom. on other grounds*, *Short Pump Town Ctr. Cnty. Dev. Auth. v. Hahn*, 262 Va. 733, 554 S.E.2d 441 (2001).

130. 54 Va. Cir. at 505-06.

131. *Id.* at 506-07.

132. *Id.* at 511-12.

133. *Id.* at 507, 512.

134. *Hahn*, 262 Va. at 740, 554 S.E.2d at 444.

court vacated the judgment of the Henrico Circuit Court, holding that a CDA was not entitled to bring a bond validation suit under Virginia Code section 15.2-2651 of the Virginia Public Finance Act.¹³⁵ At that time, CDAs were not classified as “political subdivisions” - one of the specifically defined entities then entitled to bring such a suit under that statute.¹³⁶ Rather, the parties should have used the bond validation procedure contained in the WWAAs.¹³⁷ The court’s decision acknowledged that it left many questions unanswered regarding the nature of infrastructure improvements permitted to be financed by a CDA as the case was vacated and dismissed on technical grounds.¹³⁸

In a separate action filed two days after the original filing of the Short Pump Town Center CDA bond validation suit, the owner of a competing shopping mall, Taubman Regency Square Associates, separately contested the issuance of Short Pump Town Center CDA’s bonds in *Taubman Regency Square Associates, L.L.C. v. Board of Supervisors*.¹³⁹ The court consolidated and stayed this action pending the outcome of the CDA’s bond validation suit.¹⁴⁰ Heard by the Henrico County Circuit Court in 2002 following *Hahn*, Taubman relitigated most of the issues heard earlier in *Short Pump Town Center Community Development Authority v. Taxpayers*.¹⁴¹ This time, however, the circuit court ruled in favor of the Short Pump Town Center CDA, finding that the proposed improvements were within the scope of the authorizing statute.¹⁴² The court rejected the plaintiff’s request that it take a narrow view of the purposes for the creation of a CDA.¹⁴³ Taubman subsequently appealed the decision to the Supreme Court of Virginia, which declined to grant the appeal.¹⁴⁴

135. *Id.* at 736, 554 S.E.2d at 441.

136. *Id.* at 745-46, 554 S.E.2d at 447.

137. *Id.* at 748, 554 S.E.2d at 448-49.

138. *Id.* at 748-49 & n.15, 554 S.E.2d at 449 & n.15.

139. No. CH00-1304, at 2 (Cir. Ct. May 10, 2002) (Henrico County).

140. *Id.*

141. Compare *id.*, with *Short Pump Town Ctr. Cmty. Dev. Auth. v. Taxpayers*, 54 Va. Cir. 501 (Cir. Ct. 2001) (Henrico County).

142. *Taubman*, at 8-10.

143. *Id.* at 10.

144. *Taubman Regency Square Assocs., L.L.C. v. Bd. of Supervisors*, No. 022024 (Va. Apr. 18, 2003) (appeal refused Feb. 10, 2003). In separate actions, Taubman also sued federal agencies and Henrico County in 2002 and 2003 in the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit. See *Taubman Realty Group v. Mineta*, 320 F.3d 475 (4th Cir. 2003), aff’d 198 F. Supp. 2d 744 (E.D. Va. 2002).

3. Contracting for Construction and Services: Public Procurement Limited Exemption

Since 1996, CDAs have enjoyed a limited exemption from the Virginia Public Procurement Act for contracts in which special *ad valorem* taxes or assessments authorized pursuant to Virginia Code section 15.2-5158 are used for payment.¹⁴⁵ Accordingly, for contracts using these forms of payment, CDAs may enter into noncompetitive contracts when exercising any powers permitted by section 15.2-5158.¹⁴⁶ This automatic exemption, however, does not apply to the awarding of contracts where any form of public funds not contemplated by section 15.2-5158 - including, for example, tax increment financing¹⁴⁷ - are involved.¹⁴⁸ Accordingly, CDAs or localities wishing to award CDA-related contracts making use of these funds without competitive negotiation or sealed bidding must make an advanced factual written determination that competitive sealed bidding is not practicable or fiscally advantageous to the public, and "that there is only one source practically available for" improvements or services needed by the locality.¹⁴⁹

145. See Act of Apr. 10, 1996, ch. 897, 1996 Va. Acts 1667, 1667 (currently codified as amended at VA. CODE ANN. § 2.2-4344(C) (Cum. Supp. 2010)); *id.* §§ 2.2-4300 to -4342 (Repl. Vol. 2008 & Cum. Supp. 2010); *see also* Mary M. Bathory Vidaver, CDAs: A Primer 2 (Apr. 21, 2010) (unpublished manuscript), <http://www.loudoun.gov/Default.aspx?tabid=312&fmpath=/Press%20Releases/Supervisor%20Burton/> (follow "CDA's-A Primer" hyperlink; then follow "CDA Primer" hyperlink) (stating that Virginia Code section 15.2-5158 requires annual *ad valorem* assessments).

146. § 2.2-4344(C) (Cum. Supp. 2010).

147. See discussion *infra* Section IV.C.4.

148. § 2.2-4344(C) (Cum. Supp. 2010); *see also* Author Notes to Stone & Youngberg Webinar, *supra* note 65 (on file with author).

149. § 2.2-4303(E) (Cum. Supp. 2010); *see also* 1984 Op. Va. Att'y Gen. 291 (analyzing whether or not a "public body" can award a contract without a competitive bidding process under the Virginia Public Procurement Act, VA. CODE ANN. § 11-35 to -80 (Cum. Supp. 1983)).

B. *Power to Incur Debt*

CDAs may issue limited obligation bonds.¹⁵⁰ Except where approval by the locality is specifically required by the provisions of the CDA's governing documents or by the trust agreement securing the bonds, bond issuance by the CDA does not require the consent of the locality.¹⁵¹ CDA bonds are typically issued pursuant to a trust indenture and are secured over a maximum maturation period of forty years from specifically identified CDA revenues.¹⁵² To date, approximately twenty CDAs have issued debt, ranging from approximately \$6.6 million to more than \$92 million.¹⁵³

1. Local Obligations to Support CDA Bonds

One of the determining factors governing a locality's receptivity to a CDA proposal is whether a CDA's potential default on bond repayments, and a diffusion of debt-issuing authority, will have a negative impact on a jurisdiction's credit rating.¹⁵⁴ Indeed,

150. § 15.2-5101 (Cum. Supp. 2010); id. § 15.2-5103(C) (Repl. Vol. 2008); id. §§ 15.2-5125, -5158(A)(2) (Cum. Supp. 2010). Note that local governments sometimes question whether the expediency in using CDA bonds to finance improvements and provide services is outweighed by the efficiency of the usually lower borrowing rates of a locality. See Memorandum from Kirby M. Bowers, Cnty. Adm'r, to Fin. & Gov't Servs. Comm. A2-4 (May 5, 2005), <http://www.loudoun.gov/Default.aspx?tabid=313&fmpath=/Board%20Standing%20Committees> (follow "Finance-Gov't Services" hyperlink; then follow "2005" hyperlink; then follow "05-09-05 CDA" hyperlink; then follow "Fiscal Policy Amendment Special Assessment District Policy.pdf" hyperlink).

151. § 15.2-5158(A)(2) (Cum. Supp. 2010). This provision was added to the CDA Statutes in 2004. See Act of Apr. 12, 2004, ch. 637, 2004 Va. Acts 925 (codified as amended at VA. CODE ANN. § 15.2-5158 (Cum. Supp. 2004)).

152. §§ 15.2-5125, -5133 (Cum. Supp. 2010). "Bond maturities of approximately 30 years are typical for long-term CDA financing. . . ." Presentation to the Loudoun County Finance & Government Services Committee: A Summary of Community Development Authorities, <http://www.loudoun.gov/Default.aspx?tabid=313&fmpath=/Board%20Standing%20Committees> (follow "Finance-Gov't Services Committee" hyperlink, then follow "Special FGS Committee Meetings Jan-Feb 04" hyperlink; then follow "Special FGS Committee Meetings Jan-Feb 04" hyperlink; then follow "Presentation" hyperlink; then follow "B-CDA Overview for Loudoun.pdf" hyperlink) (last visited Oct. 30, 2010).

153. Todd, *supra* note 11, at 10; Powell, *supra* note 2, at 6.

154. See, e.g., Informal Worksession Presentation to the Prince William Cnty. Gov't: Cnty. Dev. Auths. 5 (Feb. 15, 2005), <http://www.pwcgov.org/docLibrary/PDF/003230.pdf>; Loudoun County, Va., Action Item No. 4 for the Meeting of the Bd. of Supervisors Fin./Gov't Servs. & Operations Comm., 2-3, Apr. 28, 2010, <http://www.loudoun.gov/Default.aspx?tabid=312&fmpath=/Board%20Standing%20Committees> (follow "Finance-Govt Services-Operations Committee" hyperlink; then follow "2010" hyperlink; then follow "4-28-10" hyperlink; then follow "4-28-10 PDF" hyperlink); Loudoun Cnty., Va., Agenda Item 15h for the Regular Meeting of the Loudoun Cnty. Bd. of Supervisors, July 15, 2009, available at

Virginia's localities were hesitant to explore the use of CDAs until 1997, when major amendments to the Virginia Code clarified that CDA debt would not be considered a debt of the locality.¹⁵⁵ The amendments further stated that no amount of CDA bonds may be included in a jurisdiction's financial statements as a contingent obligation, and that jurisdictions that did not elect to provide in their CDA Ordinances to back CDA bonds financially were precluded from doing so.¹⁵⁶

Today, any ordinance, agreement, or resolution adopted pursuant to the CDA Statutes must provide that bonds issued by a CDA are the debt of the authority rather than of the local government.¹⁵⁷ Moreover, localities are prohibited from assisting in the repayment of CDA bonds unless specifically contemplated in the CDA Ordinance or pursuant to a subsequent ordinance authorizing additional improvements.¹⁵⁸ In the CDA Ordinance, a locality may elect to offer support where it perceives that doing so is fiscally prudent.¹⁵⁹ Alternatively, a jurisdiction may fashion a CDA Ordinance provision that preserves its ability to intervene without making a moral or legal commitment to stand behind the bonds.¹⁶⁰

<http://www.loudoun.gov/Default.aspx?tabid=312&fmpath=BOS%20Minutes> (follow "Business Meeting Minutes 2009" hyperlink; then follow "07-21-09 BOS Minutes final" hyperlink); Mike DiCicco, *Board Denies Kincora Development*, CASCades CONNECTION (Alexandria), Nov. 20, 2007, <http://www.connectionnewspapers.com/article.asp?article=310712&paper=83&cat=104>.

155. Act of Mar. 15, 1997, ch. 363, 1997 Va. Acts 535, 535 (codified as amended at VA. CODE ANN. § 15.1-1242(C) (Spec. Supp. & Repl. Vol. 1997)). These amendments were later recodified at Virginia Code section 15.2-5103(C) (Repl. Vol. 1997).

156. *Id.*, 1997 Va. Acts at 537 (codified as amended at VA. CODE ANN. § 15.1-1257(B)-(C) (Spec. Supp. & Repl. Vol. 1997)). These amendments were later recodified at Virginia Code section 15.2-5131(B)-(C) (Repl. Vol. 1997). The General Assembly solidified these protections in 2004. Act of Apr. 12, 2004, ch. 637, 2004 Va. Acts 925, 925 (codified as amended at VA. CODE ANN. § 15.2-5158 (Cum. Supp. 2004)).

157. § 152-5103(C) (Repl. Vol. 2008).

158. *Id.* § 15.2-5131(B) (Repl. Vol. 2008). While counties may give or advance funds to authorities under Virginia Code section 15.2-1205, and though section 15.2-5114(9) permits all political subdivisions to provide such funds, their ability to do so in relation to CDA bond repayment appears to be superseded by the express provisions of section 15.2-5131(B). *Id.* § 15.2-1205 (Repl. Vol. 2008); *id.* § 15.2-5114(9) (Cum. Supp. 2010); *id.* § 15.2-5131(B) (Repl. Vol. 2008).

159. For example, a locality may elect to back CDA bonds to assist with their marketing, or because it may feel its interests are best served by agreeing to assume debt in event of default. See John O. O'Neill, Jr. & Martha A. Warthen, *Economic Development Incentives*, in HANDBOOK, *supra* note 37, at 11-12, -15.

160. For example, 2009's economic woes hurt the ability of the City of Richmond's Broad Street CDA to repay bonds, and the CDA was forced to seek assistance from the

While the issuance of CDA bonds cannot count towards a locality's debt capacity from a statutory perspective, rating agencies, private lenders, and potential purchasers of debt instruments may take CDA bonds into account when reviewing a locality's debt burden.¹⁶¹ Local governments have adopted a range of responses to minimize the potential for default and to guard against real or perceived risks to a jurisdiction's fiscal reputation. For example, some localities have established debt service reserve funds or require continuing municipal securities disclosure compliance or both.¹⁶² Almost all localities have required that CDA bonds be sold in \$100,000 denominations to avoid sales to unsophisticated investors.¹⁶³ Several jurisdictions, beginning with Prince William County in 1997, have adopted policies specifically governing the procedures for evaluating CDA proposals.¹⁶⁴ Most notably, many

Richmond City Council, which had previously assumed the obligation to assist in the payment of debt service of up to \$3 million if needed. See Richmond City, Va., Ordinance No. 2003-107-92, Attachment: Memorandum of Understanding 8, (Apr. 14, 2003); Will Jones, *Richmond Budget Plan Has No Cuts in Services*, RICH. TIMES-DISPATCH, Mar. 23, 2010, at Al.

161. See Todd, *supra* note 11, at 8, 10. Some jurisdictions remain disconcerted with what they have interpreted as vagueness on the part of rating agencies as to how CDA debt would be calculated. See *Kincora Village Center Rezoning Gains Planning Commission Support*, LOUDOUN NEWSLETTER (Virginia Newsletters, LLC., Herndon, Va.), Apr. 28, 2010, at 3. For an additional review of rating agencies and bond market perspectives related to CDAs, see Nathan S. Betnun, Legg Mason Wood Walker, Inc., Presentation to the Loudoun Cnty. Bd. of Supervisors Fin. Comm.: Rating Agencies/Bond Markets (May 9, 2005), <http://www.loudoun.gov/Default.aspx?tabid=313&fmpath=/Board%20Standing%20Committees> (follow "Finance-Govt. Services Committee" hyperlink; then follow "2005" hyperlink; then follow "05-09-05 CDA" hyperlink; then follow "Fiscal Policy Amendment Special Assessment District Policy" hyperlink).

162. See Mosaic MOU, *supra* note 66, at 12-13.

163. See Loudoun County, Va. Board of Supervisors, Fiscal Policy, E-63 to E-64 (1984 & Supp. 2008), <http://www.loudoun.gov/Default.aspx?tabid=326> (follow "Budget" hyperlink; then follow "FY 2010" hyperlink; then follow "Adopted FY10 Budget" hyperlink; then follow "Executive Summary" hyperlink; then follow "19 FY10 Fiscal Policy. Pdf" hyperlink) [hereinafter Loudoun Fiscal Policies]; Bonnie France, Partner, Williams Mullen L.L.C., Presentation to Joint Subcom. Established under House Joint Resolution 178/Senate Joint Resolution 70: Cnty. Dev. Auths. 8 (Jan. 13, 2009), http://dls.state.va.us/GROL_PS/dlutil/MEETINGS/011309/CDAs.pdf [hereinafter France Presentation].

164. Prince William's policies have served as an example for several jurisdictions. See Prince William County, Va., Resolution 97-979 (Dec. 2, 1997). The guidelines were subsequently amended and reinstated in 1998 and again in 2005. Prince William County, Va., Resolution 98-1069 (Dec. 15, 1998); Prince William County, Va., Resolution 05-226 (Mar. 15, 2005); see also Roanoke County, Va., Resolution 0921308-1 (Sept. 23, 2008), available at www.roanokecountyva.gov/DepartmentsBoardofSupervisors/CommunityDevelopmentAuthorityCDA.htm (setting forth guidelines from the petitioning stage to the issuance of bonds); Fairfax County, Va., Principles for Public Investment in Support of Commercial Redevelopment, (July 21, 2008) (providing requirements for the use of public funds in a CDA); Loudoun Fiscal Policies, *supra* note 163, at E-60 to E-64 (setting forth minimum criteria in order for the locality to support a CDA).

localities require that a disclosure statement inform investors of the limitations on the revenues securing the CDA bonds.¹⁶⁵

2. Bond Validation

To shield localities from the consequences of the authorization of illegal securities and to provide additional assurance to prospective bond purchasers, the General Assembly permits CDAs to make use of two judicial bond validation proceedings to ensure conclusively the validity of bonds and the legality of all related proceedings before their authorization or issuance. First, under Virginia Code section 15.2-5126, a CDA may file its CDA Ordinance with the circuit court and await challenges for thirty days, during which any person in interest may contest the validity of bonds issued by the CDA.¹⁶⁶ If no challenges are filed, the bonds and all proceedings related to their authorization are presumed legal and may not be challenged.¹⁶⁷ However, only interested parties may utilize this procedure in challenging—not establishing—the validity of bonds.¹⁶⁸ This section is similar to that of section 15.2-2627, which similarly does not permit a CDA to establish the validity of its bonds.¹⁶⁹

Pursuant to Virginia Code section 15.2-2651, part of Virginia's Public Finance Act, a bond-issuing CDA may also bring a motion for judgment in any court of the jurisdiction in which it is located to establish the validity of the bonds.¹⁷⁰ Any interested party—including taxpayers, property owners, and citizens of the jurisdiction—are named defendants.¹⁷¹ Because legislative actions related to bond issuance enjoy a strong presumption of validity, a

165. *See, e.g.*, Prince William County, Va., Resolution 05-226 (Mar. 15, 2005); Peninsula MOU, *supra* note 66, at 2. Such a statement may assert that the CDA debt is not the debt of the locality, that the locality has no legal or moral obligation to assist the CDA in the event of a default, and that the jurisdiction's full faith and credit will not be pledged to any CDA bonds. *See* VA. CODE ANN. § 15.2-5158(A)(2) (Cum. Supp. 2010).

166. § 15.2-5126 (Repl. Vol. 2008).

167. *Id.*

168. *Id.*; *see* Short Pump Town Ctr. Cnty. Dev. Auth. v. Hahn, 262 Va. 733, 747, 554 S.E.2d 441, 448 (2001).

169. *Compare* § 15.2-2627 (Repl. Vol. 2008 & Cum. Supp. 2010), with *id.* § 15.2-5126 (Repl. Vol. 2008). *See Hahn*, 262 Va. at 747, 554 S.E.2d at 448, for a comparison of the two code sections.

170. § 15.2-2651 (Repl. Vol. 2008).

171. *Id.*

bond issue is to be upheld unless there are substantial defects, material errors, or omissions in it.¹⁷²

As noted above in relation to *Hahn*, prior to 2003, CDAs had neither been legislatively declared nor judicially determined to be political subdivisions and, as such, were prohibited from using Virginia Code section 15.2-2651 for bond validation purposes.¹⁷³ Following *Hahn*, however, the General Assembly amended section 15.2-5155 in 2003 to state that CDAs are “a public body politic and corporate and political subdivision of the Commonwealth” and, accordingly, CDAs may now use the method provided by section 15.2-2651.¹⁷⁴ Regardless of the method of bond validation, CDA bonds are presumed to be valid and legal obligations and are enforceable by law.¹⁷⁵ All proceedings taken in connection with the “authorization, issuance, sale, execution, delivery, and repayment of [CDA] bonds” enjoy a similar presumption of validity.¹⁷⁶

C. Power to Generate Revenue

The CDA Statutes contemplate that CDAs may generate revenue in three main ways: special *ad valorem* taxes, special assessments, and special rates or fees.¹⁷⁷ While CDAs have no access to a jurisdiction's general fund revenues and do not possess the ability to independently levy special taxes or special assessments, CDAs have traditionally serviced bond debt via special taxes or special assessments levied and collected on the

172. *Id.* § 15.2-2658 (Repl. Vol. 2008); *see* *Harper v. City Council*, 220 Va. 727, 740, 251 S.E.2d 560, 568 (1980) (“Code § 15.1-221 is a codification of the general principle that the validity of a bond issue will be sustained by the courts”). At the time of this decision, Virginia Code section 15.2-2568 was codified at section 15.1-221 (Repl. Vol. 1973 & Cum. Supp. 1980).

173. *Hahn*, 262 Va. at 746, 748, 554 S.E.2d at 447, 449.

174. Act of Mar. 19, 2003, ch. 712, 2003 Va. Acts 950 (codified as amended at VA. CODE ANN. § 15.2-5155(A) (Repl. Vol. 2003)). Presumably, this amendment also counteracts a portion of a June 2002 ruling of the Virginia Tax Commissioner, which held that because a CDA was not a political subdivision, CDAs do not qualify for government exemption from retail sales and use taxes for “tangible personal property for use or consumption.” *See* VA. DEPT OF TAXATION, PUB. DOO. 02-89 (June 11, 2002), available at <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf> (follow “Rulings of the Tax Commissioner” hyperlink; then follow “2002” hyperlink; then follow “PD 02-89” hyperlink).

175. § 15.2-5159 (Cum. Supp. 2010).

176. *Id.*

177. *Id.* § 15.2-5158(A)(3), (5), (6) (Cum. Supp. 2010).

CDAs' behalf by the locality.¹⁷⁸ Many localities have also pledged certain incremental increases in tax revenues to the CDA.¹⁷⁹ Each of these four methods, frequently referenced in the CDA Ordinance, is briefly discussed below.¹⁸⁰ Notably, the imposition of special assessments, taxes, and other fees and rates charged by a CDA can be met with surprise and/or disfavor by landowners, customers, and potential purchasers of property.¹⁸¹

1. Characteristics of Special *Ad Valorem* Taxes

CDAs may request that the locality charge an annual *ad valorem* real estate tax ("special *ad valorem* tax") based upon the assessed fair market value of the taxable real property within the CDA district.¹⁸² Special *ad valorem* taxes are limited to twenty-five cents of every \$100 of assessed value per parcel, unless all landowners within the CDA district request more.¹⁸³ A locality collects the special *ad valorem* tax and maintains the proceeds in a separate account, which may only be used for assisting the

178. *Id.* § 15.2-5125 (Cum. Supp. 2010); *see* John D. O'Neill, Jr. & Martha A. Warthen, *Economic Development Incentives*, in HANDBOOK, *supra* note 37, at 11-12.

179. *See, e.g.*, Mosaic MOU, *supra* note 66, at 13. While tax increment financing ("TIF") is authorized under Virginia Code section 58.1-3245 through -3245.5, many practitioners could rely on the locality's general authority to appropriate to the CDA pursuant to section 15.2-1205 (for counties) or section 15.2-5114(9) (for towns and cities). § 15.2-1205 (Repl. Vol. 2008); *id.* § 15.2-5114(9) (Cum. Supp. 2010); *id.* §§ 58.1-3245 to -3245.5 (Repl. Vol. 2009). Information regarding TIF agreements is often referenced in the MOU and CDA Ordinance. *See* Stone & Youngberg Webinar, *supra* note 65, at 19; *see also* CITY OF CHESAPEAKE, VA., CODE OF ORDINANCES §§ 30-550 to -562 (2010); PATRICIA A. PHILLIPS, DEP'T OF FIN., REPORT ON TAX INCREMENT FINANCING DISTRICTS AND SPECIAL SERVICE DISTRICTS IN THE CITY OF VIRGINIA BEACH, VIRGINIA (Nov. 21, 2008), http://www.vbgov.com/file_source/dept/mcg/WebPage/HotTopics/Town%20Center/Documents/admin_nl_2008_tif_report_final.pdf.

180. Failed legislation in recent years would have allowed CDAs to request annually its respective locality impose additional sales, transient occupancy, and food and beverage taxes within a CDA district. *See* H.B. 359, Va. Gen. Assembly (Reg. Sess. 2010); H.B. 343, Va. Gen. Assembly (Reg. Sess. 2010); H.B. 2662, Va. Gen. Assembly (Reg. Sess. 2009).

181. *See, e.g.*, Shannon Humphrey, *Peninsula Town Center Purchases Come with an Unexpected Charge*, DAILY PRESS (Newport News), Jan. 15, 2010, at A1, available at http://articles.dailypress.com/2001-01-15/news/1001140192_1_mall-properties-bond-issue-hampton-city-council; Nikita Stewart, *Cherry Hill Might Levy Special Taxes*, WASH. POST, Jan. 15, 2006, at T01.

182. § 15.2-5158(A)(3) (Cum. Supp. 2010).

183. *Id.*

CDA.¹⁸⁴ As discussed below,¹⁸⁵ special *ad valorem* taxes are treated as tax liens under Virginia Code section 58.1-3340.¹⁸⁶

2. Characteristics of Special Assessments

a. In General

At the request of the CDA, a special assessment may be imposed by the governing body on property within the district, apportioned to each parcel based upon benefits conferred by the planned improvements.¹⁸⁷ Similarly to special *ad valorem* taxes, special assessments receive the same treatment as tax liens, may be used solely for CDA purposes, and are annually appropriated to the CDA.¹⁸⁸ While a special assessment is a species of a tax and represents an exercise of the locality's general taxing powers, it is distinguishable from the special *ad valorem* tax and a locality's general taxes in that it is based upon benefits conferred only on favored properties.¹⁸⁹

CDA special assessments are subject to statutory and constitutional restrictions. Because Virginia's localities enjoy only those powers of assessment expressly conferred on them by the General Assembly, the power to assess must be exercised strictly within such restrictions.¹⁹⁰ Article X, section 3 of the Virginia Constitu-

184. *Id.*

185. See *infra* Section IV.C.2-3.

186. § 58.1-3340 (Cum. Supp. 2010).

187. *Id.* § 15.2-5158(A)(5) (Cum. Supp. 2010); see also 1978 Op. Va. Att'y Gen. 504 (stating that a property owner is required to pay a special assessment "unless that amount would exceed the 'peculiar benefits' to the property").

188. § 15.2-5158(A)(5) (Cum. Supp. 2010); see also *id.* § 58.1-3340 (Cum. Supp. 2010). The amount of the annual appropriation is in the amount needed to meet the principal and interest demands of bonds on an annual basis. *Id.* § 15.2-5158(A)(5) (Cum. Supp. 2010).

189. See *Norfolk v. Ellis*, 67 Va. (26 Gratt.) 224, 230 (1875) ("[A]ssessments, as distinguished from general taxation, rest solely upon the idea of equivalents, a compensation proportioned to the special benefits derived from the improvement"). For a related discussion, see 64 *C.J.S. Municipal Corporations* § 1117 (1999); 16 *MICHIE'S JURISPRUDENCE Special Assessments* §§ 2, 8, 10, 13 (Repl. Vol. 2010).

190. *S. Ry. Co. v. City of Richmond*, 175 Va. 308, 313, 8 S.E.2d 271, 273 (1940); see also *Hicks v. City of Bristol*, 102 Va. 861, 864-65, 47 S.E. 1001, 1002 (1904) (discussing how a state, through constitutional provision, may void permission to levy special assessments); *Violett v. City Council of Alexandria*, 92 Va. 561, 579, 23 S.E. 909, 915 (1896) (stating how localities must keep closely within the provisions delegated by the legislature to levy special assessments). Prior to the adoption of the 1971 Constitution, localities were prohibited from levying special assessments for local improvements on abutting property owners by

tion—which authorizes the General Assembly to permit localities to levy special assessments—imposes two basic limitations on such assessments in relation to the improvements they finance.¹⁹¹ First, any special assessment must “abut” an improvement, and second, any special assessments imposed may not exceed the “peculiar benefits” resulting from the improvements to abutting property owners.¹⁹² A discussion of these two requirements follows.

b. Abutting Improvements

Prior to 2006, statutory and constitutional interpretations of the term “abutting” as they related to the permissibility of special assessments were generally more restrictive than the statute or provision being interpreted.¹⁹³ The Supreme Court of Virginia previously addressed the issue of abutment in the context of highway improvements in *Taylor v. Board of Supervisors*.¹⁹⁴ There, the court held that the term “abutting” limited levying special assessments “to owners of land bordering upon, and not merely adjacent or in close proximity to, the portion of the street that is being improved.”¹⁹⁵ This decision accorded with a 1980 At-

section 170 of the Constitution of 1902. Exceptions to this limitation included cities and towns that improved sidewalks, paved alleys, and constructed sewers. While amendments in 1927 modestly expanded the use of assessments, and further amendments in 1966 were proposed, most constitutional limitations were removed by the inclusion of article X, section 3 in the 1971 Constitution, which granted to the General Assembly the power to determine the legitimacy of special assessments. See JOHN DINAN, THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 195-196 (2006); 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1060-61 (1974). The 1902 provision ended the practice of localities charging and enforcing payment of special assessments as authorized on an individual basis by charter. See 16 MICHIE'S JURISPRUDENCE *Special Assessments* § 9.

191. VA. CONST. art. X, § 3; see 1981 Op. Va. Att'y Gen. 91.

192. VA. CONST. art. X, § 3. These requirements are similar to those established under Virginia Code sections 15.2-2400 through -2413 for local public improvement service districts generally. §§ 15.2-2400 to -2413 (Repl. Vol. 2008 & Cum. Supp. 2010); accord *Norwood v. Baker*, 172 U.S. 269, 279 (1898) (holding that an assessment “in substantial excess of the special benefits accruing to [the property owner] is ... a taking [] under the guise of taxation”).

193. See 2006 Op. Va. Att'y Gen. 89, 92.

194. 243 Va. 409, 412, 416 S.E.2d 433, 435 (1992); see also 2006 Op. Va. Att'y Gen. 89, 92.

195. *Taylor*, 243 Va. at 412, 416 S.E.2d at 435. The term “abut” is defined as “to reach or touch.” BALLENTINE'S LAW DICTIONARY 8 (3d ed. 1969); see also *State Highway & Transp. Comm'r v. Creative Displays of Norfolk, Ltd.*, 236 Va. 352, 355, 374 S.E.2d 30, 32 (1988) (quoting *Holston Salt & Plaster Co. v. Campbell*, 89 Va. 396, 398, 16 S.E.2d 274, 274 (1892) (“What is adjacent ... may be separated by the intervention of some other ob-

torney General's opinion, which narrowly construed the definition of "abutting property" to mean "property touching, contacting or bordering on [an] improvement," and required "an immediate physical connection between the improvement and the property assessed."¹⁹⁶

While no Virginia court has defined the term "abutting" as it pertains to CDAs or the WWAA specifically, the Attorney General revisited the definition of "abutting" in 2006, this time providing a slightly expanded definition as the term relates to levying a special assessment, but noting the unison between the 1980 Attorney General interpretation and Taylor.¹⁹⁷ Asked to opine upon the permissibility of assessments levied against properties that only abutted a portion of an improvement, the Attorney General noted that abutting property owners "are not necessarily limited to owners of property with fee simple frontage on the improvement[,] but that properties merely abutting only a portion of an integrated system of improvements "may be taxed or assessed ... to pay its allocable share of the cost of the entire system of improvements."¹⁹⁸ Furthermore, the Attorney General concluded that multiple parcels under the same ownership "may all be considered to abut an improvement when at the time the assessment is levied at least one such parcel abuts the improvement, each parcel adjoins another such parcel, and each parcel derives some benefit from the infrastructure improvements."¹⁹⁹ Arguably, the nature of improvements that a CDA is authorized to undertake (including school buildings, recreational facilities, bridges, parking facilities, and fire prevention systems) suggests a more liberal interpretation of the "abutting" requirement.²⁰⁰

c. Peculiar Benefits of Improvements

As noted in Article X, section 3 of the Virginia Constitution, the amount of assessment may not exceed the "peculiar benefits" of the improvements to any assessed property.²⁰¹ Apportioning the

ject; what is contiguous must touch on one side.").

196. 1981 Op. Va. Att'y Gen. 91, 91.

197. See 2006 Op. Va. Att'y Gen. 89, 92-93.

198. *Id.* at 90, 94.

199. *Id.* at 92-93.

200. See VA. CODE ANN. § 15.2-5158(A)(1) (Cum. Supp. 2010).

201. VA. CONST. art. X, § 3. This rule was in existence prior to the adoption of the 1971

benefit of improvements to particular parcels has long been held to be a legislative function,²⁰² and an assessment may not exceed the full cost of improvements being financed plus any incidental administrative costs required in establishing the CDA and said improvements.²⁰³ In *Southern Railway Co. u. City of Richmond*, the Supreme Court of Virginia interpreted the term “peculiar benefits” to mean “the difference [in] the value of the lot with and without [improvements]” and “the full amount of the enhanced value” of each lot resulting from the construction of improvements.²⁰⁴ And in *City of Richmond u. Eubank*, the court further held that “the maximum amount which may be charged or taxed is measured by the value of the [improvement] to the abutting lots.”²⁰⁵

Multiple parcels within a CDA have previously been assessed differently based on their relationship to the improvements, their use, or development intensity.²⁰⁶ In no event, however, is an “abutting property owner required to pay an assessment in excess of” the advantages accruing to the property as a result of the proposed improvements.²⁰⁷ If multiple contiguous parcels owned by one landowner are subsequently sold and no longer exist under a unified ownership, such a sale does “not affect the validity of the assessment” and it may be apportioned to the new owners.²⁰⁸

constitution. See *Violett v. City Council of Alexandria*, 92 Va. 561, 576, 23 S.E. 909, 914 (1896) (discussing how assessments upon abutting lots levied according to benefits are not in violation of article X, section 1 of the Virginia Constitution).

202. See *Norfolk v. Ellis*, 67 Va. (26 Gratt.) 224, 228 (1875) (“[C]ourts are not authorized to interfere [in assessments] merely because they may consider the taxation impolitic, or even unjust and oppressive.”).

203. Calculation of such costs are discussed in Virginia Code section 15.2-5158(A) (5)(i) (Cum. Supp. 2010).

204. *S. Ry. Co. v. City of Richmond*, 175 Va. 308, 315-16, 8 S.E.2d 271, 274 (1940); *see also City of Richmond v. Eubank*, 179 Va. 70, 75, 18 S.E.2d 397, 400 (1942) (discussing a tax assessment on sewers in light of “the peculiar benefits”). For CDAs with multiple parcels, the special assessment must be proportionate to the specific benefit of the proposed improvements to each individual parcel. The method of apportionment will be upheld unless “palpably arbitrary and a plain abuse.” *Roberts v. Richland Irrigation Dist.*, 289 U.S. 71, 74-75 (1933) (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 176 (1896)); *see also* 1981 Op. Va. Att'y Gen. 91, 92 (discussing the distinction between apportionment of costs and assessment of peculiar benefits).

205. *Eubank*, 179 Va. at 75, 18 S.E.2d at 400; *see also Asberry v. City of Roanoke*, 91 Va. 562, 565, 22 S.E. 360, 361 (1895) (stating that where a benefit is deficient or nonexistent, the special element “loses its foundation”).

206. See DTC RMA, *supra* note 78, at 3; Henrico RMA, *supra* note 78, at 4; New Kent RMA, *supra* note 78, at 5.

207. 1978 Op. Va. Att'y Gen. 504, 505.

208. 2006 Op. Va. Att'y Gen. 89, 92-93.

However, the assessment for each of the properties in aggregate may not “exceed the peculiar benefits of the improvements to the abutting land as subdivided.”²⁰⁹

3. Collection of Special *Ad Valorem* Taxes & Assessments

A CDA's special *ad valorem* taxes and assessments levied are in the nature of a tax²¹⁰ and exist as a “personal liability upon the owner against whom the taxes are assessed.”²¹¹ They are treated as tax liens against real property and are superior in dignity to all other liens imposed against the property, including judicial liens, vendor's liens, or any other lien created by act of the property owner.²¹² Accordingly, local governments may pursue collection of delinquent CDA charges for up to twenty years from the original date of nonpayment by utilizing any methods contemplated by the enforcement provisions of Virginia Code title 58. 1.²¹³

Additionally, because foreclosure is often the only remedy for delinquent special *ad valorem* taxes and assessments, a locality may establish a collection agreement on behalf of the bondholders within the MOU or by a separate writing to pursue collection of delinquent payments (or foreclosure) “with the same diligence and in the same manner as it employs” when pursuing delinquent general *ad valorem* taxes.²¹⁴ Additional MOU provisions or CDA governing documents may require the developer to provide disclosure to any subsequent purchaser of land whose property is subject to an outstanding special *ad valorem* tax or assessment, and to disclose that the locality will collect special *ad valorem*

209. VA. CODE ANN. § 15.2-5158(A)(5)(ii) (Cum. Supp. 2010).

210. John D. O'Neill, Jr. & Martha A. Warthen, *Economic Development Incentives*, in HANDBOOK, *supra* note 37, at 11-12.

211. *City of Richmond v. Monument Ave. Dev. Corp.*, 184 Va. 152, 157, 34 S.E.2d 223, 225 (1945); *see also* §§ 58.1-3919 to -3938 (Repl. Vol. 2009) (discussing collection of delinquent taxes).

212. § 58.1-3340 (Cum. Supp. 2010); *see Monument Ave. Dev. Corp.*, 184 Va. at 157, 34 S.E.2d at 224; *City of Richmond v. Williams*, 102 Va. 733, 744, 47 S.E. 844, 847 (1904); *Thomas v. Jones*, 94 Va. 756, 758-59, 27 S.E. 813, 814 (1897).

213. *See* § 58.1-3341 (Repl. Vol. 2009); *id. tit. 58.1, ch. 39* (Repl. Vol. 2009 & Cum. Supp. 2010). There exists no provision indicating prioritization of tax lien sale proceeds between a locality's outstanding general taxes or other taxes in arrears. See John D. O'Neill, Jr. & Martha A. Warthen, *Economic Development Incentives*, in HANDBOOK, *supra* note 37, at 11-14.

214. Mosaic MOU, *supra* note 66, at 11. Notably, the signatories to the Mosaic MOU have agreed that the county will not expend resources collecting *de minimis* amounts of outstanding payments. *Id.*

taxes and assessments at the same time and in the same manner as general real estate taxes.²¹⁵

For special assessments in particular, property owners may either elect to prepay the full amount of the assessment up front or in installments for up to forty years, if provided for by the CDA and the locality.²¹⁶ If paid at one time, the property subject to the assessment may be released from the lien; if paid in installments, any assessment lien will be reduced for the principal portion of the annual assessment.²¹⁷

4. Characteristics of Tax Increment Financing

A CDA and a jurisdiction may enter into an agreement whereby the locality dedicates the incremental taxes above a specified base level, generated by economic activity within a designated geographic area, to fund CDA improvements.²¹⁸ This practice, commonly known as “tax increment financing” (“TIF”), does not involve the charging of new taxes, and the sources of tax revenues and amounts may be negotiated.²¹⁹ For example, the locality may pay all or a portion of the net revenues of a development project to a CDA, as well as any other taxes or anticipated revenues that the jurisdiction may lawfully pledge, including real property taxes, personal property taxes, BPOL taxes, sales taxes, transient occupancy taxes, meals taxes, and more.²²⁰

215. *Id.* at 13. Interestingly, the Mosaic MOU also stipulates that failure to provide disclosure has no effect on one's obligation to pay the special assessment or special tax. *Id.* at 13-14.

216. § 15.2-5158(5)(iii) (Cum. Supp. 2010). Property owners in Prince William County's Cherry Hill CDA, for example, will pay annual assessments in installments over 30 years. See Stewart, *supra* note 181.

217. This is often contemplated in the RMA. See, e.g., New Kent RMA, *supra* note 78, at 6, 9. In the event the outstanding amount of a special assessment is permanently paid, most supplemental agreements for CDAs will require the CDA to release the lien and/or provide a recordable notice of payment to the owner. See, e.g., *id.* at 8.

218. See France Presentation, *supra* note 163, at 13; *supra* note 179.

219. See France Presentation, *supra* note 163, at 13. For a general discussion of TIF financing, see COUNCIL OF DEVELOPMENT FINANCE AGENCIES & INTERNATIONAL COUNCIL OF SHOPPING CENTERS, TAX INCREMENT FINANCE BEST PRACTICES REFERENCE GUIDE (2007) [hereinafter BEST PRACTICES GUIDE], available at <http://www.mrsc.org/artdocmisc/CDFA.pdf>.

220. § 58.1-3245.4 (Repl. Vol. 2009); see Powell, *supra* note 2, at 4; Davenport & Co., Presentation to the Spotsylvania Cnty. Bd. of Supervisors: Cmty. Dev. Auths. & Tax Increment Fins. 12 (Dec. 2008), http://www.spotsylvania.va.us/onlineservices/agendas/compositeagendas/Board_of_Supervisors_Meeting_2008-12-09.pdf (follow “R07-0012 Summit

Combining TIF with special *ad valorem* taxes and assessments can make CDA projects more feasible for both local governments and developers and may provide additional security for bond purchasers.²²¹ Bonds are frequently structured so that incremental tax revenues pay the debt service, while special taxes or assessments are used to make up any deficiencies.²²² In conjunction with the powers of industrial and economic development authorities under the Industrial Development and Revenue Bond Act, TIF assists with providing private economic development incentive payments and financing improvements in relation to CDA projects.²²³

5. Characteristics of Rates and Fees

In 2009, the General Assembly amended the CDA Statutes to permit CDAs to set and charge user fees for the use or benefit derived from services and/or facilities provided, owned, operated, or financed by the CDA.²²⁴ Unlike other levies collected by the locality and subsequently appropriated to the CDA, the CDA may directly assign responsibility for collecting user fees to any owner, tenant, or customer of property served by, contracted for, or benefited from CDA services or improvements.²²⁵ The City of Hampton's Peninsula Town Center CDA, for example, has imposed a special retail sales assessment on landowners and retailers equal to 0.5% of all taxable retail sales transactions that are subject to

Crossing" hyperlink).

221. See Powell, *supra* note 2, at 4; see also Davenport & Co., *supra* note 220, at 12.

222. Davenport & Co., *supra* note 220, at 12.

223. See § 15.2-4900 to -4908 (Repl. Vol. 2008 & Cum. Supp. 2010). This financing scheme, utilized in the Short Pump Town Center CDA, was upheld in *Taubman Regency Square Associates, L.L.C. v. Board of Supervisors*, and has more recently been utilized in Prince Edward County's Granite Falls CDA. No. CH00-1304 (Cir. Ct. May 10, 2002) (Henrico County); see Economic Dev. Grant Agreement Between Prince Edward Dev., Prince Edward Cnty. Bd. of Supervisors, and Prince Edward IDA 25-26 (2009), available at http://www.co.prince-edward.va.us/Agendas/AS/AS-01122010_18b.pdf.

224. Act of Mar. 27, 2009, ch. 473, 2009 Va. Acts 756, 763 (codified as amended at VA. CODE ANN. § 15.2-5158(A)(6) (Cum. Supp. 2010)). This amendment, which appears to have been in response to uncertainty as to whether certain WWAA powers applied to CDAs, mirrors the language of Virginia Code section 15.2-5114(10) (Cum. Supp. 2010); France Presentation, *supra* note 163, at 18. Presumably, CDAs may collect such fees without prior authorization by the locality.

225. § 15.2-5158(A)(6) (Cum. Supp. 2010).

the Virginia retail sales and use tax.²²⁶ The Virginia Tax Commissioner has ruled that if a CDA imposes a retail sales tax based upon a percentage of taxable retail sales within a CDA district, revenues generated by the charge are includable within “the sales price of tangible personal property or taxable services sold within the CDA district.”²²⁷

D. Additional Incidental Powers

CDAs are authorized to “[p]urchase development rights that will be dedicated as easements for conservation, open space or other purposes pursuant to [Virginia’s] Open-Space Land Act.”²²⁸ They may also finance the acquisition of land within a CDA district, subject to authorization by the local governing body and other agencies having jurisdiction within the CDA district.²²⁹

V. CONCLUSION

While CDAs remain relatively new to many Virginia jurisdictions, several revisions have been made to the original 1993 CDA Statutes to clarify formerly obscure provisions.²³⁰ Statutes related to establishing CDAs, their proper legal characterization, and governance structure are now more comprehensible, while the confines of CDA powers have been further developed by a handful of cases and interpretations as well as the practical experiences of developers and localities.

Looking ahead, further legislative changes may be warranted. For example, the General Assembly could clarify the notice provisions for nonpetitioning landowners whose properties are included in CDA proposals. Additionally, the legal characterization of supplemental authorization agreements, including what provisions may be included therein, deserves review, as does the over

226. *BEST PRACTICE GUIDE*, *supra* note 219, at 48; *see, e.g.*, HAMPTON, VA., *CODE* § 2-377(h)(1) (2008).

227. VA. DEPT of TAXATION, PUB. Doc. 10-22 (March 26, 2010), *available at* <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf> (follow “Rulings of Tax Commissioner” hyperlink; then follow “2010” hyperlink; then follow “PD 10-2 2” hyperlink).

228. § 15.2-5158(A)(7) (Cum. Supp. 2010); *see id.* § 10.1-1700 to -1705 (Repl. Vol. 2006 & Cum. Supp. 2010).

229. *Id.* § 15.2-5158(A)(8) (Cum. Supp. 2010).

230. *See supra* note 6 and accompanying text.

arching interplay between the WWAAs and CDA Statutes. With the benefit of hindsight and the condition of the economy seventeen years since the CDA statutes were first enacted, the time may be ideal to revisit the underlying purpose of CDAs and determine whether they provide the beneficial, viable, and long-term alternative to public infrastructure financing that was originally envisioned.