

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COUNTY BOARD OF ARLINGTON, )  
)  
Plaintiff, )

v. )

**Case No. 1:09-cv-01570-RMC**

UNITED STATES DEPARTMENT OF )  
TRANSPORTATION; RAYMOND H. )  
LAHOOD, in his official capacity and )  
individual capacity, Secretary of the U.S. )  
Department of Transportation; )  
FEDERAL HIGHWAY )  
ADMINISTRATION; VICTOR )  
MENDEZ, in his official and individual )  
capacity, Federal Highway )  
Administrator; VIRGINIA )  
DEPARTMENT OF )  
TRANSPORTATION; PIERCE R. )  
HOMER, in his individual capacity, and )  
SEAN T. CONNAUGHTON, in his )  
official capacity as Virginia Secretary of )  
Transportation, )

Defendants.

**PLAINTIFF’S MOTION FOR LEAVE TO AMEND COMPLAINT**

Plaintiff, the County Board of Arlington, Virginia (“Arlington County”), by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 15(a), files this motion to amend its Complaint in the above-captioned matter. As more fully set forth below, the amendment is appropriate at this time in order to clarify the claims raised in plaintiff’s original Complaint, to plead facts with more specificity, to add a necessary party to the case and to facilitate the litigation of this matter.

On August 19, 2009, Arlington County filed its Complaint alleging civil rights and constitutional violations under Title VI of the Civil Rights Act, the Equal Protection and Due Process clauses of the United States Constitution and Article 1 § 11 of the Commonwealth of Virginia

Constitution, as well as violations of the National Environmental Policy Act (“NEPA”), the Clean Air Act (“CAA”) and the Federal-Aid Highway Act (“FAHA”). The Complaint seeks declaratory and injunctive relief against defendants based on defendants’ (i) blatant and intentional derogation of Federal and State anti-discrimination laws and (ii) arbitrary and capricious failure to comply with environmental obligations relating to their submission for approval, and subsequent improvident approval, of a proposed transportation project in Northern Virginia involving a highway toll facility (the “Project”), all to the direct and unlawful detriment of Arlington County and its residents.

Defendants submitted their answers to plaintiff’s Complaint on February 26, 2010. On April 15, 2010, this Court denied the motion of defendant Virginia Department of Transportation (“VDOT”) to dismiss defendant Pierce Homer, former Secretary of VDOT, in his individual capacity. The Court also allowed the substitution of Sean Connaughton, the current Secretary of VDOT, in the place of Secretary Homer in his official capacity. The defendants have submitted their Administrative Record related to the NEPA process, to which plaintiff may file objections with the Court no later than September 27, 2010.

Pursuant to the Court’s Minute Order of July 13, 2010, Arlington County seeks leave to amend its original Complaint. A copy of plaintiff’s proposed First Amended Complaint is attached to this motion as **Exhibit A**. In accordance with Fed. R. Civ. P. 7(b), the basis for amendment is as follows:

Plaintiff’s proposed First Amended Complaint makes three general changes to the original Complaint. First, the proposed First Amended Complaint sets forth facts with greater specificity and therefore amplifies Arlington County’s original pleading. All supplemental facts in the proposed Amended Complaint arise out of the same conduct alleged in the original Complaint. Second, for purposes of clarity, Arlington County has separated into distinct counts its claims involving violations of due process and equal protection. Third, Arlington County has named Edward Sundra,

Planning/Environmental Program Manager, Federal Highway Administration (“FHWA”), in his official and individual capacities, as an additional defendant. At all times pertinent to the Complaint, and the Amended Complaint, Mr. Sundra served as the Senior Environmental Specialist for the FHWA/Virginia Division. In this position, Mr. Sundra was integrally involved, and executed final decisions, in the process of determining (i) the segmentation of the Project into the “Northern Section” and the “Southern Section” and (ii) a categorical exclusion from the comprehensive environmental and public health review requirements of NEPA for the “Northern Section.” Due to his pivotal role in the controversy of this case and his deliberate failure to consider the disparate impacts on minority populations of his decisions, Mr. Sundra is a necessary addition to plaintiff’s Complaint.

The proposed First Amended Complaint does not expand the theory or scope of the claims set forth in the original Complaint. Furthermore, amendment at this time will not prejudice any of the parties to this action.

Defendants have received sufficient notice of Arlington County’s intention to file its First Amended Complaint. Arlington County initially disclosed its intention to file during the Rule 16.3 “meet and confer” discussion with defendants’ counsel on April 28, 2010. Arlington County again declared its intention to file its Amended Complaint on July 8, 2010 during a conference call with representatives of the United States Department of Justice, pursuant to this Court’s order requiring the submission of a briefing schedule. During this call, plaintiff’s counsel also discussed the intention to add a new party defendant. This Court’s Minute Order of July 13, 2010, set out the schedule for filing such Amended Complaint as August 13, 2010.

Arlington County’s proposed First Amended Complaint will clarify the claims at issue in this action, plead facts with more specificity and facilitate the litigation of this matter.

WHEREFORE Arlington County respectfully requests that the Court grant leave to file and serve the attached First Amended Complaint.

Respectfully submitted,

Dated: August 13, 2010

COUNTY BOARD OF ARLINGTON  
By Counsel

Stephen A. MacIsaac, (#362530)  
County Attorney  
County Board of Arlington  
Suite 403  
2100 Clarendon Blvd.  
Arlington, VA 22201  
Telephone : (703) 228-3100  
Telefax : (703) 228-7106  
Email : [smacisaac@arlingtonva.us](mailto:smacisaac@arlingtonva.us)

SCHNADER HARRISON SEGAL & LEWIS LLP

By: /s/ John B. Britton  
John Burke Britton (#426434)  
Neil Thomas Proto (#167197)  
Claudine E.A. Wilson (#974539)  
750 9<sup>th</sup> Street NW, Suite 550  
Washington, DC 20001  
Telephone: (202) 419-4218  
Telefax: (202) 419-4258  
Email: [jbritton@schnader.com](mailto:jbritton@schnader.com)

*Counsel for Plaintiff County Board of Arlington*

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SEAN T. CONNAUGHTON, in his )  
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Transportation, )

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFF’S MOTION FOR LEAVE TO AMEND COMPLAINT**

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading once a responsive pleading has been served “by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” *Fed. R. Civ. P. 15(a)*; see also *Foman v. Davis*, 371 U.S. 178, 182 (1962). The D.C. Circuit has held that for a trial court to deny leave to amend is an abuse of discretion unless the court provides a sufficiently compelling reason, such as “undue delay, bad faith, or dilatory motive . . . repeated failure to cure deficiencies by [previous] amendments [or] futility of amendment.” See *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir.

1996) (*quoting Foman*, 371 U.S. at 182). Leave to amend the Complaint may also be denied where amending would cause the opposing party undue prejudice. *See Foman*, 371 U.S. at 182. A district court has broad discretion in granting motions for leave to amend a Complaint.

Where a court denies a motion to amend a Complaint, the court must base its ruling on a valid ground and provide an explanation. *See James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996).

Applying the factors the Supreme Court set forth in *Foman*, Arlington County's Motion for Leave to Amend the Complaint should be granted as plaintiff has not delayed, acted in bad faith or failed to correct defects by prior amendments; plaintiff's amendment would not be futile; and granting plaintiff's motion would not prejudice defendants.

**1. Arlington County Did Not Unduly Delay, Act In Bad Faith or Fail to Correct Deficiencies**

On August 19, 2009, Arlington County filed its Complaint in the above-captioned case alleging civil rights and constitutional violations under Title VI of the Civil Rights Act, the Equal Protection and Due Process clauses of the United States Constitution and Article 1 § 11 of the Commonwealth of Virginia Constitution, as well as violations of the National Environmental Policy Act ("NEPA"), the Clean Air Act ("CAA") and the Federal-Aid Highway Act ("FAHA"). Defendants submitted their answers to Arlington County's Complaint on February 26, 2010. With respect to Mr. Edward Sundra, plaintiff did not learn of his pervasive and instrumental role in reviewing, determining and executing the decisions concerning segmentation and the categorical exclusion status—forcefully challenged in plaintiff's Complaint related to, among others, its disparate impact claims—until plaintiff received the Administrative Record on June 25, 2010.

Significantly, Arlington County informed defendants of its intention to file its Amended Complaint on multiple occasions. Arlington County initially disclosed its intention to file during its Rule 16.3 "meet and confer" discussion with defendants' counsel. Arlington County again declared its

intention to file its Amended Complaint on July 8, 2010 during a conference call with representatives of the United States Department of Justice, pursuant to this Court's order requiring the submission of a briefing schedule, and as reflected in the parties' Proposed Scheduling Order of July 12, 2010. During this telephone call, plaintiff also discussed its intention to add a new party defendant to the case. Furthermore, the motion filed by Arlington County is the first motion before the court for leave to amend the Complaint in this action. Accordingly, this Court should find that plaintiff did not unduly delay, act in bad faith or fail to correct deficiencies, and it should allow the filing and service of the attached Amended Complaint.

**2. Arlington County's Motion is Not Futile**

"An amendment is futile if it merely restates the same facts as the original Complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss." *3 Moore's Federal Practice § 15.15[3]* (3d ed. 2000). Arlington County's proposed First Amended Complaint makes three general, yet vital, changes to plaintiff's original Complaint. First, the proposed First Amended Complaint sets forth facts with greater specificity and therefore amplifies plaintiff's original pleading; secondly, the Amended Complaint separates the civil rights counts to clarify each claim; and thirdly, the Amended Complaint adds Edward Sundra as an additional and necessary defendant. For these reasons, the Amended Complaint is clearly not futile.

**3. Granting Leave to Amend Will Not Unduly Prejudice Defendants**

Granting leave to amend the Complaint is not unduly prejudicial to the defendants. First, the proposed First Amended Complaint does not expand the theory or scope of the claims set forth in the original Complaint. This court has held that an amendment should be denied if it would radically change the scope and nature of the case, and "bears no more than a tangential relationship to the original

action. . .” *Mississippi Assn. of Cooperatives v. Farmers House Admin.*, 139 F.R.D. 542, 544 (D.D.C. 1991) (stating that courts have granted leave to amend so that additional claims and a new theory could be added to the claim). Arlington County’s proposed First Amended Complaint sets forth facts with greater specificity where those facts arise out of the same conduct alleged in the original Complaint. The addition of these supplemental facts does not radically alter the nature and scope of litigation. Furthermore, the addition of Edward Sundra as a defendant in his official and individual capacities does not unduly prejudice defendants, as this addition will in no way delay or radically change the scope and nature of the case.

Arlington County’s proposed First Amended Complaint will clarify the claims at issue in this action, plead facts with more specificity and facilitate the litigation of this matter. In light of the liberal standard set forth in Rule 15(a), the relatively minimal delay, if any, and the lack of significant prejudice, this Court should grant Arlington County's Motion for Leave to Amend the Complaint.

Dated: August 13, 2010

Respectfully submitted,

COUNTY BOARD OF ARLINGTON  
By Counsel

Stephen A. MacIsaac, (#362530)  
County Attorney  
County Board of Arlington  
Suite 403  
2100 Clarendon Blvd.  
Arlington, VA 22201  
Telephone : (703) 228-3100  
Telefax : (703) 228-7106  
Email : [smacisaac@arlingtonva.us](mailto:smacisaac@arlingtonva.us)



SCHNADER HARRISON SEGAL & LEWIS LLP

By: /s/ John B. Britton  
John Burke Britton (#426434)  
Neil Thomas Proto (#167197)  
Claudine E.A. Wilson (#974539)  
750 9<sup>th</sup> Street NW, Suite 550  
Washington, DC 20001  
Telephone: (202) 419-4218  
Telefax: (202) 419-4258  
Email: [jbritton@schnader.com](mailto:jbritton@schnader.com)

*Counsel for Plaintiff County Board of Arlington*

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TRANSPORTATION; PIERCE R. )

HOMER, in his individual capacity, and )

SEAN T. CONNAUGHTON, in his )

official capacity as Virginia Secretary of )

Transportation, )

Defendants.

**ORDER**

THIS COURT having reviewed Plaintiff's Motion for Leave to Amend Complaint, and any opposition thereto, hereby:

ORDERS that Plaintiff's Motion for Leave to Amend Complaint is GRANTED;

It is further ORDERED that Plaintiff's First Amended Complaint shall be considered filed as of the date of this Order;

It is further ORDERED that defendants shall have \_\_\_\_\_ days from the date of this

Order to answer Plaintiff's First Amended Complaint.

Dated: August \_\_\_\_\_, 2010

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Judge Rosemary M. Collyer  
United States District Court  
For the District of Columbia

With copies to:

Stephen A. MacIsaac, County Attorney  
County Board of Arlington  
Suite 403  
2100 Clarendon Blvd.  
Arlington, VA 22201  
Telephone : (703) 228-3100  
Telefax : (703) 228-7106  
Email : smacisaac@arlingtonva.us

John B. Britton (#426434)  
Schnader Harrison Segal & Lewis LLP  
750 9<sup>th</sup> Street NW, Suite 550  
Washington, DC 20001  
Telephone: (202) 419-4218  
Telefax: (202) 419-4258  
Email: jbritton@schnader.com

Neil Thomas Proto (#167197)  
Schnader Harrison Segal & Lewis LLP  
750 9<sup>th</sup> Street NW, Suite 550  
Washington, DC 20001  
Telephone: (202) 419-4214  
Email: nproto@Schnader.com

Claudine E. A. Wilson (#974539)  
750 9<sup>th</sup> Street NW, Suite 550  
Washington, DC 20001  
Telephone: (202) 419-4228  
Telefax: (202) 419-3454  
Email: cewilson@schnader.com

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2010, I caused a true and accurate copy of the foregoing Motion for Leave to Amend Complaint, which has been filed with the Court electronically, to be served via this Court's electronic filing system on the following:

Channing D. Phillips, Esq.  
United States Attorney  
555 4<sup>th</sup> Street, NW  
Washington, D.C. 20530

United States Department of Transportation  
1200 New Jersey Avenue, S. E.  
Washington, DC 20590

Raymond H. LaHood, Secretary of Transportation,  
United States Department of Transportation  
1200 New Jersey Ave., SE  
Washington, DC 20590

Federal Highway Administration  
1200 New Jersey Avenue, S. E.  
Washington, DC 20590

Victor Mendez  
Federal Highway Administrator  
1200 New Jersey Ave., SE  
Washington, DC 20590

Virginia Department of Transportation  
1401 E. Broad Street  
33Richmond, VA 23219

Sean T. Connaughton, Secretary of Transportation  
Commonwealth of Virginia  
1111 E. Broad Street  
Richmond, VA 23219

Pierce R. Homer, Former Secretary of Transportation  
c/o Commonwealth of Virginia  
1111 E. Broad Street  
Richmond, VA 23219

/s/ John B. Britton  
John B. Britton