

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

MONTGOMERY COUNTY, VIRGINIA,)

AND)

THE BOARD OF SUPERVISORS OF)
MONTGOMERY COUNTY, VIRGINIA,)

Plaintiffs,)

v.)

Case No.: _____

THE VIRGINIA DEPARTMENT OF RAIL)
AND PUBLIC TRANSPORTATION,)

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

AND)

MATTHEW O. TUCKER, DIRECTOR,)
VIRGINIA DEPARTMENT OF RAIL)
AND PUBLIC TRANSPORTATION,)

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

AND)

COMMONWEALTH TRANSPORTATION)
BOARD,)

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

Defendants.)

COMPLAINT

Montgomery County, Virginia (the “County”) and the Board of Supervisors of Montgomery County, Virginia (the “Board of Supervisors” or the “Board”), by counsel, pursuant to Va. Code Ann. §§ 8.01-184 and 8.01-620, state the following as their Complaint.

A. Preliminary Statement

This action challenges the constitutionality and validity of Va. Code Ann. § 33.1-221.1:1.1 which provides for the establishment of, and expenditures from, the “Rail Enhancement Fund.” The Director of the Virginia Department of Rail and Public Transportation (the “Department” or “DRPT”) administers and expends the Rail Enhancement Fund subject to the approval of the Commonwealth Transportation Board. Section 33.1-221.1:1.1 purports to authorize the Department to make grants of the Commonwealth’s funds to private railroad companies for the acquisition, leasing and improvement of privately owned railroad facilities.

Pursuant to Va. Code § 33.1-221.1:1.1, the Department has entered into a Rail Enhancement Fund: Multi-Year Funding Agreement with the Norfolk Southern Railway Company, Agreement No. 76506-1 (the “Grant Agreement”), dated May 16, 2006. The Grant Agreement purports to authorize the Department to grant Norfolk Southern Railway Company (“Norfolk Southern”) funds exceeding \$31,000,000 for railroad improvements to be owned and operated by Norfolk Southern, including the acquisition, design, construction and development of intermodal facility improvements to be located in the Elliston area of Montgomery County. The Department is a party to the Grant Agreement which specifically provides that the Commonwealth of Virginia, through the Department, will have an interest in the Norfolk Southern improvements acquired, designed, constructed and developed with grant funds provided by the Department.

Virginia Code § 33.1-221.1:1.1 and the Grant Agreement violate the prohibitions in Article X, § 10 of the Constitution of Virginia (1971). The “Internal Improvements Clause” of Article X, § 10 provides that the Commonwealth shall not become a party to or become interested in any work of internal improvements, except public roads and public parks, or engage in carrying on such work. The “Credit Clause” of Article X, § 10 provides that the credit of the Commonwealth, shall not, directly or indirectly, under any device or pretense whatsoever, be granted to or in aid of any person, association or corporation.

The Department’s granting of funds to Norfolk Southern for the purpose of Norfolk Southern’s acquisition, design, construction and development of intermodal facility improvements in Montgomery County, and the establishment of an interest of the Department in such works of internal improvement, violate the prohibitions in the Credit Clause and Internal Improvements Clause of the Constitution of Virginia. Section 33.1-221.1:1.1 and the Grant Agreement are, therefore, unconstitutional, illegal and void.

B. Parties

1. Montgomery County is a Virginia County.
2. The Board of Supervisors is the governing body of Montgomery County pursuant to Va. Code Ann. § 15.2-1400.
3. The Department is a department of the executive branch of government of the Commonwealth of Virginia established pursuant to Chapter 10.1 of Title 33.1 of the Code of Virginia, §§ 33.1-391.1 et seq.
4. Matthew O. Tucker is the Director of the Department pursuant to Va. Code §§ 33.1-391.1 and 33.1-391.3. The Director is charged with administering and expending the

Rail Enhancement Fund pursuant to § 33.1-221.1:1.1(C). This action is brought against Mr. Tucker solely in his official capacity as the Department's Director.

5. The Commonwealth Transportation Board is established pursuant to Va. Code § 33.1-1. The Commonwealth Transportation Board is charged with approving the actions of the Director in administering and expending the Rail Enhancement Fund pursuant to Va. Code § 33.1-221.1:1.1(C).

6. The proposed intermodal facility improvements will have a significant adverse effect on the Elliston area of Montgomery County, and Montgomery County generally, as a result of:

a. The establishment of a large industrial land use in a predominately rural area that is incompatible with surrounding uses.

b. The adverse effects resulting from the operation of the proposed improvements including, but not limited to, noise, artificial lighting, dust, and odor.

c. Increased train and truck traffic in the area. The existing road, bridge and interstate access facilities in the area are already inadequate.

d. Increased air and water pollution in the area, including environmentally sensitive areas.

e. Increased development pressure for incompatible land uses and development activity needed to support the proposed intermodal facility including truck stops, service facilities, hotels, restaurants, and other commercial or industrial uses.

f. The frustration of the County's land use planning goals as set forth in its Comprehensive Plan.

C. Jurisdiction and Venue

7. This Court has jurisdiction over this action pursuant to Va. Code Ann. §§ 8.01-184, 8.01-620 and 17.1-513.

8. Venue in this Court is proper pursuant to Va. Code § 8.01-261.

D. Facts

1. Va. Code § 33.1-221.1:1.1

9. The General Assembly enacted § 33.1-221.1:1.1 in 2004. As originally enacted in 2004, § 33.1-221.1:1.1(E) provided that:

Tracks and facilities constructed and property and equipment purchased under this section shall be the property of the Commonwealth for the useful life of the project as determined by the Executive Director of the Department of Rail and Public Transportation and shall be made available for use by all common carriers using the railway system to which they connect under the trackage rights agreements between the parties.

See Chapter 221, 2004 Va. Acts of Assembly, p. 908. Compare § 33.1-221.1:1(F) (providing for the funding of industrial access railroad tracks and requiring that tracks and facilities constructed with public funds shall be the property of the Commonwealth for the useful life of the project).

See also Former § 56-451.2 (same).

10. The General Assembly amended § 33.1-221.1:1.1 in 2005. The amendments included expanding the types of facilities that could be funded as specified in subsection (C). The General Assembly further recharacterized the prior subsection (E) to subsection (D) and deleted the requirement that tracks and facilities constructed and property and equipment purchased under the statute must be the property of the Commonwealth. See Chapter 323, 2005 Va. Acts of Assembly, p. 417.

11. Section 33.1-221.1:1.1(A) provides for the creation of the Rail Enhancement Fund as a special fund within the Transportation Trust Fund.

12. Section 33.1-221.1:1.1(B) provides that the Rail Enhancement Fund shall consist of funds dedicated pursuant to Va. Code § 58.1-2425 and such funds from other sources as may be set forth in the appropriations act.

13. Section 33.1-221.1:1.1(C) provides:

The Director of the Department of Rail and Public Transportation 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 improvements is for the common good of a region of the Commonwealth or the Commonwealth as a whole. Prior to recommending an allocation of the Fund to the Commonwealth Transportation Board, the Director of the Department of Rail and Public Transportation shall consult with and obtain the advice and recommendations of the Rail Advisory Board established pursuant to § 33.1-391.3:1.

14. Section 33.1-221.1:1.1(D) provides:

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.

15. Section 33.1-391.3:1 provides for the establishment of the Rail Advisory Board.

2. DRPT Proceedings

16. On or about October 20, 2005, the Commonwealth Transportation Board approved the Policy Goals and Implementation Guidelines for the Administration of the Rail Enhancement Fund (the “Guidelines”).

a. Paragraph 5 of the Guidelines states:

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 years.

Projects will have an achievable schedule that demonstrates completion within a specified timeframe to limit the long term liability of the Rail Enhancement Fund. Projects will have well defined cost estimates that reduce the likelihood of overruns. Project budgets and schedules will be adequately developed prior to award and will be completed within a specified timeframe. Some large projects will require funding over several years. The Rail Advisory Board will work with DRPT to 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 on time and on budget.

b. Paragraph 7 of the Guidelines states:

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.

17. On November 30, 2005, the Rail Advisory Board approved certain "Tier 1" projects which included the proposed intermodal facility in Montgomery County. The Rail Advisory Board recommended to the Commonwealth Transportation Board that the Tier 1 projects be funded.

18. The Rail Advisory Board's Minutes from its November 30, 2005 meeting state:

Mr. Crewe expressed concern about the three years of funding in one year and the inclusion/enforcement of the “claw” back clause. John Beale, AG representative, indicated that the state was morally obligated subject to appropriations. Mr. Beadles also voiced his concern about the state’s ability to get money back and cautioned that the staff carefully work to ensure that the projects protect the state’s interests.

19. On December 15, 2005, the Commonwealth Transportation Board approved the allocation for the Tier 1 projects as set forth for Fiscal Years 2006, 2007 and 2008 of the Rail Enhancement Fund Program of Project Tier 1 list, subject to specific contingencies. The action of the Commonwealth Transportation Board was expressly limited to Fiscal Years 2006, 2007 and 2008. A copy of the Commonwealth Transportation Board’s Resolution is attached as Exhibit 1.

3. The Grant Agreement

20. On May 15, 2006, the Department entered into the Rail Enhancement Fund: Multi-Year Funding Agreement, Agreement No. 76506-01 (the “Grant Agreement”) with Norfolk Southern Railway Company as “Grantee.” A copy of the Grant Agreement is attached as Exhibit 2.

21. The Grant Agreement provides for the acquisition, design, construction, and development of certain railroad facilities and improvements to be undertaken by and owned by Norfolk Southern including intermodal facility improvements to be located in the Roanoke region. See Grant Agreement, Article 1.

22. Norfolk Southern has identified the Elliston area of Montgomery County as its chosen location for the proposed intermodal facility.

23. Article 4 of the Grant Agreement sets out the “Project Budget” and the “Project Schedule.”

a. The Project Budget provides for the Department to grant Norfolk Southern over \$31,000,000 between July 1, 2005 and June 30, 2008.

b. The Project Schedule provides for the project to be completed by June 30, 2008. See also Grant Agreement, § 7.1.

24. Section 5.6 of the Grant Agreement provides that the Department shall have access to the project at all times to inspect and protect its interest in the project.

25. Article 8 of the Grant Agreement provides for the Department's interest in the completed work.

a. Section 8.2 requires Norfolk Southern to file a declaration on any real property and/or rights-of-way acquired for the project which shall subject the real property or rights-of-way to the covenants set forth in the Grant Agreement.

b. Section 8.3 provides that the Department shall have the power to review and approve a purchase price offered to Norfolk Southern for the property required for the proposed intermodal facility improvements.

c. Section 8.4 provides that Norfolk Southern certifies that it owns or will own or control the real property upon which the project will occur and will protect and respect the Department's interest in the project.

d. Section 8.5, applicable only to the proposed intermodal facility improvements, provides, among other things, that if Norfolk Southern abandons or ceases to operate the project during the performance period, the Department shall be reimbursed the value of its interest in the portion of the project abandoned or discontinued.

26. Pursuant to the Grant Agreement, Norfolk Southern will have exclusive control over the project and the facilities acquired, designed, constructed, and developed pursuant to the Grant Agreement and with the Commonwealth's funds.

4. Actions in Furtherance of the Project

27. On or about April 4, 2008, Norfolk Southern disclosed that the Elliston area of Montgomery County was its preferred site for the proposed intermodal facility improvements.

28. Norfolk Southern has not constructed the proposed intermodal facility improvements in accord with the Project Budget or Project Schedule specified in the Grant Agreement.

29. On or about April 4, 2008, Norfolk Southern submitted an amended application (the "Amended Application") to the Department stating that, now that Elliston had been identified as the Norfolk Southern preferred site, it had been determined that Cove Hollow Road will need to be relocated in order to accommodate the facility. The amendment to the original project is identified as relocating and constructing Cove Hollow Road around the facility and over the Roanoke River to reconnect the road to Route 460. The Amended Application seeks additional grant funding of \$4,410,000 from the Rail Enhancement Fund. A copy of this Amended Application is attached as Exhibit 3.

30. On April 9, 2008, the Department presented the Amended Application to the Rail Advisory Board and invited comments from the members.

31. By letter dated May 2, 2008, Rail Advisory Board Member Richard L. Beadles made the following comments to the Department related to the proposed private intermodal facility improvements.

Project No. 14: NS Roanoke Intermodal Facility (Supplemental):
Once again, a Roanoke-area intermodal facility is needed, to serve

I-81 traffic as well as 460, or Heartland Corridor, traffic. It may be recalled by some members of the RAB that when the then-director of DRPT presented the original Roanoke project in 2005, as part of the Heartland Corridor project, it was billed as “*ready to go*”! In fact, it was obviously not and NS’ own VP – no longer a public player in this very public spectacle – did not help matters at the outset. So, this RAB member is not clear on why the public should put additional money into this mishandled project and just what the public would get for its added investment?

32. On May 16, 2008, the Rail Advisory Board approved a motion to recommend a Six Year Program of Projects which included a proposed allocation of \$4,410,000 for the Amended Application for the relocation of Cove Hollow Road as part of the proposed intermodal facility improvements project.

33. The Commonwealth Transportation Board has not made a determination pursuant to § 33.1-221.1:1.1(D) with respect to the improvements identified in the Amended Application.

34. By letter dated August 19, 2008, the Department issued a “Notice to Proceed” to Norfolk Southern authorizing Norfolk Southern to begin work as described in Sections 1.1B and 1.1C of the May 15, 2006 Grant Agreement. A copy of this letter is attached as Exhibit 4.

35. Grant Agreement Section 2.2 requires that the Grantee shall submit to the Department a Project Budget, Project Schedule and Schedule of Values prior to the Department’s issuing a Notice to Proceed for the Work described in Section 1.1C.

36. The Department issued its August 19, 2008 Notice to Proceed in violation of the requirements stated in the Grant Agreement.

37. The Department issued its August 19, 2008 Notice to Proceed without the Commonwealth Transportation Board’s determination with respect to the Amended Application as required by § 33.1-221.1:1.1(D).

38. On information and belief, the relocation and reconstruction of Cove Hollow Road as described in the Amended Application is an essential element of the proposed intermodal facility improvements.

39. The Department issued its August 19, 2008 Notice to Proceed based on the Project Budget and Project Schedule stated in the Grant Agreement. All of the time requirements stated in the Project Budget and Project Schedule have passed.

40. The Department has not entered into, considered or approved a new agreement with respect to the proposed improvements nor any extension or modification of the Grant Agreement.

41. The Commonwealth Transportation Board's action on December 15, 2005, with respect to the proposed improvements, was expressly limited to Fiscal Years 2006, 2007 and 2008. Any action by the Commonwealth Transportation Board with respect to the proposed private railroad improvements has expired.

5. The County's Opposition to the Proposed Facility

42. On information and belief, the siting, construction, development and operation of the proposed intermodal facility improvements are not subject to land use review or regulation by Montgomery County because of the preemption provisions of the federal Interstate Commerce Commission Termination Act, codified at 49 U.S.C. § 701 et seq.

43. The Department has not required that Norfolk Southern submit the proposed intermodal facility improvements for land use review and regulation by Montgomery County notwithstanding grant funding by the Department of seventy percent of the Project Budget pursuant to the Grant Agreement.

44. Montgomery County has consistently resisted and objected to the proposed acquisition, construction, and development of the proposed intermodal facility improvements in the Elliston area of Montgomery County because of the significant adverse effects the proposed facility improvements will have on the area and the County in general. The Board of Supervisors adopted Resolutions, dated September 25, 2006, October 23, 2006, and April 9, 2007, stating its opposition to the siting of the proposed improvements in the Elliston area and its opposition to taxpayer funding of the improvements that are objected to by the local government and the community directly affected by the proposed facility. These Resolutions note that:

- a. The proposed improvements do not comply with the provisions of the County's 2025 Comprehensive Plan.
- b. The proposed improvements will have a negative environmental impact on the Roanoke River and the surrounding rural environment.
- c. The proposed improvements will greatly increase truck traffic traveling through the rural villages of Shawsville, Elliston and Lafayette which is not compatible with the rural residential character of these villages.
- d. The proposed improvements are not the type of economic development the County is encouraging to locate in the County.
- e. The proposed improvements will have a negative impact on the County's tourism initiatives by industrializing one of the County's most scenic landscapes.

45. At least one locality in the region, the City of Salem, has solicited Norfolk Southern to locate the proposed intermodal facility improvements in their locality. On information and belief, other localities in the region have also sought to have the proposed improvements in their locality.

46. By letter dated May 2, 2008, the County advised the Attorney General of Virginia, the Secretary of Transportation and the Department that the proposed public funding of the private railroad facilities violated Article X, § 10 of the Constitution of Virginia and gave notice of the County's intent to challenge the constitutionality and validity of § 33.1-221.1:1.1 and the Grant Agreement.

47. By letter dated August 19, 2008, the Secretary of Transportation stated that the County's objections to the constitutionality of the funding mechanism were without merit.

48. Pursuant to Va. Code § 33.1-221.1:1.1 and the Grant Agreement, the Department proposes to contract with Norfolk Southern for the acquisition, design, construction and development of intermodal facility improvements in the Elliston area of Montgomery County to be owned and operated by Norfolk Southern. Pursuant to § 33.1-221.1:1.1 and the Grant Agreement, the Commonwealth proposes to grant at least \$31,000,000 to Norfolk Southern to assist Norfolk Southern in acquiring, designing, constructing and developing the facilities which Norfolk Southern will own and exclusively control. The Grant Agreement provides for the granting of the Commonwealth's credit to Norfolk Southern over a minimum of a three year period during which the Commonwealth purports to obligate itself to reimburse Norfolk Southern expenditures relating to the acquisition, design, construction and development of the proposed intermodal facility improvements. The Grant Agreement expressly provides that the Department shall have, retain and administer an interest in the proposed intermodal facility improvements.

49. An actual controversy exists with respect to the constitutionality and validity of Va. Code § 33.1-221.1:1.1 and the Grant Agreement.

50. Montgomery County has no adequate remedy at law.

51. Montgomery County will be irreparably damaged by the acquisition, design, construction and operation of the proposed improvements pursuant to the unconstitutional public funding mechanism described above.

52. The Attorney General of Virginia has issued a formal opinion holding that a proposed statutory funding mechanism that would allow state funding of privately owned railroad facilities violates the prohibitions in Article X, § 10 of the Constitution of Virginia. See 1981-1982 Op. Atty. Gen. Va. 87, 1981 Va. AG LEXIS 21.

Count I – The Internal Improvements Clause

53. The County and the Board of Supervisors restate the allegations set forth above.

54. Article X, § 10 of the Constitution of Virginia provides:

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.

55. The proposed intermodal facility improvements, to be owned and operated by Norfolk Southern, are internal improvements within the meaning of Article X, § 10.

56. Pursuant to Va. Code § 33.1-221.1:1.1 and the Grant Agreement, the Commonwealth is a party to and would have an interest in works of internal improvement owned by Norfolk Southern including the proposed intermodal facility improvements.

57. The acquisition, design, construction and development of the proposed intermodal facility improvements by Norfolk Southern is not the exercise of a governmental function.

58. The prohibition of the Internal Improvements Clause results from the Commonwealth's experience in loaning and advancing large sums of money to various corporations engaged in developing and operating privately owned works of internal improvement, such as canals, turnpikes and railroad companies, believing that their successful

operations would benefit the State. The result was that obligations of magnitude were incurred and heavy losses suffered by the Commonwealth. The constitutional provisions reflect the determination of the drafters that the Commonwealth should cease lending its support and aid to such undertakings and leave them to private enterprise. See Harrison v. Day, 200 Va. 764, 770-771, 107 S.E.2d. 594, 598-9 (1959); Almond v. Day, 197 Va. 782, 787-8, 91 S.E.2d 660, 664-5 (1956).

59. The acquisition, design, construction and development of the proposed intermodal facility improvements by Norfolk Southern is neither incidental nor necessary to the performance of the Commonwealth's governmental functions.

60. The Supreme Court of Virginia has never approved the acquisition, design, construction and operation of private railroad facilities with grant funds directly from the Commonwealth as a governmental function allowed under the Internal Improvements Clause.

61. Virginia Code § 33.1-221.1:1.1, both facially and as applied, violates the prohibition stated in the Internal Improvements Clause.

62. The Department's actions in entering into and administering the Grant Agreement with respect to the proposed intermodal facility improvements violate the prohibition stated in the Internal Improvements Clause.

Count II – The Credit Clause

63. The County and the Board of Supervisors restate the allegations set forth above.

64. Article X, § 10 of the Constitution of Virginia provides:

Neither 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.

65. The Department's granting of funds exceeding \$31,000,000 over the minimum of a three year period to Norfolk Southern, pursuant to Va. Code § 33.1-221.1:1.1 and the Grant Agreement, is a device or pretense for the granting of the credit of the Commonwealth to or in aid of Norfolk Southern.

66. The facts underlying the granting of the Commonwealth's funds to Norfolk Southern do not establish that the dominant or animating purpose for the granting of funds was to benefit the Commonwealth.

67. The animating purpose and the object that Va. Code § 33.1-221.1:1.1 and the Grant Agreement were designed to accomplish was to benefit Norfolk Southern in its business affairs and in the development of railroad facilities owned by Norfolk Southern, rather than to benefit the Commonwealth.

68. The primary purpose of Va. Code § 33.1-221.1:1.1 and the Grant Agreement is the use of the Commonwealth's funds and credits to foster and encourage the construction and operation of private enterprises. The benefit of the financing scheme to Norfolk Southern is not merely incidental, but is primary. Pursuant to the statute and the Grant Agreement, both facially and as applied, it is inherent in the operation of the funding scheme that the use of the Rail Enhancement Fund will be to benefit the private interests of railroad companies through the acquisition and improvement of railroad facilities that are to be privately owned and operated. See Button v. Day, 208 Va. 494, 504-505, 158 S.E.2d 735, 741-742 (1968).

69. No facts available in the public record demonstrate a long-standing intractable problem that could not be solved without public financing for the proposed privately owned and operated railroad improvements.

70. The Supreme Court of Virginia has never approved direct grants from the Commonwealth of public funds over multiple years to a private business for the reimbursement of expenses for the construction of private improvements as a use of public funds allowed under the Credit Clause.

71. Virginia Code § 33.1-221.1:1.1, both facially and as applied, violates the prohibition stated in the Credit Clause.

72. The Department's actions in entering into and administering the Grant Agreement with respect to the proposed intermodal facility improvements violate the prohibition stated in the Credit Clause.

Count III – Failure to Comply with Statutory and Other Requirements

73. The County and the Board of Supervisors restate the allegations stated above.

74. The Department issued its purported August 19, 2008 Notice to Proceed without an effective determination by the Commonwealth Transportation Board with respect to the proposed private railroad improvements as required by § 33.1-221.1:1.1(D).

75. The Department issued its purported August 19, 2008 Notice to Proceed without an effective approval of the Commonwealth Transportation Board with respect to the proposed private railroad improvements as required by § 33.1-221.1:1.1(C).

76. The Department issued its purported August 19, 2008 Notice to Proceed in violation of the action by the Commonwealth Transportation Board on December 15, 2005.

77. The Department issued its purported August 19, 2008 Notice to Proceed in violation of the requirements of the Grant Agreement.

78. The Department issued its purported August 19, 2008 Notice to Proceed in violation of its own Guidelines.

79. The Department's purported August 19, 2008 Notice to Proceed is illegal, ineffective and void.

Count IV - Injunction

80. The County and the Board of Supervisors restate the allegations stated above.

81. Based on the invalidity and unconstitutionality of Va. Code § 33.1-221.1:1.1 and the Grant Agreement, both facially and as applied, the Director is without authority to enter into the Agreement or any modifications or extensions of the Grant Agreement or to expend funds pursuant to the Grant Agreement with respect to the proposed intermodal facility improvements.

Prayer for Relief

The County and the Board of Supervisors respectfully request that this Court enter an Order granting the following relief:

A. A declaration that Va. Code § 33.1-221.1:1.1 is facially invalid and unconstitutional in that it purports to authorize the Commonwealth, through the Department, to be a party to and have an interest in works of internal improvements owned by a private railroad company in violation of the Internal Improvements Clause of Article X, § 10 of the Constitution of Virginia.

B. A declaration that § 33.1-221.1:1.1 is facially invalid and unconstitutional in that it purports to authorize the Commonwealth, through the Department, to grant its credit to and in aid of Norfolk Southern in violation of the Credit Clause in Article X, § 10 of the Constitution of Virginia.

C. A declaration that § 33.1-221.1:1.1 is unconstitutional as applied in that the Department, in administering the Grant Agreement, seeks to be a party to and have an interest in

works of internal improvement owned by a private railroad company in violation of the Internal Improvements Clause of Article X, § 10 of the Constitution of Virginia.

D. A declaration that § 33.1-221.1:1.1 is unconstitutional as applied in that the Department, in administering the Grant Agreement, seeks to grant the Commonwealth's credit to and in aid of a private railroad company in violation of the Credit Clause of the Constitution of Virginia.

E. A declaration that the Grant Agreement is invalid and unconstitutional and in violation of the Internal Improvements Clause Article X, § 10 of the Constitution of Virginia.

F. A declaration that the Grant Agreement is invalid and unconstitutional and in violation of the Credit Clause of Article X, § 10 of the Constitution of Virginia.

G. A declaration that the purported August 19, 2008 Notice to Proceed is invalid, ineffective and void.

H. Enjoin the Director and the Department from administering the Rail Enhancement Fund or the Grant Agreement in a manner that violates the Internal Improvements Clause or the Credit Clause of Article X, § 10 of the Constitution of Virginia.

I. Enjoin the Director and the Department from administering the Grant Agreement in violation of § 33.1-221.1:1.1(D), the Commonwealth Transportation Board's action on December 15, 2005, and the limiting provisions of the Grant Agreement.

J. Enjoin the Director and the Department from administering the Grant Agreement without the approval of the Commonwealth Transportation Board in violation of § 33.1-221.1:1.1(C).

K. Grant such further relief as this Court deems just and proper.

Dated: September 10, 2008.

MONTGOMERY COUNTY, VIRGINIA
BOARD OF SUPERVISORS OF
MONTGOMERY COUNTY, VIRGINIA

By: _____
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of September, 2008, a true and accurate copy of
the foregoing Complaint was delivered via United States Mail, postage prepaid, to:

The Honorable Robert F. McDonnell
Attorney General of Virginia
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
