



# **REPORT TO THE DULLES CORRIDOR AND FINANCE COMMITTEES**

**RECOMMENDATION TO ENTER AGREEMENT WITH  
FAIRFAX COUNTY IN CONNECTION WITH  
A GRANT IT IS RECEIVING FROM THE  
NORTHERN VIRGINIA TRANSPORTATION AUTHORITY  
TO FUND CERTAIN COSTS OF THE DULLES CORRIDOR  
METRORAIL PROJECT**

**MAY 2016**



# PURPOSE

Receipt of staff recommendation that the Dulles Corridor and Finance Committees approve, and recommend that the Board of Directors approve and authorize the President and CEO to execute, an agreement with Fairfax County to support the County in connection with a second grant it has been awarded by the Northern Virginia Transportation Authority (NVTa) to help fund the cost to construct the Innovation Station, near Route 28, as part of Phase 2 of the Metrorail Project.

## DISCUSSION

- As part of the funding arrangements for the Metrorail Project, Fairfax County agreed to seek funds from third parties for construction of the Innovation Station near Route 28.
- In 2015, Fairfax County obtained a grant of \$33 million from the NVTA to help fund the construction of the Innovation Station.
- In September 2015, following the Board's approval, the Airports Authority entered an agreement with Fairfax County in which the Authority agreed to supply the necessary documentation of costs incurred in the construction of the Innovation Station that would allow the County to draw grant funds from NVTA for use in paying these costs.

# DISCUSSION

- In 2016, Fairfax County successfully applied for a second grant from NVTA – for \$27 million – to assist in funding the construction of the Innovation Station.
- As it did in connection with its first NVTA grant, the County has asked the Airports Authority to enter an agreement that will facilitate the County’s ability to draw funds from NVTA under this second grant and to ensure that these funds are used to pay for Innovation Station construction costs.
- Airports Authority and Fairfax County staff have prepared such an agreement that is the equivalent, in all material respects, of the Authority-County agreement the Board approved in 2015 in connection with the County’s first NVTA grant.

## DISCUSSION

- This month, Fairfax County's Board of Supervisors is expected to approve the County's acceptance of this second NVTA grant and to make these grant funds available to the Airports Authority to fund the Innovation Station construction costs.
- The NVTA funds used to fund Innovation Station costs will reduce the Rail Project funding partners' contributions to the project. Stated as a percentage of the NVTA funds, these reductions will be as follows:

16.1%	Fairfax County
4.8%	Loudoun County
4.1%	MWAA (Aviation Enterprise Fund)
75.0%	MWAA (Dulles Toll Road Funds)



## RECOMMENDATION

Staff recommends that the Dulles Corridor and Finance Committees approve, and recommend that the Board approve and authorize the President and CEO to execute, this second agreement with Fairfax County relating to its \$27 million grant from NVTA.



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AIRPORTS AUTHORITY

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**REPORT TO THE  
DULLES CORRIDOR AND FINANCE COMMITTEES**

**RECOMMENDATION TO ENTER INTO AGREEMENT WITH FAIRFAX COUNTY  
TO SUPPORT THE COUNTY IN CONNECTION WITH A GRANT IT ANTICIPATES  
RECEIVING FROM THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY  
TO FUND CERTAIN COSTS OF THE DULLES CORRIDOR METRORAIL PROJECT**

**MAY 2016**

**ACTION REQUESTED**

Staff recommend that the Dulles Corridor and Finance Committees approve, and recommend to the Board of Directors that it approve, and authorize the President and Chief Executive Officer to execute an agreement with Fairfax County in which the Airports Authority agrees to support the County in connection with a \$27 million grant the County anticipates receiving from the Northern Virginia Transportation Authority (NVTA) to fund certain costs of Phase 2 of the Dulles Corridor Metrorail Project (Rail Project). The recommended agreement is attached to this paper.

**DISCUSSION**

In the 2011 Memorandum of Agreement among the Airports Authority, the United States Department of Transportation, Fairfax County and other Rail Project stakeholders, Fairfax County agreed to seek financing sources for the Innovation Station planned near Route 28 as part of Phase 2 of the Rail Project. In 2015, the County learned that it was being awarded a \$33 million grant by NVTA to help fund the costs of the Innovation Station. In September 2015, the Board approved an agreement between the County and the Airports Authority under which the Airports Authority would work with the County in developing documentation of the Innovation Station construction costs that would meet the requirements of NVTA and allow the County to make periodic draws on its grant from NVTA. Under the agreement, funds the County could draw from NVTA would be electronically transferred by NVTA to the Airports Authority and then used to pay, or as a reimbursement of, the documented Innovation Station costs.

Fairfax County has now successfully applied for an additional \$27 million grant from NVTA to help fund the construction of the Innovation Station, and the County has again asked the Airports Authority to enter an agreement that will parallel the agreement the parties entered in 2015 in connection with the \$33 million NVTA grant to the County. This agreement, which is equivalent in all meaningful respects to the 2015 agreements, is attached to this paper.

NVTA will not, as a result of this \$27 million grant to Fairfax County, obtain any interest in the Innovation Station. That station, like the rest of the Phase 2 facilities, will be conveyed by the Airports Authority to Washington Metropolitan Area Transportation Authority upon WMATA's acceptance of the completed facilities.

All NVTA grant funds received for construction of the Innovation Station will reduce the Rail Project funding partners' contributions toward the project's construction. Stated as a percent of the NVTA funds, these reductions will be as follows:

- 16.1% Fairfax County
- 4.8% Loudoun County
- 4.1% MWAA (Aviation Enterprise Fund)
- 75.0% MWAA (Dulles Toll Road Funds)

The Fairfax County Board of Supervisors is expected this month to act on an agreement between the County and NVTA relating to the \$27 million NVTA grant. Under the resolution which has been prepared for this item, the President and CEO's authority to execute the Airports Authority-Fairfax agreement is conditioned upon the Fairfax Board's approval of the NVTA-Fairfax grant agreement.

**RECOMMENDATION**

Staff recommends that the Dulles Corridor and Finance Committees approve the attached agreement with Fairfax County and recommend to the Board of Directors that it also approve the agreement and authorize the President and Chief Executive Officer to execute it.

Prepared by:

Office of General Counsel  
May 2016

Attachment

**First Amended Project Agreement  
Between  
Fairfax County, Virginia  
and  
Metropolitan Washington Airports Authority**

This First Amended Project Agreement (this “**Agreement**”) is made and executed in duplicate on this \_\_\_\_\_ day of \_\_\_\_\_, 2016, between FAIRFAX COUNTY, VIRGINIA (“**Fairfax**”) and the METROPOLITAN WASHINGTON AIRPORTS AUTHORITY (“**MWAA**”) (collectively the “Parties”).

**RECITALS**

- A. On October 15, 2015, the Parties entered into a Project Agreement (the “Initial Project Agreement”) concerning the use of approximately \$33,000,000 in funding from the Northern Virginia Transportation Authority (“NVTA”) made available to Fairfax to pay for the construction of a specified portion of Phase 2 of the extension of Metrorail service commonly known as the Silver Line Project, that funding being identified in the Project Agreement as the “NVTA Project Funding” and that portion of the Silver Line Project being identified in the Project Agreement as the “Innovation Project.”
- B. As a result of further actions by the NVTA and Fairfax, the amount of NVTA funding being made available to Fairfax to pay for construction of the Innovation Project has increased by approximately \$27,000,000, making the total now available for that purpose \$60,000,000.
- C. The Initial Project Agreement provides that it may be modified, in writing, upon mutual agreement of both Parties.
- D. The Parties wish by this Agreement to amend and restate the Initial Project Agreement to reflect the increased funding being made available by NVTA to Fairfax for construction of the Innovation Project.
- E. The NVTA is a political subdivision of the Commonwealth of Virginia created by the Northern Virginia Transportation Authority Act (the “**NVTA Act**”), Chapter 25 of Title 33.2 of the Code of Virginia, as amended.
- F. Section 33.2-2500 (4) of the Code of Virginia authorizes NVTA to enter into project agreements with certain statutorily designated entities for the provision of transportation facilities and services to the area embraced by NVTA.

- G. Section 33.2-2509 of the Code of Virginia authorizes NVTA to use funds from a fund established pursuant to that Code section (the “**NVTA Fund**”) in order to assist in the financing, in whole or in part, of certain regional transportation projects in accordance with Code Section 33.2-2510.
- H. The NVTA Fund provides for the deposit therein of certain dedicated revenues and other funds appropriated by the Virginia General Assembly.
- I. Section 33.2-2510 of the Code of Virginia authorizes the use of funds from the NVTA Fund and the use of proceeds from NVTA debt issuances (“**NVTA Bond Proceeds**”) to be used by NVTA solely for transportation purposes benefitting those counties and cities embraced by NVTA.
- J. Fairfax and the NVTA have determined that the project set forth and described on **Appendix A** and **Appendix A1** to this Agreement, which consists of construction of the Metrorail Innovation Center Station and certain related facilities (“**the Innovation Project**”), satisfies the requirements of Virginia Code Section 33.2-2510.
- K. The Innovation Project is to be financed, as described in **Appendix B** and **Appendix B1** to this Agreement, in whole or in part, by funds from the NVTA Fund and/or from NVTA Bond Proceeds, and the Innovation Project is located within a locality embraced by NVTA’s geographical borders.
- L. By timely submitting an application for NVTA funding in response to NVTA’s call for projects, Fairfax, a statutory component government of NVTA, formally requested on Fairfax’s own behalf and for the benefit of its citizens that NVTA provide funding to the Innovation Project.
- M. On May 14, 2013, the Board of Supervisors of Fairfax County, Virginia, the governing body of Fairfax County, endorsed and approved submission of the Innovation Center Metrorail Station project for funding by the NVTA for Fiscal Year 2014. On \_\_\_\_\_, 20\_\_\_, the Board of Supervisors endorsed and approved submission of a request for such funding by the NVTA for Fiscal Year 2015.
- N. Fairfax has arranged for NVTA to provide, using the NVTA Fund and the NVTA Bond Proceeds, approximately \$60,000,000 (the “**NVTA Project Funding**”) for construction of the Innovation Project, consisting of approximately \$33,000,000 from Fairfax’s request for funding for Fiscal Year 2014 (the “2014 Tranche”) and approximately \$27,000,000 from Fairfax’s request for funding for Fiscal Year 2015 (the “2015 Tranche”).
- O. The Innovation Project is a part of Phase 2 of the Silver Line project (“**Phase 2**”).

P. MWAA has contracted with Capital Rail Constructors, LLC, a Joint Venture (the “**Contractor**”) to build the rail and station components of Phase 2, including the Innovation Project, pursuant to that certain Design-Build Contract dated May 14, 2013 (the “**Phase 2 Contract**”).

Q. MWAA is using one or more loans, known as Transportation Infrastructure Finance and Innovation Act (“**TIFIA**”) loans (the “**TIFIA Financing**”) from the Department of Transportation under the auspices of the Federal Transit Administration (“**FTA**”), to pay a portion of the cost to construct Phase 2.

R. The costs of the Innovation Project have been and will continue to be incurred as a part of the costs of Phase 2.

S. MWAA has agreed to support Fairfax in documenting that the requirements of the NVTA Project Funding are met with respect to the costs of Phase 2 that MWAA and Fairfax, in consultation with NVTA as necessary, determine are allocable to the Innovation Project.

T. The Parties understand that NVTA has determined that (i) compliance with the rules governing the documentation of Phase 2 costs to support payment with the proceeds of the TIFIA Financing are substantially similar to, and at least as stringent as, the rules governing documentation of Innovation Project costs to support payment with the proceeds of the NVTA Project Funding; (ii) MWAA’s compliance with FTA and other federal requirements applicable to procurement and other matters will satisfy NVTA and Virginia requirements applicable to all such matters; and (iii) the NVTA Project Funding has been duly authorized by the NVTA Board to finance the Innovation Project.

U. The Parties understand that NVTA Project Funding is available to reimburse expenses that are incurred within the scope of the Innovation Project, and that the Parties will endeavor to secure such reimbursement as set forth in this Agreement, but that Fairfax does not guarantee that NVTA will reimburse any particular expense and that the final decision regarding whether any particular expense should or will be reimbursed with NVTA Project Funding rests solely with the NVTA.

V. The Parties agree that MWAA will act as “Owner” under the Phase 2 Contract and will administer the expenditure of the NVTA Project Funding for costs of the Innovation Project as part of Phase 2.

W. The Parties each have authorized their respective designees to execute this Agreement.

NOW THEREFORE, in consideration of the promises made and mutual covenants and agreements contained herein, the Parties agree as follows:

A. MWAA's Obligations

1. MWAA shall continue to engage the Contractor to complete or perform the Innovation Project as part of Phase 2 in accordance with (i) the Phase 2 Contract, which requires the Contractor to build Phase 2 in accordance with all applicable federal, state, and local laws and regulations, and (ii) all terms and conditions of this Agreement.
2. MWAA shall provide Fairfax and NVTA prompt access as either may request to all Innovation Project records to enable Fairfax and NVTA to verify to their respective satisfaction that (i) the Innovation Project remains the same as presented to NVTA in order to obtain the NVTA Project Funding as described in Appendix B for the 2014 Tranche and Appendix B1 for the 2015 Tranche, (ii) all work performed or to be performed as part of the Innovation Project and paid for with NVTA Project Funding complies with Va. Code Ann. Sections 33.2-2510 (A) and (C)(1), and (iii) that NVTA cash flow estimates as set forth in Appendix B and B1 remain accurate throughout the life of the Innovation Project.
3. MWAA shall provide Fairfax prompt access to all records in the possession of MWAA related to the funding of design and engineering for the Innovation Project, including all environmental work, right-of-way acquisition, construction, contract administration, testing services, inspection services, or capital asset acquisitions.
4. MWAA shall use NVTA Project Funding only to pay Innovation Project costs as permitted by this Agreement and the NVTA Act. NVTA or Fairfax may but are not obligated to notify MWAA in advance that NVTA Project Funding may not be used to pay a particular cost and, in the event such notification is provided, MWAA will not submit a Payment Requisition as defined below with respect to any such cost. In this Agreement, references to payment of a cost by MWAA with NVTA Project Funding include the reimbursement to MWAA of a cost otherwise eligible for NVTA Project Funding that previously was paid by MWAA from any other source of funds.

5. Each draw request or other request for payment of the proceeds of the NVTA Project Funding (“Payment Requisition”) submitted by MWAA shall be consistent with Appendix C.
6. MWAA shall consult with NVTA and Fairfax to ensure that MWAA’s method or methods for determining which Phase 2 costs are properly allocable to the Innovation Project are satisfactory to NVTA.
7. MWAA and Fairfax shall endeavor to agree on the eligibility of a cost for NVTA Project Funding, In the event they do not agree, MWAA shall not apply proceeds of the NVTA Project Funding to costs that Fairfax has specifically advised MWAA, in writing, are ineligible for payment using the NVTA Project Funding. Fairfax shall document any such advice to MWAA’s reasonable satisfaction.
8. MWAA shall provide Fairfax access to the Phase 2 project schedule, which includes activities for the Innovation Project, as updated from time to time.
9. MWAA shall assist Fairfax with Fairfax’s submittal of draw requests for the NVTA Funding as follows: (i) MWAA shall provide to Fairfax from time to time copies of TIFIA Funding draw requests that have been submitted by MWAA for draws under the TIFIA Financing and that that MWAA believes include Innovation Project costs; (ii) MWAA shall identify which costs in such draw request are Innovation Project costs and certify, in the form attached hereto as Appendix D, the amount of such costs based on MWAA’s good-faith application of this Agreement; and (iii) MWAA shall assist Fairfax as necessary to respond to any request for clarification by NVTA regarding any information provided by MWAA as described in this sentence. Fairfax shall endeavor in good faith to satisfy all other NVTA draw conditions. However, Fairfax and MWAA shall have no liability to each other in the event that NVTA does not honor one or more Payment Requests. Fairfax shall request that NVTA make electronic transfer of funds drawn directly to or for the account of MWAA.
10. MWAA shall release or return any unexpended funds from the NVTA Project Funding to NVTA on behalf of Fairfax no later than 90 days after final payment has been made to the Contractor.

11. MWAA shall maintain complete and accurate financial records relative to Phase 2. Those records shall include the Innovation Project, but the Innovation Project records will not be maintained separately. MWAA shall deliver such records to WMATA upon acceptance by WMATA of Phase 2. MWAA will obtain WMATA's agreement that, upon acceptance of Phase 2 by WMATA, WMATA will (i) retain the Phase 2 financial records and a complete set of architectural and engineering plans, final site plans, inspection records, testing records, and as-built drawings for the Innovation Project, as part of the records of Phase 2, for all time periods as may be required by FTA regulations and the Virginia Public records Act, Chapter 7 of Title 42.1 of the Code of Virginia, as amended. MWAA shall provide Fairfax and NVTA access to any such records described above free of charge, upon request.
12. MWAA shall reimburse NVTA, directly or through Fairfax as determined by Fairfax, for all NVTA Project Funding that MWAA misapplies or uses in violation of the NVTA Act, Chapter 766 of the 2013 Virginia Acts of Assembly ("Chapter 766"), as determined by NVTA, plus interest at the "NVTA Rate" as described below. Provided and to the extent that any such reimbursement is for a cost that is within the scope of the term "Dulles Rail Project Cost" as used in the Agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor entered into as of July 19, 2007, by and between MWAA, Fairfax, and Loudoun County, Virginia (**the "Funding Agreement"**), the cost so reimbursed, and any required interest payable with respect to that reimbursement, shall be funded proportionally as provided in § 2.2(b)(1) of the Funding Agreement. The "**NVTA Rate**" means the rate that will provide NVTA with the total interest that NVTA would have earned from its invested funds on the amount of the reimbursement, calculated from the date that NVTA disbursed funds to MWAA that are reimbursed to NVTA through the date of reimbursement of those funds to NVTA.
13. MWAA shall name Fairfax, NVTA, and NVTA's Bond Trustee or require that all MWAA's contractors name Fairfax, NVTA and NVTA's Bond Trustee as additional insureds on any liability insurance policy issued for the work to be performed by or on behalf of MWAA for the Innovation Project and present NVTA and Fairfax with satisfactory evidence thereof before any NVTA Project Funding is used by MWAA for the Innovation Project.

14. MWAA generally may fund the costs of administering the NVTA Project Funding with the proceeds of such funding, provided, however, that NVTA shall retain the final authority to determine whether any particular such costs should or should not be paid with NVTA Project Funding.
15. MWAA will, upon completion, turn the Innovation Project over to WMATA by deed, long-term lease, and/or easement, for WMATA's ownership, use, and operation, subject where applicable to the rights of the United States of America as fee owner of the underlying land. Any such deed, lease or easement shall provide that no part of the Innovation Project paid for with NVTA Project Funding (the "**NVTA Innovation Project Assets**") may during its useful life be transferred to private ownership without the prior written consent of NVTA and that all of the NVTA Innovation Project Assets shall be used for the transportation purposes of Phase 2 throughout the useful life of the NVTA Innovation Project Assets. Under no circumstances will NVTA, Fairfax or MWAA be considered responsible or obligated to operate and/or maintain the Innovation Project after its completion.
16. Appendix E is a copy in substantial form of the tax covenants that Fairfax, as the "Recipient Entity" as used therein, will be required to execute as part of the Fairfax-NVTA Agreement (defined below). MWAA shall utilize any Project Funding derived from NVTA Bond Proceeds in a manner consistent with the requirements of the tax covenants attached as Appendix E and shall make such factual representations to NVTA as may be reasonably required by NVTA to support NVTA's determination of compliance with the tax covenants attached as Appendix E.
17. For any portion of the Innovation Project planned to be submitted for acceptance by the Commonwealth into its transportation system, MWAA will direct the Contractor to comply with the "Standards, Requirements and Guidance" of the Virginia Department of Transportation ("VDOT") with respect to that portion of the Innovation Project.
18. MWAA recognizes that neither NVTA nor Fairfax is responsible for obtaining any permits and permissions necessary to construct and/or operate the Innovation Project, including but not limited to, obtaining, to the extent applicable, VDOT and local land use permits, zoning approvals,

and regulatory approvals.

19. MWAA shall provide a certification to NVTA no later than 90 days after final payment to the Contractor that, to MWAA's actual knowledge, the Contractor and MWAA adhered to all applicable laws and regulations and all requirements of this Agreement.

B. Fairfax's Obligations

1. Fairfax shall coordinate all matters involving the NVTA Project Funding and shall perform all obligations related thereto that are not expressly undertaken by MWAA under this Agreement.
2. Fairfax shall arrange for NVTA to provide to MWAA the NVTA Project Funding for the Innovation Project, all on a reimbursement basis as set forth in this Agreement, on the condition that NVTA is satisfied that each Payment Requisition submitted to NVTA by MWAA justifies payment by NVTA to MWAA of the requested portion of the NVTA Project Funding.
3. Fairfax shall request that NVTA promptly review any Payment Requisition submitted by MWAA in accordance with the requirements of this Agreement and make electronic transfer of funds from NVTA to or for the account of MWAA upon completion of NVTA's review of the Payment Requisition as set forth in the Fairfax-NVTA Agreement, defined below.
4. As provided in the Standard Project Agreement for Funding and Administration between NVTA and Fairfax dated July 23, 2015 (the "**Fairfax-NVTA Agreement**"), NVTA will assign a Program Coordinator for the Innovation Project, who generally will be responsible for monitoring the Innovation Project and whose specific duties are set forth in the Fairfax-NVTA Agreement. When Fairfax learns that the NVTA has assigned such a Program Coordinator, Fairfax will inform MWAA of the Program Coordinator's identity and will do what Fairfax reasonably can to facilitate the Program Coordinator's relationship with MWAA in the performance of the Program Coordinator's duties pursuant to the Fairfax-NVTA

Agreement.

5. Fairfax shall use its best efforts to facilitate NVTA's periodic compliance reviews scheduled in advance for the Innovation Project so as to enable NVTA to determine whether the work being performed remains within the scope of this Agreement, the NVTA Act, Chapter 766, and other applicable law. Such compliance reviews may entail review of MWAA's financial records for the Innovation Project and on-site inspections.
6. Fairfax shall make available to MWAA such applicable recommendations as Fairfax may have to assist the Parties in carrying out the terms of this Agreement in accordance with applicable law.

C. Procedure Following Negative NVTA Review

The Parties understand that, in accordance with the provisions of the Fairfax-NVTA Agreement, if, as a result of NVTA's review of any Payment Requisition or of any NVTA compliance review, NVTA staff determines that Fairfax or MWAA has misused or misapplied any NVTA funds in breach of this Agreement or in contravention of the NVTA Act, Chapter 766, or other applicable law, NVTA staff will promptly advise NVTA's Executive Director and will advise Fairfax's and MWAA's designated representatives in writing. Fairfax and MWAA each thereafter will have thirty (30) days to respond in writing to NVTA's initial findings or, if so desired by both Fairfax and MWAA, they instead may submit a joint response within that time period. NVTA's staff will review the response or responses and make a recommendation to NVTA's Finance Committee. NVTA's Finance Committee will thereafter conduct its own review of all submissions and make a recommendation to NVTA. Pending final resolution of the matter, NVTA may withhold further funding on the Innovation Project. If NVTA makes a final determination that Fairfax or MWAA has misused or misapplied funds in contravention of this Agreement or applicable law, NVTA may cease further funding for the Innovation Project and will seek reimbursement all funds previously remitted by NVTA (with interest earned at the NVTA Rate) which NVTA concludes were misapplied or misused by Fairfax or MWAA. To the extent any such reimbursement is for a cost that is within the scope of the term "Dulles Rail Project Cost" as used in the Funding Agreement, the cost so reimbursed, and any required interest payable with respect to that reimbursement, shall be funded proportionally as provided in § 2.2(b)(1) of the Funding Agreement. Nothing herein shall, however, be construed as denying, restricting or limiting the pursuit of either party's legal rights or available legal remedies to challenge any such determination by NVTA.

D. Term

1. This Agreement shall be effective upon execution and delivery by both Parties.
2. MWAA may, by written notice to Fairfax, terminate this Agreement, for cause, in the event of a material breach by Fairfax of this Agreement that has continued more than sixty (60) days after written notice to Fairfax of the alleged default. If this Agreement is so terminated, Fairfax shall request that NVTA pay for all Innovation Project costs incurred through the date of termination. The Virginia General Assembly's failure to appropriate funds to NVTA as described in Paragraph F of this Agreement, or repeal of the legislation establishing the NVTA Fund, shall not be considered material breaches of this Agreement by Fairfax.
3. Fairfax may, by written notice to MWAA, terminate this Agreement if NVTA terminates the NVTA Agreement. In addition, Fairfax may, by written notice to MWAA, terminate this Agreement, for cause, in the event of a material breach by MWAA of this Agreement that has continued more than sixty (60) days after written notice to MWAA of the alleged default. If this Agreement is so terminated for either reason, MWAA will release or return to NVTA all unexpended NVTA Project Funding no later than sixty (60) days after the date of termination. In addition, if NVTA finds that any other NVTA Project Funding was expended in violation of this Agreement or applicable law and demands the return of such funding, then within sixty (60) days after written notice to Fairfax or MWAA of such determination and demand, MWAA shall refund to NVTA, on behalf of Fairfax, any such NVTA Project Funding, together with interest at the NVTA Rate. To the extent any such refund is a Dulles Rail Project Cost, it shall be funded proportionally as provided in Section A.12 above.

E. Disputes

In the event of a dispute under this Agreement, the Parties agree to meet and confer in order to ascertain if the dispute can be resolved informally without the need of a third party or judicial intervention. Fairfax's County Executive and MWAA's Chief Executive Officer shall be authorized to conduct negotiations on behalf of their respective entities. If a resolution of the dispute is reached via a meet and confer dispute resolution method, it shall be presented to Fairfax and to MWAA's governing body for formal confirmation and approval. If no satisfactory resolution can be reached via the meet and confer method, either party is free to pursue whatever remedies it may have at law, including all judicial remedies,

except that both sides waive all damages for each other's default other than the non-breaching party's direct out-of-pocket costs caused by the breaching party.

F. MWAA, Fairfax, and NVTA To Have No Financial Interest in Project Assets

MWAA intends to obtain an agreement by WMATA, or in the case of certain ancillary facilities (such as roads) by VDOT and/or Fairfax, to use the **Innovation Project Assets** for the transportation purposes of Phase 2. The parties agree that because the Innovation Project Assets will be conveyed to WMATA, MWAA will not convey to NVTA any financial interest in the value of any of the Innovation Project Assets.

G. Appropriations Requirements

1. Nothing herein shall require or obligate any party to commit or obligate funds to the Innovation Project beyond those funds that have been duly authorized and appropriated by their respective governing bodies.
2. The parties acknowledge that all funding provided by NVTA pursuant to Chapter 766 is subject to appropriation by the Virginia General Assembly. The parties further acknowledge that: (i) the moneys allocated to the NVTA Fund pursuant to Va. Code Ann. Sections 58.1-638, 58.1-802.2, and 58.1-1742 and any other moneys that the General Assembly appropriates for deposit into the NVTA Fund are subject to appropriation by the General Assembly and (ii) Fairfax's obligation to provide NVTA Project Funding to MWAA under this Agreement is subject to such moneys being appropriated for deposit in the NVTA Fund by the General Assembly. However, NVTA has in its possession \$60,000,000 to provide the NVTA Project Funding described in this Agreement. This sum has been appropriated; however, funding for the operations of NVTA is subject to annual approval by the Virginia General Assembly, and thus NVTA's ability to pay out any portion of the NVTA Project Funding is subject to such approval.

H. Notices

All notices under this Agreement to either party shall be in writing and forwarded to the other party by U.S. mail, care of the following authorized representatives:

- 1) To Fairfax:

Tom Biesiadny, Director

Fairfax County Department of Transportation  
4050 Legato Road, 4th Floor  
Fairfax, VA 22033-2867

2) To MWAA:

Controller  
Metropolitan Washington Airports Authority  
198 Van Buren Street, Suite 300  
Herndon, Virginia 20170

With a copy to

MWAA General Counsel  
Metropolitan Washington Airports Authority  
1 Aviation Circle  
Washington, D.C. 20001

I. Assignment

This Agreement shall not be assigned by either Party unless express written consent is given by the other party.

J. Modification or Amendment

This Agreement may be modified, in writing, upon mutual agreement of both Parties.

K. No Personal Liability or Creation of Third Party Rights

Neither this Agreement nor any certificate or other document delivered pursuant to this Agreement shall be construed as creating any personal liability on the part of any officer, employee, or agent of the Parties; nor shall it be construed as giving any rights or benefits to anyone other than the Parties hereto.

L. No Agency

MWAA represents that it is not acting as a partner or agent of Fairfax; and nothing in this Agreement shall be construed as making any Party a partner or agent with any other Party.

M. Sovereign Immunity

This Agreement shall not be construed as a waiver of either party's sovereign immunity rights.

N. Incorporation of Recitals

The recitals to this Agreement are hereby incorporated into this Agreement and are expressly made a part hereof. The Parties acknowledge and agree that such recitals are true and correct.

O. Mutual Preparation and Fair Meaning

The Parties acknowledge that this Agreement has been prepared on behalf of all Parties and shall be construed in accordance with its fair meaning and not strictly construed for or against either Party.

P. Governing Law

This Agreement is governed by the laws of the Commonwealth of Virginia.

Q. Program Costs.

The NVTA Project Funding may be used to pay all reasonable costs of compliance with NVTA requirements, as determined by and subject to the approval of NVTA, including without limitation the costs, determined by MWAA acting reasonably and agreed to by Fairfax, of assisting Fairfax in preparing and submitting all draw requests to NVTA.

R. Status of NVTA Funding.

NVTA Project Funding actually received and retained by MWAA shall be credited 16.1% to Fairfax, 4.1% to MWAA Non-DTR Funds, 4.8% to Loudoun County, and 75% to DTR Funds, as those terms are used in Section 2.2(b)(1) of the Funding Agreement, for purposes of computing the Total Capital Contributions of each party to the Funding Agreement.

S. Construction of Agreement.

This Agreement replaces and supersedes the Original Project Agreement. This agreement is intended by the Parties to be construed as a whole and indivisible and its meaning is to be ascertained from the entire instrument. All parts of the Agreement are to be given effect with equal dignity, including but not limited to the recitals at the beginning of this Agreement, and all such parts, including the recitals, are to be given full force and effect in construing this Agreement. No provision of any recital shall be construed as being controlled by or having less force and effect than any other part of the Agreement because the provision is set forth in a recital.

IN WITNESS WHEREOF, each party hereto has caused this Agreement to be executed as of the day, month, and year first herein written by its duly authorized representative.

**Fairfax County**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Metropolitan Washington Airports Authority**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

## **Appendices**

- A. Innovation Project Description for 2014 Tranche
- A1. Innovation Project Description for 2015 Tranche
- B. Innovation Project Budget and Cash Flow Projection for 2014 Tranche
- B1. Innovation Project Budget and Cash Flow Projection for 2015 Tranche
- C. NVTA Form of Payment Requisition
- D. Form of Draw Certificate
- E. Tax Covenants

[Appendices are not included in this attachment to Board paper]

## **PROPOSED RESOLUTION**

**Approving an Agreement Between the Airports Authority and Fairfax County  
Relating to a Grant to the County from the Northern Virginia Transportation Authority  
to Fund a Portion of the Costs to Construct Innovation Station  
as Part of Phase 2 of the Metrorail Project**

WHEREAS, In September 2015, the Airports Authority and Fairfax County entered into an agreement in connection with the County's receipt of a \$33,000,000 grant from the Northern Virginia Transportation Authority (NVTA) to be used to pay a portion of the costs of constructing the Innovation Station, near Route 28, as part of Phase 2 of the Dulles Corridor Metrorail Project;

WHEREAS, Fairfax County has successfully applied to NVTA for an additional grant in the amount of approximately \$27,000,000 also to be used to pay a portion of the costs of constructing the Innovation Station, and now intends to enter a second grant agreement with NVTA relating to this \$27,000,000 grant (Second Grant Agreement):

WHEREAS, The Airports Authority has been asked to enter into another agreement with Fairfax County that will parallel and support the Second Grant Agreement;

WHEREAS, Under this proposed agreement with Fairfax County (Second Airports Authority-Fairfax Agreement), the Airports Authority will work with the County in developing documentation of the Innovation Station costs which meets the requirements of NVTA and which will allow the County to make periodic draws of grant funds from NVTA to be used to pay such costs;

WHEREAS, Under this proposed agreement, grant funds drawn from NVTA by Fairfax County will be made available to the Airports Authority to pay, or provide reimbursement of, costs that the Airports Authority has incurred in the construction of Innovation Station;

WHEREAS, The proposed Second Airports Authority-Fairfax Agreement was presented to the Dulles Corridor and Finance Committees during a joint special meeting on May 18, 2016; and

WHEREAS, At this meeting, the Committees approved the proposed Second Airports Authority-Fairfax Agreement and recommended that the Board of Directors authorize its execution, subject to the Fairfax County Board of Supervisors approving the Second Grant Agreement; now, therefore, be it

**RESOLVED**, That the President and Chief Executive Officer is authorized to execute the Second Airports Authority-Fairfax Agreement, subject to the Board of

Supervisors of Fairfax County having approved the Second Grant Agreement between the County and NVTA.

*For consideration of the Dulles Corridor and Finance Committees  
and the Board of Directors on May 18, 2016*