

Meeting Date
10/02/2014



AGENDA REPORT
BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

ADD ON

AGENDA	
Section	Unfinished Business
Item No.	IV A

SUBJECT:	ALL ABOARD FLORIDA ("AAF") AND FLORIDA EAST COAST RAILWAY ("FEC") EXTENSION OF TIME TO RESPOND TO JUNE 18, 2014 LETTER
DEPT/OFFICE	Brevard County Attorney's Office

Requested Action:

Requesting a decision regarding an offer from AAF's Counsel to extend the County's response deadline to the June 18, 2014 letter from October 31, 2014 to January 15, 2015.

Summary Explanation & Background:

On June 18, 2014, FEC and AAF sent a letter to Brevard County entitled: "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")." This letter gave Brevard County an 120 day deadline to respond to the offers and demands made within it. Since that time, AAF representatives have contacted the County staff exploring ways to resolve any impacts associated with the proposed AAF passenger service.

The Board of County Commissioners and staff have both consistently requested that more information regarding the specific costs of the AAF project be received and reviewed before the County responds to the June 18, 2014 letter. FEC and AAF have indicated that the cost information specifically requested by the County will be available in their 90% plans which the County is expected to receive in mid-December 2014. In light of this, counsel for AAF offered to extend the County's response deadline from October 31, 2014 to January 15, 2015, which would grant the Board of County Commissioners and staff time to review the cost information prior to responding to the June 18, 2014 letter.

The Board of County Commissioners can make the following decisions:

- (1) Accept the deadline extension and await receipt of the 90% plans prior to making a decision on how to respond to the June 18, 2014 letter; or
- (2) Do not accept the deadline extension and make a decision on how to respond to the June 18, 2014 letter without the cost information that will be provided in the 90% plans.

The County Attorney's Office recommends that the Board of County Commissioners selects the first option.

Fiscal Impact: FY 2014-2015: Undetermined

Contact Person: Scott Knox, County Attorney

Phone: 321-633-2090

Clerk to the Board Instruction:

Exhibits Attached:

- (1) June 18, 2014 letter from FEC and AAF
- (2) Email from Myles Tobin, Counsel for AAF, offering to extend response deadline to January 15, 2015.


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

County Manager's Office

County Attorney's Office:

Stockton Whitten, County Manager

Mel Scott, Assistant County Manager


 Scott Knox, County Attorney

DM



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Coral Gables, FL 33134
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VIA EMAIL

July 31, 2014

Mr. Scott Knox
Brevard County Attorney
2725 Judge Fran Jamieson Way
Viero, FL 32940

RE: Rail Crossing Legal Analysis

Dear Mr. Knox:

As you know, I am the General Counsel for All Aboard Florida. I appreciate the opportunity to provide my views with respect to the "legal analysis" memo which you provided to the Brevard County Board on July 2, 2014.

As a predicate to my comments on the memo, I think it might be useful to share a little bit of my background. I have worked for or on behalf of railroads for the last 30 years. I was a regulatory attorney for the Chicago and North Western Transportation Company (now Union Pacific), during which time I participated in the drafting of the current State of Illinois crossing statutes as well as the implementing regulations administered by the Illinois Commerce Commission.

I left Chicago and North Western (CNW) to become a chief regulatory and commercial attorney for the Illinois Central Railroad (IC) and ultimately became its General Counsel.

After the Illinois Central merger with Canadian National (CN), I was responsible for CN's U.S. legal affairs for many years before becoming a private practitioner. CN, IC and the former CNW are (or in the case of CNW, were) among the top ten largest railroads in the U.S.

Throughout my career I have participated in a host of litigated proceedings involving rail crossing openings and closures in a multitude of midwestern and southern states.

I am concerned that you have received some uninformed factual and legal advice, which has caused you to develop an analysis fraught with misinformation and tenuous conclusions. I would like to assist you in correcting this misinformation.

All Aboard Florida and Florida East Coast Railroad anticipate double tracking the rail line through Brevard County. As a part of this project we propose to spend hundreds of thousands of dollars per crossing in order to upgrade the warning devices (bells and lights), gates and signal systems at each of the crossings in the County. This is money which the County and other municipalities in Brevard County would otherwise have been obligated to pay pursuant to the crossing maintenance agreements executed by the railroad and the County or the applicable municipalities. In so doing we will effectively extend the life cycle of the crossing mechanisms, thereby deferring certain maintenance costs that the County would have otherwise been obligated to pay. This significant fact is nowhere to be found in your memo.

The memo also incorrectly suggests that the per crossing maintenance costs will double. That is similarly incorrect.

Will the County's crossing and maintenance costs increase? The answer is likely "yes." Attached is a Florida Department of Transportation chart establishing the relatively minimal signal inspection increases for crossings in various configurations.

Will the County's crossing surface maintenance costs increase? The answer is also likely "yes." Crossing surface maintenance is largely a function of vehicular traffic over the crossing. The more vehicles – the more maintenance. The trains themselves run on the rails so they don't have a huge impact on the crossing surface. Certainly, we estimate that the addition of a second track in some crossings will add approximately 20%, on average, to the annual crossing maintenance cost, but again, that is largely a function of vehicular traffic.

In the face of this potential huge expenditure by the railroad of monies that the County would have otherwise been obligated to spend, coupled with the modest maintenance cost increases, all we have requested is that the County execute amendments to the existing crossing agreements which incorporate All Aboard Florida into the agreements and effectively memorialize the benefits to be received by the County.

The memo, which suggests that the County should reject the existing Agreements, condemn easements over the Florida East Coast rail line, and cease contributions to the maintenance of these crossings because these contributions allegedly benefit the railroad and not the county, plainly and simply misses the mark.

As you and I briefly discussed, Federal Highway Administration Regulations explicitly state that projects for grade crossing improvements "are deemed to be of no ascertainable benefit to the railroads." 49 C.F.R. 646.210

Where Federal Highway Administration Funds are used for improvements at a crossing "there shall be no required railroad share of the costs." 23 U.S.C. 130(b); 49 C.F.R. 646.210(b).

Where Federal Highway Administration Funds are used for crossing improvements "a crossing agreement allocating maintenance responsibility is necessary." 49 C.F.R. 646.216

In this context, my preliminary research has determined that, since 1995, at least 8 of the 14 Brevard County crossings have been improved with these Federal Highway funds. Since that time, approximately 50 crossings in Brevard County have been improved with Federal Highway funds. Because many of the crossings in Brevard County were opened before 1995, I anticipate that further research will reveal that a substantially greater number of Brevard County crossings were the beneficiary of Federal Highway funds since the crossing improvement program was enacted in 1972. This funding program is one of the several fundamental bases for the maintenance agreements.

The memo also suggests that Article VII, Section 10 of the Florida Constitution prohibits the County from using its resources to "aid any corporation," as such resource can only be used for "County projects." However, as indicated above, federal law has determined that the crossing improvements are of no benefit to the railroads. Moreover, even for crossings where no federal funding was utilized, the maintenance agreements themselves constituted the consideration for the creation of the crossings, and those agreements continue to stand as the legal basis for existence of the crossings. Thus, the maintenance agreements formed the basis for the county and its citizenry obtaining the crossing

improvements, which would not otherwise have been funded by the federal government, the State of Florida, or both.

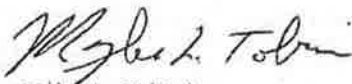
The memo suggests that Florida statute 335.141 "purports" to authorize maintenance contracts between municipalities and railroads. It doesn't "purport" to do that - it specifically reaffirms those maintenance agreements. And, Florida Constitution Article 1, Section 10, prohibits the legislature from interfering with pre-existing contractual obligations.

The memo mentions several eminent domain cases involving grade crossings, including an 1897 case focused on Illinois. However, what the memo omits is that all of these cases predated legislative enactments which invested the Departments of Transportation or Public Service Commissions in various states with the exclusive authority over the opening, closing, and overall administration of grade crossings. As an example, in 1972 the Florida Department of Transportation was granted "regulatory authority overall public railroad crossings in the State." Fla. Stat. Section 338.21 (3).

Consequently, the suggestion that any county or municipality can take unilateral action with respect to crossings, simply does not comport with applicable law. The crossing maintenance agreements at issue in the memo form the basis for the creation of, and continued operation of, the crossings encompassed by those agreements. Termination of those agreements presents risk and uncertainty with respect to the status of those crossings. We believe it is in the County's and the railroads' best interest to work together to improve the warning devices and other features of these crossings in a way which maximizes benefits and opportunities for all parties.

I look forward to discussing this matter with you further.

Very truly yours,



Mytes L. Tobin*
General Counsel

**Member of the Illinois Bar only, and not a member of the Florida Bar*

**SCHEDULE OF ANNUAL COST OF AUTOMATIC
HIGHWAY GRADE CROSSING TRAFFIC CONTROL DEVICES**

STANDARD 2 QUADRANT SIGNAL INSTALLATIONS

Annual Maintenance Cost Exclusive of Installation

<u>CLASS</u>	<u>DESCRIPTION</u>	<u>COST*</u>
I	Flashing Signals – One Track	\$2,256.00
II	Flashing Signals – Multiple Tracks	\$2,985.00
III	Flashing Signals and Gates – One Track	\$3,402.00
IV	Flashing Signals and Gates – Multiple Tracks	\$4,272.00

3 OR 4 QUADRANT SIGNAL INSTALLATIONS

Annual Maintenance Cost of Installation

<u>CLASS</u>	<u>DESCRIPTION</u>	<u>COST*</u>
III	Flashing Signals and Gates – One Track	\$6,726.00
IV	Flashing Signals and Gates – Multiple Tracks	\$8,442.00

AUTHORITY: FLORIDA ADMINISTRATIVE RULE: 14-57.011
Public Railroad- Highway Grade Crossing Costs

F. A. RULE EFFECTIVE DATE: July 22, 1982

GENERAL AUTHORITY: 334.044, F. S.

SPECIFIC LAW IMPLEMENTED: 335.141, F. S.

*This schedule was effective July 1, 2011, and will be reviewed every 5 years and revised as appropriate based on the Consumer Price Index for all Urban Consumers published by the U.S. Department of Labor.

Location	MILEPOST	Street Name	AAR/DOT#	NUMBER TRACKS	SIDE TRACKS	LENGTH	TYPE	Agreement Holder	License Agreement	Last Rebuild
Cocoa	170+2981	Michigan Avenue	272092P	1	0	74	T	Brevard County	11/25/70	6/13/11
Cocoa	171+2728	Dixon Boulevard	272095K	1	0	74	T	Brevard County	3/5/94	8/21/04
Rockledge	177+4924	Barnes Boulevard	272108J	1	0	90	O	Brevard County	10/5/09	6/21/10
Bonaventure	179+742	Carver Street	272109R	1	0	34	T	Brevard County	3/15/88	4/16/12
Bonaventure	179+2096	Ansini Road	272110K	1	0	24	T	Brevard County	1/25/66	2/13/06
Bonaventure	180+1465	Viera Boulevard	272976W	1	0	144	T	Brevard County	9/10/91	6/28/10
Pineda	182+3422	Suntree Boulevard	272115U	1	0	84	T	Brevard County	1/16/80	5/21/07
Pineda	184+2687	Pineda Causeway	272863R	1	0	90	O	Brevard County	12/16/08	4/24/09
Melbourne	189+3584	Aurora Road	272122E	1	0	104	T	Brevard County	8/20/91	4/16/07
Melbourne	190+3040	Sarno Road	272125A	1	0	64	T	Brevard County	12/14/82	4/5/05
Grant Valkaria	208+681	Senne Road	272154K	1	0	34	T	Brevard County	2/8/90	4/27/04
Micco	208+5229	Barefoot Boulevard	272155S	2	0	94	T	Brevard County	2/19/59	7/24/02
Micco	209+1239	Micco Road	272156Y	2	0	34	T	Brevard County	5/11/67	4/15/04
Micco	211+3210	Holly Street	272157F	1	0	24	T	Brevard County	3/4/65	5/25/04



RAILWAY

Robert B. Ledoux

Senior Vice President, General Counsel
and Corporate Secretary

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, L.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