

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

PATRICK R. GRAY,)

and)

JAMES W. NAGLE,)

Plaintiffs,)

v .)

Civil Action No.: _____

VIRGINIA SECRETARY OF)
TRANSPORTATION,)

Serve: Robert F. McDonnell)
Attorney General of Virginia)
900 East Main Street)
Richmond, VA 23219)

COMMONWEALTH TRANSPORTATION)
BOARD,)

Serve: Robert F. McDonnell)
Attorney General of Virginia)
900 East Main Street)
Richmond, VA 23219)

VIRGINIA COMMISSIONER OF)
TRANSPORTATION,)

Serve: Robert F. McDonnell)
Attorney General of Virginia)
900 East Main Street)
Richmond, VA 23219)

VIRGINIA DEPARTMENT OF)
TRANSPORTATION,)

Serve: Robert F. McDonnell)
Attorney General of Virginia)
900 East Main Street)
Richmond, VA 23219)

and)

THE METROPOLITAN WASHINGTON)
AIRPORTS AUTHORITY,)
))
Serve: Edward S. Faggen, Esquire)
Vice President and General Counsel)
Metropolitan Washington Airports)
Authority)
1 Aviation Circle)
Washington, DC 20001)
))
Defendants.)

COMPLAINT

Plaintiffs state the following for their Complaint:

Introduction

1. This is a suit seeking a declaratory judgment that any agreement by an officer, agent or agency of the Commonwealth to transfer the Dulles Toll Road, or any asset or responsibility related to the Dulles Toll Road to the Metropolitan Washington Airports Authority (“MWAA”), an agency established by an interstate compact between the Commonwealth of Virginia and the District of Columbia and subsequently approved by the United States Congress, is not valid and effective unless and until it has been approved by the Virginia General Assembly and that the contracting away of the power to tax is invalid. The Plaintiffs also seek to enjoin any transfer of the Dulles Toll Road or related assets or responsibilities unless and until such transfer is approved and authorized by the Virginia General Assembly.

Jurisdiction

2. This Court has jurisdiction over the subject matter of the suit pursuant to Va. Code § 17.1-513.

Venue

3. Venue is proper in this Court pursuant to Va. Code § 8.01-261(2) because the principal Defendants, the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation, have their official offices within the City of Richmond.

Parties

4. Plaintiff Patrick R. Gray is a resident of the Braddock Magisterial District of Fairfax County, Virginia, and a frequent user of the Dulles Toll Road.

5. Plaintiff James W. Nagle is a resident of the Hunter Mill Magisterial District of Fairfax County, Virginia, and a frequent user of the Dulles Toll Road.

6. The Virginia Secretary of Transportation is an officer of the Commonwealth whose position is established by law, Va. Code § 2.2-228, and whose powers are conferred by Va. Code § 2.2-200 and by delegation of the Governor of Virginia pursuant to Va. Code § 2.2-104. The incumbent Virginia Secretary of Transportation, Pierce R. Homer, executed a Memorandum of Understanding between the Commonwealth of Virginia and the Metropolitan Washington Airports Authority concerning the Dulles Corridor Metrorail Project and Dulles Toll Road (“MOU”), dated March 24, 2005. A copy of the MOU is attached hereto as Exhibit 1.

7. The Commonwealth Transportation Board is a collegial body established by the Virginia General Assembly. Va. Code § 33.1-1. Its powers and duties are set forth in the Code of Virginia, particularly Va. Code §§ 33.1-12, 33.1-25, 33.1-269 and 33.1-292 for purposes of this action.

8. The Virginia Commissioner of Transportation is an officer of the Commonwealth whose position is established by law, Va. Code §§ 33.1-1, 33.1-3, and whose powers are set forth

in the Code of Virginia, particularly Va. Code §§ 2.2-603, 33.1-13, 33.1-25 and 33.1-37 for purposes of this action.

9. The Virginia Department of Transportation (“VDOT”) is an agency of the Commonwealth established by the Virginia General Assembly. Va. Code §§ 33.1-1, 33.1-3 and 33.1-12. On December 29, 2006, VDOT entered into agreements with MWAA to implement the transfer of the Dulles Toll Road.

10. MWAA is a governmental entity established by an interstate compact, which was approved by the United States Congress in 1986. Pub. L. 99-500, Title VI, 100 Stat. 1783-379, as reenacted in Pub. L. 99-591, 100 Stat. 3341-382, as amended by Pub. L. 102-240, Title VII, 105 Stat. 2202, and Pub. L. 104-264, Title IX, 110 Stat. 3276, codified at 49 U.S.C. § 49101 *et seq.* MWAA exercises powers and jurisdiction conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia. 49 U.S.C. § 49106(a)(1). The Virginia General Assembly and the City Council of the District of Columbia enacted similar legislation for the purpose of establishing MWAA. Va. Code § 5.1-152 *et seq.*; D.C. Code § 9-901 *et seq.* Congressional legislation approving the agreement between the Commonwealth and the District of Columbia that established MWAA provided that MWAA would be independent of the federal government, the District of Columbia, the Commonwealth and their political subdivisions. 49 U.S.C. § 49106(a)(2); D.C. Code § 9-902; Va. Code § 5.1-153. MWAA’s function is restricted by statute to the operation and improvement of the Metropolitan Washington Airports, namely, the Reagan National Airport and Washington Dulles International Airport (the latter airport hereinafter referred to as “Dulles Airport”). 49 U.S.C. § 49106(a)(3). On behalf of MWAA, James E. Bennett, its President and Chief Executive

Officer, executed the MOU. MWAA is joined in its capacity as a signatory to the MOU and to any future agreement involving a transfer of the Dulles Toll Road by the Commonwealth.

Standing

11. The Plaintiffs intend to use the Dulles Toll Road for the foreseeable future.

12. As users of the Dulles Toll Road, the Plaintiffs will be aggrieved by a transfer of that facility from the Commonwealth to MWAA, a governmental entity beyond the control of the Commonwealth, without review and approval of the transfer by the Virginia General Assembly. Upon the proposed transfer, the Plaintiffs will continue to pay tolls for the use of the Dulles Toll Road. MWAA proposes to increase Dulles Toll Road tolls without review or control by the Commonwealth. The predominant portion of those tolls will be diverted to pay the Commonwealth's share of the cost of constructing the Dulles Corridor Metrorail Project.

13. Unlike the present situation under which the Commonwealth exercises direct control over the Dulles Toll Road through the Commonwealth Transportation Board and the Commissioner of Transportation, the Commonwealth will no longer control the amount of user charges imposed on the Plaintiffs and other users for access to the Dulles Toll Road once that facility and the toll concession related to it are transferred to MWAA. Under the proposal submitted to VDOT by MWAA and a December 29, 2006, Agreement between the Commonwealth and MWAA, the decision of whether to approve any future increases in Dulles Toll Road user charges will be made exclusively by MWAA.

14. MWAA places a higher priority on constructing the Dulles Corridor Metrorail Project than on improving, maintaining and operating the Dulles Toll Road. In its proposal to acquire the Dulles Toll Road, MWAA has pledged \$137 million for construction of Phase II of the Dulles Corridor Metrorail Project in addition to the planned expenditure of \$3.72 billion in

Dulles Toll Road revenues for Phase II construction. Because the final design and cost of construction of the Dulles Corridor Metrorail Project have not been determined, the Plaintiffs are subject to further increases in user charges for using the Dulles Toll Road to fund the increased state share of funding for the Dulles Corridor Metrorail Project if the Dulles Toll Road is transferred to MWAA.

15. MWAA has a recent history of management failures, which warrant close scrutiny by the Commonwealth before a final decision is made to transfer the Dulles Toll Road to MWAA. In 2002, for example, the General Accounting Office (“GAO”) (now the General Accountability Office) reported to the United States Congress, after a 14-month investigation, that MWAA “did not satisfy its obligation to obtain, to the maximum extent practicable, full and open competition” for fifteen of the thirty-five contracts GAO reviewed. A copy of that GAO report is attached hereto as Exhibit 2.

16. Despite MWAA’s recent record on obtaining or assuring competitive bidding, as reported by GAO, the proposal submitted by MWAA on December 20, 2005, and subsequently updated and modified on January 17, 2006, to acquire the Dulles Toll Road and to construct the Dulles Corridor Metrorail Project is predicated on the assumption that “the use of value engineering, competitive construction bidding and management” will mitigate the risk of being forced to increase tolls. A copy of the MWAA proposal dated December 20, 2005, is attached hereto as Exhibit 3. A copy of the subsequent MWAA modification of its proposal dated January 17, 2006, is attached hereto as Exhibit 4.

17. The Virginia General Assembly enacted the Public Private Transportation Act, Va. Code §§ 56-556 through 56-575, in 1995 to enhance the likelihood that needed

transportation facilities will be acquired, constructed and improved in a more timely or less costly fashion by authorizing a greater role for private entities in those processes.

18. At the time MWAA submitted a proposal to VDOT to acquire the Dulles Toll Road and to construct the Dulles Corridor Metrorail Project, VDOT was considering several proposals from private entities to operate the Dulles Toll Road (“Private Proposals”). One of those Private Proposals, the proposal submitted by Dulles Express, offered \$5.7 billion to the Commonwealth over a 50-year period for the right to collect and use tolls from the users of the Dulles Toll Road and to operate that facility during that period. Dulles Express also committed to limit increases in tolls other than a single increase during 2007 on the Dulles Toll Road during the term of any agreement with the Commonwealth.

19. As a consequence of the transfer of control over the Dulles Toll Road to MWAA, Plaintiffs will be denied the opportunity to appeal to their elected representatives in the General Assembly (1) to exercise the legislature’s prerogative to withhold approval of the transfer to MWAA of possession of the Dulles Toll Road easement and the right to collect tolls for use of that easement or (2) to impose terms and conditions on such transfer, if the General Assembly approves the transfer, to protect the plaintiffs and other citizens of the Commonwealth unless the Court enters an order declaring that the Commonwealth Defendants must obtain authorization and approval from the Virginia General Assembly before transferring the Commonwealth’s interests in, and control over, the Dulles Toll Road to MWAA.

20. The Constitution requires the affirmative vote of each house of the General Assembly for any transfer of assets of the Commonwealth to other persons, including MWAA.

21. Plaintiffs, as users of the Dulles Toll Road, pay tolls to cover the cost of policing, operating and maintaining the facility, to service the debt associated with its construction and to

fund the Commonwealth's share of the costs associated with the construction of the Dulles Corridor Metrorail Project, which is a \$4-plus billion undertaking to provide an extension of rail transit service from West Falls Church to Dulles Airport. The original debt incurred to construct the Dulles Toll Road is currently scheduled to be defeased in 2016. Annual debt service payments associated with that debt will decline from \$11.5 million to \$6.9 million in fiscal year 2009 and in subsequent fiscal years to \$3.7 million until the debt is retired. Under MWAA's proposal, only a small fraction of the tolls on the Dulles Toll Road will be used for purposes of policing, operating, maintaining and improving that facility, while the predominant share will be used to construct the Dulles Corridor Metrorail Project.

22. MWAA was established by statute as a quasi-governmental agency that would not be directly accountable to any elected officials, whether federal, state or local. It is "independent of Virginia and its local governments, the District of Columbia, and the United States Government." 49 U.S.C. § 49106(a)(2).

23. MWAA is governed by a 13-member board of directors. Five members are appointed by the Governor of Virginia. Three members are appointed by the Mayor of the District of Columbia. Two members are appointed by the Governor of Maryland. Three members are appointed by the President of the United States with the advice and consent of the Senate. 49 U.S.C. § 49106(c)(1). No member may hold elective or appointive political office. 49 U.S.C. § 49106(c)(4)(A). Members are appointed for fixed terms and may be removed or suspended only for cause. 49 U.S.C. § 49106(c)(6)(C); Va. Code § 5.1-155(E).

24. As a consequence of any transfer of the Dulles Toll Road assets or of responsibility for the Dulles Toll Road to MWAA, the focus of MWAA will be changed to the detriment of the plaintiffs as users of Dulles Airport and the Dulles Toll Road. MWAA was

established for airport purposes only. Unless the plaintiffs are granted the relief they seek, they will be denied the right to petition their legislators to prevent, or minimize the effect of, a transfer of the Commonwealth's interests in, and control over, the Dulles Toll Road to MWAA.

Historical Background

25. On September 7, 1950, Congress enacted, and President Harry S. Truman later signed, legislation authorizing “the construction, protection, operation and maintenance of a public airport in or in the vicinity of the District of Columbia” by the U.S. Secretary of Commerce. Pub. L. 81-762, 64 Stat. 770.

26. A ten-thousand-acre site located in Fairfax and Loudoun counties in Virginia was selected in 1958 by President Dwight D. Eisenhower as the site for the new airport, which was to become Dulles Airport. Construction commenced on September 2, 1958.

27. During the 1950s, an agency under the U.S. Secretary of the Commerce, the Civil Aeronautics Administration (the “CAA”), conducted a study to assess the best way to connect the proposed Dulles Airport to planned and existing state and federal highways. Ultimately, the CAA decided to construct an access highway as part of the overall airport project.

28. The CAA and the local communities worked together to select four tentative routes for the proposed access highway. After several public hearings, the CAA and the Commonwealth Transportation Board's predecessor, the Virginia Highway Commission, with input from the local communities, selected the current 16-mile route from Dulles Airport to Falls Church, Virginia.

29. In 1958, Congress enacted the Federal Aviation Act, which transferred the responsibilities of the CAA to a new Federal Aviation Agency. Pub. L. 85-726, 72 Stat. 744.

30. When the U.S. Department of Transportation was established in 1966, the Federal Aviation Agency was transferred to the new cabinet-level department and renamed the Federal Aviation Administration (the “FAA”). Pub. L. 89-670, 80 Stat. 932.

31. The first 13.5 miles of the access road were constructed by the FAA and opened in 1962, connecting Dulles Airport to Interstate 495 (the “Beltway”). The remaining 2.5 miles, constructed for the FAA under the supervision of the Federal Highway Administration, opened on November 30, 1983, connecting Dulles Airport directly to Interstate 66 (“I-66”), which had been opened for public use shortly before that date.

32. The entire 16-mile road, known as the Dulles Airport Access Highway (“DAAH”), is limited to airport traffic only and has no exits west of the Beltway, other than direct access to the airport at the western terminus of the highway.

33. Dulles Airport was completed in 1962 and dedicated on November 17, 1962, as Dulles International Airport. In 1984, it was renamed Washington Dulles International Airport.

34. As Fairfax and Loudoun counties grew, the public demand for access to points along the DAAH increased, but the DAAH itself provided no access to local residents because it was restricted to those traveling to Dulles Airport only.

35. To address this problem, the United States, through the FAA, the United States Department of Transportation and the Director of the Metropolitan Washington Airports, entered into an agreement with the Commonwealth, dated July 6, 1981 (the “1981 Agreement”), to construct a new road in the existing right-of-way for the DAAH. The Metropolitan Washington Airports were identified in the 1981 Agreement as Dulles Airport and Washington National Airport. At the time, these were the only two airports in the United States operated by the federal government. The two airports shared a single director. MWAA was later established to

assume responsibility for, and control over, those airports and related contracts, such as the 1981 Agreement.

36. Under the 1981 Agreement, the new road proposed by the Commonwealth was to run from Spring Hill Road in Fairfax County eastward to a point adjacent to the right-of-way for I-66, which facility was then under construction.

37. The Commonwealth agreed to operate and maintain certain sections of the new road if those sections were not restricted to airport users only. In practical terms, this meant that the new road would have exit ramps for local commuters. This new road for local users is known as the Dulles Toll Road. The Dulles Toll Road parallels the DAAH in both directions, and has been operating since 1984.

38. In order to develop the Dulles Toll Road, the United States agreed to grant an easement to the Commonwealth that was adequate to accommodate the new road over the existing DAAH right-of-way. The United States retained title to the land. In exchange, the Commonwealth agreed to accept responsibility for all maintenance, operation and policing of the Dulles Toll Road. The Commonwealth, through the Commonwealth Transportation Board, was statutorily authorized to fix and collect tolls for the Dulles Toll Road. Va. Code Ann. § 33.1-269(5).

39. The easement obtained by the Commonwealth to use the DAAH right-of-way owned by the United States, the authority to impose tolls for access to the Dulles Toll Road, and the Dulles Toll Road facility itself, which was constructed by the Commonwealth, are valuable assets of the Commonwealth subject to the ultimate control of the Virginia General Assembly.

40. The deed of easement over the DAAH right-of-way owned by the United States was granted by the FAA, on behalf of the United States, to the Commonwealth on January 10,

1983 (“First Easement”). The First Easement terminates by its own terms in 2082, or sooner if certain contingencies occur, and grants the Commonwealth an easement and right-of-way for the construction, reconstruction, operation and maintenance of a limited access highway on land owned by the FAA.

41. On November 23, 1983, the United States granted a second deed of easement (“Second Easement”) to the Commonwealth to clarify that, despite an existing dispute between the FAA and the Commonwealth regarding legislative jurisdiction over the Dulles Toll Road, the Commonwealth did have “the requisite authority to operate, maintain and police the easement and the highway constructed in the easement.”

42. On December 21, 1984, the FAA and the Commonwealth entered into a Maintenance Agreement that set forth the Commonwealth’s responsibilities with respect to maintaining the Dulles Toll Road.

43. In October 1986, Congress consented to the interstate compact between the Commonwealth and the District of Columbia, to the creation of MWAA and to MWAA’s control over Dulles Airport in the Metropolitan Washington Airport Act of 1986, Title VI of Public Law 99-591, 100 Stat. 3341-376, codified at 49 U.S.C. §§ 49101 *et seq.* (“Transfer Act”). The Transfer Act explicitly authorized the transfer to MWAA of operational responsibility for Dulles Airport, including the DAAH, under a long-term lease.

44. Congress placed several conditions on the authority of the United States Secretary of Transportation to enter into an agreement with MWAA to allow MWAA to obtain authority to exercise operational control over the two airports. For instance, the Commonwealth and the District of Columbia were required to grant certain powers to MWAA. MWAA was also required to remain an independent political subdivision constituted solely to operate the local

airports, to have a board of directors, to provide the United States an annual payment of \$3 million in inflation-adjusted 1987 dollars, and to have a Board of Review comprised entirely of members of Congress.

45. After applicable Congressional preconditions were satisfied, the United States, by the Secretary of Transportation, and MWAA entered into a lease dated March 2, 1987, which became effective June 7, 1987 (the “Lease”). The Lease transferred operational responsibility of Dulles Airport to MWAA.

46. The Lease will expire on June 7, 2067. It provides that upon its expiration, MWAA will “give up, surrender and deliver to the Secretary [of Transportation] the Leased Premises together with all buildings, structures and improvements thereon (as the same may have been altered or replaced).”

47. Pursuant to the Lease, the United States leased to MWAA the land upon which the Dulles Toll Road was later built.

48. Under the Lease, MWAA is limited to undertaking activities for “airport purposes” only. This term is defined as “a use of property interests (other than a sale) for aviation business or activities, or for activities necessary or appropriate to serve passengers or cargo in air commerce, or for nonprofit, public use facilities.”

49. By Deed of Easement dated January 9, 1990 (“1990 Easement”), MWAA conveyed to the Commonwealth the right to use additional land within the DAAH right-of-way to widen the Dulles Toll Road.

50. VDOT constructed the Dulles Toll Road in the early 1980s and has maintained and operated the facility since it was opened to public use. It is a part of the Commonwealth’s

primary system of highways and, as such, is included in the State Highway System within the meaning of Va. Code § 33.1-25.

51. The Dulles Toll Road was not constructed and is not operated for airport purposes, but rather to accommodate local traffic.

52. In September 2001, the Commonwealth Transportation Board directed that a minimum of eighty-five percent (85%) of the excess revenue from the Dulles Toll Road be dedicated for public transportation initiatives in the Dulles Corridor.

53. The debt remaining to cover the capital costs of the Dulles Toll Road as of the end of Fiscal Year 2006 was \$64,750,260.46. This debt consists of the balance outstanding on five bond series. Four of the five bond series will be fully paid by 2009, leaving only \$26,211,250 in debt to be repaid in the seven years from 2009 until 2016. The current annual revenue of the Dulles Toll Road is approximately \$65 million.

54. On July 26, 2005, VDOT received an unsolicited proposal from the Dulles Corridor Mobility Consortium (“DCMC”) to privatize operation of the Dulles Toll Road. The DCMC proposal sought a concession agreement to collect tolls, operate, maintain and improve the Dulles Toll Road.

55. The DCMC proposal was submitted to VDOT pursuant to the Public-Private Transportation Act of 1995, Va. Code Ann. §§ 56-557 *et seq.*

56. Pursuant to the PPTA’s implementation guidelines, VDOT published a notice on July 28, 2005, accepting the DCMC proposal for consideration and inviting other private firms to submit competing proposals by October 28, 2005.

57. In response to this public notice, VDOT received four additional Private Proposals.

58. On December 7, 2005, VDOT announced that four of the five Private Proposals, including the DCMC proposal, were selected to advance to the Independent Review Panel (“IRP”) phase of consideration.

59. MWAA threatened during December 2005 to prevent the privatization of the Dulles Toll Road by the Commonwealth by exercising its rights to withhold approval of any assignment of the Dulles Road right-of-way by the Commonwealth under the terms of the 1987 Lease described in paragraphs 45 through 49, above, and a deed of easement from MWAA to the Commonwealth described in paragraph 49, above.

60. Before the IRP could complete its evaluation of the four Private Proposals, MWAA submitted its proposal to VDOT on December 20, 2005, well after the October 28, 2005, submission deadline under the Virginia Public-Private Transportation Act. Exhibit 3 attached. The MWAA proposal was subsequently updated on January 17, 2006. Exhibit 4 attached.

61. VDOT announced on February 8, 2006, that it was suspending evaluation of the other Private Proposals for up to 45 days to provide it with an opportunity to review the MWAA proposal independent of the Private Proposals.

62. During this evaluation, the MWAA proposal was not considered by the IRP, nor was it evaluated against the Private Proposals.

63. VDOT selected the MWAA proposal without fully considering the pending Private Proposals.

64. Under the MWAA proposal, the Commonwealth would relinquish its right to control the Dulles Toll Road until 2067. MWAA would operate the Dulles Toll Road and utilize the revenue stream derived from tolls charged for use of that facility to fund the

Commonwealth's share of the capital cost of constructing the extension of the Metrorail system to Dulles Airport, which extension is known as the Dulles Corridor Metrorail Project.

65. The MOU provides that the Commonwealth will transfer possession and control of the Dulles Toll Road and all its improvements to MWAA, that MWAA will assume all operational, maintenance, toll-setting, toll-collection, debt and financial responsibility for the Dulles Toll Road and that MWAA will construct the Dulles Corridor Metrorail Project. Upon completion of that project, MWAA will transfer its ownership and control to the Washington Metropolitan Area Transit Authority ("WMATA").

66. MWAA further agreed that it would develop the necessary agreements with WMATA regarding the design and construction of the Dulles Corridor Metrorail Project; that it would develop local funding agreements with non-federal partners; and that it would have responsibility to design and construct Phases 1 and 2 of the Dulles Corridor Metrorail Project.

67. Under the MOU, the Commonwealth agreed to transfer funds dedicated for the design and construction of the Project to MWAA. The Commonwealth also agreed to assign the revenues collected from operation of the Dulles Toll Road to MWAA.

68. By the terms of the MOU, the Commonwealth, through VDOT and the Virginia Department of Rail and Public Transportation, further agreed to provide "services and support to the Project and other transportation improvements in the corridor on a contract basis."

69. According to the MOU, revenues "collected from the [Dulles Toll Road] shall be used for any and all costs related to the operation, maintenance and debt service of the [Dulles Toll Road], and the design, construction and financing of the Dulles Corridor Metrorail Project." After sufficient revenues have been collected for those purposes, any further revenues collected from operation of the Dulles Toll Road "may only be used for costs related to highway and other

transportation improvements in the Dulles Corridor, and transit capital and operating expenses in the Dulles Corridor.”

70. On December 29, 2006, VDOT and MWAA entered into the first of several agreements contemplated by the MOU to effect the transfer of the Dulles Toll Road to MWAA. A summary of the provisions of that agreement, as provided by MWAA, is attached hereto as Exhibit 5. VDOT’s media release concerning the execution of that agreement is attached hereto as Exhibit 6. Among other things, the December 29, 2006, Agreement transfers the authority to set toll rates and collect tolls for access to the Dulles Toll Road from the Commonwealth to MWAA. A copy of the December 29, 2006, Agreement is attached hereto as Exhibit 7.

71. The General Assembly has not authorized a transfer to MWAA of any of the assets associated with the Dulles Toll Road.

72. The General Assembly has not authorized a transfer, delegation or assignment to MWAA of the authority and responsibility to direct and supervise the improvement, operation and maintenance of the Dulles Toll Road.

73. The General Assembly has not authorized a transfer, delegation or assignment to MWAA of the authority and responsibility to fix and collect tolls on the Dulles Toll Road.

74. None of the Defendants has the authority to contract away the Commonwealth’s power to tax. The Constitution of Virginia vests the power to tax in the General Assembly. Article IV, Section 1. The General Assembly may delegate the power to tax only to the governing bodies of counties, cities, towns and regional governments. Article VII, Sections 2, 3 and 7. Neither the General Assembly nor any officer or agency of the Executive Branch of the government of the Commonwealth may contract away the power to tax.

COUNT ONE

75. The allegations contained in paragraphs 1 through 74, above, are incorporated here by reference.

76. The Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation lack authority to convey or transfer valuable Dulles Toll Road assets of the Commonwealth to MWAA in the absence of authorization from the Virginia General Assembly.

77. As a matter of law, any agreement by the Defendants to convey or transfer Dulles Toll Road assets to MWAA is unauthorized and invalid, and its implementation should be enjoined.

COUNT TWO

78. The allegations contained in paragraphs 1 through 77, above, are incorporated here by reference.

79. The Dulles Toll Road, as part of the State Highway System, is committed by statute to the direction and supervision of the Commissioner of Transportation and is “established, constructed and maintained exclusively by the Commonwealth.” Va. Code § 33.1-37.

80. Neither the Commissioner of Transportation nor any other officer or agent of the Commonwealth is authorized to delegate or assign such exclusive responsibility and authority conferred by Va. Code § 33.1-37 to MWAA.

81. The delegation or assignment by the Virginia Department of Transportation or the Commissioner of Transport to MWAA of the responsibility and authority to direct and supervise the modification, operation and maintenance of the Dulles Toll Road pursuant to the December

29, 2006, Agreement violates Va. Code § 33.1-37 and, unless and until the Virginia General Assembly has authorized such delegation or assignment, is an *ultra vires* act.

82. As a matter of law, any agreement by the Defendants to delegate or assign to MWAA the responsibility and authority to direct and supervise the operation and maintenance of the Dulles Toll Road without prior authorization from the Virginia General Assembly is unauthorized and invalid, and its implementation should be enjoined.

COUNT THREE

83. The allegations contained in paragraphs 1 through 82, above, are incorporated here by reference.

84. The Commonwealth Transportation Board is empowered by statute to fix and collect tolls and other charges for the use of the Dulles Toll Road. Va. Code § 33.1-269(5).

85. Neither the Commonwealth Transportation Board nor any other officer, agent or agency of the Commonwealth is authorized to delegate or assign the responsibility and authority to fix and collect tolls for the use of the Dulles Toll Road conferred by Va. Code § 33.1-269(5) to MWAA.

86. The delegation or assignment by VDOT to MWAA of the power to collect and fix tolls on the Dulles Toll Road pursuant to the December 29, 2006, Agreement violates Va. Code § 33.1-269(5) and, unless and until the Virginia General Assembly authorizes such a delegation or assignment, constitutes an *ultra vires* act.

87. As a matter of law, any agreement by the Defendants to delegate or assign to MWAA of the authority and responsibility for fixing and collecting tolls on the Dulles Toll Road without prior authorization from the Virginia General Assembly is unauthorized and invalid, and its implementation should be enjoined.

COUNT FOUR

88. The allegations contained in paragraphs 1 through 87, above, are incorporated here by reference.

89. The current tolls and the tolls that MWAA intends to impose upon users of the Dulles Toll Road are not user charges to cover the capital and operating costs of the Dulles Toll Road to the extent the revenues from such toll collections exceed the debt service and operating expenses related to the construction, administration, maintenance, policing and other expenses associated with the Dulles Toll Road. The surplus revenues constitute a tax on the users of the Dulles Toll Road to fund a portion of the cost of constructing the Dulles Corridor Metrorail Project.

90. The Commonwealth Defendants — the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation — lack the authority to contract away, transfer, delegate or assign to MWAA the taxing power of the Commonwealth, which is an element of the legislative power of the General Assembly conferred by Article IV, Section 1 of the Constitution of Virginia.

91. The members of the board of directors of MWAA are not popularly elected and, by law, may not hold other elective or appointive positions. A majority of the members need not reside in Virginia. 49 U.S.C. § 49106(c).

92. The contracting away, transfer, delegation or assignment by the Commonwealth Defendants of taxing power to MWAA pursuant to the December 29, 2006, Agreement is an *ultra vires* act and violates the Constitution of Virginia, which prohibits such transfer, delegation

or assignment of taxing power to an entity over which the General Assembly exercises no control.

93. As a matter of law, any contracting away, transfer, delegation or assignment to MWAA of the authority to impose a toll for the use of the Dulles Toll Road the proceeds of which will be used to fund construction of another, separate facility is unlawful and invalid, and should be enjoined permanently.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs request that the Court enter an order:

- 1) Declaring that the Memorandum of Understanding dated March 24, 2006, between the Commonwealth and the Metropolitan Washington Airport Authority concerning the Dulles Corridor Metrorail Project and Dulles Toll Road is illegal and invalid;
- 2) Declaring that the December 29, 2006, Agreement between the Virginia Department of Transportation and the Metropolitan Washington Airports Authority is illegal and invalid;
- 3) Declaring that the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation lack the authority to transfer or convey the Dulles Toll Road assets of the Commonwealth to the Metropolitan Washington Airports Authority without authorization from the Virginia General Assembly;
- 4) Declaring that the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation lack the authority to delegate, transfer or assign to the Metropolitan Washington Airports Authority the authority and responsibility to direct and supervise the

modification, operation and maintenance of the Dulles Toll Road without prior authorization from the Virginia General Assembly;

5) Declaring that the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation lack the authority to delegate, transfer or assign to the Metropolitan Washington Airports Authority the authority and responsibility to direct and supervise the modification, operation and maintenance of the Dulles Toll Road without prior authorization from the Virginia General Assembly;

6) Declaring that the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation are in violation of Article IV, Section 1 of the Constitution of Virginia and exceed their authority under the Constitution and laws of the Commonwealth by contracting away, transferring, delegating or assigning to the Metropolitan Washington Airports Authority the power to impose a tax, nominally a toll, for access to and use of the Dulles Toll Road when the predominant share of the toll revenues are intended for purposes other than the construction, debt repayment, operation, policing or maintenance of the Dulles Toll Road;

7) Enjoining the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation from taking any action to implement a transfer, conveyance or assignment of Dulles Toll Road assets to the Metropolitan Washington Airports Authority unless and until the Virginia General Assembly has authorized such transfer, conveyance or assignment;

8) Enjoining the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department

of Transportation from taking any action to transfer, delegate or assign to the Metropolitan Washington Airports Authority the authority and responsibility for directing and supervising the modification, operation and maintenance of the Dulles Toll Road unless and until the Virginia General Assembly has authorized such transfer, delegate or assignment;

9) Enjoining the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation from taking any action to transfer, delegate or assign to the Metropolitan Washington Airports Authority the authority and responsibility for fixing and collecting tolls on the Dulles Toll Road unless and until the Virginia General Assembly has authorized such transfer, delegation or assignment;

10) Enjoining the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation from taking any action to contract away, transfer, delegate or assign to the Metropolitan Washington Airports Authority the authority and responsibility for imposing a tax in the form of a toll for access to and use of the Dulles Toll Road when the predominant share of the toll revenues are intended for purposes other than the construction, modification, debt repayment, operation, policing or maintenance of the Dulles Toll Road;

11) Enjoining the Virginia Secretary of Transportation, the Commonwealth Transportation Board, the Virginia Commissioner of Transportation and the Virginia Department of Transportation from implementing the Memorandum of Understanding or the December 29, 2006, Agreement and from taking further action, without requisite authority granted to one or more of them by the Virginia General Assembly, to convey, transfer or assign the assets of the Commonwealth in the Dulles Toll Road and the Deed of Easement in which the United States

conveyed to the Commonwealth a leasehold interest in the land on which the Dulles Toll Road was constructed;

- 12) Awarding the Plaintiffs their costs incurred in this proceedings; and
- 13) Granting such further relief as appropriate in the circumstances.

January 11, 2007

Respectfully submitted,

PATRICK R. GRAY and JAMES W. NAGLE

By: /s/ Patrick M. McSweeney

Patrick M. McSweeney (VSB No. 05669)
Wesley G. Russell, Jr. (VSB No. 38756)
Kristie G. Haynes (VSB No. 41466)
MCSWEENEY, CRUMP, CHILDRESS & GOULD, P.C.
11 S. Twelfth Street (23219)
Post Office Box 1463
Richmond, Virginia 23218
(804) 783-6800
Fax: (804) 782-2130