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CLERK TO THE
COUNTY BOARD

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February 2, 2011

The Honorable William Howell
General Assembly Building, Room 635
Richmond, VA 23219

The Honorable Charles J Colgan Sr.,
General Assembly building room 626,
Richmond, VA 23219

MEMBERS
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Mr. Speaker and Senator Colgan:

I write to continue the exchange you were engaged in last fall with the previous Chairman, Mr. Fisette, concerning the I-395/95 HOT Lanes project and the Arlington litigation. Mr. Fisette delayed his response to your November 11, 2010 follow-up letter, as it appeared that a resolution of the matter might be imminent. Regrettably, that turned out not to be the case. Having assumed the chairmanship in January, I want to give you as full and thoughtful a response as possible.

As representatives of Northern Virginia jurisdictions yourselves, you are profoundly aware of the transportation challenges our region endures – challenges which can be expected to become more acute in the years to come. That is especially true in the I-395/95 corridor, which as you know, is extremely sensitive; even a minor disruption reverberates throughout its length and into the surrounding street network, with impacts from Arlington to Stafford. I take it as given that all of us share a commitment to policy actions that will improve conditions for commuters and surrounding communities, and that we would oppose any action that would worsen such conditions. It is precisely for this reason that the Arlington County Board felt compelled to enter into litigation in August 2009.

The members of the Arlington County Board certainly agree with you that negotiation is preferable to litigation. That is why, well before litigation was even contemplated, the County attempted to engage VDOT in discussions about the deficient analysis that was done of the project. These attempts were ignored. The Board initiated discussion with the present Administration when it took office a year ago, and proposed the basis for what could have been an early settlement. Unfortunately, the Administration chose a different course, going to court in March to seek dismissal of certain named parties from the case (which motion the court rejected). Again, the County sought a negotiated resolution, which it has been attempting to achieve for many months. We began serious conversations through Secretary Connaughton last summer. It was our view that significant progress had been made in those negotiations through the fall. Availability and interest of the Commonwealth appeared to wane in the past month, culminating in a

letter from the Attorney General's office, received just today, which effectively ends the negotiation process and withdraws any positions heretofore agreed to as a part of those discussions. Needless to say, we are very disappointed with this turn of events.

I would ask you to take note of the fact that Arlington has consistently sought to confine our argument to direct discussion with the parties involved – even as others have conducted an increasingly escalated campaign of public rhetoric that has distorted both the facts of the litigation and Arlington's position. For a year now, we have met such attacks with forbearance, trusting in the validity of our position and the good faith of those with whom we are negotiating, and recognizing that carrying on overheated diatribes through the news media is not conducive to conciliation. That we have not responded in kind to these public attacks you should understand to reflect our sincere intention to seek reasonable accommodation of our concerns through negotiated resolution.

I will try to fully explain Arlington's concerns and the basis for our legal action in greater detail below, but let me first state the matter as succinctly as possible: 1) We believe that the pending transfer of the I-395/95 HOV facility to Flour-Transurban as currently proposed presents a real threat of great harm to the people that we and you represent in Northern Virginia; and 2) we believe that the tactic pursued by the Commonwealth and sanctioned by the Federal Highway Administration to accommodate the transfer without proper review, analysis, and mitigation constitutes a violation of federal law.

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Let me emphasize that bringing suit against federal and state officials is a most unusual action for Arlington County. We did so in this case only because we saw the potential for irreparable harm, and the (illegal) issuance of the Categorical Exclusion deprived us of alternative opportunities for redress.

In your November 11 letter, you asked very specific questions concerning "legal tactics." While it is my wish and intention to address your concerns as forthrightly as possible, I am sure you can appreciate that I am necessarily constrained in openly discussing the County's strategy in on-going litigation in a correspondence of this nature.

I can say that the counts in the suit as presented by Arlington's counsel arise out of the specific provisions of the federal law under which the litigation has been brought, and the specific facts of the case. I would also point out that on three separate occasions in the past year, the court has ruled in Arlington's favor on procedural matters some of which were directly related to the issues you raise. Whether the County's claims are valid is ultimately a matter for judicial decision; were they "outrageous" or even frivolous, the court would undoubtedly have dismissed them, as the Commonwealth requested.

Arlington has never called anyone racist. It remains true, however, that minorities and vulnerable populations in Arlington may be disproportionately impacted by the HOT lanes project. Under the National Environmental Policy Act (NEPA), when a highway project creates a disproportionate, negative environmental impact on areas with a high

proportion of minority and low-income residents, a cause of action for discrimination may arise for failure to address those impacts. Such a discrimination claim against an agency is routinely brought by suing the head of the agency, or other responsible official in his or her personal capacity. (The personally named defendants are of course provided legal representation through government general liability coverage. Furthermore, Arlington has no plan to recover damages against any party so named.)

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Unless carefully designed, the HOT lanes project has the potential to reduce the capacity of the I-395/95 facility (Shirley Highway) to move commuters. In other words, there is a substantial risk that it could exacerbate, rather than mitigate, traffic congestion throughout Northern Virginia. This potential has been demonstrated by modeling and analysis conducted by VDOT itself in their February 1999, "I-95/395 HOV Restriction Study." This VDOT study acknowledged that a change from HOV-3 to HOV-2 and/or the addition of a third lane would result in increased congestion and decreased speeds which would,

... have negative effects on bus and vanpool operators. Private and public bus ridership could decrease by as much as 50 to 80 percent and vanpool riders could be reduced by 60 percent. This will result in lower fare revenues and increased operating costs. A change to HOV 2+ will also significantly diminish the effectiveness of current informal carpool matching, or slugging, activities.

It is clear that changes to this very successful HOV corridor need to be considered carefully. The study goes on to say that, "Transportation providers have long realized that the solution to traffic congestion in dense urban areas cannot rely solely on the provision of unbounded highway capacity, but must also incorporate alternative modes (e.g., transit), demand management strategies and optimization of the person-carrying capacity of the existing highway network. **The latter objective can be achieved through the use of High Occupancy Vehicle (HOV) facilities** (emphasis added)." If the efficient operation of transit service, van pools, and other HOV traffic on the express facility is impaired, congestion in the corridor could quickly become intolerable.

Please note that this concern has been raised not only by Arlington, but by all the local governments and regional transportation agencies through which the facility runs, going back at least five years. Most recently, the Chairman of the Fairfax Board of Supervisors, the Mayor of Alexandria, and the Chairman of the Arlington County Board submitted a detailed explanation of the problem, and outlined potential remedies, in a joint communication to the Governor (September 2010 – attached).

It is also important to recognize that the situation on I-395/95 is different than that of the Capital Beltway HOT Lanes project. On the Beltway, *new capacity is being added* to the existing roadway to create an entirely new toll facility. In the case of I-395/95, an existing road facility (built by taxpayers to move transit vehicles), will be turned over to a

private company which will superimpose a high-occupancy toll facility on the existing transit and HOV operations. As you know, the facility is already used at a level at or near to capacity. Nonetheless, according to VDOT itself, the HOV system in northern Virginia is one of the most successful in the nation and carries more peak-hour passengers than the general purpose lanes, bus systems, Metro or Virginia Railway Express. (The Shirley Highway HOV lanes move ~ 6,000 /lane/hour versus 1,500 /lane/hour on general "SOV" lanes in the peak periods.) With the transfer to a private company, the facility will be operated in a radically different manner than it has functioned for the last four decades.

As early as 2005, transportation staff here in Northern Virginia have warned about the potential to upset the delicate balance of this high capacity system on which morning and evening mobility depends, from Stafford all the way to the Potomac. As they reviewed the methods by which the private operator proposed to deploy the high-occupancy toll system on the express facility they became increasingly alarmed about the potential adverse impact on the efficiency of transit service. A "slow down" of transit vehicles on the facility would have two serious consequences:

- 1) Increasing the "re-cycle time" for buses, thus raising the cost of providing the services (because more buses are needed to move the same number of passengers per hour); and,
- 2) Reducing the utility of transit (by lengthening commute times, especially for riders coming from outer jurisdictions), and thus discouraging its use.

The former directly raises costs to governments which subsidize these bus services. (For example: If delays on a service were sufficient to require just three additional buses, the capital cost alone of three new buses would be more than a \$1 million, plus additional operating costs for three more drivers, fuel, and maintenance.) The latter effect runs counter to all objectives of sound transportation policy. As I am sure we all agree, inducing commuters to shift away from public transportation to greater reliance on individual automobiles is bad policy on every level: It would aggravate congestion on major arterials and add more traffic on side streets; increase vehicle emissions that contribute to air pollution locally and climate change inducing green-house gases globally; and injure national security by increasing our country's energy dependence on foreign sources.

I ask you also to consider the unusual implications of the nature of the partnership by which the HOT lanes project is proposed to be implemented, which make it unlike typical transportation projects. The Commonwealth will be granting a private (foreign) company control of an existing facility, *for decades*, pursuant to an agreement negotiated in private and not subjected to any public process before approval. The company will have the right to operate the facility and to set tolls in their own interests, being responsible only to their own shareholders. If their profit-maximizing policy should turn out to raise the cost of operations for the governments that provide transportation services on the facility (e.g., increasing bus subsidies because of reduced performance), or generate congestion on the

surrounding street network, there will be little recourse. That is why it is so critical to identify problems and mitigation now, prior to the signing of the final agreement.

Unfortunately, it is in the nature of the agreement that the private company will have a financial incentive to prevent transit and HOV use of the HOV lanes. (And it is hard to ignore the fact that in the Beltway contract the Commonwealth has agreed to pay a "fine" to the company if "too many" people opt for transit.)

I have focused here on bus service, both because of the high volume of people they move each day, and because it is a direct cost-item for local governments like Arlington (and Fairfax, Alexandria, Prince William, etc.). Nonetheless, I acknowledge that the potential impacts extend to other components of the current system as well, such as van pools; and tens of thousands are transported on the facility through the system of informal ride-sharing ("slugs") that has evolved over decades.

In view of these facts, I hope you can appreciate why Arlington is so gravely concerned. It cannot be emphasized strongly enough, that the harm from an improperly implemented HOT Lanes plan will affect not just Arlingtonians, but commuters coming from points to the south, and the communities in which they live.

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Again, I must emphasize that Arlington was left with no alternative to litigation due to the granting of a Categorical Exclusion by the Federal Highway Administration in January 2009, which preempted the normal process through which jurisdictions in the region could seek to have problems identified and remedies provided. Arlington believes this action by the FHWA constitutes a clear violation of federal law. As a result of the illegal CE, litigation was the only avenue by which Arlington could ensure that a thorough analysis of the project's impacts is conducted so that those impacts can be mitigated.

From the beginning, Arlington has been clear that our objective is not to prevent the project, but to ensure the protection of transit and HOV operations in the corridor, and minimize the impacts of the project on surrounding local streets and communities. I have to believe that you share that objective. I respectfully ask for your assistance in protecting the common interests of the people you and we represent.

Sincerely,



Christopher Zimmerman
Chairman
Arlington County Board