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Meeting Date
July 22, 2014



AGENDA	
Section	Unf. Business
Item No.	IV.A

REVISED AGENDA REPORT
 BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

Tabled from 7-8-14

SUBJECT:	FECR/ All Aboard Florida Report and FECR/AAF request to execute letter agreement adding AAF as 3 rd Party Beneficiary
DEPT/OFFICE:	County Attorney

Requested Action:

1. Accept County Attorney Report and provide direction on what option the Board would like to pursue;
2. Consider whether or not to agree to FECR /AAF (attached) offer to modify existing crossing agreements, which offer expires 120 days after date of the proposed letter agreement (June 18, 2014)

Summary Explanation & Background:

The Board Requested a report from the County Attorney's office on the FECR/All Aboard Florida issue. The attached report has been prepared with the assistance of the County Engineer and an outside appraisal firm.

The Commission's options, set forth in more detail within the report, are as follows:

Legal:

1. Seek declaratory judgment:
 - A. establishing irrevocable license with no maintenance responsibility going forward
 - B. declaring county assuming FECR maintenance responsibility to be void; recoupment of payments to FECR for maintenance; and injunctive relief to maintain crossing pending completion of eminent domain proceeding; and
2. File eminent domain proceeding condemning easements over all railroad crossings
 - a. Slow take (recommended, if necessary)
 - b. Quick take
3. Retain legal counsel to fight Railroad Loan from Federal RR Administration

Political:

4. Retain lobbyist to oppose AAF loan from Federal RR Administration

Administrative:

5. Join in review and challenge of Administrative: Environmental Impact Statement consultants/attorneys
6. Decline to take any action pending receipt of final proposal from FECR (continued on page 2)

Clerk to the Board instruction:

Exhibits Attached: 1) FECR/AAF report [attached to previously submitted agenda item] ; 2) FECR/AAF proposed letter agreement with attachment

Contract /Agreement (If attached): Reviewed by County Attorney Yes No

County Manager's Office Department : County Attorney PR

Stockton Whitten, County Manager

Page 2: FECR/AAF Report and Letter Agreement (continued)

By email dated July 3, 2014 FECR delivered the attached letter modification to fifteen existing crossing agreements. The proposal seeks to add All Aboard Florida as a third party beneficiary in accordance with the terms outlined in the report.

The Board has been given 120 days from June 18, 2014 within which to execute the agreement, failing which, the offer will stand withdrawn and become void. It is possible FECR would take the position that, absent the agreement, the County would be responsible for paying the costs for the additional track within the FECR in accordance with the terms of the existing crossing agreements.

Options:

1. Authorize Chair to execute the FECR/AAF letter agreement
2. Decline to enter into letter agreement

RESOLUTION NO. 2014-___

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, URGING ALL POTENTIAL DONOR AGENCIES TO REQUIRE ALL ABOARD FLORIDA TO PAY FOR ALL COSTS OF ALL ABOARD FLORIDA, AND THAT ANY GOVERNMENT ASSISTANCE SHALL BE PROVIDED AT NO LESS THAN MARKET RATES; AND DIRECTING CERTIFIED COPIES OF THIS RESOLUTION TO BE PROVIDED TO ANY APPLICABLE DONOR AGENCIES.

WHEREAS, All Aboard Florida, a subsidiary of Florida East Coast Industries, is proposing to provide passenger rail service between Miami and Orlando that will run through populated areas of Brevard County, including Micco, Barefoot Bay, Grant-Valkaria, Malabar, Palm Bay, Melbourne, Rockledge and Cocoa; and

WHEREAS, at first such passenger rail service was touted as being provided by a private company, using solely private resources; and

WHEREAS, it is now understood that the passenger rail service is being proposed to be funded by a Railroad Rehabilitation & Improvement Financing (RRIF) Program loan of up to potentially \$1.5 billion from the Federal Rail Administration, an agency of the United States federal government; and

WHEREAS, it is now also understood that the State of Florida is proposing to spend \$215 million for a new rail station at Orlando International Airport which will benefit All Aboard Florida; and

WHEREAS, per the Federal Rail Administration Grade Crossing Inventory, there are a total of 48 railroad crossings within Brevard County and 352 rail crossings in the region, local governments, such as Brevard County, will bear the maintenance costs of upgraded railroad crossings and the costs of installing and maintaining quiet zones;

WHEREAS, instead of being a passenger rail service provided by a private company, using solely private resources, it is now clear that a significant portion of the financial burden of this passenger rail service is actually going to be borne by the taxpayers through assistance from the federal, state and local governments; and

WHEREAS, the Board of County Commissioners of Brevard County implores any donor agency, including the Federal Rail Administration and any other federal agency and the State of Florida and its agencies, to require All Aboard Florida to pay for the costs of All Aboard Florida, including quiet zones and corridor improvements, and that there shall be no governmental assistance, be it in the form of loans, infrastructure or right-of-way at less than market rates, as such support would put the risk of the passenger rail service on the backs of the taxpayers,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, THAT:

Section 1. The above "WHEREAS" clauses are true and correct, and are hereby adopted as findings of the Board.

Section 2. The Board of County Commissioners of Brevard County urges any donor agency, including the Federal Rail Administration and any other federal agency and the State of Florida and its agencies, to require All Aboard Florida to pay for the costs of All Aboard Florida, including quiet zones and corridor improvements, and that there shall be no governmental assistance, be it in the form of loans, infrastructure or right-of-way at less than market rates, as such support would put the risk of the passenger rail service on the backs of the taxpayers.

Section 3. A certified copy of this resolution shall be provided to Governor Rick Scott, the Federal Railroad Administration and any other state, local or federal agency which intends to offer support for All Aboard Florida.

The foregoing resolution was moved for adoption by Commissioner _____, and seconded by Commissioner _____, and upon being put to a vote, the vote was as follows:

Commissioner Mary Bolin Lewis, Chairman District 4	_____
Commissioner Robin Fisher, Vice-Chairman District 1	_____
Commissioner Chuck Nelson, District 2	_____
Commissioner Trudie Infantini, District 3	_____
Commissioner Andy Anderson, District 5	_____

The Chairman thereupon declared the resolution duly passed and adopted this 8th day of July, A.D., 2014

Knox, Scott L

From: Neil Schiller <neil.schiller@me.com>
Sent: Wednesday, July 02, 2014 2:28 PM
To: Knox, Scott L
Cc: Mark Stempler; Colleen LaPlant; Ashley Bourget
Subject: All Aboard Florida - Crossing Agreements
Attachments: June 18, 2014 Letter from Florida East Coast to Scott Knox RE_ Agreement Between FECR, City of Rockl.PDF; Exhibit A - Brevard.pdf

Mr. Knox,

Please be advised that the law firm of Becker and Poliakoff represents All Aboard Florida in relation to the crossing agreements that Martin County has with the Florida East Coast Railway. I believe that you have previously received correspondence from FEC about this issue. Please find attached, the most current correspondence from FEC.

Please confirm receipt and advise how you'd like to move forward. I will do my best to make myself available to you.

I hope you have a great holiday!

Sincerely,

Neil Schiller

June 18, 2014

Scott Knox, Esq.
c/o Brevard County
2725 Judge Fran Jamieson Way
Viera, Florida 32940

Re: Agreement between Florida East Coast Railway, L.L.C. ("FECR"), Brevard County (the "Licensee") and All Aboard Florida - Operations LLC ("AAF") with regard to the documents listed on Exhibit A hereto (as amended and assigned to date, the "Crossing Agreements") relating to the crossings referenced therein (the "Crossings")

Dear Mr. Knox:

This letter shall serve to memorialize the agreement reached between Licensee, FECR and AAF relating to the Crossing Agreements in existence that govern the Crossings (as such Crossings are more particularly defined in the Crossing Agreements) and terms relating to the construction, maintenance and safety of such Crossings. Specifically, and without modification to any other term, obligation or condition set forth in the Crossing Agreements, Licensee, FECR and AAF hereby agree to the following terms and conditions, in exchange for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties:

- AAF is developing an intercity passenger rail service from Miami to Orlando (the "Project").
- AAF shall incur the necessary and reasonable capital investments to complete the initial installation of crossing improvements at the Crossings to the extent required for the Project to comply with currently applicable laws regarding safety at public crossings and commence passenger rail service (the "Initial Development Cost"). It is acknowledged and agreed, however, that the AAF's commitment to cover the Initial Development Cost for the installation of crossings improvements at the Crossings for the Project shall not encompass the cost of any other improvements to the Crossings, including any improvements required or desired by Licensee such as those related to the establishment of quiet zones. The Initial Development Cost expressly excludes any and all costs related to such other improvements.

In consideration of the foregoing, Licensee confirms the following:

- The Crossings, as improved for the Project, shall continue to be governed by the Crossing Agreements.
- The Licensee shall not be responsible for the Initial Development Cost, but shall be liable for any and all other costs due under the Crossing Agreements with respect to

the Crossings as improved, provided, however, that Licensee shall be entitled to receive an estimate of any and all costs or expenses to be paid by Licensee pursuant to the Crossing Agreements at least ninety (90) days in advance of the date by which payment shall be due.

- AAF is an intended third-party beneficiary of the Crossing Agreements, with the right to enforce the terms and conditions thereof.
- Except as expressly provided herein with regard to the planned improvements to the Crossings, the Initial Development Cost and AAF's beneficiary status, all of the terms, conditions, covenants, agreements and understandings contained in the Crossing Agreements shall remain unchanged and in full force and effect, and the same are hereby expressly ratified and confirmed by the Licensee. This includes, without limitation, the Licensee's continuing obligations related to construction, maintenance, safety, future changes and upgrades to the Crossings and the reimbursement of costs, all of which would continue to be governed by the Crossing Agreements, provided, however, that Licensee shall be entitled to receive an estimate of any and all costs or expenses to be paid by Licensee pursuant to the Crossing Agreements at least ninety (90) days in advance of the date by which payment shall be due.

If these terms are acceptable, please sign this letter in the space provided at the end of this signature page and return that signed document to us. To facilitate this process, it is agreed that this letter will be executed in counterparts, each of which will be deemed to be an original copy of this letter and all of which, when taken together, will be deemed to constitute one and the same agreement. It is also agreed that signed counterparts may be transmitted electronically (as an Adobe PDF file) or by facsimile, and that delivery in that way shall have the same force and effect as the delivery of original signatures. Also, this letter will be construed in accordance with the laws of the State of Florida, without regard to conflict of laws principles. Please understand, however, that the terms of this letter and any offer presented herein will expire and shall be null and void on the date that is 120 days of the date hereof if it has not been executed and returned to us by then. Further, if the improvements at the Crossings for the Project are not completed by December 31, 2018, the terms of this letter and any offer presented herein will expire and will be null and void.

We do hope to hear from you soon and look forward to working together. If you should have any questions, please contact Neil Schiller at Becker & Poliakoff (561) 655-5444 or nschiller@bplegal.com.

Sincerely,

Florida East Coast Railway, J.L.C.

By: Robert B. Ledoux

Print Name: Robert B. Ledoux

Print Title: SVP

All Aboard Florida – Operations LLC

By: P. Michael Reinger

Print Name: P. MICHAEL REINGER

Print Title: PRESIDENT & CDO

Cc: Robert Ledoux, FECR
Margarita Martinez Miguez, AAF

AGREED, ACKNOWLEDGED AND CONFIRMED:

By: _____

Print Name: _____

Print Title: _____

Exhibit A

Crossing Agreements Listing

Location	Mile Post	Street Name	AAR/D OT#	Agreement Holder	License Agreement Date
Cocoa	170+29 81	Michigan Avenue	272092 P	Brevard County	11/25/70
Cocoa	171+27 28	Dixon Boulevard	272095 K	Brevard County	3/5/91
Rockledge	177+49 24	Barnes Boulevard	272108J	Brevard County	10/5/09
Bonaventure	179+74 2	Carver Street	272109 R	Brevard County	3/15/88
Bonaventure	179+20 96	Ansin Road	272110 K	Brevard County	1/25/66
Bonaventure	180+14 65	Viera Boulevard	272976 W	Brevard County	9/10/91
Pineda	182+34 22	Suntree Boulevard	272115 U	Brevard County	1/16/90
Pineda	184+26 87	Pineda Causeway	272863 R	Brevard County	12/16/08
Melbourne	189+35 84	Aurora Road	272122 E	Brevard County	8/20/91
Melbourne	190+30 40	Sarno Road	272125 A	Brevard County	12/14/82
Grant Valkaria	208+68 1	Senne Road	272154 K	Brevard County	2/6/90
Micco	208+52 29	Barefoot Boulevard	272155 S	Brevard County	2/19/59
Micco	209+12 39	Micco Road	272156 Y	Brevard County	5/11/67
Micco	211+32 10	Holly Street	272157 F	Brevard County	3/4/65




BOARD OF COUNTY COMMISSIONERS

County Attorney's Office
2725 Judge Fran Jamieson Way
Building C, Room 308
Viera, Florida 32940

Inter-Office Memo

TO: HONORABLE CHAIR AND MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS

FROM: SCOTT L. KNOX, COUNTY ATTORNEY 

RE: ALL ABOARD FLORIDA REPORT AND LEGAL ANALYSIS

DATE: July 2, 2014

Contents

- I. Summary
- II. Background
- III. Cost Analysis
- IV. Legal Analysis
- V. Options

As a result of the AAF proposal, the office was instructed to report back on financial and legal issues raised. The factual background is set forth first, followed by a cost analysis, analysis of legal issues and options available to the Board.

I. Summary

As requested by the Board, this office has prepared a report analyzing the County's legal position relating to the Florida East Coast Railroad (FEC) and All Aboard Florida (AAF) request to enter into an agreement modifying existing crossing agreements. This office has spoken with affected counties south of Brevard and consulted with the Brevard County Public Works Director in preparing this report.

The conclusions reached in this report can be summarized as follows:

- A. The County is currently spending between \$300,000- \$400,000 each year paying the expenses that have been declared to be railroad expenses in Florida case law.
- B. With the addition of All Aboard America, the County will face increased maintenance expenses that could ultimately double the current expenses if the crossing agreements remain in effect.

- C. The existing FEC crossing agreements are likely void and unenforceable which presents the County with the opportunity to seek an accounting and recoupment of *all* maintenance fees that have been paid to FEC. Based on County data, that amounts to \$1.78 million going back to 2006 and an undetermined amount for the decades before that.
- D. The County is also poised to claim that irrevocable licenses exist in favor of the County and the public over all 34 existing crossings covered by FEC/County license agreements.
- E. Even if the license agreements were valid, they are terminable upon reasonable notice by the County, notwithstanding the absence of such a provision in the agreement.
- F. If necessary, the County can condemn ingress/egress easements over the existing crossings to provide perpetual access to the public. The high-end projected cost for that condemnation effort would be \$1.7 million.
- G. Counties to the south of Brevard are looking at becoming actively involved in the Environmental Impact Statement process that All Aboard Florida/FEC is undertaking as a prerequisite to building an additional track. Those counties are also looking at possibly fighting any federal loan All Aboard America may be seeking to finance the construction costs for the additional track.

II. Background

The Florida East Coast Railway has proposed to add All Aboard Florida (AAF) as a third-party beneficiary with full rights to enforce the crossing agreements currently existing between FEC and Brevard County. In exchange, AAF would assume the responsibility for *constructing* all tracks and crossing improvements required to provide relatively high speed passenger rail service on tracks running parallel to existing FEC track within FEC right of way running through the entire county south of State Road 528. The proposed AAF track affects thirteen road crossing agreements between the FEC and the County. It would appear to be FEC's position that under those crossing agreements, the County would be responsible to pay the costs for the any crossing improvements required for a second track owned by FEC. The AAF trains will not stop in Brevard County, nor can FEC identify any other benefit to Brevard apart from the FEC's position that AAF will assume costs associated with the construction of expanded railroad crossings south of SR 528 that would otherwise be contractually obligated costs of the County.

However, under the existing contracts, a second track would cause the County to incur additional *maintenance* costs at each affected crossing. This county responsibility for maintenance is perpetual because most of the crossing agreements are automatically renewed for one year terms forever unless terminated by FEC with a sixty day notice, at which time Brevard would have to pay the cost of removing all crossing improvements. Brevard County has no express right to terminate under most of these crossing agreements.

The additional maintenance costs for the upgraded crossings required to serve AAF have been analyzed by the Public Works Director. Based on current information, there are expected to be 16 trains per day using the new tracks traveling each direction for a total of 32 trains per day. These trains are projected to service a maximum of 400 passengers for each leg of the trip from Orlando to Miami and back. The existing FEC tracks currently carry about 18 trains per day.

The AAF trains are projected to take approximately one minute to pass any individual road crossing. It has been reported that the road crossing gates at most, if not all, crossings will be improved by adding gates regulating vehicular traffic approaching the crossings from either direction. AAF states that the principal cause for the cost of crossing maintenance is the heavy truck vehicular traffic using the public roads not the trains themselves.

The foregoing train frequency and alleged truck usage as the cause for crossing maintenance are assumed to be correct for the following analysis. If any of these factors is not accurate some of the following cost projections could require revision.¹

III. Cost Analysis

Thirteen railroad crossings in the unincorporated area are impacted by the AAF proposal. Under existing agreements with FEC, the railroad will assert that the County is responsible for paying the cost of maintaining existing and future crossing improvements. It has been reported by AAF officials and representatives and in some of their official publications that the results of the rail improvements and operations of AAF will have “de minimus” impacts on costs to local governments and FDOT for the maintenance of at-grade rail road crossings. AAF has not provided the Public Works Director with any supporting documentation or analysis to substantiate this claim. Unfortunately this lack of transparency requires the County evaluation of County resources to analyze AAF impacts on the cost of rail road crossing maintenance. If and when AAF provides this analysis the County will examine it for purposes of either agreeing or disagreeing. Until then the following is a narrative of the County’s projection of the costs local governments could expect as a result of the proposed AAF activity.

First, the number of crossing gates and barriers appear to be increasing by as much as a factor of two since double gates are proposed on both sides of every crossing to prevent vehicles from driving around a single gate. These facilities are moving gates, with lights, bells, and horns. It is only reasonable to assume that the cost of maintenance and replacement of this equipment will approximately double the current cost of replacement. Also, since these parts are all moving the effects of more movements due to a near doubling of projected train traffic (from

¹ For example, the Melbourne City attorney has raised the following additional cost issues:

- (a) If any utilities must be moved, will FEC/All Aboard FL be paying for that cost?
- (b) Will HazMat or emergency fire rescue costs associated with increased train usage be totally the responsibility of the local governments?
- (c) Is it FEC/AAF position that local governments must bear increased maintenance costs due to increased use of crossing arms/bells in response to more train traffic?

18 trains to approximately 32 trains) will wear the equipment out more rapidly than currently is occurring.

Second, the need to maintain, service or replace a second crossing infrastructure involves double the current expenses for the worst performing portion of the crossing infrastructure. With additional train traffic, the frequency of the replacement of the crossings could be expected to increase rather than decrease and, under the terms of the crossing agreements, the need for maintenance and replacement is left to the discretion of FEC. Yet FEC will seek to impose the cost of that maintenance or replacement upon the County—which cost can be expected to more than double due to increased train traffic over two sets of tracks.

Based on the limited analysis above and the lack of information presented by AAF or FEC regarding these concerns, the County's view of projected maintenance vastly exceeds the FEC expectation of "de minimus" additional costs since, in the world infrastructure maintenance, "de minimus" typically represents a change of less than 1%.

The forgoing is not intended to be an in depth or complete analysis of the expected change to the costs of maintenance of rail road crossings to local governments but it is intended as an explanation of concerns about a potential doubling or worse of those maintenance costs. In the case of Brevard County, over the past several years the County's contractually imposed costs for crossing maintenance south of SR528 has ranged between \$225,000 and \$450,000 per year, with an average cost of \$330,000. In fact, the 2014 FEC "invoiced" cost to Brevard County for just *four* crossings is \$384,227.²

This cost analysis does not include the additional cost of any future expansion of the second track into northern Brevard County should such expansion be required to accommodate additional commercial train traffic expected to be generated by the newly opened Panama Canal and recently expanded port facilities at Port Everglades and the Port of Miami in south Florida which, if the double tracking were to occur, would involve additional maintenance costs associated with about 20 more crossings located in northern Brevard County of SR 528.

In assessing crossing costs, it is very important to note that the FEC is in complete control of the quality, design and installation costs associated with these crossing facilities. In the event that FEC upgrades the quality and performance of the crossing facilities in a manner that increases the life cycle of those improvements, the projected costs could be significantly revised downward. County staff has requested and look forward to receiving a reasonably presented logical analysis of the actual proposed construction, costs and life cycle of the improvements to be constructed at the affected railroad crossings.

As a side note, expenses paid in behalf of FEC under current crossing agreements are paid with the County's share of gas taxes and ad valorem taxes.

² FEC June 24, 2014 letter to Public Works Director, John Denninghoff from FEC Public Projects Engineer, Joseph (Leslie) Schonder

IV. Legal Analysis

In view of the perpetual and substantially increased annual expenses expected to be incurred by Brevard County for maintenance of the crossing infrastructure of two *private* companies once the AAF project is up and running, there are several legal issues associated with the continuation of the current FEC crossing agreements which may make the addition of AAF as a third party beneficiary to the existing FEC agreements a moot point. Those issues and a short analysis of each are outlined below.

1. **Some or all of the crossing agreements may be void and unenforceable because:**
 - a. **Under the Florida Constitution, neither the County nor the State of Florida can contract to expend tax revenues for maintenance of FEC's crossings and tracks, for under Florida law FEC/AAF has the duty to install and maintain its facilities including crossings.**

Article VII, §10 of the Florida Constitution³ prohibits the County from using its taxing power to aid any corporation. A companion provision in the Florida Constitution authorizes the County to levy property taxes and other taxes authorized by law, but only for *county purposes*.⁴ These constitutional provisions prevent the county from expending county tax funds on private facilities, such as dredging projects and financing of facilities benefiting a private owner;⁵ private subdivision roads and infrastructure or privately owned water and sewer systems.⁶

Under Florida law, railroad companies have a legal duty to maintain railroad beds, facilities and equipment and the state has the inherent power and duty to require the property of a common carrier corporation devoted to the public service within its borders to be maintained in a

³ **ARTICLE VII, SECTION 10. Pledging credit.**—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person

⁴ **ARTICLE VII, SECTION 9. Local taxes.**—

(a) **Counties**, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, *for their respective purposes*, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

(b) Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: *for all county purposes, ten mills*; for all municipal purposes, ten mills; for all school purposes, ten mills; for water management purposes for the northwest portion of the state lying west of the line between ranges two and three east, 0.05 mill; for water management purposes for the remaining portions of the state, 1.0 mill; and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

⁵ *Brumby v. Clearwater*, 108 Fla. 633, 634, 149 So. 203, 204, 1933 Fla. LEXIS 1528, 1 (Fla. 1933)

⁶ AGO 2002-48

reasonably safe and adequate condition.⁷ That common law duty is memorialized in §351.35 Florida Statute, which requires the Department of Transportation to adopt rules governing the maintenance of tracks.⁸ As to state highways, those rules require the railroad to bear the costs of maintenance of all track bed and rail components, as well as the highway roadbed for the width of the rail ties within the crossing area.⁹ Likewise, section 335.141 Florida Statutes¹⁰ imposes upon the railroad company the duty to maintain crossings on the railway which were opened prior to July 1, 1972, subject to a *purported* exception for those crossings where maintenance has been provided for in another manner under a contract entered into prior to October 1, 1982.¹¹

Although section 335.141 Florida Statutes is silent on maintenance responsibility for crossings opened after July 1, 1972, the codification of the railroad's common law duty to maintain railroad crossings is embodied in the first clause of section 351.03, Florida Statutes which imposes upon the railroad the duty to exercise reasonable care for the safety of motorists at all railroad crossings.¹²

⁷ *State ex rel. Ellis v. Atlantic C. L. R. Co.*, 53 Fla. 650; 44 So. 213 (Fla 1907)

⁸ Florida Statutes section 351.35 (1) The Department of Transportation shall adopt rules requiring companies operating railroads wholly or in part in the state to maintain tracks and all supportive, related equipment, including locomotives and other rolling stock, of such railroad companies within the state in a safe condition.

⁹ "14-57.011(1) (b) Travel Way. When the grade crossing is located on the State Highway System, the railroad shall be responsible for the maintenance cost of all track bed and rail components, and the highway roadbed for the width of the rail ties within the crossing area. The Department shall be responsible for the maintenance cost of the highway roadbed outside of the railway ties on crossings where the railroad has a property interest. The railroad shall be responsible for the maintenance cost of the highway roadbed where the crossing occupies public right of way.

¹⁰ Section 335.141(2)(c), Florida Statutes. Any public railroad crossing opened prior to July 1, 1972, shall be maintained by the railroad company at its own expense, unless the maintenance has been provided for in another manner by contractual agreement entered into prior to October 1, 1982. If the railroad company fails to maintain the crossing, the unit of government with jurisdiction over the public road that is crossed, after notifying the railroad company of the needed repairs and after giving the company 30 days after the date of receipt of the notice to make the repairs, shall proceed to make the repairs. The cost of repairs shall thereupon become a lien upon the railroad and its rolling stock, which lien shall be enforceable by an ordinary suit at law. Any judgment rendered under this paragraph shall include a reasonable attorney's fee.

¹¹ The exception is constitutionally suspect under Article VII, section 10 of the Florida Constitution, as will be discussed in subsection (b).

¹² Section 351.03, Florida Statutes: (1) Every railroad company *shall* exercise reasonable care for the safety of motorists whenever its track crosses a highway *and shall* be responsible for erecting and maintaining crossbuck grade-crossing warning signs in accordance with the uniform system of traffic control devices adopted pursuant to s. 316.0745. Such crossbuck signs shall be erected and maintained at all public or private railroad-highway grade crossings.

Notably the railroad company's duty is set forth in mandatory "shall" language that separates the general duty of reasonable care from a second duty to erect and maintain crossbuck warning signs which is written into the statute with its own, distinct mandatory "shall" language.

Notably, in *Florida East Coast Ry. Co. v. Martin County*,¹³ an eminent domain case, the Florida Supreme Court explained that “the expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated,-if all that should be required,-necessarily result from the maintenance of a public highway under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded *as incidental to the exercise of the police powers of the state.*”¹⁴ [Emphasis supplied] The Court held “that any additional expense of the railroad in the grade crossing or in providing automatic protection devices is a cost of railroading” and non-compensable in an eminent domain case¹⁵—a position implicitly recognizing the effect of the railroad’s statutory duty of reasonable care under section 351.03 and maintenance under 351.141, Florida Statutes, both of which are police power regulations imposed on railroad companies.¹⁶

From the foregoing statutes and case law, this office is of the opinion that the maintenance of all railroad crossings is a statutory duty imposed upon *private* railroad companies such as FEC and AAF. That is, the statutory duties are *private* obligations imposed under the police power. Since Article VII, section 10 of the Florida Constitution prohibit counties and states from expending funds for private purposes, it is the opinion of this office that the crossing agreements with FEC are void and unenforceable.

¹³ 171 So.2d 873 (1965)

¹⁴ *Id.* at 876

¹⁵ *Id.* at 877

¹⁶ The *Martin County* rule promulgated by the Florida Supreme Court followed the extensive “police power” analysis of the United States Supreme Court in *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897) another eminent domain case involving a railroad crossing. There, the U.S. Supreme Court spent a great deal of its opinion analyzing and adopting the Illinois Supreme Court’s analysis of the inherent police power vested in the states and their subdivisions vis a vis the Illinois statutory exercise of the police power requiring railroads to install and maintain crossings at public highways. Specifically, the Court noted that:

“The State has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved, and which must inhere in the State, is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains.”

The Court also acknowledged and adopted this point of law from the Illinois Supreme Court:

“Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision.”

Moreover, since the private railroad obligation has been contractually shifted to Brevard County from FEC in violation of the Florida Constitution, under Florida law, the County can attempt to recoup all maintenance expenditures from the railroad made under those crossing agreements.¹⁷

- b. The County cannot contract away the State's sovereign police power implemented in the statutes requiring railroad companies like FEC and AAF to maintain railroad crossings. Any statute read as creating or ratifying the contractual transfer of such expenses from the FEC to the County is unconstitutional:**
 - i. for authorizing expenditures of public funds for a private purpose in violation of the Florida Constitution; and**
 - ii. for attempting to ratify the contracting away of the State's police power as manifested in statutes requiring the railroads to pay the expenses for maintaining crossings.**

It is a fundamental precept of Florida law that local governments do not have the right to contract away their police powers.¹⁸ It follows that the County is also prohibited from contracting away the State's police power and the state Legislature cannot pass legislation attempting to ratify such an "ultra vires" contract or, for that matter, a contract that purports to authorize county expenditures of tax revenues for the benefit of private corporations in violation of the Florida Constitution.¹⁹

Section 351.03, Florida Statutes—the state police power regulation requiring railroads to exercise reasonable care for the safety of motorists whenever its track crosses a highway—preceded the provisions of section 335.141(2)(c), Florida Statutes, which—as to crossings existing prior to July 1, 1972—*purports* to ratify maintenance contracts entered into prior to October 1, 1982. Based on the foregoing analysis of the unconstitutionality of county maintenance expenditures incurred in behalf of FEC and the clear constitutional law prohibiting the County from entering into a contract relinquishing the state's police power statutes requiring the railroad company to maintain its facilities, an agreement between the County and a private railroad company shifting the cost of the railroad's maintenance responsibility would be void and section 335.141 (2)(c) cannot ratify an agreement that is void under the Florida Constitution.

2. The Agreements, though appearing to be revocable by FEC, have resulted in the creation of an irrevocable license to cross the railroad right of way.

Over the years, the county has paid the expenses for maintaining and reconstructing each of the 34 railroad crossings at issue. Though FEC purports to reserve the right to revoke the

¹⁷ *Boca Raton v. Raulerson*, 108 Fla. 376 (1933); *Mayer Printing Co. v. Flowers*, 154 So. 2d 859(Fla. 1st DCA 1963); *Armco Drainage & Metal Products, Inc. v. County of Pinellas*, 137 So. 2d 234(Fla. 1st DCA 1962)

¹⁸ *Daly v. Stokell*, 63 So. 2d 644 (Fla. 1953); *Morgran Co. v. Orange County*, 818 So. 2d 640 (Fla. 5th DCA 2002)

¹⁹ *Daytona Beach v. King*, 132 Fla. 273 (1938); *Lykes Bros., Inc. v. Plant City*, 354 So. 2d 878 (Fla. 1978)

agreements, the Courts have found that a licensee's substantial capital investment into the licensed property creates an irrevocable license.²⁰ Since the County has already spent money for capital maintenance at most, if not all, of the railroad crossings, and the public continues to use each and every crossing, the County may want to seek a court declaration that irrevocable licenses have been established at each crossing and that any future maintenance expense under the crossing agreements are voided.

3. Due to their perpetual nature, the County may seek to terminate the crossing agreements.

Most of the County/FEC crossing agreements provide for automatic annual renewals in perpetuity under terms requiring the County to pay for all railroad crossing expenses within the railroad right of way, including reconstruction, maintenance and additional tracks. From Brevard County's point of view, these contracts are indefinite in duration since the County has no express right to cancel the agreements. Contracts for an indefinite period are not favored in the law and may be terminated by either party with reasonable notice.²¹

Termination of the crossing agreements would only become relevant if the court were to decide that no irrevocable license existed. Upon termination, the County would have to seek legal access at all crossings through its power of eminent domain.

4. If the crossing agreements are terminated or void and no irrevocable license is declared, the County can use the power of eminent domain, if necessary, to obtain a permanent crossing easements at existing railroad crossings.

a. Condemnation of a crossing easement is not preempted by Federal law

i. The federal agency vested with exclusive jurisdiction to regulate railroads has determined that eminent domain, though a regulation, can be used to condemn crossing easements

ii. Federal cases have determined that only condemnation of crossings that unreasonably interfere with railroad operations are preempted

b. The cost of using eminent domain to acquire crossing easements should be substantially less, over time, than the costs of perpetual maintenance of 34 railroad crossings spread over the entire 72 miles of track lying within Brevard County.

²⁰ *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993)

²¹ *Florida-Georgia Chemical Co. v. National Laboratories, Inc.*, 153 So. 2d 752; *Abrams v. George E. Keith Co.* (Fla. 1st DCA 1963); 30 F.2d 90 (C.C.A.3d, 1929); *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296, 34 L.R.A.(N.S.) 542; *Myra Foundation v. Harvey* (N.D.) 100 N.W.2d 435, 76 A.L.R.2d 1313.

a. The County has the power of eminent domain for road purposes.²² That right includes the right to condemn ingress and egress rights for roads crossing over existing railroad tracks.²³ The only restriction on the County's authority to condemn railroad property is whether the eminent domain proceeding is preempted by 49 USCA§10501, a federal law granting exclusive regulatory jurisdiction to the Surface Transportation Board (STB).²⁴ However, the STB has ruled that "acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street would not implicate the Federal preemption of 49U.S.C. 10501(b) unless it would prevent or unreasonably interfere with

²² Section 127.01(1) (a) Each county of the state is delegated authority to exercise the right and power of eminent domain; that is, the right to appropriate property, except state or federal, for any county purpose. The absolute fee simple title to all property so taken and acquired shall vest in such county unless the county seeks to condemn a particular right or estate in such property.

²³ *Florida E. C. R. Co. v. Martin County*, 171 So. 2d 873 (Fla. 1965)

²⁴ In relevant part, that law provides as follows:

49 USCA §10102. Definitions

In this part [49 USCS §§ 10101 et seq.]--

- (1) "Board" means the Surface Transportation Board;

49 USCA §10501. General Jurisdiction

(a) (1) Subject to this chapter [49 USCS §§ 10501 et seq.], the Board has jurisdiction over transportation by rail carrier that is--

- (A) only by railroad; or
(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--

- (A) a State and a place in the same or another State as part of the interstate rail network;
(B) a State and a place in a territory or possession of the United States;
(C) a territory or possession of the United States and a place in another such territory or possession;
(D) a territory or possession of the United States and another place in the same territory or possession;
(E) the United States and another place in the United States through a foreign country; or
(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over--

- (1) transportation by rail carriers, and the remedies provided in this part [49 USCS §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part [49 USCS §§ 10101 et seq.], the remedies provided under this part [49 USCS §§ 10101 et seq.] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

railroad operations.”²⁵ The STB reasoning, as applied to railroad crossings, has been applied in several federal court decisions.²⁶ In the case of Brevard County, it would be extremely difficult for FEC to contend that condemnation of an easement for ingress and egress over railroad crossings that have existed and been used by the public for years would unreasonably interfere with railroad operations.

b. If the Board were to authorize condemnation proceedings there are two options available, a slow take and quick take. The advantage of a slow take is that the compensation is determined by a jury before title to the property transfers to the County. The slow take proceeding allows the county to determine the cost before deciding whether to acquire the property since title only passes upon payment of the judgment and the County can choose not to pay.²⁷ However, attorney’s fees and costs would still have to be paid.

The projected cost of eminent domain would have to be weighed against the long term relief from maintenance responsibility for the existing crossings *and* the modified double tracked crossings if All Aboard Florida comes to fruition. Appraisers retained by the County have estimated the value of easements over rural crossings in the \$18,000 range, while values for crossing easements in more commercialized urban settings are set at in range of \$45,000 to \$51,000.

To put the issue in perspective, if easements were sought at all 34 crossings at an urban crossing value of \$50,000 per crossing, the cost of land acquisition would be \$1.7 million, since there should be no viable severance or business damage claim. That \$1.7 million excludes attorney’s fees and costs. Adding attorney’s fees and costs of \$500,000 the total cost would be \$2.2 million. At current annual maintenance expenses paid to FEC by the County, that \$2.2 million cost of acquisition would be paid for in four to five years if the crossing agreements are successfully terminated and there are no future railroad expenses paid by the County. The Director of Public Works indicates the funds are available to pursue an eminent domain action, should it become necessary.

In comparison, if AAF comes online and the existing crossing agreements remain in place, the County will likely expend that same \$2.2 million in less than five years with a continuing *indefinite* obligation to pay FEC’s annual maintenance expenses for two tracks instead of one. If double tracking for freight traffic is contemplated for the entire length of existing FEC track, the annual maintenance expenses to the County under the existing agreements will be considerably higher.

²⁵ *Maumee & W. R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order* 2004 STB LEXIS 140, 2004 WL 395835, (March 2, 2004)

²⁶ *District of Columbia v. 109,205.5 Square Feet of Land*, 2005 U.S. Dist. LEXIS 7990; *Bayou Dechene Reservoir Commission v. Union Pacific Railroad Corp*, 2009 U.S. Dist. LEXIS 48236 (June 8, 2009); *City of Sachse, TX v. Kansas City Southern*, 564 F. Supp. 2d 649 (E.D.Tex. 2008); *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir 2010); *see also*: *Louisville & N. R. Co. v. Western U. Tel. Co.*, 207 F. 1 (6th Cir. 1913); *City of Lincoln v. Lincoln Lumber Co.*, 2006 U.S. Dist. LEXIS 34287, 2006 WL 1479043 (D.Neb. May 23, 2006); *See also*: (*City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 863 (8th Cir. 2005) ([I]t is well established that nonconflicting, nonexclusive easements across railroad property are not preempted if they do not hinder rail operations or pose safety risks.)

²⁷ Section 73.101, Florida Statutes; §5.39 *Florida Eminent Domain Practice and Procedure, 9th Edition*(2014)

Actions by Other Counties

Counties to the south of Brevard are looking at becoming actively involved in the Environmental Impact Statement process that All Aboard Florida/FEC is undertaking as a prerequisite to building an additional track. Those counties are also looking at possibly fighting any federal loan All Aboard America may be seeking to finance the construction costs for the additional track.

V. Options

1. The County's legal options include:
 - a. File suit for declaratory relief seeking irrevocable licenses or right to terminate crossing agreements; declaring the crossing agreements void; and seeking recoupment of maintenance expenses paid to FEC to the full extent allowable by law; and
 - b. Grant authority to file a slow take eminent domain action, should it become necessary.
2. The Board can instruct the federal lobbyist or retain outside counsel to fight any federal loan sought by AAF or FEC to finance All Aboard Florida. The Board should note that one county has spoken with a law firm who successfully fought a similar loan, however, the legal fees were approximately \$2 million.
3. The Board can become involved in fighting the Environmental Impact Statement FEC is required to present, although this office understands this process is already moving forward.
4. The Board can decline to take any action.

Lewis, Sally A

From: Mannier, Linda
Sent: Wednesday, July 02, 2014 4:30 PM
To: Lewis, Sally A
Subject: V.D.2 attachment
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Sally,
Please place this attachment with agenda item V.D.2
Thanks,
Linda

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