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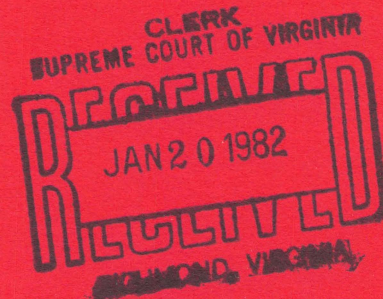
IN THE
Supreme Court of Virginia

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JAN 26 1984

RECORD NO. 810520



VIRGINIA HINCHEY,

Appellant,

v.

NEAL A. OGDEN,

Appellee.

JOINT APPENDIX

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MOTION FOR JUDGMENT

COMES NOW the plaintiff, Virginia Hinchey, and moves for judgment against the defendants, Neal A. Ogden and Donald Henderson, jointly and severally, on the grounds and in the amount as hereinafter set forth:

1. On the 15th day of April, 1979, defendant Donald Henderson was operating an automobile, owned by him, in a westerly direction on the Norfolk-Virginia Beach Expressway near the Toll Plaza located on the Toll Road near the Rosemont Road Exit, in the City of Virginia Beach, Virginia.

2. At that time the plaintiff was the passenger on a motorcycle traveling in an easterly direction on the Norfolk-Virginia Beach Expressway

3. At that time and place it was the duty of defendant Donald Henderson, to operate his vehicle with reasonable care and due regard for others using the said roadway.

4. Notwithstanding said duties, defendant, Donald Henderson, did then and there so carelessly, recklessly and negligently operate his automobile so that it collided with the plaintiff with great force and violence. Defendant was negligent in that he

(a) failed to maintain his vehicle in the proper lanes of travel, in that, he crossed into the east bound lane while heading in a westerly direction, after passing through the Toll Plaza located on the Toll Road.

(b) and, traveled a distance of approximately one mile in the center lane of the three lane east bound side, and struck the plaintiff.

4. At that time and place it was the duty of Neal A. Ogden, Superintendent of the Norfolk-Virginia Beach Expressway to protect the users of the Toll Road from unsafe conditions and to insure against unreasonable risks.

5. Notwithstanding said duties, defendant, Neal A. Ogden, permitted an inadequate lane dividing system to be maintained in a carelessly, recklessly and grossly negligent manner. Defendant, Neal A. Ogden, was grossly negligent in that he

(a) was on actual notice of the unsafe and inadequate condition of the lane dividing system then in existence at the Toll Plaza on the Norfolk-Virginia Beach Expressway; and

(b) failed to correct the said unsafe and inadequate lane dividing system; and

(c) failed to warn travelers on the limited access Toll Road of the danger of the unsafe and inadequate lane dividing system.

6. As a direct and proximate result thereof, plaintiff was caused to sustain serious and permanent injuries, has been prevented from transacting her business, has suffered and will continue to suffer great pain of body and mind; has sustained permanent disability, deformity and loss of earning capacity; and has incurred and will incur in the future hospital, doctors' and related bills in an effort to be cured of said injuries.

WHEREFORE, plaintiff demands judgment against the defendants, Neal A. Ogden, Superintendent of the Norfolk-Virginia Beach Expressway and

Donald Henderson, jointly and severally, in the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$1,500,000.00), and his costs in this behalf expended.

VIRGINIA HINCHEY

By Moody E. Stallings, Jr.
Of Counsel

Moody E. Stallings, Jr., p.q.
HANSON AND STALLINGS
2902 Arctic Avenue
Post Office Box 269
Virginia Beach, Virginia 23458

O R D E R

THIS DAY came the parties plaintiff and defendants, by counsel, to be heard upon the motion to dismiss filed herein as to the defendant, Neal A. Ogden, to be heard in conjunction with similar motions to dismiss filed in the cases of William H. Patterson v. Norfolk-Virginia Beach Expressway, Neal A. Ogden, and Donald Anderson, Law No. L-9380, and Kenneth Garbe v. Neal A. Ogden and Norfolk-Virginia Beach Expressway, Law No. L-8127.

Upon consideration whereof, it appearing to the Court that the plaintiff, Virginia Hinchey, has brought this action seeking damages for personal injuries sustained when the motorcycle upon which she was a passenger was ^{allegedly} struck by a vehicle traveling west in an eastbound lane on the Norfolk-Virginia Beach Expressway, a state highway facility owned by the Commonwealth of Virginia and operated by the State Highway Commission, and that the defendant Neal A. Ogden, superintendent of the Norfolk-Virginia Beach Expressway, who is alleged to have been negligent in the control, operation, and maintenance of the said highway facility, having moved the Court to dismiss the case against him on the grounds that the Norfolk-Virginia Beach Expressway is a state highway facility constructed, owned, and operated by the Virginia Department of Highways and Transportation and that Neal A. Ogden, superintendent of the said state highway facility, is an employee of the Commonwealth of Virginia, who exercises judgment and discretion within the scope of

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his employment, whose acts are the acts of the Commonwealth, and for which he may not be sued, without the consent of the Commonwealth.

Wherefore, the Court having heard the arguments of counsel, reviewed the record, and considered the applicable statutes and reported cases, as well as the oral testimony and exhibits introduced by agreement of counsel, is of the opinion that the Norfolk-Virginia Beach Expressway is a state highway facility, owned by the Commonwealth of Virginia and operated through the State Department of Highways and Transportation, and that Neal A. Ogden, superintendent of the Norfolk-Virginia Beach Expressway, is an employee of the Commonwealth of Virginia who exercises judgment and discretion in the discharge of an essential governmental function, whose acts are the acts of the Commonwealth and he may not, therefore, be sued for negligence in the performance of his duties without the consent of the Commonwealth of Virginia.

It is hereby ADJUDGED and ORDERED that the aforesaid lawsuit be and hereby is DISMISSED with prejudice as to the defendant, Neal A. Ogden.

Enter this Order:

Judge

: ask for this:

ask for this:

Robert L. Mills, p.d.

Seen and Objected to:

Monk p.q.

A Copy Tests: J. Curtis Fruit, Clerk

By Emilia D. Romero

W. D. Wilson

of Counsel for State Farm Ins Co -

ASSIGNMENT OF ERROR

1. Did the trial Court err in ruling that the defendant, Neal A. Ogden, was an employee of the Commonwealth of Virginia and was thereby protected from suit by the doctrine of Sovereign Immunity?

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

KENNETH J. GARBE,

Plaintiff,

v

NEAL A. OGDEN, et al,

Defendants.

AT LAW

No. L-8127.

Stenographic transcript of the testimony introduced
and proceedings had upon the trial of the above-entitled
cause in said court on March 14, 1980, before the Honorable
Philip L. Russo, Judge of said court.

-----oOo-----

APPEARANCES: Messrs. Hanson and Stallings
(Mr. Edward Hanson, Mr. Moody E.
Stallings, Jr.), attorneys for the
plaintiff.

Messrs. White, Reynolds, Smith and
Winters (Mr. Douglas B. Smith),
attorneys for the defendants.

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Yates, R. D.	4	6		
Yates, R. D. (Rec.)	18	19		

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
Plaintiff's Exhibit 1	Document pertaining to toll revenue bonds, Series 1965	8

(The following took place in chambers:)

THE COURT: All right. Now, Mr. Smith, you filed a motion to dismiss on behalf of the Commonwealth of Virginia. Now, the two defendants in this suit are Neal A. Ogden -- And it's my understanding that you're not asking that it be dismissed against Mr. Ogden. You're asking that it be dismissed against the Norfolk-Virginia Beach Expressway?

MR. SMITH: Yes.

THE COURT: Don't you still -- You're pleading Commonwealth of Virginia by Douglas B. Smith?

MR. SMITH: Well, Your Honor, I'm going to offer evidence there is no such legal entity as the Norfolk-Virginia Beach Expressway.

MR. STALLINGS: Your Honor --

MR. SMITH: And I don't want him saying, "Commonwealth of Virginia trading as", or doing something like that.

MR. STALLINGS: Your Honor, he's answered the Commonwealth of Virginia. This whole argument is going to be that I'm not suing the Commonwealth of Virginia. I'm suing the Norfolk-Virginia Beach Expressway, not Neal A. Ogden. He's got to

represent one or the other. If he wants to say I'm representing the Expressway, that's fine.

MR. SMITH: If he wants me to say I'm representing the Expressway, okay, but there is no such thing.

MR. STALLINGS: That's what we're going to argue about.

THE COURT: All right. Let's see. Has somebody answered for Mr. Ogden?

MR. SMITH: Yes.

THE COURT: Did you?

MR. SMITH: I am.

THE COURT: Okay.

MR. SMITH: Okay.

-----oOo-----

R. D. YATES, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Yates, would you please tell the Court your name and address, sir.

A My name is R. D. Yates. My address is 22 Malbon Avenue, Newport News, Virginia.

Q Where do you work, Mr. Yates?

A I work for the Virginia Department of Highways and Transportation. I'm in charge of the tunnels and tolls facilities section of the Highway Department with offices in Hampton.

Q You're in charge of what?

A Tunnels and tolls facilities section of the Highway Department.

Q Okay. Just generally speaking, what do your duties entail? What is your position with the Highway Department? What do you do?

A This involves primarily the maintenance and operations of what is known as the tunnels and tolls facilities which encompasses the Coleman Bridge, the James

River Bridge, the Hampton Roads Tunnels, the Norfolk-Virginia Beach Toll Road, and Elizabeth River Tunnels.

Q Are you familiar with the Norfolk-Virginia Beach Expressway?

A Yes.

Q Who owns and operates the Norfolk-Virginia Beach Expressway?

A The Department of Highways and Transportation.

Q Under what authority was the Virginia Department -- Excuse me -- was the Norfolk-Virginia Beach Expressway constructed?

A This was constructed under the authority of the Revenue Bond Act, Article 5, from the State Code.

MR. SMITH: Your Honor, for your information, this is Section 33.1-267 of the Code.

BY MR. SMITH:

Q And what did that Bond Act provide as far as the construction of the Norfolk-Virginia Beach Expressway is concerned?

A Well, this Act provided for the selling of bonds, in simple language, to finance and operate the toll road -- the operations and maintenance of toll roads.

Q Okay. And this was done directly by the State of Virginia through the Department of Highways?

A Right, through the Department of Highways.

Q It was not done through a special commission like the Elizabeth River Tunnel Commission or the Hampton Roads Tunnel Commission?

A No, sir.

Q And the toll road has always been owned by the Commonwealth of Virginia and operated by the Commonwealth of Virginia?

A Correct.

Q And is presently so?

A Presently so.

MR. SMITH: That is all I have.

MR. STALLINGS: May I see that, please?

CROSS-EXAMINATION

BY MR. STALLINGS:

Q Mr. Yates, are you familiar with -- Well, I'll have to pull it out since you don't have it here.

Are you familiar with the statute under the same section which says that the Commonwealth of Virginia will not indemnify or back the bonds sold on the Expressway?

A I'm not familiar with that portion of it.

Q Are you familiar with the fact that the Expressway is independently insured for liability?

A Yes.

Q Will you tell me is Interstate --

MR. SMITH: Wait a minute. Hold it.

MR. STALLINGS: Sir?

MR. SMITH: He's -- Okay.

MR. STALLINGS: Yes, it is independently insured.

MR. SMITH: It's not. The Department of Highways is independently insured.

MR. STALLINGS: I asked him, sir.

MR. SMITH: Okay. If he knows. You're asking something he doesn't know.

THE COURT: Well, let's find out what he knows, if he knows.

BY MR. STALLINGS:

Q Can you tell me if Interstate 264 is independently insured?

A Not that I know of. I have nothing to do with Interstate 264.

Q Well, maybe then you can tell me why it is necessary -- Well, how about Highway 58? Highway 58 -- Is that independently insured?

A Not that I know of.

Q Will you tell me the necessity of putting a

liability insurance policy on the Norfolk-Virginia Beach
Expressway and not Route 158?

A Well, the bond indenture requires that certain
amounts of insurance for various things be carried on any
toll facility.

Q Can you identify this document?

A This concerns the toll revenue bonds, Series
1965.

Q Okay, sir. Now, I ask you if you would
look down here on this last paragraph, and would you read
the last paragraph to the Court, please.

A "The bonds are payable from tolls and other
revenues of the toll road as provided in the trust indenture.
The faith and credit of the State of Virginia not pledged
thereto."

MR. STALLINGS: Your Honor, I would move
to introduce this as Plaintiff's Exhibit 1.

MR. SMITH: I have no objection.

(Marked and received by the Court as
Plaintiff's Exhibit 1.)

THE COURT: Okay. You can go ahead.

MR. STALLINGS: Thank you, sir.

BY MR. STALLINGS:

Q Does your function include anything to do with

1 the Chesapeake Bay Bridge Tunnel?

2 A No, we have nothing to do with the Chesapeake
3 Bay Bridge-Tunnel. It is operated by a Commission.

4 Q Set up by the Highway Department?

5 A Not the Highway Department.

6 Q Independent of the Highway Department?

7 A Independent of the Highway Department.

8 Q On the Coleman Bridge and the James River
9 Bridge -- Do you know if they have independent insurance
10 policies?

11 A I'm not sure. I wasn't there when they were
12 still under tolls. See, the tolls came off of those the
13 same time they came off of the Hampton Roads Bridge Tunnel
14 on June 3, 1976.

15 Q There are still tolls on the Elizabeth
16 River Tunnels?

17 A It is still a toll facility, and the bonds
18 have not all been retired.

19 Q Not all retired?

20 A Right.

21 Q And would you tell me that once the bonds
22 are retired on the Virginia Beach Toll Road, the statute
23 does require and it would be the Highway Department's
24 responsibility to stop the toll collection; is that correct?

25 A That is correct.

Q Do you know if, in fact, that retirement is ahead of schedule or behind schedule?

A At this time, that is ahead of schedule.

Q All right, sir. Now, concerning the paying of the interest and the retirement of the bonds and the operating expenditure of the toll road, it's my understanding that the toll road has an operating budget somewhere around a million dollars per year. I don't know how familiar you are with those figures.

A That's close.

Q Isn't it a fair statement that operating expenses are paid from the revenues collected from the toll road?

A That is correct.

Q So at this time the Commonwealth of Virginia and the State Treasury is not receiving any proceeds from the toll road?

A No.

Q And will not until the tolls are lifted; is that correct?

A That is correct.

Q Until the bonds are retired?

A Well, right. Correct.

MR. STALLINGS: Okay, sir. Thank you, sir.

That's all I have.

1 MR. SMITH: I have no further questions,
2 Your Honor.

3 THE COURT: What section of the code did you
4 point out, Doug?

5 MR. SMITH: Section 33.1-267.

6 THE COURT: Has somebody got mine?

7 MR. STALLINGS: Oh, yes, sir. I pulled it
8 and never got into it.

9 THE COURT: Is it in the main part or the
10 pocket part?

11 MR. STALLINGS: The main part, I believe,
12 Your Honor.

13 MR. SMITH: I am sure it is.

14 THE COURT: Well, 267 and following.

15 MR. SMITH: Oh, I'm sorry. You're right.
16 Actually, the toll road is set out under Paragraph
17 (k), "Definitions" there.

18 THE COURT: "The Norfolk-Virginia Beach
19 Highway, extending from a point in the vicinity of
20 the intersection of interstate route sixty-four and
21 primary route fifty-eight at Norfolk to some
22 feasible point between Londonbridge and primary
23 route sixty; however, the project authorized by
24 this subsection shall not be coupled or united with
25 any other project or projects for the purpose of

1 financing its construction and operation."

2 MR. SMITH: That's what brings it under that
3 toll act, and then the next section goes into the
4 powers of the State Highway Commission to build,
5 maintain, and so forth. That's 269.

6 There is a Section (2) that raises the issue
7 of the document that he put into evidence.

8 THE COURT: Now, it's your position that the
9 facility is owned by the State Highway Commission?

10 MR. SMITH: Yes, sir. Just like I had a
11 case recently where they sued the State Highway
12 Department concerning an accident some truck was
13 involved in. It's really Commonwealth of Virginia.

14 THE COURT: I'm not saying it's not. I'm
15 just inquiring.

16 MR. SMITH: Well, this impowers the State
17 Highway Commission to build the Norfolk-Virginia
18 Beach Expressway and tells them what to do and how
19 to issue bonds and whatever.

20 THE COURT: Well, Paragraph (1) says, "Acquire
21 by purchase or condemnation," so that would indicate
22 that it doesn't own it yet, wouldn't it, if it's
23 got the power to acquire it or the power to purchase
24 it, either to acquire by purchase or condemnation?

25 MR. SMITH: It gives them the power to acquire

1 any one or more of those projects which are listed
2 over in the foregoing one, the 268.

3 THE COURT: All right. Well, that's right,
4 but wouldn't that indicate --

5 MR. SMITH: Issue bonds and collect tolls.

6 THE COURT: Wouldn't that indicate if they've
7 got the power to acquire either by condemnation or
8 purchase that they don't own it now?

9 MR. SMITH: If they don't, it wouldn't be
10 there.

11 THE COURT: I'm just asking you.

12 MR. SMITH: No, this statute simply gives the
13 State Highway Department power to build the toll road.
14 Simple as that. It spells out the various ones.
15 See, it covers different ones here: Rappahannock
16 River Bridge, James River Bridge -- It covers them
17 all.

18 THE COURT: But all the way through, Doug --
19 Take 33.1-270. It says, "The Commission shall acquire
20 or construct, as the case may be, under the provisions
21 of this article, each of the projects included in
22 the undertaking, at the earliest dates", so on and
23 so forth. Then it goes on to 271, "Purchase of
24 Projects: The Commission may acquire by purchase,
25 whenever it shall deem such purchase expedient, any

of the projects set forth in subsection (2) of 33.1-268" -- which includes the toll facility -- "upon such terms and at such prices as may be reasonable and can be agreed upon between the Commission and the owner thereof."

MR. SMITH: Well, I think here again you're referring to, like, the Elizabeth River Tunnel Commission, Your Honor. They acquired -- The State of Virginia acquired the Elizabeth River -- the tunnel and so forth from the Elizabeth River Tunnel Commission, and that's what they're referring to there.

THE COURT: Is the Elizabeth River Tunnel Commission listed under 33.1-268?

MR. SMITH: I'm not sure.

THE COURT: Looks to me like that thing may be neither fish nor fowl.

MR. STALLINGS: Your Honor, there's another whole issue right in that code which provides that the state -- The state has no liability whatsoever on the bonds that have been sold, so if you want to be technical as to the ownership at this time, the ownership is in the bondholders. They're the people who own the road until the bonds are retired. The state will then, as the code gives them the

authority to do so -- It will then acquire it. It will then be the state's animal, and the tolls will fall off.

THE COURT: Doug, you say that -- Now you say that 33.1-271 which is titled "Purchase of Projects" -- And you say that that applies to the Elizabeth River -- That isn't even mentioned?

MR. SMITH: I know. It --

THE COURT: Well, show me something else in there that it applies to; that you say it applies to.

MR. STALLINGS: Okay. Hampton Roads Bridge Tunnel.

MR. SMITH: That was operated by a commission, built by a commission such as -- or created by the legislature. See, there was never a Hampton -- Excuse me. There was never a Norfolk-Virginia Beach Expressway Commission, and he can't show it, and that's what I was trying to establish here. There was never a commission set up such as the Norfolk-Virginia Beach Expressway Commission.

THE COURT: Can you tell me why?

MR. SMITH: Because the State of Virginia is the one who actually built the toll road.

MR. STALLINGS: The State of Virginia didn't put a nickel into this. I'm suing the bondholders.

I'm suing the toll road. I'll worry about collecting it once I get my judgment.

Your Honor, if we can get back to the legislative intent of why it was done that way, it's the old Harry Byrd philosophy of pay as you go. The state didn't want to shell out, so they sold the bonds, and the state cannot pick up the options until the construction and the obligation of it is paid for; then the tolls come off and it becomes the state's toll road.

MR. SMITH: Your Honor, there is one other thing Mr. Yates has brought to my attention. The State of Virginia purchased the James River Bridge from private interests. In other words, the James River Bridge was apparently owned by private interests.

MR. STALLINGS: What is the difference in private interests and bondholders who hold the bonds?

THE COURT: Yes.

MR. SMITH: What's the difference between the bondholders and a mortgage? Are you going to say you can sue all the mortgage companies because someone has a mortgage on something?

THE COURT: But I think from what you all have told me and it's very limited at this point -- I think that there is a good question as to who

does own -- at this point as to who owns the facilities.

It goes on to say in 33.1-272, "Condemnation of Projects and Property. The Commission, whenever a reasonable price cannot be agreed upon or whenever the owner is legally incapacitated or is absent or is unable to convey valid title or is unknown, may acquire by condemnation a project or projects contemplated by 33.1-271", and that goes on back and refers to 33.1-268, subsection (2), and so on and so forth.

I think there is a real good question about who does own the thing at this time, but the Highway Department has not elected to take it over yet.

MR. SMITH: The Highway Department -- Mr. Yates is an employee of the Highway Department. Excuse me.

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R. D. YATES, recalled as a witness on behalf of the defendants, having been previously sworn, resumed the stand, was examined and testified as follows:

DIRECT EXAMINATION (Rec.)

BY MR. SMITH:

Q Mr. Yates, who do you work for and who pays you?

A I work for the Virginia Department of Highways and Transportation and am paid -- My salary is paid by the Virginia Department of Highways.

Q Who does Mr. Ogden work for?

A He also works for the Virginia Department of Highways.

Q Who pays the salaries of the thirty or forty employees of the Norfolk-Virginia Beach Toll Road? Who pays the salaries of those people?

A Well, the actual salaries of the employees are paid out of the bond money.

MR. STALLINGS: That's my answer.

THE WITNESS: They're paid out of the bond indenture or the proceeds of the sale of tickets.

CROSS-EXAMINATION (Rec.)

BY MR. STALLINGS:

Q It doesn't come from the State Treasury?

A No.

MR. STALLINGS: Thank you, sir.

Your Honor, I think that to get right to the meat of this, I've got a case that couldn't be any more on point, and the real issue is who am I suing and who, if I get judgment, will the money come from.

In Morris versus Elizabeth River Tunnel District the Court clearly states that the construction of sovereign immunity is whether the money is coming out of the State Treasury. The state can't have it both ways. They can't go out and spend \$40,000 a year on an insurance policy for liability. They can't have bonds which they don't back up and yell when they get sued, scream sovereign immunity. This case holds that if claims are not to be paid from the State Treasury, then there's no sovereign immunity issue. They are being paid from other sources; a two million dollar liability insurance policy that is on the Norfolk-Virginia Beach Expressway and from the bonds

that are being held by the -- that are now retiring and paying the operation of the toll road. That is my source and here's my case, and I ask that the motion be dismissed.

MR. SMITH: Your Honor, there is one simple answer to that. The defendant in that case is the Elizabeth River Tunnel District and the Elizabeth River Tunnel Commission, Your Honor, which was a commission established and set up by state law especially for the construction, operation and maintenance of the Elizabeth River Tunnels. It was one of those state organizations which was set up especially for that purpose. We do not have that in this case, Your Honor.

What we have here, Your Honor, is we have the State Highway Department under this section that I've just referred to building the toll road. Now, I know the point he's making. He's saying, well, the operation of this is paid for and so forth by revenue of the people going through it and, therefore, you get around to sovereign immunity; but I think Your Honor is well aware that the state cannot be sued except with its own permission.

Now, more currently, Your Honor, and we've got to get more current, Your Honor, and a little more

on point is a case of Lawhorne versus Harlan, Virginia 214.405. That's a case involving the University of Virginia Hospital in which it had a paying patient who went in and was allegedly injured because of malpractice on the part of one of the doctors on the staff, one of the paid employees of the hospital -- University of Virginia Hospital -- and also because of the allegedly improper procedures which had been established by the administrative staff; and they not only held in this case, Your Honor, that the state was immune, but they held that immunity extended to the employees in this particular case.

THE COURT: Is this Mr. Ogden?

MR. OGDEN: Yes, sir.

THE COURT: Who is your employer?

MR. OGDEN: Virginia Department of Highways and Transportation.

THE COURT: Virginia Department of Highways and Transportation?

MR. OGDEN: Yes, sir.

MR. STALLINGS: Your Honor, if I might, calling an orange an apple doesn't make it an apple. Now, because he gets his check from the Virginia department of Highways, that's not where the money

comes from. The money is coming from the toll road.

Do you know -- If I could ask you a question, Mr. Ogden. Do you know where your check comes from -- Where the money to pay you comes from?

MR. OGDEN: From the collection of tolls.

MR. STALLINGS: Comes from collection of the toll?

MR. OGDEN: Yes, sir.

MR. SMITH: It is supposed to be self-sustaining. I'll concede that.

MR. STALLINGS: Then what's the point of liability insurance?

MR. SMITH: That is immaterial.

MR. STALLINGS: It's not immaterial because I'm going after an insurance company. I don't want one penny from the State Treasury.

MR. SMITH: The State Highway Department has a lot of other coverage, too.

MR. STALLINGS: Well, they might get sued on it.

THE COURT: Only one at a time.

MR. STALLINGS: Your Honor, why is the public by the toll road out of its revenues paying \$40,000 a year for a liability policy and then walk into court and say, "But you can't sue

us on it anyway because we've got sovereign immunity"?

THE COURT: What's the rational behind a church which has charitable immunity which carries insurance and then the insurance company hides behind this charitable immunity? They can do it.

MR. STALLINGS: The same reasoning. The church buys an insurance policy for the same reason as the toll road. They want to protect their patrons. The toll road wants to protect the bondholders because they know good and well the state doesn't stand behind it. If I was a sophisticated bond buyer, which I'm not, and looked at those bonds and saw that the state doesn't back them up -- Suppose Joe Blow sues the toll road. I would want liability insurance to come in so they wouldn't grab off the revenue that's supposed to be paid to me as a bondholder.. That's what a sophisticated bondholder would want. That's who I'm suing.

THE COURT: I'm going to put you gentlemen to work. I'm going to get you gentlemen to write me something on it because it's really not clear to me who owns -- at this point, who owns the facility. They keep talking about, you know, that the Highway Commission -- They may acquire by purchase or by condemnation and all this and that, which

indicates to me at this point that they don't own it. If they did own it, why would they have to acquire it?

MR. SMITH: That was a statute passed back in 1952, Your Honor, when they were contemplating at that time -- Yes, they were contemplating acquiring -- Where is that statute anyway?

THE COURT: But if they owned it, why would they have to acquire it?

MR. SMITH: They're talking about several different projects.

THE COURT: Well, I understand. Well, why don't they -- If they wanted to exempt this one, they could say, "With the exemption of the Norfolk-Virginia Beach Highway which is already owned by the Highway Commission, may own, construct" and so on and so forth. If they intended to do that, why didn't they do it?

MR. SMITH: As I read the section, in other words, this is the Revenue Bond Act. Under the "Definitions" it sets up and tells them what the state can do, and among other things, they can acquire the York River Bridge, the James River Bridge or the Norfolk-Virginia Beach Expressway. They had to have the authority before the Highway

Department -- before they could have issued the bonds, sold the bonds and built the Expressway.

Now, I'm sure that I can get evidence in here as to who actually supervised the construction and so forth. I think we're going back because it goes back to 1950 some.

THE COURT: I don't know how I'm going to rule, but is it fair to allow the Norfolk-Virginia Beach -- What is it?

MR. STALLINGS: Toll Road.

THE COURT: Norfolk-Virginia Beach Expressway to come along and not have any commissioners; to have all of their employees paid out of the tolls; nothing coming from the Commonwealth of Virginia; have everything paid out of the tolls and set them out and have them on a different footing from the Elizabeth River Tunnel District? Do you think it is?

MR. SMITH: I think the state had the option to do it, and that's the way they chose to do. I think number one is -- Let me finish.

MR. STALLINGS: Excuse me.

MR. SMITH: I think number one is had they so desired, they could have done so with the Elizabeth River Tunnel or the Hampton Roads

Bridge-Tunnel or the Chesapeake Bay Bridge Tunnel.

THE COURT: In the Morris case, the Commonwealth couldn't have gotten exemption.

MR. SMITH: The State of Virginia did. They themselves. The only difference between this and any other project they did is when they borrowed money, and I don't know. I guess they customarily don't borrow money, but they could to build Interstate 264. They could issue bonds. The State of Virginia doesn't customarily do that, but in this case when they did that they exempted the state from liability. That's the only distinction.

MR. HANSON: When this area was built, remember we wanted a road down here, and the state wouldn't build us one. They said, "The only way you can do it is by an independent road financed by bonds which you yourself will finance by the toll", and now the state wants to hide out.

THE COURT: In this area, we always pay by tolls. For anything in this area, we've always got to pay. Some states I go to and some of the areas in this state have beautiful facilities, some cut through mountains and costing millions of dollars, I guess, to build, and no tolls. In this area, we always pay tolls, but that's something else again.

MR. SMITH: These other facilities -- most -- Well, ninety per cent of them were built by commissions that were established -- legally established commissions. In this instance, the Commonwealth of Virginia did it itself. Therefore, the real party in issue is the Commonwealth of Virginia. You can call it what you want, but the real party in issue is the Commonwealth of Virginia. We call it the Virginia Department of Highways.

THE COURT: Well, why then in the Morris case didn't the Commonwealth say, "Well, the real party in issue is the Commonwealth of Virginia"? That's what I'm asking you, Doug. Is it fair? Let's see.

MR. SMITH: I'm not going by -- I don't know what's fair, Your Honor. I'm just going by the law.

MR. STALLINGS: Doesn't consider what's fair.

MR. SMITH: All I know is what these cases say.

THE COURT: And is it fair to say that the facility which is apparently neither fish nor fowl -- You can say it's operated by the Commonwealth of Virginia, but all the salaries and everything are paid by the tolls, and have them exempt from the ruling in Morris versus Elizabeth River just because of the

fact that they don't have a commissioner and are not a commission, then say, well, even though everything is paid for, this -- maintenance, salaries, everything. The Commonwealth of Virginia hasn't spent one dime. Everything is paid for by the tolls, but they come under a different footing from the Elizabeth River Tunnel District because the Elizabeth River Tunnel District is a commission. That doesn't seem like fair play to me.

MR. SMITH: It may not be, Your Honor, but then again, I think it's the option of the Commonwealth. It's just like the Tidewater Transportation District, the TRT. That is owned by commission. It's run by a commission established by the state. A quasi-public corporation. Not public either, but it's a governmental corporation set up strictly for the operation of the Tidewater Regional Transit.

THE COURT: Probably not self-sustaining.

MR. SMITH: No, it's subsidized; about sixty or eighty per cent subsidized.

MR. STALLINGS: Your Honor, I think one more point we've all overlooked is what is the purpose of sovereign immunity? So you don't wipe out the sovereign. This goes back to the days of

kings. You can't sue the sovereign. Meanwhile, as the cases will support, in the State of Virginia the purpose of sovereign immunity is to protect the state from tort actions which would deplete the State Treasury because the state performs a public function for all.

I'm not going after any proceeds of the State Treasury. I'm going after two sources: an insurance policy and the bonds.

THE COURT: But to get back to my question to you and --

MR. STALLINGS: Yes, sir.

THE COURT: And a while back I could have said hospitals, but there's a special statute on hospitals now, but my question to you once again is that a church -- your church, my church, whoever's church -- qualifies under the eleemosynary doctrine and, therefore, they have certain benefits insofar as negligence is concerned and so on and so forth. Yet they maintain insurance policies, and any claims against them are going to be paid out of the insurance company, but that still doesn't take them out of the way of the eleemosynary exemption.

MR. STALLINGS: No, sir, it doesn't but the purpose of charitable immunity and sovereign immunity is

different. Sovereign immunity is to protect the State Treasury.

THE COURT: What's the purpose of charitable immunity?

MR. STALLINGS: Well, charities can't function. It's to protect the coffers of the charities.

THE COURT: But when the charity buys an insurance policy, doesn't that take that away -- that purpose away?

MR. SMITH: I think that could also be an argument to argue against charitable immunity.

THE COURT: But then the counter argument to that is if the legislature of Virginia intended that churches be taken out, they would have taken them out when they took the hospitals out, under certain conditions, and they didn't do it.

MR. SMITH: Also overlooking the fact that somebody pays the insurance premium.

MR. STALLINGS: That's right. The toll road out of the revenues.

MR. SMITH: So it's not free money. Let's put it that way.

MR. STALLINGS: I didn't choose to insure it.

THE COURT: Yes, it's an interesting question. It really is. I'm not sure of the answer. It looks

like that our toll road out there that I've been enjoying by throwing my dimes and quarters in might be neither fish nor fowl. I don't know what it is.

I'm going to let you all write something on it.

MR. STALLINGS: Okay, sir.

THE COURT: It's your motion, Doug. How much time do you want?

MR. SMITH: I'm right crowded right now. A couple of weeks.

THE COURT: Oh, yes. Well, just suit yourself. It's not set for trial, is it?

MR. STALLINGS: Yes, sir. May. A couple of weeks off.

THE COURT: We can always take it off. We aren't going anywhere.

MR. SMITH: Let me have three weeks. I'm right crowded right now.

THE COURT: Okay. You have three weeks to submit a memo. How much time do you want, Sonny?

MR. STALLINGS: To answer him, Judge?

THE COURT: Um-hum.

MR. STALLINGS: A week.

THE COURT: A week to answer. Do you want five days or so to rebut?

MR. SMITH: Well, I might. Five days. I might want to respond to something he might say.

THE COURT: All right. Now, do more than just cite the -- I want you to do some exhaustive research. See if you can find parallel situations in other states or whatever.

MR. STALLINGS: I can.

THE COURT: Do give me some guidance on it. Now, it is an interesting question. Well, whatever we do, maybe we'll make some new law.

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EXHIBIT #A

STATE HIGHWAY COMMISSION
OF VIRGINIA

to

VIRGINIA NATIONAL BANK

As Trustee

Trust Indenture

Dated as of July 1, 1965

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THIS INDENTURE, dated for convenience of reference as of the 1st day of July, 1965, by and between

STATE HIGHWAY COMMISSION

(hereinafter sometimes called the "Commission"), an agency of the State of Virginia (also known as the "Commonwealth of Virginia"), and

VIRGINIA NATIONAL BANK,

a national banking association duly organized and existing under the laws of the United States of America and having its principal office in the City of Norfolk, Virginia, which is authorized under such laws to exercise corporate trust powers and is subject to examination by federal authority, as trustee (said banking association and any bank or trust company becoming successor trustee under this Indenture being hereinafter sometimes called the "Trustee"), WITNESSETH:

WHEREAS, by virtue of Article 8, Chapter 3, Title 33, Code of Virginia, 1950, as amended (hereinafter sometimes called the "State Revenue Bond Act"), the Commission is authorized and empowered

(a) to acquire by purchase or by condemnation, construct, improve, operate and maintain any one or more of the projects mentioned in the State Revenue Bond Act, including, among others, a highway extending from a point in the vicinity of the intersection of Interstate Route 64 and U. S. Route 58 in the City of Norfolk, Virginia, to some feasible point between Londonbridge and U. S. Route 60 in the City of Virginia Beach, Virginia,

(b) to issue revenue bonds of the State of Virginia to pay the cost of such projects, and

(c) to fix and collect tolls and other charges for the use of such projects; and

WHEREAS, the Consulting Engineers (hereinafter defined) have made investigations and studies and have prepared and filed with the Commission their engineering report dated October 25, 1965, describing a toll road, approximately 12.1 miles in length, extending from the interchange of Interstate Routes 64 and 264, immediately south of U. S.

Route 58, in the City of Norfolk, Virginia, to a point in the City of Virginia Beach, Virginia, east of Londonbridge and west of U. S. Route 60, having an eastbound roadway terminus at 21st Street and a westbound roadway terminus at 22nd Street in the City of Virginia Beach (said toll road being hereinafter sometimes called the "Project"), and setting forth their estimates of the cost of constructing the Project and of the amounts required for maintenance, repair and operation of the Project and for reserves for such purposes; and

WHEREAS, the Traffic Engineers (hereinafter defined) have made investigations and studies and have prepared and filed with the Commission their traffic report dated July 31, 1965, describing the Project and setting forth their estimates with respect to the traffic to use the Project and the revenues to be received therefrom based on the tolls recommended by them; and

WHEREAS, the Commission has determined the location of the Project and has approved plans for the construction of the Project as recommended by the Consulting Engineers; and

WHEREAS, the Commission has determined to proceed with the construction of the Project and has determined that the proceeds of the revenue bonds to be issued initially under the provisions of this Indenture will be required and will be sufficient to pay the cost of the Project as such cost is defined in the State Revenue Bond Act; and

WHEREAS, the Commission has determined to provide for the issuance from time to time of additional revenue bonds of the State on a parity with the bonds initially issued under the provisions of this Indenture for the purpose of paying all or any part of the cost of any additions, improvements and enlargements to the Project, if and to the extent then permitted by law; and

WHEREAS, for the purpose of paying the cost of the Project, the Commission has by resolution duly authorized the issuance of toll revenue bonds of the State of Virginia in the aggregate principal amount of Thirty-four Million Dollars (\$34,000,000), designated "State of Virginia Toll Revenue Bonds (Series 1965) (Norfolk-Virginia Beach Toll Road)", dated as of the 1st day of July, 1965, and bearing interest

and maturing, subject to the right of prior redemption, all as hereinafter set forth (said bonds and all additional bonds at any time issued under this Indenture being hereinafter sometimes called the "bonds"); and

WHEREAS, the Commission has determined that the coupon bonds to be issued hereunder and the interest coupons to be attached thereto, the registered bonds without coupons to be issued hereunder, and the certificate of authentication by the Trustee to be endorsed on all such bonds shall be, respectively, substantially in the following forms, with such variations, omissions and insertions as are required or permitted by this Indenture:

(Form of Coupon Bonds)

No.

\$5,000

UNITED STATES OF AMERICA

STATE OF VIRGINIA

TOLL REVENUE BONDS (SERIES 1963)

(NORFOLK-VIRGINIA BEACH TOLL ROAD)

Due January 1, 2005

The State of Virginia (also known as the "Commonwealth of Virginia"), by the State Highway Commission as an agency thereof, for value received, hereby promises to pay, solely from the special fund provided therefor as hereinafter set forth, to the bearer on the 1st day of January, 2005 (or earlier as hereinafter referred to), upon the presentation and surrender hereof, the principal sum of

FIVE THOUSAND DOLLARS

and to pay, solely from said special fund, interest thereon from the date hereof at the rate of per centum (....%) per annum until payment of said principal sum, such interest to the maturity hereof being payable semi-annually on the 1st days of January and July in each year upon the presentation and surrender of the coupons representing such interest as the same respectively become due. Both the principal of and the interest on this bond are payable in any coin or currency of the United States of America which on the respective dates of payment thereof is legal tender for the payment of public and private debts. The principal of this bond and the interest hereon are payable at the principal office of Virginia National Bank, in the City of Norfolk,

Virginia, or, at the option of the holder, at the principal office of Chemical Bank New York Trust Company, in the Borough of Manhattan, City and State of New York.

The State of Virginia is not obligated to pay this bond or the interest hereon except from the special fund provided therefor from tolls and revenues of the Toll Road (hereinafter defined), and the faith and credit of the State are not pledged to the payment of the principal hereof or the interest hereon, and the State is not, directly or indirectly or contingently, obligated to levy or to pledge any form of taxation whatever therefor or to make any appropriation for the payment of the principal of or the interest on this bond except from such special fund.

This bond is one of a duly authorized series of revenue bonds (herein called the "bonds") known as "State of Virginia Toll Revenue Bonds (Series 1965) (Norfolk-Virginia Beach Toll Road)", dated as of the 1st day of July, 1965, and issued for the purpose of paying the cost of a toll road extending from the interchange of Interstate Routes 64 and 264, immediately south of U. S. Route 58, in the City of Norfolk, Virginia, to a point in the City of Virginia Beach, Virginia, east of Londonbridge and west of U. S. Route 60, having an eastbound roadway terminus at 21st Street and a westbound roadway terminus at 22nd Street in the City of Virginia Beach (said toll road being herein called the "Project"). The bonds of this series aggregate Thirty-four Million Dollars (\$34,000,000) in principal amount, the proceeds of which bonds were estimated at the time of their issuance to be sufficient to provide funds for such purpose.

All of the bonds are issued under and pursuant to a trust indenture (said indenture, together with all indentures supplemental thereto as therein permitted, being herein called the "Indenture"), dated as of the 1st day of July, 1965, by and between the State Highway Commission (herein sometimes called the "Commission") and Virginia National Bank, in the City of Norfolk, Virginia, as trustee (said banking association and any bank or trust company becoming successor trustee under the Indenture being herein called the "Trustee"), an executed counterpart of which Indenture is on file at the principal office of the Trustee. Reference is hereby made to the Indenture for the provisions, among

others, with respect to the custody and application of the proceeds of bonds issued under the Indenture, the collection and disposition of revenues, the fund charged with and pledged to the payment of the interest on and the principal of the bonds, the nature and extent of the security, the terms and conditions on which the bonds of each series are or may be issued, the rights, duties and obligations of the Commission and of the Trustee and the rights of the holders of the bonds, and, by the acceptance of this bond, the holder hereof assents to all of the provisions of the Indenture.

The Indenture provides that, if and to the extent necessary to provide additional funds for completing payment of the cost of the Project, additional series of bonds may be issued under the Indenture for such purpose. The Indenture also provides, if and to the extent then permitted by law, for the issuance, from time to time, under the conditions, limitations and restrictions therein set forth, of additional series of bonds for the purpose of paying all or any part of the cost of any additions, improvements and enlargements to the Project (the Project, together with any additions, improvements and enlargements thereto, being herein called the "Toll Road").

This bond is issued and the Indenture was made and entered into under and pursuant to the Constitution and laws of the State of Virginia, particularly Article 8, Chapter 3, Title 33, Code of Virginia, 1950, as amended (herein called the "State Revenue Bond Act"), and under and pursuant to resolutions duly adopted by the Commission.

The Indenture, in accordance with and as required by the State Revenue Bond Act, provides for the fixing, revising, charging and collecting by the Commission of tolls for the use of the Toll Road and for revising such tolls from time to time in order that such tolls and other revenues of the Toll Road will be sufficient to provide funds to pay the cost of maintaining, repairing and operating the Toll Road and to pay the principal of and the interest on all bonds issued under the Indenture as the same shall become due and payable, and to create reserves for such purposes. The Indenture also provides for the deposit of a sufficient amount of such tolls and other revenues, over and above

such cost of maintenance, repair and operation and reserves for such purposes, to the credit of a special fund designated "State of Virginia Toll Revenue Bonds (Series 1965) Interest and Sinking Fund" (herein called the "Sinking Fund") to pay such principal and interest. The Sinking Fund is pledged to and charged with the payment of the principal of and the interest on all bonds issued under the Indenture.

The bonds are issuable as coupon bonds in the denomination of \$5,000 each, and as registered bonds without coupons in denominations of \$5,000 or any multiple thereof. At the principal office of the Trustee, in the manner and subject to the limitations and conditions provided in the Indenture, registered bonds without coupons may be exchanged for an equal aggregate principal amount of coupon bonds of the same series, bearing interest at the same rate and having attached thereto coupons representing all unpaid interest due or to become due thereon, or of registered bonds without coupons of the same series, of authorized denominations and bearing interest at the same rate, and coupon bonds with all coupons appertaining thereto representing all unpaid interest due or to become due thereon may in like manner be exchanged for an equal aggregate principal amount of registered bonds without coupons of the same series, of authorized denominations and bearing interest at the same rate.

The bonds of this series at the time outstanding may be redeemed prior to their maturity either

(a) in whole, on any date not earlier than January 1, 1976, at the option of the Commission, from any moneys that may be made available for such purpose, at the principal amount of the bonds to be redeemed, together with the interest accrued thereon to the date fixed for redemption, plus a premium of 4% of such principal amount if redeemed on or prior to December 31, 1980, 3% if redeemed thereafter and on or prior to December 31, 1985, 2% if redeemed thereafter and on or prior to December 31, 1990, 1% if redeemed thereafter and on or prior to December 31, 1995, $\frac{1}{2}$ of 1% if redeemed thereafter and on or prior to December 31, 2000, and without premium if redeemed thereafter, or

(b) in part, on any interest payment date not earlier than January 1, 1971, from moneys in the Sinking Fund, at the principal amount of the bonds to be redeemed, together with the interest accrued thereon to the date fixed for redemption, plus a premium of 3% of such principal amount if redeemed on or prior to July 1, 1975, 2% if redeemed thereafter and on or prior to July 1, 1980, 1% if redeemed thereafter and on or prior to July 1, 1985, $\frac{1}{2}$ of 1% if redeemed thereafter and on or prior to July 1, 1990, and without premium if redeemed thereafter.

The moneys in the Sinking Fund available for the purchase or redemption of bonds shall be allocated to all series of bonds outstanding under the Indenture in the manner provided in the Indenture.

If less than all of the bonds of a series shall be called for redemption, the particular bonds or portions of registered bonds without coupons to be redeemed from such series shall be selected by lot as provided in the Indenture.

Any such redemption, either in whole or in part, shall be made upon at least thirty (30) days' prior notice by publication and otherwise as provided in the Indenture, and shall be made in the manner and under the terms and conditions provided in the Indenture. On the date designated for redemption, notice having been published and moneys for payment of the redemption price and the accrued interest being held by the Trustee or by the paying agents, all as provided in the Indenture, the bonds or portions of registered bonds without coupons so called for redemption shall become and be due and payable at the redemption price provided for redemption of such bonds or such portions thereof on such date, interest on such bonds or such portions thereof so called for redemption shall cease to accrue, the coupons for any such interest payable subsequent to the redemption date shall be void, such bonds or such portions thereof so called for redemption shall cease to be entitled to any benefit or security under the Indenture, and the holders or registered owners thereof shall have no rights in respect of such bonds or such portions thereof so called for redemption except to receive payment of the redemption price thereof and the accrued interest so held by the Trustee or by the paying agents.

The holder of this bond shall have no right to enforce the provisions of the Indenture or to institute action to enforce the covenants therein, or to take any action with respect to any event of default under the Indenture, or to institute, appear in or defend any suit or other proceeding with respect thereto, except as provided in the Indenture.

Modifications or alterations of the Indenture or of any indenture supplemental thereto may be made by the Commission and the Trustee only to the extent and in the circumstances permitted by the Indenture.

As declared by the State Revenue Bond Act, this bond shall have, as between successive holders, all the qualities and incidents of negotiable instruments under the negotiable instruments law of the State of Virginia, and nothing contained in this bond or in the Indenture shall affect or impair the negotiability of this bond.

This bond is issued with the intent that the laws of the State of Virginia shall govern its construction.

All acts, conditions and things required by the Constitution and laws of the State of Virginia and the rules and regulations of the Commission to happen, exist and be performed precedent to and in the issuance of this bond and the execution of the Indenture have happened, exist and have been performed as so required.

This bond shall not be valid or become obligatory for any purpose or be entitled to any benefit or security under the Indenture until it shall have been authenticated by the execution by the Trustee of the certificate of authentication endorsed hereon.

IN WITNESS WHEREOF, the State of Virginia, by the State Highway Commission as an agency thereof, has caused this bond to be signed by the State Highway Commissioner, who is the Chairman of said Commission, and the official seal of said Commission to be affixed hereto and attested by the Secretary of said Commission, and the attached interest coupons to bear the facsimile signature of said State Highway Commissioner, all as of the 1st day of July, 1965.

Attest:

.....
State Highway Commissioner

.....
Secretary of the
State Highway Commission

(FORM OF COUPONS)

No.

\$.....

On 1, 19...., the State of Virginia, by the State Highway Commission as an agency thereof, will pay to bearer (unless the bond mentioned below shall previously have become payable as provided in the Indenture referred to in said bond and provision for payment thereof shall have been duly made) at the principal office of Virginia National Bank, in the City of Norfolk, Virginia, or, at the option of the bearer, at the principal office of Chemical Bank New York Trust Company, in the Borough of Manhattan, City and State of New York, upon the presentation and surrender hereof, the sum of Dollars in any coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts, solely from the special fund referred to in, and for the semi-annual interest then due upon, its Toll Revenue Bond (Series 1965) (Norfolk-Virginia Beach Toll Road), dated as of July 1, 1965, No.

.....
State Highway Commissioner

(Form of Registered Bonds Without Coupons)

Same as Form of Coupon Bonds except as follows:

1. *Substitute the following for the caption and the first paragraph:*

No. R

\$.....

UNITED STATES OF AMERICA

STATE OF VIRGINIA

TOLL REVENUE BONDS (SERIES 1965)

(NORFOLK-VIRGINIA BEACH TOLL ROAD)

Due January 1, 2005

The State of Virginia (also known as the "Commonwealth of Virginia"), by the State Highway Commission as an agency thereof, for value received, hereby promises to pay, solely from the special fund provided therefor as hereinafter set forth, to
..... or registered assigns or legal representative, on the 1st day of January, 2005 (or earlier as hereinafter referred to), upon the

presentation and surrender hereof at the principal office of the Trustee (hereinafter mentioned), the principal sum of

..... DOLLARS

in any coin or currency of the United States of America which on the date of payment thereof is legal tender for the payment of public and private debts, and to pay, solely from said special fund, to the registered owner hereof by check or draft mailed to the registered owner at his address as it appears on the bond registration books of the State Highway Commission, interest on said principal sum from at the rate of per centum (....%) per annum until payment of said principal sum, such interest to the maturity hereof being payable semi-annually on the 1st days of January and July in each year in like coin or currency.

2. *Substitute the following for the paragraph concerning the notice of redemption and the effect thereof:*

Any such redemption, either in whole or in part, shall be made upon at least thirty (30) days' prior notice by publication and otherwise as provided in the Indenture, and shall be made in the manner and under the terms and conditions provided in the Indenture. On the date designated for redemption, notice having been published and moneys for payment of the redemption price and the accrued interest being held by the Trustee or by the paying agents, all as provided in the Indenture, the bonds or portions of registered bonds without coupons so called for redemption shall become and be due and payable at the redemption price provided for redemption of such bonds or such portions thereof on such date, interest on such bonds or such portions thereof so called for redemption shall cease to accrue, such bonds or such portions thereof so called for redemption shall cease to be entitled to any benefit or security under the Indenture, and the holders or registered owners thereof shall have no rights in respect of such bonds or such portions thereof so called for redemption except to receive payment of the redemption price thereof and the accrued interest so held by the Trustee or by the paying agents. If a portion of this bond shall be called for redemption, a new bond or bonds in principal amount equal to the unredeemed portion hereof will be issued to the registered owner upon the surrender hereof.

3. *Substitute the following for the paragraph concerning negotiability:*

This bond is transferable by the registered owner hereof in person

or by his attorney or legal representative at the principal office of the Trustee but only in the manner and subject to the limitations and conditions provided in the Indenture, and upon surrender and cancellation of this bond. Upon any such transfer the Commission shall execute and the Trustee shall authenticate and deliver in exchange for this bond a new registered bond or bonds without coupons, registered in the name of the transferee, of authorized denominations, or, at the option of the transferee, coupon bonds with coupons attached representing all unpaid interest due or to become due thereon, in aggregate principal amount equal to the principal amount of this bond, of the same series and bearing interest at the same rate.

As declared by the State Revenue Bond Act, this bond shall have, as between successive holders, all the qualities and incidents of negotiable instruments under the negotiable instruments law of the State of Virginia, subject to the provisions for transfer stated herein and contained in the Indenture, and, subject to such provisions, nothing contained in this bond or in the Indenture shall affect or impair the negotiability of this bond.

4. Substitute the following for the witnessing clause:

IN WITNESS WHEREOF, the State of Virginia, by the State Highway Commission as an agency thereof, has caused this bond to be signed by the State Highway Commissioner, who is the Chairman of said Commission, and the official seal of said Commission to be affixed hereto and attested by the Secretary of said Commission, all as of the 1st day of July, 1965.

5. Omit the Form of Coupons.

(To be endorsed on all bonds)

CERTIFICATE OF AUTHENTICATION

This bond is one of the bonds of the series designated therein and issued under the provisions of the within mentioned Indenture.

VIRGINIA NATIONAL BANK,
As Trustee

By.....
Authorized Officer

and

WHEREAS, by virtue of the State Revenue Bond Act, the Commission is authorized to issue revenue bonds of the State as hereinafter provided, to enter into this Indenture and to do or cause to be done all the acts and things herein provided or required to be done as hereinafter covenanted; and

WHEREAS, the execution and delivery of this Indenture have been duly authorized by resolution of the Commission; and

WHEREAS, all acts, conditions and things required by the Constitution and laws of the State of Virginia and by the rules and regulations of the Commission to happen, exist and be performed precedent to and in the execution and delivery of this Indenture have happened, exist and have been performed as so required, in order to make this Indenture a legal, valid and binding trust indenture for the security of the bonds in accordance with its terms; and

WHEREAS, the Trustee has accepted the trusts created by this Indenture and in evidence thereof has joined in the execution hereof;

NOW, THEREFORE, THIS INDENTURE WITNESSETH, that in consideration of the premises, of the acceptance by the Trustee of the trusts hereby created, and of the purchase and acceptance of the bonds by the holders thereof, and also for and in consideration of the sum of One Dollar to the Commission in hand paid by the Trustee at or before the execution and delivery of this Indenture, the receipt of which is hereby acknowledged, and for the purpose of fixing and declaring the terms and conditions upon which the bonds are to be issued, authenticated, delivered, secured and accepted by all persons who shall from time to time be or become holders thereof, and in order to secure the payment of all the bonds at any time issued and outstanding hereunder and the interest and the redemption premium, if any, thereon according to their tenor, purport and effect, and in order to secure the performance and observance of all the covenants, agreements and conditions therein and herein contained, the Commission has executed and delivered this Indenture and has pledged and does hereby pledge to the Trustee the tolls and other revenues of the Toll Road (hereinafter defined) and other moneys to the extent provided in this Indenture as security for the payment of

the bonds and the interest and the redemption premium, if any, thereon and as security for the satisfaction of any other obligation assumed by it in connection with such bonds, and it is mutually agreed and covenanted by and between the parties hereto, for the equal and proportionate benefit and security of all and singular the present and future holders of the bonds issued and to be issued under this Indenture, without preference, priority or distinction as to lien or otherwise, except as otherwise hereinafter provided, of any one bond over any other bond, by reason of priority in the issue, sale or negotiation thereof or otherwise, as follows:

ARTICLE I.

DEFINITIONS.

SECTION 101. In addition to words and terms elsewhere defined in this Indenture, the following words and terms as used in this Indenture shall have the following meanings, unless some other meaning is plainly intended:

As applied to the bonds of any Series, the term "Amortization Requirement" for any fiscal year shall mean the principal amount fixed or computed for such fiscal year as hereinafter set forth for the retirement of the bonds of such Series by purchase or redemption.

The Amortization Requirements for the bonds of each Series shall be initially the respective principal amounts (each of which shall be in a multiple of \$5,000) for the respective fiscal years as fixed in the resolution of the Commission awarding the bonds of such Series. The aggregate amount of such Amortization Requirements for the bonds of each Series shall be equal to the principal amount of the bonds of such Series. The Amortization Requirements for the bonds of each Series shall begin in the fiscal year determined by the Commission and shall end with the fiscal year immediately preceding the maturity of such bonds.

If at the close of any fiscal year the total principal amount of the bonds of any Series retired by purchase or redemption or called for redemption under the provisions of Section 511 of this Indenture prior to the close of such fiscal year shall be in excess of,

or shall be less than, the total amount of the Amortization Requirements for the bonds of such Series to and including such fiscal year, then the total amount of the Amortization Requirements for the bonds of such Series for all subsequent fiscal years shall be reduced by the amount of such excess or increased by the amount of such deficiency. The amount of the reduction or of the increase in the Amortization Requirement for each such subsequent fiscal year shall be in the same proportion, as nearly as practicable (the amount of the reduction or increase in any such fiscal year being in a multiple of \$5,000) as determined by the Trustee, as the total reduction or total increase for all such subsequent fiscal years bears to the total amount of the Amortization Requirements for all such subsequent fiscal years for the bonds of such Series.

It shall be the duty of the Trustee, on or before the 10th day of January in each fiscal year, to compute the Amortization Requirements for the then current and all subsequent fiscal years for the bonds of each Series then outstanding. The Amortization Requirement for the then current fiscal year shall continue to be applicable during the balance of such current fiscal year and no adjustment shall be made therein by reason of bonds purchased or redeemed during such current fiscal year.

The term "Annual Budget" shall mean the Commission's budget of Current Expenses adopted or in effect for each fiscal year pursuant to the provisions of Section 505 of this Indenture.

The term "Bond Interest Account" shall mean the special account created in the Sinking Fund by the provisions of Section 507 of this Indenture.

The word "bonds" shall mean the bonds issued under this Indenture.

The term "Chief Engineer" shall mean the Chief Engineer for the State Highway Commission, or such other employee or officer as may be lawfully employed or designated to perform the functions of the Chief Engineer.

The word "Commission" shall mean the State Highway Commission or, if the State Highway Commission shall be abolished, any board, commission or officer succeeding to the principal functions thereof or upon whom the powers given by the State Revenue Bond Act to the Commission shall be given by law.

The term "Construction Fund" shall mean the State of Virginia 1965 Toll Project Construction Fund, a special fund created and designated by the provisions of Section 401 of this Indenture.

The term "Consulting Engineers" shall mean the engineer or engineering firm or corporation at the time employed by the Commission under the provisions of Section 706 of this Indenture to perform and carry out the duties imposed on the Consulting Engineers by this Indenture.

The word "cost", as applied to the Project or any Improvements, shall embrace, without intending thereby to limit or restrict any proper definition of such word under the provisions of the State Revenue Bond Act, the cost of construction and all obligations and expenses and all items of cost which are set forth in Section 403 of this Indenture.

The term "Current Expenses" shall mean the Commission's reasonable and necessary current expenses of maintenance, repair and operation of the Toll Road, whether payable or paid from the tolls and other revenues of the Toll Road or from any other available funds, and shall include, without limiting the generality of the foregoing, all ordinary and usual expenses of maintenance, repair and operation, which may include expenses not annually recurring, premiums for insurance, all administrative and engineering expenses relating to maintenance, repair and operation, fees and expenses of the Trustee and the Paying Agents, legal expenses, advertising expenses, any taxes lawfully levied on the Toll Road, any reasonable payments to pension or retirement funds, and any other expenses required or permitted to be paid by the Commission under the provisions of this Indenture or by law, but shall not include any reserves for extraordinary maintenance or repair, or any allowance for depreciation, or any deposits or transfers to

the credit of the Sinking Fund, the Reserve Maintenance Fund or the Improvement Fund.

The term "daily newspaper" shall mean a newspaper regularly published in the English language on at least five business days in each calendar week.

The term "fiscal year" shall mean the same as the calendar year.

The term "Improvement Fund" shall mean the State of Virginia 1965 Toll Project Improvement Fund, a special fund created and designated by the provisions of Section 507 of this Indenture.

The word "Improvements" shall mean any additions, improvements and enlargements to the Project.

The word "Indenture" shall mean this Indenture, dated as of the 1st day of July, 1965, together with all indentures supplemental hereto as herein permitted.

The term "Initial Budget" shall mean the Commission's budget of Current Expenses adopted or in effect pursuant to the provisions of the last paragraph of Section 505 of this Indenture.

The term "Paying Agents" shall mean the Virginia National Bank, in the City of Norfolk, Virginia, and the Chemical Bank New York Trust Company, in the Borough of Manhattan, City and State of New York, and any successor of either thereof.

The term "Principal and Interest Requirements" for any fiscal year, as applied to the bonds of any Series, shall mean the sum of:

(a) the amount required to pay the interest on all bonds of such Series then outstanding which is payable on July 1 in such fiscal year and on January 1 in the following fiscal year, and

(b) the Amortization Requirement for the bonds of such Series for such fiscal year.

The Principal and Interest Requirements shall be determined, as required from time to time, by the Trustee. In computing the Prin-

principal and Interest Requirements for any fiscal year for the bonds of any Series, the Trustee shall assume that an amount of the bonds of such Series equal to the Amortization Requirement for the bonds of such Series for such fiscal year will be retired by purchase or redemption on the 1st day of January of the succeeding fiscal year.

The term "principal underwriters" shall mean the firms or corporations or the firm or corporation named as the principal underwriters in the resolution mentioned in clause (a) of Section 208 of this Indenture. In the event two or more firms or corporations shall be named as the principal underwriters and any such firm or corporation shall retire from active business leaving no successor, the term shall thereafter mean the remaining underwriter or underwriters. In the event only one firm or corporation shall be named or shall remain as the principal underwriters and such firm or corporation shall retire from active business leaving no successor, the provisions of this Indenture which relate to the principal underwriters shall no longer be in force. For the purposes of this paragraph any firm or corporation succeeding to the business of any principal underwriter by assignment, merger or otherwise shall be deemed to be a principal underwriter.

The word "Project" shall mean the toll road, approximately 12.1 miles in length, extending from the interchange of Interstate Routes 64 and 264, immediately south of U. S. Route 58, in the City of Norfolk, Virginia, to a point in the City of Virginia Beach, Virginia, east of Londonbridge and west of U. S. Route 60, having an eastbound roadway terminus at 21st Street and a westbound roadway terminus at 22nd Street in the City of Virginia Beach, as described in the engineering report of the Consulting Engineers dated October 25, 1965.

The term "Redemption Account" shall mean the special account created in the Sinking Fund by the provisions of Section 507 of this Indenture.

The term "report date" shall mean the date on which the Consulting Engineers shall have submitted their report to the Commission pursuant to the provisions of the second paragraph of Section 504 of this Indenture.

The term "Reserve Account" shall mean the special account created in the Sinking Fund by the provisions of Section 507 of this Indenture.

The term "Reserve Maintenance Fund" shall mean the State of Virginia 1965 Toll Project Reserve Maintenance Fund, a special fund created and designated by the provisions of Section 507 of this Indenture.

The term "Revenue Fund" shall mean the State of Virginia 1965 Toll Project Revenue Fund, a special fund created in the State Treasury and designated by the provisions of Section 503 of this Indenture.

The word "Series" shall mean either the bonds issued under the provisions of Section 208 of this Indenture for the purpose of paying the cost of the Project or the bonds, if any, delivered at any one time under the provisions of Section 209 of this Indenture for the purpose of completing payment of the cost of the Project or the bonds, if any, delivered at any one time under the provisions of Section 210 of this Indenture for the purpose of paying all or any part of the cost of any Improvements.

The term "Sinking Fund" shall mean the State of Virginia Toll Revenue Bonds (Series 1965) Interest and Sinking Fund, a special fund created and designated by the provisions of Section 507 of this Indenture, there being three separate accounts in the Sinking Fund designated "Bond Interest Account", "Reserve Account" and "Redemption Account", respectively.

The term "State Revenue Bond Act" shall mean Article 8, Chapter 3, Title 33, Code of Virginia, 1950, as amended.

The term "Toll Road" shall mean the Project together with any improvements.

The term "Traffic Engineers" shall mean the engineer or engineering firm or corporation at the time employed by the Commission under the provisions of Section 706 of this Indenture to perform and carry out the duties imposed on the Traffic Engineers by this Indenture.

The word "Trustee" shall mean the Trustee for the time being, whether original or successor.

The term "1965 Revenue Fund—Trustee Account" shall mean the special account created and designated by the provisions of Section 506 of this Indenture.

The term "1965 Toll Project Bond Proceeds Account" shall mean the special account created in the State Treasury and designated by the provisions of Section 208 of this Indenture.

SECTION 102. Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and neuter genders. Unless the context shall otherwise indicate, the words "bond", "coupon", "owner", "holder" and "person" shall include the plural as well as the singular number, the word "person" shall include corporations and associations, including public bodies, as well as natural persons, and the word "holder" or "bondholder" when used herein with respect to bonds issued hereunder shall mean the holder or registered owner, as the case may be, of bonds at the time issued and outstanding hereunder.

ARTICLE II.

FORM, EXECUTION, AUTHENTICATION AND DELIVERY OF BONDS.

SECTION 201. No bonds may be issued under the provisions of this Indenture except in accordance with the provisions of this Article.

SECTION 202. The definitive bonds are issuable as coupon bonds in the denomination of \$5,000 each, and as registered bonds without coupons in denominations of \$5,000 or any multiple thereof. The definitive bonds issued under the provisions of Section 208 of this Article shall be substantially in the forms hereinabove set forth, with such appropriate variations, omissions and insertions as are permitted or required by this

Indenture. The bonds issued under the provisions of any other Section of this Article shall be substantially in the forms hereinabove set forth, with such additional changes as may be necessary or appropriate to conform to the provisions of the resolution or resolutions providing for the issuance of such bonds. All such bonds may have endorsed thereon such legends or text as may be necessary or appropriate to conform to any applicable rules and regulations of any governmental authority or of any securities exchange on which the bonds may be listed or any usage or requirement of law with respect thereto.

SECTION 203. The bonds shall be dated, shall bear interest until their payment, such interest to the maturity thereof being payable semi-annually on the 1st days of January and July in each year, and shall be stated to mature (subject to the right of prior redemption), all as hereinafter provided.

Each coupon bond shall bear interest from its date. Each registered bond without coupons shall bear interest from the interest payment date next preceding the date on which it is authenticated, unless authenticated upon an interest payment date, in which case it shall bear interest from such interest payment date, or, unless authenticated prior to the first interest payment date, in which case it shall bear interest from its date; provided, however, that if at the time of authentication of any registered bond without coupons interest is in default, such bond shall bear interest from the date to which interest shall have been paid.

The bonds shall be signed by the State Highway Commissioner, who is the Chairman of the Commission, and the official seal of the Commission shall be affixed to the bonds and attested by the Secretary of the Commission; provided, however, that the bonds may be executed in such other manner as may then be authorized by law.

The coupons attached to the coupon bonds shall be substantially in the form hereinabove set forth and shall bear the facsimile signature of the State Highway Commissioner.

In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be such officer before

the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery, and also any bond may bear the facsimile signature of or may be signed by such persons as at the actual time of the execution of such bond shall be the proper officers to sign such bond although at the date of such bond such persons may not have been such officers.

Both the principal of and the interest on the bonds shall be payable in any coin or currency of the United States of America which on the respective dates of payment thereof is legal tender for the payment of public and private debts. The principal of coupon bonds and the interest thereon shall be payable at the principal office of Virginia National Bank, in the City of Norfolk, Virginia, or, at the option of the holder, at the principal office of Chemical Bank New York Trust Company, in the Borough of Manhattan, City and State of New York (herein sometimes called the "Paying Agents"). The principal of all registered bonds without coupons shall be payable at the principal office of the Trustee, and payment of the interest on each registered bond without coupons shall be made by the Trustee on each interest payment date to the person appearing on the registration books of the Commission hereinafter provided for as the registered owner thereof, by check or draft mailed to such registered owner at his address as it appears on such registration books. Payment of the principal of all bonds shall be made upon the presentation and surrender of such bonds as the same shall become due and payable. Payment of the interest on the coupon bonds shall be made upon the presentation and surrender of the coupons, if any, representing such interest as the same respectively become due and payable.

SECTION 204. Only such of the bonds as shall have endorsed thereon a certificate of authentication substantially in the form hereinabove set forth, duly executed by the Trustee, shall be entitled to any benefit or security under this Indenture. No bond and no coupon appertaining to any coupon bond shall be valid or obligatory for any purpose unless and until such certificate of authentication shall have been duly executed by the Trustee, and such certificate of the Trustee upon any such bond shall be conclusive evidence that such bond has been duly authenticated and delivered under this Indenture. The Trustee's certificate of authentica-

tion on any bond shall be deemed to have been duly executed if signed by an authorized officer of the Trustee, but it shall not be necessary that the same officer sign the certificate of authentication on all of the bonds that may be issued hereunder at any one time. Before authenticating or delivering any coupon bonds the Trustee shall detach and cancel all matured coupons, if any, appertaining thereto, except any coupons which represent unpaid interest.

Section 205. Coupon bonds, upon surrender thereof at the principal office of the Trustee with all unmatured coupons and all matured coupons in default, if any, appertaining thereto, may, at the option of the holder thereof, be exchanged for an equal aggregate principal amount of registered bonds without coupons of the same Series, of any denomination or denominations authorized by this Indenture, bearing interest at the same rate, and, with the exception of the differences between the form of coupon bonds and the form of registered bonds without coupons which are set forth in the preambles of this Indenture, in the same form as the coupon bonds surrendered for exchange.

Registered bonds without coupons, upon surrender thereof at the principal office of the Trustee, together with an assignment duly executed by the registered owner or his attorney or legal representative in such form as shall be satisfactory to the Trustee, may, at the option of the registered owner thereof, be exchanged for an equal aggregate principal amount of coupon bonds of the same Series, bearing interest at the same rate and having attached thereto coupons representing all unpaid interest due or to become due thereon, or of registered bonds without coupons of the same Series, of any denomination or denominations authorized by this Indenture, and bearing interest at the same rate, and in either case, with the exception of the differences between the form of coupon bonds and the form of registered bonds without coupons which are set forth in the preambles of this Indenture, in the same form as the registered bonds without coupons surrendered for exchange.

The Commission shall make provision for the exchange of bonds at the principal office of the Trustee.

Section 206. Title to any coupon bond and to any interest coupon shall pass by delivery in the same manner as a negotiable instrument payable to bearer.

The Trustee as Bond Registrar shall keep books of the Commission for the registration and for the transfer of bonds as provided in this Indenture. The principal of any registered bond without coupons shall be payable only to or upon the order of the registered owner or his legal representative.

Any registered bond without coupons may be transferred only upon the books kept for the registration and transfer of bonds upon surrender thereof to the Bond Registrar together with an assignment duly executed by the registered owner or his attorney or legal representative in such form as shall be satisfactory to the Bond Registrar. Upon any such transfer the Commission shall execute and the Trustee shall authenticate and deliver in exchange for such bond, a new registered bond or bonds without coupons, registered in the name of the transferee, of any denomination or denominations authorized by this Indenture, or, at the option of the transferee, coupon bonds with coupons attached representing all unpaid interest due or to become due thereon, in an aggregate principal amount equal to the principal amount of such registered bond without coupons, of the same Series and bearing interest at the same rate.

In all cases in which bonds shall be exchanged or registered bonds without coupons shall be transferred hereunder, the Commission shall execute and the Trustee shall authenticate and deliver at the earliest practicable time bonds in accordance with the provisions of this Indenture. All bonds and coupons surrendered in any such exchange or transfer shall forthwith be cancelled by the Trustee. The Commission or the Trustee may make a charge for every such exchange or transfer of bonds sufficient to reimburse it for any tax, fee or other governmental charge required to be paid with respect to such exchange or transfer, but no other charge shall be made to any bondholder for the privilege of exchanging or transferring bonds under the provisions of this Indenture. Neither the Commission nor the Trustee shall be required to make any such exchange or transfer of bonds during the fifteen (15) days immediately preceding an interest payment date on the bonds or, in the case of any proposed redemption of bonds, after such bond or any portion thereof has been selected for redemption.

SECTION 207. As to any registered bond without coupons, the person in whose name the same shall be registered shall be deemed and

regarded as the absolute owner thereof for all purposes, and payment of or on account of the principal of any such bond and the interest thereon shall be made only to or upon the order of the registered owner thereof or his legal representative. All such payments shall be valid and effectual to satisfy and discharge the liability upon such bond including the interest thereon to the extent of the sum or sums so paid. The Commission, the Trustee, the Bond Registrar and the Paying Agents may deem and treat the bearer of any coupon bond, and the bearer of any coupon appertaining to any coupon bond, as the absolute owner of such bond or coupon, as the case may be, whether such bond or coupon shall be overdue or not, for the purpose of receiving payment thereof and for all other purposes whatsoever, and neither the Commission, the Trustee, the Bond Registrar nor the Paying Agents shall be affected by any notice to the contrary.

Any person in possession of any coupon bond or of any coupon appertaining to any coupon bond, regardless of the manner in which he shall have acquired possession, is hereby authorized to represent himself as the absolute owner of such bond or coupon, as the case may be, and is hereby granted power to transfer absolute title thereto by delivery thereof to a bona fide purchaser for value (present or antecedent) without notice of prior defenses or equities or claims of ownership enforceable against his transferor or any person in the chain of title and before the maturity of such bond. Any registered owner of any registered bond without coupons is hereby granted power to transfer absolute title thereto by assignment thereof to a bona fide purchaser for value (present or antecedent) without notice of prior defenses or equities or claims of ownership enforceable against his assignor or any person in the chain of title and before the maturity of such bond. Every prior holder or owner of any bond or of any coupon appertaining to any coupon bond shall be deemed to have waived and renounced all of his equities or rights therein in favor of every such bona fide purchaser, and every such bona fide purchaser shall acquire absolute title thereto and to all rights represented thereby.

SECTION 208. There shall be initially issued under and secured by this Indenture revenue bonds of the State of Virginia in the aggregate principal amount of Thirty-four Million Dollars (\$34,000,000) for

the purpose of paying the cost of the Project. Said bonds shall be designated "State of Virginia Toll Revenue Bonds (Series 1965) (Norfolk-Virginia Beach Toll Road)", shall be dated as of the 1st day of July, 1965, shall bear interest at a rate not exceeding six per centum (6%) per annum, and shall be stated to mature, subject to the right of prior redemption as hereinafter set forth, on the 1st day of January, 2005.

Said bonds shall be executed substantially in the form and manner hereinabove set forth and shall be deposited with the Trustee for authentication, but before said bonds shall be authenticated and delivered by the Trustee there shall be filed with the Trustee the following:

(a) a copy, certified by the Secretary or an Assistant Secretary of the Commission, of the resolution adopted by the Commission awarding said bonds, fixing the initial Amortization Requirements for said bonds, specifying the interest rate of said bonds and directing the authentication and delivery of said bonds to or upon the order of the principal underwriters therein named upon payment of the purchase price therein set forth and the accrued interest on said bonds;*

(b) a statement, signed by the Consulting Engineers and approved by the Chief Engineer, giving the Consulting Engineers' estimates of

(i) the date on which the Project will be opened for traffic,

(ii) the date on which the construction of the Project will be completed,

(iii) the cost of the Project, including an amount for contingencies but excluding financing charges and interest during construction, and

(iv) the amount of funds required each three months following the delivery of said bonds and during the estimated period of construction to meet such cost, accompanied by a progress schedule for such construction;

(c) vouchers, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose,

* See page 105 for the initial Amortization Requirements and the interest rate for the bonds as fixed by resolution of the Commission adopted on October 27, 1965.

directing the issuance of warrants by the State Comptroller for disbursements by the State Treasurer from the proceeds of said bonds of the amounts and for the purposes hereinafter set forth in this Section; and

(d) an opinion of the Attorney General or an Assistant Attorney General of the Commonwealth stating that the signer is of the opinion that the issuance of said bonds and the execution of this Indenture have been duly authorized and that all conditions precedent to the delivery of said bonds have been fulfilled.

When the documents and vouchers mentioned above in this Section shall have been filed with the Trustee and when said bonds shall have been executed and authenticated as required by this Indenture, the Trustee shall deliver (i) said vouchers to the State Comptroller and (ii) said bonds at one time to or upon the order of the principal underwriters named in the resolution mentioned in clause (a) of this Section, but only upon payment to the State Treasurer of the purchase price of said bonds and the accrued interest, and the State Treasurer shall simultaneously therewith deposit the proceeds (including accrued interest) of said bonds with the Trustee, as depositary thereof, for the credit of a special account hereby created in the State Treasury and designated "1965 Toll Project Bond Proceeds Account". The State Treasurer and the Trustee shall be entitled to rely upon such resolution as to the names of the principal underwriters, the initial Amortization Requirements for said bonds, the interest rate of said bonds and the amount of such purchase price.

The proceeds (including accrued interest) of said bonds shall be applied simultaneously with the delivery of said bonds as follows:

(1) The sum of \$300,000 shall be paid to the Trustee for deposit to the credit of a special checking account in its commercial department in the name of the Commission, to be used by the Commission as a checking account for the payment of expenses incident to the financing. The Trustee shall be under no duty or obligation with respect to the disbursements by the Commission of such sum or any part thereof. The Commission shall pay such expenses by check drawn on said account and signed by such officer

or officers or employee or employees of the Commission as shall be designated by the State Highway Commissioner for such purpose. Any balance of said sum not expended within ninety (90) days from the date of delivery of said bonds shall be paid by the Commission to the Trustee for deposit to the credit of the Construction Fund.

(2) The balance of said proceeds shall be paid to the Trustee for deposit to the credit of the Construction Fund.

SECTION 209. If and to the extent necessary (as shown by the documents mentioned in clauses (a) and (c) of this Section) to provide additional funds for completing payment of the cost of the Project, revenue bonds of the State of Virginia may be issued under and secured by this Indenture, at one time or from time to time, in addition to the bonds issued under the provisions of Section 208 of this Article. Such additional bonds shall be designated "State of Virginia Toll Revenue Bonds (Series 1965) (Norfolk-Virginia Beach Toll Road)", shall be dated, shall bear interest at a rate not exceeding the maximum rate permitted by law, shall be stated to mature on the 1st day of January, 2005, and shall be made redeemable at such times and prices (subject to the provisions of Article III of this Indenture), all as may be provided by the resolution authorizing the issuance of such bonds. Except as to any difference in the rate of interest or the provisions for redemption, such additional bonds shall be on a parity with and shall be entitled to the same benefit and security of this Indenture as the bonds issued under the provisions of Section 208 of this Article.

Such additional bonds shall be executed substantially in the form and manner hereinabove set forth and shall be deposited with the Trustee for authentication, but before such bonds shall be authenticated and delivered by the Trustee, there shall be filed with the Trustee the following:

(a) a copy, certified by the Secretary or an Assistant Secretary of the Commission, of the resolution adopted by the Commission authorizing the issuance of such additional bonds in the amount specified therein and fixing the times and prices at which such additional bonds are to be redeemable;

(b) a copy, certified by the Secretary or an Assistant Secretary of the Commission, of the resolution adopted by the Commission awarding such bonds, fixing the initial Amortization Requirements for such bonds, specifying the interest rate of such bonds and directing the authentication and delivery of such bonds to or upon the order of the purchasers therein named upon payment of the purchase price therein set forth and the accrued interest on such bonds:

(c) a statement, signed by the Consulting Engineers and approved by the Chief Engineer, giving the Consulting Engineers' estimates of (i) the date on which the Project will be opened for traffic, unless the Project shall have been opened for traffic prior to the date of such statement, and (ii) the date on which the construction of the Project will be completed, and certifying that, according to the Consulting Engineers' estimate of the total amount required for paying the balance of the cost of the Project, the proceeds of such bonds will be required and will be sufficient for paying such balance, including any financing charges and any interest during construction:

(d) a voucher, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, directing the issuance of a warrant by the State Comptroller for payment by the State Treasurer of the proceeds (including accrued interest) of such bonds to the Trustee for deposit to the credit of the Construction Fund; and

(e) an opinion of the Attorney General or an Assistant Attorney General of the Commonwealth stating that the signer is of the opinion that the issuance of such bonds has been duly authorized and that all conditions precedent to the delivery of such bonds have been fulfilled.

When the documents and voucher mentioned above in this Section shall have been filed with the Trustee and when the bonds described in the resolutions mentioned in clauses (a) and (b) of this Section shall have been executed and authenticated as required by this Indenture, the

Trustee shall deliver (i) said voucher to the State Comptroller and (ii) such bonds at one time to or upon the order of the purchasers named in the resolution mentioned in said clause (b), but only upon payment to the State Treasurer of the purchase price of such bonds and the accrued interest, and the State Treasurer shall simultaneously therewith deposit the proceeds (including accrued interest) of such bonds with the Trustee, as depository thereof, for the credit of the 1965 Toll Project Bond Proceeds Account. The State Treasurer and the Trustee shall be entitled to rely upon such resolution as to the names of the purchasers, the initial Amortization Requirements for such bonds, the interest rate of such bonds and the amount of such purchase price.

The proceeds (including accrued interest) of all bonds issued under the provisions of this Section shall be paid by the State Treasurer simultaneously with the delivery of such bonds to the Trustee for deposit to the credit of the Construction Fund.

SECTION 210. Additional revenue bonds of the State of Virginia, may be issued under and secured by this Indenture, subject to the conditions hereinafter provided in this Section, for the purpose of paying all or any part of the cost of any Improvements, at any time or times after the expiration of twenty-four (24) complete months following the opening of the Project for traffic, if and to the extent then permitted by law.

Before any bonds shall be issued under the provisions of this Section the Commission shall adopt a resolution authorizing the issuance of such bonds, fixing the amount and the details thereof, and describing in brief and general terms the Improvements to be constructed. The bonds of each Series issued under the provisions of this Section shall be designated "State of Virginia Toll Revenue Bonds (Series) (Norfolk-Virginia Beach Toll Road)". shall be dated, shall bear interest at a rate not exceeding the maximum rate permitted by law, shall be stated to mature on January 1 in a year not earlier than the year 2005 and not later than forty (40) years from their date, and shall be made redeemable at such times and prices (subject to the provisions of Article III of this Indenture), all as may be provided by the resolution authorizing the issuance of such bonds. Except as to any difference in the rate of interest or the provisions for redemption, such

additional bonds shall be on a parity with and shall be entitled to the same benefit and security of this Indenture as the bonds issued under the provisions of Sections 208 and 209 of this Article. Such additional bonds shall be executed substantially in the form and manner hereinabove set forth and shall be deposited with the Trustee for authentication, but before such bonds shall be authenticated and delivered by the Trustee, there shall be filed with the Trustee the following:

(a) a copy, certified by the Secretary or an Assistant Secretary of the Commission, of the resolution mentioned above;

(b) a copy, certified by the Secretary or an Assistant Secretary of the Commission, of the resolution adopted by the Commission awarding such bonds, fixing the initial Amortization Requirements for such bonds, specifying the interest rate of such bonds and directing the authentication and delivery of such bonds to or upon the order of the purchasers therein named upon payment of the purchase price therein set forth and the accrued interest on such bonds;

(c) a statement, signed by the Consulting Engineers and approved by the Chief Engineer, certifying that the construction of the Improvements described in the resolution authorizing the issuance of such bonds will, in the Consulting Engineers' opinion, preserve, develop or improve the Project and giving the Consulting Engineers' estimates of

(i) the date on which such Improvements will be opened for traffic or placed in operation,

(ii) the date on which the construction of such Improvements will be completed,

(iii) the cost of such Improvements, including an amount for contingencies, and

(iv) the amount of funds required each three months following the delivery of such bonds and during the estimated period of construction to meet such cost, accompanied by a progress schedule for such construction;

(d) a certificate, signed by the State Highway Commissioner and approved by the independent firm of certified public accountants referred to in Section 712 of this Indenture, setting forth

(i) the amount obtained by dividing by two the total amount of the net revenues (the excess of the tolls and other revenues of the Toll Road deposited to the credit of the Revenue Fund over the Current Expenses and the required deposits to the credit of the Reserve Maintenance Fund) of the Toll Road for the last twenty-four (24) months,

(ii) the respective amounts of the Principal and Interest Requirements for each fiscal year thereafter on account of the bonds of each Series then outstanding (as determined by the Trustee) and the bonds then requested to be authenticated and delivered, and

(iii) the amount, if any, which is then or will be available for paying a part of the cost of constructing the Improvements which are described in the resolution mentioned in clause (a) of this Section, and the source or sources from which such amount has been or will be received;

(e) a certificate, signed by the State Highway Commissioner, stating that the Commission is not then in default in the performance of any of the covenants, conditions, agreements or provisions contained in this Indenture;

(f) vouchers, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, directing the issuance of warrants by the State Comptroller for payments by the State Treasurer of the proceeds (excluding accrued interest) of such bonds to the Trustee for deposit to the credit of the special construction fund hereinafter mentioned and the amount received as accrued interest on such bonds to the Trustee for deposit to the credit of the Bond Interest Account; and

(g) an opinion of the Attorney General or an Assistant Attorney General of the Commonwealth stating that the signer is of the opinion that the issuance of such bonds has been duly authorized and that all conditions precedent to the delivery of such bonds have been fulfilled.

When the documents and vouchers mentioned above in this Section shall have been filed with the Trustee and when the bonds described in

the resolutions mentioned in clauses (a) and (b) of this Section shall have been executed and authenticated as required by this Indenture, the Trustee shall deliver (i) said vouchers to the State Comptroller and (ii) such bonds at one time to or upon the order of the purchasers named in the resolution mentioned in said clause (b), but only upon payment to the State Treasurer of the purchase price of such bonds and the accrued interest, and the State Treasurer shall simultaneously therewith deposit the proceeds (including accrued interest) of such bonds with the Trustee, as depository thereof, for the credit of a special account to be created in the State Treasury and to be designated "19... Toll Project Bond Proceeds Account". The State Treasurer and the Trustee shall be entitled to rely upon such resolution as to the names of the purchasers, the initial Amortization Requirements for such bonds, the interest rate of such bonds and the amount of such purchase price, but the Trustee shall not authenticate and deliver such bonds unless

(I) the proceeds (excluding accrued interest but including any premium) of such bonds, together with the other funds which have been or will be made available for such purpose as set forth in item (iii) of the certificate mentioned in clause (d) of this Section, shall be not less than the cost of the Improvements to be constructed as estimated by the Consulting Engineers in item (iii) of the statement mentioned in clause (c) of this Section, and

(II) the percentage derived by dividing the amount shown in item (i) of the certificate mentioned in said clause (d) by the maximum amount of the Principal and Interest Requirements for any fiscal year thereafter on account of all bonds then outstanding and the bonds then requested to be authenticated and delivered as shown in item (ii) of such certificate shall be not less than one hundred thirty-five per centum (135%).

The proceeds (excluding accrued interest) of such bonds and the other funds mentioned in paragraph (I) above, if any, shall be paid by the State Treasurer simultaneously with the delivery of such bonds to the Trustee for deposit to the credit of a special construction fund appropriately designated and held in trust for the sole and exclusive purpose of paying the cost of such Improvements. All of the provisions of Article IV of this Indenture, except Section 404 thereof, which relate to the Project and to the Construction Fund shall apply to such Im-

provements and to such special construction fund to the extent that such provisions may be applicable. The amount received as accrued interest on such bonds shall be paid by the State Treasurer simultaneously with the delivery of such bonds to the Trustee for deposit to the credit of the Bond Interest Account.

SECTION 211. Until definitive bonds of any Series are ready for delivery, there may be executed, and upon request of the Commission the Trustee shall authenticate and deliver, in lieu of definitive bonds and subject to the same limitations and conditions, temporary printed, engraved or lithographed bonds, in the form of either coupon bonds in the denomination of \$5,000 or any multiple thereof, with or without coupons, or registered bonds without coupons in denominations of \$5,000 or any multiple thereof, or both, as the Commission by resolution may provide, substantially of the tenor hereinabove set forth and with such appropriate omissions, insertions and variations as may be required.

Until definitive bonds of any Series are ready for delivery, any temporary bond of such Series may, if so provided by the Commission by resolution, be exchanged at the principal office of the Trustee, without charge to the holder thereof, for an equal aggregate principal amount of temporary coupon bonds or of temporary registered bonds without coupons, or both, of like tenor, of the same Series and bearing interest at the same rate.

If temporary bonds shall be issued, the Commission shall cause the definitive bonds to be prepared and to be executed and delivered to the Trustee, and the Trustee, upon presentation to it at its principal office of any temporary bond accompanied by all unpaid coupons, if any, shall cancel the same and authenticate and deliver in exchange therefor at the place designated by the holder, without charge to the holder thereof, a definitive bond or bonds of an equal aggregate principal amount, of the same Series and bearing interest at the same rate as the temporary bond surrendered. Upon any such exchange all coupons appertaining to definitive coupon bonds and representing interest theretofore paid shall be detached and cancelled by the Trustee. Until so exchanged the temporary bonds shall in all respects be entitled to the same benefit and security of this Indenture as the definitive bonds to be issued and authenticated hereunder. Interest on temporary coupon bonds, when due and

payable, if the definitive bonds shall not be ready for exchange, shall be paid on presentation of such temporary coupon bonds and notation of such payment shall be endorsed thereon, or such interest shall be paid upon the surrender of the appropriate coupons if coupons representing such interest shall be attached to such temporary bonds.

SECTION 212. In case any bond secured hereby shall become mutilated or be destroyed or lost, the Commission shall cause to be executed, and the Trustee shall authenticate and deliver, a new bond of like date and tenor in exchange and substitution for and upon the cancellation of such mutilated bond and its interest coupons, if any, or in lieu of and in substitution for such bond and its coupons, if any, destroyed or lost, upon the holder's paying the reasonable expenses and charges of the Commission and the Trustee in connection therewith and, in the case of a bond destroyed or lost, his filing with the Trustee evidence satisfactory to it and to the Commission that such bond and coupons, if any, were destroyed or lost, and of his ownership thereof, and furnishing the Commission and the Trustee with indemnity satisfactory to them.

ARTICLE III.

REDEMPTION OF BONDS.

SECTION 301. The bonds issued under the provisions of Section 208 of this Indenture at the time outstanding may be redeemed prior to their maturity either

(a) in whole, on any date not earlier than January 1, 1976, at the option of the Commission, from any moneys that may be made available for such purpose, at the principal amount of the bonds to be redeemed, together with the interest accrued thereon to the date fixed for redemption, plus a premium of 4% of such principal amount if redeemed on or prior to December 31, 1980, 3% if redeemed thereafter and on or prior to December 31, 1985, 2% if redeemed thereafter and on or prior to December 31, 1990, 1% if redeemed thereafter and on or prior to December 31, 1995, ½ of 1% if redeemed thereafter and on or prior to December 31, 2000, and without premium if redeemed thereafter, or

(b) in part, on any interest payment date not earlier than January 1, 1971, from moneys in the Sinking Fund, at the principal amount of the bonds to be redeemed, together with the interest accrued thereon to the date fixed for redemption, plus a premium of 3% of such principal amount if redeemed on or prior to July 1, 1975, 2% if redeemed thereafter and on or prior to July 1, 1980, 1% if redeemed thereafter and on or prior to July 1, 1985, $\frac{1}{2}$ of 1% if redeemed thereafter and on or prior to July 1, 1990, and without premium if redeemed thereafter.

The bonds of any other Series issued under the provisions of this Indenture shall be made subject to redemption, both in whole and in part and at such times and prices, as may be provided in the resolution authorizing the issuance of such bonds; provided, however, that any redemption in part may be made only on an interest payment date and any premium to be paid on the redemption of any such bonds shall not exceed five per centum (5%) of the principal amount of the bonds to be redeemed.

If less than all of the bonds of a Series shall be called for redemption, the particular bonds or portions of registered bonds without coupons to be redeemed from such Series shall be selected by lot by the Trustee in such manner as the Trustee in its discretion may determine; provided, however, that the portion of any registered bond without coupons to be redeemed shall be in the principal amount of \$5,000 or some multiple thereof, and that, in selecting bonds for redemption, the Trustee shall treat each registered bond without coupons as representing that number of coupon bonds which is obtained by dividing the principal amount of such registered bond without coupons by \$5,000.

SECTION 302. At least thirty (30) days before the redemption date of any bonds the Trustee shall cause a notice of any such redemption, either in whole or in part, signed by the Trustee, (a) to be published once in a daily newspaper of general circulation published in the City of Norfolk, Virginia, and in a daily newspaper of general circulation or a financial journal published in the Borough of Manhattan, City and State of New York, (b) to be filed with the Paying Agents, and (c) to be mailed, postage prepaid, to all registered owners of bonds or portions

of bonds to be redeemed at their addresses as they appear on the registration books hereinabove provided for, but failure so to file or mail any such notice shall not affect the validity of the proceedings for such redemption. Each such notice shall set forth the date fixed for redemption, the redemption price to be paid and, if less than all of the bonds of a Series then outstanding shall be called for redemption, the distinctive numbers and letters, if any, of such bonds to be redeemed and, in the case of registered bonds without coupons to be redeemed in part only, the portion of the principal amount thereof to be redeemed. In case any registered bond without coupons is to be redeemed in part only, the notice of redemption which relates to such bond shall state also that on or after the redemption date, upon surrender of such bond, a new bond or bonds in principal amount equal to the unredeemed portion of such bond will be issued.

Section 303. On the date so designated for redemption, notice having been published in the manner and under the conditions hereinabove provided and moneys for payment of the redemption price and the accrued interest being held in separate accounts by the Trustee or by the Paying Agents in trust for the holders of the bonds or portions thereof to be redeemed, all as provided in this Indenture, the bonds or portions of registered bonds without coupons so called for redemption shall become and be due and payable at the redemption price provided for redemption of such bonds or portions of bonds on such date, interest on the bonds or portions of bonds so called for redemption shall cease to accrue, the coupons for interest on any coupon bonds so called for redemption payable subsequent to the redemption date shall be void, such bonds or portions of bonds shall cease to be entitled to any benefit or security under this Indenture, and the holders or registered owners of such bonds or portions of bonds shall have no rights in respect thereof except to receive payment of the redemption price thereof and the accrued interest and, to the extent provided in Section 305 of this Article, to receive bonds for any unredeemed portions of registered bonds without coupons.

Section 304. All unpaid coupons which appertain to coupon bonds so called for redemption and which shall have become due and payable on or prior to the date of redemption designated in such notice shall continue to be payable to the bearers severally and respectively upon the presentation and surrender of such coupons.

SECTION 305. In case part but not all of an outstanding registered bond without coupons shall be selected for redemption, the registered owner thereof or his attorney or legal representative shall present and surrender such bond to the Trustee for payment of the principal amount thereof so called for redemption, and the Commission shall execute and the Trustee shall authenticate and deliver to or upon the order of such registered owner or his legal representative, without charge therefor, for the unredeemed portion of the principal amount of the registered bond without coupons so surrendered, either coupon bonds or a registered bond or bonds without coupons of the same Series, at the option of such registered owner or his attorney or legal representative, of any denomination or denominations authorized by this Indenture and bearing interest at the same rate.

SECTION 306. Coupon bonds so redeemed and all unmatured coupons appertaining thereto, and registered bonds without coupons so presented and surrendered, shall be cancelled upon the surrender thereof.

SECTION 307. Bonds and portions of bonds which have been duly called for redemption under the provisions of this Article, or with respect to which irrevocable instructions to call for redemption at the earliest redemption date have been given to the Trustee in form satisfactory to it, and for the payment of the redemption price and the accrued interest of which moneys shall be held in separate accounts by the Trustee or by the Paying Agents in trust for the holders of the bonds or portions thereof to be redeemed, all as provided in this Indenture, shall not thereafter be deemed to be outstanding under the provisions of this Indenture.

ARTICLE IV.

CUSTODY AND APPLICATION OF PROCEEDS OF BONDS.

SECTION 401. A special fund is hereby created and designated "State of Virginia 1965 Toll Project Construction Fund" (herein sometimes called the "Construction Fund"), to the credit of which such deposits shall be made as are required by the provisions of Sections 208 and 209 of this Indenture.

The moneys in the Construction Fund shall be held by the Trustee in trust and, subject to the provisions of Section 410 of this Article, shall be applied to the payment of the cost of the Project and, pending such application, shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Indenture and for the further security of such holders until paid out or transferred as herein provided.

Section 402. Payment of the cost of the Project shall be made from the Construction Fund. All payments from the Construction Fund shall be subject to the provisions and restrictions set forth in this Article, and the Commission covenants that it will not cause or permit to be paid from the Construction Fund any sums except in accordance with such provisions and restrictions.

Section 403. For the purposes of this Indenture the cost of the Project shall embrace the cost of constructing the same, and the cost of grade separations and any road relocations deemed necessary by the Commission in connection therewith, and, without intending thereby to limit or restrict any proper definition of such cost under the provisions of the State Revenue Bond Act, shall include the following:

(a) obligations incurred for labor and materials and to contractors, builders and materialmen in connection with the construction of the Project, for machinery and equipment, for the restoration or relocation of property damaged or destroyed in connection with such construction, for the removal or relocation of structures and for the clearing of lands;

(b) the cost of acquiring by purchase, if such purchase shall be deemed expedient, and the amount of any deposit in court or award or final judgment in or any settlement or compromise of any proceeding to acquire by eminent domain, such lands, property, rights, rights of way, easements, franchises and other interests as may be deemed necessary or convenient by the Commission and the Consulting Engineers for the construction and operation of the Project, options and partial payments thereon, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, and the amount of any

damages incident to or consequent upon the construction and operation of the Project;

(c) interest on the bonds issued under the provisions of Section 208 and on any bonds issued under the provisions of Section 209 of this Indenture prior to the commencement of and during the construction of the Project and for one year after the completion of construction of the Project, and the reasonable fees of the Trustee and the Paying Agents for the payment of such interest;

(d) the fees and expenses of the Trustee for its services prior to and during construction, taxes or other municipal or governmental charges lawfully levied or assessed during construction upon the Project or any property acquired therefor, and premiums on insurance (if any) in connection with the Project during construction;

(e) the cost of borings and other preliminary investigations to determine foundation or other conditions, expenses necessary or incident to determining the feasibility or practicability of constructing the Project, and fees and expenses of engineers for making traffic studies, surveys and estimates of costs and of revenues and other estimates and for preparing plans and specifications and supervising construction, as well as for the performance of all other duties of engineers set forth herein in relation to the construction of the Project and the issuance of bonds therefor;

(f) expenses of administration properly chargeable to the Project, legal expenses and fees, financing charges, cost of audits and of preparing and issuing the bonds, and all other items of expense not elsewhere in this Section specified incident to the construction and equipment of the Project, the financing thereof, the placing of the same in operation (including the initial premiums on any insurance required or obtained under the provisions of this Indenture), and the acquisition of lands, property, rights, rights of way, easements, franchises and interests therefor, including abstracts of title, title insurance, cost of surveys and other expenses in connection with such acquisition; and

(g) any obligation or expense heretofore or hereafter incurred by the Commission or any member or officer thereof in connection with the Project for any of the foregoing purposes.

SECTION 404. The Trustee shall set aside from the proceeds of the bonds issued under the provisions of Section 208 of this Indenture and credit to a separate interest account in the Construction Fund the amount required for paying the interest which will become due and payable on said bonds on each interest payment date to and including January 1, 1969, such period being less than the estimated period of construction plus one year after the completion of construction of the Project. In the event that bonds shall be issued under the provisions of Section 209 of this Indenture, the Trustee shall set aside from the proceeds of such bonds and credit to said separate interest account the amount required for paying the interest which will become due and payable on such bonds on each interest payment date to and including January 1, 1969. Without requisition from the Commission or other or further authority than is contained herein, the Trustee shall apply the moneys to the credit of said separate interest account to the payment of such interest as it becomes due and payable.

SECTION 405. Payments from the Construction Fund, except the payments which the Trustee is authorized to make under the provisions of Section 404 of this Article, shall be made in accordance with the provisions of this Section. Before any such payment shall be made the Commission shall file with the Trustee:

(a) a requisition, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, stating

- (i) the item number of each such payment,
- (ii) the name of the person, firm or corporation to whom each such payment is due,
- (iii) the respective amounts to be paid, and
- (iv) the purpose by general classification for which each obligation to be paid was incurred;

(b) a certificate, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose and attached to such requisition, certifying:

- (i) that obligations in the stated amounts have been incurred by the Commission and are presently due and payable

and that each item thereof is a proper charge against the Construction Fund and has not been paid,

(ii) that there has not been filed with or served upon the Commission notice of any lien, right to lien or attachment upon, or claim affecting the right of any such persons, firms or corporations to receive payment of, the respective amounts stated in such requisition which has not been released or will not be released simultaneously with the payment of such obligation, and

(iii) that such requisition contains no item representing payment on account of any retained percentage which the Commission is at the date of such requisition entitled to retain, unless payment of such retained percentage shall be approved by the Consulting Engineers; and

(c) a certificate, signed by the Consulting Engineers and attached to such requisition, certifying their approval thereof.

Upon receipt of each requisition and accompanying certificates the Trustee shall transfer from the Construction Fund to the credit of a special checking account in its commercial department in the name of the State Treasurer an amount equal to the total of the amounts to be paid as set forth in such requisition, the amount so transferred to be used solely for the payment of the obligations set forth in such requisition. The Commission shall thereupon file with the State Comptroller a duplicate of each such requisition and accompanying certificates and a voucher, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, covering each item set forth in such requisition and thereupon the State Comptroller shall issue warrants for the payment by the State Treasurer of each such item, and each such payment shall be made by the State Treasurer by check drawn on such special checking account. Moneys transferred to the credit of such special checking account shall be deemed to be a part of the Construction Fund until paid out as above provided. In making such transfers the Trustee may rely upon such requisitions and accompanying certificates. If for any reason the Commission should decide prior to the payment of any item in a requisition not to pay such item, the State Highway Commissioner or such other officer or employee of

the Commission as may be designated by the State Highway Commissioner for such purpose shall give notice of such decision to the Trustee and, in case the amount of such item shall have been included in any such transfer, the State Treasurer shall, upon voucher and warrant as above provided, thereupon pay the amount of such item by check similarly signed and drawn on such special checking account to the Trustee for deposit to the credit of the Construction Fund.

In addition to such transfers, the Trustee shall pay from the Construction Fund to the Commission upon its requisitions therefor, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, at one time or from time to time, a sum or sums aggregating not more than Fifty Thousand Dollars (\$50,000), exclusive of reimbursements as hereinafter in this Section authorized, such sums and such reimbursements to be used by the Commission as a revolving fund for the payment of items of cost and expenses referred to in Section 403 of this Article which can not conveniently be paid as herein otherwise provided. Such moneys shall be deemed to be a part of the Construction Fund until paid out as above provided. The revolving fund shall be reimbursed by the Trustee from time to time for such items of cost and expenses so paid by payments from the Construction Fund upon requisition of the Commission, filed with the Trustee and similarly signed, specifying the payee, the amount and the purpose by general classification of each payment from the revolving fund for which such reimbursement is requested, and stating that each such item of cost or expense so paid was a necessary item of cost or expense within said Section 403 and that such cost or expense could not conveniently be paid except from such revolving fund, and a certificate, signed by the Consulting Engineers and attached to such requisition, certifying their approval thereof. In making such payments and reimbursements the Trustee may rely upon such requisitions and certificates.

SECTION 406. If any requisition contains any item for the payment of the purchase price or cost of any lands, property, rights, rights of way, easements, franchises or interests in or relating to lands, there shall be attached to such requisition, in addition to the certificates mentioned in Section 405 of this Article,

(a) a certificate, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, stating that such lands, property, rights, rights of way, easements, franchises or interests are being acquired in furtherance of the acquisition of the right of way for the Project or in furtherance of the construction or operation of the Project, and

(b) a written opinion of the Attorney General or an Assistant Attorney General of the Commonwealth stating that the signer is of the opinion that the Commission is authorized to acquire such lands, property, rights, rights of way, easements, franchises or interests, and that the State will have upon the payment of such item title in fee simple to, or perpetual easements for the purposes of the Project over, such lands, free from all liens, encumbrances and defects of title except liens, encumbrances or defects of title which do not have a materially adverse effect upon the Commission's right to use such lands or properties for the purposes intended or which have been adequately guarded against by a bond or other form of indemnity, or, if such payment be a deposit in court in any proceeding to acquire any interest in or relating to lands by eminent domain or a payment for an option to purchase or for a quitclaim deed or a lease or a release or on a contract to purchase or is otherwise for the acquisition of a right or interest in lands less than a fee simple or a perpetual easement, or if such payment be a part payment for any such purpose, the written approval of the acquisition of such lesser right or interest or of such deposit or part payment signed by the Attorney General or an Assistant Attorney General, or, in lieu of the opinion required by this clause, a firm undertaking by a reputable title insurance company to issue its title insurance policy and a written opinion of the Attorney General or an Assistant Attorney General stating that, in the opinion of the signer, any objections or exceptions to be noted therein are not of a material nature.

SECTION 407. The Commission covenants that the Project will be constructed on land which is owned or can be acquired by the Commission in the name of the State of Virginia in fee simple or over which the Commission shall have acquired or can acquire in the name of the State

of Virginia perpetual easements for the purposes of the Project, free from all liens, encumbrances and defects of title except liens, encumbrances or defects of title which do not have a materially adverse effect upon the Commission's right to use such lands or properties for the purposes intended.

SECTION 408. All requisitions, certificates and opinions received by the Trustee, as required in this Article as conditions of payment from the Construction Fund, may be relied upon by the Trustee.

SECTION 409. The Commission covenants that, at least once in each three months' period after the delivery of the bonds under the provisions of Section 208 of this Indenture and until the construction of the Project shall have been completed, as evidenced by the filing with the Trustee of the certificate and opinion referred to in Section 410 of this Article, it will prepare a progress report in connection with the acquisition of the right of way for the Project and will cause the Consulting Engineers to prepare a progress report in connection with the construction of the Project, including their current estimates of

(i) the date on which the Project will be opened for traffic, unless the Project shall have been opened for traffic prior to the date of such report,

(ii) the date on which the construction of the Project will be completed,

(iii) the cost of the Project (showing separately the amount for each general classification set forth in the engineering report mentioned in the preambles of this Indenture), exclusive of financing charges and interest during construction, and

(iv) the amount of funds required each three months during the remaining estimated period of construction to meet such cost, accompanied by a statement of progress of such construction,

and comparisons between such times, amounts and progress and the estimated times and amounts and the progress schedule set forth in said engineering report and in the statement filed under the provisions of clause (b) of said Section 208. Copies of such progress reports shall be filed with the Trustee and the Commission and mailed by the Com-

mission to the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose.

The Commission further covenants that, at least once in each six (6) months after the delivery of the bonds under the provisions of said Section 208 and until the construction of the Project shall have been completed, it will cause an audit to be made by an independent firm of certified public accountants of recognized ability and standing, to be chosen by the Commission with the approval of the Trustee, covering all receipts and moneys then on deposit with or in the name of the Trustee and the Commission and any security held therefor, any investments thereof and all payments and disbursements made pursuant to the provisions of Sections 404 and 405 of this Article. Reports of each such audit shall be filed with the Trustee and the Commission and copies of such reports shall be mailed by the Commission to the principal underwriters, the Consulting Engineers and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose.

SECTION 410. When the construction of the Project shall have been completed, which fact shall be evidenced to the Trustee by a certificate stating the date of such completion, signed by the State Highway Commissioner or the Chief Engineer and by the Secretary or an Assistant Secretary of the Commission and approved by the Consulting Engineers, accompanied by an opinion of the Attorney General or an Assistant Attorney General of the Commonwealth stating that the Commission has acquired in the name of the State of Virginia title in fee simple to, or perpetual easements for the purposes of, the Project and all of the property necessary and incident thereto, free from all liens, encumbrances and defects of title except liens, encumbrances or defects of title which do not have a materially adverse effect upon the Commission's right to use such lands or properties for the purposes intended or which have been adequately guarded against by a bond or other form of indemnity, that there are no unsatisfied mechanics', laborers', contractors' or materialmen's liens on any property constituting a part of the Project or on file in any public office where the same should be filed in order to be valid liens against any part of such property, and that, in the opinion of the signer, the time within which such liens can be

filed has expired, the balance in the Construction Fund (excluding any amount held for the credit of the separate interest account therein under the provisions of Section 404 of this Article), including any amount in the revolving fund created by Section 405 of this Article, not reserved by the Commission with the approval of the Consulting Engineers for the payment of any remaining part of the cost of the Project, shall be transferred by the Trustee or deposited by the State Treasurer with the Trustee, as the case may be, to the credit of the Reserve Account; provided, however, that the Commission by resolution may from time to time, with the approval of the Consulting Engineers, authorize and direct the Trustee to transfer from the Construction Fund to the credit of the Reserve Account all or a portion of the moneys held for the credit of the Construction Fund in excess of the amount then estimated by the Commission, with the approval of the Consulting Engineers, to be sufficient for the purpose of providing funds for completing payment of the cost of the Project.

If at any time after such transfer there shall be filed with the Trustee a certificate, signed by the State Highway Commissioner or the Chief Engineer and by the Secretary or an Assistant Secretary of the Commission and approved by the Consulting Engineers, stating that the cost of the Project has been finally determined and that the part of such cost then remaining unpaid exceeds the amount reserved by the Trustee under this Section, an amount equal to such excess shall forthwith be retransferred by the Trustee from the Reserve Account to the Construction Fund and thereafter applied, upon requisition as above provided, to meet such unpaid cost; provided, however, that the amount so retransferred shall not exceed the amount transferred from the Construction Fund to the Reserve Account under the foregoing provisions of this Section. If at any time after such transfer or retransfer there shall be filed with the Trustee a certificate, similarly signed and approved, stating that the cost of the Project has been finally determined and that the amount reserved under this Section exceeds the part of such cost then remaining unpaid, an amount equal to such excess shall forthwith be transferred by the Trustee from the Construction Fund to the Reserve Account.

In making any such transfer or retransfer the Trustee may rely upon (a) a certificate filed with it by the Commission, signed by the State Highway Commissioner or the Chief Engineer and approved by

the Consulting Engineers, as to any items of such cost then remaining unpaid and as to any estimate in such certificate of the amount of any items of such cost the actual amount of which is not finally determined, and (b) a certificate, signed by the Attorney General or an Assistant Attorney General of the Commonwealth, as to the status and amount of any claims then outstanding affecting such cost. The Trustee may require the filing of such certificates as a condition of such transfer or retransfer.

ARTICLE V.

REVENUES AND FUNDS.

SECTION 501. The Commission covenants

(a) that before the Project or any part thereof is opened for traffic it will fix and place in effect an initial schedule of tolls for traffic using the Project, which schedule will be in substantial conformity with the tolls recommended by the Traffic Engineers in their traffic report mentioned in the preambles of this Indenture, subject to any change or revision which will not, in the opinion of the Traffic Engineers, result in producing less revenues,

(b) that it will not change the toll collecting facilities or change or revise the tolls for traffic using the Toll Road if, in the opinion of the Traffic Engineers, such change or revision will result in producing less revenues unless such change or revision, in the opinion of the Traffic Engineers, will still result in producing revenues sufficient to provide for the deposit to the credit of the Sinking Fund and the Improvement Fund in each fiscal year of an amount not less than

(i) the amount of estimated net revenues (over and above Current Expenses and deposits to the credit of the Reserve Maintenance Fund) for each such fiscal year as determined from the estimates set forth in said traffic report and in the engineering report of the Consulting Engineers mentioned in the preambles of this Indenture or, in case any additional bonds shall be issued under the provisions of Section 209 of this Indenture, such estimated net revenues plus an amount equal to such percentage thereof as is obtained by dividing

the principal amount of such additional bonds by the principal amount of the bonds issued under the provisions of Section 208 of this Indenture, or

(ii) one hundred thirty-five per centum (135%) of the maximum amount of the Principal and Interest Requirements for any fiscal year thereafter on account of all bonds then outstanding,

whichever is the lesser amount, and

(c) that if the schedule of tolls then in effect for traffic using the Toll Road is not producing revenues sufficient to provide for the deposit to the credit of the Sinking Fund and the Improvement Fund in each fiscal year of an amount not less than one hundred twenty per centum (120%) of the Principal and Interest Requirements for such fiscal year, it will request the Traffic Engineers to make recommendations as to a revision of the schedule of tolls in order to produce the maximum amount of revenues possible and, upon receiving such recommendations, it will revise such schedule of tolls in order to produce the maximum amount of revenues possible; provided, however, that the Commission need not provide for the deposit to the credit of the Sinking Fund and the Improvement Fund of an amount in excess of the amount referred to in this clause.

The Commission further covenants that, if the amount deposited to the credit of the Sinking Fund and the Improvement Fund in any fiscal year shall be less than the amount referred to in clause (c) above for such fiscal year, it will, before the 15th day of February of the following fiscal year, request the Traffic Engineers to make recommendations as to a revision of the schedule of tolls in order to produce the maximum amount of revenues possible and, upon receiving such recommendations, it will revise such schedule of tolls in order to produce the maximum amount of revenues possible; provided, however, that the Commission need not provide for the deposit to the credit of the Sinking Fund and the Improvement Fund of an amount in excess of the amount referred to in said clause (c).

Anything in this Indenture to the contrary notwithstanding, if the Commission shall comply with all recommendations of the Traffic

Engineers (or such independent engineer or engineering firm or corporation as hereinafter provided for in this Section) in respect of tolls, it will not constitute an event of default under the provisions of clause (i) of Section 802 of this Indenture even though the amount deposited to the credit of the Sinking Fund and the Improvement Fund in any fiscal year shall be less than the amount referred to in clause (c) above for such fiscal year. In the event of any such deficiency and regardless of any recommendations of the Traffic Engineers or compliance therewith by the Commission, the Trustee or the holders of not less than fifteen per centum (15%) in aggregate principal amount of the bonds then outstanding may, however, and the Trustee shall, upon the written request of the holders of not less than ten per centum (10%) in aggregate principal amount of the bonds then outstanding and upon being indemnified to its satisfaction, institute and prosecute in a court of competent jurisdiction an appropriate action to compel the Commission to revise the schedule of tolls in order to produce the amount referred to in clause (c) above. The Commission covenants that it will adopt and charge tolls in compliance with any final order, decree or judgment entered in any such proceeding, or any modification thereof.

In the event that the Commission shall call upon the Traffic Engineers for their recommendations as hereinabove in this Section required and the Traffic Engineers, after such request by the Commission, shall fail to file with the Commission and with the Trustee such recommendations in writing within sixty (60) days after such request, the Trustee shall forthwith designate and appoint an independent engineer or engineering firm or corporation having a nation-wide and favorable repute for skill and experience in such work in lieu of the Traffic Engineers to make a survey and study and recommendations as to a revision of the schedule of tolls, which recommendations shall be reported in writing to the Commission and to the Trustee on or before the 1st day of August following. Such written report shall for all purposes be considered to be the equivalent of and substitute for the recommendations of the Traffic Engineers hereinabove mentioned.

The Commission further covenants that upon its making any request to the Traffic Engineers for their recommendations as to a revision of the schedule of tolls or upon the receipt of any such recommendations from the Traffic Engineers or upon the adoption by

the Commission of any revised schedule of tolls, certified copies of any such request, recommendations or revised schedule of tolls so adopted will forthwith be filed with the Trustee and mailed by the Commission to the principal underwriters.

SECTION 502. The Commission covenants that tolls will be classified in a reasonable way to cover all traffic, so that the tolls may be uniform in application to all traffic falling within any reasonable class regardless of the status or character of any person, firm or corporation participating in the traffic, and that no reduced rate of toll will be allowed within any such class except that, subject to the provisions of Section 501 of this Article, provision may be made for the use of commutation or other tickets or privileges based upon frequency or volume. The Commission further covenants that no free vehicular passage will be permitted on the Toll Road or any part thereof except to vehicles of members, officers and employees of the Commission, the State Department of Highways and the Division of Motor Vehicles while they are in the discharge of their official duties, to vehicles of any fire or police department of the State of Virginia or any political subdivision thereof while operated in the discharge of official duties, to ambulances owned or operated by a political subdivision of the State of Virginia or a non-profit organization while in the discharge of their duties and to vehicles owned or operated by agents and independent contractors of the Commission which are used in connection with the maintenance or operation of the Toll Road and except as is permitted on account of the interchanges and the toll collecting facilities described in the traffic report of the Traffic Engineers mentioned in the preambles of this Indenture.

SECTION 503. A special fund is hereby created in the State Treasury and designated "State of Virginia 1965 Toll Project Revenue Fund" (herein sometimes called the "Revenue Fund"). The Commission covenants that all tolls and other revenues derived from the operation or ownership of the Toll Road will be collected by the Commission and deposited daily, so far as practicable, in a state depository, in the name of the State Treasurer to the credit of the Revenue Fund.

SECTION 504. The Commission covenants that it will cause the Consulting Engineers employed by it under the provisions of Section 706 of this Indenture, among such other duties as may be imposed upon

them by the Commission or by this Indenture, to make an inspection of the Toll Road at least once in each year following the opening of the Project for traffic and, on or before the 1st day of October in each fiscal year after such opening, to submit to the Commission a report setting forth (a) their findings whether the Toll Road has been maintained in good repair, working order and condition and (b) their recommendations as to

(i) the proper maintenance, repair and operation of the Toll Road during the ensuing fiscal year and an estimate of the amount of money necessary for such purposes,

(ii) insurance to be carried under the provisions of Sections 707 and 708 of this Indenture,

(iii) the amount, if any, that should be transferred during the ensuing fiscal year to the credit of the Reserve Maintenance Fund for the purposes set forth in Section 509 of this Article, and

(iv) the amount, if any, that should be transferred during the ensuing fiscal year to the credit of the Improvement Fund for the purposes set forth in Section 512 of this Article.

The Commission further covenants that it will cause the Consulting Engineers to submit to the Commission at least three months prior to the opening of the Project for traffic a report setting forth their recommendations with respect to the matters set forth in items (i), (ii), (iii) and (iv) of clause (b) above for the period of time from the opening of the Project for traffic until the close of the then current fiscal year if the Project shall be opened for traffic before October 1 of such fiscal year, and until the close of the ensuing fiscal year if the Project shall be opened for traffic on or after October 1 of a fiscal year.

Promptly after the receipt of such reports by the Commission, copies thereof shall be filed with the Trustee and mailed by the Commission to the Traffic Engineers, the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose.

The Commission further covenants that, if any such report of the Consulting Engineers shall set forth that the Toll Road has not been maintained in good repair, working order and condition, it will, from the revenues of the Toll Road and any other moneys available therefor, promptly restore the Toll Road to good repair, working order and condition with all expedition practicable in accordance with the recommendations of the Consulting Engineers.

SECTION 505. The Commission covenants that on or before the 10th day of October in each fiscal year it will prepare a preliminary budget of Current Expenses for the ensuing fiscal year. On or before the 20th day of October in such fiscal year copies of each such preliminary budget shall be filed with the Trustee and mailed by the Commission to the Consulting Engineers, the Traffic Engineers, the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose. The Commission further covenants that it will comply with any reasonable request of the Trustee or the Consulting Engineers as to the classifications in which such budget shall be prepared, particularly with respect to the divisions into which such budget shall be divided. Each such budget shall show separately what classifications, or portions thereof, of Current Expenses are to be paid from available funds other than the revenues of the Toll Road.

If the Trustee, the holders of five per centum (5%) in aggregate principal amount of the bonds then outstanding or a majority of the principal underwriters shall so request the Commission in writing on or before the 1st day of November in any fiscal year, the Commission shall hold a public hearing on or before the 20th day of November in such fiscal year at which the Trustee, any bondholder or any principal underwriter may appear in person or by agent or attorney and present any objections he may have to the final adoption of such budget. Notice of the time and place of such hearing shall be mailed by the Commission at least ten (10) days prior to the date fixed by the Commission for the hearing to the Trustee, the Consulting Engineers, the Traffic Engineers, the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose.

The Commission further covenants that on or before the 1st day of December in such fiscal year it will finally adopt the budget of Current Expenses for the ensuing fiscal year (herein sometimes called the "Annual Budget") and that the total appropriations in any division thereof will not exceed the total appropriations in the corresponding division in the preliminary budget. On or before the 10th day of December in such fiscal year copies of the Annual Budget shall be filed with the Trustee and mailed by the Commission to the Consulting Engineers, the Traffic Engineers, the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose.

If for any reason the Commission shall not have adopted the Annual Budget before the first day of any fiscal year, the preliminary budget for such fiscal year, if approved by the Consulting Engineers, or, if there is none so approved, the budget for the preceding fiscal year, shall, until the adoption of the Annual Budget, be deemed to be in force and shall be treated as the Annual Budget under the provisions of this Article.

The Commission may at any time adopt an amended or supplemental Annual Budget for the remainder of the then current fiscal year, but no such amended or supplemental Annual Budget shall be effective until it shall be approved by the Consulting Engineers, and when so approved the Annual Budget so amended or supplemented shall be treated as the Annual Budget under the provisions of this Article. Copies of any such amended or supplemental Annual Budget shall be filed with the Trustee and mailed by the Commission to the Consulting Engineers, the Traffic Engineers, the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose.

The Commission further covenants that the Current Expenses incurred in any fiscal year will not exceed the reasonable and necessary amount thereof, and that it will not expend any amount or incur any obligations for maintenance, repair and operation of the Toll Road in excess of the amounts provided for Current Expenses in the Annual Budget, except amounts which may be paid from the Reserve Maintenance Fund. Nothing in this Section contained shall limit the amount

which the Commission may expend for Current Expenses in any fiscal year provided any amounts expended therefor in excess of the Annual Budget shall be received by the Commission from some source other than the revenues of the Toll Road and the Commission shall not make any reimbursement therefor from such revenues.

The Commission further covenants that, any of the foregoing provisions of this Section to the contrary notwithstanding, in the fiscal year in which the Project shall be opened for traffic it will, on or before the 10th day following the date (herein called the "report date") on which the Consulting Engineers shall have submitted their report to the Commission pursuant to the provisions of the second paragraph of Section 504 of this Article, prepare a preliminary budget of Current Expenses for the period of time for which such report shall have been submitted, and copies of such preliminary budget shall be filed and mailed on or before the 20th day following the report date. If the Trustee, the holders of five per centum (5%) in aggregate principal amount of the bonds then outstanding or a majority of the principal underwriters shall so request the Commission in writing on or before the 40th day following the report date, the Commission shall hold a public hearing on or before the 60th day following the report date. The Commission further covenants that on or before the 70th day following the report date it will finally adopt the budget of Current Expenses for the period for which said preliminary budget shall have been prepared (herein called the "Initial Budget"), and copies thereof shall be filed and mailed within ten (10) days after the adoption thereof. If for any reason the Commission shall not have adopted the Initial Budget before the Project shall have been opened for traffic, the preliminary budget for such period, if approved by the Consulting Engineers, or, if there is none so approved, the recommendations of the Consulting Engineers in their report submitted to the Commission pursuant to the provisions of said second paragraph of Section 504 as to the proper maintenance, repair and operation of the Project for such period, shall, until the adoption of the Initial Budget, be deemed to be in force and shall be treated as the Initial Budget under the provisions of this paragraph. Except as to any such provisions which may conflict with the provisions of this paragraph, all of the foregoing provisions of this Section shall be applicable to the preliminary budget and the Initial Budget provided for in this paragraph and to all action required, taken

or permitted in connection therewith or relating thereto. Except as herein provided, all of the provisions of this Indenture with respect to the Annual Budget shall be applicable to the Initial Budget.

Section 506. A special fund is hereby created and designated "1965 Revenue Fund-Trustee Account", to be held and applied in accordance with the provisions of this Article. On or before the 7th day of each month the State Highway Commissioner, or such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, shall issue a voucher directing the issuance of a warrant by the State Comptroller for payment by the State Treasurer of all moneys held as of the last day of the preceding month for the credit of the Revenue Fund pursuant to the provisions of Section 503 of this Article to the Trustee for deposit to the credit of the 1965 Revenue Fund-Trustee Account.

Payments from the 1965 Revenue Fund-Trustee Account, except the withdrawals which the Trustee is authorized to make as provided in Section 507 of this Article, shall be made in accordance with the provisions of this Section. Before any such payment shall be made the Commission shall file with the Trustee:

(a) a requisition, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, stating

- (i) the item number of each such payment,
- (ii) the name of the person, firm or corporation to whom each such payment is due,
- (iii) the respective amounts to be paid, and
- (iv) the purpose by general classification for which each obligation to be paid was incurred; and

(b) a certificate, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose and attached to such requisition, certifying:

- (i) that obligations in the stated amounts have been incurred by the Commission and are presently due and payable

and that each item thereof was properly incurred as an item of Current Expenses and has not been paid,

(ii) that there has not been filed with or served upon the Commission notice of any lien, right to lien or attachment upon, or claim affecting the right of any such persons, firms or corporations to receive payment of, the respective amounts stated in such requisition which has not been released or will not be released simultaneously with the payment of such obligation, and

(iii) that the total amount of such payments will not be in excess of the unencumbered balance of the Annual Budget or any amendment thereof or supplement thereto.

Upon receipt of each requisition and accompanying certificate the Trustee shall transfer from the 1965 Revenue Fund-Trustee Account to the credit of a special checking account in its commercial department in the name of the State Treasurer an amount equal to the total of the amounts to be paid as set forth in such requisition, the amount so transferred to be used solely for the payment of the obligations set forth in such requisition. The Commission shall thereupon file with the State Comptroller a duplicate of each such requisition and accompanying certificate and a voucher, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, covering each item set forth in such requisition and thereupon the State Comptroller shall issue warrants for the payment by the State Treasurer of each such item, and each such payment shall be made by the State Treasurer by check drawn on such special checking account. Moneys transferred to the credit of such special checking account shall be deemed to be a part of the 1965 Revenue Fund-Trustee Account until paid out as above provided. In making such transfers the Trustee may rely upon such requisitions and accompanying certificate. If for any reason the Commission should decide prior to the payment of any item in a requisition not to pay such item, the State Highway Commissioner or such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such pur-

pose shall give notice of such decision to the Trustee and, in case the amount of such item shall have been included in any such transfer, the State Treasurer shall, upon voucher and warrant as above provided, thereupon pay the amount of such item by check similarly signed and drawn on such special checking account to the Trustee for deposit to the credit of the 1965 Revenue Fund-Trustee Account.

In addition to such transfers, the Trustee shall pay from the 1965 Revenue Fund-Trustee Account to the Commission upon its requisitions therefor, signed by the State Highway Commissioner or by such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose, at one time or from time to time, a sum or sums aggregating not more than Fifty Thousand Dollars (\$50,000), exclusive of reimbursements as hereinafter in this Section authorized, such sums and such reimbursements to be used by the Commission as a revolving fund for the payment of Current Expenses which can not conveniently be paid as herein otherwise provided. Such moneys shall be deemed to be a part of the 1965 Revenue Fund-Trustee Account until paid out as above provided. The revolving fund shall be reimbursed by the Trustee from time to time for such expenses so paid by payments from the 1965 Revenue Fund-Trustee Account upon requisition of the Commission, filed with the Trustee and similarly signed, specifying the payee, the amount and the purpose by general classification of each payment from the revolving fund for which such reimbursement is requested, and stating that each such expense so paid was a necessary item of Current Expenses, that such expense could not conveniently be paid except from such revolving fund, and that such payments were not in excess of the unencumbered balance of the Annual Budget or any amendment thereof or supplement thereto. In making such payments and reimbursements the Trustee may rely upon such requisitions.

Section 507. A special fund is hereby created and designated "State of Virginia Toll Revenue Bonds (Series 1965) Interest and Sinking Fund" (herein sometimes called the "Sinking Fund"). There are hereby created three separate accounts in the Sinking Fund designated "Bond Interest Account", "Reserve Account" and "Redemption Account", respectively. Two additional special funds are hereby

created and designated "State of Virginia 1965 Toll Project Reserve Maintenance Fund" (herein sometimes called the "Reserve Maintenance Fund") and "State of Virginia 1965 Toll Project Improvement Fund" (herein sometimes called the "Improvement Fund").

The moneys in each of said Funds and Accounts shall be held by the Trustee in trust and applied as hereinafter provided with respect to each such Fund or Account and, pending such application, shall be subject to a lien and charge in favor of the holders of the bonds issued and outstanding under this Indenture and for the further security of such holders until paid out or transferred as herein provided.

It shall be the duty of the Trustee, on or before the 27th day of each month after the opening of the Project or any part thereof for traffic, to withdraw from the 1965 Revenue Fund-Trustee Account an amount equal to the amount of all moneys held for the credit of said Account on the last day of the preceding month less the amount in the revolving fund therein and an amount (to be held as a reserve for Current Expenses) equal to twenty per centum (20%) of the amount shown by the Annual Budget to be necessary for Current Expenses for the current fiscal year, or of the amount shown by the Initial Budget to be necessary for Current Expenses for the period covered thereby, as the case may be, and deposit the sum so withdrawn to the credit of the following Accounts or Funds in the following order:

(a) to the credit of the Bond Interest Account, such amount thereof (or the entire sum so withdrawn if less than the required amount) as may be required to make the amount then to the credit of the Bond Interest Account equal to the amount of interest then or to become within the next ensuing six (6) months due and payable on all bonds then outstanding, except any interest which the Trustee is required to pay from the separate interest account in the

Construction Fund under the provisions of Section 404 of this Indenture;

(b) to the credit of the Reserve Maintenance Fund, such amount, if any, of any balance remaining after making the deposit under clause (a) above (or the entire balance if less than the required amount) as may be required to make the amount deposited in the current fiscal year to the credit of the Reserve Maintenance Fund equal to the amount recommended by the Consulting Engineers, as provided by Section 504 of this Article, to be deposited to the credit of said Fund during such fiscal year; provided, however, that if the amount so deposited to the credit of said Fund in any fiscal year shall be less than the amount recommended by the Consulting Engineers, the requirement therefor shall nevertheless be cumulative and the amount of any such deficiency in any fiscal year shall be added to the amount otherwise required to be deposited in each fiscal year thereafter until such time as such deficiency shall have been made up, unless such requirement shall have been modified by the Consulting Engineers in writing, signed copies of such modification to be filed with the Trustee and the Commission and mailed by the Commission to the principal underwriters;

(c) to the credit of the Reserve Account, such amount, if any, of any balance remaining after making the deposits under clauses (a) and (b) above (or the entire balance if less than the required amount) as may be required to make the amount then to the credit of the Reserve Account equal to eighteen (18) months' interest on all bonds then outstanding;

(d) to the credit of the Redemption Account, such amount, if any, of any balance remaining after making the deposits under clauses (a), (b) and (c) above (or the entire balance if less than the required amount) as may be required to make the amount deposited in the then current fiscal year to the credit of the Redemption Account equal to the Amortization Requirements, if any, for such fiscal year for the bonds of each Series then outstanding, plus the premium, if any, on such principal amount of bonds which

would be payable in such fiscal year if such principal amount of bonds were to be redeemed prior to their maturity from moneys held for the credit of the Sinking Fund;

(c) to the credit of the Improvement Fund, such amount, if any, of any balance remaining after making the deposits under clauses (a), (b), (c) and (d) above (or the entire balance if less than the required amount) as may be required to make the amount deposited in the current fiscal year to the credit of the Improvement Fund equal to the amount recommended by the Consulting Engineers, as provided by Section 504 of this Article, to be deposited to the credit of said Fund during such fiscal year; provided, however, that if the amount so deposited to the credit of said Fund in any fiscal year shall be less than the amount recommended by the Consulting Engineers, the requirement therefor shall nevertheless be cumulative and the amount of any such deficiency in any fiscal year shall be added to the amount otherwise required to be deposited in each fiscal year thereafter until such time as such deficiency shall have been made up, unless such requirement shall have been modified by the Consulting Engineers in writing, signed copies of such modification to be filed with the Trustee and the Commission and mailed by the Commission to the principal underwriters; and

(f) to the credit of the Redemption Account, the balance, if any, remaining after making the deposits under clauses (a), (b), (c), (d) and (e) above.

SECTION 508. The Trustee shall, immediately preceding each interest payment date, withdraw from the Bond Interest Account and (a) remit by mail to each owner of registered bonds without coupons the amounts required for paying the interest on such bonds as such interest becomes due and payable and (b) deposit in trust with the Paying Agents the amounts required for paying the interest on the coupon bonds as such interest becomes due and payable.

SECTION 509. Except as hereinafter provided in this Section and in Section 707 of this Indenture, moneys held for the credit of the Reserve Maintenance Fund shall be disbursed only for the purpose of paying the cost of

- (a) resurfacing the Toll Road or any part thereof,
- (b) unusual or extraordinary maintenance or repairs, maintenance or repairs not recurring annually, and renewals and replacements, including major items of equipment,
- (c) repairs or replacements resulting from an emergency caused by some extraordinary occurrence, so characterized by a certificate signed by the Consulting Engineers and filed with the Trustee and accompanied by a certificate, signed by the Secretary or an Assistant Secretary of the Commission, stating that the moneys in the 1965 Revenue Fund-Trustee Account and insurance proceeds, if any, available therefor are insufficient to meet such emergency,
- (d) engineering expenses incurred under the provisions of this Section, and
- (e) premiums on insurance carried under the provisions of this Indenture.

Such disbursements by the Trustee shall be made in accordance with the provisions of Section 405 of this Indenture for payments from the Construction Fund to the extent that such provisions may be applicable.

If at any time the moneys held for the credit of the Bond Interest Account and the Reserve Account shall be insufficient for the purpose of paying the interest on the bonds as such interest becomes due and payable, then the Trustee shall transfer from any moneys held for the credit of the Reserve Maintenance Fund to the credit of the Bond Interest Account an amount sufficient to make up any such deficiency. Any moneys so transferred from the Reserve Maintenance Fund shall be restored by the Trustee from available moneys in the 1965 Revenue Fund-Trustee Account, subject to the same conditions as are prescribed for deposits to the credit of the Reserve Maintenance Fund under the provisions of Section 507 of this Article.

The Trustee shall from time to time transfer any moneys from the Reserve Maintenance Fund to the credit of the 1965 Revenue Fund-Trustee Account upon the receipt of a certified copy of a resolution duly adopted by the Commission directing such transfer and a certificate of the Consulting Engineers certifying that the amount so to be

transferred is not required for the purposes for which the Reserve Maintenance Fund has been created.

SECTION 510. Except as otherwise provided in Section 410 of this Indenture, moneys held for the credit of the Reserve Account shall be used for the purpose of paying interest on bonds whenever and to the extent that the moneys held for the credit of the Bond Interest Account shall be insufficient for such purpose. If at any time during the first fifteen (15) days of May or November in each fiscal year the moneys held for the credit of the Reserve Account shall exceed eighteen (18) months' interest on all bonds then outstanding, such excess shall be transferred by the Trustee to the credit of the Redemption Account. The Trustee may, however, in its discretion transfer at any time the moneys held for the credit of the Reserve Account in excess of eighteen (18) months' interest on all bonds then outstanding.

SECTION 511. Moneys held for the credit of the Redemption Account shall be applied to the retirement of bonds issued under the provisions of this Indenture as follows:

(a) Subject to the provisions of paragraph (c) of this Section, the Trustee shall endeavor to purchase bonds or portions of bonds secured hereby and then outstanding, whether or not such bonds or portions shall then be subject to redemption, at the most advantageous price obtainable with reasonable diligence, such price not to exceed the principal of such bonds plus the amount of the premium, if any, which would be payable on the next redemption date to the holders of such bonds under the provisions of Article III of this Indenture if such bonds or portions of bonds should be called for redemption on such date from moneys in the Sinking Fund. The Trustee shall pay the interest accrued on such bonds or portions of bonds to the date of settlement therefor from the Bond Interest Account and the purchase price from the Redemption Account, but no such purchase shall be made by the Trustee within the period of forty-five (45) days immediately preceding any interest payment date on which such bonds are subject to call for redemption under the provisions of this Indenture except from moneys other than the moneys set aside or deposited for the redemption of bonds.

(b) Subject to the provisions of paragraph (c) of this Section, the Trustee shall call for redemption on each interest payment date on which bonds are subject to redemption from moneys in the Sinking Fund such amount of bonds or portions of bonds then subject to redemption as, with the redemption premium, if any, will exhaust the moneys then held for the credit of the Redemption Account as nearly as may be; provided, however, that not less than One Hundred Thousand Dollars (\$100,000) principal amount of bonds shall be called for redemption at any one time. Such redemption shall be made pursuant to the provisions of Article III of this Indenture. Prior to calling bonds or portions of bonds for redemption the Trustee shall withdraw from the Bond Interest Account and from the Redemption Account and set aside in separate accounts or deposit with the Paying Agents the respective amounts required for paying the interest on, and the principal and redemption premium of, the bonds or portions of bonds so called for redemption.

(c) Moneys in the Redemption Account shall be applied by the Trustee in each fiscal year to the retirement of bonds of each Series then outstanding in the following order:

first, the bonds of each such Series to the extent of the Amortization Requirement, if any, for such fiscal year for the bonds of each such Series then outstanding, plus the applicable premium, if any, and, if the amount available in such fiscal year shall not be equal thereto, then in proportion to the Amortization Requirement, if any, for such fiscal year for the bonds of each such Series then outstanding, plus the applicable premium, if any; and

second, any balance then remaining shall be applied to the retirement of the bonds of each such Series in proportion (as nearly as practicable) to the aggregate principal amount of the bonds of each such Series originally issued under the provisions of this Agreement:

provided, however, that if the bonds of any Series shall not then be subject to redemption from moneys in the Sinking Fund and if the Trustee shall at any time be unable to exhaust the moneys appli-

cable to the bonds of such Series in the purchase of such bonds under the provisions of paragraph (a) of this Section, such moneys or the balance of such moneys, as the case may be, shall be retained in the Redemption Account and, as soon as it is feasible, applied to the retirement of bonds of such Series.

The Commission shall pay from the 1965 Revenue Fund-Trustee Account all expenses in connection with any such purchase or such redemption.

SECTION 512. Except as hereinafter provided in this Section and in Section 707 of this Indenture, moneys held for the credit of the Improvement Fund shall be disbursed only for the purpose of paying, if and to the extent then permitted by law,

- (a) all or any part of the cost of any Improvements, and
- (b) engineering and other expenses incurred in connection with such Improvements.

Such disbursements by the Trustee shall be made in accordance with the provisions of Section 405 of this Indenture for payments from the Construction Fund to the extent that such provisions may be applicable.

If at any time the moneys held for the credit of the Bond Interest Account, the Reserve Account and the Reserve Maintenance Fund shall be insufficient for the purpose of paying the interest on the bonds as such interest becomes due and payable, then the Trustee shall transfer from any moneys held for the credit of the Improvement Fund to the credit of the Bond Interest Account an amount sufficient to make up any such deficiency. Any moneys so transferred from the Improvement Fund shall be restored by the Trustee from available moneys in the 1965 Revenue Fund-Trustee Account, subject to the same conditions as are prescribed for deposits to the credit of the Improvement Fund under the provisions of Section 507 of this Article.

The Trustee shall from time to time transfer any moneys from the Improvement Fund to the credit of the Redemption Account upon the receipt of a certified copy of a resolution duly adopted by the Commission directing such transfer and a certificate of the Consulting Engi-

neer certifying that the amount so to be transferred is not required for the purposes for which the Improvement Fund has been created.

SECTION 513. Subject to the terms and conditions set forth in this Indenture, moneys held for the credit of the separate interest account in the Construction Fund, the Bond Interest Account, the Reserve Account and the Redemption Account shall be held in trust and disbursed by the Trustee for (a) the retransfer to the Construction Fund from the Reserve Account of any amount required to be retransferred under the provisions of Section 410 of this Indenture, or (b) the payment of interest on the bonds issued hereunder as such interest becomes due and payable, or (c) the payment of the principal of such bonds at maturity, or (d) the payment of the purchase or redemption price of such bonds before maturity, and such moneys are hereby pledged to and charged with the payments mentioned in this Section.

Whenever the total of the moneys held for the credit of the Bond Interest Account, the Reserve Account and the Redemption Account shall be sufficient for paying the principal of and the redemption premium, if any, and the interest accrued on all bonds then outstanding under the provisions of this Indenture, such moneys shall be applied by the Trustee to the payment, purchase or redemption of such bonds.

SECTION 514. All moneys which the Trustee shall have withdrawn from the Sinking Fund or shall have received from any other source and set aside, or deposited with the Paying Agents, for the purpose of paying any of the bonds hereby secured, either at the maturity thereof or upon call for redemption, or for the purpose of paying any maturing coupons appertaining to any of the coupon bonds hereby secured, shall be held in trust for the respective holders of such bonds or coupons. But any moneys which shall be so set aside or deposited by the Trustee and which shall remain unclaimed by the holders of such bonds or of such coupons for the period of six (6) years after the date on which such bonds or such coupons shall have become due and payable shall upon request in writing be paid to the Commission or to such officer, board or body as may then be entitled by law to receive the same, and thereafter the holders of such bonds or coupons

shall look only to the Commission or to such officer, board or body, as the case may be, for payment and then only to the extent of the amounts so received without any interest thereon, and the Trustee and the Paying Agents shall have no responsibility with respect to such moneys.

SECTION 515. All bonds paid, redeemed or purchased, either at or before maturity, together with all unmatured coupons, if any, appertaining thereto, shall be cancelled upon the payment, redemption or purchase of such bonds. All coupons shall be cancelled upon their payment. All bonds and coupons cancelled under any of the provisions of this Indenture shall be cremated by the Trustee or by the New York Paying Agent at the request of the Trustee. The Trustee or the New York Paying Agent effecting such cremation shall execute a certificate of cremation in duplicate describing the bonds and coupons so cremated except that the numbers of the bonds to which such coupons appertain may be omitted, and one executed certificate shall be filed with the Secretary of the Commission and the other executed certificate shall be retained by or filed with the Trustee.

ARTICLE VI.

DEPOSITARIES OF MONEYS, SECURITY FOR DEPOSITS AND INVESTMENT OF FUNDS.

SECTION 601. All moneys deposited under the provisions of this Indenture with the Trustee or any other depositary and all tolls and other revenues of the Toll Road collected by the Commission shall be held in trust and applied only in accordance with the provisions of this Indenture, and shall not be subject to lien or attachment by any creditor of the Commission.

No moneys shall be deposited with any depositary, other than the Trustee, in an amount exceeding fifty per centum (50%) of the amount which an officer of such depositary shall certify to the Commission as the combined capital and surplus of such depositary.

All moneys deposited with the Trustee or any other depository hereunder shall be continuously secured, for the benefit of the Commission and the holders of the bonds, either (a) by lodging with a bank or trust company approved by the Commission and by the Trustee as custodian, as collateral security, direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States Government, or other marketable securities eligible as security for the deposit of trust funds under regulations of the Comptroller of the Currency of the United States, having a market value (exclusive of accrued interest) not less than the amount of such deposit, or (b) in such other manner as may then be required or permitted by applicable state or federal laws and regulations regarding the security for, or granting a preference in the case of, the deposit of trust funds; provided, however, that it shall not be necessary for the Paying Agents to give security for the deposit of any moneys with them for the payment of the principal of or the redemption premium or the interest on any bonds issued hereunder, or for the Trustee to give security for any moneys which shall be represented by obligations purchased under the provisions of this Article as an investment of such moneys.

All moneys deposited with each depository, including the Trustee, shall be credited to the particular fund or account to which such moneys belong.

SECTION 602. Moneys held for the credit of the Construction Fund, excluding the moneys set aside in the separate interest account in the Construction Fund as provided by Section 404 of this Indenture, or any special construction fund shall, as nearly as may be practicable, be invested and reinvested by the Trustee in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States Government, Federal Intermediate Credit Banks, Federal Land Banks, Federal National Mortgage Association, Federal Home Loan Banks or Banks for Cooperatives which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than one year after the date on which the Project or Improvements will be opened for traffic or placed in operation as estimated by the Consulting Engineers in their statement filed under the provisions of clause (b) of Section

208 or clause (c) of Section 210 of this Indenture. Any moneys held for the credit of the Construction Fund, excluding the moneys set aside in said separate interest account, or such special construction fund at the expiration of such one year's period or thereafter shall, as nearly as may be practicable, be invested and reinvested by the Trustee in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States Government which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than one year after the date of such investment.

Moneys held for the credit of said separate interest account in the Construction Fund and the Bond Interest Account in the Sinking Fund shall, as nearly as may be practicable, be invested and reinvested by the Trustee in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States Government which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than the respective dates when the moneys held for the credit of said accounts will be required for the purposes intended.

Moneys held for the credit of the Reserve Account in the Sinking Fund shall, as nearly as may be practicable, be invested and reinvested by the Trustee in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States Government which shall mature, or which shall be subject to redemption by the holder thereof at the option of such holder, not later than five (5) years after the date of such investment.

Moneys held for the credit of the Reserve Maintenance Fund and the Improvement Fund shall be invested by the Trustee, from time to time, upon receipt of a copy of a resolution of the Commission, certified by the Secretary or an Assistant Secretary of the Commission, directing such investment and the written approval of the Consulting Engineers of the amount of such moneys to be so invested, in direct obligations of, or obligations the principal of and interest on which are unconditionally guaranteed by, the United States Government which shall mature, or which shall be subject to redemption by the holder thereof at the option

of such holder, not later than five (5) years after the date of such investment.

Obligations so purchased as an investment of moneys in any such Fund or Account shall be deemed at all times to be a part of such Fund or Account, and the interest accruing thereon and any profit realized from such investment shall be credited to such Fund or Account, and any loss resulting from such investment shall be charged to such Fund or Account; provided, however, that the interest accruing on the investment of moneys in said separate interest account in the Construction Fund and any profit realized from such investment shall be credited to the Construction Fund and not to said separate interest account, and any loss resulting from such investment shall be charged to the Construction Fund and not to said separate interest account. The Trustee shall sell at the best price obtainable or present for redemption any obligations so purchased whenever it shall be necessary so to do in order to provide moneys to meet any payment or transfer from any such Fund or Account. Neither the Trustee nor the Commission shall be liable or responsible for any loss resulting from any such investment.

ARTICLE VII.

PARTICULAR COVENANTS.

SECTION 701. The Commission covenants that it will promptly pay the principal of and the interest on every bond issued under the provisions of this Indenture at the places, on the dates and in the manner provided herein and in said bonds and in any coupons appertaining to said bonds, and any premium required for the retirement of said bonds by purchase or redemption, according to the true intent and meaning thereof. Except as in this Indenture otherwise provided, such principal, interest and premium are payable solely from tolls and other revenues derived from the ownership or operation of the Toll Road, which tolls and other revenues and other moneys to the extent provided in this Indenture are hereby pledged to the payment thereof in the manner and to the extent hereinabove particularly specified, and nothing in the bonds or coupons or in this Indenture shall be construed as obligating the

Commission or the State of Virginia or any political subdivision thereof to pay the bonds or the interest thereon except from revenues of the Toll Road and such other moneys or as pledging the faith and credit or taxing power of the State of Virginia or of any such political subdivision.

The Commission further covenants that so long as the bonds or any of them shall be outstanding it will cause offices or agencies where the coupon bonds and coupons may be presented for payment to be maintained in the City of Norfolk, Virginia, and in the Borough of Manhattan, City and State of New York.

SECTION 702. The Commission covenants that it will forthwith proceed to acquire the right of way for the Project and to construct the Project substantially as described in the engineering and traffic reports mentioned in the preambles of this Indenture and in accordance with plans and specifications which shall have been approved by the Consulting Engineers and in conformity with law and all requirements of all governmental authorities having jurisdiction thereover, and that it will complete such acquisition and construction with all expedition practicable. The Commission further covenants that, in the event that bonds shall be issued under the provisions of Section 210 of this Indenture, it will forthwith proceed to construct the Improvements for which such bonds shall be issued in accordance with plans and specifications which shall have been approved by the Consulting Engineers and in conformity with law and all requirements of all governmental authorities having jurisdiction thereover, and that it will complete such construction with all expedition practicable. The Commission further covenants that upon the opening of the Project or any part thereof for traffic it will deliver to the Trustee a certificate, signed by the State Highway Commissioner or the Chief Engineer, stating the date upon which such opening occurred.

The Commission further covenants that before entering into any contract or incurring any obligation which will become a charge against the Construction Fund or any special construction fund it will secure the approval of the Consulting Engineers of such contract or the incurring of such obligation and of the plans and specifications referred to in any such contract, and that it will require each person, firm or cor-

poration with whom it may contract for labor or materials in connection with the construction of the Project or any improvements to furnish a performance bond in the full amount of any contract exceeding Twenty-five Thousand Dollars (\$25,000) in amount or, in lieu thereof, to deposit with the Trustee, to insure completion and performance, marketable securities having a market value equal to the amount of such contract and eligible as security for the deposit of trust funds under regulations of the Comptroller of the Currency of the United States, and to carry such workmen's compensation or employers' liability insurance as may be required by law and such public liability and property damage insurance, including provisions to indemnify and save the Commission harmless, and such builders' risk insurance, if any, as may be recommended by the Consulting Engineers. The Commission further covenants that, in the event of any default under any such contract and the failure of the surety to complete the contract, the proceeds of such performance bond or securities will forthwith, upon receipt of such proceeds, be deposited to the credit of the Construction Fund or the appropriate special construction fund, and will be applied toward the completion of the contract in connection with which such performance bond or securities shall have been furnished.

SECTION 703. The Commission covenants that it will establish and enforce reasonable rules and regulations governing the use of the Toll Road and the operation thereof, that all conditions of employment and all compensation, salaries, fees and wages paid by it in connection with the maintenance, repair and operation of the Toll Road will be reasonable, that no more persons will be employed by it than are necessary, that all persons employed by it will be qualified for their respective positions, that it will maintain and operate the Toll Road in an efficient and economical manner, that, from the revenues of the Toll Road and any other available moneys, it will at all times maintain the same in good repair and in sound operating condition and will make all necessary repairs, renewals and replacements, and that it will observe and perform all of the terms and conditions contained in the State Revenue Bond Act.

The Commission may, in its discretion, use such personnel, material and equipment in the maintenance, repair and operation of the Toll Road as it may otherwise have available and nothing in this Indenture shall be construed as requiring the Commission to maintain, repair and operate the Toll Road with personnel, material and equipment used

exclusively for the Toll Road. The allocation to the Toll Road of the expense of any such personnel, material and equipment not used exclusively for the Toll Road shall be made on such equitable basis as shall be approved by the Consulting Engineers and any such expense so allocated shall be a part of the Current Expenses of the Toll Road.

The Commission further covenants that it will take all lawful action on its part which may be necessary or desirable to advertise the Toll Road to the traveling public and that it will provide and maintain highway designation signs and adequate directional signs to the Toll Road which, in the judgment of the Commission, may be beneficial to the Toll Road or necessary to protect against the diversion of traffic from the Toll Road.

SECTION 704. The Commission covenants that, except as otherwise permitted in Section 714 of this Article, it will not create or suffer to be created any lien or charge upon the Toll Road or any part thereof or upon the tolls or other revenues therefrom except the lien and charge of the bonds secured hereby upon such tolls and revenues, and that, from such revenues or other available funds, it will pay or cause to be discharged, or will make adequate provision to satisfy and discharge, within sixty (60) days after the same shall accrue, all lawful claims and demands for labor, materials, supplies or other objects which, if unpaid, might by law become a lien upon the Toll Road or any part thereof or the tolls or other revenues therefrom; provided, however, that nothing in this Section contained shall require the Commission to pay or cause to be discharged, or make provision for, any such lien or charge so long as the validity thereof shall be contested in good faith.

SECTION 705. Notwithstanding any other provision of this Indenture, the Commission may permit the United States of America, the State of Virginia or any of their agencies, departments or political subdivisions, to pay all or any part of the cost of constructing, maintaining, repairing and operating the Toll Road.

SECTION 706. The Commission covenants that it will, for the purpose of performing and carrying out the duties imposed on the Consulting Engineers by this Indenture, employ an independent engineer or engineering firm or corporation having a nation-wide and favorable

repute for skill and experience in such work, and that it will, for the purpose of performing and carrying out the duties imposed on the Traffic Engineers by this Indenture, employ an independent engineer or engineering firm or corporation having a nation-wide and favorable repute for skill and experience in such work. Howard, Needles, Tammen & Bergendoff, of New York City, New York, are now employed by the Commission as such Consulting Engineers, and Wilbur Smith and Associates, of New Haven, Connecticut, are now employed by the Commission as such Traffic Engineers. The Commission further covenants that before employing any other engineer or engineering firm or corporation as Consulting Engineers or as Traffic Engineers under this Indenture it will secure the written approval of the Trustee and a majority of the principal underwriters of such employment.

The Commission further covenants that an engineer of suitable experience will at all times be employed for the purpose of performing and carrying out the duties imposed on the Chief Engineer by this Indenture.

SECTION 707. The Commission covenants that during the construction of the Project or any part thereof or any Improvements it will carry such builders' risk insurance, if any, as shall be recommended by the Consulting Engineers, and that from and after the time when the contractors or any of them engaged in constructing any bridge or elevated structure or part thereof constituting a part of the Toll Road the replacement cost of which is in excess of Five Hundred Thousand Dollars (\$500,000) shall cease to be responsible, pursuant to the provisions of the respective contracts for the construction of such bridge or structure or such part, for loss or damage to such bridge or structure or such part occurring from any cause, it will insure and at all times keep such bridge or structure or such part insured with a responsible insurance company or companies, qualified to assume the risk thereof, against physical loss or damage however caused, with such exceptions as are ordinarily required by insurers of structures or facilities of similar type, in an amount not less than eighty per centum (80%) of the replacement value of each such bridge or structure or such part, less depreciation, as shall be certified by the Consulting Engineers in writing filed with the Commission and with the Trustee, a copy of which shall be mailed by the Commission to the principal underwriters; provided, however, that such amount of insurance shall at all times be

sufficient to comply with any legal or contractual requirement which, if breached, would result in assumption by the Commission of a portion of any loss or damage as a co-insurer, and such insurance may provide for the deduction from each claim for loss or damage (except in case of a total loss) of not more than two per centum (2%) of the replacement value of the property insured, less depreciation. If at any time the Commission shall be unable to obtain such insurance to the extent above required, either as to amount of such insurance or as to the risks covered thereby or the deductible provision thereof, it will not constitute an event of default under the provisions of this Indenture if the Commission shall carry such insurance to the extent reasonably obtainable.

The Commission further covenants that, if and when war risk insurance is obtainable, it will obtain such insurance on any bridge or elevated structure or part thereof constituting a part of the Toll Road in such amount and during such period as shall be recommended by the Consulting Engineers.

All such policies shall be for the benefit of the Trustee and the Commission as their interests shall appear, shall be made payable to the Trustee and shall be deposited with the Trustee, and the Trustee shall have the sole right to receive and receipt for the proceeds of such insurance. The proceeds of any and all such insurance shall be held by the Trustee as security for the bonds issued hereunder until paid out as hereinafter provided.

The Commission further covenants that, immediately after any substantial damage to or destruction of any part of the Toll Road, it will cause the Consulting Engineers to prepare plans and specifications for repairing, replacing or reconstructing the damaged or destroyed property (either in accordance with the original or a different design) and an estimate of the cost thereof, and to file copies of such estimate with the Commission and the Trustee and to mail copies of such estimate to the principal underwriters.

The proceeds of all insurance referred to in this Section shall be available for, and shall to the extent necessary be applied to, the repair, replacement or reconstruction of the damaged or destroyed property, and such disbursements by the Trustee for such purposes shall be made

in accordance with the provisions of Section 405 of this Indenture for payments from the Construction Fund to the extent that such provisions may be applicable. If such proceeds are more than sufficient for such purpose, the balance remaining shall be deposited to the credit of the Reserve Maintenance Fund or the Redemption Account, as the Commission by resolution may determine. If such proceeds shall be insufficient for such purpose, the deficiency shall be supplied by the Trustee upon requisition of the Commission from any moneys held for the credit of the Reserve Maintenance Fund or the Improvement Fund.

The Commission further covenants that, in the case of any substantial damage to or destruction of any part of the Toll Road, it will forthwith, with any funds available for such purpose, commence and diligently proceed with the repair, replacement or reconstruction of the damaged or destroyed property according to plans and specifications prepared or approved by the Consulting Engineers.

The proceeds of any such insurance not applied or obligated within eighteen (18) months after their receipt by the Trustee to repairing, replacing or reconstructing the damaged or destroyed property, unless the Commission shall advise the Trustee in writing that it has been prevented from so doing because of conditions beyond its control or unless the Commission, with the consent of the holders of a majority in principal amount of all the bonds then outstanding, shall otherwise direct, shall be deposited to the credit of the Redemption Account.

SECTION 708. The Commission covenants that it will at all times carry in a responsible insurance company or companies qualified to assume the risk thereof such workmen's compensation or employers' liability insurance as may be required by law and such use and occupancy, public liability, property damage and other insurance as the Consulting Engineers may recommend. Copies of all such recommendations shall be filed with the Commission and the Trustee and mailed by the Commission to the principal underwriters.

All policies providing use and occupancy insurance shall be made payable to and deposited with the Trustee, and the Trustee shall have the sole right to receive and receipt for any proceeds of such policies. Any proceeds of use and occupancy insurance paid to the Trustee shall

be deposited by it forthwith to the credit of the 1965 Revenue Fund-Trustee Account.

SECTION 709. All insurance policies referred to in Sections 707 and 708 of this Article shall be open at all reasonable times to the inspection of the principal underwriters and the bondholders and their agents and representatives. The Commission covenants that it will take such action as may be necessary to demand, collect and sue for any insurance money which may become due and payable under any policy payable to the Trustee. The Trustee is hereby authorized in its own name to demand, collect, sue and receipt for any insurance money which may become due and payable under any policies payable to it.

Any appraisalment or adjustment of any loss or damage under any policy payable to the Trustee and any settlement or payment of indemnity under any such policy which may be agreed upon by the Commission, the Trustee and any insurer shall be evidenced by a certificate, signed by the State Highway Commissioner or such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose and by the Trustee, approved by the Consulting Engineers, and filed with the Secretary of the Commission and the Trustee. The Trustee shall in no way be liable or responsible for the collection of insurance moneys in case of any loss or damage.

SECTION 710. The Commission covenants that none of the revenues of the Toll Road will be used for any purpose other than as provided in this Indenture and no contract or contracts will be entered into or any action taken by it which shall be inconsistent with the provisions of this Indenture.

SECTION 711. The Commission covenants that it will, from time to time, execute and deliver such further instruments and take such further action as may be required to carry out the purposes of this Indenture.

SECTION 712. The Commission covenants that it will keep an accurate record of the total cost of the Toll Road, of the daily tolls and other revenues collected, of the number and class of vehicles using the Toll Road, and of the application of such tolls and other revenues. Such

records shall be open at all reasonable times to the inspection of the Trustee, the principal underwriters and the bondholders and their agents and representatives.

The Commission further covenants that at least once each month after the opening of the Project or any part thereof for traffic it will cause to be filed with the Trustee and mailed to the Consulting Engineers, the Traffic Engineers, the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose, copies of any revisions of the toll schedule during the preceding calendar month and a report setting forth in respect of the preceding calendar month

- (a) an income and expense account for the Toll Road,
- (b) the number of vehicles in each toll class using the Toll Road and the revenues derived from each such class,
- (c) all deposits to the credit of and withdrawals from each Fund and Account created under the provisions of this Indenture,
- (d) the details of all bonds issued, paid, purchased or redeemed,
- (e) a balance sheet as of the end of such month,
- (f) the amount on deposit at the end of such month to the credit of each such Fund and Account, the security therefor, and the details of any investments thereof, and
- (g) the amounts of the proceeds received from any sale of property pursuant to the provisions of Section 714 of this Article and the amounts of the proceeds of any insurance received pursuant to the provisions of Sections 707 and 708 of this Article, and the disposition thereof.

The Commission further covenants that promptly after the close of each fiscal year after the opening of the Project or any part thereof for traffic it will cause an audit to be made of its books and accounts relating to the Toll Road for the preceding fiscal year by an independent firm of

certified public accountants of recognized ability and standing, to be chosen by the Commission with the approval of the Trustee. The Trustee shall make available to such accountants all its books and records pertaining to the Toll Road. Promptly thereafter reports of each such audit shall be filed with the Commission and the Trustee and copies of such reports shall be mailed by the Commission to the Consulting Engineers, the Traffic Engineers, the principal underwriters and all bondholders who shall have filed their names and addresses with the Secretary of the Commission for such purpose. Each such audit report shall set forth in respect of the preceding fiscal year the same matters as are hereinabove required for the monthly reports, the amounts and classifications of Current Expenses paid from available funds other than revenues of the Toll Road during such fiscal year, the findings of such certified public accountants as to whether the moneys received by the Commission under the provisions of this Indenture during such fiscal year have been applied in accordance with the provisions of this Indenture, whether any obligations for Current Expenses were incurred in the preceding fiscal year in excess of the Annual Budget for such fiscal year, whether the amount deposited to the credit of the Sinking Fund and the Improvement Fund in the preceding fiscal year has exceeded or was less than the amount for such fiscal year referred to in clause (e) of Section 501 of this Indenture and whether the Commission is in default in the performance of any of the covenants contained in said Section 501, and also a schedule of all insurance policies referred to in Sections 707 and 708 of this Article which are then in effect, stating with respect to each policy the name of the insurer, the amount, the number, the expiration date and the risks covered thereby. Such monthly reports and audit reports shall be open at all reasonable times to the inspection of the bondholders and their agents and representatives.

The Commission further covenants that it will cause any additional reports or audits relating to the Toll Road to be made as required by law and that, as often as may be requested, it will furnish to the Trustee, the principal underwriters and the holder of any bond issued hereunder such other information concerning the Toll Road or the operation thereof as any of them may reasonably request.

The cost of the reports and audits referred to in this Section shall be treated as a part of the cost of operation of the Toll Road.

SECTION 713. The Commission covenants that all the accounts and records of the Commission will be kept according to recognized accounting practices consistent with the provisions of this Indenture.

SECTION 714. The Commission covenants that, except as in this Section otherwise permitted, it will not sell, lease or otherwise dispose of or encumber the Toll Road or any part thereof. The Commission may, however, from time to time, sell any machinery, fixtures, apparatus, tools, instruments or other movable property acquired by it from the proceeds of bonds issued on account of the Toll Road or from the revenues thereof, if the State Highway Commissioner or such other officer or employee of the Commission as may be designated by the State Highway Commissioner for such purpose shall determine that such articles are no longer needed or are no longer useful in connection with the construction or maintenance and operation of the Toll Road, and the proceeds thereof shall be applied to the replacement of the properties so sold or disposed of or shall be deposited to the credit of the Construction Fund, the Reserve Maintenance Fund or the Redemption Account, as such officer or employee may determine. The Commission may from time to time sell any real estate owned by it as the Commission by resolution shall determine, with the approval of the Consulting Engineers, is not needed or serves no useful purpose in connection with the maintenance and operation of the Toll Road. The proceeds of any sale of real estate shall be disposed of as hereinabove provided for the proceeds of the sale or disposal of movable property.

Upon any sale of property under the provisions of this Section the Commission shall notify the Trustee of the property so sold and the amount and disposition of the proceeds thereof.

The Commission may lease, or grant easements, franchises or concessions for the use of, any part of the Toll Road not needed or required for the maintenance and operation thereof as a traffic facility, and the net proceeds of any such lease or concession shall be deposited as received to the credit of the 1965 Revenue Fund—Trustee Account.

ARTICLE VIII.

REMEDIES.

SECTION 801. In case the time for the payment of any coupon or the interest on any registered bond without coupons shall be extended,

whether or not such extension be by or with the consent of the Commission, such coupon or such interest so extended shall not be entitled in case of default hereunder to the benefit or security of this Indenture except subject to the prior payment in full of the principal of all bonds then outstanding and of all coupons and interest the time for the payment of which shall not have been extended.

SECTION 802. Each of the following events is hereby declared an "event of default", that is to say: If

(a) payment of the principal and of the redemption premium, if any, of any of the bonds shall not be made when the same shall become due and payable, either at maturity or by proceedings for redemption or otherwise; or

(b) payment of any instalment of interest on any of the bonds shall not be made within thirty (30) days after the same shall become due and payable; or

(c) the Commission shall unreasonably delay or fail to carry on with reasonable dispatch or discontinue the construction of the Project; or

(d) the Commission shall for any reason be rendered incapable of fulfilling its obligations hereunder; or

(e) any substantial part of the Toll Road shall be destroyed or damaged to the extent of impairing its efficient operation or adversely affecting its gross revenues and shall not be promptly repaired, replaced or reconstructed (whether such failure promptly to repair, replace or reconstruct the same be due to the impracticability of such repair, replacement or reconstruction or to lack of funds therefor or for any other reason); or

(f) final judgment for the payment of money shall be rendered against the Commission as a result of the ownership, control or operation of the Toll Road and any such judgment shall not be discharged within ninety (90) days from the entry thereof or an appeal shall not be taken therefrom or from the order, decree or

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process upon which or pursuant to which such judgment shall have been granted or entered, in such manner as to stay the execution of or levy under such judgment, order, decree or process or the enforcement thereof; or

(g) an order or decree shall be entered, with the consent or acquiescence of the Commission, appointing a receiver or receivers of the Toll Road or any part thereof or of the tolls or other revenues thereof, or if such order or decree, having been entered without the consent or acquiescence of the Commission, shall not be vacated or discharged or stayed on appeal within ninety (90) days after the entry thereof; or

(h) any proceeding shall be instituted, with the consent or acquiescence of the Commission, for the purpose of effecting a composition between the Commission and its creditors or for the purpose of adjusting the claims of such creditors pursuant to any federal or state statute now or hereafter enacted, if the claims of such creditors are under any circumstances payable from the revenues of the Toll Road; or

(i) the Commission shall default in the due and punctual performance of any other of the covenants, conditions, agreements and provisions contained in the bonds or in this Indenture on the part of the Commission to be performed, and such default shall continue for thirty (30) days after written notice specifying such default and requiring same to be remedied shall have been given to the Commission by the Trustee, which may give such notice in its discretion and shall give such notice at the written request of the holders of not less than ten per centum (10%) in aggregate principal amount of the bonds then outstanding.

Section 803. Upon the happening and continuance of any event of default specified in Section 802 of this Article, then and in every such case the Trustee may proceed, and upon the written request of the holders of not less than ten per centum (10%) in aggregate principal amount of the bonds then outstanding hereunder shall proceed, subject to the provisions of Section 902 of this Indenture, to protect and enforce its rights and the rights of the bondholders under the laws of the State

of Virginia or under this Indenture by such suits, actions or special proceedings in equity or at law, or by proceedings in the office of any board or officer having jurisdiction, either for the specific performance of any covenant or agreement contained herein or in aid or execution of any power herein granted or for the enforcement of any proper legal or equitable remedy, as the Trustee, being advised by counsel, shall deem most effectual to protect and enforce such rights.

In the enforcement of any remedy under this Indenture the Trustee shall be entitled to sue for, enforce payment of and receive any and all amounts then or during any default becoming, and at any time remaining, due from the Commission for principal, interest or otherwise under any of the provisions of this Indenture or of the bonds and unpaid, with interest on overdue payments of principal at the rate or rates of interest specified in such bonds, together with any and all costs and expenses of collection and of all proceedings hereunder and under such bonds, without prejudice to any other right or remedy of the Trustee or of the bondholders, and to recover and enforce judgment or decree against the Commission, but solely as provided herein and in such bonds, for any portion of such amounts remaining unpaid and interest, costs and expenses as above provided, and to collect (but solely from moneys in the Sinking Fund and any other moneys available for such purpose) in any manner provided by law, the moneys adjudged or decreed to be payable.

SECTION 804. Anything in this Indenture to the contrary notwithstanding, if at any time the moneys in the Sinking Fund shall not be sufficient to pay the interest on or the principal of the bonds as the same shall become due and payable, such moneys, together with any moneys then available or thereafter becoming available for such purpose, whether through the exercise of the remedies provided for in this Article or otherwise, shall be applied as follows:

(a) If the principal of all the bonds shall not have become due and payable, all such moneys shall be applied

first: to the payment to the persons entitled thereto of all instalments of interest then due and payable in the order in which such instalments became due and payable and, if the

amount available shall not be sufficient to pay in full any particular instalment, then to the payment, ratably, according to the amounts due on such instalment, to the persons entitled thereto, without any discrimination or preference except as to any difference in the respective rates of interest specified in the bonds; and

second: to the retirement of bonds in accordance with the provisions of Section 511 of this Indenture.

(b) If the principal of all the bonds shall have become due and payable, all such moneys shall be applied

first: to the payment to the persons entitled thereto of all instalments of interest due and payable on or prior to maturity, if any, in the order in which such instalments became due and payable and, if the amount available shall not be sufficient to pay in full any particular instalment, then to the payment, ratably, according to the amounts due on such instalment, to the persons entitled thereto, without any discrimination or preference except as to any difference in the respective rates of interest specified in the bonds, and then to the payment of any interest due and payable after maturity on the bonds, ratably, to the persons entitled thereto, without any discrimination or preference except as to any difference in the respective rates of interest specified in the bonds; and

second: to the payment of the principal of the bonds, ratably, to the persons entitled thereto, without preference or priority of any bond over any other bond.

The provisions of paragraphs (a) and (b) of this Section are in all respects subject to the provisions of Section 801 of this Article.

Whenever moneys are to be applied by the Trustee pursuant to the provisions of this Section, such moneys shall be applied by the Trustee at such times, and from time to time, as the Trustee in its sole discretion shall determine, having due regard to the amount of such moneys available for application and the likelihood of additional

moneys becoming available for such application in the future; the deposit of such moneys with the Paying Agents, or otherwise setting aside such moneys, in trust for the proper purpose shall constitute proper application by the Trustee; and the Trustee shall incur no liability whatsoever to the Commission, to any bondholder or to any other person for any delay in applying any such moneys, so long as the Trustee acts with reasonable diligence, having due regard to the circumstances, and ultimately applies the same in accordance with such provisions of this Indenture as may be applicable at the time of application by the Trustee. Whenever the Trustee shall exercise such discretion in applying such moneys, it shall fix the date (which shall be an interest payment date unless the Trustee shall deem another date more suitable) upon which such application is to be made and upon such date interest on the amounts of principal to be paid on such date shall cease to accrue. The Trustee shall give such notice as it may deem appropriate of the fixing of any such date, and shall not be required to make payment to the holder of any unpaid coupon or any bond until such coupon or such bond and all unmatured coupons, if any, appertaining to such bond shall be surrendered to the Trustee for appropriate endorsement, or for cancellation if fully paid.

SECTION 805. In case any proceeding taken by the Trustee or bondholders on account of any default shall have been discontinued or abandoned for any reason, then and in every such case the Commission, the Trustee and the bondholders shall be restored to their former positions and rights hereunder, respectively, and all rights, remedies, powers and duties of the Trustee shall continue as though no such proceeding had been taken.

SECTION 806. Anything in this Indenture to the contrary notwithstanding, the holders of a majority in principal amount of the bonds then outstanding hereunder shall have the right, subject to the provisions of Section 902 of this Indenture, by an instrument or concurrent instruments in writing executed and delivered to the Trustee, to direct the method and place of conducting all remedial proceedings to be taken by the Trustee hereunder, provided that such direction shall not be otherwise than in accordance with law or the provisions of this Indenture.

Section 807. Except as provided in Section 501 of this Indenture, no holder of any of the bonds shall have any right to institute any suit, action or proceeding in equity or at law on any bond or for the execution of any trust hereunder or for any other remedy hereunder unless such holder previously shall have given to the Trustee written notice of the event of default on account of which such suit, action or proceeding is to be instituted, and unless also the holders of not less than ten per centum (10%) in aggregate principal amount of the bonds then outstanding shall have made written request of the Trustee after the right to exercise such powers or right of action, as the case may be, shall have accrued, and shall have afforded the Trustee a reasonable opportunity either to proceed to exercise the powers hereinabove granted or to institute such action, suit or proceeding in its or their name, and unless, also, there shall have been offered to the Trustee reasonable security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee shall have refused or neglected to comply with such request within a reasonable time; and such notification, request and offer of indemnity are hereby declared in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this Indenture or to any other remedy hereunder; provided, however, that notwithstanding the foregoing provisions of this Section and without complying therewith, the holders of not less than twenty per centum (20%) in aggregate principal amount of the bonds then outstanding may institute any such suit, action or proceeding in their own names for the benefit of all holders of bonds hereunder. It is understood and intended that, except as otherwise above provided, no one or more holders of the bonds hereby secured shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the security of this Indenture, or to enforce any right hereunder except in the manner herein provided, that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the benefit of all holders of such outstanding bonds and coupons, and that any individual right of action or other right given to one or more of such holders by law is restricted by this Indenture to the rights and remedies herein provided.

Section 808. All rights of action under this Indenture or under any of the bonds secured hereby, enforceable by the Trustee, may be

enforced by it without the possession of any of the bonds or the coupons appertaining thereto or the production thereof at the trial or other proceeding relative thereto, and any such suit, action or proceeding instituted by the Trustee shall be brought in its name for the benefit of all of the holders of such bonds and coupons, subject to the provisions of this Indenture.

Section 809. No remedy herein conferred upon or reserved to the Trustee or to the holders of the bonds is intended to be exclusive of any other remedy or remedies herein provided, and each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder.

Section 810. No delay or omission of the Trustee or of any holder of the bonds to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver of any such default or an acquiescence therein; and every power and remedy given by this Indenture to the Trustee and to the holders of the bonds, respectively, may be exercised from time to time and as often as may be deemed expedient.

The Trustee may, and upon written request of the holders of not less than a majority in principal amount of the bonds then outstanding shall, waive any default which in its opinion shall have been remedied before the entry of final judgment or decree in any suit, action or proceeding instituted by it under the provisions of this Indenture or before the completion of the enforcement of any other remedy under this Indenture, but no such waiver shall extend to or affect any other existing or any subsequent default or defaults or impair any rights or remedies consequent thereon.

Section 811. The Trustee shall mail to the principal underwriters, all registered owners of bonds at their addresses as they appear on the registration books, and all other bondholders who shall have filed their names and addresses with the Trustee for such purpose, written notice of the occurrence of any event of default set forth in Section 802 of this Article within thirty (30) days after the Trustee shall have notice, pursuant to the provisions of Section 908 of this Indenture, that any such event of default shall have occurred. The Trustee shall not, how-

ever, be subject to any liability to the principal underwriters or to any bondholder by reason of its failure to mail any such notice.

ARTICLE IX.

CONCERNING THE TRUSTEE.

SECTION 901. The Trustee accepts and agrees to execute the trusts imposed upon it by this Indenture, but only upon the terms and conditions set forth in this Article and subject to the provisions of this Indenture, to all of which the parties hereto and the respective holders of the bonds agree.

SECTION 902. The Trustee shall be under no obligation to institute any suit, or to take any remedial proceeding under this Indenture, or to enter any appearance or in any way defend in any suit in which it may be made defendant, or to take any steps in the execution of the trusts hereby created or in the enforcement of any rights and powers hereunder, until it shall be indemnified to its satisfaction against any and all costs and expenses, outlays and counsel fees and other reasonable disbursements, and against all liability; the Trustee may, nevertheless, begin suit, or appear in and defend suit, or do anything else in its judgment proper to be done by it as such Trustee, without indemnity, and in such case the Commission shall reimburse the Trustee from the revenues of the Toll Road for all costs and expenses, outlays and counsel fees and other reasonable disbursements properly incurred in connection therewith. If the Commission shall fail to make such reimbursement, the Trustee may reimburse itself from any moneys in its possession under the provisions of this Indenture and shall be entitled to a preference therefor over any of the bonds or coupons outstanding hereunder.

SECTION 903. The Trustee shall be under no obligation to effect or maintain insurance or to renew any policies of insurance or to inquire as to the sufficiency of any policies of insurance carried by the Commission, or to report, or make or file claims or proof of loss for, any loss or damage insured against or which may occur, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require any such payment to be made. The Trustee shall have no responsibility in respect of the validity, sufficiency, due execution or acknowledgement of this Indenture, or, except as to the authentica-

tion thereof, in respect of the validity of the bonds or of the coupons or the due execution or issuance thereof. The Trustee shall be under no obligation to see that any duties herein imposed upon the Commission, the Consulting Engineers, the Traffic Engineers, the Paying Agents, any depositary, or any party other than itself, or any covenants herein contained on the part of any party other than itself to be performed, shall be done or performed, and the Trustee shall be under no obligation for failure to see that any such duties or covenants are so done or performed.

SECTION 904. The Trustee shall not be liable or responsible because of the failure of the Commission or of any of its employees or agents to make any collections or deposits or to perform any act herein required of the Commission or because of the loss of any moneys arising through the insolvency or the act or default or omission of any other depositary in which such moneys shall have been deposited under the provisions of this Indenture. The Trustee shall not be responsible for the application of any of the proceeds of the bonds or any other moneys deposited with it and paid out, withdrawn or transferred hereunder if such application, payment, withdrawal or transfer shall be made in accordance with the provisions of this Indenture. The immunities and exemptions from liability of the Trustee hereunder shall extend to its directors, officers, employees and agents.

SECTION 905. Subject to the provisions of any contract between the Commission and the Trustee relating to the compensation of the Trustee, the Commission shall, from the revenues of the Toll Road, pay to the Trustee reasonable compensation for all services performed by it hereunder and also all its reasonable expenses, charges and other disbursements and those of its attorneys, agents and employees incurred in and about the administration and execution of the trusts hereby created and the performance of its powers and duties hereunder, and, from such revenues only, shall indemnify and save the Trustee harmless against any liabilities which it may incur in the exercise and performance of its powers and duties hereunder. If the Commission shall fail to make any payment required by this Section, the Trustee may make such payment from any moneys in its possession under the provisions of this Indenture and shall be entitled to a preference therefor over any of the bonds or coupons outstanding hereunder.

SECTION 906. It shall be the duty of the Trustee, on or before the 15th day of each month after the opening of the Project or any part thereof for traffic, to file with the Commission a statement setting forth in respect of the preceding calendar month

(a) the amount withdrawn or transferred by it and the amount deposited with it on account of each Fund and Account held by it under the provisions of this Indenture,

(b) the amount on deposit with it at the end of such month to the credit of each such Fund and Account,

(c) a brief description of all obligations held by it as an investment of moneys in each such Fund and Account,

(d) the amount applied to the purchase or redemption of bonds under the provisions of Section 511 of this Indenture and a description of the bonds or portions of bonds so purchased or redeemed, and

(e) any other information which the Commission may reasonably request.

All records and files pertaining to the Toll Road in the custody of the Trustee shall be open at all reasonable times to the inspection of the Commission, the principal underwriters and their agents and representatives.

SECTION 907. In case at any time it shall be necessary or desirable for the Trustee to make any investigation respecting any fact preparatory to taking or not taking any action or doing or not doing anything as such Trustee, and in any case in which this Indenture provides for permitting or taking any action, the Trustee may rely conclusively upon any certificate, requisition, opinion or other instrument required or permitted to be filed with it under the provisions of this Indenture, and any such instrument shall be conclusive evidence of such fact to protect the Trustee in any action that it may or may not take or in respect of anything it may or may not do, in good faith, by reason of the supposed existence of such fact. Except as otherwise provided in

this Indenture, any request, notice, certificate or other instrument from the Commission to the Trustee shall be deemed to have been signed by the proper party or parties if signed by the State Highway Commissioner or the Chief Engineer and by the Secretary or an Assistant Secretary of the Commission, and the Trustee may accept and rely upon a certificate signed by the Secretary or an Assistant Secretary of the Commission as to any action taken by the Commission.

Section 908. Except upon the happening of any event of default specified in clauses (a) and (b) of Section 802 of this Indenture, the Trustee shall not be obliged to take notice or be deemed to have notice of any event of default hereunder, unless specifically notified in writing of such event of default by the holders of not less than ten per centum (10%) in aggregate principal amount of the bonds hereby secured and then outstanding.

Section 909. The bank or trust company acting as Trustee under this Indenture, and its directors, officers, employees or agents, may in good faith buy, sell, own, hold and deal in any of the bonds or coupons issued under and secured by this Indenture, and may join in any action which any bondholder may be entitled to take with like effect as if such bank or trust company were not the Trustee under this Indenture.

Section 910. The recitals, statements and representations contained herein and in the bonds (excluding the Trustee's certificate of authentication on the bonds) shall be taken and construed as made by and on the part of the Commission and not by the Trustee, and the Trustee assumes and shall be under no responsibility for the correctness of the same.

Section 911. The Trustee shall be protected and shall incur no liability in acting or proceeding, or in not acting or not proceeding, in good faith, reasonably and in accordance with the terms of this Indenture, upon any resolution, order, notice, request, consent, waiver, certificate, statement, affidavit, requisition, bond or other paper or document which it shall in good faith reasonably believe to be genuine and to have been adopted or signed by the proper board or person or

to have been prepared and furnished pursuant to any of the provisions of this Indenture, or upon the written opinion of any attorney, engineer or accountant believed by the Trustee to be qualified in relation to the subject matter, and the Trustee shall be under no duty to make any investigation or inquiry as to any statements contained or matters referred to in any such instrument. The Trustee shall not be under any obligation to see to the recording or filing of this Indenture or otherwise to the giving to any person of notice of the provisions hereof.

SECTION 912. The Trustee may resign and thereby become discharged from the trusts hereby created, by notice in writing to be given to the Commission and to the principal underwriters and published once in a daily newspaper of general circulation published in the City of Richmond, Virginia, and in a daily newspaper of general circulation or a financial journal published in the Borough of Manhattan, City and State of New York, not less than sixty (60) days before such resignation is to take effect, but such resignation shall take effect immediately upon the appointment of a new Trustee hereunder, if such new Trustee shall be appointed before the time limited by such notice and shall then accept the trusts hereof.

SECTION 913. The Trustee may be removed at any time by an instrument or concurrent instruments in writing, executed by the holders of not less than a majority in principal amount of the bonds hereby secured and then outstanding and filed with the Commission. A facsimile copy of each such instrument shall be delivered promptly by the Commission to the Trustee. The Trustee may also be removed at any time for any breach of trust or for acting or proceeding in violation of, or for failing to act or proceed in accordance with, any provision of this Indenture with respect to the duties and obligations of the Trustee by any court of competent jurisdiction upon the application of the Commission pursuant to resolution or the holders of not less than ten per centum (10%) in aggregate principal amount of the bonds then outstanding under this Indenture.

SECTION 914. If at any time hereafter the Trustee shall resign, be removed, be dissolved or otherwise become incapable of acting, or the bank or trust company acting as Trustee shall be taken over by any

governmental official, agency, department or board, the position of Trustee shall thereupon become vacant. If the position of Trustee shall become vacant for any of the foregoing reasons or for any other reason, the Commission shall appoint a Trustee to fill such vacancy. The Commission shall publish notice of any such appointment by it made once in each week for four (4) successive weeks in a daily newspaper of general circulation published in the City of Richmond, Virginia, and in a daily newspaper of general circulation or a financial journal published in the Borough of Manhattan, City and State of New York, and, before the second publication of such notice, shall mail a copy thereof to the principal underwriters.

At any time within one year after any such vacancy shall have occurred, the holders of a majority in principal amount of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing, executed by such bondholders and filed with the Commission, may appoint a successor Trustee, which shall supersede any Trustee theretofore appointed by the Commission. Facsimile copies of each such instrument shall be delivered promptly by the Commission to the predecessor Trustee and to the Trustee so appointed by the bondholders.

If no appointment of a successor Trustee shall be made pursuant to the foregoing provisions of this Section within ten (10) days after the vacancy shall have occurred, the holder of any bond outstanding hereunder or any retiring Trustee may apply to any court of competent jurisdiction within the State of Virginia to appoint a successor Trustee. Such court may thereupon, after such notice, if any, as such court may deem proper and prescribe, appoint a successor Trustee.

Any Trustee hereafter appointed shall be a bank or trust company duly authorized to exercise corporate trust powers and subject to examination by federal or state authority, of good standing, and having a combined capital and surplus aggregating not less than Five Million Dollars (\$5,000,000).

Section 915. Every successor Trustee appointed hereunder shall execute, acknowledge and deliver to its predecessor, and also to the Commission, an instrument in writing accepting such appointment

hereunder, and thereupon such successor Trustee, without any further act, shall become fully vested with all the rights, immunities, powers and trusts, and subject to all the duties and obligations, of its predecessor; but such predecessor shall, nevertheless, on the written request of its successor or of the Commission, and upon payment of the expenses, charges and other disbursements of such predecessor which are payable pursuant to the provisions of Section 905 of this Article, execute and deliver an instrument transferring to such successor Trustee all the rights, immunities, powers and trusts of such predecessor hereunder; and every predecessor Trustee shall deliver all property and moneys held by it hereunder to its successor. Should any instrument in writing from the Commission be required by any successor Trustee for more fully and certainly vesting in such Trustee the rights, immunities, powers and trusts hereby vested or intended to be vested in the predecessor Trustee, any such instrument in writing shall and will, on request, be executed, acknowledged and delivered by the Commission.

Notwithstanding any of the foregoing provisions of this Article, any bank or trust company having power to perform the duties and execute the trusts of this Indenture and otherwise qualified to act as Trustee hereunder with or into which the bank or trust company acting as Trustee may be merged or consolidated, or to which the assets and business of such bank or trust company may be sold, shall be deemed the successor of the Trustee.

ARTICLE X.

EXECUTION OF INSTRUMENTS BY BONDHOLDERS AND PROOF OF OWNERSHIP OF BONDS.

SECTION 1001. Any request, direction, consent or other instrument in writing required or permitted by this Indenture to be signed or executed by bondholders may be in any number of concurrent instruments of similar tenor and may be signed or executed by such bondholders or their attorneys or legal representatives. Proof of the execution of any such instrument and of the ownership of bonds shall be sufficient for any purpose of this Indenture and shall be conclusive in favor of the Trustee with regard to any action taken by it under such instrument if made in the following manner:

(a) The fact and date of the execution by any person of any such instrument may be proved by the verification of any officer in any jurisdiction who, by the laws thereof, has power to take affidavits within such jurisdiction, to the effect that such instrument was subscribed and sworn to before him, or by an affidavit of a witness to such execution. Where such execution is by an officer of a corporation or association or a member of a partnership on behalf of such corporation, association or partnership such verification or affidavit shall also constitute sufficient proof of his authority.

(b) The fact of the holding of coupon bonds hereunder by any bondholder and the amount and the numbers of such bonds and the date of his holding the same may be proved by the affidavit of the person claiming to be such holder, if such affidavit shall be deemed by the Trustee to be satisfactory, or by a certificate executed by any trust company, bank, banker or any other depository, wherever situated, if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with or exhibited to such trust company, bank, banker, or other depository the bonds described in such certificate. The Trustee may conclusively assume that such ownership continues until written notice to the contrary is served upon it. The ownership of registered bonds without coupons shall be proved by the registration books kept under the provisions of Section 206 of this Indenture.

However, nothing contained in this Article shall be construed as limiting the Trustee to such proof, it being intended that the Trustee may accept any other evidence of the matters herein stated which it may deem sufficient. Any request or consent of the holder of any bond shall bind every future holder of the same bond in respect of anything done by the Trustee in pursuance of such request or consent.

Notwithstanding any of the foregoing provisions of this Section, the Trustee shall not be required to recognize any person as a holder of any bond or coupon or to take any action at his request unless such bond or coupon shall be deposited with it.

ARTICLE XI.

SUPPLEMENTAL INDENTURES.

SECTION 1101. The Commission and the Trustee may, from time to time and at any time, enter into such indentures supplemental hereto as shall not be inconsistent with the terms and provisions hereof (which supplemental indentures shall thereafter form a part hereof),

(a) to cure any ambiguity or formal defect or omission in this Indenture or in any supplemental indenture, or

(b) to grant to or confer upon the Trustee for the benefit of the bondholders any additional rights, remedies, powers, authority or security that may lawfully be granted to or conferred upon the bondholders or the Trustee.

At least thirty (30) days prior to the execution of any supplemental indenture for any of the purposes of this Section, the Trustee shall cause a notice of the proposed execution of such supplemental indenture to be mailed, postage prepaid, to the principal underwriters, all registered owners of bonds at their addresses as they appear on the registration books and all other bondholders who shall have filed their names and addresses with the Trustee for such purpose. Such notice shall briefly set forth the nature of the proposed supplemental indenture and shall state that copies thereof are on file at the principal office of the Trustee for inspection by all bondholders. A failure on the part of the Trustee to mail the notice required by this Section shall not affect the validity of such supplemental indenture.

SECTION 1102. Subject to the terms and provisions contained in this Section, and not otherwise, the holders of not less than two-thirds (2/3) in aggregate principal amount of the bonds then outstanding shall have the right, from time to time, anything contained in this Indenture to the contrary notwithstanding, to consent to and approve the execution by the Commission and the Trustee of such indenture or indentures supplemental hereto as shall be deemed necessary or desirable by the Commission for the purpose of modifying, altering, amending, adding to or rescinding, in any particular, any of the terms or provisions contained in this Indenture or in any supplemental indenture; provided, however, that nothing herein contained shall permit.

or be construed as permitting, (a) an extension of the maturity of the principal of or the interest on any bond issued hereunder, or (b) a reduction in the principal amount of any bond or the redemption premium or the rate of interest thereon, or (c) the creation of a lien upon or a pledge of revenues other than the lien and pledge created by this Indenture, or (d) a preference or priority of any bond or bonds over any other bond or bonds, or (e) a reduction in the aggregate principal amount of the bonds required for consent to such supplemental indenture. Nothing herein contained, however, shall be construed as making necessary the approval by bondholders of the execution of any supplemental indenture as authorized in Section 1101 of this Article.

If at any time the Commission shall request the Trustee to enter into any supplemental indenture for any of the purposes of this Section, the Trustee shall, at the expense of the Commission, cause notice of the proposed execution of such supplemental indenture to be published once in each week for four (4) successive weeks in a daily newspaper of general circulation published in the City of Norfolk, Virginia, and in a daily newspaper of general circulation or a financial journal published in the Borough of Manhattan, City and State of New York, and, on or before the date of the first publication of such notice, the Trustee shall also cause a similar notice to be mailed, postage prepaid, to the principal underwriters, all registered owners of bonds at their addresses as they appear on the registration books and all other bondholders who shall have filed their names and addresses with the Trustee for such purpose. Such notice shall briefly set forth the nature of the proposed supplemental indenture and shall state that copies thereof are on file at the principal office of the Trustee for inspection by all bondholders. The Trustee shall not, however, be subject to any liability to any bondholder by reason of its failure to mail the notice required by this Section, and any such failure shall not affect the validity of such supplemental indenture when consented to and approved as provided in this Section.

Whenever, at any time within one year after the date of the first publication of such notice, the Commission shall deliver to the Trustee an instrument or instruments in writing purporting to be executed by the holders of not less than two-thirds (2/3) in aggregate principal amount of the bonds then outstanding, which instrument or instruments shall refer to the proposed supplemental indenture described

in such notice and shall specifically consent to and approve the execution thereof in substantially the form of the copy thereof referred to in such notice, thereupon, but not otherwise, the Trustee may execute such supplemental indenture in substantially such form, without liability or responsibility to any holder of any bond, whether or not such holder shall have consented thereto.

If the holders of not less than two-thirds (2/3) in aggregate principal amount of the bonds outstanding at the time of the execution of such supplemental indenture shall have consented to and approved the execution thereof as herein provided, no holder of any bond shall have any right to object to the execution of such supplemental indenture, or to object to any of the terms and provisions contained therein or the operation thereof, or in any manner to question the propriety of the execution thereof, or to enjoin or restrain the Trustee or the Commission from executing the same or from taking any action pursuant to the provisions thereof.

Upon the execution of any supplemental indenture pursuant to the provisions of this Section, this Indenture shall be and be deemed to be modified and amended in accordance therewith, and the respective rights, duties and obligations under this Indenture of the Commission, the Trustee and all holders of bonds then outstanding shall thereafter be determined, exercised and enforced in all respects under the provisions of this Indenture as so modified and amended.

SECTION 1103. The Trustee is authorized to join with the Commission in the execution of any such supplemental indenture and to make the further agreements and stipulations which may be contained therein. Any supplemental indenture executed in accordance with the provisions of this Article shall thereafter form a part of this Indenture, and all of the terms and conditions contained in any such supplemental indenture as to any provision authorized to be contained therein shall be and shall be deemed to be part of the terms and conditions of this Indenture for any and all purposes. In case of the execution and delivery of any supplemental indenture, express reference may be made thereto in the text of any bonds issued thereafter, if deemed necessary or desirable by the Trustee.

SECTION 1104. In each and every case provided for in this Article, the Trustee shall be entitled to exercise its discretion in determining

whether or not any proposed supplemental indenture, or any term or provision therein contained, is desirable, having in view the purposes of such instrument, the needs of the Commission, the rights and interests of the bondholders, and the rights, obligations and interests of the Trustee, and the Trustee shall not be under any responsibility or liability to the Commission or to any bondholder or to anyone whomsoever for its refusal in good faith to enter into any such supplemental indenture if such agreement is deemed by it to be contrary to the provisions of this Article. The Trustee shall be entitled to receive, and shall be fully protected in relying upon, the opinion of any counsel approved by it, who may be counsel for the Commission, as evidence that any such proposed supplemental agreement does or does not comply with the provisions of this Indenture, and that it is or is not proper for it, under the provisions of this Article, to join in the execution of such supplemental indenture.

ARTICLE XII.

DEFEASANCE.

SECTION 1201. If, and when the bonds secured hereby shall have become due and payable in accordance with their terms or shall have been duly called for redemption or irrevocable instructions to call the bonds for redemption shall have been given by the Commission to the Trustee, the whole amount of the principal and the interest and the premium, if any, so due and payable upon all of the bonds and coupons then outstanding shall be paid or sufficient moneys, or direct obligations of the United States Government the principal of and the interest on which when due will provide sufficient moneys, shall be held by the Trustee or the Paying Agents for such purpose under the provisions of this Indenture, and provision shall also be made for paying all other sums payable hereunder by the Commission, then and in that case the right, title and interest of the Trustee shall thereupon cease, determine and become void, and the Trustee in such case, on demand of the Commission, shall release this Indenture and shall execute such documents to evidence such release as may be reasonably required by the Commission, and shall turn over to the Commission or to such officer, board or body as may then be entitled by law to receive the same any surplus in any account in the Sinking Fund and all balances remaining in any other funds or accounts other than moneys held for the redemption or payment of bonds or coupons; otherwise this Inden-

ture shall be, continue and remain in full force and effect: provided, however, that in the event direct obligations of the United States Government shall be deposited with and held by the Trustee or the Paying Agents as hereinabove provided, and in addition to the requirements set forth in Article III of this Indenture, the Trustee shall within thirty (30) days after such obligations shall have been deposited with it cause a notice signed by the Trustee to be published once in a daily newspaper of general circulation published in the City of Norfolk, Virginia, and in a daily newspaper of general circulation or a financial journal published in the Borough of Manhattan, City and State of New York, setting forth (a) the date designated for the redemption of the bonds, (b) a description of the obligations so held by it and (c) that this Indenture has been released in accordance with the provisions of this Section.

All moneys and obligations held by the Trustee or the Paying Agents pursuant to this Section shall be held in trust and the principal and interest of said obligations when received, and said moneys, applied to the payment, when due, of the principal and the interest and the premium, if any, of the bonds so called for redemption.

ARTICLE XIII.

MISCELLANEOUS PROVISIONS.

SECTION 1301. In the event of the dissolution of the Commission all of the covenants, stipulations, obligations and agreements contained in this Indenture by or in behalf of or for the benefit of the Commission shall bind or inure to the benefit of the successor or successors of the Commission from time to time and any officer, board, commission, authority, agency or instrumentality to whom or to which any power or duty affecting such covenants, stipulations, obligations and agreements shall be transferred by or in accordance with law, and the word "Commission" as used in this Indenture shall include such successor or successors.

SECTION 1302. Any bank or trust company with or into which any Paying Agent may be merged or consolidated, or to which the assets and business of such Paying Agent may be sold, shall be deemed the successor of such Paying Agent for the purposes of this Indenture. If the position of any Paying Agent shall become vacant for any reason, the Commission shall, within thirty (30) days thereafter, appoint a bank or trust company located in the same city as Paying

Agent to fill such vacancy: provided, however, that if the Commission shall fail to appoint such Paying Agent within said period, the Trustee shall make such appointment.

SECTION 1303. Any notice, demand, direction, request or other instrument authorized or required by this Indenture to be given to or filed with the Commission or the Trustee shall be deemed to have been sufficiently given or filed for all purposes of this Indenture if and when sent by registered mail, return receipt requested:

to the Commission, if addressed to State Highway Commission, Richmond, Virginia; and

to the Trustee, if addressed to Virginia National Bank, Norfolk, Virginia, or to any successor Trustee, if addressed to it at its principal office.

All documents received by the Trustee under the provisions of this Indenture, or photostatic copies thereof, shall be retained in its possession until this Indenture shall be released under the provisions of Section 1201 hereof, subject at all reasonable times to the inspection of the Commission, the Consulting Engineers, the Traffic Engineers, the principal underwriters, any bondholder, and the agents and representatives thereof.

SECTION 1304. If, because of the temporary or permanent suspension of publication of any newspaper or financial journal or for any other reason, the Trustee shall be unable to publish in a newspaper or financial journal any notice required to be published by the provisions of this Indenture, the Trustee shall give such notice in such other manner as in the judgment of the Trustee shall most effectively approximate such publication thereof, and the giving of such notice in such manner shall for all purposes of this Indenture be deemed to be compliance with the requirement for the publication thereof.

SECTION 1305. Except as herein otherwise expressly provided, nothing in this Indenture expressed or implied is intended or shall be construed to confer upon any person, firm or corporation other than the parties hereto and the holders of the bonds issued under and secured by this Indenture any right, remedy or claim, legal or equitable, under or by reason of this Indenture or any provision hereof, this Indenture and all its provisions being intended to be and being for the sole and exclusive benefit of the parties hereto and the holders from time to time of the bonds issued hereunder.

SECTION 1306. In case any one or more of the provisions of this Indenture or of the bonds or coupons issued hereunder shall for any reason be held to be illegal or invalid, such illegality or invalidity shall not affect any other provision of this Indenture or of said bonds or coupons, but this Indenture and said bonds and coupons shall be construed and enforced as if such illegal or invalid provision had not been contained therein. In case any covenant, stipulation, obligation or agreement contained in the bonds or in this Indenture shall for any reason be held to be in violation of law, then such covenant, stipulation, obligation or agreement shall be deemed to be the covenant, stipulation, obligation or agreement of the Commission to the full extent permitted by law.

SECTION 1307. All covenants, stipulations, obligations and agreements of the Commission contained in this Indenture shall be deemed to be covenants, stipulations, obligations and agreements of the Commission and of the State of Virginia to the full extent authorized by the State Revenue Bond Act and permitted by the Constitution of Virginia. No covenant, stipulation, obligation or agreement contained herein shall be deemed to be a covenant, stipulation, obligation or agreement of any present or future member, officer, employee or agent of the Commission in his individual capacity, and neither the members of the Commission nor any officer thereof executing the bonds shall be liable personally on the bonds or be subject to any personal liability or accountability by reason of the issuance thereof. No member, officer, employee or agent of the Commission shall incur any personal liability in acting or proceeding or in not acting or not proceeding, in good faith, reasonably and in accordance with the terms of this Indenture and the State Revenue Bond Act. This Indenture is executed with the intent that the laws of the State of Virginia shall govern its construction.

SECTION 1308. The principal underwriters shall be under no obligation to any bondholder for any action that they may or may not take or in respect of anything that they may or may not do by reason of any information contained in any reports or other documents received by them under the provisions of this Indenture. The immunities and exemptions from liability of the principal underwriters hereunder shall extend to their partners, directors, officers, successors, employees and agents.

SECTION 1309. This Indenture may be executed in multiple counterparts, each of which shall be regarded for all purposes as an original; and such counterparts shall constitute but one and the same instrument.

SECTION 1310. Any headings preceding the texts of the several articles hereof, and any table of contents or marginal notes appended to copies hereof, shall be solely for convenience of reference and shall not constitute a part of this Indenture, nor shall they affect its meaning, construction or effect.

IN WITNESS WHEREOF, the State Highway Commission has caused this Indenture to be executed in its behalf by the State Highway Commissioner, the Chairman of said Commission, and its official seal to be impressed hereon and attested by its Secretary, and Virginia National Bank has caused this Indenture to be executed in its behalf by its President or a Vice President and its corporate seal to be impressed hereon and attested by its Cashier or an Assistant Cashier, all as of the day and year first above written.

STATE HIGHWAY COMMISSION,

By DOUGLAS B. FUGATE
*State Highway Commissioner,
Chairman of said Commission*

[SEAL]

Attest:

W. M. SCLATER, JR.
Secretary

VIRGINIA NATIONAL BANK,
Trustee

[SEAL]

By E. R. MACKETHAN
Senior Vice President

Attest:

JOHN N. SKIDMORE
Assistant Cashier

We hereby approve the provisions of the foregoing Indenture.

LEWIS H. VADEN
State Treasurer of Virginia

SIDNEY C. DAY, JR.
State Comptroller of Virginia

COMMONWEALTH OF VIRGINIA }
 CITY OF RICHMOND } ss

Be it remembered that on the 7th day of December, 1965, before me, the subscriber, a notary public within and for said City and State, personally came Douglas B. Fugate, who is the State Highway Commissioner and Chairman of the State Highway Commission of the State of Virginia, and acknowledged that the name of the Commission was subscribed to the foregoing Indenture by himself as such officer, that the seal impressed hereon is the seal of the Commission, that said name was subscribed and said seal impressed by the direction and authority of the Commission, and that the foregoing Indenture is the free act and deed of the Commission, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

CHARLES E. OWEN
 Notary Public
 State of Virginia at Large

My commission expires May 28, 1967

(Seal)

COMMONWEALTH OF VIRGINIA

CITY OF RICHMOND

{ ss

Be it remembered that on the 9th day of December, 1965, before me, the subscriber, a notary public within and for said City and State, personally came E. R. MacKERNAN, who is a Senior Vice President of said Virginia National Bank, and acknowledged that the name of said bank was subscribed to the foregoing Indenture by himself as Senior Vice President thereof, that the seal impressed thereon is the seal of said bank, that said name was subscribed and said seal impressed by the direction and authority of said bank, and that the foregoing Indenture is the free act and deed of said bank, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal on the day and year aforesaid.

C. P. MULLER, JR.
Notary Public

My commission expires January 13, 1968

(Seal)

\$34,000,000

STATE OF VIRGINIA
4% Toll Revenue Bonds (Series 1965)
(Norfolk-Virginia Beach Toll Road)

Initial Amortization Requirements as fixed by resolution
of the State Highway Commission of the State of
Virginia adopted on October 27, 1965.

<i>Fiscal Year</i>	<i>Amortization Requirement</i>	<i>Fiscal Year</i>	<i>Amortization Requirement</i>
1970	\$120,000	1988	\$ 965,000
1971	205,000	1989	1,005,000
1972	290,000	1990	1,045,000
1973	385,000	1991	1,085,000
1974	480,000	1992	1,130,000
1975	580,000	1993	1,175,000
1976	605,000	1994	1,220,000
1977	625,000	1995	1,270,000
1978	650,000	1996	1,320,000
1979	680,000	1997	1,375,000
1980	705,000	1998	1,430,000
1981	735,000	1999	1,485,000
1982	765,000	2000	1,545,000
1983	795,000	2001	1,605,000
1984	825,000	2002	1,670,000
1985	860,000	2003	1,740,000
1986	890,000	2004	1,810,000
1987	930,000		


Exh. b. T # C

092883	TICKET NO. 17
BOOK NUMBER	

COMMUTATION TICKET
NORFOLK-VIRGINIA BEACH
TOLL ROAD

COMMUTATION TICKET GOOD FOR ONE TOLL TRANS-
ACTION OF VEHICLE FOR WHICH PURCHASED, TICKET
VOID IF NOT PRESENTED WITH THE SAME NUMBERED
BOOK FROM WHICH THE TICKET WAS DETACHED.

THIS TICKET NOT
REDEEMABLE


ASST. DIST. ENGINEER

PLACE TICKET BEHIND COVER		VIRGINIA DEPT. of HIGHWAYS and TRANSPORTATION	
092883		NORFOLK-VIRGINIA BEACH	
BOOK NUMBER		TOLL ROAD	
MAY 25 1980		P. O. BOX 3447	
EXPIRATION DATE		HAMPTON, VA 23463	
516-349		50 COMMUTER TICKETS	
LICENSE NUMBER		\$7.50	
LICENSE NUMBER		ISSUED SUBJECT TO CONDI- TIONS PRINTED ON INSIDE FRONT COVER	
PLEASE DETACH TICKET AND PLACE BEHIND COVER IN SPACE INDICATED BY ARROWS WITH TICKET NUMBER SHOWING AT TOP		 ASST. DIST. ENGINEER	

Filed
4/3/81
P.S.R.

\$34,000,000

STATE OF VIRGINIA

4% Toll Revenue Bonds (Series 1965)

(Norfolk-Virginia Beach Toll Road)

(Payable from tolls and other revenues as hereinafter set forth)

Dated July 1, 1965

Due January 1, 2005

Issuable as coupon bonds in the denomination of \$5,000 each, and as registered bonds without coupons in denominations of \$5,000 or any multiple thereof, and interchangeable as provided in the Trust Indenture. Semi-annual interest (January 1 and July 1) and principal of coupon bonds payable at Virginia National Bank, Norfolk, Virginia, or, at the option of the holder, at Chemical Bank New York Trust Company, New York, New York. Principal of registered bonds without coupons payable at the office of the Trustee.

Redeemable prior to maturity, upon 30 days' published notice, either in whole, on any date not earlier than January 1, 1976, from any moneys made available for such purpose, or, in part, by lot, on any interest payment date not earlier than January 1, 1971, by operation of the Sinking Fund, at the following prices and accrued interest to the date fixed for redemption:

Period	Redemption Prices	
	As a Whole	Sinking Fund
January 1, 1971 to December 31, 1975, inclusive	—	103%
January 1, 1976 to December 31, 1980, inclusive	104%	102
January 1, 1981 to December 31, 1985, inclusive	103	101
January 1, 1986 to December 31, 1990, inclusive	102	100½
January 1, 1991 to December 31, 1995, inclusive	101	100
January 1, 1996 to December 31, 2000, inclusive	100½	100
January 1, 2001 and thereafter prior to maturity	100	100

Interest is exempt, in the opinion of Bond Counsel, from all present Federal income taxes.

The State Revenue Bond Act provides that the Bonds and the income thereof shall be exempt from all taxation within the State of Virginia.

The Bonds are being issued for the purpose of paying the cost of a toll road extending from the interchange of Interstate Routes 64 and 264, immediately south of U. S. Route 58, in the City of Norfolk, Virginia, to a point in the City of Virginia Beach, Virginia, east of Londonbridge and west of U. S. Route 60, having an eastbound roadway terminus at 21st Street and a westbound roadway terminus at 22nd Street in the City of Virginia Beach. The Bonds are to be issued under a Trust Indenture, dated as of July 1, 1965, between the State Highway Commission of Virginia and Virginia National Bank, Norfolk, Virginia, as Trustee.

The Bonds are payable from tolls and other revenues of the Toll Road as provided in the Trust Indenture. The faith and credit of the State of Virginia are not pledged thereto, and the State is not, directly or indirectly or contingently, obligated to levy or to pledge any form of taxation whatever therefor or to make any appropriation for the payment of the principal of or the interest on the Bonds.

Price 100½%
(and accrued interest)

The Bonds are offered for delivery when, as and if issued and received by us, and subject to approval of legality by Mitchell, Pershing, Shetterly & Mitchell, New York, N. Y. Bond Counsel. It is expected that the Bonds in definitive form will be available for delivery on or about December 9, 1965. Alex. Brown & Sons has acted as Financial Consultant to the Commission.

Ex. P. 1
Lester E. Egner, et al.
3/14/80
L. F. A.

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

3 -----
4 VIRGINIA WINCHEY,

5 Plaintiff,

6 v.

7 NEAL A. UGDEN, et al,

8 Defendants.
9 -----

10 KENNETH J. GARBE,

11 Plaintiff,

12 v.

13 NEAL A. UGDEN, et al,

14 Defendants.
15 -----

16 WILLIAM H. PATTERSON, JR.,

17 Plaintiff,

18 v.

19 NEAL A. UGDEN, et al,

20 Defendants.
21 -----
22

23 DATE: October 3, 1950

24 BEFORE: The Honorable Phillip L. Russo

Filed
4/3/81
D. P. R.

1
2 APPEARANCES:

3 BY: M. E. Stallings, Esquire,
4 Appearing on behalf of Virginia Minney.

5 BY: Joan W. Gibson, Esquire,
6 Appearing on behalf of Donald Henderson.

7 BY: C. Richard Cranwell, Esquire,
8 Appearing on behalf of William H.
9 Patterson, Jr.

10 WHITE, REYNOLDS, SMITH AND WINTERS,
11 BY: Robert L. Mills, Esquire,
12 Appearing on behalf of Neal A. Ogden
13 and Norfolk-Virginia Beach Expressway.
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25

1 THE COURT: Now, let me get the cast
2 of characters now. We're going to talk about three
3 cases. We've got Virginia Hinchey; and Sonney
4 Stallings represents her, right?

5 MR. STALLINGS: Yes, sir.

6 THE COURT: Then we've got Neal Ogden.
7 And Bob, you represent Neal Ogden?

8 MR. MILLS: That's right.

9 THE COURT: Doug's not coming?

10 MR. MILLS: No, sir, he won't be here.

11 THE COURT: What's your full name,
12 Bob?

13 MR. MILLS: Robert L. Mills.

14 THE COURT: And then we've got Donald
15 Henderson; and our pretty lady friend represents
16 Donald Henderson, right?

17 MS. GIBSON: Donald Henderson is the
18 uninsured motorist and I represent Allstate.

19 THE COURT: You are here on his
20 behalf?

21 MS. GIBSON: I'm here on his behalf.

22 THE COURT: You're Joan W. Gibson?

23 MS. GIBSON: That's correct.

24 THE COURT: All right. Now, then
25 we've got the Garbe case. That's Mr. Stallings

1 again, isn't it, sir?

2 MR. STALLINGS: Yes, sir.

3 THE COURT: Kenneth J. Garbe versus --
4 let me see. The other one you didn't name
5 Norfolk-Virginia Beach Expressway, did you?

6 MR. STALLINGS: In the Garbe case?

7 THE COURT: No. In the Hinchey case.

8 MR. STALLINGS: Judge, I'm not sure.

9 THE COURT: You named Neal A. Ogden,
10 Superintendent, Norfolk-Virginia Beach Expressway,
11 200 South Kentucky Avenue and Donald Henderson.

12 MR. STALLINGS: That's correct on
13 that suit, yes, sir.

14 THE COURT: Cast of characters.
15 Kenneth Garbe represented by Moody Stallings. Neal
16 Ogden represented by Robert L. Mills, right?

17 MR. MILLS: Yes, sir.

18 THE COURT: And Norfolk-Virginia
19 Beach Expressway represented by you?

20 MR. MILLS: That's correct.

21 THE COURT: Don't have any
22 independent defendant? By independent, I mean
23 somebody who's not either the Expressway or
24 connected with the Expressway like you did in that
25 Henderson case. Okay.

1 MR. MILLS: That's correct. That was
2 a single vehicle accident.

3 THE COURT: We come to Mr. Cranwell's
4 case, right? This is part two of Garbe. Mr.
5 Cranwell, your full name is what?

6 MR. CRANWELL: C. Richard. Last name
7 is C-R-A-N-W-E-L-L.

8 THE COURT: Cranwell. Yes, sir, I've
9 got that. And Norfolk-Virginia Beach Expressway and
10 Neal A. Ogden by Robert L Mills. And then Mr.
11 Henderson --

12 MR. CRANWELL: Yes, sir.

13 THE COURT: Henderson represented by
14 Miss Gibson. Now, Bob, let me see if my memory of
15 these things is right now. In the Hinchey case
16 where you've got Ogden and not the Norfolk-Virginia
17 Beach Expressway, you're not claiming sovereign
18 immunity for Ogden, are you?

19 MR. MILLS: Yes, we are.

20 THE COURT: But you're not in the
21 Garbe case?

22 MR. MILLS: No. We're claiming
23 sovereign immunity in the Garbe case also.

24 THE COURT: All right. For Ogden?

25 MR. MILLS: For Ogden. He is a State

1 employee, employed by the State Department.

2 THE COURT: I know, but seems to me
3 in one of these you were not claiming sovereign
4 immunity for Ogden.

5 MR. MILLS: No, we haven't said
6 anything about Ogden in the cases -- well, no, we've
7 claimed sovereign immunity for Ogden in each and
8 every case. The situation is identical with regard
9 to everyone. There's really no change in his status.

10 MR. STALLINGS: Your Honor, I think
11 it may be one point when we were back here before
12 with Mr. Smith, Mr. Smith mistakenly said, I believe,
13 they weren't claiming sovereign immunity toward
14 Ogden. That may be the reason the Court's confused.

15 THE COURT: Maybe it is. It seems to
16 me that Doug Smith left me with that distinct
17 impression.

18 MR. STALLINGS: Judge, he did. But
19 in all fairness, we fully are prepared for sovereign
20 immunity defense in all these matters.

21 THE COURT: All right. Okay. All
22 right. Now, come here now look. Kenneth J. Garbe,
23 plaintiff, against Neal A. Ogden and Norfolk-Virginia
24 Beach Expressway. "The Norfolk-Virginia Beach
25 Expressway is owned, operated and maintained by the

1 Commonwealth of Virginia and Norfolk-Virginia Beach,
2 who's a party, may not be sued for damages." And
3 nowhere in there is there anything about Ogden.

4 THE COURT: Now, I was wondering why,
5 but I didn't want to say anything because I didn't
6 want to inject myself into the picture too much, but
7 that was the distinct impression I got from Doug and
8 also it was born out by the memo which y'all wrote.

9 MR. MILLS: This was a memo in the
10 Garbe case, right?

11 THE COURT: Um-hum. Is it Garbe or
12 Garbe?

13 MR. STALLINGS: Garbe.

14 MR. MILLS: If my memory serves me
15 correctly, Judge, back in April when we filed that
16 brief we were not yet authorized by the Commonwealth
17 of Virginia to assert that defense on behalf of Mr.
18 Garbe.

19 We have since been so authorized.
20 And the other three subsequent beliefs that have
21 been written, I believe we mentioned them, and the
22 nature of his function and the nature --

23 THE COURT: No doubt about it. No
24 doubt about it. And that's why I was a little
25 perplexed. I thought it was just strategy on

1 ya'll's part. I don't want to inject myself into
2 that sort of thing, but I remember specifically that
3 I asked Doug Smith. I said, "Now, in the Garde case,
4 you're not claiming immunity on behalf of Mr. Ogden,
5 but in the" -- that case at that time we were
6 talking about Patterson also -- and I said, "but in
7 the Patterson case, you are?"

8 THE COURT: He said, "Yes, sir,
9 that's right." At any rate, is it understood that
10 he claims --

11 MR. STALLINGS: I have no problem.

12 THE COURT: He's claiming it on
13 behalf of Ogden all the way through in every case?

14 MR. STALLINGS: I have no problem
15 with that.

16 THE COURT: You are claiming immunity
17 for the Expressway and also for Neal A. Ogden as
18 Superintendent?

19 MR. MILLS: Yes, sir.

20 THE COURT: Okay. All right. Now,
21 let's see. Young lady, did you get the style of
22 these?

23 THE COURT REPORTER: Yes, sir.

24 THE COURT: For the record, we are
25 hearing arguments in three different cases, but I

9
1 think that counsel have all agreed that the same
2 principles would apply in all three cases. So the
3 way they appear on the docket first is Virginia
4 Hinchey and then the next one is Garbe and the next
5 one is Patterson. So let me hear from Mr. Stallings
6 first, if you have anything to add.

7 MR. STALLINGS: Judge, I really don't
8 have anything to add at this point. I think there's
9 been extensive research on everybody's part here,
10 probably less so mine than everybody else's. You've
11 read Mr. Cranwell's brief and I'm sure you've read
12 defense's brief. I just ask the Court to make it's
13 ruling. I think all has been said.

14 THE COURT: Let me say this at the
15 outset. It's been a long time since I've seen
16 better briefs than those that were submitted in this
17 case.

18 MR. CRANWELL: Thank you, Your Honor.
19 That's a compliment.

20 THE COURT: I think they are really
21 excellent and it's apparent to me that counsel have
22 done a lot of work and spent a good deal of time in
23 the library and got some well organized arguments,
24 all of you, and I'm very happy to state that for the
25 record.

1 I think that when the Chief Justice
2 talked about incompetent counsel these days, you
3 know, and so on, I don't think he had anybody in
4 this room in mind because y'all have really done an
5 excellent job.

6 Okay. Then let me go to the other
7 plaintiff then. I'll go to Mr. Cranwell and see if
8 he has anything that he wants to argue or stress or --

9 MR. CRANWELL: Your honor, couple of
10 things that I would like to follow back on. I tried
11 to brief this case extensively. I would like to
12 respond to just a couple of things that are in the
13 reply brief filed by Mr. Mills.

14 THE COURT: All right.

15 MR. CRANWELL: Your honor, I would
16 state, as I stated in the brief, to me, as the
17 Supreme Court said in James v. Jane the reason for
18 the granting of sovereign immunity are eroding away
19 all the time.

20 As society changes -- we found that
21 it is changing -- and I think that in light of the
22 factual circumstances in this case it is an
23 equitable situation, as far as the plaintiff's
24 concerned, and would be a severe injustice if the
25 expressway were allowed to cloak itself with the

1 shield of sovereign immunity.

2 The three criteria as indicated for
3 the agency of the state, Your Honor, and there's no
4 question that there's no law in Virginia. In his
5 reply brief Mr. Mills pointed out several times that
6 I cited no Virginia law on the point, for example,
7 in talking about the lack of state funds. He said
8 that I cited the Morris case which does not stand
9 for the principle that the Supreme Court of Virginia
10 has said that the shield of sovereign immunity is
11 gone if there is no state funds involved in the
12 state agency.

13 Your Honor, I grant that -- I did not
14 say in the brief that the case was an explicit on
15 point statement of that. If the Court will recall,
16 I said that if you read the Morris v. Tunnel
17 District case in conjunction with what the authority
18 throughout the United States is, the indication is
19 that the Supreme Court is in the main vein of what
20 the law is and throughout the United States is and
21 that there's no state funds involved, there's no
22 threat to the State Treasury and that is to say that
23 you are going to raid the taxpayers' funds based on
24 the old theory of common law that risk should be
25 spread among everybody.

1 But if you read that case, the
2 inescapable conclusion to be drawn from that case is
3 that the Supreme Court is in tune with what the
4 majority thinking of the United States is because
5 they, although it could be construed to be Dicta,
6 they have stated very flatly in the Morris case that
7 there were no state funds, that there was no
8 jeopardy of state funds in that case.

9 Now, the law is absolutely clear
10 throughout the United States. And I will point out
11 in the reply brief that they did not respond to what
12 the case law is throughout the United States with
13 respect to piercing of the shield of sovereign
14 immunity when no state funds are involved.

15 Your Honor, the cases are classical.
16 You go through the Centennial Digest and you can
17 find them right on point in most of the
18 jurisdictions throughout the United States. Again,
19 as I say, my point is to make sure that what he says
20 in his reply brief is correct. There's absolutely
21 no case on point in Virginia. This is a unique case.

22 But Morris v. Tunnel District
23 indicates to me that Virginia is in the plane with
24 what the law throughout the United States is and,
25 obviously, the defendant hasn't taken issue with

13
1 that point, that is the law throughout the United
2 States.

3 The other point that concerns me is
4 the response to the argument about internal
5 improvements and they seem to take the fact that
6 anything that the state wants to do is, in fact, a
7 state function and can be done. And they say that a
8 toll road is a necessary public function.

9 well, your honor, I don't know of any
10 evidence or anything in this case that indicates to
11 the Court that the construction of that toll road
12 out there was a necessary public function. It is
13 paralleled on all sides by highways that have been
14 paid for by the taxpayers.

15 Now, to follow-up on that, let me
16 give the Court a scenario of what the public
17 function of the Highway Department is with respect
18 to maintaining the highway. Your honor, they
19 conduct extensive hearings every year throughout the
20 state in each highway district and listen to its
21 citizens, they listen to local governing bodies and
22 to everybody as to what the need for the public
23 highway system is in that area. Okay?

24 Then they look at the funds that are
25 available and on a priority basis then they

1 construct the highways to meet the public needs.

2 Your Honor, this construction is paid for through

3 the gasoline tax. Now, let's stop and come back and

4 take a look at how this project is determined as to

5 whether it will or will not be constructed. What do

6 you do?

7 This is not constructed with highway

8 funds. VDA and T, as part of their public purpose,

9 did not come to the General Assembly and say, "Let

10 us construct a Norfolk-Virginia Beach Highway."

11 Authority was granted to construct that highway

12 without any substantial discussion as to public need

13 or anything.

14 But do you know what the major

15 criteria or the major purpose of that highway was?

16 I reiterate to you it wasn't the public need. The

17 reason or the major criteria was the fact that any

18 time you issue bonds you're raising private capital

19 to do a project.

20 Now, the only way you can raise

21 bonds -- and the process that you go through in

22 issuing bonds, whether industrial revenue, state

23 bonds or anything else -- you go through what they

24 call an Economic Feasibility Study, to determine if,

25 In fact, the project will generate enough revenue to

1 attract investors who will put up the private
2 capital.

3 When this project out here -- I don't
4 care what the public need would have been, had they
5 not been able to convince private investors that
6 there was an economically viable project through
7 their feasibility study that was done, there would
8 have been no funds at all raised and it wouldn't
9 have been constructed. So it wasn't constructed out
10 of public need and public purpose. It was
11 constructed and structured because private capital
12 was willing to put up the money in order to fund the
13 construction of this project.

14 Now, that is the only way it can be
15 done because, Your Honor, again, they talked about
16 internal improvements and said it was absurd to say
17 bridges and toll roads were public improvements as
18 part of the highway system, that Toll Roads weren't.

19 Your Honor, they talk about the
20 inconsistency with my citing of the Harrison case
21 and Almond v. Gilmer. Your Honor, those cases cite
22 very explicitly that the state is not to be involved
23 in internal improvements, those that are of the
24 commerce kind.

25 Sure they said in the cases you can

1 build college buildings and you can build the state
2 capitol, you can build office buildings for
3 legislature. Those are all internal improvements.
4 but if you read those cases, the type of personal
5 improvements that are prohibited by the constitution
6 are those that deal with commerce and they cite
7 canals and turnpikes right in there. Absolutely.
8 There's no question that in that case it says the
9 kind of internal improvements that are prohibited by
10 the constitution are canals and turnpikes, power
11 generation facilities. Some other things that they
12 talk about.

13 But the point that I make to you is
14 that this is generated by private capital, it is a
15 private project. There are no state funds involved
16 in there. It is a self-sustained project. The
17 money was put up by private investors to build it.
18 They are being paid back out of funds charged for
19 private users of that. Me, as a private individual,
20 I use it when I come to the beach. But it is not
21 public in nature and it is not an essential public
22 function.

23 And if you look at the constitution
24 and you look at the case law, the state got into a
25 lot of trouble years ago by pledging its faith and

1 credit and putting money up to fund these kind of
2 projects. They had a constitutional conference back
3 in 1902 and people said, "hey, it's time we quit
4 throwing the tax dollars away and we're going to
5 quit this kind of stuff in the future." That's what
6 they did. That's why the legislature went through
7 to divorce the financial responsibility of this
8 project from the state. All the state is performing
9 as a clerk function over there.

10 Your Honor, the other response that I
11 wanted to make with respect to what they talked
12 about was the fact that the liability insurance
13 coverage on this, they seem to think that because
14 the private insurance company pays their fees to
15 defend these suits that that some way should have
16 some impact on this case and should justify the
17 obtaining of liability insurance. That's not true,
18 Your Honor.

19 Again, I'll come back and say as I
20 said before, it's a private project. If you look at
21 the trust indenture, the bond indenture, and the
22 commitments on the purchase of the bond, all
23 mandate they maintain insurance and it's not to
24 cover the state, it's to cover the private investors
25 to insure that they have no loss.

1 Now, I would say to you that it's the
2 loss we're concerned about here and protecting the
3 State having insurance is for paying private
4 attorneys, then I think we need to abolish the
5 Attorney General's office. I know what the Attorney
6 General's budget is. I know how many they've got on
7 the staff up there and they've got plenty of people.
8 I have filed suits against other State agencies and
9 had to oppose the Attorney General's office before.

10 But it's a unique situation I find
11 myself with pleading that it is a state, the state
12 is defending it, yet we've got attorneys being paid.
13 Then they turn around and say that as a
14 justification for buying the insurance is to cover
15 those kind of claims. If that's a justification --
16 as I said in my brief -- if that's the justification
17 you want to look at then I say to you to deny the
18 consuming public the right to proceed against them
19 for negligence when, in fact, that every dollar that
20 the consuming public pays goes, in effect, to pay
21 part of the liability insurance premium and is, in
22 effect, reduces the amount to amortize the bond and
23 extends the life of the pay-off out there, it's
24 unfair for the consuming public for that to happen,
25 then to be able to say, "You pay for the insurance.

1 You'll continue to pay longer for this Toll Road
2 because you have to pay insurance premiums, but if
3 you get hurt out there you can't sue the State even
4 though they've got insurance coverage and you paid
5 for it with your quarters out there."

6 That's what they've said to us and
7 that's just not what the law is. The law is what
8 makes you feel good in your tummy. And I tell all
9 the young lawyers that come into my firm, "when you
10 get to thinking about what the law is, you listen to
11 your head, but feel down here first because that's
12 usually what tells you what's really fair and
13 what's equitable."

14 I come back and the last thing I want
15 to talk about is James v. June, and their hanging
16 their hat on this. Your honor, there is absolutely
17 no magnitude of State interest in this project with
18 respect to any discretionary function.

19 Now, the State interest in this
20 project is what? I don't know what the State
21 interest is. They've got 14 projects that have been
22 funded. They're limited. Certainly the State
23 interest is not to make this a part of an overall
24 highway system. I don't think that's the intent at
25 all. Because if you did, then these Toll Roads

1 would be all over the state of Virginia. All over
2 the state of Virginia. That's where they'd be.

3 But that's not the state interest.

4 The state interest in this project is very minimal,
5 if at all. It may be a convenience to the public.
6 may be a convenience to the public. It is narrow
7 and specific.

8 What has been done out here cannot
9 today this day be done anywhere else in the state
10 until there is legislative approval of such project.
11 nowhere. It's not a part of the initial preliminary
12 grant of borrowers. The state delegated all that
13 discretion to the highway department. They
14 determine where the roads are going to be located,
15 when they are going to be funded and when they are
16 going to be constructed. It's not the legislature
17 that does that, but it is the legislature that
18 decides where these special projects would go.

19 But again, that is merely a
20 legislative function. To come back to determine
21 where those projects are built you have to have
22 capital and you have to have a private enterprise
23 adventure. So what the James v. Jane case says is
24 the state must have compelling interest before we
25 will grant the employees sovereign immunity. You

1 look at their function and it said the type of
2 function we're talking about are those functions
3 granted by the constitution and draw mandates under
4 the general law.

5 your honor, even, even if I accept
6 the defendants contention that it was not a special
7 act that created the Norfolk-Virginia Beach
8 Expressway but is part of a general act, it is so
9 limited in its scope and nature that there is no
10 broad exercise of discretionary function as
11 contemplated in James v. Jane that would drag with
12 it the cloak of sovereign immunity.

13 your honor, I would submit to you
14 that not only is not VDH and through its entity of
15 Norfolk-Virginia Beach Expressway not entitled to
16 sovereign immunity, but Mr. Ogden, no matter how
17 much discretion he exercised to tell his employees
18 what time to come to work out there, that the State
19 has no compelling interest in that function that
20 would -- that would or should allow him to wrap
21 themselves in that cloak of sovereign immunity. And
22 I would respectfully suggest to the Court that we
23 should be allowed to proceed and schedule this
24 matter for jury trial. Thank you, your honor.

25 THE COURT: All right.

1 MR. CRANWELL: I apologize for being
2 long-winded.

3 THE COURT: That's all right. That's
4 what we're here for. It's an extremely interesting
5 question. I've really -- you know, there's some
6 cases that you labor through and, you know, just
7 part of the job, but this has really caught my fancy.
8 It's an interesting case. Okay. Do they call you
9 Bob?

10 MR. MILLS: Robert.

11 THE COURT: Okay, Robert, I'll hear
12 from you.

13 MR. MILLS: Judge Russo, there is
14 absolutely nothing private about the Norfolk-Virginia
15 Beach Expressway. That Expressway out there is
16 owned, operated, maintained, and was constructed by
17 the State Highway Commission. It is operated by the
18 Virginia Department of Highways and Transportation.

19 It is staffed by its employees. All
20 the land that the Expressway is built on was
21 acquired in the name of the State. Certificates to
22 that effect were required to be presented on the
23 completion of that project. Before that project
24 could be opened, the State had to be assured of the
25 fact that all that land had been acquired in the

1 name of the State and they were the owners of that
2 facility.

3 The only single element that I can
4 see the plaintiffs can base such an assertion that
5 the Norfolk-Virginia Beach Expressway is private in
6 any respect is the method of financing with which
7 the legislature chose to build this particular
8 facility.

9 Now, Mr. Cranwell has said that the
10 construction of this facility was not based on any
11 public need and that it's not an essential
12 governmental function. I frankly can not understand
13 where that assertion comes from or what it's based
14 on.

15 The need was so compelling that the
16 legislature, the General Assembly of Virginia itself,
17 passed an act saying, "we need a facility here in
18 the Tidewater area that will connect the Interstate
19 systems and will service this particular area."

20 The facility was built to
21 accommodate heavy traffic. In 1977 alone it
22 accommodated over 26 million vehicles. It's ahead of
23 schedule in paying for itself. Now, they say the
24 State Treasury funds are not involved in the
25 construction and operation and maintenance of this

25
1 project, but the fact is that that is simply not
2 true. State Treasury funds -- every single piece of
3 revenue that comes in, every quarter that comes in,
4 from that Expressway is received into the State
5 Treasury, a special fund that has been created
6 within the State Treasury. And in order for any
7 funds to be disbursed from that, there needed to be
8 warrants issued by the State controller to the State
9 Treasurer authorizing him to disburse those funds in
10 a given way. A certain portion of the funds go to
11 redeem the bonds. A certain part of it goes to
12 operate the Expressway.

13 But the State also allocates funds
14 and has done so since the day that project was
15 opened. The State Highway Commission has resolved
16 and made this resolution public as assurance to the
17 traveling public that they will spend highway funds
18 to make sure that facility is operated and
19 maintained in accordance with all the other State
20 highway facilities around the State.

21 State highway vehicles are used.
22 State Highway employees are used to make sure that
23 this project operates in a manner commensurate with
24 all the other State highway facilities. Now, the
25 plaintiffs in these cases keep bringing up the

1 Morris case and I've discussed that case at length
2 in my briefs. I don't think it applies to this case
3 situation and I think any reasonable reading of that
4 case will reveal that it does not. Morris was a
5 case in the nature of imminent domain brought by a
6 woman who had some land damaged during the
7 construction of the Elizabeth River Tunnel.

8 The State affirmed -- or the State
9 Supreme Court rather -- said very clearly within
10 that case and quoted cases that say the same thing
11 that the State is not suable in Court. Elizabeth
12 River Tunnel District is not suable in Court. They
13 can't be sued that way.

14 They said if this were a suit in tort
15 they could not hear the claim, but since it was
16 based on the constitutional prohibition against the
17 taking of property for State purposes without just
18 compensation, then they could pay this woman for the
19 damage to her land. But that's not the situation in
20 any of these cases. None of these cases involve
21 imminent domain.

22 They used that case, I think,
23 primarily for the proposition that unless State
24 funds -- State Treasury funds -- are directly
25 involved in any adverse judgment, that sovereign

1 immunity doesn't apply. That's frankly not what the
2 case says. The case says that unless state funds
3 are involved venue provisions applicable to where
4 the suit can be brought do not apply.

5 In this case they were talking about
6 the Elizabeth River Tunnel which at that time was a
7 separate private commission that had all these
8 powers that had been granted in this case to the
9 State Highway Commission by imminent domain and, you
10 know, be able to disburse revenue and so on.

11 And quick reference to that case will
12 reveal that that's exactly what they say about it.
13 It's in about the last page of the case. Very clear.
14 It can't be used as authority for the fact that
15 unless State Treasury funds are involved sovereign
16 immunity does not apply. But that's not really
17 important to the decision here because State
18 Treasury funds are involved.

19 All the funds we are talking about
20 are State Treasury funds. They are received into
21 and disbursed from the State Treasury funds, the
22 ones that come from the revenue and ones that come
23 from the State gasoline tax which Mr. Cranwell is so
24 concerned about. They are used to maintain the
25 Expressway also.

1 virtually every case that the
2 plaintiffs have cited in their briefs as authority
3 for the proposition that the State and State highway
4 facilities can be sued in tort, all of them have
5 explicit language in them to the contrary.

6 Then with regard to this internal
7 improvement prohibition that the State Constitution
8 contains in Article 10, Section 10, that's an old
9 provision that was in the State, kind of came into
10 the State Constitution way back. It has everything
11 to do with the way these projects were financed. It
12 puts rigid limitations on the amount of debt the
13 State can acquire for certain reasons.

14 But the simple fact is that the State
15 of Virginia is not prohibited from building internal
16 improvements. And the States in the cases that deal
17 with that fact say clearly that no one would
18 seriously contend that this is the fact. We
19 wouldn't have any public buildings. We wouldn't
20 have any public highways. All these things are
21 works of internal improvement.

22 The case law has been clear that that
23 distinction is not important. They said in Harrison
24 that the State could construct port facilities and
25 the State -- since then port facilities, hospitals,

1 schools -- all of these things have been constructed
2 by the State. They are works of internal
3 improvement and the State can not -- they are all
4 essential governmental functions and the State
5 cannot function without them.

6 Now, Mr. Cranwell has said that the
7 State really has no legitimate interest in the
8 operation and maintenance and control of the
9 Virginia Norfolk-Virginia Beach Expressway. I don't
10 understand how he can say that.

11 It's true it is paralleled on all
12 sides by other highways, but none of them could
13 accomodate the flow of traffic that this particular
14 facility receives. I think that all of us residents
15 of the Tidewater area are aware that were it not for
16 the Hampton Roads Bridge Tunnel and the Norfolk-Virginia
17 Beach Expressway, which are two of the greatest
18 factors in the tremendous expansion in the Tidewater
19 area in the past 10, 15 years, 20 years.

20 THE COURT: Mr. Cranwell is from
21 Roanoke so he never drove from Virginia Beach to
22 Norfolk to work in the morning before the Expressway
23 came along.

24 MR. MILLS: No, sir, but I'm sure if
25 he had to --

21
1 MR. CRANWELL: I'm from Tazewell
2 County.

3 MR. MILLS: All those roads are free.

4 THE COURT: That --

5 MR. MILLS: I do not know why the
6 State legislature chose this particular method of
7 financing for the construction of this facility.
8 Mr. Cranwell as a member of that August body is
9 probably better qualified to answer that question
10 than I am.

11 THE COURT: There's one point -- I
12 hate to interrupt you because it might interrupt
13 your train of thought -- I don't remember whether
14 you addressed it in the reply brief or not. Now
15 about his point about this being a turnpike in that
16 the State was prohibited -- as I remember -- was
17 prohibited from constructing turnpikes?

18 MR. MILLS: There is no explicit
19 provision anywhere in the State Constitution or
20 anywhere else that the State is prohibited from
21 constructing turnpikes. And the case law has been
22 clear on that point. I think what Mr. Cranwell is
23 referring to is some dicta from a case that mentions
24 turnpikes along with works of internal improvement.
25 I can't recall exactly. Can you tell me what case

1 that was?

2 MR. CRANWELL: Yes. That's the
3 Harrison case.

4 THE COURT: Talks about turnpikes and
5 canals.

6 MR. CRANWELL: The quote's on page 17
7 of the brief. Bottom of page 17. Says discussing
8 terms of internal improvement, the Court has said --
9 and then the Court starts quoting. And using the
10 term and talking about internal improvements in
11 Article 135 of the Late Constitution must have
12 presumed to be according to the established rules of
13 construction, to have used the term only in the
14 definite sense and meaning that had attached to it
15 throughout the history of the State.

16 I think what they said there was what
17 the constitutional convention meant when they put
18 internal improvement in the Constitution is what
19 everybody on a commonly accepted basis understood
20 that to mean.

21 It's meaning was thus defined and
22 understood through the legislation of the State and
23 the decision of the Court has included reference of
24 changes of trade and commerce and again they're
25 still talking about internal improvements, such as

1 turnpikes, canals, railroad, telegraph lines,
2 including more recent years telephone lines and
3 other walks of a like quasi public character. I
4 don't know how you can be any more specific, Your
5 Honor.

6 MR. MILLS: Judge, can I pull that
7 case out so we can look at it?

8 THE COURT: Sure. I didn't remember.
9 I just got your reply brief, what, couple of days
10 ago, and I read it very carefully, but I didn't
11 remember whether you addressed that point or not.
12 He raised so many of them. He did a good job.

13 MR. MILLS: He did. Sure did.

14 MR. CRANWELL: Thank you, Your Honor.
15 Maybe I raised too many.

16 THE COURT: No.

17 MR. MILLS: Some of them were very
18 creative.

19 MR. CRANWELL: The quote is on page
20 17, your brief, Robert.

21 MR. MILLS: Well, I want to show it
22 to the Judge in the context in which it's quoted in
23 the case. It's the Harrison case. I should have
24 quoted it myself really. I think I did in some
25 places. But all through this case they are

1 talking about the restrictive provisions of the
2 Virginia Constitution that we are concerned with
3 Section 185 and Section 188.

4 They talk about how the State is
5 prohibited from constructing works of internal
6 improvement. I would direct the Judge's attention
7 to this language. "There is nothing in the history
8 of Section 185 to suggest that its purpose was to
9 restrict or limit the State in the exercise of its
10 governmental functions. From the origin of the
11 Commonwealth, down to its present time, it has
12 constructed many works of internal improvement which
13 are incidental and necessary to the performance of
14 its governmental functions." And I would submit
15 there's nothing more essential as a governmental
16 function than providing highways for the use of
17 citizens and people that visit the Commonwealth.

18 "Plainly each of these is a 'work of
19 internal improvements'". They talk about State
20 capitols, Supreme Court library buildings, office
21 buildings, according to literal meanings of this
22 word. "Yet no one would seriously contend that any
23 of these are within the constitutional prohibition."

24 I submit there's no constitutional
25 prohibition against chosing bond financing to build

33
1 certain projects. It's just an alternative method.
2 The state could have taxed everyone in a certain way
3 in order to construct this facility, but rather than
4 do that they chose to tax individual persons as they
5 went through the toll booth and paid.

6 They sold bonds, state revenue bonds
7 for the creation of a state project. And how that
8 method of financing is relevant to the issue of
9 sovereign immunity, I can't understand. Not when
10 the facility itself has been constructed, owned,
11 operated, maintained by the State Highway Commission.
12 The State Highway Commission chose to build it with
13 funds they had acquired in a certain way. And I
14 can't see that -- the importance of that decision to
15 whether or not it enjoys sovereign immunity. It's a
16 State facility that we all use, owned, operated --

17 THE COURT: What were you going to
18 say?

19 MR. CRANWELL: In order not to lose
20 the refined point I think we ought to be talking
21 about this morning, I would like to say he is
22 quoting extensively from the Harrison v. Day and I
23 concede that the Harrison case does say there are
24 certain governmental functions that are not
25 restricted by the internal improvements prohibition

1 in the Constitution.

2 The case says it and it outlines
3 those things and he quoted them and I'll quote them
4 for you again if you are talking about -- they talk
5 about Court buildings, college rooms, college
6 dormitories and those kind of things. But in that
7 same case -- in that same case, in Harrison -- they
8 come back and say -- and they are talking about the
9 definition of internal improvements now and they say
10 that that definition has reference to the channels
11 of trade and commerce, the channels of trade and
12 commerce. Those are the key words. Such as
13 turnpikes and canals and railroads.

14 Now, what I understand the Harrison
15 case says is exactly what he says it says, are
16 certain internal improvements that no one would ever
17 contemplate that the government would be restricted,
18 because if you did -- if the State of Virginia
19 couldn't construct office buildings, they couldn't
20 carry on their function.

21 But to leap from that and to say that
22 the Highway Department is an agency of the State,
23 can't carry on its functions unless it constructs
24 toll roads is absolutely absurd and that is
25 absolutely prohibited by the Constitution because,

1 like he said, you run 26 million cars through there,
2 the cost of that is astronomical.

3 You may spend as much as five million
4 dollars constructing an office building. Maybe the
5 State can bear those kind of losses, but back in
6 1902 they found out the State was losing its rear
7 end in all those canals and all those turnpikes and
8 said, "Hey, we got to stop that." That is the exact
9 reason that we are not involved in the State in this
10 project out here.

11 Yet -- and I would agree with him --
12 there are certain internal improvements that I don't
13 think the Constitution prohibits and the case law
14 has said it and Harrison v. Day supports that
15 contention. It goes on to say there are certain
16 internal improvements such as turnpikes and canals
17 that the State can't participate in. And I think
18 that that's -- I've already said it. I think the
19 point needn't be argued and I apologize for arguing.
20 I didn't want to lose it while we were there.

21 THE COURT: That's all right.

22 MR. MILLS: The Harrison case
23 explicitly upholds various other decisions of the
24 State Supreme Court in talking about the Elizabeth
25 River Tunnel.

1 The constitutional decision of
2 financing things through bonds and tolls has been
3 litigated three, four, five times. I've cited all
4 the cases, Harrison v. Day, Almond against Gilmer.
5 They said this is not a constitutional method of
6 financing. You can't sell bonds and pay for the
7 bonds from tolls and have that as a State facility.
8 It's not permitted. The Supreme Court says no, it is.
9 It's an essential governmental function.

10 The Elizabeth River is a toll
11 facility. The Hampton Roads Bridge Tunnel is a toll
12 facility. What is the distinction in sovereign
13 immunity between those facilities which the Supreme
14 Court has explicitly held not to be sueable in tort --
15 what is the distinction between those facilities --
16 and a turnpike, a toll road?

17 If the Supreme Court of Virginia has
18 held the Hampton Roads Bridge Tunnel to be an
19 essential link in the State Highway System, why is
20 the Norfolk-Virginia Beach Expressway not an
21 essential link in the State Highway System? I just
22 don't see the distinction and I wish Mr. Cranwell
23 would point that one out to me.

24 And with regard to the situation in
25 1902 when the Supreme Court came up with this

1 prohibition, and he says as mentioned in some dicta
2 in the case about turnpikes, that was a different
3 situation. It was all turned around. The State was
4 investing its money, lending its money, to private
5 entities which constructed turnpikes and the State
6 was losing money when those turnpikes went under.
7 They paved them with wood and every other kind of
8 thing.

9 well, that's not the situation here.
10 The State is borrowing money from people who are
11 willing to invest it in order to build this facility
12 for use by the State. It's not the same situation
13 at all that the constitutional prohibition was
14 designed to remedy. And that would be my reply to
15 that specific point.

16 THE COURT: All right.

17 MR. CRANWELL: Do I take it then you
18 would concede its a private function that the
19 State's carry on with private funds?

20 MR. MILLS: No, no, not at all. I'm
21 saying the State has obtained funds through a given
22 method of financing and there's nothing -- the State
23 is not allowed to obligate State Treasury funds for
24 funds to pay back funds they have borrowed, but I
25 don't see where that's relevant to our discussion

1 here.

2 MR. CRANWELL: The reason I think
3 it's relevant here as to whether or not it's a
4 private function --

5 MR. MILLS: what is private about
6 providing an Expressway --

7 MR. CRANWELL: What's private about
8 Piedmont Airline providing a public transportation
9 system? Are you saying to me that you think
10 Piedmont -- because Piedmont is performing an
11 essential function of transporting people --

12 MR. MILLS: The State has never been
13 in the business of transporting people by air from
14 one place to another.

15 MR. CRANWELL: There may come a time
16 when we would.

17 THE COURT: I think we have probably
18 explored that point. That was the one that got
19 y'all off. Robert, did you want to move on to
20 something else?

21 MR. MILLS: I would like to sum up a
22 few words about Mr. Ogden and his situation and I
23 would like to talk about the James v. Jane decision
24 because I think it's favorable to our point of view.
25 The James v. Jane case came out in June of this year.

1 THE COURT: I wish they had different
2 names.

3 MR. MILLS: Hard to say and you get
4 them backwards. Hard to remember. Should have been
5 the two other people involved in that case. Should
6 have used their names.

7 THE COURT: Yeah. Go ahead.

8 MR. MILLS: In that case the Supreme
9 Court held that where doctors employed as salaried
10 professors of the University of Virginia Medical
11 School when treating private patients, that the
12 state had a limited interest in the relationship
13 between doctor and patient, and it was not one they
14 felt compelled to interfere in.

15 But in the James v. Jane case they
16 explicitly upheld the case of Lawhorne versus Harlan
17 which was another case against the University
18 Medical School in which the administrators --

19 THE COURT: Were granted immunity in
20 that case.

21 MR. MILLS: Right. Now, there's
22 absolutely no distinction, I think, and if there is
23 one, I'd like to hear it from plaintiffs' counsel,
24 between the administrator of a facility such as the
25 University of Virginia hospital in exercising

1 discretionary functions in the performance of their
2 duties and the Superintendent of a large State
3 highway project.

4 Both people are -- both officers are
5 required to exercise a large amount of discretion,
6 supervise a large number of employees, deal with a
7 large amount of funds. Both those that are
8 allocated by the State and both those which were
9 received through their respective projects and
10 facilities.

11 And the State does have a compelling
12 interest in seeing that the Norfolk-Virginia Beach
13 Expressway as a State highway is owned, operated and
14 maintained properly.

15 I can hardly see how their interest
16 can be any more acute. They have just as much
17 interest in that facility, if not more, as in any
18 other State highway facility that's been constructed.
19 Lawhorne v. Harlan is a case that's directly on
20 point with our situation here -- with Mr. Ogden's
21 situation -- as the Superintendent of a large
22 highway project. He has toll takers he's
23 responsible for. He has equipment he's responsible
24 for. He has 26 million dollars a year in revenues --
25 not 26 million -- over six million dollars a year in

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1 revenue that he's responsible for.

2 he's an employee that uses, every day,
3 discretionary functions, and the type of employee,
4 just as the administrator in the hospital --
5 administrators in the Marlan case -- that's entitled
6 to a grant of sovereign immunity. He's an upper
7 level employee of the State Department of Highways
8 and Transportation.

9 And just a few words about the
10 sovereign immunity doctrine and its application
11 throughout the nation. I think if there's any
12 second point that might be in favor of plaintiffs in
13 this case is the fact that sovereign immunity
14 doctrine has been abrogated by statute in a number
15 of other jurisdictions and that the immunity
16 doctrine in general has undergone substantial
17 modification in the past few years.

18 I'm not sure that's a good trend, a
19 trend we want to continue with, certainly not a
20 trend that the State of Virginia has decided to go
21 with. All across the country we see municipalities,
22 school systems, businesses, projects of various
23 types, literally sued out of existence because they
24 no longer have immunity protection in certain areas.

25 I can foresee a situation when immunity no

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1 longer exists in any respect. That's almost
2 apocalyptic. I think it would cause a stranglehold
3 on the ability of the state to function and to act --
4 the state function through its employees and its
5 employees would certainly be impeded by the fact
6 that they would be pecuniarily liable for their acts
7 in various capacities and in the performance of
8 their duties.

9 I could see now that would have a
10 very serious effect and would have very serious
11 value as precedent and could be very detrimental to
12 the Commonwealth of Virginia and the way it conducts
13 its affairs and its ability to provide essential
14 governmental services and facilities to citizens.

15 THE COURT: How long have you been
16 practicing?

17 MR. MILLS: About eight months.

18 THE COURT: We've come a long way in
19 a short time.

20
21 (Further discussion held off the record.)
22

23 THE COURT: All right. I'll give Mr.
24 Stallings and Mr. Cranwell one more crack to just
25 respond at what Mr. Mills has just said.

1 MR. STALLINGS: That's all I want to
2 do, Judge. I thank you for the brief opportunity
3 I'm going to take here. Judge, Mr. Mills was not
4 here on March the 14th in this chamber where we took
5 evidence in this case. He has cited some matters
6 which I would tender --

7 THE COURT: I'm sure you read that
8 transcript though.

9 MR. MILLS: Yes, I have.

10 MR. STALLINGS: I wish to refresh his
11 memory on the transcript. It was just my
12 understanding that the State Treasury actually
13 expended funds for the construction and maintenance
14 of this highway that is contrary to the evidence
15 which Mr. Yates stated where I asked him directly, "All
16 right, sir. Now, concerning the paying of the
17 interest and the retirement of the bonds and the
18 operating expenditure of the toll road, it's my
19 understanding that the toll road has an operating
20 budget somewhere around a million dollars per year.
21 I don't know how familiar you are with those figures."
22 His answer, "That's close." "Isn't it a fair
23 statement that operating expenses are paid from the
24 revenues collected from the toll road?" "That is
25 correct." "So at this time the Commonwealth of

1 virginia and the state treasury is not receiving any
2 proceeds from the toll road?" he said, "No."

3 now, the second argument is the
4 difference of Mr. Ogden and the private hospital
5 administrator. The private hospital administrator
6 is paid by the state. No question that out of the
7 State Treasury, out of the general funds. Let's
8 find out where Mr. Ogden -- who his employer is. I
9 asked him, "who is your employer?" "Virginia
10 Department of highways."

11 THE COURT: There's no doubt.
12 There's no doubt that unless the Norfolk-Virginia
13 beach Expressway is granted immunity, Mr. Ogden
14 doesn't get it. I mean, you know, and if they get
15 it, he doesn't automatically get it. But there's no
16 doubt that that's his first hurdle in order to get
17 it for --

18 MR. STALLINGS: I think -- that's my
19 point, Judge. And we've talked about a lot of cases
20 in the Constitution. We get back to one basic issue
21 of sovereign immunity. Does it affect the state
22 treasury? Mr. Ogden's salary does not affect the
23 state treasury, it's all from tolls. And the toll
24 road itself does not affect the state treasury, the
25 operation and maintenance is from the toll revenues

1 and it affects the bondholders.

2 And not to belabor the point of
3 insurance, I know the case law on insurance says
4 insurance per se does not waive sovereign immunity.
5 But I think we find here the very basis of insurance.
6 The reason we have insurance in this case is because
7 we do have private bondholders who have to be
8 protected.

9 If we were worrying about protecting
10 the State Treasurer, then the heck with insurance
11 because we don't need it because we've got the
12 shield of sovereign immunity. But they don't have
13 it here and that's the very reason it's required
14 from the bond indemnity agreement, there will be
15 insurance.

16 He said they sold the bonds. Not
17 true. The State did not sell the bonds. They even
18 went so far as to get a private stock company to
19 sell the bonds. You didn't find any State employees
20 out hanging on doors. It was turned over to a
21 private company and they sold the bonds.

22 The State, as Mr. Cranwell pointed
23 out, is merely a clerk and that alone. Certainly
24 washing of quarters through the State Treasury does
25 not entitle them to the cloak of sovereign immunity.

1 Their funds are never co-mingled. Their funds are
2 never expended on this project. And I think that is
3 the basic issue of sovereign immunity. That is what
4 we are here on today. State funds.

5 now, he makes a point in his brief --
6 and that is the last matter I want to argue - on
7 page 13 of his brief, he argues it is obvious that
8 every adverse judgment will reduce the funds
9 available to redeem the revenue bonds. And every
10 single delay in redemption of the bonds will
11 penalize the individual -- key word here, individual
12 taxpayers -- who continue to pay the tolls, some of
13 them daily, for the use of the facility.

14 Your honor, taxpayers don't pay that.
15 The people who use that toll road pay that. Mr.
16 Cranwell is a taxpayer in the Commonwealth of
17 Virginia. He does not receive the benefit of that
18 toll road. You and I do because we travel it, but
19 only as individuals who get on it and pay our
20 quarter, not as taxpayers because our tax dollars do
21 not go to that Toll Road. Our quarters out of our
22 pockets, but our tax dollars don't. So the
23 taxpayers are not receiving a benefit from the use
24 of that toll road.

25 The people would have to fight

1 virginia beach boulevard to get into norfolk and
2 they're individuals. And to try to lump them in
3 their argument and say taxpayers is the very core of
4 this case it's not so. If that's the case, then go
5 back to the airline case. I'm a taxpayer, does that
6 mean I can not sue an airline because I'm a taxpayer?
7 No, I'm a private individual who uses that toll road
8 and that distinguishes me from Mr. Cranwell in
9 Roanoke who does not.

10 THE COURT: Mr. Cranwell.

11 MR. CRANWELL: Your honor, just a
12 couple short points. Mr. Mills makes a point that
13 the funds are paid into the State Treasury and paid
14 out by warrants on the State Treasury and therefore
15 they are state funds. If that is true, then every
16 bit of funds that is paid into Cranwell, Flora,
17 Selbe & Barbe escrow account and earmarked and paid
18 out at the special direction of our clients are our
19 funds. But you and I know that's not true. Those
20 are funds that I'm holding in trust and are in an
21 escrow account and they are disbursed at the
22 direction of my client. And in effect I'm holding
23 someone else's funds.

24 Nowhere in the law -- and I've cited
25 each one of the code sections -- nowhere in the law

1 Does it say these become state treasury funds. It
2 says these funds shall be paid into the state
3 treasury. There is a fine distinction there.

4 Your honor, I submit it says that
5 they are paid into the treasury into a special fund.
6 It doesn't say they are paid into the general
7 treasury, it says that they are paid into a special
8 fund. So just because they are paid into that
9 special fund, the State Treasury doesn't make them
10 state treasury funds.

11 Your honor, federal tort claims acts
12 hasn't crippled the federal government. It's still
13 operating. I don't think it would be one bit of
14 difference if we abolish sovereign immunity. I
15 don't think all the state governments or local
16 governments would come to a screeching halt. He
17 says --

18 THE COURT: I don't know. That may
19 be the reason we're always operating in the red.
20 Have been as long as my memory.

21 MR. CRANWELL: Well, he says that --

22 THE COURT: I hope the state of
23 Virginia never gets to the bottom. I guess the
24 federal government is the only thing in the world
25 that can operate in the red like they do.

1 MR. CRANWELL: Federal government's a
2 unique animal. It's not the Federal claim tort act
3 that's got them operating in the red.

4 THE COURT: I was just being
5 facetious.

6 MR. CRANWELL: He says that they're
7 State employees, they are paid by the State, they
8 drive State cars and all that stuff out there. Your
9 honor, I don't have any real serious problem with
10 that. The only question I put back to the Court,
11 are State employees entitled to sovereign immunity?
12 If they were, VDD and T employees, under 33.1
13 Chapter 1, Articles 1-15, you wouldn't have me here.

14 What I'm saying to you is that
15 sovereign immunity is not like a tattoo you have on
16 your arm. You don't carry it everywhere with you.
17 It's not like the old bikes you used to pick up and
18 carry around, occasionally you can lay it down
19 and/or occasionally some guy doesn't get one when
20 they are handing out the hardware. What I'm saying
21 is you -- even if these people are State employees
22 out here as he said, they haven't been issued that
23 shield. Two reasons, number one, there's no State
24 funds out there so they shouldn't be entitled to it
25 period.

1 Secondly, as said in James v. Jane,
2 that's all changed. We're not looking at those
3 employees if they were the vassals of an eighteenth
4 century warlord or something. The old feudal system
5 when you run around entreffing people and all that
6 kind of stuff.

7 We've got a new world out there and
8 what they said in James v. Jane is that we're
9 looking at a decision that doesn't even control any
10 more. Matter of fact, they said in that case almost
11 every job entails exercise of some decision.

12 And I will just take one second and
13 read the court the question because I think they are
14 extremely important. And when you're talking about
15 the type of State officials and type of decision it
16 should carry forth, it says, "Certain State
17 officials and State employees must of necessity
18 enjoy immunity in the performance of their duties.
19 These officers, inclusive of, but not limited to,
20 the Governor, State officials, and judges." And
21 listen, "They are required by the Constitution and
22 by general law to exercise broad discretionary
23 powers often involving the determination and
24 implementation of State policy."

25 Now, if somebody will tell me what

1 Deal A. Ogden, hiring 45 employees and telling them
2 what time to take up the tolls out there has to do
3 with determining State policy, as for example, the
4 construction of a statewide transportation system or
5 implementing a statewide transportation system,
6 then, your honor, I just misread James v. Jane. But
7 I think the Supreme Court has said in that case,
8 yeah, there are certain times to grant immunity, no
9 others.

10 I just think that those employees out
11 there really, your honor, are carrying on a special
12 function and it's really unfortunate the General
13 Assembly didn't set up a turnpike commission because
14 we wouldn't be arguing all this. We would know we
15 had a separate entity. The truth, in fact, is that
16 VDA and T was with preliminary powers drawn under
17 Chapter 1, Chapter 3, Article 5 which this is, and
18 that entity is carrying on essential private
19 functions of constructing a toll road.

20 And the toll road in VDA and T
21 should not be entitled to sovereign immunity and
22 those employees should not be because they aren't
23 carrying on any magnitude of discretion,
24 particularly Deal A. Ogden. He doesn't even decide,
25 for example, discretion as to what roads in this

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1 highway district get paved. I mean he doesn't even
2 exercise discretion of that magnitude.

3 Again, he does exercise discretion,
4 he tells these people who's going to work what shift
5 and those kinds of things, but that's the extent of
6 his discretion and that's not of the magnitude to be
7 involved in the implementation and determination of
8 State policy. He's not entitled to state -- I've
9 belabored the point and I appreciate your hearing
10 it.

11 MR. MILLS: Can I respond very
12 specifically and briefly?

13 THE COURT: We can go on forever and
14 I think see what the points are. Once again, I want
15 to say in all seriousness, candor, that I think all
16 of you ought to be commended on the amount of work
17 you've done and the quality of your work and also
18 the quality of your briefs and oral presentations.

19 But we've all taken a lot of time on
20 this thing and I think that it's a case that
21 deserves a lot of time because, as I say, first
22 blush you would think it was a narrow issue, but you
23 fellows have done such a job of researching that
24 you've brought out a lot of things that really made
25 me think.

1 And I've been thinking about this
2 thing and I've been studying it, listening to ya'll
3 carefully today, and I've got to go in one direction
4 or another. That's for sure.

5 And I think that after hearing the argumen
6 that I heard before, the testimony that I heard
7 months ago, studying your briefs, studying your
8 authorities, therein, listening today, that the
9 prevailing way the argument seems to dictate that I
10 rule that the Norfolk-Virginia Beach Expressway is
11 owned by the State and is entitled to sovereign
12 immunity and James versus Jane -- I think that Mr.
13 Mills has distinguished that one -- if that had not
14 come along in between Lawhorne and this case, there
15 wouldn't be too much of a problem.

16 But I think that the Lawhorne case,
17 the administrator of that hospital, and Mr. Ogden are
18 more parallel situations. Their jobs are more
19 parallel than some of those that were described in
20 James versus Jane. And if the administrator of a
21 hospital like the University of Virginia hospital is
22 entitled to immunity, I think that Mr. Ogden as
23 Superintendent of this Expressway is also. So, Mr.
24 Mills, if you will prepare orders to that effect
25 carrying out those rulings and circulate them.

MR. MILLS: My pleasure.

(whereupon, the hearing
was concluded.)

1 COMMONWEALTH OF VIRGINIA:

2 CITY OF VIRGINIA BEACH, to wit:

3
4 I, Barbara A. W. Jenkins, CSR, RPR, a
5 Notary Public in and for the Commonwealth of
6 Virginia at Large, do hereby certify that the
7 foregoing deposition was duly taken and sworn to
8 before me at the time and place in the caption
9 mentioned, and that the deposition is a true record
10 of the testimony given by the witness.

11 I further certify that I am neither
12 attorney or counsel for, nor related to or employed
13 by, any of the parties to the action in which this
14 deposition is taken, nor am I a relative or employee
15 of any attorney or counsel employed by the parties
16 hereto, nor am I financially interested in the
17 action.

18 IN WITNESS WHEREOF I have hereunto set my
19 hand and affixed my notarial seal this 21 day of
20 October, 1980.

21
22 Barbara A. W. Jenkins

23 Barbara A. W. Jenkins, Notary Public

24 I was commissioned as Barbara Ann Wallis
25 my term of office expires June 29, 1984.