

**REPORT OF THE  
COMMISSION STUDYING**

**Alternative Methods of  
Financing Certain  
Facilities at  
State-Supported Colleges  
and Universities  
Pursuant to HJR 373**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



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The Division of Legislative Services wishes to thank other  
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# **EXECUTIVE SUMMARY**

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## **Authority and Study Objectives**

House Joint Resolution No. 373 established a commission to study alternative methods of financing certain facilities at state-supported colleges and universities. The Commission was charged with the responsibility of determining whether changes are needed in the Procurement Act and other laws and policies presently governing the financing of capital projects for higher education. The resolution stated that, despite strong support from the Commonwealth's general fund, the construction and expansion needs of higher education institutions are not being met. The resolution also cited the significant interest among colleges and universities in pursuing cooperative projects with local governments, foundations, and private developers. The Commission's inquiry necessarily focused on the Commonwealth's constitutional debt restrictions and capital outlay and procurement processes, as well as administrative policies and their application to higher education.

## **Financing Capital Facilities for Higher Education**

### **Background**

The demand for additional capital funding for Virginia's colleges and universities stems from a number of factors. The increasing reputations of Virginia's institutions of higher education, together with the growing number of Virginia high school graduates, have clearly affected college applications and enrollments, thus creating a need for expanded facilities. The special preservation and renovation needs of certain institutions may also require additional appropriations. While an aggressive capital outlay program has provided nearly \$1 billion for higher education in the past 10 years, certain institutions may require capital outlay funds exceeding the present rate of appropriations.

### **Constitutional Guidelines**

The public debt financing options available to state-supported colleges and universities are authorized by Article X, § 9 of the Virginia Constitution. The Constitution creates four categories of debt, three of which are secured by the Commonwealth's full faith and credit. In recent years, most higher education institutions have typically relied on § 9(c) debt, secured by project revenues and the Commonwealth's full faith and credit, and § 9(d) debt, for which there is no pledge of full faith and credit, to finance capital expansion.

### **Statutory Guidelines for State Debt**

Institutions of higher education may obtain § 9(d) funding through a number of sources. The institutions themselves may issue debt to finance capital projects, subject to gubernatorial consent and legislative appropriations. Payment sources for institutional bonds include revenues

from the project and existing facilities, student fees, and other funds. Institutional bonds may also, in some cases, be secured by endowment funds and private gifts.

Institutional bonds may be sold directly on the open market or to the Virginia College Building Authority (VCBA). The VCBA may also issue its own bonds to construct and operate a higher education project which is conveyed to the participating institution upon full payment of the Authority's bonds. Traditionally, the VCBA has provided tax-exempt, secured financing for private institutions; except for certain VCBA equipment lease arrangements, the state-supported institutions have typically relied on other methods to finance capital expansion. While the projects that local industrial development authorities may finance for higher education appear to be quite limited, other bond-issuing entities might serve the capital needs for higher education. The Virginia Public Building Authority is empowered to issue revenue bonds that might be used to benefit higher education; however, it currently possesses a relatively small unused debt capacity to finance the Commonwealth's state-supported colleges and universities.

## **Statutory And Administrative Procedures**

Capital expansion for public higher education is also governed by a plethora of budgetary and statutory procedures, as well as administrative policies, created to ensure prudence in project selection and finance, fairness in the procurement of services, and safety and quality in project design and construction. The pre-planning, planning, and construction phases of the traditional capital outlay process require the input and oversight of a number of agencies; multiple reviews of financial feasibility and project justification are required prior to the issuance of permanent financing to ensure compliance with construction codes, financial procedures, and approved project scope and design.

The Virginia Public Procurement Act also figures quite prominently in the development of capital projects for higher education. College and university officials have expressed concern that compliance with the Act's bidding procedures may hinder or prohibit the development of unique project proposals involving private developers. The Commission's study has confirmed, however, that compliance with competitive processes and review procedures generally ensures quality in project design and construction.

## **Alternatives and Considerations**

The Commission received testimony from several institutions describing a number of potential projects and unique financing proposals. College and university officials relayed concerns regarding the flexibility and efficiency of the administrative procedures governing the capital expansion process. Institutions have also expressed interest in pursuing privatization arrangements and in clarifying procedures for the evaluation and development of exceptional capital project proposals.

Deficiencies in research laboratory and office space plague several institutions. Indirect cost recoveries may well serve as an innovative funding source for this necessary expansion. A

large portion of indirect cost recoveries, obtained from research grants and contracts, is currently retained by institutions as an appropriation for the conduct and enhancement of research. Preliminary opinions of bond counsel indicate that these funds might be pledged as debt service or security for § 9(c) debt for research facility projects. Resolution of other legal and policy considerations and the implementation of appropriate control mechanisms would be necessary to ensure the prudent use of such an option.

The Commission also studied the use of a general operating revenue pledge to secure § 9(d) debt issued by the colleges and universities. Broadly defined, “general operating revenues” might include tuition and fees, indirect cost recoveries, general fund appropriations, and other institutional funds. Clarification of budgetary and statutory authority regarding the definition and scope of such a pledge would be necessary to implement this option.

The Commission also explored the use of various privatization arrangements in higher education capital expansion. Lease-purchase arrangements might be developed within the privatization concept, allowing a private developer to own, construct, and lease a capital project to an institution. In assessing the appropriateness of these arrangements for higher education financing, the Commission also reviewed administrative policies regarding long-term lease arrangements and the possible delegation of certain project reviews to qualified institutions, localities, or private developers.

Finally, the Commission explored the development of a special state review process or manual to provide guidance and assistance to institutions considering unique financing proposals. Other alternatives reviewed by the Commission included the increased issuance of taxable debt and state general obligation bonds. Expanded use of market study analysis in project development and greater emphasis on a long-term higher education capital development plan were also explored.

## **Recommendations**

The development of appropriate, effective alternative methods of financing higher education capital projects involves consideration of a variety of constitutional, statutory, and administrative requirements. The Commission recognizes that the evaluation of innovative financing practices, or simply the clarification of existing procedures, is necessarily guided by several interests shared by the Commonwealth and its state-supported colleges and universities: prudent funding of viable projects, fairness and efficiency in the procurement of services, and continued excellence in higher education.

The Commission makes the following recommendations:

### **RECOMMENDATION 1:**

**That state-supported colleges and universities be authorized to pledge general university operating revenues, which may include tuition and fees, indirect cost recoveries, and other funds, to provide debt service and security for §9(d) bonds, subject to guidelines to be developed by the Secretary of Finance.**

A pledge of general university operating revenues may allow institutions to obtain more favorable credit ratings in financing projects that are not considered “revenue producing.” The Commission has considered a number of proposed parameters to govern such a pledge and recommends that the Secretary of Finance promulgate guidelines for the appropriate use of a general operating revenue pledge.

**RECOMMENDATION 2:**

**That state-supported colleges and universities be permitted to lease state property to university-related foundations or private entities, subject to legislative approval and guidelines to be promulgated by the Secretary of Finance and the Department of General Services; that such proposed lease and project use must be for a purpose consistent with the educational and general mission, auxiliary enterprise, and sponsored program activities of the institution or such other purposes as the General Assembly may authorize; that the term of any such lease agreement be based upon, among other things, the useful life of the project and shall not exceed fifty years; (however, any agreement may be extended upon the written recommendation of the Department of General Services and gubernatorial approval); and that capital outlay process reviews and approvals may be waived, amended, or adjusted by the Governor for these transactions, after approval of the project preplanning study.**

To facilitate the private development of state property, the Commission recommends that higher education institutions be permitted to lease state property to private entities or university-related foundations without first offering the land to other state entities pursuant to the state surplus property statute. Because compliance with the Commonwealth’s traditional and sometimes lengthy capital outlay review process may discourage private development, the Commission has concluded that, upon legislative approval and a showing that the proposed transaction is consistent with the institution’s mission and related programs, capital outlay review requirements may be waived, amended, or adjusted by the Governor for these transactions, after approval of the project preplanning study. Guidelines developed by the Department of General Services (DGS) and the Secretary of Finance would ensure the appropriate implementation of this recommendation.

**RECOMMENDATION 3:**

**That the Secretary of Finance create a resource guide for the development of alternative financing proposals by colleges and universities.**

The Commission has received testimony from a number of institutions regarding a perceived lack of specific policies and guidelines for the development of unique capital project financings. Clarification of the capital outlay review procedures will promote consistency in the application of these policies and requirements as well as creativity in the development of higher education project proposals.

**RECOMMENDATION 4:**

**That the Department of General Services articulate guidelines governing the waiver of Department of General Services/Division of Engineering and Buildings Directive 1, § IV 2G, regarding a five-year lease term for agreements between state institutions and other entities.**



A number of institutions have indicated a need for clarification of the DGS directive limiting leases to five-year terms. Private parties are often dissuaded from negotiating lease arrangements without some assurance that a longer lease term is available. Although the five-year term directive may be waived, no clear criteria exist to guide the institutions in the development of long-term lease arrangements.

**RECOMMENDATION 5:**

**That a state-supported college or university be permitted to retain the unexpended general fund balance from a completed capital project, subject to certification by the Department of General Services that the project has been completed in accordance with project plans, and that such funds be deposited in a special account for use by the institution for other projects upon appropriation.**

Allowing institutions to benefit from prudent project financings will increase flexibility in financing future capital projects that may require additional funds. To encourage scrutiny, efficiency, and quality in project planning, development, and construction, this Commission recommends that institutions of higher education be permitted to retain cost savings realized from completed capital projects.

**RECOMMENDATION 6:**

**That the State Council of Higher Education for Virginia review and consider revising space planning guidelines for research space and assist the Secretary of Education in the development of a policy addressing the appropriate mix of general and nongeneral fund support for the construction and renovation of research space at institutions of higher education.**

Funding for higher education research space facilities has been derived from a variety of general and nongeneral funds. No consistent funding policy has been applied to projects of this nature. The lack of comprehensive space planning guidelines for research and medical research space makes it difficult to assess the need for these projects.

Research space should receive an appropriate measure of general fund support in recognition of the contribution of research to instruction and the Commonwealth as a whole. Each institution should, however, be expected to contribute nongeneral funds for the construction or renovation of research facilities. The State Council of Higher Education should continue to revise space planning guidelines for research space and develop guidelines for medical research space to identify and address actual space deficiencies.



# **FINAL REPORT**

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## **Authority for Study**

Adopted in the 1989 Session of the General Assembly, House Joint Resolution No. 373 established a commission to study alternative methods of financing certain facilities at state-supported colleges and universities. The Commission is also charged with the responsibility of determining whether changes are needed in current laws and policies governing the financing of higher education capital projects as well as in the Public Procurement Act. The Commission includes the Chairman of the House Appropriations Committee or her designee, the Chairman of the Senate Finance Committee or his designee, the Secretary of Finance, the Secretary of Education, the State Treasurer, the Director of the State Council of Higher Education, and two members to be appointed by the Governor. The resolution required the Commission to submit its findings and recommendations to the Governor and the 1990 Session of the General Assembly.

## **Objectives and Study Design**

Citing the “essential” value of Virginia’s system of higher education to the economy of the Commonwealth and the “future well-being of its citizens,” HJR 373 stated that, despite strong support from general fund appropriations, the capital needs of many of the Commonwealth’s state-supported colleges and universities are not being met. The demand for expanded classroom, research, laboratory, and auxiliary support space, together with the special renovation and preservation needs of certain institutions, indicates that increased funding will be necessary to ensure continued excellence in the instructional programs and operation of these institutions. The Commission’s inquiry, pursuant to HJR 373, necessarily focused on the Commonwealth’s capital outlay and procurement processes, public debt restrictions and policies, and their application to higher education. A number of Virginia colleges and universities have expressed concerns regarding the financing options presently available to higher education institutions and certain perceived statutory, constitutional, and administrative impediments to timely and cost-efficient methods of financing capital expansion. The Commission’s study also examined these concerns in order to develop recommended alternatives for financing capital expansion at the Commonwealth’s state-supported colleges and universities.

A working group, comprised of representatives of the Departments of Treasury, Finance, Planning and Budget, and General Services, the State Council of Higher Education for Virginia, the Office of the Attorney General, the House Appropriations and Senate Finance Committee staffs, and the Division of Legislative Services, met throughout the course of the Commission’s study to review and explore a variety of financial, legal, and construction concerns. Members of this group conferred with college and university officials, legal counsel, and higher education capital expansion consultants; the group coordinated and relayed the findings and expertise of these individuals to the Commission. In meeting the charge of HJR 373, the Commission focused on the development of financial and procedural alternatives which might not only advance the prudent funding of justifiable capital expansion but also ensure the continued excellence of the Commonwealth’s system of higher education.

# Financing Capital Facilities for Virginia's Higher Education Institutions

## Introduction

The Commonwealth's commitment to provide a superior system of state-supported institutions of higher education is evidenced in the Bill of Rights and in Article VIII of the Virginia Constitution.<sup>1</sup> Recognizing the General Assembly's power to create institutions of higher education, the editors of the 1971 constitutional revisions emphasized "the importance of education in a democratic society" and confirmed "the relation of an educated citizenry to other fundamental values...."<sup>2</sup> Although some theorists have stated that the plenary power of the legislative branch makes any constitutional education article superfluous, other scholars have suggested that "one of the legitimate purposes of a constitution is to express the highest aspirations of the people and to deal with those areas which ... are seen to be fundamental. Especially in recent years, it is likely that there is no object of government which Virginians would see as more fundamental and of more continuing concern than education."<sup>3</sup>

That education is a fundamental value of the Commonwealth may well be reflected in the excellence of its state-supported colleges and universities. In a recent survey of college and university presidents, two Virginia institutions appeared among the eight public institutions included in the nation's top 25 colleges and universities.<sup>4</sup> In a similar poll rating regional "comprehensive" institutions, only three of the top ten such institutions in the Southeast were state-supported; two Virginia schools were included among the trio.<sup>5</sup> Professional degree programs at the University of Virginia and at George Mason University have also received

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1. A. Howard, 2 Commentaries on the Constitution of Virginia at 885 (1974). [hereinafter referred to as Howard]. The 1971 revision added language reminiscent of Thomas Jefferson's Notes on the State of Virginia, in which Jefferson proposed to "diffuse knowledge more generally through the mass of the people." Id. at 879. The Virginia Bill of Rights states that "free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth." Virginia Constitution, Article I, § 15.
  2. Howard, supra note 1, at 947; see also, Report of the Commission on Constitutional Revision at 269, 99 (1969).
  3. Howard, supra note 1, at 884, n.42. The Education Article of the Virginia Constitution has been deemed "little more than a compilation of unnecessary grants of power, non self-executing mandates and details that belong in the Code rather than the Constitution;" yet these "superfluous" sections are "important because they reflect well the attitude of the Assembly toward public education." H. Moore, In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971, 5 U. Rich. L. Rev. 263 at 309, 308 (1971).
  4. "America's Best Colleges," U.S. News & World Rep., October 26, 1987, at 52, 53 [hereinafter referred to as 1987 U.S. News]. Among "national universities," the University of Virginia and the College of William & Mary placed 15th and 22nd, respectively. In a 1989 poll, the University of Virginia placed 21st among the best "national universities." "America's Best Colleges," U.S. News & World Rep., October 16, 1989, at 66 [hereinafter referred to as 1989 U.S. News].
  5. 1987 U.S. News, supra note 4, at 72. James Madison University tied for 4th place overall (with the University of Richmond) and placed the highest of the three public institutions making the list. George Mason University was rated sixth overall. Virginia Military Institute and Roanoke College were cited as noteworthy Southern liberal arts colleges. Id. at 63. "Comprehensive" institutions have been described as those schools enrolling at least 2,500 students, offering baccalaureate and master's programs, and awarding more than half of their baccalaureate degrees in "occupational or professional disciplines." "America's Best Colleges," U.S. News & World Rep., October 10, 1988, at C1 [hereinafter referred to as 1988 U.S. News]. In 1989, JMU again was rated 4th among the South's best regional colleges and universities; GMU placed 13th. 1989 U.S. News, supra note 4, at 72.

national and regional notice.<sup>6</sup> A 1988 survey combining the subjective input of college officials with objective data on student selectivity, faculty quality, graduation rate, and available resources, rated the University of Virginia 20th among the top national universities, one of only five public institutions included in the list.<sup>7</sup>

The increasing reputations of Virginia colleges and universities, coupled with the growing number of Virginia public high school graduates, have clearly affected applications and enrollment.<sup>8</sup> Although enrollment in Virginia's institutions of higher education has traditionally reflected the number of Virginia public high school graduates, enrollment in the 1980's continued to increase despite a slight decline in the number of high school graduates.<sup>9</sup> Studies indicate continued enrollment increases; Virginia is one of only eight states in which the number of public high school graduates is expected to increase more than 27% between 1986 and 2004.<sup>10</sup>

The concerns facing some Virginia colleges and universities are not "whether to grow but by how much... [and how to] prepare for the growth before it takes place."<sup>11</sup> College and university officials, legislators, and other state government officials have cited a number of possible responses to anticipated growth, including restricting out-of-state enrollments, building a new state university, and expanding facilities at Virginia's existing colleges and universities. Increased enrollment is not the only factor affecting funding demands for higher education. Colleges and universities expecting only minor enrollment increases often require additional appropriations for special renovation and, in some cases, preservation of older or historic facilities.<sup>12</sup> Other institutions, particularly Virginia's community colleges, have expressed interest in projects "not justified by the higher education space planning guidelines but... by regional need."<sup>13</sup>

Efforts by the institutions and the Commonwealth to meet the demands of growth have been considerable. An "aggressive" capital outlay program for higher education has provided nearly \$1 billion for construction and renovation of certain facilities in the past ten years;<sup>14</sup>

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6. "Top Training for Top Jobs: The Best Professional Schools," U.S. News & World Rep., November 2, 1987, at 73, 82. The Colgate Darden Graduate School of Business Administration at the University of Virginia was rated 14th among the nation's top 20 national Business Schools; the University's Law School placed 8th among national law schools. The Business School at George Mason University was rated the best of the Southern "regional" business schools. Id. at 83.
  7. 1988 U.S. News, supra note 5, at C6, C7. Based on Carnegie Foundation for the Foundation of Teaching guidelines, "national universities" were cited as those offering a full range of baccalaureate programs, granting the largest number of doctoral degrees, and performing "extensive campus-based research." Id. at C5, C6.
  8. State Council of Higher Education for Virginia, "Enrollment Prospects and Their Financial Implications," Minutes, July 6, 1988 meeting.
  9. Id. at 1, 3. The 1960s witnessed a surge in the number of high school graduates and college enrollments in the Commonwealth. The graduation rate peaked in 1981 and began a slight four-year decline.
  10. The graduation rate had previously been estimated to increase by 35%. Id. (More recent information from the State Council of Higher Education for Virginia indicates an expected 27% increase). Also contributing to increased enrollments are a greater interest in higher education on the part of high school graduates and the expanded marketing and recruiting efforts by the institutions. State Council of Higher Education for Virginia, "Enrollments Set Record in State," On Line, vol. 3, No. 4, December 1987, at 1, 5.
  11. W. Sublette and M. Coryell, "The Growth Issue," University of Virginia Alumni News, vol. 77, no. 5, May/June 1989, at 3.
  12. State Council of Higher Education For Virginia, Meeting the Extraordinary Capital Outlay Needs of Some State-Supported Colleges and Universities (Draft), November 1, 1988, at 1 [hereinafter referred to as SCHEV Draft].
  13. Id. New River Community College has submitted plans for a Regional Center for Economic Development.
  14. Id.

consequently, the physical facilities at state-supported institutions have grown 15 1/2%.<sup>15</sup> According to the State Council of Higher Education for Virginia (SCHEV), while present funding levels for higher education capital outlay “will be sufficient to support the new construction and renovation needs of most institutions,” certain institutions require capital outlay funds exceeding the current rate of appropriation.<sup>16</sup> General fund appropriations for higher education in the current fiscal biennium totalled \$283.75 million, meeting approximately 70% of the total general fund amounts requested (see Appendix). The amount of funds available for higher education in the next biennium is uncertain; higher education budget requests for the 1990-92 biennium total nearly \$800 million, approximately \$200 million more than the amount requested for the current biennium (see Table). Construction for higher education is clearly expensive; it has been estimated that the Commonwealth may pay nearly 20% more than the private sector for similar capital facilities.<sup>17</sup>

The demand for increased funding for higher education has also risen due to the “legacy of inflation, demographic shifts, and fundamental economic changes....”<sup>18</sup> Academicians and administrators agree that “[it] is no longer reasonable to assume that traditional sources of outside funding will be available as abundantly as in the past. The future health and well-being of a college or university increasingly require a solid and well-managed foundation of capital assets and a progressive development program.”<sup>19</sup> Other writers have claimed that “[many] elements of our society must bear fiscal responsibility for maintaining excellence and opportunity in higher education—students and their families, states, corporations, foundations and colleges and universities themselves.”<sup>20</sup>

Major expansion, renovation, and preservation of higher education facilities have typically required funds from the Commonwealth and compliance with numerous statutory or administrative requirements. Through its power to establish, operate, and maintain Virginia institutions of higher education,<sup>21</sup> the General Assembly bears much responsibility for the growth and excellence of state-supported colleges and universities and controls the funding of capital projects at these schools. Ensuring prudence in capital expansion and quality in higher education, however, requires the cooperative efforts and administrative expertise of not only the legislature but also the executive branch and a number of its agencies.<sup>22</sup> Addressing the capital growth concerns

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15. State Council of Higher Education for Virginia, Facilities Inventory Report for 1988-89 Academic Year (Public Colleges and Universities) and Ten-Year Trend Analysis, at II-1 (March 1989). The actual increase has been measured at 4.5 million square feet.
  16. SCHEV Draft, supra note 12, at 1. According to SCHEV, even if only half of Virginia Tech’s biennial appropriation (about \$10 million) is used for renovation, rather than for new construction, the university’s current space needs would not be met for 20 years. Because George Mason expects a 50% increase in its enrollment by 2007, the school can “justify construction of about 200,000 assignable square feet each biennium for the next 20 years.” GMU would need \$20 million each biennium to expand its facilities “more slowly than, but at least in step with, its enrollment growth.” The university currently receives about \$10 million each biennium.
  17. A. Wurtzel, Remarks for Buildings and Grounds Workshop, SCHEV Conference for Boards of Visitors, October 21-22, 1987 [hereinafter referred to as Wurtzel]. This discrepancy has been attributed to excessive governmental control in the capital outlay process, publication of construction budgets and architectural fees, delays in project review, and lack of flexibility in construction criteria.
  18. NACUBO, Capital Formation Alternatives in Higher Education at ix (1988) [hereinafter referred to as NACUBO].
  19. Id.
  20. M. Sovern, “The Real Crisis,” New York Times Magazine, January 22, 1989, at 56.
  21. See Virginia Constitution, Article VIII, § 9. See also, Howard, supra note 1, at 945, 948, 949.
  22. See generally, Howard, supra note 1, at 885.

## 1990-92 Budget Requests by State-Supported Institutions of Higher Education

INSTITUTION	GENERAL FUND REQUEST	NON-GENERAL FUND REQUEST	TOTAL REQUEST
Virginia Community College System	\$68,495,029	\$17,782,402	\$86,277,431
University of Virginia *	\$61,649,600	\$77,054,100	\$138,703,700
Virginia Tech	\$54,789,400	\$65,674,300	\$120,463,700
VCU / MCV	\$32,777,600	\$21,068,200	\$53,845,800
ODU	\$58,160,611	\$3,095,000	\$61,255,611
George Mason University	\$35,897,300	\$58,520,600	\$94,417,900
College of William & Mary **	\$20,857,450	\$23,370,050	\$43,807,500
James Madison University	\$25,766,400	\$14,423,000	\$40,189,400
Christopher Newport College	\$7,359,400	\$24,430,800	\$31,790,200
Longwood College	\$8,864,428	\$2,087,900	\$10,952,328
Mary Washington College ***	\$12,379,900	\$19,534,200	\$26,210,400
Norfolk State University	\$11,704,668	\$17,470,318	\$29,174,986
Radford University	\$12,334,800	\$14,748,200	\$27,083,000
Virginia Military Institute	\$6,856,100	\$25,000	\$6,881,100
Virginia State University	\$17,263,500	-----	\$17,263,500
<b>TOTAL</b>	<b>\$435,156,186</b>	<b>\$359,284,070</b>	<b>\$788,316,556</b>

\* includes University hospitals and Clinch Valley College

\*\* includes Richard Bland College and Virginia Institute of Marine Science

\*\*\* includes Melcher-Monroe Memorials

Virginia School for the Deaf & Blind (Staunton)•	\$2,948,800	-----	\$2,948,800
Virginia School for the Deaf & Blind (Hampton)•	\$6,964,468	-----	\$6,964,468
Woodrow Wilson Rehabilitation Center•	\$1,102,800	-----	\$1,102,800

• other educational institutions declared governmental instrumentalities under §23-14 and empowered to issue debt

SOURCE: House Appropriations Committee Staff

facing Virginia's colleges and universities necessitates an examination of documented needs at the institutions and an understanding of present capital outlay procedures and current financing options. As authorized by HJR 373, the Commission's study focused on these issues as well as state constitutional guidelines, statutory requirements, and administrative policies governing the financing of capital facilities at Virginia's state-supported colleges and universities.

### Constitutional Guidelines for Financing Higher Education

The public debt financing options presently available to Virginia's state-supported colleges and universities are authorized by Article X, § 9 of the Virginia Constitution. Section 9 outlines three categories of debt to be backed by the Commonwealth's full faith and credit and also excludes from constitutional restrictions obligations of the Commonwealth, its agencies, and public authorities for which there is no pledge of full faith and credit. While bonds for higher education may be refinanced under § 9(a) or issued as general obligations under § 9(b), in recent years, most institutions have relied on the issuance of § 9(c) or, in a few cases, § 9(d) debt to finance capital projects.<sup>23</sup>

Section 9(c) allows the General Assembly to authorize debt "for certain revenue-producing capital projects."<sup>24</sup> The Commission on Constitutional Revision proposed the addition of this section as a cost-saving measure; state-guaranteed revenue projects would carry lower interest rates.<sup>25</sup> Secured by a pledge of net revenues "from rates, fees, or other charges" and the full faith and credit of the Commonwealth, this "double barrel" debt is not included in the limitation on the Commonwealth's § 9(b) general obligation debt.<sup>26</sup> Unlike § 9(b) debt, § 9(c) bonds do not require a referendum but must receive the affirmative vote of two-thirds of the members elected to each house of the General Assembly. Other requirements for the issuance of § 9(c) bonds include certification by the Governor as to anticipated net revenues and compliance with the section's limitation on the aggregate amount of outstanding § 9(c) debt.<sup>27</sup> The revenue-producing projects operated by the Commonwealth's institutions of higher education or the executive branch expressly qualify for § 9(c) financing; apparently "the prospect of savings on bonds for such facilities as college dormitories and dining halls was a central motive for the inclusion of section 9(c) in the Constitution."<sup>28</sup> Section 9(c) debt traditionally carries the Commonwealth's Aaa/AAA

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23. Virginia Constitution, Article X, § 9. Section 9(a) grants the General Assembly the power to contract debts "to meet emergencies and redeem previous debt obligations." Section 9(b) authorizes the issuance of general obligation debt of the Commonwealth for "capital projects." No new § 9(b) debt has been authorized since 1978. Department of Planning and Budget and Department of Treasury, Bonded Debt in Virginia: Historical Overview and Future Approaches, January 1986, at II-5 [hereinafter referred to as Bonded Debt Study].
  24. Virginia Constitution, Article X, § 9.
  25. Howard, supra note 1, at 1113, 1114.
  26. Virginia Constitution, Article X, § 9. See also, Howard, supra note 1, at 1124.
  27. Virginia Constitution, Article X, § 9. Issuance of § 9(c) debt requires passage by two-thirds of the members elected to each house, rather than two-thirds vote of those members present. The General Assembly passed the constitutional revision permitting the issuance of selected state-secured revenue bonds without referendum because "the risk that the Commonwealth would actually have to step in and pay off bonds from other than revenue derived from the project was minimal." Howard, supra note 1, at 1115, 1116. See also, Miller v. Watts, 215 Va. 836, 214 S.E.2d 165 (1975). The Virginia Supreme Court stated that the purpose of § 9(c) is "to permit the General Assembly, under limited circumstances and under strict safeguards, to place the full faith and credit of the Commonwealth behind certain self-liquidating revenue producing State capital projects and thereby save large sums in interest on the bonds." 214 S.E.2d at 169. See also, Howard, supra note 1, at 1123.
  28. Howard, supra note 1, at 1124. Shortly after § 9(c) became effective, the General Assembly authorized \$23.6 million for § 9(c) capital projects at certain Virginia colleges and universities. It was estimated that this § 9(c) issue alone would save \$6.5 million to \$10 million in interest costs. Id. at 1125.



credit rating, thus usually garnering the lowest possible interest rates at the time of bond issuance. As of June 30, 1989, the Commonwealth's total outstanding § 9(c) debt was \$416 million, of which \$250 million was for higher education.<sup>29</sup>

Section 9(d) excludes from constitutional debt restrictions those obligations of the Commonwealth "or any institution, agency, or authority thereof if the full faith and credit of the Commonwealth is not pledged or committed to the payment of such obligation."<sup>30</sup> The terms, conditions, and purposes of § 9(d) bonds may be determined by the General Assembly "or other competent authority" so long as Virginia's full faith and credit are not pledged to the payment of the bonds.<sup>31</sup> The Virginia judiciary has validated a number of § 9(d) issues involving projects secured solely by a pledge of revenues under the Special Fund Doctrine.<sup>32</sup> The Court has upheld § 9(d) issues secured by revenue increases from existing facilities<sup>33</sup> as well as by project rentals and fees.<sup>34</sup> The test is usually three-pronged: bonds are deemed constitutional under § 9(d) when (i) bonds financing a state capital project are to be paid solely from a special fund derived from project revenues, (ii) the legislature is not obligated to appropriate funds for payment on the bonds, and (iii) the debt is not secured by the "general faith, credit and taxing power of the State."<sup>35</sup>

Section 9(d) debt is the largest category of state debt. As of June 30, 1988, total outstanding § 9(d) debt stood at about \$5 billion, of which \$246 million financed state-supported higher education capital projects. Because § 9(d) bonds carry the credit rating of the issuer and not that of the Commonwealth, interest rates on § 9(d) obligations are generally higher than those on § 9(c) debt.<sup>36</sup>

## Statutory Guidelines for Debt Issuance

### *Institutional Debt*

One form of § 9(d) financing available for higher education expansion is found in the debt-issuing powers granted to the colleges and universities themselves. Declared "governmental

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29. Information from House Appropriations Committee Staff; see also, Department of Treasury, Department of Planning and Budget, and State Council of Higher Education for Virginia, Revenue Bond Project Financing Guidelines at C-1 (September 1988) [hereinafter referred to as Revenue Bond Guidelines], showing \$339 million in § 9(c) debt as of June 30, 1988.
  30. Virginia Constitution, Article X, § 9.
  31. Howard, supra note 1, at 1126.
  32. The Virginia Supreme Court has developed and applied the Special Fund Doctrine to a number of § 9(d) challenges, and has consistently held that "obligations payable solely from a special fund derived from the revenue of the enterprise for which such obligations are issued do not constitute a bond or a debt within the meaning of any such constitutional limitation or provision." Button v. Day, 204 Va. 270, 272, 130 S.E.2d 459, 460 (1963), citing Almond v. Gilmer, 188 Va. 822, 844, 51 S.E.2d 272, 281 (1949). See also, Farquhar v. Board of Supervisors, 196 Va. 54, 60, 61, 82 S.E.2d 577, 582 (1954).
  33. 130 S.E.2d at 462.
  34. Baliles v. Mazur, 225 Va. 462, 297 S.E.2d 695 (1982). The Court held that no constitutionally prohibited debt was created even when the pledged rentals were to be paid by the Commonwealth. Although the project was to be leased to the Commonwealth, the General Assembly was not obligated to appropriate funds for lease payments. The Court concluded that no pledge of the Commonwealth's full faith and credit existed. 297 S.E.2d at 699, 700.
  35. 214 S.E.2d at 169.
  36. Information from Office of State Treasurer. Approximately \$216 million of the sum financing higher education benefited hospital facilities at UVa and MCV. See also, Revenue Bond Guidelines, supra note 29, at C-1.

instrumentalities” and “public bodies” under § 23-14 of the Code of Virginia,<sup>37</sup> state-supported colleges and universities have the power, with the Governor’s consent, to issue and provide security for bonds for the acquisition, construction, or refinancing of capital “projects.”<sup>38</sup> In each odd-numbered year, the institutions must submit a list of any desired capital projects, including estimated costs, for consideration by the Governor. The Governor may include such projects in his biennial budget recommendations to the General Assembly.<sup>39</sup> The Code authorizes the educational institutions to finance only those projects approved by the General Assembly in the appropriations act.<sup>40</sup>

Only four payment sources are authorized for these bonds: (i) rents, fees, and charges from the project; (ii) rents, fees, and charges or revenue increases from existing facilities at the institutions; (iii) student building fees and other student fees; and (iv) other available funds “not required by law or by previous binding contract to be devoted to some other purpose.”<sup>41</sup> Beyond pledged revenues, the debt created is not a debt of the institution or the Commonwealth;<sup>42</sup> in actuality, the General Assembly has authorized the Treasury to disburse only those funds received from project revenues and bond proceeds. Disbursements are made upon receipt of a warrant from the State Comptroller, issued upon the request of the treasurer or “other fiscal officer of the board of such institution.”<sup>43</sup> The institutions must return to the Treasurer, after project completion and discharge of the bonds, “sums of money received by it ... or derived from any project erected pursuant to this chapter.”<sup>44</sup> The project and the bonds are exempt from state taxation.<sup>45</sup>

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37. Va. Code § 23-14 (1989). The Code declares the following state-supported institutions as “governmental instrumentalities”: The College of William and Mary, the rector and visitors of Christopher Newport College, Longwood College, Mary Washington College, Clinch Valley College, George Mason University, James Madison University, Old Dominion University, State Board of Community Colleges, Virginia Commonwealth University, Radford University, University of Virginia, Virginia Military Institute, Virginia Polytechnic Institute and State University, Virginia Schools for the Deaf and Blind, Virginia State University, Norfolk State University, Woodrow Wilson Rehabilitation Center, and the Medical College of Hampton Roads.
  38. Va. Code §§ 23-16, 23-18 (1985). “Project” is defined as “any building, facility, additions, extension or improvement of a capital nature required by or convenient for the purposes of an educational institution” and includes “administration, teaching, lecture and exhibition halls, libraries, dormitories, student apartments” as well as dining areas, athletic facilities, laboratory and research space, parking facilities, and storage centers. Va. Code § 23-18(e)(1985).
  39. Va. Code § 23-27 (1985). The Governor has “absolute discretion” in granting or withholding consent regarding higher education capital projects.
  40. Va. Code § 23-19(b) (1985). The General Assembly may include projects that did not receive the Governor’s recommendation.
  41. Va. Code § 23-19(d) (1985).
  42. Va. Code § 23-19(e) (1985). The institution is only obligated for the collection of project revenues and is not liable for the payment of principal or interest on the bonds from any other funds. Section 23-24 states that such bonds do not create any debt or obligation, “legal, moral, or otherwise” on the part of the Commonwealth.
  43. Va. Code § 23-21 (1985).
  44. Va. Code § 23-28 (1985). It has been suggested that allowing the institutions to keep excess bond proceeds for application to approved, documented capital needs might encourage economy in project construction. A system of controls, establishing construction standards adjusted according to facility type and location, would be necessary to prevent abuse of excess funds and overestimation of original project costs. See Wurtzel, *supra* note 17.
  45. Va. Code § 23-25 (1985). The Code states that the institution is not required to pay taxes or assessments on the project and that “such project shall be exempt from taxation.” However, because the definition of “project” in § 23-15 does not specifically require ownership by the institution, it is unclear whether a private entity might own a project or project site and be entitled to the same exemptions. Technical revision of this section might also be appropriate to track federal tax law language regarding exclusion of interest earnings from gross income and to clarify whether proceeds from the sale of the bonds are also exempt from taxation.

Institutions are also permitted to borrow money and issue bonds or notes secured by endowment funds or “unrestricted gifts from private sources.” This borrowing must be approved by the Governor and passed by a 2/3 vote of the institution’s board.<sup>46</sup> A similar procedure also enables institutions to borrow funds for the acquisition of real estate, “improved or unimproved.” Payment of the debt may be secured by a lien on the real estate, while interest may be secured by a pledge of endowed funds.<sup>47</sup> The Code also provides for interest rate limitations for any bonds issued pursuant to the chapter and permits the board of the institution to determine the terms and conditions of the borrowing.<sup>48</sup>

### *Statutory Authorities*

#### *Virginia College Building Authority*

Although the institutions may issue bonds on the open market, high financing costs may delay or impede this method of funding capital improvement. The Virginia College Building Authority (VCBA) was created to purchase the bonds of educational institutions for the purpose of “financing the construction of projects of capital improvement at less cost, thereby facilitating such construction.”<sup>49</sup> As a political subdivision of the Commonwealth, the Authority is empowered not only to purchase bonds but to acquire and lease equipment to state-supported educational institutions.<sup>50</sup>

The Authority may issue its own bonds to purchase educational institution bonds or to finance equipment acquisition. Payment of VCBA bonds is limited to specific sources, including principal and interest payments or sales proceeds of purchased educational institution bonds or authority bonds, equipment lease payments, and payments due under credit enhancement agreements.<sup>51</sup> Although not backed by the Commonwealth’s full faith and credit, the VCBA

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46. Va. Code § 23-30.01 (1985). *Id.* The University of Virginia and Virginia Tech have collateralized debt issued pursuant to § 23-30.01. The combined collateralized debt of these two schools was \$35,643,000 as of June 30, 1985. *Bonded Debt Study*, *supra* note 23, at iv.

47. Va. Code § 23-30.02 (1985). The acquisition of real estate need not be tied to a capital project.

48. Va. Code §§ 23-30.03, 23-19 (1985). Revision of § 23-30.03 is necessary to referenced changes to refinanced sections. The interest limitation cited in § 23-30.03 presently restricts interest to the “greater of” interest rates authorized by a repealed Code section and a section which no longer contains a specific interest rate. Section 6.1-330.11, repealed in 1987, restricted annual interest rates to 8%. Although there is no clear comparable section, § 6.1-330.55 now restricts the contract rate of interest to 12%. Section 15.1-200 of the Public Finance Act, amended in 1984, now permits the governing body issuing the bonds to determine an interest rate “for the best interest of the Commonwealth of Virginia and of such governmental instrumentality.” The section formerly restricted interest rates on public debt to 6%.

Section 23-19 allows the institution’s board to set payment dates and conditions, denomination, form and other terms by resolution, and requires the Governor’s approval of the issue. The principal amount of the issue may include engineering and inspection costs, legal or accounting fees, and the “costs of issuance,” including printing, engraving, and advertising. Technical revision of this section might be appropriate to better reflect federal tax law requirements and definitions concerning authorized expenditures and “costs of issuance.” *See also*, Va. Code § 2.1-326.1 (1987) regarding a general override of interest rate restrictions.

49. Va. Code § 23-30.24 (1989).

50. Va. Code § 23-30.27:1 (1989). The acquisition and sale or lease of equipment to educational institutions is subject to “standards and procedures as approved through the Commonwealth’s budget and appropriation process.”

51. Va. Code § 23-30.28 (1989). Other sources of payment include principal and interest payments and sale proceeds from obligations or assets transferred to the Authority from the General Assembly, funds received from the enforcement of liens and security interests, reserve or sinking funds, and other funds established or held by the Authority.

equipment lease program is dependent on the General Assembly for appropriations to make principal and interest payments.<sup>52</sup>

The VCBA is granted “supplemental and additional” powers under the Educational Facilities Authority Act, which contemplates the direct construction and operation of projects by the Authority without the purchase of institutional bonds.<sup>53</sup> Again, the Authority’s role is to assist higher education institutions in project acquisition, construction, and financing. Here, however, the VCBA is empowered to purchase property in its own name or in the name of an educational institution, to manage and operate projects, and to undertake joint projects for two or more institutions.<sup>54</sup> The Authority may establish project fees, rates, and charges without the supervision of any other department or agency of the Commonwealth.<sup>55</sup> The act provides for conveyance of a project to the participating institution upon full payment of the Authority’s revenue bonds.<sup>56</sup> The chapter grants the Authority powers which do not require the supervision, regulation, approval, or consent “of any municipality or political subdivision or any department, division, commission, board, body, bureau, official or agency thereof or of the Commonwealth.”<sup>57</sup> In practice, the Virginia College Building Authority has primarily provided tax-exempt, secured financing for private institutions; except for recent equipment lease arrangements, the state-supported institutions have relied on other methods to finance capital expansion.<sup>58</sup>

#### *Virginia Public Building Authority*

The Virginia Public Building Authority (VPBA) was created in 1981 for the purpose of constructing, acquiring, and operating public buildings for the Commonwealth. Although it primarily leases Richmond office buildings and correctional facilities to the Commonwealth, the VPBA is also authorized to issue revenue bonds for “additions and improvements to land grant colleges, state colleges, universities and medical colleges.”<sup>59</sup> Requiring approval by a majority vote of the members elected to each house of the General Assembly, VPBA projects are owned and controlled by the VPBA and, with the Governor’s approval, may be leased to the Commonwealth or its agencies and political subdivisions. The VPBA must submit its construction report and project cost estimates to the General Assembly prior to January 1 of each odd-numbered year.<sup>60</sup>

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52. Bonded Debt Study, *supra* note 24, at ix.

53. Va. Code § 23-30.39 (1985).

54. Va. Code §§ 23-30.44, 23-30.42 (1985).

55. Va. Code § 23-30.50 (1985).

56. Va. Code §§ 23-30.45, 23-30.47 (1985).

57. Va. Code § 23-30.56 (1985).

58. Bonded Debt Study, *supra* note 23, at III-12,13. See also, Report to the SJR 90 Joint Subcommittee on Methods of Financing Replacement of Obsolete or Unusable Equipment in Institutions of Higher Education, Senate Document No. 21, at 17 (1986) [hereinafter referred to as Senate Document No. 21]. As of June 30, 1985, the outstanding debt of the VCBA was \$65,468,000. Bonded Debt Study, *supra* note 23, at III-13.

59. Va. Code § 2.1-234.13 (1989). The VPBA may finance projects for capital projects which might otherwise be financed under § 9(b). Bonded Debt Study, *supra* note 23, at III-11.

60. Va. Code § 2.1-234.13 (1989). The VPBA may allow an “agent” to operate a project for a term not to exceed 30 years. The “agent” is required, however, to operate the project as a public facility for uses consistent with the article. Va. Code § 2.1-234.21 (1987).

This form of § 9(d) debt may be secured by a pledge of project revenues; however, the project itself may not be conveyed or mortgaged.<sup>61</sup> While VPBA bonds are not a debt of the Commonwealth, these obligations are nonetheless dependent upon General Assembly appropriations to pay rentals.<sup>62</sup> The article also provides a mechanism whereby excess bond proceeds may be applied to the payment of the cost of additional projects and requires a competitive bidding procedure for all projects estimated to exceed \$10,000.<sup>63</sup> The Authority is not required to pay taxes or assessments on the project or project income; the bonds, their income, and sale proceeds are also exempt from taxation.<sup>64</sup>

The VPBA is authorized to issue up to \$335 million in revenue bonds. Its current outstanding debt of \$290.8 million, plus commitments for a large portion of remaining funds, leaves a relatively small debt capacity available for financing capital projects for the Commonwealth's state-supported colleges and universities.<sup>65</sup>

### *Local Industrial Development Authorities*

The projects that state-supported colleges and universities may finance through local industrial development authorities appear to be quite limited. Local industrial development authorities may provide § 9(d) financing for higher education, but they are restricted to acquiring, expanding, or improving facilities for "private, accredited and nonprofit institutions of collegiate education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education..."<sup>66</sup> While certain athletic and recreational facilities may be financed by industrial development bonds (IDBs), the section denies this financing for such facilities owned and operated by educational institutions.<sup>67</sup> Virginia's public colleges and universities might, however, qualify to receive IDB financing for parking facilities and office space.<sup>68</sup> The issuing authority may acquire, maintain, and lease a

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61. Va. Code § 2.1-234.15 (1987).

62. Va. Code § 2.1-234.14 (1987). See also, Bonded Debt Study, *supra* note 23, at III-11. The Virginia Supreme Court also found that such an arrangement is consistent with the Special Fund Doctrine; because the General Assembly is not obligated to make an appropriation, no pledge of full faith and credit exists. See note 34, *supra*.

63. Va. Code §§ 2.1-234.14, 2.1-234.27 (1987). But see Va. Code § 23-28, *supra* note 44. Educational institutions are required to return excess funds from their bond issues to the Treasury.

64. Va. Code § 2.1-234.24 (1987). The Code states that the bonds are exempt "from taxation within the Commonwealth;" presumably this encompasses state and local taxes.

65. Va. Code § 2.1-234.13 (1989); debt information from House Appropriations Committee Staff and Office of State Treasurer.

66. Va. Code § 15.1-1374. (1989) The facilities must be for academic or administration use or for "application usual and customary to a college campus other than chapels and their like." See also, Va. Code § 9-250 *et seq.* (1989) regarding the Innovative Technology Authority and its power to finance certain scientific and technological research projects.

67. *Id.* The article permits the financing of athletic, health, and recreational facilities owned and operated by organizations described in § 501(c)(3) of the Internal Revenue Code and exempt from federal income taxation under § 501(a) of the Internal Revenue Code. Although state-supported colleges and universities might fall within these parameters, institutions "organized and operated exclusively for religious or educational purposes" are specifically excluded. College or university foundations might, however, pursue IDB financing for certain projects to benefit public institutions.

68. *Id.* The definition of "authority facilities" includes office space for use by "governmental or nonprofit, nonreligious or nonsectarian organizations," which could well include Virginia's public colleges and universities.

facility or project but may not operate any facility of an institution of higher education.<sup>69</sup> These bonds are payable solely from revenues and, again, are exempt from state and local taxation.<sup>70</sup> Compliance with a plethora of federal tax law requirements may, however, make this form of financing inaccessible or unattractive to public institutions of higher education.

## **Statutory and Administrative Procedures Governing Capital Expansion**

Obtaining adequate and timely financing for capital projects is only one concern facing an expanding college or university. Capital expansion for public higher education is also governed by a number of budgetary and statutory procedures, as well as administrative policies, enacted to ensure prudence in project selection and financing, safety and quality in design and construction, and fairness and economy in the procurement of services. These requirements establish necessary guidelines and safeguards but may, in some cases, also produce inefficiency and redundancy -- unnecessarily impeding capital expansion for higher education. Examination of these procedures is necessary to determine the existence and effects of any unnecessary impediments and to isolate issues warranting further study. The following two charts illustrate the capital outlay process and reviews for higher education projects financed by § 9(c) and § 9(d) debt.

### **Preplanning Phase**

The preplanning phase of the capital outlay process determines the “justification, alternatives, scope, and budget for capital projects.”<sup>71</sup> The process begins with a determination of capital project and financial need by the educational institution. The institution then prepares a capital project request for consideration by the Department of Planning and Budget (DPB).<sup>72</sup> Review of the capital project request is shared by a number of agencies granted responsibility for higher education capital expansion, including the Secretary of Education, SCHEV, and the Department of General Services (DGS).<sup>73</sup>

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69. Va. Code §§ 15.1-1378, 15.1-1375 (1989). One of the purposes of the chapter is to induce institutions of higher education “to locate in or remain in this Commonwealth.” Va. Code 15.1-1375 (1989).
70. Va. Code §§ 15.1-1379, 15.1-1383 (1989). “Revenues” for bond payments may be derived from project revenues or revenues from other designated facilities.
71. Report of the HJR Joint Subcommittee on the Commonwealth’s Capital Outlay Process and Lease/Purchase Arrangements, House Document No. 11 (1985) at 3 [hereinafter referred to as House Document No. 11].
72. Revenue Bond Guidelines, *supra* note 29, at 4. See also, Va. Code § 2.1-391 (1989), authorizing the Department of Planning and Budget to formulate an executive budget, to “determine the participation of any executive agency ... [and] to support an efficient and effective budget process....”
73. Revenue Bond Guidelines, *supra* note 29, at B-1. The Department of General Services, through its Division of Engineering and Buildings, provides “assistance in the administration of capital outlay construction projects set forth in the Appropriations Act,” which includes “review and approval of plans and specifications, and acceptance of completed projects.” The Department of General Services is also required to review every proposed acquisition of real property by the departments, agencies, and institutions of the Commonwealth. Va. Code §§ 2.1-483.1, 2.1-504.2 (1987). SCHEV is empowered to review and approve “all changes in the inventory and general space which any public institution of higher education may propose.” Va. Code § 23-9.6:1 (1989). Pursuant to § 4-4.01(e)(1)(b) of the 1989 Appropriations Act, SCHEV is also required to identify the impact of requested revenue projects on current and projected total costs to students. 1989 Acts of Assembly, ch. 668 [hereinafter referred to as the 1989 Appropriations Act]. The Secretary of Education may review proposed projects under the broad planning and budget responsibilities granted by the Code of Virginia. Va. Code § 2.1-51.20 (1987).

Upon approval of a capital project request, DPB may require a preplanning study, depending on the size or cost of the project. While the capital project request justifies need and provides cost estimates, the preplanning study provides more detailed architectural and engineering information, confirms technical feasibility, and refines cost estimates.<sup>74</sup> The preplanning study is reviewed by DGS, SCHEV, and the Secretary of Education, with recommendations directed to DPB.<sup>75</sup>

Financial feasibility studies are required at several points in the capital outlay process. The State Treasurer must review the financial feasibility of proposed capital projects to be financed by revenue bonds or federal loans prior to the inclusion of any such project in the Governor's budget or revenue bond bills.<sup>76</sup> This initial financial feasibility study is also reviewed by SCHEV; all recommendations are then directed to DPB. Based on the preplanning and feasibility reviews and final recommendations by DPB, the Governor may include proposed capital projects in the budget or revenue bond bills for submission to the General Assembly.<sup>77</sup>

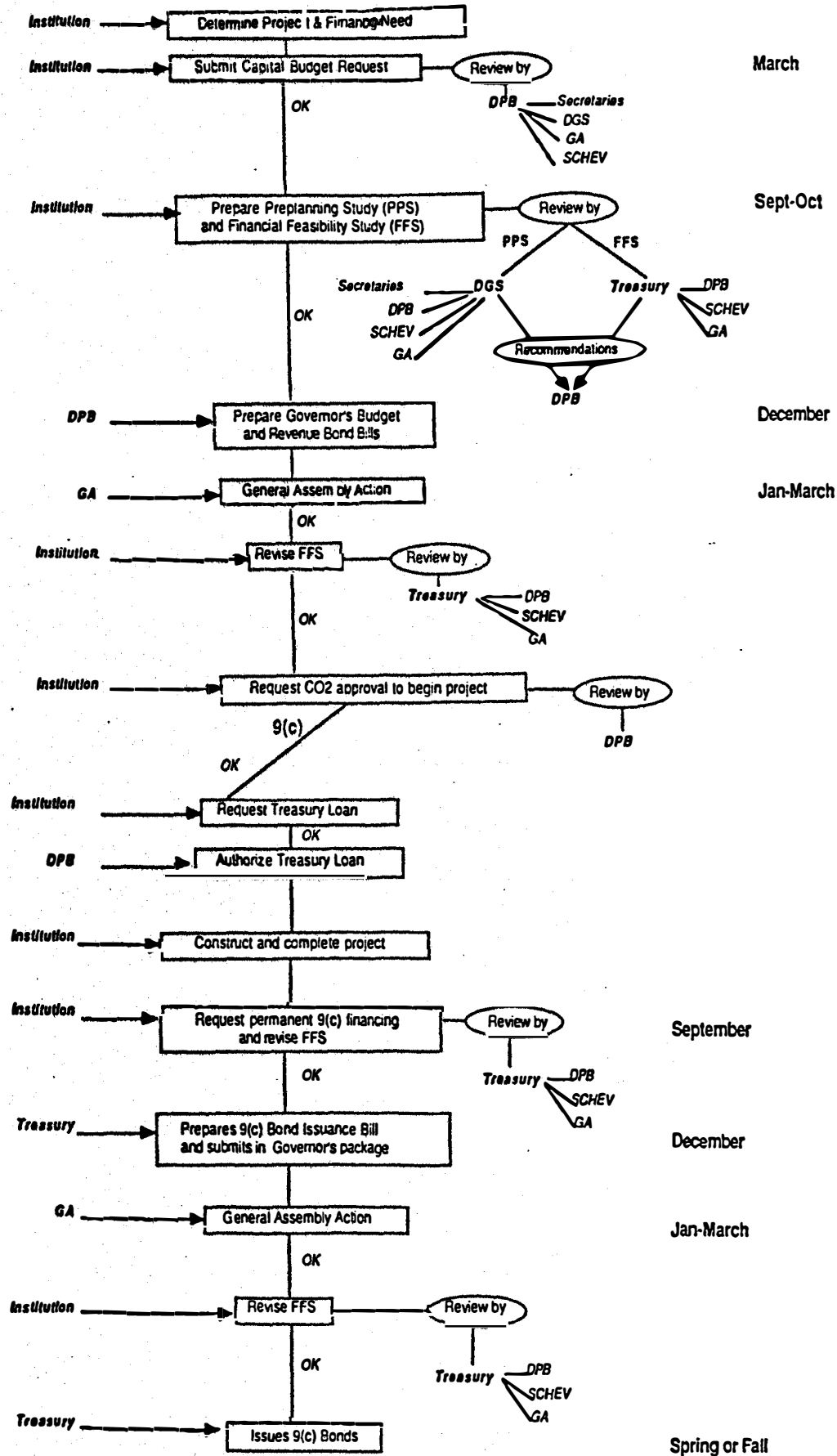
### Planning Phase

Once the General Assembly has approved a capital project through an appropriations act, the planning phase commences. This phase is also characterized by multiple state agency reviews. Another financial feasibility review is required prior to the commencement of any engineering planning or project construction if more than one year has elapsed since the initial study.<sup>78</sup> Upon approval by DPB, the institution may initiate the selection process for architects and engineers to undertake project planning and design.<sup>79</sup> The Division of Engineering and Buildings reviews project designs and drawings during this planning phase; this review is intended to ensure compliance with building and safety codes, financial procedures, and project scope and design.<sup>80</sup>

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74. Revenue Bond Guidelines, *supra* note 29, at A-1. The capital project request contains cost estimates, budget impact data, and funding source information. The project request should also explain the relationship between the requested project and the institution's "mission." *Id.* Preplanning studies are required for (i) new construction or purchases with space greater than 20,000 square feet or costs exceeding \$1,000,000 or (ii) improvements to existing facilities where costs exceed \$500,000 or (iii) acquisitions, upon a determination by DPB.
75. *Id.* at B-1.
76. *Id.* at 6. *See also*, Section 4-4.01(e)(1), 1989 Appropriations Act, *supra* note 73. If a project is to be financed by § 9(d) bonds, the institution must also submit a financing plan with the initial feasibility study. The financing plan must include information on project construction and permanent financing, and should show that the institution's debt is "prudently structured and of high quality." Revenue Bond Guidelines, *supra* note 29, at 4, 7.
77. Va. Code §§ 2.1-398, 2.1-399 (1987).
78. 1989 Appropriations Act, *supra* note 73, § 4-4.01(e)(1)(c).
79. *See Revenue Bond Guidelines*, *supra* note 29, at B-1; *see also*, House Document No. 11, *supra* note 71, at 7. According to House Document No. 11, policy required the selection of new architects and engineers; capital outlay directors indicated, however, that continuing with the same entities might save time and money in project completion.
80. House Document No. 11, *supra* note 71, at 7, 8. The State Fire Marshall must also review the project design. *See also*, Va. Code § 2.1-483.1 (1987). The Art and Architectural Review Board, within the Division of General Services, must also review the design, location, and "artistic character" of construction on state property. Va. Code § 2.1-488.4 (1987).

# HIGHER EDUCATION REVENUE BOND PROJECTS

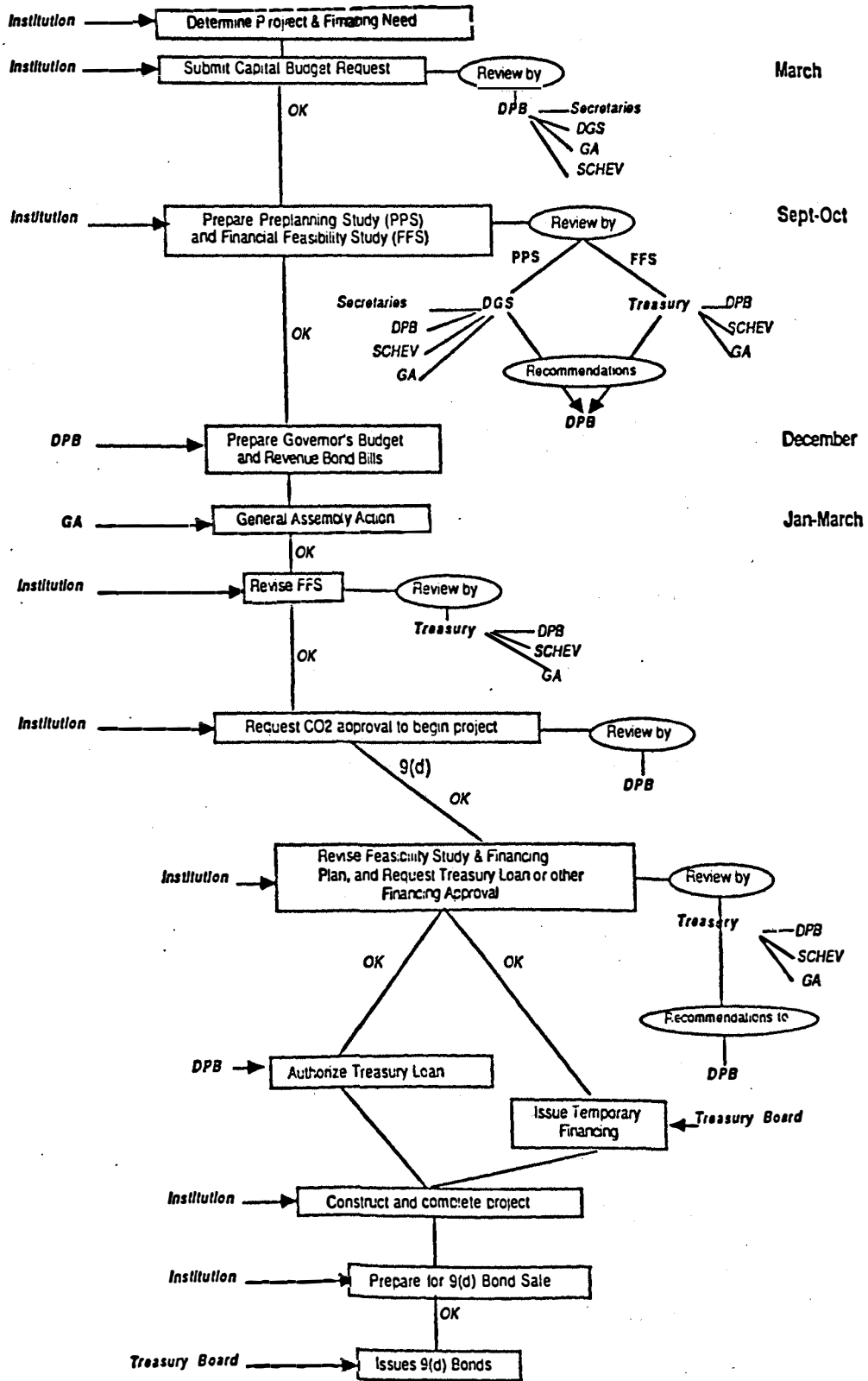
## For 9(c) Bond Projects





# HIGHER EDUCATION REVENUE BOND PROJECTS

## For 9(d) Bond Projects



## Construction Phase

While the preplanning and planning phases are identical for § 9(c) and § 9(d) debt, the capital outlay process is bifurcated at the construction phase. Regardless of whether a project is financed through § 9(c) or § 9(d) debt, however, bonds have typically been issued upon project completion (see pages 14 and 15). Construction costs have usually been financed by interim loans from the State Treasury; however, this practice is currently under review by the Treasury.<sup>81</sup>

Prior to the issuance of a Treasury loan, institutions seeking § 9(d) financing again revise the feasibility study and financing plan for Treasury and DPB review. Project construction commences after the issuance of interim financing; the Treasury Board issues permanent financing—§ 9(d) bonds—upon project completion and approval of a revised feasibility study.<sup>82</sup>

Institutions requesting § 9(c) financing also initiate project construction after securing interim financing from the Treasury Board; however, a revised financial feasibility study is not required until the project is completed and the institution requests permanent § 9(c) financing. The request for § 9(c) debt is then included in the Governor's § 9(c) bond issuance bill for submission to the General Assembly. The final feasibility study is required prior to the actual issuance of § 9(c) bonds.<sup>83</sup>

## Additional Statutory Requirements

### *Virginia Public Procurement Act*

The Virginia Public Procurement Act establishes a number of requirements directly affecting capital projects for higher education. The Act clearly reflects the intent of the General Assembly to encourage the maximum feasible competition in the procurement of “high quality goods and services at reasonable cost” and seeks to ensure impartiality and fairness in the procurement process.<sup>84</sup> The Act applies to most state-funded higher education projects; its provisions govern the public procurement of professional and nonprofessional services from nongovernmental sources.<sup>85</sup> All public contracts with private contractors for goods, services, insurance, or construction must be awarded through competitive sealed bidding or competitive negotiation.<sup>86</sup>

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81. Va. Code § 2.1-179 (1987). The Treasury Board has supervisory duties regarding the financing of state buildings and is empowered to “approve terms and structures of proposed bonds.” See also, Virginia Constitution, Article X, § 7. Presumably the practice of using interim loans reflects some concern over the possibility of violating the constitutional prohibition against extended appropriations: “No money shall be paid out of the State treasury except in pursuance of appropriations made by law; and no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which time law is enacted authorizing the same.”

82. *Revenue Bond Guidelines*, *supra* note 29, at B-3, 6. The final feasibility study must be available 60 days prior to the issuance of § 9(d) bonds.

83. *Id.* at B-2, 6.

84. Va. Code § 11-35(g) (1989).

85. Va. Code § 11-37 (1989). The Procurement Act defines “professional services” as work performed by an independent contractor, in areas such as accounting, architecture, law, and engineering. “Nonprofessional services” are those not specifically identified as “professional services” in the Act.

86. Va. Code § 11-41 (1989). The Act waives competitive sealed bidding and competitive negotiation in emergency cases, when a written determination indicates only one source of procurement, and when public bodies have established certain approved alternative purchase procedures.

Competitive sealed bidding is generally used for the procurement of nonprofessional services. After issuing a written invitation to bid, detailing the terms, specifications, and conditions of the procurement, the institution evaluates bids received and must award the service contract to the lowest “responsive and responsible bidder.” Although the institutions must provide 10-day notice of the invitation to bid, the evaluation of bids is not time-limited.<sup>87</sup>

Greater flexibility exists in the competitive negotiation for selection of professional and nonprofessional services. This procedure also requires solicitation for bids (here, a “request for proposal”) but allows the institution to describe the desired procurement in more general terms. After receipt of proposals, the institution may engage in discussions with two or more offerors, selected on the basis of professional competence. Contracts for professional services may be awarded after a two-step negotiation process, in which the institution narrows its choices to at least two offerors before fully negotiating price and contract terms. Contracts for nonprofessional services may be awarded after negotiations; price need not be the sole determining factor in making the award.<sup>88</sup>

Compliance with the Procurement Act poses a number of concerns for higher education expansion. Because construction services are usually procured through competitive sealed bidding,<sup>89</sup> institutions may often be forced to choose a particular contractor due to price considerations. The Act does, however, permit the use of design-build and construction management contracts for higher education projects;<sup>90</sup> obtaining design and construction services from one contractor may prove to be both time-saving and cost effective. Requirements for bid bonds and payment and performance bonds, often necessary safeguards, may increase bid contract prices in cases where other guarantees or surety devices may prove more economical.<sup>91</sup> The Procurement Act does provide special exceptions for higher education computer software purchases<sup>92</sup> and for local industrial development authority projects.<sup>93</sup> It is conceivable that other similar exceptions or alternative procurement procedures might be developed to facilitate the financing of higher education projects without compromising the goals of the Act; however, further input from the colleges and universities themselves may be necessary to fully identify those procedures that may unnecessarily impede capital projects.

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87. Va. Code § 11-37 (1989). The “responsible” bidder is deemed to have the capability, reliability, and business integrity necessary to perform contract requirements. The “responsive” bidder is one who has submitted a bid conforming “in all material respects” to the institution’s invitation to bid. Clearly, the “responsible” bidder is not always “responsive,” and the institution may be required to choose a less desirable contractor under this procedure.

88. *Id.*

89. Va. Code § 11-41(C)(2) (1989). Exceptions to this requirement exist in certain renovations and demolition contracts for less than \$500,000; highway construction and drainage or excavation projects; and certain fixed price design-build or construction-management contracts.

90. Va. Code § 11-41.2 (1989). Technical revision of this section may be necessary to clarify use of these arrangements. The Act mentions design-build contracts by the Commonwealth and certain designated localities in one section, while contemplating design-build contracts by the Commonwealth and its “departments, agencies, and institutions” in another section. Va. Code § 11-41(c)(2)(i) (1989).

91. Va. Code §§ 11-57, 11-58 (1989). These safeguards are required for all public construction contracts exceeding \$100,000.

92. Va. Code § 11-41.3 (1989). The institutions of higher education may purchase software without competition subject to certain price restrictions and with the approval of the Office of the Attorney General.

93. Va. Code § 11-45 (1989).

## *Federal Tax Law Considerations*

While § 9(c) and § 9(d) financing are granted specific exemptions from state and local taxation, these projects must satisfy a battery of tests in order to qualify for tax-exempt financing under federal law. Recent amendments to the Internal Revenue Code have made tax-exempt obligations a less attractive investment for certain purchasers, such as banks and other financial institutions, thus changing the market for these obligations.<sup>94</sup> The new tax law basically classifies tax-exempt obligations as either governmental bonds or private activity bonds, each subject to different requirements regarding project use and arbitrage.<sup>95</sup> Changes in arbitrage rules, restrictions on issuance costs, and computation of rebates on certain investment earnings are all concerns meriting examination by the college or university seeking tax-exempt financing.<sup>96</sup>

## **Alternatives and Considerations**

A recurring theme in the development of alternatives and proposals for financing capital facilities for higher education has been the difficulty in identifying specific impediments within the Commonwealth's traditional capital outlay process. To address this problem, the State Treasurer's Office recently conducted an informal survey of Virginia college and university vice presidents; responses cited a number of potential projects and unique proposals for financing and implementation. Concerns surfaced regarding the flexibility and efficiency of the statutory and administrative procedures governing the capital expansion process. The Commission also solicited the input of the colleges and universities; several institutions expressed interest in pursuing public/private partnerships and special lease-purchase arrangements and in clarifying procedures for the evaluation and development of expansion opportunities. In responding to these concerns, the Commission first examined the present statutory and administrative issues governing financing options for higher education expansion. The Commission then explored specific financing alternatives, procedural and legal issues, and administrative policies. A number of alternatives studied by the Commission focus on innovative or expanded revenue sources, while others contemplate changes in the laws and policies governing the development of state property and the present capital outlay process.

### **Indirect Cost Recoveries**

Deficiencies in research laboratory and office space plague several institutions, most notably the University of Virginia and Virginia Tech. Although research space guidelines are

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94. P. Arey and J. O'Connor, "Tax Exempt Obligations after the Tax Reform Act of 1986—A Brief Guide for the Local Government Attorney," 19 The Urban Lawyer 1051, 1052 (Fall 1987) [hereinafter referred to as The Urban Lawyer]. The new Code changes affect the deductibility of tax-exempt interest by financial institutions and the computation of the alternative minimum tax. *Id.* at 1063, 1064. See also, Hawkins, Delafield & Wood, Analysis of Provisions of the Tax Reform Act of 1986 Affecting Tax-Exempt Obligations at 49, 50 (1986) [hereinafter referred to as Hawkins].

95. *Id.* at 1052. The Internal Revenue Code of 1986 effectively defines private activity bonds in terms of private business use and security interest tests or a private loan test. Governmental bonds are simply bonds that are not private activity bonds. Hawkins, *supra* note 94, at 1-3.

96. The Internal Revenue Code of 1986 does not require a rebate when gross proceeds of a bond, other than those held in a bona fide debt service fund, are expended for the governmental purpose for which the bond was issued within 6 months of the date of bond issuance. The Urban Lawyer, *supra* note 94, at 1058.

currently under review by SCHEV, it is nonetheless clear that additional research space is needed and that funds are rarely available to finance this expansion.<sup>97</sup> In exploring innovative revenue sources to meet this need, the Commission examined the current and potential use of indirect cost recoveries to finance research facility projects for higher education.

Indirect costs are defined as “those costs associated with overhead functions and incurred for a common or joint purpose that support one or more cost objectives (contract, award, project or program).”<sup>98</sup> In the context of higher education, indirect costs are comprised of overhead costs borne by the institution and “serve one or more programs, grants, or contracts ... .”<sup>99</sup> “Indirect cost recoveries” are those indirect costs recovered from grants or contracts.<sup>100</sup> When an institution accepts a research grant or contract, it must recover full indirect costs unless specifically exempted by the Comptroller or prohibited by the grantor. Under the 1989 Appropriations Act, 70% of the indirect cost recoveries received by an institution of higher education must be retained as an appropriation by the General Assembly for the “conduct and enhancement of research and research-related requirements.” The institution must apply the remaining 30% to its educational and general revenues.<sup>101</sup>

Higher education institutions in the Commonwealth have used indirect cost recoveries to fund faculty salaries, graduate student support, and the construction of research and rental space. Although other states have applied indirect recoveries to support debt service for capital projects, questions have persisted regarding the sufficiency and stability of these funds to support similar projects in the Commonwealth.<sup>102</sup>

To pledge indirect cost recoveries (ICRs) to the payment of § 9(c) debt, several legal concerns and policy issues must be addressed. First, it must be determined that indirect cost recoveries are a constitutionally qualified revenue source derived from “rates, fees and other charges.”<sup>103</sup> Preliminary opinions from bond counsel indicate ICRs may indeed constitute “fees or other charges” from which net revenues may be derived for the payment of § 9(c) bonds. Because ICRs are associated with grants and contracts awarded in consideration of research services to be performed, these funds might be considered project fees or charges.

In analyzing this option, it is important to distinguish those funds to be used as debt service from funds to be pledged as security for debt service payments.<sup>104</sup> Even if indirect cost recoveries qualify either as a source of debt service or security, these funds alone may not be sufficient to finance a research facility. Although other funds may be pledged to secure debt payments, other

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97. See Minutes, September 11, 1989 and October 24, 1989 meetings of this Commission.

98. Department of Accounts, Comptroller’s Directive Number 2-87, “Indirect Cost Recovery,” April 1, 1987 [hereinafter referred to as Comptroller’s Directive]. The Comptroller’s Directive states that indirect costs “cannot be directly identified with a specific project even though they may be assigned to a specific project through a cost accounting system.”

99. Comptroller’s Directive, *supra* note 98. These “agency indirect costs” are “incurred entirely by ... [an] institution in support of its mission.”

100. Id.

101. 1989 Appropriations Act, *supra* note 73, §§ 4-2.01(c)(1) and 4.2.01(c)(3).

102. See Minutes, October 24, 1989 meeting of this Commission.

103. Va. Constitution, Art. X, § 9(c).

104. A preliminary opinion of bond counsel has indicated that pledging ICRs to secure bonds would not constitute a federal guarantee prohibited under Section 149(b) of the Internal Revenue Code.

project revenues, in addition to ICRs, must be available to make the facility “self-liquidating” under § 9(c).<sup>105</sup>

Critical policy considerations also exist regarding the stability of ICRs as a marketable revenue source and as the basis for the Governor’s certification “based on responsible ... economic estimates.”<sup>106</sup> A number of control mechanisms and guidelines would be necessary to ensure the prudent use of ICRs to fund capital projects. These parameters might include establishing the reliability of ICR financial projections and ensuring that the project to be financed will be used only for research. This option might be best introduced in a test case; clarification of these constitutional and policy concerns is advisable to prudently implement the use of ICRs as a § 9(c) revenue source.

### General Operating Revenue Pledge

Colleges and universities may issue § 9(d) debt for certain capital projects with the Governor’s consent; repayment sources are generally limited to revenues from the project and existing facilities, student fees, and other funds.<sup>107</sup> No clear mechanism appears to exist, however, which allows the institutions to pledge general revenues to finance capital projects. Institutions may find such an arrangement attractive for the development of certain projects, such as research facilities, which might not be considered “revenue producing.” No guidelines exist for institutions wishing to pursue this option.<sup>108</sup>

The Commission again coordinated the expertise of its financial agencies and legal counsel to examine the efficacy and appropriateness of authorizing a pledge of general operating revenues for § 9(d) projects. “General operating revenues,” broadly defined, might well include a university’s sponsored revenue overhead, unrestricted endowment income, tuition and fees, indirect cost recoveries, auxiliary enterprise revenues, and general fund appropriations. Although general operating revenues may constitute “other funds” authorized for the payment of an institution’s § 9(d) bonds, what comprises these revenues should be clearly defined.<sup>109</sup> Clarification of statutory and budgetary authority might be necessary to permit such a pledge.<sup>110</sup> In addition, appropriate control mechanisms, such as imposing a cap on general revenue pledges, establishing safeguards against tuition and fee increases, or restricting such a pledge to certain types of facilities, might be advisable to ensure prudent use of this option.

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105. See *Miller v. Watts*, *supra* note 27, 215 Va. 836 at 845. The Virginia Supreme Court stated that a § 9(c) project is “self-liquidating” when “net revenues and its anticipated net revenues are sufficient to meet payments on the bonds as the same become due.”

It should also be noted the Court stated that future appropriations may not be considered “net revenues” or “anticipated net revenues” within the meaning of § 9(c). Because ICRs are considered General Assembly “appropriations,” it is still unclear whether these funds may provide a viable revenue source for § 9(c) debt. Further clarification by the Office of the Attorney General and bond counsel would be advisable to pursue this option.

Prof. Howard notes that § 9(c) debt may be secured by “pledging the unencumbered revenues of other projects to help pay for the project in question.” Howard, *supra* note 1, at 1124, n.107.

106. Va. Constitution, Art. X, § 9(c).

107. Va. Code §§ 23-16, 23-19(d),(e) (1985). See notes 42-47, *infra*.

108. Information received from House Appropriations Committee Staff.

109. Va. Code § 23-19(d)(4) (1985).

110. Although indirect cost recoveries may arguably be included “moneys available” for the institutions within § 23-19(d)(4), revision of the 1989 Appropriations Act to clearly permit the pledge of ICRs as part of general operating revenues might be advisable.

Other financing alternatives that the Commission studied included the increased issuance of taxable debt and § 9(b) general obligation bonds.

### **Privatization**

In the last decade, a number of institutions have expressed interest in pursuing capital expansion proposals involving partnerships with private developers and with localities. Described as a “recently coined word for a centuries-old arrangement,” privatization simply refers to a contractual arrangement between the public and private sectors whereby certain public facilities or services are owned, operated, or provided by a private party, presumably at a savings to the public entity and with a profit to the private partner.<sup>111</sup> The concept has been revived in recent years due to various tax law benefits and reduced funding available to public entities.<sup>112</sup>

Consultants find privatization an attractive option for several reasons. Privatization arguably reduces the design and construction period. In addition, privatization may be attractive to institutions with limited debt capacity.<sup>113</sup> Evaluation of privatization alternatives is a complicated matter, requiring financial, legal, and technical expertise; the feasibility of specific privatization projects is “necessarily dependent upon a combination of attitudinal, economic, legal, political and technological factors ....”<sup>114</sup>

### ***Lease-Purchase Option***

Several institutions expressed interest in various lease-purchase arrangements.<sup>115</sup> These options contemplate construction of higher education facilities by a private developer for use by the institution. Initial ownership remains with the private developer, who receives depreciation and other tax benefits. The institution becomes the lessee of the facility, with an option to purchase the project at a predetermined, nominal price upon the expiration of the lease. The project might be financed through a general obligation or revenue pledge.

A number of statutory and administrative requirements presently restrict this option. Regardless of whether the facility is constructed on private property, the arrangement is still subject to the capital outlay process, as the 1989 Appropriations Act clearly includes these lease arrangements with the definition of “capital project.”<sup>116</sup> Institutions have indicated to this Commission that the potentially lengthy capital outlay approval procedures may dissuade private

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111. P. Newman, “Privatization: A Financing Alternative for State and Local Governments,” The Privatization Review 37 at 37, 38 (Winter 1987) [hereinafter referred to as Newman]. Ms. Newman traces the “tradition of public/private partnership in America” to President George Washington’s 1790 arrangement with French engineer L’Enfant to design the nation’s capital through a unique land donation and sale plan.
112. J. Dobbs, “Rebuilding America: Legal Issues Confronting Privatization,” The Privatization Review 28 (Summer 1985).
113. M. Olstein, “Selecting a Privatizer,” The Privatization Review 26 at 30, 31 (Spring 1986).
114. Newman, *supra* note 111, at 39.
115. See 1988 Acts of Assembly, ch. 800, item 345. The 1988 Appropriations Act identified lease-purchase arrangements (as well as partnerships with localities) as a means of “supplementing the general fund construction of needed higher education facilities....”
116. 1989 Appropriations Act, *supra* note 73, § 4-4.01(a)(1). The Act states the “capital project” shall include “any improvements to property leased for use by a state agency, and not owned by the State, when such improvements are financed by public funds....”

developers from negotiating lease-purchase arrangements. In addition, long-term leases require special approval from the Department of General Services, whose administrative directives normally limit lease agreements between state institutions and other entities to five years.<sup>117</sup> Compliance with applicable Procurement Act competitive bidding procedures may also be viewed as a hindrance to this privatization option because the institution may find “other factors, such as a firm’s exposure, financial stability, staff expertise, reputation and ability to perform ... more important than price.”<sup>118</sup>

A variation of the lease-purchase arrangement would involve construction by a private developer on university property. Although the private developer would construct the facility with its own funding and lease the project to the institution, the arrangement would nonetheless fall within the Appropriations Act definition of “capital projects.” The project would still be subject to the capital outlay approval process and state building construction specifications.<sup>119</sup>

Statutory guidance for these arrangements is somewhat unclear. Although higher education institutions are certainly authorized to sell, lease, or convey real property interests with gubernatorial approval, it is unclear whether an institution could avoid the capital outlay process by simply conveying the facility site to a private developer.<sup>120</sup> Other variations of these privatization options contemplate the university as the developer and lessor of property (to be reclaimed and used by the institution at a later date) and the financing of projects through local business entities having direct interests in a particular educational program facility. Additional concerns include the questionable authority of the institutions to negotiate with private developers without competitive processes and compliance with applicable state surplus property statutes.<sup>121</sup> The Commission received testimony from a number of institutions regarding the implementation of these privatization arrangements on a “pilot project” basis.

## Other Options

### *State Assistance in Review and Development of Unique Projects*

In recent years, some institutions may have abandoned unique project proposals due to a perceived lack of specific policies and procedures guiding the development of such ventures. One possible option addressing this problem is the creation or revision of a manual or review process for providing guidance and assistance to institutions developing exceptional financing proposals.

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117. Information received from House Appropriations Committee Staff; *see also*, Department of General Services, Division of Engineering and Buildings Directive 1, § IV 2G.
118. D. Watson, “The Public View: Privatization—One Possible Solution,” *The Privatization Review* 38 at 38-40 (Fall 1985). The Procurement Act requires construction services to be obtained through competitive sealed bidding. Va. Code § 11-41 (1989).
119. Section 4-4.01(a)(1) of the 1989 Appropriations Act includes “new construction and improvements related to state-owned property” as capital projects.
120. Va. Code § 23-4.1 (1985). Neither the institutions nor the Commonwealth favor this conveyance route.
121. Va. Code §§ 2.1-511, 2.1-512 (1989). Institutions may lease property “for which there is an anticipated future use” to a private entity if no other department or agency of the Commonwealth has a need for the property. The recommendation of the Department of General Services and the Governor’s approval are required; leases to private entities or other governmental agencies may not exceed fifteen years. Institutions wishing to sell property to a private developer may have to comply with § 2.1-512, which requires DGS to handle the sale of “surplus” property by public auction or by sealed bidding.



Clarification of a review process might provide consistency in the application of state construction and financing requirements as well as creativity in the development of new project proposals.

### *Decentralization of Project Reviews*

The Commission also reviewed present capital outlay review requirements to determine whether current procedures are duplicative or unnecessary. Testimony from DGS confirmed that while the agency reviews and preplanning studies often required for higher education projects may be perceived as cumbersome, these reviews often detect and correct design errors and inefficient project features early in project development. Delegation of certain project reviews to private developers and those institutions possessing in-house architectural and engineering expertise has been cited, however, as a way to encourage private development as well as greater efficiency in the current review process. DGS presently exercises some authority to delegate specific project reviews to localities and the institutions themselves.<sup>122</sup> Specific criteria by which the institutions might become eligible to assume greater review responsibilities could be developed to facilitate this option.

### *Long-range Planning*

The value of long-range and project-specific planning was also examined by this Commission. Greater emphasis on long-range capital project development may also promote prudent capital expansion. The current higher education master plan, monitored by SCHEV, focuses on site use rather than specific long-term planning. A long-range plan, encompassing general fund and non-general fund projects, might assist institutions in their individual project development efforts. Individual project development may be enhanced by the use of detailed market studies assessing potential project use and market interest.<sup>123</sup>

The Commission also received testimony regarding the use of “blind bids” in the appropriation and procurement process. This option might be implemented through a consolidated capital appropriation, identifying project nature and scope, without disclosing a project dollar amount. Such an option might curtail the perceived practice of “bidding to the project estimate.” The Commission has also examined the use of cost-savings incentives to encourage economy in project construction.

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122. See Minutes, October 24, 1989 and November 21, 1989 meetings of this Commission. See also, Va. Code § 36-98.1 (1989 Supp.). DGS is required to provide for the inspection of state-owned buildings and may delegate this inspection to “appropriate state agencies having needed expertise, and to local building departments....”

Throughout this study, several institutions have contended that private development offers faster and less expensive construction alternatives than does the Commonwealth’s capital outlay review process. To test this view, the Commission requested a cost comparison. VPI’s Innovation Center, a computer and research space facility constructed pursuant to a privatization arrangement with the VPI Foundation, served as the project model. The DGS estimate of \$56.72 unit cost per square foot, adjusted to reflect inflation and the project’s Blacksburg location, compared favorably with the project’s actual unit cost of approximately \$55.00 per square foot. See Minutes, October 24, 1989 meeting.

123. See Minutes, November 21, 1989 meeting. See also, Va. Code § 23-9.6:1 (1989 Supp.). The National Conference of State Legislatures has recommended the use of long-range capital plans which show “the infrastructure needs of the state over the next five to 10 years and ... how and where the current capital budget request fits into the long-term capital plan.” The National Conference of State Legislatures, Capital Budgeting and Finance: The Legislative Role at 23 (November, 1987).

## **Recommendations**

The development of appropriate alternatives to traditional methods of financing capital projects for higher education involves consideration of a variety of procedures, statutes, and policies. Increased budget requests for higher education clearly indicate a need for viable alternatives to traditional financing sources and methods. While an aggressive capital outlay program has met the needs of higher education in the past, expanding enrollments and the changing construction needs of Virginia's colleges and universities have placed even greater demands on the Commonwealth's funds. Review of constitutional debt requirements and the administrative and statutory guidelines governing the capital outlay process has yielded a variety of possible alternatives. This Commission recognizes that the development of innovative financing practices, or simply the clarification of existing procedures, is necessarily guided by consideration of the purposes, policies, and goals which reflect the shared interests of the Commonwealth and its system of higher education: the prudent funding of justified projects, quality construction, efficiency and fairness in the procurement process, and continued excellence in higher education in Virginia. Therefore, the Commission recommends the following actions:

### **RECOMMENDATION 1:**

**That state-supported colleges and universities be authorized to pledge general university operating revenues, which may include tuition and fees, indirect cost recoveries, and other funds, to provide debt service and security for §9(d) bonds, subject to guidelines to be developed by the Secretary of Finance.**

A pledge of general university operating revenues may allow institutions to obtain more favorable credit ratings in financing projects that are not considered "revenue producing." The Commission has considered a number of proposed parameters to govern such a pledge and recommends that the Secretary of Finance promulgate guidelines for the appropriate use of a general operating revenue pledge.

### **RECOMMENDATION 2:**

**That state-supported colleges and universities be permitted to lease state property to university-related foundations or private entities, subject to legislative approval and guidelines to be promulgated by the Secretary of Finance and the Department of General Services; that such proposed lease and project use must be for a purpose consistent with the educational and general mission, auxiliary enterprise, and sponsored program activities of the institution or such other purposes as the General Assembly may authorize; that the term of any such lease agreement be based upon, among other things, the useful life of the project and shall not exceed fifty years; (however, any agreement may be extended upon the written recommendation of the Department of General Services and gubernatorial approval); and that capital outlay process reviews and approvals may be waived, amended, or adjusted by the Governor for these transactions, after approval of the project preplanning study.**

To facilitate the private development of state property, the Commission recommends that higher education institutions be permitted to lease state property to private entities or university-related foundations without first offering the land to other state entities pursuant to the state surplus property statute. Because compliance with the Commonwealth's traditional and sometimes lengthy capital outlay review process may discourage private development, the Commission has concluded that, upon legislative approval and a showing that the proposed transaction is consistent with the institution's mission and related programs, capital outlay review requirements may be waived, amended, or adjusted by the Governor for these transactions, after approval of the project preplanning study. Guidelines developed by the Department of General Services and the Secretary of Finance would ensure the appropriate implementation of this recommendation.

**RECOMMENDATION 3:**

**That the Secretary of Finance create a resource guide for the development of alternative financing proposals by colleges and universities.**

The Commission has received testimony from a number of institutions regarding a perceived lack of specific policies and guidelines for the development of unique capital project financings. Clarification of the capital outlay review procedures will promote consistency in the application of these policies and requirements as well as creativity in the development of higher education project proposals.

**RECOMMENDATION 4:**

**That the Department of General Services articulate guidelines governing the waiver of Department of General Services/Division of Engineering and Buildings Directive 1, § IV 2G, regarding a five-year lease term for agreements between state institutions and other entities.**

A number of institutions have indicated a need for clarification of the DGS directive limiting leases to five-year terms. Private parties are often dissuaded from negotiating lease arrangements without some assurance that a longer lease term is available. Although the five-year term directive may be waived, no clear criteria exist to guide the institutions in the development of long-term lease arrangements.

**RECOMMENDATION 5:**

**That a state-supported college or university be permitted to retain the unexpended general fund balance from a completed capital project, subject to certification by the Department of General Services that the project has been completed in accordance with project plans, and that such funds be deposited in a special account for use by the institution for other projects upon appropriation.**

Allowing institutions to benefit from prudent project financings will increase flexibility in financing future capital projects that may require additional funds. To encourage scrutiny, efficiency, and quality in project planning, development, and construction, this Commission recommends that institutions of higher education be permitted to retain cost savings realized from completed capital projects.

**RECOMMENDATION 6:**

**That the State Council of Higher Education for Virginia review and consider revising space planning guidelines for research space and assist the Secretary of Education in the development of a policy addressing the appropriate mix of general and nongeneral fund support for the construction and renovation of research space at institutions of higher education.**

Funding for higher education research space facilities has been derived from a variety of general and nongeneral funds. No consistent funding policy has been applied to projects of this nature. The lack of comprehensive space planning guidelines for research and medical research space makes it difficult to assess the need for these projects.

Research space should receive an appropriate measure of general fund support in recognition of the contribution of research to instruction and the Commonwealth as a whole. Each institution should, however, be expected to contribute nongeneral funds for the construction or renovation of research facilities. The State Council of Higher Education should continue to revise space planning guidelines for research space and develop guidelines for medical research space to identify and address actual space deficiencies.

The Commission extends its appreciation to the Commonwealth's institutions of higher education, contributing state agencies, and members of the legal community for their assistance and cooperation during the course of this study.□

Respectfully submitted,

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## HOUSE JOINT RESOLUTION NO. 373

*Establishing a commission to study alternative methods of financing certain facilities at state-supported colleges and universities.*

Agreed to by the House of Delegates, February 6, 1989

Agreed to by the Senate, February 23, 1989

WHEREAS, the higher education system in Virginia is essential to the economy of the Commonwealth and the future well-being of its citizens; and

WHEREAS, an aggressive capital outlay program for Virginia higher education over the past decade has provided almost \$1 billion for the construction and renovation of facilities, more than half of which has come from the state's general fund; and

WHEREAS, despite this strong support not all the space needs of the institutions are being met; and

WHEREAS, some institutions need large amounts of additional classroom, class laboratory, research, and auxiliary support space to meet their current or projected enrollment and research activities; and

WHEREAS, some institutions have needs that involve the renovation and preservation of older buildings; and

WHEREAS, some institutions would like to work with local governments, institutional foundations, or private developers to construct facilities to address some of the need for additional space but are constrained by specific aspects of the Commonwealth's Public Procurement Act, the provisions of § 23-19 of the Code of Virginia, or administrative policies and procedures; and

WHEREAS, there is significant interest in developing cooperative projects that include the state, local governments, institutional foundations, or private firms and such cooperative projects could satisfy documented needs for additional higher education facilities; and

WHEREAS, in accordance with Chapter 800 of the Acts of the General Assembly of 1988, the Secretary of Finance, in conjunction with the State Council of Higher Education and the Department of Treasury identified supplemental methods of funding higher education that warrant further study; and

WHEREAS, it is urgent that these supplemental methods be developed into specific financing alternatives; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a commission be established to study alternative methods of financing facilities at the state-supported institutions of higher education and to determine whether changes are needed in the laws and policies governing the financing of higher education projects and the Public Procurement Act. The commission shall be composed of eight members to be appointed as follows: the Chairman of the House Appropriations Committee or her designee, the Chairman of the Senate Finance Committee or his designee, two members appointed by the Governor, the Secretary of Finance, the Secretary of Education, the State Treasurer, and the Director of the State Council of Higher Education. Agencies and institutions of the Commonwealth shall provide assistance upon request of the commission.

The commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1990 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

The indirect costs of this study are estimated to be \$8,300; the direct costs of this study shall not exceed \$2,200.

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## Budget Requests: 1988-90 Biennium

INSTITUTION	1988-90 REQUEST			APPROPRIATIONS ACT			1989 LOTTERY BILL			1988-90 REVENUE BOND BILLS		
	GF	NGF	TOTAL	GF	NGF	TOTAL	GF	NGF	TOTAL	GF	NGF	TOTAL
George Mason University	\$46,360,848	\$17,905,145	\$64,265,993	\$2,226,265	\$5,557,500	\$7,783,765	\$21,889,000		\$21,889,000	\$31,563,900	\$21,563,900	\$53,127,800
Old Dominion University	\$39,658,242	\$13,132,136	\$52,790,378	\$4,629,604	\$4,995,108	\$9,624,712	\$4,940,000		\$4,940,000	\$7,903,600	\$7,903,600	\$15,807,200
University of Virginia	\$26,061,660	\$38,494,000	\$64,555,660	\$10,367,589	\$43,754,300	\$54,121,889	\$11,979,000	\$1,000,000	\$12,979,000	\$977,500	\$977,500	\$1,977,500
University of Virginia Hospitals	\$9,464,300	\$10,573,800	\$20,038,100	\$8,431,203	\$11,227,100	\$19,658,303			\$0			\$0
Virginia Commonwealth University	\$34,442,000	\$10,035,600	\$44,477,600	\$2,588,287	\$8,163,500	\$10,751,787	\$19,199,000		\$19,199,000	\$5,128,300	\$5,128,300	\$24,327,000
VCU Hospitals	\$4,741,700	\$19,420,500	\$24,162,200	\$2,950,251	\$26,934,100	\$29,884,351	\$1,862,000	\$465,000	\$2,327,000			\$0
Va. Polytechnic Institute & S. U.	\$58,019,320	\$20,856,971	\$78,876,291	\$11,249,444	\$7,973,100	\$19,222,544	\$13,454,000		\$13,454,000	\$10,813,600	\$10,813,600	\$24,267,600
VPI & SU - Research Division	\$4,302,800	\$1,500,000	\$5,802,800	\$721,677	\$4,250,000	\$4,971,677	\$1,931,000		\$1,931,000			\$0
The College of William & Mary	\$13,209,200	\$1,815,800	\$15,025,000	\$8,154,272	\$2,368,385	\$10,522,657	\$13,079,000		\$13,079,000	\$19,164,500	\$19,164,500	\$38,244,000
Va. Institute of Marine Science	\$628,100		\$628,100	\$717,080	\$250,000	\$967,080			\$0			\$0
Christopher Newport College	\$4,564,100	\$35,000	\$4,539,100	\$815,417	\$35,000	\$850,417	\$2,772,000		\$2,772,000			\$0
Clinch Valley College	\$7,149,000		\$7,149,000	\$757,750		\$757,750	\$4,560,000		\$4,560,000			\$0
James Madison University	\$16,171,130	\$803,970	\$16,975,100	\$13,781,095	\$1,505,610	\$15,286,705	\$4,100,000		\$4,100,000	\$15,391,645	\$15,391,645	\$30,783,290
Longwood College	\$12,449,651	\$345,000	\$12,794,651	\$7,728,581	\$626,500	\$8,355,081	\$2,509,000		\$2,509,000	\$825,000	\$825,000	\$1,650,000
Mary Washington College	\$17,693,319	\$3,759,654	\$21,452,973	\$1,039,635	\$330,400	\$1,370,035	\$6,442,000		\$6,442,000	\$4,454,700	\$4,454,700	\$10,896,700
Melchers Monroe Memorials	\$390,000	\$100,000	\$490,000	\$490,000	\$255,465	\$745,465			\$0			\$0
Norfolk State University	\$12,612,790	\$5,153,686	\$17,766,476	\$944,233	\$762,140	\$1,706,373	\$7,042,000		\$7,042,000	\$4,975,600	\$4,975,600	\$12,017,600
Radford University	\$12,607,373	\$9,769,573	\$22,376,946	\$1,260,247	\$3,826,407	\$5,086,654	\$7,455,000		\$7,455,000	\$7,524,300	\$7,524,300	\$14,979,300
Virginia Military Institute	\$7,222,894	\$1,071,500	\$8,294,394	\$1,345,909	\$2,797,000	\$4,142,809	\$4,017,000	\$100,000	\$4,117,000			\$0
Virginia State University	\$7,986,594	\$3,500,000	\$11,486,594	\$5,233,655	\$2,630,000	\$7,863,655	\$9,900,000		\$9,900,000			\$0
Virginia Community College System	\$70,330,626	\$17,941,527	\$88,272,153	\$12,188,676	\$11,940,428	\$24,129,104	\$37,965,000	\$3,161,000	\$41,146,000			\$0
Richard Bland College	\$337,000		\$337,000	\$9,260,462	\$2,618,385	\$11,878,847	\$1,988,000		\$1,988,000			\$0
<b>TOTAL</b>	<b>\$406,333,587</b>	<b>\$176,213,862</b>	<b>\$582,547,449</b>	<b>\$106,646,717</b>	<b>\$143,119,963</b>	<b>\$249,766,680</b>	<b>\$177,102,000</b>	<b>\$4,726,000</b>	<b>\$181,828,000</b>	<b>\$0</b>	<b>\$108,782,645</b>	<b>\$108,782,645</b>

	GF	NGF	TOTAL
<b>SUMMARY</b>			
1988-90 Amount Requested	\$406,333,587	\$176,213,862	\$582,547,449
1988-90 BUDGET BILL	\$106,646,717	\$143,119,963	\$249,766,680
1989-91 LOTTERY BILL	\$177,102,000	\$4,726,000	\$181,828,000
1988-90 REVENUE BOND BILL		\$108,782,645	\$108,782,645

SUMMARY	REQUESTED	BUDGET	LOTTERY	REVENUE BOND	TOTAL	% NEED/MET
General Fund	\$406.33	\$106.65	\$177.10		\$283.75	69.83%
NonGeneral Fund	\$176.21	\$143.12	\$4.73	\$108.78	\$432.84	245.64%
	\$582.54	\$249.77	\$181.83	\$108.78	\$716.59	123.01%

SOURCE: House Appropriations Committee Staff

# 1990 SESSION

LD0975568

## HOUSE BILL NO. 375 Offered January 19, 1990

*A BILL to amend and reenact § 2.1-511 of the Code of Virginia, relating to leases by institutions of higher education.*

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Patrons—Smith; Senator: Andrews

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Referred to the Committee on Appropriations

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Be it enacted by the General Assembly of Virginia:

1. That § 2.1-511 of the Code of Virginia is amended and reenacted as follows:

§ 2.1-511. Temporary transfer of use of property between state agencies and institutions; lease to private entities.— *A. Whenever any department, agency, or institution of state government shall possess or have under its control property for which there is an anticipated future use, but for which there is no immediate use, such department, agency, or institution of the Commonwealth may effect, subject to the written recommendation of the Department of General Services to the Governor and the written approval by the Governor, an agreement in writing with any other department, agency, or institution of state government for the use of such property by such other department, agency, or institution during a period not to exceed fifteen years. Any such mutual agreement may be extended beyond such fifteen-year period on an annual basis in accordance with the procedures hereinabove prescribed. In the event no other department, agency, or institution of state government has use for the property, any department, agency, or institution may lease such property to private individuals, firms, corporations or other entities in accordance with the procedures and subject to the limitations as to term hereinabove prescribed.*

*B. The provisions of subsection A notwithstanding, state-supported institutions of higher education, subject to the approval of the General Assembly, may enter into written agreements with university-related foundations, private individuals, firms, corporations, or other entities to lease property in the possession or control of the institution. Any such agreement and proposed development or use of property shall be for a purpose consistent with the educational and general mission, auxiliary enterprise, and sponsored program activities of the institution, or such other purpose as the General Assembly may authorize, and shall comply with guidelines to be promulgated by the Department of General Services. The term of any such agreement shall be based upon, among other things, the useful life of the improvements to the property and shall not exceed fifty years; however, any agreement may be extended upon the written recommendation of the Department of General Services and the approval of the Governor. Agreements with private individuals, firms, corporations, or other entities shall also be subject to guidelines to be promulgated by the Secretary of Finance.*

*For the purposes of this section, "university-related foundation" means any foundation affiliated with an institution of higher education.*

# 1990 SESSION

LD0901568

## HOUSE BILL NO. 376

Offered January 19, 1990

*A BILL to amend and reenact § 23-19 of the Code of Virginia, relating to bonds of educational institutions.*

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Patrons—Smith; Senator: Andrews

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Referred to the Committee on Appropriations

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Be it enacted by the General Assembly of Virginia:

1. That § 23-19 of the Code of Virginia is amended and reenacted as follows:

§ 23-19. Amount of bonds; purposes; resolutions; Treasury Board to be issuing, etc., agent; payment or purchase by institution; no personal liability.—(a) Every institution shall have power and is hereby authorized and empowered from time to time to execute its bonds in such aggregate principal amount as may be determined upon by its board and approved by the Governor. All such bonds shall be issued and sold through the Treasury Board which is hereby designated the issuing, sales, and paying agent of such institutions under this chapter. Such aggregate principal amount may include without limitation any engineering or inspection costs or legal or accounting expenses incurred by the institution in connection with the project for the erection of which such bonds are issued, and the cost of issuance of the bonds, including printing, engraving, advertising, legal and other similar expenses.

(b) Such bonds shall be authorized by resolution of the board, approved by the Governor, and may be issued in one or more series, shall bear such date or dates, mature at such time or times, bear interest at such rate not exceeding the rate specified in § 23-30.03 payable at such time or times, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, be subject to such terms of redemption, with or without premium, as such resolution or resolutions may provide. Such bonds may be sold at public or private sale for such price or prices as the board with the approval of the Governor shall determine, provided that the interest cost to maturity of the money received for any issue of such bonds shall not exceed the rate specified in § 23-30.03; however, prior to the issuance of bonds to finance any "project" ~~after the first day of September, 1965~~, the approval of the General Assembly must be obtained; and provided further, that *biennially* on or before the first day of September ~~in 1965 and biennially thereafter~~ in the odd-numbered years, each educational institution shall submit to the Governor any project or projects and the estimated cost of each separate project such educational institution desires to have financed under the provisions of this chapter, and the Governor shall consider such projects and make his recommendation to the General Assembly in the budget submitted in accordance with the provisions of § 2.1-398 of the Code of Virginia. Each educational institution is authorized to finance only those projects approved by the General Assembly in the ~~appropriation~~ *appropriations* act for the biennium covered by such ~~appropriation~~ *appropriations* act, which projects need not be limited to the projects recommended by the Governor.

(c) Such bonds may be issued for the corporate purpose or purposes of the institution specified by § 23-17 hereof or to carry out the powers conferred on the institution by § 23-18 hereof.

(d) Any resolution or resolutions authorizing such bonds may contain a provision or provisions which shall be part of the contract with the holders of such bonds as to

(1) Fixing, revising, charging and collecting fees, rents and charges for or in connection with the use, occupation or services of the project and pledging the same and any increases in revenues to be derived from any existing facilities at such institution resulting from any increase in the fees, rents or charges for or in connection with the use, occupation or services of any such existing facilities to the payment of the principal of and

the interest on such bonds;

(2) Fixing, revising, charging and collecting fees, rents and charges for or in connection with the use, occupation or services of any existing facilities at such institution and pledging the same to the payment of the principal of and the interest on such bonds;

(3) Fixing, revising, charging and collecting student building fees and other student fees from students enrolled at such institution and pledging the same in whole or in part to the payment of the principal of and the interest on such bonds;

(4) Pledging to the payment of the principal of and the interest on such bonds any moneys available for the use of such institution , *including, but not limited to, and subject to guidelines to be promulgated by the Secretary of Finance, moneys appropriated to such institution from the general fund of the Commonwealth or from nongeneral funds, without regard to the source of such moneys,* and which are not required by law or by previous binding contract to be devoted to some other purpose;

(5) Paying the cost of operating and maintaining any project and any such existing facilities from any one or more of the revenue sources mentioned in clauses (1), (2), (3) and (4) of this subdivision, creating reserves for such purposes and providing for the use and application thereof;

(6) Creating sinking funds for the payment of the principal of and the interest on such bonds, creating reserves for such purposes and providing for the use and application thereof;

(7) Limiting the right of the institution to restrict and regulate the use, occupation and services of the project and such other existing facilities or the services rendered therein;

(8) Limiting the purposes to which the proceeds of sale of any issue of bonds then or thereafter to be issued may be applied;

(9) Limiting the issuance of additional bonds;

(10) Setting forth the procedure, if any, by which the terms of any contract with the holders of such bonds may be amended or abrogated and the manner in which such consent of such holders to any such amendment or abrogation may be given; and

(11) Setting forth such other condition or conditions as may be required by the United States of America or any federal agency as a condition precedent to or a requirement in connection with the obtaining of a direct grant or grants of money for or in aid of the erection of any project, or to defray or to partially defray the cost of labor and material employed in the erection of any project, or to obtain a loan or loans of money for or in aid of the erection of any project from the United States of America or any federal agency, provided that such other condition or conditions are approved by the Governor.

(e) The power and obligation of an institution to pay any bonds issued under this chapter shall be limited. Such bonds shall be payable only from any one or more of the revenue sources mentioned in clauses (1), (2), (3) and (4) of subdivision (d) of this section and pledged therefor pursuant to a resolution adopted under said subdivision (d). Such bonds shall in no event constitute an indebtedness of the institution, except to the extent of the collection of such revenues and such institution shall not be liable to pay such bonds or the interest thereon from any other funds; and no contract entered into by the institution pursuant to subdivision (b) of this section shall be construed to require the costs or expenses of operation and maintenance of the project for the erection of which the bonds are issued and any such other existing facilities to be paid out of any funds other than the revenues derived from the sources mentioned in clauses (1), (2), (3) and (4) of subdivision (d) of this section and pledged therefor. Any provision of the general laws to the contrary notwithstanding, any bonds issued pursuant to the authority of this chapter shall be fully negotiable within the meaning and for all the purposes of ~~Chapter 10 of Title 6,~~ *Title 8.3 of the Code of Virginia , as amended .*

(f) Neither the Governor nor the members of the board nor any person executing such bonds shall be liable personally on the bonds or be subject to any personal liability or accountability by reason of the issuance thereof.

(g) The institution shall have power out of any funds available therefor to purchase any

bonds issued by it at a price not more than the principal amount thereof and the accrued interest. All bonds so purchased shall be cancelled unless purchased as an endowment fund investment. This paragraph shall not apply to the redemption of bonds.

(h) In any case in which an institution shall have obtained a loan for or in aid of the erection of any project from the United States of America or any federal agency, which loan requires the establishment of a debt service reserve, the institution, with the consent of the Governor, may deposit securities in a separate collateral account in an amount equal to the required debt service reserve, which securities shall be pledged to meet the debt service requirements only if the revenues derived from any one or more of the sources mentioned in clauses (1), (2), (3) and (4) of subdivision (d) of this section and pledged for the payment of such loan become insufficient for such purpose. The face value of United States government securities and the market value of all other securities shall be deemed to be the value of any securities so deposited. Nothing herein shall be construed as prohibiting repayment of any portion of such loan from income derived from the securities so deposited. No securities shall be deposited in any such collateral account unless the same shall have been purchased with funds, the use of which is in nowise limited or restricted or shall have been donated to such institution for the purpose of establishing such debt service reserve.

<b>Official Use By Clerks</b>	
<p style="text-align: center;"><b>Passed By</b></p> <p><b>The House of Delegates</b></p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>	<p style="text-align: center;"><b>Passed By The Senate</b></p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>
Date: _____	Date: _____
_____ Clerk of the House of Delegates	_____ Clerk of the Senate

# 1990 SESSION

LD2083101

## SENATE BILL NO. 246

Offered January 23, 1990

A BILL to amend and reenact § 23-19 of the Code of Virginia, relating to bonds of educational institutions.

Patron—Andrews

Referred to the Committee on Finance

Be it enacted by the General Assembly of Virginia:

1. That § 23-19 of the Code of Virginia is amended and reenacted as follows:

§ 23-19. Amount of bonds; purposes; resolutions; Treasury Board to be issuing, etc., agent; payment or purchase by institution; no personal liability.—(a) Every institution shall have power and is hereby authorized and empowered from time to time to execute its bonds in such aggregate principal amount as may be determined upon by its board and approved by the Governor. All such bonds shall be issued and sold through the Treasury Board which is hereby designated the issuing, sales, and paying agent of such institutions under this chapter. Such aggregate principal amount may include without limitation any engineering or inspection costs or legal or accounting expenses incurred by the institution in connection with the project for the erection of which such bonds are issued, and the cost of issuance of the bonds, including printing, engraving, advertising, legal and other similar expenses.

(b) Such bonds shall be authorized by resolution of the board, approved by the Governor, and may be issued in one or more series, shall bear such date or dates, mature at such time or times, bear interest at such rate not exceeding the rate specified in § 23-30.03 payable at such time or times, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, be subject to such terms of redemption, with or without premium, as such resolution or resolutions may provide. Such bonds may be sold at public or private sale for such price or prices as the board with the approval of the Governor shall determine, provided that the interest cost to maturity of the money received for any issue of such bonds shall not exceed the rate specified in § 23-30.03; however, prior to the issuance of bonds to finance any "project" after the first day of September, 1965, the approval of the General Assembly must be obtained; and provided further, that *biennially* on or before the first day of September in 1965 and *biennially thereafter* in the odd-numbered years, each educational institution shall submit to the Governor any project or projects and the estimated cost of each separate project such educational institution desires to have financed under the provisions of this chapter, and the Governor shall consider such projects and make his recommendation to the General Assembly in the budget submitted in accordance with the provisions of § 2.1-398 of the Code of Virginia. Each educational institution is authorized to finance only those projects approved by the General Assembly in the ~~appropriation~~ *appropriations* act for the biennium covered by such ~~appropriation~~ *appropriations* act, which projects need not be limited to the projects recommended by the Governor.

(c) Such bonds may be issued for the corporate purpose or purposes of the institution specified by § 23-17 hereof or to carry out the powers conferred on the institution by § 23-18 hereof.

(d) Any resolution or resolutions authorizing such bonds may contain a provision or provisions which shall be part of the contract with the holders of such bonds as to

(1) Fixing, revising, charging and collecting fees, rents and charges for or in connection with the use, occupation or services of the project and pledging the same and any increases in revenues to be derived from any existing facilities at such institution resulting from any increase in the fees, rents or charges for or in connection with the use, occupation or services of any such existing facilities to the payment of the principal of and

1 the interest on such bonds;

2 (2) Fixing, revising, charging and collecting fees, rents and charges for or in connection  
3 with the use, occupation or services of any existing facilities at such institution and  
4 pledging the same to the payment of the principal of and the interest on such bonds;

5 (3) Fixing, revising, charging and collecting student building fees and other student fees  
6 from students enrolled at such institution and pledging the same in whole or in part to the  
7 payment of the principal of and the interest on such bonds;

8 (4) Pledging to the payment of the principal of and the interest on such bonds any  
9 moneys available for the use of such institution , *including, but not limited to, and subject*  
10 *to guidelines to be promulgated by the Secretary of Finance, moneys appropriated to such*  
11 *institution from the general fund of the Commonwealth or from nongeneral funds, without*  
12 *regard to the source of such moneys, and which are not required by law or by previous*  
13 binding contract to be devoted to some other purpose;

14 (5) Paying the cost of operating and maintaining any project and any such existing  
15 facilities from any one or more of the revenue sources mentioned in clauses (1), (2), (3)  
16 and (4) of this subdivision, creating reserves for such purposes and providing for the use  
17 and application thereof;

18 (6) Creating sinking funds for the payment of the principal of and the interest on such  
19 bonds, creating reserves for such purposes and providing for the use and application  
20 thereof;

21 (7) Limiting the right of the institution to restrict and regulate the use, occupation and  
22 services of the project and such other existing facilities or the services rendered therein;

23 (8) Limiting the purposes to which the proceeds of sale of any issue of bonds then or  
24 thereafter to be issued may be applied;

25 (9) Limiting the issuance of additional bonds;

26 (10) Setting forth the procedure, if any, by which the terms of any contract with the  
27 holders of such bonds may be amended or abrogated and the manner in which such  
28 consent of such holders to any such amendment or abrogation may be given; and

29 (11) Setting forth such other condition or conditions as may be required by the United  
30 States of America or any federal agency as a condition precedent to or a requirement in  
31 connection with the obtaining of a direct grant or grants of money for or in aid of the  
32 erection of any project, or to defray or to partially defray the cost of labor and material  
33 employed in the erection of any project, or to obtain a loan or loans of money for or in  
34 aid of the erection of any project from the United States of America or any federal  
35 agency, provided that such other condition or conditions are approved by the Governor.

36 (e) The power and obligation of an institution to pay any bonds issued under this  
37 chapter shall be limited. Such bonds shall be payable only from any one or more of the  
38 revenue sources mentioned in clauses (1), (2), (3) and (4) of subdivision (d) of this section  
39 and pledged therefor pursuant to a resolution adopted under said subdivision (d). Such  
40 bonds shall in no event constitute an indebtedness of the institution, except to the extent of  
41 the collection of such revenues and such institution shall not be liable to pay such bonds  
42 or the interest thereon from any other funds; and no contract entered into by the  
43 institution pursuant to subdivision (b) of this section shall be construed to require the costs  
44 or expenses of operation and maintenance of the project for the erection of which the  
45 bonds are issued and any such other existing facilities to be paid out of any funds other  
46 than the revenues derived from the sources mentioned in clauses (1), (2), (3) and (4) of  
47 subdivision (d) of this section and pledged therefor. Any provision of the general laws to  
48 the contrary notwithstanding, any bonds issued pursuant to the authority of this chapter  
49 shall be fully negotiable within the meaning and for all the purposes of ~~Chapter 10 of Title~~  
50 ~~6, Title 8.3 of the Code of Virginia ; as amended .~~

51 (f) Neither the Governor nor the members of the board nor any person executing such  
52 bonds shall be liable personally on the bonds or be subject to any personal liability or  
53 accountability by reason of the issuance thereof.

54 (g) The institution shall have power out of any funds available therefor to purchase any

1 bonds issued by it at a price not more than the principal amount thereof and the accrued  
2 interest. All bonds so purchased shall be cancelled unless purchased as an endowment fund  
3 investment. This paragraph shall not apply to the redemption of bonds.

4 (h) In any case in which an institution shall have obtained a loan for or in aid of the  
5 erection of any project from the United States of America or any federal agency, which  
6 loan requires the establishment of a debt service reserve, the institution, with the consent  
7 of the Governor, may deposit securities in a separate collateral account in an amount equal  
8 to the required debt service reserve, which securities shall be pledged to meet the debt  
9 service requirements only if the revenues derived from any one or more of the sources  
10 mentioned in clauses (1), (2), (3) and (4) of subdivision (d) of this section and pledged for  
11 the payment of such loan become insufficient for such purpose. The face value of United  
12 States government securities and the market value of all other securities shall be deemed  
13 to be the value of any securities so deposited. Nothing herein shall be construed as  
14 prohibiting repayment of any portion of such loan from income derived from the securities  
15 so deposited. No securities shall be deposited in any such collateral account unless the  
16 same shall have been purchased with funds, the use of which is in nowise limited or  
17 restricted or shall have been donated to such institution for the purpose of establishing  
18 such debt service reserve.

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<b>Official Use By Clerks</b>	
<p><b>Passed By The Senate</b></p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>	<p><b>Passed By The House of Delegates</b></p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>
Date: _____	Date: _____
_____ Clerk of the Senate	_____ Clerk of the House of Delegates



1990 SESSION

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SENATE BILL NO. 247  
Offered January 23, 1990

*A BILL to amend and reenact § 2.1-511 of the Code of Virginia, relating to leases by institutions of higher education.*

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Patron—Andrews  
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Referred to the Committee on General Laws  
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Be it enacted by the General Assembly of Virginia:

1. That § 2.1-511 of the Code of Virginia is amended and reenacted as follows:

§ 2.1-511. Temporary transfer of use of property between state agencies and institutions; lease to private entities.— *A.* Whenever any department, agency, or institution of state government shall possess or have under its control property for which there is an anticipated future use, but for which there is no immediate use, such department, agency, or institution of the Commonwealth may effect, subject to the written recommendation of the Department of General Services to the Governor and the written approval by the Governor, an agreement in writing with any other department, agency, or institution of state government for the use of such property by such other department, agency, or institution during a period not to exceed fifteen years. Any such mutual agreement may be extended beyond such fifteen-year period on an annual basis in accordance with the procedures hereinabove prescribed. In the event no other department, agency, or institution of state government has use for the property, any department, agency, or institution may lease such property to private individuals, firms, corporations or other entities in accordance with the procedures and subject to the limitations as to term hereinabove prescribed.

*B.* The provisions of subsection A notwithstanding, state-supported institutions of higher education, subject to the approval of the General Assembly, may enter into written agreements with university-related foundations, private individuals, firms, corporations, or other entities to lease property in the possession or control of the institution. Any such agreement and proposed development or use of property shall be for a purpose consistent with the educational and general mission, auxiliary enterprise, and sponsored program activities of the institution, or such other purpose as the General Assembly may authorize, and shall comply with guidelines to be promulgated by the Department of General Services. The term of any such agreement shall be based upon, among other things, the useful life of the improvements to the property and shall not exceed fifty years; however, any agreement may be extended upon the written recommendation of the Department of General Services and the approval of the Governor. Agreements with private individuals, firms, corporations, or other entities shall also be subject to guidelines to be promulgated by the Secretary of Finance.

For the purposes of this section, "university-related foundation" means any foundation affiliated with an institution of higher education.

REQUEST FOR BUDGET BILL AMENDMENT  
TO HOUSE BILL 1150 AS INTRODUCED

DATE: 1/12/90

ITEM: ! 4-4.01  
AMEND. #: 2  
PATRON: Alson H. Smith, Jr

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LANGUAGE:

Page 285, line 20, insert:  
"q. Facility Lease Agreements Involving Institutions of Higher Education: In the case of any lease agreement involving state-owned property controlled by an institution of higher education, where the lease has been entered into consistent with the provisions of Section 2.1-511 of the Code of Virginia, the Governor may amend, adjust or waive any project review and reporting procedures of Executive agencies as may reasonably be required to promote the property improvement goals for which the lease agreement was developed."

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JUSTIFICATION FOR REQUEST:

(This amendment allows the Governor to amend capital outlay, environmental, and related review procedures on a case-by-case basis in instances where foundations or other entities have agreed to develop state-owned property to the benefit of higher education institutions, as provided for in Section 2.1-511 of the Code.)

REQUEST FOR BUDGET BILL AMENDMENT  
TO HOUSE BILL 1150 AS INTRODUCED

DATE: 1/12/90

ITEM: ! 4-1.06  
AMEND. #: 1  
PATRON: Alson H. Smith, Jr.

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LANGUAGE:

Page 276, line 32, after the word "project." insert:  
"However, in the case of an unexpended general fund balance involving any capital project completed at an institution of higher education, where the Director of the Department of Planning & Budget certifies that the project has been completed clearly and materially in accordance with the plans upon which the appropriation was based, such funds shall not revert to the general fund but shall be deposited in a special account established by the Comptroller for use by the institution, upon appropriation, for other capital projects including without limitation, new construction, improvement, acquisition, and maintenance or repair."

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JUSTIFICATION FOR REQUEST:

(This amendment is self-explanatory.)

*The Governor's proposed budget included language consistent with the Commission's recommendations regarding indirect cost recoveries:*

**§ 4-2.01 NONGENERAL FUND REVENUES**

**— c. INDIRECT COSTS**

41 3. All indirect cost recoveries received by an institution of higher education shall be subject to the  
42 following provisions:

43

44 a) Seventy percent shall be retained by the institution as an appropriation of funds by the General  
45 Assembly for the conduct and enhancement of research and research-related requirements. Such funds may  
46 be used for payment of principal of and interest on bonds issued by or for the institution pursuant to § 23-19  
47 of the Code of Virginia, for any appropriate purpose of the institution, including but not limited to the  
48 conduct and enhancement of research and research-related requirements.

49

50 b) Thirty percent of the indirect cost recoveries for the sponsored program activity levels authorized in  
51 Part 1 of this act shall be included in the educational and general revenues of the institution.

52

53 c) During the current biennium institutions of higher education may retain 100 percent of the indirect  
54 cost recoveries related to research grants and contract levels in excess of the levels authorized in Part 1 of  
55 this act. This provision is included as an additional incentive for increasing externally funded research  
56 activities.

