

Updates and Enhancements to Rail Enhancement Fund Legislative and Policy Goals (DRAFT)

August 14, 2015

Purpose of This Report

In HB 1887, the 2015 General Assembly directed the Commonwealth Transportation Board to “develop no later than December 1, 2015, a legislative proposal to revise the public benefit requirements of the Rail Enhancement Fund....” The Appropriations Act of that same year directed the Secretary of Transportation and the Department of Rail and Public Transportation (DRPT) to summarize previous Rail Enhancement Fund allocations, expenditures and transfers, as well as the long-term needs of the Rail Enhancement Fund.

The Commonwealth Transportation Board, through its Rail Subcommittee, expanded the study to include an equivalent consideration of program policy goals for both the Rail Enhancement Fund (REF) and the Rail Preservation Fund (RPF).

In addition, the Department of Rail and Public Transportation is seeking administrative and technological improvements to simplify the grant process and to enhance overall transparency and accountability of the Rail Enhancement Fund activities.

The Department of Rail and Public Transportation has divided these tasks into four broad components:

- Updates and enhancements to the REF Benefit/Cost Analysis (BCA) model
- Updates and enhancements to the REF legislative and policy goals, including a proposed prioritization process to use in allocating Rail Enhancement grant requests that may exceed future available funds
- Updates and enhancements to the RPF
- Updates and enhancements to the Department of Rail and Public Transportation grant administration, processes and procedures for the Rail Enhancement and Rail Preservation Funds

This report focuses on the second component, updates and enhancements to the REF legislative and policy goals, including a prioritization process to allocate scarce Rail Enhancement funds.

Background

The 2005 General Assembly created the REF on the recommendation of Governor Warner. As an early innovation in multimodal planning and funding, the REF embodied three unique characteristics:

- The REF had a dedicated and ongoing funding source, a portion of the motor vehicle rental tax imposed by the Commonwealth. This dedication allowed the Department of Rail and Public Transportation to plan and fund a multi-year, statewide capital program for rail.
- The REF had a statutory focus on public benefits, instead of simple capital improvements and capital assets. This focus allowed the Department of Rail and Public Transportation to develop a benefit/cost analytical tool to quantify public benefits and public costs.
- The REF was agnostic with respect to passenger and freight rail projects. This approach allowed the Department of Rail and Public Transportation to address the many (and increasing) mixed-use rail corridors in Virginia, by promoting greater benefits to ***both*** passenger and freight rail networks and services.

In its decade of existence, the REF has enabled the implementation of some of the most important transportation investments in recent Virginia and national history.

The **Heartland Corridor** provides double-stack intermodal freight service between Chicago and the Port of Virginia. As a \$300 million federal-state-private partnership among Norfolk Southern, US Department of Transportation, Virginia, Kentucky, West Virginia and Ohio, the \$31.9 million in REF allocated to the initiative provide the Port of Virginia with time- and price-competitive access to Midwestern import and export markets. The Heartland Corridor is generally regarded as among the three most important freight rail initiatives since World War II, alongside the Alameda Corridor in Los Angeles/Long Beach and the CREATE program in greater Chicago.

The **Lynchburg Amtrak Enhancement** extended daily Amtrak Northeast Corridor service through Manassas and Charlottesville and to Lynchburg. As one of only two state-sponsored Amtrak routes in the country to show an operating profit, the service is an unqualified success and is strongly supported by both Liberty University and the University of Virginia as a means of reducing on-campus and near-campus automobile ownership. The REF investment of \$22 million in the entire Rt. 29 corridor yields public benefits daily and supports a further service extension to Roanoke.

The **National Gateway** provides additional double-stack freight rail service between the Port of Virginia and both Midwestern and Northeastern import and export markets, as well as domestic intermodal markets. As a \$700 million federal-state-private partnership among CSX, US Department of Transportation, Virginia, North Carolina, Maryland, Pennsylvania, and Ohio, the \$36 million in REF allocated funds provides not only greater opportunities for double-stack freight rail service in the I-95 corridor, but also greater Amtrak reliability and fewer heavy truck movements in that same corridor.

The **Norfolk Amtrak Extension** restored intercity passenger rail service to the City of Norfolk for the first time since 1977. The origination of Amtrak Northeast Corridor service from Norfolk has enabled the South Hampton Roads region access to the entire Northeast Corridor, similar to that enjoyed by the Peninsula from Newport News. The success of this \$114 million REF investment is part of the rationale for the ongoing study of higher speed rail service between Hampton Roads, Richmond, and the entire Northeast Corridor.

While the above projects are clearly the most visible examples of REF investments, the program has supported many other projects. The **Commonwealth Railway Median Relocation** addressed important community and safety issues and allowed CSX and Norfolk Southern to compete for cargo at the Virginia International Gateway (formerly APM) Terminal. The Norfolk Southern **Crescent Corridor** ultimately will result in fewer heavy truck movements in the I-81 corridor. The remaining REF grants, while smaller in size, show similar public benefits for both passenger and freight movements.

Guiding Principles

Based on monthly meetings of the Rail Subcommittee of the Commonwealth Transportation Board, this analysis and recommendations are based on four guiding principles:

1. **Transparency and simplicity** should guide any proposed revisions to legislation, policy, or administrative guidelines
2. **Scarcity of funds** is an impending reality, requiring prioritization protocols, stronger completion date commitments, and a need for both minimum and possibly additional matching requirements
3. **Public/private and state/local partnerships** are cornerstones of the REF program, requiring funding and other commitments from all parties
4. **Clear policy goals** should drive both prioritization and administrative efforts

Review of Rail Enhancement Fund Statute

Section 33.2-1601 of the Code of Virginia establishes the Rail Enhancement Fund and the conditions for the use of those funds (see Appendix A: Code of Virginia).

As noted in the Background section, the Rail Enhancement Fund has contributed significantly to numerous freight and passenger rail initiatives, including several nationally recognized freight and passenger rail projects and programs. Very few state-level rail programs have successfully funded and combined passenger and freight benefits and improvements. In addition, the enabling statute has withstood the highest levels of constitutional and legal scrutiny (see Appendix B, Virginia Supreme Court). Given this level of success and scrutiny, *any* proposed statutory changes should be limited in scope and character and address a significant policy or practical priority.

The Department of Rail and Public Transportation considered seven statutory issues in light of the current REF policies as part of this study. Based on this review and the desire to limit statutory changes to significant policy or practical issues, the Department only recommends one statutory change for consideration by the Commonwealth Transportation Board. A summary of each of the issues considered, along with recommendations for how to address them, is provided below.

- 1. Multimodal Transportation System.** *Question: Should the definition of a modern, multimodal system of transportation be incorporated into the Code of Virginia?* The Code of Virginia states: “The General Assembly declares it to be in the public interest that railway preservation and development of railway transportation facilities are an important element of a balanced transportation system of the Commonwealth....” Given the flexibility of the statute, the long history of successful REF projects, and the Virginia Supreme Court review and support of the statute, ***no statutory changes are recommended. However, the prioritization process should recognize projects that provide both passenger and freight benefits, and projects that link to local transit systems for passengers, and to domestic and international supply chains for freight.***
- 2. Project Benefits.** *Question: Should the Code of Virginia be updated to include a statutory definition of project benefits?* One of the reasons for this study is the advances that have been made in benefit-cost analysis or BCA (particularly on the quantification and standardization of recognized benefits) since the REF was created in 2005. However, the current statute has been able to accommodate those advances and changes, and a statutory definition of “public benefit” could limit the current and legally defensible ability of the statute to accommodate future beneficial advances in BCA methodology and new technologies in rail. ***No statutory changes are recommended. However, the BCA administration and BCA methodologies and policies should be periodically updated to reflect best practices.***
- 3. Project Costs.** *Question: For the purpose of comparing public benefits to project costs, should the Rail Enhancement Fund definition of “project costs” be revised to include TOTAL project costs?* The Code of Virginia currently defines the project cost as the amount of the REF Grant: “Projects undertaken pursuant to this section shall be limited to those the Board has determined will result in public benefits to a region of the Commonwealth or the Commonwealth as a whole that are equal to or greater than the investment of funds under this section.”

A TOTAL project cost approach would be consistent with best practices and the approach used by USDOT in evaluating federal TIGER grant applications. However, comparing project benefits to the amount of REF funding would encourage more and better public-private partnerships and state-local partnerships. ***No statutory changes are recommended for the***

definition of project costs. However, the pending scarcity of funds will require a project prioritization process, and TOTAL project costs should be considered in the prioritization process. This two-tiered approach to benefit-cost analysis is similar to approach taken in HB 2 (Section 4.4 of the HB 2 Policy Guide).

- 4. Benefits of Economic Growth.** Question: Should the Code of Virginia be updated to include a revised definition of economic growth? The Code of Virginia states that the General Assembly: “declares it to be in the public interest that the retention, maintenance, improvement, and development of freight and passenger railways are essential to the Commonwealth’s continued economic growth, vitality, and competitiveness in national and world markets.” The current Rail Enhancement Fund policies address economic development by encouraging dual rail access. **No statutory changes are recommended. However, the prioritization process should recognize the importance of projects that retain or increase employment and that encourage capital investment. While BCA best practices do not include economic impacts, the BCA methodologies should be updated to better reflect the “wider economic benefits” of rail investments.**
- 5. Minimum 30% Matching Requirement.** Question: Should the Code of Virginia 30% matching requirement be revised? The Code of Virginia states that REF projects “shall include a minimum of 30 percent cash or in-kind matching contribution from a private source, which may include a railroad, a regional authority, a local government source, or a combination of such sources.” Requiring “skin in the game” for both public and private partners has been a cornerstone of the REF program, and with the impending scarcity of REF funds, match ratios greater than 30% could become an important discriminator. **No statutory changes are recommended. However, the pending scarcity of funds will require a project prioritization process, and the extent of local or private matching funds in excess of the minimum 30% should be considered in the prioritization process.**
- 6. Source of 30% Matching Requirement.** Question: Should the Code of Virginia be revised to clarify the use of pass-through federal or state funds to qualify as 30% match? The Code of Virginia states that REF projects “shall include a minimum of 30 percent cash or in-kind matching contribution from a private source, which may include a railroad, a regional authority, a local government source, or a combination of such sources.” The overlapping and complex flow of transit and rail funds that at some point flow through a local or regional entity (e.g., HRTAC, HRT, NVTA, NVTC, PRTC, WMATA, VRE, or a city or county) could be stymied by a statutory definition of local or regional funds solely for purposes of the REF. **No statutory changes are recommended. However, there may be a need for a policy or procedure to consider fact-specific determinations under the Code of Virginia.**
- 7. State of Good Repair.** Question: Should the Code of Virginia be revised to allow state of good repair investments in Class 1 railroad facilities, similar to highway and bridge maintenance and replacement? While the Code of Virginia currently allows public funding of “improvements” to their rail infrastructure, Class 1 railroads are required under federal law to maintain tracks and facilities to certain standards, and it would be difficult for a standalone Class 1 maintenance project or state of good repair project to meet the public benefit requirement of the Code of Virginia. However, many REF projects have a significant maintenance, operation, or state of good repair benefit. These benefits should be considered as part of any prioritization or BCA process.

The situation for Shortline Railroads is quite different though, and the Shortline Railway Preservation and Development Fund (also known as the RPF) is designed to support “last mile” connections to captive industries and to protect surrounding communities from the

risks of poorly maintained rail infrastructure. The Commonwealth Transportation Board should have the flexibility to transfer funds from the REF to the RPF, without triggering the BCA and other requirements associated with the Rail Enhancement Fund evaluation process.

A statutory change is recommended to allow the transfer of Rail Enhancement Funds (REF) to the Railway Preservation and Development Fund (RPF), without triggering the BCA or other requirements associated with the Rail Enhancement Fund. In addition, the BCA methodologies for the Rail Enhancement Fund should be updated to include consideration of state of good repair benefits as part of any Rail Enhancement Fund prioritization process.

Policy Issues and Goals

Guiding Principle 4 (above) states “*Clear policy goals* should drive both prioritization and administrative efforts.” The Department of Rail and Public Transportation has reviewed the original REF policy goals established in 2005 and revised in 2013 by the Commonwealth Transportation Board (Attachment C) and identified nine policy goals for consideration and possible inclusion in a project prioritization framework.

- 1. Project Timelines.** The original policy goals included an initial emphasis on “quick turnaround projects” and “achievable schedules.” After a decade of experience, it is clear that publicly-funded rail projects, particularly in congested freight corridors, have extended timelines for both project development and project construction. These schedule impacts can be managed in two ways: by performing additional, up-front preliminary or conceptual engineering; and also by including a prioritization criterion for firm project completion dates. The need for additional engineering is addressed in more detail below. **A policy change is recommended to significantly value project readiness and firm construction completion dates in the prioritization process.**
- 2. Leverage Other Funds.** The original policy goals encourage projects where the match amount is greater than the minimum 30% and where other funding sources, both public and private, are used to support the overall project. The recently-adopted HB 2 prioritization process has a similar policy goal. An emerging issue is the maintenance standards and costs of rail facilities funded with Rail Enhancement funds. **A policy update is recommended to create a prioritization process for the REF that generally conforms to the HB 2 prioritization policy encouraging the use of other (non-REF) funds, to value matching funds greater than 30%, and to explicitly address long term maintenance standards and costs for rail facilities funded with Rail Enhancement funds.**
- 3. Protect the Public Interest through Public Ownership (Clawback).** The original policy goals seek to protect the public interest by maintaining DRPT ownership interest in the rail assets, including a “clawback” provision if certain performance standards (typically carloads, passengers, or intermodal lifts) are not met. This DRPT ownership approach was imported from the original RPF for Shortline Railroads, at a time when shortline ownership and solvency issues were paramount.

The performance metrics to protect public ownership in private rail facilities typically involve proprietary information for freight, and market-driven trends for passenger and intermodal services. Actually asserting a public ownership right under those metrics would raise very difficult policy and legal issues, and probably would not yield any tangible public benefits—what would the Commonwealth do with a minority interest in an intermodal facility or a series of crossovers designed to serve both passenger and freight needs?

A significant policy change is recommended to emphasize the Benefit-Cost determination of the project and eliminate the administrative practice of writing agreements to monitor a project benefits based on just one metric (carloads or passengers). A contingent interest would be retained only to protect the value of the Commonwealth's investment in the event the intended uses of the improvements under the agreement are not met.

Under this new paradigm, the CTB would recommend funding based on a more transparent Benefit-Cost Analysis and prioritize Rail Enhancement Fund grant requests on multiple criteria, including past Rail Enhancement Fund grant performance. Such a policy change should be accompanied by a broader and more transparent evaluation of the public benefits of the project in question. Therefore, the Department recommends a task force to evaluate options to monitor the success of future projects. The intent would be to shift focus away from performance measures with a "claw-back" provision on a specific project, and instead report measures focused on growth throughout the entire network.

4. **Appropriate Planning Document.** The original policy goals require a project to address the needs identified in the appropriate state, regional or local plan. Consideration was given to broadening this criterion to include private rail plans. While many potential Rail Enhancement Fund projects may be too small for inclusion in a regional or statewide plan, or may be directly related to a confidential economic development project, allocating public funds based on public plans and policies is the only way to assure transparency and accountability in the allocation of scarce Rail Enhancement Funds. **A policy update is recommended to generally conform to the HB 2 prioritization policy regarding a project's inclusion in the appropriate state, local or regional plan.**
5. **Economic Development, Multimodal Projects and Dual Freight Rail Access.** The original policy goals promote economic development through dual freight rail access and mixed-use passenger and freight rail corridors. This is a very limited definition of economic development, and pre-existed the federal emphasis on high speed passenger rail in the Southeast. The dual freight rail access provision was intended to guide the significant investments in the Commonwealth Railway shortline service to the new APM marine terminal in Portsmouth (currently Virginia International Gateway). While those goals were accomplished for the Commonwealth Railway relocation and on-dock rail service to APM, the larger issue of dual rail access is a very sensitive issue at the state and national levels. However, given the high speed rail studies for both Hampton Roads and the I-95 rail corridors, consideration should be given to high speed and intercity passenger rail projects, especially where they involve both Virginia Class 1 railroads. ***A policy update is recommended to highlight the importance of economic development, employment growth and retention, and capital investment attributable to rail projects. In addition, the policy should refine references to joint, dual or competitive rail access, and to specifically include high speed/intercity rail in the definition of a joint-use, mixed or multimodal rail corridor.***
6. **Planning/Preliminary Engineering.** The original policy goals require that at least 90% of the Rail Enhancement funds be spent on capital improvements. As noted above in the policy regarding project timelines, one way to manage or mitigate the extended Rail Enhancement Fund timelines for both project development and project construction is to commit additional resources to up front planning and conceptual/preliminary engineering, and to allow DRPT to fund planning and/or preliminary engineering prior to making a full funding commitment to a project. Given the pending scarcity of Rail Enhancement funds, as well as a stronger emphasis on project completion deadlines, more and better planning and early design efforts will benefit both the Commonwealth and its private and local partners in the long term

management of the REF. *A significant policy update is recommended to eliminate the requirement that 90% of the Rail Enhancement funds be spent on capital improvements. This will allow the Commonwealth Transportation Board and the Department of Rail and Public Transportation to determine the appropriate level of project planning, conceptual/preliminary engineering, and project readiness.*

7. **State of Good Repair.** The clear emphasis of the 2014 and 2015 General Assemblies was the state of good repair for road, bridge and public transportation assets. The Class 1 Railroads are generally required under federal law and regulation to maintain tracks and related facilities to a certain minimal standard. The REF should not supplant that requirement. However, an individual construction project may include state of good repair benefits, and these benefits *should* be a part of a public benefit evaluation process. Moreover, there may be very unique circumstances where a single, state of good repair project is essential (e.g. a structurally deficient rail bridge or access to an isolated employment, consumption or production site). *A policy update is recommended to properly value maintenance or state of good repair project benefits and to identify any guiding or controlling federal or state maintenance standards, and to apportion future maintenance costs.*
8. **Rail Operational Costs.** Stakeholders and legislators have identified a desire to use the REF to subsidize passenger and freight rail operations. While there are clearly unmet operational needs for both passenger and freight purposes, such a change would conflict with the statutory and policy goals of the Rail Enhancement Fund. *No policy changes regarding passenger or freight rail operations are recommended.*
9. **Unique Projects.** Not every project will fit the mold envisioned by the Rail Enhancement Fund benefit/cost analysis or the prioritization process outlined below. Some might be too large, over too long of period of time, or even address intangibles such as industry or community reliance on rail service or a multistate project. Fortunately, the federal TIGER grant process provides a well-established framework for evaluating every type of transportation project, including benefit/cost analysis, economic impacts, and community impacts. *A policy addition is recommended to allow project sponsors to follow federal TIGER grant guidelines for unique, large or multistate projects that do not easily fit into the REF prioritization or BCA processes, provided they have received prior approval from the Department of Rail and Public Transportation. In practice, TIGER grant guidelines are significantly more complex than REF grant guidelines.*

Project Prioritization

Benefit-cost analysis (BCA) is a stand-alone, statutory requirement that has served the Commonwealth well. A revised and more transparent BCA process should remain as a stand-alone, pass-fail requirement for future Rail Enhancement Fund (REF) investments.

Given the growing rail needs and the likely reduction in funds available to the REF, a prioritization process is needed to allocate scarce REF funds to those projects that meet the pass-fail requirement of BCA.

Given the goal of greater transparency in the REF funding process, the number of likely grant requests, and the unique challenges associated with the purchase of public benefits from private railroads, a very simple and graphic guide to project prioritization is recommended, based on the

adopted policies of the Commonwealth Transportation Board. This could be accomplished on a simple form, with a pass-fail evaluation for each of the following nine policies:

- BCA.** Does the project pass Rail Enhancement Fund BCA? Has the project sponsor completed a TOTAL project cost BCA?
- Project Readiness.** Does the project include firm completion dates? Has there been REF funding for a study or preliminary engineering?
- Leverage Other Funds.** Does the REF investment synergize or support other public or private funding sources?
- Past Performance.** Has the project sponsor performed well on previous REF and DRPT projects?
- Planning Process.** Is the project included in an appropriate local, regional, Virginia or federal plan?
- Economic Development.** Does the project support employment retention or growth? Does the project support capital investment?
- Multimodal and Mixed-Use Corridors.** Does the project link to local transit systems for passengers or to domestic or international supply chains for freight? Does the project provide both passenger and freight benefits?
- State of Good Repair.** Does the project contribute to a state of good repair for critical rail access facilities or for critical safety protections?
- Matching Funds.** Does the project include a private, local or regional match in excess of 30%?

Evaluating REF grant requests in light of these criteria should not be a mechanical or formulaic determination, but rather viewed as a transparent window into a very complex and easily misunderstood grant process. Use of the above criteria will result in better grant proposals, improve project oversight and evaluation by the Commonwealth Transportation Board, and, most importantly, allow citizens, legislators, stakeholders and investors to understand how and why a particular public investment in a private rail facility is being made.

APPENDIX A

§ 33.2-1601. Rail Enhancement Fund

A. The General Assembly declares it to be in the public interest that railway preservation and development of railway transportation facilities are an important element of a balanced transportation system of the Commonwealth for freight and passengers and further declares it to be in the public interest that the retention, maintenance, improvement, and development of freight and passenger railways are essential to the Commonwealth's continued economic growth, vitality, and competitiveness in national and world markets.

B. There is hereby created in the state treasury a special nonreverting fund to be known as the Rail Enhancement Fund, referred to in this section as "the Fund," which shall be considered a special fund within the Transportation Trust Fund. The Fund shall be established on the books of the Comptroller and shall consist of dedications pursuant to § 58.1-1741 and such funds from other sources as may be set forth in the appropriation act and shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely as provided in this section. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Director of the Department of Rail and Public Transportation or the Director's designee.

C. The Director of the Department of Rail and Public Transportation shall administer and expend or commit, subject to the approval of the Board, the Fund for acquiring, leasing, or improving railways or railroad equipment, rolling stock, rights-of-way, or facilities, or assisting other appropriate entities to acquire, lease, or improve railways or railroad equipment, rolling stock, rights-of-way, or facilities, for freight or passenger rail transportation purposes whenever the Board has determined that such acquisition, lease, or improvement is for the common good of a region of the Commonwealth or the Commonwealth as a whole. Funds provided in this section may also be used as matching funds for federal grants to support passenger or freight rail projects.

D. Projects undertaken pursuant to this section shall be limited to those the Board has determined will result in public benefits to a region of the Commonwealth or the Commonwealth as a whole that are equal to or greater than the investment of funds under this section. Such public benefits shall include the impact of the project on traffic congestion and environmental quality and, whenever possible, give due consideration to passenger rail capacity on corridors identified by the Board that have existing or proposed passenger rail service. Such projects shall include a minimum of 30 percent cash or in-kind matching contribution from a private source, which may include a railroad, a regional authority, a local government source, or a combination of such sources.

2004, c. 621, § 33.1-221.1:1.1; 2005, c. 323; 2009, c. 73; 2011, cc. 86, 405, 594, 639, 681; 2014, c. 805.

APPENDIX B

PRESENT: Kinser, C.J., Lemons, Millette, McClanahan, and Powell, JJ., and Russell and Lacy, S.JJ.

MONTGOMERY COUNTY, ET AL.

v. Record No. 100350

OPINION BY
JUSTICE ELIZABETH A. McCLANAHAN
November 4, 2011

VIRGINIA DEPARTMENT OF RAIL AND
PUBLIC TRANSPORTATION, ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Melvin R. Hughes, Jr., Judge

The Virginia Department of Rail and Public Transportation (DRPT) entered into an agreement, pursuant to the Rail Enhancement Fund created by Code § 33.1-221.1:1.1, to grant funds to Norfolk Southern Railway Company (Norfolk Southern) for the development of an "intermodal" terminal in Montgomery County. The terminal would serve as a transition point for shifting the transportation of freight by road to shipment by rail, and vice versa.

Opposing the agreement between DRPT and Norfolk Southern, appellants, Montgomery County and the Board of Supervisors for Montgomery County (collectively, the County), instituted the instant action against DRPT, DRPT's Director, and the Commonwealth Transportation Board (CTB). Norfolk Southern subsequently intervened as a defendant. In its complaint, the County claimed that Code § 33.1-221.1:1.1 and the agreement were unconstitutional under Article X, Section 10 of the Constitution of Virginia, and sought to enjoin their administration.

Specifically, the County asserted that the statute and the agreement violated the prohibitions set forth in two of the clauses in Article X, Section 10, commonly referred to as the "internal improvements clause" and the "credit clause." Under the internal improvements clause, the Commonwealth is prohibited from certain involvement in "any work of internal improvement" with the express exception of public roads and public parks. Va. Const. art. X, § 10. Under the credit clause, the Commonwealth is prohibited from lending its credit to any person, association or corporation. Id.

The parties submitted documentary evidence to the circuit court, and based upon those submissions filed cross-motions for summary judgment on the County's constitutional challenge. Ruling in favor of the three government defendants and Norfolk Southern (the appellees in this appeal), the circuit court concluded in its letter opinion that the agreement between DRPT and Norfolk Southern had been "properly effectuated pursuant to constitutionally valid legislation of the Virginia General Assembly animating public purposes, [and] governmental ones, aimed at providing for the common welfare of its citizenry to improve efficiencies of public roads."

On appeal, the County challenges the constitutionality of Code § 33.1-221.1:1.1, as applied, in authorizing funding to Norfolk Southern for the facility's development under the terms

of the agreement. The issue we decide is whether this application of the statute violates either the internal improvements clause or the credit clause of Article X, Section 10 of the Constitution of Virginia.

Concluding that Code § 33.1-221.1:1.1, as applied in this case, does not violate the subject provisions of Article X, Section 10, we will affirm the judgment of the circuit court awarding summary judgment in favor of appellees.

I. BACKGROUND

A. Legislative Intent for Shifting Highway Truck Traffic to Rail

More than a decade ago, the General Assembly expressed its concern over the growing congestion of heavy truck traffic on the highways in Virginia. In House Joint Resolution No. 704 from the 1999 legislative session, the General Assembly indicated that, through utilization of the Virginia Port Authority's Inland Port at Front Royal, the Port Authority collected truck-hauled containerized freight "in sufficient quantities to transport it in unit trains directly to the Ports of Hampton Roads." H. J. Res. 704, Va. Gen. Assem. (Reg. Sess. 1999). This mechanism, according to the General Assembly, resulted in "not only holding down costs paid by the shipper, but also eliminating a substantial number of trucks from the overcrowded long-haul highways of eastern Virginia." Id.

Pointing to this example, the General Assembly declared, "a network of intermodal transfer facilities might be established that could prove useful in reducing heavy truck traffic on other long-haul highways in the Commonwealth, particularly Interstate Route 81."¹ Id. In addition, some of the intermodal facilities "might employ a variety of 'piggy-back' container, trailer, or semitrailer configurations." Id.

Accordingly, the General Assembly tasked Virginia's Secretary of Transportation, in conjunction with the Virginia Department of Transportation and DRPT, "to study the desirability and feasibility of establishing additional intermodal transfer facilities"; and to submit findings and recommendations from the study to the Governor and the 2001 Session of the General Assembly. Id.

The following year, in Senate Joint Resolution No. 55 from the 2000 legislative session, the General Assembly again addressed the traffic problem on Virginia's interstates. S. J. Res. 55, Va. Gen. Assem. (Reg. Sess. 2000). The General Assembly declared that "many of the Commonwealth's interstate highways are experiencing an erosion of safety as a result of

¹ "Intermodal" transportation can be defined as "the shipment of cargo and the movement of people involving more than one mode of transportation during a single, seamless journey." W. Brad Jones, C. Richard Cassady & Royce O. Bowden, Jr., Developing a Standard Definition of Intermodal Transportation, 27 Transp. L.J. 345, 349 (2000).

staggering increases in traffic." Id. An "acute example" of this problem, the General Assembly explained, was Interstate 81, which was designed "to carry no more than 15 percent of its total traffic volume as truck traffic, but whose current traffic is made up of as much as 40 percent trucks." Id.

The General Assembly further declared that widening Interstate 81 alone was estimated to cost in excess of three billion dollars and take at least ten years to complete, and that similar improvements to Virginia's other interstates would have comparable costs and completion times. In an effort to provide an alternative measure that would "alleviate the excessive volumes of traffic" on Interstate 81 and Virginia's other interstate highways, the General Assembly determined that it may be "both desirable and feasible" to "shift traffic on our highways to trains on our railroads." Id.

The General Assembly thus requested that the Secretary of Transportation expand her study regarding the establishment of additional intermodal transfer facilities, pursuant to 1999 House Joint Resolution No. 704, "to include the potential for shifting Virginia's highway traffic to railroads." Id.

In 2001, the Secretary of Transportation issued a report to the Governor and the General Assembly presenting the results of the study commissioned by the General Assembly pursuant to the two resolutions described above. See Commonwealth of Va., Sec'y

of Transp., The Potential for Shifting Virginia's Highway Traffic to Railroads, S. Doc. No. 30 (2001). The Secretary explained in the report that a variety of data was collected on truck movements, Interstate 81 improvement plans, and railroad plans. Analyses were then conducted to determine "the reasonableness of both highway and railroad plans and cost estimates, the amount of highway traffic which might be diverted to rail, and the extent to which those diversions might impact I-81." Id. at 5. Based on the study, the Secretary ultimately recommended in her report, among other things, that the Commonwealth "fully consider proposals advanced to divert highway traffic to rail transportation" in light of "the potential for significant public benefits." Id. at 36.

In 2005, through House Joint Resolution No. 789, the General Assembly declared its support for such a proposal in the form of a major multi-state initiative between Virginia, West Virginia and Ohio, called the Heartland Corridor. H. J. Res. 789, Va. Gen. Assem. (Reg. Sess. 2005). As described in the resolution: "the Heartland Corridor proposes the development of a seamless, efficient rail intermodal route from an Atlantic Ocean gateway, opening up a significant portion of western Virginia and West Virginia currently excluded from international intermodal markets, . . . and connecting to a center of existing domestic and international distribution in the Midwest, thereby

strengthening the economic vitality and improving the efficiency and capacity of Virginia's and the nation's transportation network." Id.

According to the General Assembly, this newly designated railway corridor would allow intermodal containerized traffic to "move directly across the heartland" from the ports in Hampton Roads to the Midwest. Id. Further, these containers could be double-stacked on trains - a key feature of the corridor - as a result of the construction of new clearance levels along the corridor. Id.

The Roanoke Valley would be among the locations gaining direct connection, via rail, to both the Virginia ports and the Midwest, the legislature further declared. This would be accomplished by the provision of an "intermodal ramp" in the Roanoke Valley region. Id. As explained in the resolution, rail intermodal transportation requires such "ramp facilities for the seamless transfer of rail-to-truck and the reverse"; and such facilities "must be well situated relative to other infrastructure, most critically, roadway connectors." Id.

Upon completion, the General Assembly also declared, the Heartland Corridor would divert freight away from highways and onto trains in the double-stacked intermodal containers. Id. In doing so, the corridor would not only benefit the Commonwealth by way of economic development, it would also

"benefit the traveling public and address congestion by growing freight opportunities via rail instead of road (alleviating the magnitude of higher highway maintenance costs)." Id. In short, the corridor, according to the General Assembly, "will play an important role in diverting highway traffic" to rail. Id.

The General Assembly concluded this resolution by declaring support for the Heartland Corridor project upon the recognition that it would "require a public-private partnership to bring [the project] to fruition." Id. The General Assembly further indicated that this partnership should include, among others, the Commonwealth and Norfolk Southern. Id.

B. Rail Enhancement Fund Created
by Code § 33.1-221.1:1.1

In the midst of declaring its support for intermodal transportation initiatives that would divert highway traffic to railroads, the General Assembly, in 2004, enacted Code § 33.1-221.1:1.1. See 2004 Acts ch. 621. Under this statute, the Railway Preservation and Development Fund, now called the Rail Enhancement Fund (the "Fund"), was established.² This is the statutory funding scheme that appellants challenge on appeal in the limited context of DRPT's agreement (explained in section C below) to fund a portion of Norfolk Southern's development of an

² See 2005 Acts ch. 323 (changing name of the Fund from "Railway Preservation and Development Fund" to "Rail Enhancement Fund").

intermodal facility in Montgomery County as part of the Heartland Corridor project.

In subsection A of Code § 33.1-221.1:1.1, the General Assembly expressly "declares it to be in the public interest that railway preservation and development of railway transportation facilities are an important element of a balanced transportation system of the Commonwealth for freight and passengers and . . . that the retention, maintenance, improvement and development of freight and passenger railways are essential to the Commonwealth's continued economic growth, vitality, and competitiveness in national and world markets" Code § 33.1-221.1:1.1(A).

As provided in subsection B, the Fund is supported by proceeds from various dedications and appropriations, as determined by the General Assembly from time to time, which are "paid into the state treasury and credited to the Fund." Code § 33.1-221.1:1.1(B).

Pursuant to subsection C, the Fund is administered by the Director of DRPT, subject to the approval of CTB for the expenditures from the Fund. Code § 33.1-221.1:1.1(C).

Permitted expenditures include, inter alia, those for "acquiring, leasing, and/or improving railways or railroad equipment . . . or facilities, or assisting other appropriate entities to acquire, lease, or improve railways or railroad

equipment . . . or facilities, for freight and/or passenger rail transportation purposes whenever the Board shall have determined that such acquisition, lease, and/or improvement is for the common good of a region of the Commonwealth or the Commonwealth as a whole." Id.

Finally, under subsection D, projects undertaken pursuant to this statute are further limited to those that CTB has determined "will result in public benefits to the Commonwealth or to a region [thereof] that are equal to or greater than the investment of funds under [the statute]." Code § 33.1-221.1:1.1(D). Such public benefits must include "the impact of the project on traffic congestion, environmental quality, and whenever possible, give due consideration to passenger rail capacity on corridors . . . that have existing or proposed passenger rail service." Id. In addition, a private source, which may include, among others, a railroad, must provide a minimum of 30 percent cash or in-kind matching contribution toward the cost of the project. Id.

C. Agreement Between DRPT and Norfolk Southern
Pursuant to Code § 33.1-221.1:1.1

In October 2005, after the General Assembly had passed the joint resolution earlier in the year supporting the Heartland Corridor project, Norfolk Southern applied to DRPT for a grant from the Fund under Code § 33.1-221.1:1.1. The grant was to be

used for payment of capital costs incurred for components of the Heartland Corridor project located in Virginia. Norfolk Southern requested \$22,350,000 (and pledged the statutorily required 30% match) for (i) the construction of a "rail/highway intermodal facility" in the Roanoke region, so as to provide western Virginia access to "rail intermodal service" along the corridor; and (ii) the enlargement of four tunnels, so as to provide double-stack container clearance on the railroad company's main line along the Virginia section of the corridor. According to Norfolk Southern, this intermodal facility would "serve both the east-west traffic flows of the Heartland Corridor as well as future north-south flows . . . associated with the I-81 corridor." Norfolk Southern represented to DRPT that without this grant to "close the funding gap" it would not undertake these improvements to the corridor.

In December 2005, CTB, based on a recommendation by DRPT, voted to provide funding pursuant to Code § 33.1-221.1:1.1 for a number of infrastructure projects, including the rail/highway intermodal facility in the Roanoke Valley region. DRPT's recommendation was based on the required statutory criteria that the projects enhance the rail transportation network as well as remove trucks from Virginia's highways. CTB concluded that "these projects will result in public benefits to the Commonwealth as well as various regions of the Commonwealth in

which these projects are located, and serves the public purpose."

In May 2006, following approval of Norfolk Southern's grant application by DRPT and CTB, DRPT and Norfolk Southern entered into an agreement pursuant to Code § 33.1-221.1:1.1 (the "Agreement"). Under the Agreement, DRPT granted \$22,350,000 from the Fund to Norfolk Southern for the proposed Heartland Corridor project. A subsequent amendment in 2009 provided for an additional \$4,410,000 paid by DRPT to Norfolk Southern from the Fund.

Norfolk Southern certified in the Agreement that it owns or will own or control the property on which the project improvements - the "Roanoke region intermodal facility" and the enlarged tunnels on the main line - will be constructed; and that it will protect DRPT's interest in the project.³ The Agreement provided that DRPT "has an interest in ensuring that [these] improvements created by the [p]roject continue to be operated for their intended purpose for the duration of the [p]erformance [p]eriod" (15 years, starting from the project completion date).

If the project does not result in at least 150,000 additional containers a year moving through the Heartland

³ A site in Montgomery County near Interstate 81 was selected for the location of the development of the rail/highway intermodal facility pursuant to the terms of the Agreement.

Corridor after the fifth year following completion of the improvements, the Agreement provided that Norfolk Southern must reimburse DRPT a prorated amount according to a formula specified in the Agreement. In addition, if Norfolk Southern abandons or ceases to operate the improvements within the performance period, DRPT "shall be reimbursed the value of its interest in the portion of the [p]roject abandoned or discontinued." Also, in the event of a sale of one or more of the improvements purchased using funds provided to Norfolk Southern under the Agreement, DRPT shall be "repaid a share of the sale proceeds proportionate to its share of the original purchase price" unless the property continues in operation by another entity consistent with the agreement.

II. ANALYSIS

A. County's Assignments of Error

On appeal, the County does not make a facial challenge to Code § 33.1-221.1:1.1, as it did below. It does not argue "that no set of circumstances exists under which the [statute] would be valid, i.e., that the law is unconstitutional in all of its applications." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008) (citation and internal quotation marks omitted); see Jaynes v. Commonwealth, 276 Va. 443, 453, 666 S.E.2d 303, 308 (2008). Rather, the County confines its challenge under Article X, Section 10 of the

Constitution of Virginia to the constitutionality of the statute's application to the facts of this case. See Volkswagen of Am., Inc. v. Smit, 279 Va. 327, 336, 689 S.E.2d 679, 684 (2010) (addressing "as-applied" constitutional challenges).

The County here argues that the circuit court erred by upholding the constitutionality of Code § 33.1-221.1:1.1 in authorizing DRPT to grant funds to Norfolk Southern for the development of the Montgomery County rail/highway intermodal facility under the terms of the Agreement. According to the County, the Commonwealth was expressly prohibited from entering into such an agreement under the restrictions of both the internal improvements clause and the credit clause contained in Article X, Section 10.

The County asserts the circuit court erred because: (i) under the Agreement, DRPT will be a party to and have an interest in a privately owned and operated railroad terminal in violation of the internal improvements clause; (ii) development of the terminal is not a governmental function excepting it from the internal improvements clause; and (iii) under the Agreement, the Commonwealth will grant its credit to a private railroad company for the development of the terminal in violation of the credit clause.⁴

⁴ Though funding for Norfolk Southern's costs associated with enlarging four tunnels, as part of the Heartland Corridor

B. Standard of Review

The County's constitutional arguments are questions of law that we review de novo. Copeland v. Todd, 282 Va. 183, 193, ___ S.E.2d ___, ___ (2011); Covel v. Town of Vienna, 280 Va. 151, 163, 694 S.E.2d 609, 617 (2010). In conducting this review, we are guided by settled principles of statutory construction. "[W]hen, as here, the constitutionality of a statute is challenged, our determination of legislative intent is guided by the recognition that all actions of the General Assembly are presumed to be constitutional." Copeland, 282 Va. at 193, ___ S.E.2d at ___ (citations and internal quotation marks omitted). There is, indeed, no stronger presumption known to the law. FFW Enters. v. Fairfax County, 280 Va. 583, 590, 701 S.E.2d 795, 799-800 (2010); Reynolds v. Milk Comm'n of Va., 163 Va. 957, 966, 179 S.E. 507, 510 (1935); Whitlock v. Hawkins, 105 Va. 242, 248, 53 S.E. 401, 403 (1906)).

Accordingly, this Court must resolve "any reasonable doubt regarding a statute's constitutionality in favor of its validity." Supinger v. Stakes, 255 Va. 198, 202, 495 S.E.2d

project, was included in the Agreement, no issue regarding that part of the Agreement is before us on appeal. The only issue in this appeal is the constitutionality of Code § 33.1-221.1:1.1's authorization of funding for the Montgomery County rail/highway intermodal facility under the terms of the Agreement. Thus, all discussion in this opinion regarding the constitutionality of the statute's application is to be understood as limited to the context of the Agreement's grant of funds to Norfolk Southern for the development of the intermodal facility.

813, 815 (1998) (citing Blue Cross of Va. v. Commonwealth, 221 Va. 349, 358, 269 S.E.2d 827, 832 (1980); see FFW Enters., 280 Va. at 590, 701 S.E.2d at 800. Further, "[a]ny 'judgment as to the wisdom and propriety of a statute is within the legislative prerogative,' and this Court 'will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution.'" Supinger, 255 Va. at 202, 495 S.E.2d at 815 (quoting Blue Cross of Va., 221 Va. at 358, 269 S.E.2d at 832); see City of Newport News v. Elizabeth City County, 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949)); Shenandoah Lime Co. v. Governor of Va., 115 Va. 865, 867-68, 80 S.E. 753, 753 (1914).

C. Internal Improvements Clause

We turn first to the County's argument that the development of the rail/highway intermodal facility under the terms of the Agreement is not a governmental function excepted from the internal improvements clause, and thus violates this constitutional provision.

The internal improvements clause, set forth in Article X, Section 10 of the Constitution of Virginia,⁵ provides: "nor shall

⁵ Article X, Section 10 of the Constitution of Virginia states in its entirety:

§ 10. Lending of credit, stock subscriptions, and works of internal improvement.

Neither the credit of the Commonwealth nor of any county, city, town, or regional government

the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work."

This prohibition, along with the one set forth in the credit clause, dates back to the 1869 Constitution. See Va. Const. art. X, §§ 12, 15 (1869). It was a response to substantial financial losses the Commonwealth had sustained in previous years from its general investments in entities such as canal, turnpike and railroad companies, engaged in various large scale projects in Virginia, i.e., "works of internal improvement." Almond v. Day, 197 Va. 782, 787, 91 S.E.2d 660, 664 (1956) (Almond I). Faced with those losses, the Constitutional Convention for the 1869 Constitution "resolved

shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.

that the State should no longer lend its support to such undertakings but should leave them to private enterprise," including the construction of public roads. Almond v. Day, 199 Va. 1, 7, 97 S.E.2d 824, 829 (1957) (Almond II).

In the 1902 Constitution, however, the internal improvements clause was revised to expressly "except public roads" from its restrictions on the Commonwealth. Va. Const. art. XIII, § 185 (1902). The public roads exception was then retained when the current version of the Constitution was adopted in 1971.⁶

By removing the prohibition on the Commonwealth from again "becoming interested in public roads," the 1902 Constitution "restore[d] full control of that governmental power to the legislature," Almond v. Gilmer, 188 Va. 822, 837, 51 S.E.2d 272, 277 (1949); and that authority continues under our current Constitution. Indeed, we have made clear that "[t]he construction, maintenance and operation of a highway system is a governmental function. Unless abridged by the Constitution, that inherent power exists in the State by virtue of its

⁶ With the addition of a "public parks" exception to the 1902 Constitution by amendment in 1928, the internal improvements clause in the current version of the Constitution of Virginia is the same as it appeared in the amended 1902 Constitution. See Va. Const. art. XIII, § 185 (1902) (amended as provided in 1928 Acts ch. 205, ratified by election held June 19, 1928).

sovereignty." Id. at 836, 51 S.E.2d at 277. See generally 2 A. E. Dick Howard, Commentaries on the Constitution of Virginia 1126-35 (1974).

Thus, the County's challenge to Code § 33.1-221.1:1.1's authorization of funding for the development of the rail/highway intermodal facility under the Agreement, based on an alleged violation of the internal improvements clause, must be rejected if the development can be reasonably deemed an exercise of the Commonwealth's governmental function of constructing, maintaining and operating its highway system. As such, the development would fall within the public roads exception to the internal improvements clause. See, e.g., Almond II, 199 Va. at 5-10, 97 S.E.2d at 827-31 (holding that statutory authorization to State Highway Commission to provide bus service through or over bridge-tunnel project was a governmental function linked to State highway operations and, therefore, statute was not in violation of internal improvements clause).

The declarations of the General Assembly in the resolutions described above supporting intermodal transportation initiatives, the policy statement to similar effect in Code § 33.1-221.1:1.1, and the statute's authorization for funding facilities like the Montgomery County intermodal facility, all combine to evince the General Assembly's judgment and intent underlying the statute in its provision of funds for such

facilities. The General Assembly has made a policy determination that intermodal facilities such as the one proposed for Montgomery County should be developed and integrated with Virginia's highway system as "roadway connectors" - with the goal of establishing an intermodal transportation system in Virginia that provides for "the seamless transfer of rail-to-truck and the reverse." H. J. Res. 789, Va. Gen. Assem. (Reg. Sess. 2005). Under this system, Virginia's highways and railroads would become inextricably interconnected in the shipment of freight between road and rail, with the intermodal facility serving as the point of transition. The General Assembly's clearest statement of support for such a system was set forth in House Joint Resolution No. 789, in 2005, where it endorsed the multi-state Heartland Corridor initiative; and that resolution was, in fact, passed shortly before Norfolk Southern submitted its application to DRPT for the funding of the Heartland Corridor projects in Virginia, which included the development of the Montgomery County intermodal facility. Furthermore, when the General Assembly declared its support for the Heartland Corridor, it specifically identified the Roanoke Valley region as the location for an intermodal facility.

The General Assembly also made clear that it supports the development of intermodal facilities as a means of relieving Virginia's highways of congestion from excessive truck traffic,

and particularly Interstate 81. Indeed, if the rail/highway intermodal facility in Montgomery County were utilized for the diversion of truck traffic from road to rail on the level intended by the General Assembly, it would mean that, through its support for the development of this facility, the Commonwealth would have effectively purchased a significant amount of additional capacity for traffic on Interstate 81. This diversion of truck traffic from road to rail, according to the General Assembly, would also "alleviat[e] the magnitude of higher highway maintenance costs." H. J. Res. 789, Va. Gen. Assem. (Reg. Sess. 2005). In furtherance of these legislative objectives, Code § 33.1-221.1:1.1, in fact, requires, inter alia, that the projects funded pursuant to the statute must benefit the public by their "impact . . . on traffic congestion." Code § 33.1-221.1:1.1(D).

Pursuant to Code § 33.1-221.1:1.1, these legislative objectives were incorporated into the terms of the Agreement. First, the Agreement provided for the development of a rail/highway intermodal facility in Montgomery County through a DRPT grant funding a substantial portion of Norfolk Southern's capital costs for that development. Second, the Agreement also imposed performance objectives upon Norfolk Southern to operate the facility in such a way as to effectuate a large scale diversion of truck traffic from Interstate 81 to rail under a

specific time frame. If the performance objectives are not met, Norfolk Southern would be required to reimburse DRPT a prorated amount of the funding it received from DRPT according to a formula specified in the Agreement.

Giving Code § 33.1-221.1:1.1 its requisite presumption of constitutionality under our governing standard of review, we thus conclude that the funding for the facility under the Agreement was authorized pursuant to legislation intended to be directly related to the construction, maintenance and operation of Virginia's highways. Therefore, we hold that the statute's application in this case did not violate the internal improvements clause because it comes within the public roads exception.

In so holding, we reject the County's further argument that the development of the Montgomery County intermodal facility cannot be a governmental function where the facility is to be owned and operated by Norfolk Southern.⁷

When Code § 33.1-221.1:1.1 was originally enacted in 2004, it contained language, in what was then subsection E, requiring that the tracks and facilities constructed, and the property and

⁷ Under the Agreement, the Commonwealth retains an interest in the Montgomery County intermodal facility in the form of remedies it may enforce by way of set formulas for prorated repayment in the event (i) Norfolk Southern does not meet its performance goals, (ii) the facility is abandoned, or (iii) the facility is sold and its operation discontinued.

equipment purchased, pursuant to the statute had to be owned by the Commonwealth for the life of the project. See 2004 Acts ch. 621. That language was deleted from the statute the following year. See 2005 Acts ch. 323.

The General Assembly necessarily made the determination that a facility such as the rail/highway intermodal facility in Montgomery County could provide the desired public benefits with the railroad owning and operating the facility when it amended Code § 33.1-221.1:1.1 in 2005 by deleting the requirement that the Commonwealth own the facilities funded under the statute. See 2005 Acts ch. 323. That determination was within the prerogative of the legislature, and is not one that we may disturb, as we do not find it repugnant to the internal improvements clause under our narrow standard of review. "Whether an enactment is wise, and matters of policy, are questions for the legislative branch of government, and not the judicial branch." Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs., 268 Va. 187, 193, 597 S.E.2d 202, 205 (2004); see Danville Warehouse Co. v. Tobacco Growers' Co-op. Ass'n, 143 Va. 741, 761, 129 S.E. 739, 745 (1925) (explaining that the "wisdom, expediency [or] justice" of

a statute are questions to be determined by the legislature, not by the courts (citation and internal quotation marks omitted)).⁸

⁸ We note that this Court has not held in any of its decisions addressing the public roads exception to the internal improvements clause that private ownership of the particular facility at issue was a dispositive factor in deciding whether a violation of this constitutional provision had occurred. In the cases cited by the County in support of its private ownership argument, Gilmer (ferry facilities), Almond II (bus facilities), Harrison v. Day (Harrison I), 200 Va. 750, 107 S.E.2d 585 (1959) (local government produce markets), Harrison v. Day (Harrison II), 200 Va. 764, 107 S.E.2d 594 (1959) (port and harbor facilities), and Harrison v. Day (Harrison III), 202 Va. 967, 121 S.E.2d 615 (1961) (same), all of the facilities at issue were already owned, or were to be owned, by the Commonwealth or a political subdivision thereof. Thus, the issue of private ownership, in the context of the internal improvements clause, was not before this Court for review in any of those cases.

The ratio decidendi of Harrison III is indeed supportive of our holding in this case. There, one of the issues was whether the Virginia State Ports Authority (Authority) was in violation of the internal improvements clause by leasing, pursuant to the Code, the Authority's port and harbor facilities in Hampton Roads to the Norfolk and Western Railway Company (Norfolk Western) for operation as general cargo port facilities. Id. at 968-71, 121 S.E.2d at 616-17. Having already decided in Harrison II that the Authority did not violate the internal improvements clause by acquiring and operating the port and harbor facilities on the basis that those undertakings were an exercise of a governmental function, this Court held in Harrison III that the leasing of the facilities to Norfolk Western also constituted no such violation. Id. at 972-73, 121 S.E.2d at 618-19. In reaching that decision, we reasoned: "That the enterprise is a governmental function and for a public purpose has been affirmed by this [C]ourt. If the public purpose can, in the judgment of the Authority, be better accomplished through [leasing the facilities] than through the operation of the enterprise by the Authority itself, there is no good reason and no constitutional obstacle against the exercise of this power to lease." Id. at 972, 121 S.E.2d at 618-19. "It is not our function," we concluded, "to decide whether it is a wise policy for the Authority to lease this facility rather than to operate

D. Credit Clause

The County's alternative constitutional challenge to Code § 33.1-221.1:1.1's application in this case is the contention that DRPT's grant of funds to Norfolk Southern for the development of the Montgomery County intermodal facility violated the credit clause under Article X, Section 10 of the Constitution of Virginia. The credit clause provides that "[n]either the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation." Va. Const. art. X, § 10.

Given, again, our governing standard of review, we conclude that this alternative challenge must also fail. Simply put, DRPT's grant to Norfolk Southern for the development of the

it itself. Courts have nothing to do with the wisdom of legislation." Id. at 972-73, 121 S.E.2d at 619.

The same can be similarly said of the legislature's determination, expressed through Code § 33.1-221.1:1.1, to provide funding for the development of the Montgomery County intermodal facility while leaving its ownership and operation to Norfolk Southern. We have concluded that DRPT's undertakings to effect the development of the facility were an exercise of the Commonwealth's governmental function, and for the public purpose, of constructing, maintaining and operating its highway system in an efficient and effective manner. Like our view of the leasing of the ports and harbor facilities to Norfolk Western in Harrison III, we see no constitutional obstacle against the Commonwealth in allowing the governmental function and public purpose implicated here to be accomplished with Norfolk Southern owning and operating the intermodal facility pursuant to the terms and restrictions of the Agreement.

intermodal facility was only that, a grant, and not an extension of the Commonwealth's credit to Norfolk Southern. Indeed, it was effectively a purchase by the Commonwealth of additional traffic capacity for Interstate 81.

Analyzing the credit clause in Article X, Section 10, this Court in Almond I quoted with approval the following definition to be applied to the credit clause, which the Idaho Supreme Court used for its construction of a similar phrase " 'lend or pledge the credit' " under the Idaho Constitution:

"In the popular sense, lending or loaning money or credit is at once understood to mean a transaction creating the customary relation of borrower and lender, in which the money is borrowed for a fixed time, and the borrower promises to repay the amount borrowed at a stated time in the future, with interest at a fixed rate. And that is the sense, then, in which the language employed in those sections must be understood, and so understood, no county, for example, shall lend or pledge its credit or faith directly or indirectly, or in any manner which would create the customary relation of borrower and lender."

Almond I, 197 Va. at 790-91, 91 S.E.2d at 667 (quoting Bannock County v. Citizens' Bank and Trust Co., 22 P.2d 674, 680 (Idaho 1933)).

Thus, in the absence of an extension of actual credit by the Commonwealth, the credit clause does not apply. See Reasor v. City of Norfolk, 606 F. Supp. 788, 795-97 (E.D. Va. 1984) (in deciding whether the challenged activities violated the credit

clause, federal district court, relying on Almond I, explained that term "credit" under Article X, Section 10 "refers to the relation of borrower and lender, in which money is borrowed to be repaid at a later date").

Button v. Day, 208 Va. 494, 495-505, 158 S.E.2d 735, 736-42 (1968) is the only decision of this Court holding that a challenged funding scheme was in violation of the credit clause. As the funding scheme at issue here under Code § 33.1-221.1:1.1 does not extend any credit to Norfolk Southern, nor guarantee any default on the part of the railroad, it does not resemble the funding scheme in Button.⁹

Finally, we do not view the Commonwealth's remedial interests in the Montgomery County intermodal facility under the terms of the Agreement as in any way transforming the grant or purchase into an extension of credit.

⁹ We held in Button that the General Assembly's appropriation of funds to a guaranty fund, and the Virginia Industrial Building Authority's guaranty of loans for industrial projects based upon the strength of that fund, violated the credit clause. Id. at 495-505, 158 S.E.2d at 736-42. This statutory funding scheme was constitutionally prohibited because it provided for State funds to be reserved "for the sole purpose of guaranteeing future payment of defaulted loans of private debtors." Id. at 504, 158 S.E.2d at 741. This particular funding scheme was then, in fact, made constitutional three years later under our current Constitution, in Article X, Section 10, by expressly permitting the General Assembly to "establish[] an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and [to] mak[e] appropriations to such authority." Va. Const. art. X, § 10.

III. CONCLUSION

For these reasons, we conclude that Code § 33.1-221.1:1.1, as applied in this case, does not violate either the internal improvements clause or the credit clause of Article X, Section 10 of the Constitution of Virginia. Accordingly, we will affirm the judgment of the circuit court denying summary judgment to the County and awarding summary judgment in favor of appellees, DRPT, the Director of DRPT, CTB, and Norfolk Southern.

Affirmed.

APPENDIX C

Rail Enhancement Fund

Program Overview

Under §33.1-221.1:1.1 of the Code of Virginia (Appendix E), the General Assembly declared it to be in the public interest that the preservation and development of railway transportation facilities are important elements of a balanced transportation system in the Commonwealth. It further declares “it to be in the public interest that the retention, maintenance, improvement and development of the railways are essential to the Commonwealth’s continued economic growth, vitality, and competitiveness in national and world markets. There is hereby created in the state treasury a special non-reverting fund to be known as the Rail Enhancement Fund which shall be considered a special fund within the Transportation Trust Funds, hereafter referred to as ‘the Fund.’”

The Code states that the Director of the Department of Rail and Public Transportation (DRPT) “shall administer and expend or commit, subject to the approval of the Commonwealth Transportation Board, the Fund for acquiring, leasing, and/or improving railways or railroad equipment, rolling stock, rights-of-way or facilities, or assisting other appropriate entities to acquire, lease, or improve railways or railroad equipment, rolling stock, rights-of-way or facilities, for freight and/or passenger rail transportation purposes whenever the Board shall have determined that such acquisition, lease, and/or improvement is for the common good of a region of the Commonwealth or the Commonwealth as a whole.”

The Code further states that “Projects undertaken pursuant to this section shall be limited to those the Commonwealth Transportation Board shall have determined will result in public benefits to the Commonwealth or to a region of the Commonwealth that are equal to or greater than the investment of funds under this section. Such projects shall include a minimum of 30 percent cash or in-kind matching contribution from a private source, which may include a railroad, a regional authority, or a local government source, or a combination of such sources.”

This document describes the policies and procedures applicable to the consideration of requests for expenditures from the Rail Enhancement Fund.

General

Note: For the Fiscal Year 2014 (FY2014) and future years, all Rail Enhancement Fund Grant Applications shall be submitted and processed through the DRPT Online Grant Application (OLGA) system accessible at the following link:

<https://olga.drpt.virginia.gov>

1. The Director of DRPT administers and, subject to CTB approval, expends or commits funds from the Rail Enhancement Fund for the purpose of acquiring, leasing, and/or improving railways or railroad equipment, rolling stock, rights-of-way or facilities for freight and/or passenger rail transportation purposes.

2. Projects undertaken are limited to those determined by the CTB to result in public benefits to the Commonwealth or to a region of the Commonwealth equal to or greater than the public investment.
3. All projects receiving funds from the Rail Enhancement Fund must include a minimum of 30% cash or in-kind matching contribution from a private source, which may include a railroad, a regional authority, a local government source, or a combination of such sources. Funds may also be used as matching funds for federal grants to support passenger or freight rail projects.
4. All Grantees receiving funds from the Rail Enhancement Fund are contractually required to seek out and utilize Small, Women, and Minority (SWAM) owned enterprises in relation to projects funded. A goal of 40% of total eligible grant expenditures is established by execution of the Rail Enhancement Fund Agreement by the parties. Grantee must report such SWAM activity quarterly beginning at the end of the first three month period from the date of Agreement and ending at the close of the last quarter that includes the project completion, final invoice and acceptance by DRPT.

Program Policy Goals

The following Program Policy Goals were adopted by the Commonwealth Transportation Board on 10/20/2005. Goals 1, 2, 3 and 5 are minimum policy criteria for project consideration. Compliance with these minimum criteria must be demonstrated before further consideration will be given to funding a project.

- 1. Projects will provide an additional or accelerated investment in Virginia rail projects, which are determined to have a substantial public benefit equal to or greater than the public investment.**

The Rail Enhancement Fund provides funding for the development and improvement of rail infrastructure in Virginia and also for the acquisition of rolling stock, signal systems and equipment. The Rail Enhancement Fund will be used to fund projects and proposals found to have a public benefit that is equal to or greater than the public investment, and which are not likely to be completed in a timely manner without use of Rail Enhancement Funds.

- 2. Projects will address the needs identified in the applicable state, regional and/or local plans, developed in consultation with public and private partners.**

Projects will generally address the needs identified in the applicable state, regional and/or local plans to the extent such plans exist, including VTrans 2035, The Virginia State Rail Plan and those goals adopted by Governor Warner's Commission on Rail Enhancement for the 21st Century. In addition, DRPT is developing statewide rail plans for rail initiatives in the Commonwealth, which will be referenced upon completion.

- 3. Projects will encourage competition and economic development by promoting, or not precluding, access by more than one rail operator and whenever possible joint access by freight and passenger operators to optimize the Commonwealth's investment.**

Projects should maximize rail usage and promote competition whenever feasible. Projects in corridors that are utilized for both freight and passenger service must demonstrate that both types of service will benefit from the improvement. Where feasible, rail infrastructure-related projects should not be designed to preclude access by more than one operator.

- 4. The use of Rail Enhancement Funds will evolve from a focus on quick turn-around, high impact projects to a multi-year strategic program of projects that leads to an integrated six-year rail (passenger/freight) improvement program.**

The Director of DRPT will develop recommendations for an annual program of projects that will be incorporated into the Commonwealth's Six-Year Improvement Plan. In addition to considering applications, the Director of DRPT may also recommend specific projects for consideration. Individual projects will be viewed in terms of how they benefit the overall rail network in Virginia.

- 5. The Program will limit long term Commonwealth funding liability through the development of achievable project schedules and budgets. Consideration will be given to funding major projects over a period of several years.**

Projects will limit the long term liability of the Rail Enhancement Fund by proposing and adhering to achievable schedules and budgets. Well-defined project budgets and schedules will be developed prior to submission of applications and projects will be completed within a specified time frame. Applications for projects will include detailed cost, schedule and budget information. For construction projects, applications that include preliminary engineering completed to 30% will receive more positive weight and consideration during the review process. Some large projects will require funding over several years. DRPT will identify those projects that, due to their size and complexity, require funding over an extended period. The CTB will give consideration to the duration of funding for multi-year projects. Project progress will be closely monitored to ensure that they continue to move toward completion in accordance with their proposed schedules and budgets.

- 6. Where feasible, projects will optimize public benefits by leveraging funds from sources other than the Rail Enhancement Fund.**

The law creating the Rail Enhancement Fund requires a minimum of a 30 percent cash or in-kind matching contribution from a private source, which may include a railroad, a regional authority, a local government source, or a combination of such sources. Projects are likely to receive more favorable consideration if a higher match ratio is proposed. Projects that are part of a larger package of improvements funded from other sources are encouraged and are likely to receive more favorable consideration. Additional investments above the minimum match requirement broaden the sharing of the risk and improve the chances of project success.

7. Projects will protect the Commonwealth's public interest in private facilities.

The Commonwealth will ensure that any improvements made with public funds remain available for the proposed public use for the useful life of the project. Contractual agreements will be written to protect the Commonwealth's public interest in the private facilities and to require compensation for the residual value of the investment if the public use ceases within the period of useful life.

8. Projects will contribute to the effectiveness of the entire transportation system.

Projects will promote congestion relief, encourage economic development, enhance the competitiveness of Virginia ports, airports, and multi-modal facilities, and promote safety, health and environmental benefits, and improve mobility or any combination of these objectives.

9. At least 90 percent of program funds will be spent on capital improvements.

At least 90% of the Rail Enhancement Fund in any fiscal year will be expended on acquiring, leasing, and/or improving railways or railroad equipment, signals and communication improvements, rolling stock, rights-of-way or facilities, including design and construction engineering. Up to 10% of the Fund in any fiscal year may be spent on planning and environmental evaluation leading to capital project improvements.