



# Florida Department of Transportation

JEB BUSH  
GOVERNOR

605 Suwannee Street  
Tallahassee, FL 32399-0450

DENVER J. STUTLER, JR.  
SECRETARY

October 21, 2005

FILED  
05 OCT 21 PM 12:52  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

Honorable Don W. Davis  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550

**CITY OF JACKSONVILLE, Petitioner, vs.  
DEPARTMENT OF TRANSPORTATION, Respondent,  
and  
KEVIN McLAUGHLIN  
and FLORIDA EAST COAST RAILWAY, LLC, Intervenors.  
DOAH CASE NO.: 04-4577  
DOT CASE NO.: 05-382**

DWD  
Closed

Dear Mr. Davis:

Enclosed is a copy of the Order of Dismissal, filed October 21, 2005, in the above-styled case.

Sincerely,

*James C. Myers*  
James C. Myers  
Clerk of Agency Proceedings  
(850) 414-5393

jcm:m

Attachment(s)

STATE OF FLORIDA  
DEPARTMENT OF TRANSPORTATION  
Haydon Burns Building  
605 Suwannee Street  
Tallahassee, Florida

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

**CITY OF JACKSONVILLE,**

**Petitioner,**

**vs.**

**DOAH CASE NO.: 04-4577**

**DOT CASE NO.: 04-123**

**DEPARTMENT OF TRANSPORTATION,**

**Respondent,**

**and**

**KEVIN McLAUGHLIN and FLORIDA  
EAST COAST RAILWAY, L.L.C.,**

**Intervenors.**

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**FINAL ORDER**

This proceeding was initiated by the filing of a Petition for Administrative Hearing on December 8, 2004, by the **Petitioner, CITY OF JACKSONVILLE** (hereinafter **JACKSONVILLE**), pursuant to Section 120.57, Florida Statutes, in response to a Notice of Intent to Permit closure of a railroad crossing dated November 17, 2004, by the **Respondent, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**). On December 21, 2004, the matter was referred to the Division of Administrative Hearings (hereinafter **DOAH**) for assignment of an administrative law judge and a formal hearing.

A formal administrative hearing was held in this case in Jacksonville, Florida, on June

14 and 15, 2005, before the Honorable Don W. Davis, a duly appointed administrative law judge. Appearances on behalf of the parties were as follows:

For Petitioner: Thomas M. Beverly, Esquire  
Assistant General Counsel  
City of Jacksonville  
117 West Duval Street, Suite 480  
Jacksonville, Florida 32202

For Respondent: Bruce R. Conroy, Esquire  
Chief Administrative Law Counsel  
Erik R. Fenniman, Esquire  
Assistant General Counsel  
Department of Transportation  
605 Suwannee Street, M.S. 58  
Tallahassee, Florida 32399-0458

For Intervenor Florida East Coast Railway:  
Eric L. Leach, Esquire  
Milton, Leach, Whitman, D'Andrea,  
Charek, and Milton, P.A.  
815 South Main Street, Suite 200  
Jacksonville, Florida 32207

For Intervenor Kevin McLaughlin:  
Kevin McLaughlin, Pro Se  
1622 Landon Avenue  
Jacksonville, Florida 32207

#### STATEMENT OF THE ISSUE

As stated by the administrative law judge in his Recommended Order, the issue presented was:

Whether Respondent[, ] Department of Transportation (DOT)[, ] may lawfully issue a permit authorizing Florida East Coast Railway (FEC) to close the railroad-highway grade crossing (the Crossing) located at Landon Avenue in Jacksonville, Florida.

## BACKGROUND

On July 14, 2002, **Intervenor, KEVIN McLAUGHLIN** (hereinafter **McLAUGHLIN**), filed an application with the **DEPARTMENT** to close a public railroad-highway grade crossing located in Jacksonville, Florida. On November 13, 2004, the **DEPARTMENT** issued a Notice of Intent to Issue Permit to close the railroad-highway grade crossing (the Crossing) at Landon Avenue, Jacksonville, Florida. On December 8, 2004, **JACKSONVILLE** filed a Petition for Administrative Hearing. The matter was referred to DOAH on December 21, 2004, and was assigned to Judge Davis. The case was set for hearing and discovery ensued. On December 30, 2004, **Intervenor, FLORIDA EAST COAST RAILWAY, L.L.C.** (hereinafter **FEC**), filed a Motion to Intervene; and on January 3, 2005, **McLAUGHLIN** filed a motion to intervene. Both motions were granted on March 28, 2005. On January 24, 2005, a Notice of Hearing was issued scheduling the hearing for June 14 through 17, 2005, in Jacksonville, Florida.

At the hearing, **JACKSONVILLE** presented the testimony of Richard McCubbin, Chief of Traffic Engineering at the City of Jacksonville, David B. Solomon, Transportation Director for the Duval County School Board, and Lorin Mock, District Chief, Jacksonville Fire and Rescue Department; and offered Petitioner's Exhibits 1 through 4, which were admitted into evidence. **FEC** presented the testimony of Kevin McLaughlin, Jerry W. Hall, Sr., Webster Snapp, Julie Thompson, Katherine McFarlane, Charles A. Stone, and Lynn Westbrook; and introduced the deposition of Jacksonville City Council member, Arthur Shad, and Intervenor's Exhibits 1 through 27, which were admitted into evidence. The **DEPARTMENT** presented the testimony of Janice Bordelon and G. Rex Nicholson, an expert

witness; and offered Respondent's Exhibits 1 through 17, of which Exhibits 1 through 9 and 11 through 17 were admitted into evidence.

The transcript of the hearing was filed on July 5, 2005. On July 15, 2005, the DEPARTMENT, FEC, and McLAUGHLIN each filed a Proposed Recommended Order. On July 18, 2005, JACKSONVILLE, filed its Proposed Recommended Order. On August 5, 2005, Judge Davis issued his Recommended Order. On August 19, 2005, JACKSONVILLE filed exceptions to the Recommended Order. FEC and MCLAUGHLIN filed their responses to JACKSONVILLE'S exceptions on August 26, 2005. The DEPARTMENT filed its responses to JACKSONVILLE'S exceptions on August 29, 2005.

#### EXCEPTIONS TO RECOMMENDED ORDER

JACKSONVILLE'S first exception is to that portion of Finding of Fact 9, which reads:

The expert testimony of Nicholson that grade separation is not feasible, and that [the] **only way to improve safety at the Crossing is to proceed with closure**, is un rebutted.<sup>1</sup>

JACKSONVILLE asserts that this finding misconstrues the applicable legal standard of Rule 14-57.012(1), Florida Administrative Code (2005),<sup>2</sup> which, it is asserted, provides that the

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<sup>1</sup> Bold type in any material quoted from the administrative law judge's Recommended Order indicates that portion of the finding or conclusion which JACKSONVILLE asserts is erroneous. Bracketed material is supplied. Reference to the transcript of the hearing will be in the form of (TR:) followed by the appropriate page number(s).

<sup>2</sup> Rule 14-57.012, Florida Administrative Code, may be referred to herein by its full citation or as "the Rule."

objective of the **DEPARTMENT** is to reduce the accident frequency and severity of accidents at railroad-highway grade crossings. **JACKSONVILLE** asserts that nowhere does the Rule provide that closure may be ordered upon a finding that it is the “only way to improve safety at the Crossing.” **JACKSONVILLE** states that this distinction is important because safety could always be improved through closure (thus eliminating any statistical chance of an accident) regardless of whether a crossing is actually dangerous and without considering the crossing’s actual accident history which, in the instant case, includes only one previous, non-injury accident 30 years ago. **JACKSONVILLE** asserts that ordering closure as the “only way to improve safety” is not authorized by the Florida Administrative Code.

**JACKSONVILLE** offers as grounds for its first exception the facts that the Crossing is maintained pursuant to a License Agreement between **FEC** and **JACKSONVILLE**; that the License Agreement reserves to **FEC** the right to perform all maintenance and construction work at the Crossing for a distance of 60 feet extending easterly and westerly across the tracks; and that the License Agreement obligates **JACKSONVILLE** to pay for all maintenance and construction work on the Crossing and for any public improvements installed on or within 200 feet of the Crossing.

Upon review of the record in its entirety, it must be concluded that the statement in Finding of Fact 9 which reads: “[t]he expert testimony of Nicholson that grade separation is not feasible, and that [the] only way to improve safety at the Crossing is to proceed with closure, is un rebutted” is a correct statement and supported by the record. **JACKSONVILLE** did not offer any expert witness in rail safety and operations. **JACKSONVILLE’S** argument to support this exception does not rebut the competent, substantial evidence in the record. To

the extent that the exception challenges the intent of Rule 14-57.012(1), Florida Administrative Code (2005), it is not pertinent to whether Finding of Fact 9 is supported by competent, substantial evidence in the record.

In addition, Mr. Nicholson testified as an expert witness in forensic engineering, and rail safety and design, as well as highway safety and design. Mr. Nicholson also testified that after the analysis of whether a grade separation was a feasible alternative, the next step was to apply the closure analysis to the Crossing. In his opinion, grade separation was not feasible at Landon Avenue. Mr. Nicholson further testified that there were no other alternatives to closure that are feasible or reasonable at Landon Avenue. Finding of Fact 9 is supported by competent, substantial evidence and cannot be disturbed.

The **DEPARTMENT** cannot set aside findings of fact or revisit an administrative law judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown v. Criminal Justice Standards & Training Comm'n, 667 So. 2d 977, 979 (Fla. 4th DCA 1985); Heifetz v. Dep't of Business Reg., 475 So. 2d 1277, 1281-1282 (Fla. 1st DCA 1985).

**JACKSONVILLE'S** first exception is rejected.

**JACKSONVILLE'S** second exception is to that portion of Finding of Fact 9, which reads:

Nicholson's testimony further establishes that **Landon Avenue is also a safety risk because street parking narrows the 20-foot wide Landon Avenue.**

**JACKSONVILLE** asserts that the objective of Rule 14-57.012, Florida Administrative Code, is "to reduce the accident frequency and severity at public railroad-highway grade crossings"

and that the reduction of parking or other congestion up and down Landon Avenue is not authorized by the Rule as a criterion for consideration.

Review of the record establishes that Mr. Nicholson testified that on-street parking on this narrow roadway contributes to vehicle weaving which, in the approach to a crossing, increases the opportunity for collisions at the Crossing. This portion of Finding of Fact 9 is, therefore, supported by competent, substantial evidence.

**JACKSONVILLE'S** second exception is rejected.

**JACKSONVILLE'S** third exception is to that portion of Finding of Fact 12, which reads:

**Landon Avenue is a tree-lined, residential street only 20 feet wide with a blind turn as the street approaches the track from the East.**

**JACKSONVILLE** argues that Landon Avenue traverses the tracks almost at right angles in an east-west direction, that the curve or "turn" in Landon Avenue is well back from the Crossing, and that the curve does not block the view of a driver approaching from the east. This exception asserts that the finding that there is a "blind turn" as Landon Avenue approaches the Crossing from the east is contradicted by the manifest weight of the evidence.

Intervenor's Exhibits 3 and 4, and the unrebutted testimony of **McLAUGHLIN** constitute competent, substantial evidence that there is only 100 to 150 feet from the point at which a vehicle approaching the Crossing emerges from the curve in Landon Avenue, and that such a short distance creates a safety concern at the Crossing. **McLAUGHLIN'S** testimony and the exhibits presented support the administrative law judge's finding in this regard. This portion of Finding of Fact 12 is supported by competent, substantial evidence and cannot be



disturbed.

**JACKSONVILLE'S** third exception is rejected.

**JACKSONVILLE'S** fourth exception is to that portion of Finding of Fact 12, which reads:

**Residents park in the street, and Jacksonville has proposed traffic-calming devices on the street.**

**JACKSONVILLE** asserts that this finding implicitly endorses closure of railroad-highway grade crossings as a traffic calming measure, and that traffic calming is not a permissible criterion for crossing closure under applicable law, citing Rule 14-57.012, Florida Administrative Code.

Competent, substantial evidence in the record establishes that more than 50 residents of Landon Avenue, from both sides of the track, signed a petition for the implementation of Traffic Calming Techniques at Landon Avenue, which technique was identified as Railroad Closure. The testimony of **JACKSONVILLE'S** Public Works Director that **JACKSONVILLE** had proposed traffic calming measures at Landon Avenue provides competent, substantial evidence to support Finding of Fact 12. **JACKSONVILLE'S** proposal of traffic calming measures, including closure, falls within the safety criterion of Rule 14-57.012, Florida Administrative Code, in evaluation of a site for closure. This portion of Finding of Fact 12 is supported by competent, substantial evidence and cannot be disturbed.

**JACKSONVILLE'S** fourth exception is rejected.

**JACKSONVILLE'S** fifth exception is to that portion of Finding of Fact 13, which reads:

**For the same reasons the road is unsafe for speeding impatient motorists, it is unsafe for an emergency vehicle cut-through.**

**JACKSONVILLE** asserts that the objective of Rule 14-57.012, Florida Administrative Code, is “to reduce the accident frequency and severity at public railroad- highway grade crossings” and that while deterring speeders on Landon Avenue is desirable, techniques other than crossing closure are available to achieve this goal. According to **JACKSONVILLE**, there is no evidence in the record that Landon Avenue is unsafe to emergency vehicles.

The record contains competent, substantial evidence that, due to its narrow width and parking patterns, conditions on Landon may encourage vehicle weaving, which does not create a safe approach to the Crossing for emergency vehicles any more than it does for passenger vehicles. That same evidence relates to the consideration of whether closing such a road would create an excessive restriction to emergency type vehicles. The record establishes that Landon Avenue is a tree-lined, residential street only 20 feet wide, with a turn as the street approaches the track from the east. For the same reasons the evidence supports the finding that the road is unsafe for speeding motorists, the evidence supports the finding that it is unsafe for an emergency vehicle. The same safety analysis of a crossing located on a 20 foot wide street, with parking on the street, an elevated curved double-track crossing, and sight obstructions applies to the analysis of the safety of the Crossing for high speed emergency vehicles and whether closing of the Crossing imposes any excessive restriction on those emergency vehicles.

**JACKSONVILLE’S** fifth exception is rejected.

**JACKSONVILLE’S** sixth exception is to that portion of Finding of Fact 14, which

reads:

**As Landon Avenue approaches the track heading west, from Kings Road, the road turns to the southwest immediately before the Crossing to create a blind corner where vehicles are unable to see an approaching train.**

In this exception, JACKSONVILLE essentially challenges the same factual finding set forth in this exception, which was rejected herein.

The DEPARTMENT previously addressed JACKSONVILLE'S position in response to its third exception. The DEPARTMENT'S analysis of JACKSONVILLE'S argument in this regard as set forth above is adopted and incorporated herein.

JACKSONVILLE'S sixth exception is rejected.

JACKSONVILLE'S seventh exception is to that portion of Finding of Fact 15, which reads:

**Closure of the Crossing will effectuate the policy of improved safety at railroad crossings by eliminating the chance for train and car collisions.**

JACKSONVILLE takes exception to this finding, asserting that closure of the Crossing would not eliminate or reduce the number of vehicles crossing the tracks, but would simply divert those vehicles to other more hazardous crossings.

Review of the record establishes that Finding of Fact 15 is supported by competent, substantial evidence that closure of the Crossing will eliminate the chance for train-vehicle collisions. Mr. Nicholson testified as an expert in Rail Safety and Operations, that diverting traffic onto adjacent roads would enhance traffic safety. He also testified that closure eliminates one place where a vehicle and a train can attempt to occupy the same space at the

same time, and that the United States Federal Government has a program named "Gradec" which employs similar logic. The underlying basis for Mr. Nicholson's testimony was that a certain number of cars are already at risk at the adjacent crossings and that same number will be at risk at any given time even if more traffic is diverted there. The findings expressed in Finding of Fact 15 are supported by competent, substantial evidence and cannot be disturbed.

**JACKSONVILLE'S** seventh exception is rejected.

**JACKSONVILLE'S** eighth exception is to that portion of Finding of Fact 18, which reads:

Jerry Hall, Sr., FEC's director of claims, narrated a video in evidence in this proceeding that further corroborates the train operators' vantage point and **demonstrates how the combination of double tracks and lack of site [sight] distance in the super-elevated banked curve create a safety hazard at the Crossing.**

**JACKSONVILLE** asserts that the video showed that the visual obstruction of the Crossing to southbound trains was substantially caused by tall vegetation allowed to grow within a few feet of the track on FEC's right of way and that inadequate sight lines is not a valid reason to close a crossing when visibility could be improved if FEC would cut the vegetation on its right of way. **JACKSONVILLE** further asserts that train sight distance is irrelevant because automated warning devices at the Crossing alert drivers when it is unsafe to cross the tracks. The administrative law judge's finding that "the combination of double tracks and lack of site distance in the super-elevated banked curve create a safety hazard at the Crossing," is not contradicted by the evidence cited by **JACKSONVILLE**. Rather, competent, substantial evidence supports the finding that a safety hazard is created by the combination of factors of short sight distance and track configuration, the curve and super-elevation of the track, and the

inability of a train traveling 25 miles per hour to stop in the 457 to 522 feet available to avoid a collision at the Crossing. Finding of Fact 18 is supported by competent, substantial evidence and cannot be disturbed.

**JACKSONVILLE'S** eighth exception is rejected.

**JACKSONVILLE'S** ninth exception is to that portion of Finding of Fact 21, which reads:

**Further, the Crossing is a present safety concern for residents of Landon Avenue because it is used by cars and motorcycles as a ramp to "get air" in conjunction with such motorists speeding through the neighborhood to avoid traffic from other Jacksonville streets caused frequently by trains at other nearby intersections.**

**JACKSONVILLE** challenges this finding and asserts that the objective of Rule 14-S7.012, Florida Administrative Code, is "to reduce the accident frequency and severity at public railroad-highway grade crossings" and that increased law enforcement and other techniques are available to achieve this goal.

In this exception, **JACKSONVILLE** does not challenge the competent, substantial evidence underlying Finding of Fact 21 but, instead, takes exception to the use of those facts in applying the Rule. The safety criterion of the Rule extends to safety issues immediately at a crossing and adjacent to a crossing resulting from drivers' use of a crossing. Competent, substantial evidence by several witnesses support this portion of Finding of Fact 21.

**JACKSONVILLE'S** ninth exception is rejected.

**JACKSONVILLE'S** tenth exception is to that portion of Finding of Fact 21, which reads:

In addition to the accident noted above, Landon Avenue residents testified that there have been several near-miss incidents at the Crossing, **including an unreported accident in which a speeding car hit a Landon Avenue girl.**

**JACKSONVILLE** asserts that this finding should be rejected because the only testimony given at the hearing regarding a collision between a car and a child was by Katherine McFarlane, a Landon Avenue resident, and that there was no evidence that this accident had anything to do with the Crossing or with rail traffic.

Review of the record establishes that the basis asserted by **JACKSONVILLE** for this exception is incorrect. Webster Snapp also testified that a neighbor's daughter was hit by a car which speeded up because the crossing gates were coming down. Julie Thompson testified regarding near-accidents associated with high-speed motorists. **JACKSONVILLE** does not challenge the evidence underlying this finding so much as the application of that finding to analysis of the Rule criteria. Competent, substantial evidence supports Finding of Fact 21.

**JACKSONVILLE'S** tenth exception is rejected.

**JACKSONVILLE'S** eleventh exception is to that portion of Finding of Fact 23, which reads:

Closure of the Crossing would disperse traffic onto **three** different roads: Atlantic Boulevard, Hendricks Avenue and **Kings Road.**

**JACKSONVILLE** challenges the finding that traffic would be dispersed onto Kings Road if the Crossing were closed. **JACKSONVILLE** asserts that Atlantic Boulevard and Hendricks Avenue serve as alternate crossing routes over the railroad tracks, and would absorb the traffic that presently uses Landon Avenue, and that Kings Road is several blocks east of the Crossing,

running essentially parallel to the railroad tracks.

The record establishes that the dispersal of traffic onto other roadways and Finding of Fact 23, in this regard, are supported by the evidence. Ms. Bordelon testified that the closure of the road would disperse traffic onto different roads, specifically mentioning that those roads were not limited to Atlantic and Hendricks. JACKSONVILLE Director of Public Works, Lynn Westbrook, testified that traffic could safely be rerouted to other roads in the area, which he agreed included Kings Road. Competent, substantial evidence supports this portion of Finding of Fact 23.

JACKSONVILLE'S eleventh exception is rejected.

JACKSONVILLE'S twelfth exception is to that portion of Finding of Fact 23, which reads:

Regardless of the [safety] index ratings for these roads, DOT's goal of eliminating the interaction of vehicular traffic with rail traffic would be accomplished [by closure]... It would enhance safety to have traffic crossing the railroad tracks at Hendricks Avenue and Atlantic Boulevard rather than at Landon.

JACKSONVILLE essentially repeats the exception made in its exception and JACKSONVILLE'S discussion regarding that exception is incorporated herein.

Review of the Recommended Order establishes that the portion of Finding of Fact 23 quoted by JACKSONVILLE above includes these findings:

Hendricks Avenue and Atlantic Avenue are both four-lane main artery roads. These are safer roads, with non-elevated crossings, that have good sight distance for both train operators and motorists. Motorists do not go around the gates at a four-lane road as often as they do on a two-lane residential street.

The record contains competent, substantial evidence that motorists are safer using the

Hendricks and Atlantic crossings. Additionally, the DEPARTMENT's expert, Mr. Nicholson, testified that by eliminating a crossing, the DEPARTMENT would be eliminating a possible point where a train and vehicle could collide. Findings of fact supported by competent, substantial evidence cannot be disturbed.

**JACKSONVILLE'S** twelfth exception is rejected.

**JACKSONVILLE'S** thirteenth exception is to that portion of Finding of Fact 24, which reads:

**Additionally, traffic safety would be enhanced by diversion of traffic to Hendricks Avenue and Atlantic Boulevard, thus eliminating one place where a vehicle and a train can try to occupy the same space at the same time and lessening the probability of a collision; . . .**

**JACKSONVILLE** asserts that closure of the Crossing would not eliminate or reduce the number of vehicles that cross the tracks, but would divert those vehicles which would have used Landon Avenue to other crossings. This exception essentially duplicates

**JACKSONVILLE'S** seventh and twelfth exceptions.

As set forth above in its analysis of **JACKSONVILLE'S** seventh and twelfth exceptions, there is competent, substantial evidence to support the administrative law judge's findings in this regard. The DEPARTMENT cannot set aside findings of fact or revisit an administrative law judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282. Moreover, the DEPARTMENT cannot properly revisit an administrative law judge's weight and credibility determinations. Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of an administrative law judge. Boyd v.



Dep't of Revenue, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996); Heifetz, 475 So. 2d at 1280-1281. Finding of Fact 24 is supported by competent, substantial evidence and cannot be disturbed.

**JACKSONVILLE'S** thirteenth exception is rejected.

**JACKSONVILLE'S** fourteenth exception is to that portion of Finding of Fact 25, which reads:

**The closure of the Crossing would decrease operating expenses for FEC and Jacksonville.**

**JACKSONVILLE** challenges this finding, asserting that Rule 14-57.012(2)(c)(4), Florida Administrative Code, lists the effect of closure on "rail operations and expenses" as a criterion for consideration in a closure application but not the effect on expenses to a city such as **JACKSONVILLE**. **JACKSONVILLE** points out that it has stated its willingness to bear the expense of maintaining the Crossing through execution of a License Agreement with **FEC**.

**JACKSONVILLE** does not dispute whether any competent, substantial evidence supports the finding, but objects to an interpretation of the Rule which would include consideration of the effect on expenses of a party other than the railroad. The Rule does not limit the criterion to "rail expenses."

The evidence establishes that if the Crossing were closed, the expenses of maintaining the signal equipment and maintenance of the Crossing would be avoided by both **FEC** and **JACKSONVILLE**. Mr. Hall testified that the City is obligated under the License Agreement with **FEC** to pay half the costs of annual maintenance and would pay cost of labor, materials, and equipment furnished by **FEC** in doing construction at the Crossing. Mr. McCubbin, Chief

of Traffic Engineering for JACKSONVILLE, indicated that the closure would result in “substantial savings” to JACKSONVILLE. Mr. Westbrook, Director of Public Works for JACKSONVILLE, indicated that the closure would result in a savings of up to \$70,000.00 for the rehabilitation of the Crossing that is necessary every six or seven years. Mr. Hall testified that the closure of the crossing would decrease FEC’s and JACKSONVILLE’S liability and associated litigation costs.

The DEPARTMENT’S interpretation of statutory and administrative rule provisions over which it has substantial jurisdiction is entitled to great weight. DAB Constructors, Inc. v. Dep’t of Transp., 656 So. 2d 940, 944 (Fla. 1st DCA 1995); State Contracting & Eng’g Corp. v. Dep’t of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). Finding of Fact 25 of the Recommended Order is supported by competent, substantial evidence.

JACKSONVILLE’S fourteenth exception is rejected.

JACKSONVILLE’S fifteenth exception is to that portion of Finding of Fact 26, which reads:

To eliminate the elevated nature of the Crossing, the road approach would have to be raised to the level of the Crossing. Since the rail tracks are banked at a “superelevated curve” this would be a difficult task.

JACKSONVILLE asserts that there is no competent evidence in the record regarding the difficulty in raising the road bed to the level of the Crossing. JACKSONVILLE further asserts that the inquiry is not relevant since the License Agreement obligates JACKSONVILLE to pay for all maintenance and construction work on the Crossing and for any public improvements installed on or within 200 feet of the Crossing.

Competent, substantial evidence in the record supports the finding that removing the grade change of Landon as it approaches the Crossing would be difficult. Mr. Stone, FEC director of engineering, testified that because there is a curve in the track, the track must be angled and raised to prevent the train from derailing and to prevent undue wear and tear on the track. There is also record testimony that the tracks are banked at a "super elevated curve" which cannot be removed. A reasonable inference of difficulty arises from this evidence, and from the evidence that Landon Avenue is only twenty feet wide with residences along the roadway. A reasonable inference arises from this evidence that difficulty would occur in solving the problems created by any reconstruction of Landon in a manner which would change its elevation to allow it to meet the elevated crossing.

A reasonable inference also arises from the evidence that difficulty would be encountered in finding a way to keep the road from becoming a "barrier" in front of the residences along that very narrow corridor. A reasonable inference of difficulty arises from the evidence that further safety issues would be anticipated in such reconstruction relating to safety features for a portion of the roadway for vehicles using the now-elevated Landon Avenue. The fact that a witness for JACKSONVILLE offered that it would pay for any such construction does not negate the conclusion that the task of reconstructing Landon to remove the elevation differential would be difficult. The findings expressed in Finding of Fact 26 are supported by competent, substantial evidence.

**JACKSONVILLE'S** fifteenth exception is rejected.

**JACKSONVILLE'S** sixteenth exception is to that portion of Finding of Fact 29, which reads:

Closing the Crossing would save the railroad and Jacksonville operating expenses of maintaining the railroad. . . .

JACKSONVILLE asserts that closure of the crossing at Landon Avenue would have little, if any, effect on rail expenses and, therefore, does not justify closure of the Crossing.

JACKSONVILLE does not challenge the competent, substantial evidence underlying this finding, only the use of the finding in the final determination. Record evidence that closure would save operating expenses for both FEC and JACKSONVILLE is un rebutted. JACKSONVILLE points out in this exception that, under its License Agreement with FEC, JACKSONVILLE must reimburse FEC for all maintenance and construction work at the Crossing for a distance of 60 feet extending easterly and westerly across the tracks and for any public improvements installed within 200 feet of the Crossing. The License Agreement further obligates JACKSONVILLE to reimburse FEC for 50 percent of the annual cost of maintaining the warning devices at the Crossing. Whether, as JACKSONVILLE asserts, FEC's share of expenses represents an insignificant expense to FEC such that it does not justify closure has no bearing on the correctness of the Finding of Fact, but essentially challenges the use of that fact in the ultimate determination herein.

JACKSONVILLE further asserts in this exception that cost savings to JACKSONVILLE is not a subject of legitimate inquiry in this proceeding. JACKSONVILLE seeks an interpretation of Rule 14-57.012(2)(c)(4), Florida Administrative Code, in which "rail operations and expenses" is a criterion limited to the effect on expenses only to the railroad. This same argument was raised in exception 14 and the DEPARTMENT'S analysis and resolution of exception 14 above is incorporated herein. The

record contains competent, substantial evidence to support Finding of Fact 29.

**JACKSONVILLE'S** sixteenth exception is rejected.

**JACKSONVILLE'S** seventeenth exception is to that portion of Finding of Fact 32, which reads:

**. . . and the School Board Chairperson had no difficulty with such closure.**

**JACKSONVILLE** asserts that the finding was based upon a letter from School Board Chairperson Kris Barnes, dated October 27, 2003, in which she wrote, "I have been told that the school district would have no problem with the closing of this railroad crossing."

**JACKSONVILLE** further asserts that because Chairperson Barnes subsequently retracted this letter and requested that it not be considered in the closure analysis, the Finding of Fact is incorrect.

The record contains competent, substantial evidence that Ms. Barnes was not opposed to the closing of the Crossing, as found by the administrative law judge. Ms. Bordelon testified that she met with Ms. Barnes and, at the conclusion of the meeting, Ms. Barnes indicated her support for the closure. The record contains evidence that William Shad, **JACKSONVILLE** City Council member, was correctly quoted in a news article about submission to the Council of legislation for approval of the stipulation for three closures that: "[e]veryone from the sheriff's office, to public works, fire and rescue and the School Board had to approve their application before it could be submitted." Mr. Westbrook, the Director of Public Works for **JACKSONVILLE**, testified that in his opinion the Board's withdrawal of support for the closure was based on politics rather than on any factual input from any

**JACKSONVILLE** employee.

There is competent, substantial evidence to support the finding that the Duval County School Board Chairperson originally did not oppose the closing of the Crossing. Finding of Fact 32 is supported by competent, substantial evidence and cannot be disturbed.

**JACKSONVILLE'S** seventeenth exception is rejected.

**JACKSONVILLE'S** eighteenth exception is to that portion of Finding of Fact 33, which reads:

**There are 14 buses in the morning that come to Landon Middle School, and 16 buses in the afternoon that come to the school.**

**JACKSONVILLE** asserts that this finding is not supported by competent, substantial evidence and that the record shows a total of 30 school buses serve Landon Middle School twice each day. Of these, according to **JACKSONVILLE**, 14 buses cross the tracks at Landon Avenue in the morning and 16 buses cross the tracks at Landon Avenue in the afternoon.

**JACKSONVILLE** correctly recites the evidence. This portion of Finding of Fact 33 should be rejected as not supported by competent, substantial evidence, since the evidence was clear that 30 buses serve the school in the morning and in the afternoon.

**JACKSONVILLE'S** eighteenth exception is accepted and that portion of Finding of Fact 33 cited in **JACKSONVILLE'S** exception is rejected as not supported by competent, substantial evidence. The remainder of Finding of Fact 33 will not be disturbed.

**JACKSONVILLE'S** nineteenth exception is to that portion of Finding of Fact 34, which reads:

There are easily accessible alternative routes **that would not**

**disrupt the school or school bus operations and would result in a significant enhancement in safety.**

**JACKSONVILLE** asserts that the only competent evidence on this point was the testimony of Mr. Solomon, and that it establishes that the buses which cross the tracks at Landon in the morning and in the afternoon would be forced to cross the tracks at Atlantic Boulevard if the Crossing at Landon Avenue were closed. **JACKSONVILLE** further asserts that the evidence established that this would then force bus traffic onto either Hendricks, where congestion would occur, or Arcadia Place, a congested 20 foot wide street where the buses would be forced to negotiate a blind corner to access the student loading area on Minerva Avenue.

**JACKSONVILLE** asserts that the evidence showed this would be dangerous.

**JACKSONVILLE** also asserts that Mr. Solomon's testimony established that Arcadia Place is adjacent to the school's athletic field, making it hazardous for children to cross Arcadia Place to participate in after-school sports when school buses are present. In sum,

**JACKSONVILLE** asserts that closure of the Crossing would create traffic hazards that do not presently exist.

The closure analysis regarding school bus operations goes to the criteria of safety, alternate routes, and effect on operations. Mr. Solomon testified that there was a safety concern about vehicles trying to go around buses on Landon in the vicinity of the children. He testified that there are alternate routes of access to the school and that the buses could take the alternate route down Atlantic, make a right on Arcadia, then loop to Minerva. Mr. Solomon acknowledged that the buses now using Landon Avenue could use Arcadia or Hendricks or some other combination to cross the tracks to and from the school. He testified that at 7:00

a.m, and at 2:15 p.m, when the buses are operating, Arcadia does not have a lot of traffic on it. Mr. Solomon acknowledged that at one point every one of the buses that accesses the school is traveling on Atlantic Boulevard or they pass it. He testified that it is the school board's policy that the buses take all-weather roads and main roads. The evidence established that Landon Avenue is not a main road.

The testimony of Mr. Solomon and Mr. Nicholson provide competent, substantial evidence supporting that portion of Finding of Fact 34 that there are easily accessible alternate routes and that those routes are a significant enhancement in safety. Mr. Solomon provided competent, substantial evidence that buses already stack up on Landon Avenue. Mr. Nicholson testified that closure of the Landon Crossing would eliminate the possibility that stacked buses would be hit by the train.

The DEPARTMENT cannot set aside findings of fact or revisit the administrative law judge's resolution of evidentiary conflicts in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-282. Nor may the DEPARTMENT properly revisit administrative law judge's weight and credibility determinations. The agency has no authority to substitute its view of the evidence for that of an administrative law judge. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1280-1281. As there is competent, substantial evidence in the record to support a finding that there are easily accessible alternative routes that would not disrupt the school or school bus operations and which would result in an enhancement in safety, Finding of Fact 34 cannot be disturbed.

JACKSONVILLE'S nineteenth exception is rejected.

JACKSONVILLE'S twentieth exception is to that portion of Finding of Fact 37,



which reads:

**Jacksonville's Fire Chief Lorin Mock testified that . . . there "would be no issue at all in the crossing closure" if it were involved with fire responses using the Atlantic [Boulevard] crossing instead of the Crossing.**

JACKSONVILLE asserts that this finding is erroneous because Chief Mock's testimony that he would have no issue with the Crossing closure was expressly qualified by the assumption that the alternative crossings were not blocked by train traffic, which is a daily occurrence. According to JACKSONVILLE, it was erroneous for the administrative law judge to interpret Chief Mock's testimony as "having no issue at all" with the closure.

The record does not show that JACKSONVILLE'S assertion in this regard to be supported by testimony. However, this finding is erroneous for another reason. Chief Mock's quoted response actually came in response to questions about Fire Station 13, which is on the west side of the Crossing. When asked, "if we were talking about calls from this unit [referring to Station 13] to the west side of the Landon Avenue crossing, then there would be no issue at all in the crossing closure; is that right?" Chief Mock responded, "Yes, sir." (TR: 520; bracketed material supplied.) The record does not contain competent, substantial evidence that Chief Mock gave the quoted testimony in the context in which it was stated in Finding of Fact 37. Therefore, that portion of the finding characterizing the quoted statement should be rejected.

Chief Mock did qualify both an earlier answer about secondary responders using the Atlantic Avenue crossing and a later answer to a question about Fire Station 12 and its trucks taking an alternate route over Atlantic Boulevard to reach a Landon address, by his assent that

there were alternate routes and his agreement that there was no significant difference in travel time for the two routes, "providing there's no [train] blockage." (TR:514, 521) He agreed that if a train were blocking Atlantic, it would also be blocking Landon depending on the travel route, and that the alternative travel route times were all very similar.

The record establishes that the Landon Avenue-San Marco area is close to downtown Jacksonville and that there is overlapping fire and rescue coverage from Fire Station 12 and Fire Station 13. For Fire Station 13 to respond to a location on the opposite side of the tracks using the Crossing, the distance would be a bit less than a half-mile. Fire Station 13 would travel a little over a half-mile to get to that same location without using the Crossing and using Atlantic instead. Fire Station 12 would travel 1.4 miles to respond to a point on the other side of the tracks using the Landon crossing, whereas it would travel 1.5 miles using the alternate Atlantic avenue crossing to arrive at that same point. This evidence is both competent and substantial, and supports the remainder of Finding of Fact 37 that the closure would not substantially affect the response times for those stations. The administrative law judge gave later recognition, in Finding of Fact 38, to Chief Mock's opposition to the closure of the Crossing and any other crossing because of the "string of pearls" analogy, in which he expressed the belief that more crossings are better for providing opportunities to cross the tracks if one or more crossings are blocked. However, because the quoted testimony of Chief Mock is erroneously characterized in Finding of Fact 37 as relating to an alternative route over Atlantic, and the evidence does not support that characterization, that portion of Finding of Fact 37 cited by JACKSONVILLE should be rejected. The remainder of Finding of Fact 37 is supported by competent, substantial evidence and cannot be disturbed.

JACKSONVILLE'S twentieth exception is accepted, and that portion of Finding of Fact 37 quoted by JACKSONVILLE is rejected, for the reasons above.

JACKSONVILLE'S twenty-first exception is to that portion of Finding of Fact 39, which reads:

**The closure would not result in excessive restriction to the transportation of emergency vehicles.**

JACKSONVILLE asserts that of all the witnesses who testified at the hearing, Chief Lorin Mock was most qualified to render an opinion on whether closure would cause an excessive restriction to emergency vehicles. According to JACKSONVILLE, Chief Mock expressed the belief that "anything that causes an impediment to servicing public safety is something that's going to degrade public safety in that area" and that the crossings become important access points.

The record establishes that Mr. Nicholson testified that, based on the information he was provided and from his experience in rail crossings, since there was no appreciable difference in response times and distances, he did not see any excessive restriction to emergency vehicles. Chief Mock acknowledged the similarity in response times from the different fire stations using routes other than the Crossing. He also acknowledged the overlapping fire coverage, because fire stations are closer in the core city area, and because fire hydrants are available on both sides of the track.

The findings expressed in Finding of Fact 39 are supported by competent, substantial evidence and should not be disturbed. The DEPARTMENT cannot set aside findings of fact or revisit the administrative law judge's resolution of evidentiary conflicts in the absence of a

showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282. Nor may the DEPARTMENT properly revisit an administrative law judge's weight and credibility determinations. Heifetz, 475 So. 2d at 1281. Neither an agency nor a reviewing court has the authority to substitute its view of the evidence for that of the administrative law judge. Boyd, 682 So. 2d at 1118; Heifetz, 475 So. 2d at 1280-1281. Finding of Fact 39 is supported by competent, substantial evidence.

JACKSONVILLE'S twenty-first exception is rejected.

JACKSONVILLE'S twenty-second exception is to that portion of Conclusion of Law 45, which reads:

The Crossing has **significant safety hazards**, including;

(a) **visibility obstructions** for train crews and motorists;

JACKSONVILLE asserts that the conclusion that the Crossing has "significant safety hazards" is unsupported because only one accident has been recorded at the Crossing, in which no one was injured and which occurred when the signalization at the Crossing consisted of only crossbucks and lights. JACKSONVILLE further asserts that the video submitted by FEC showed that any visual obstruction to train crews was substantially caused by tall vegetation allowed to grow on FEC'S right of way, which would be FEC'S responsibility for removing. JACKSONVILLE submits that the testimony of Mr. Nicholson that automated warning devices at the Crossing alert drivers when it is unsafe to cross the tracks makes sight distance irrelevant.

By its exception, JACKSONVILLE is asking the DEPARTMENT to reweigh evidence, which it cannot do when a finding is supported by competent, substantial evidence.

This exception is also repetitive of exceptions 3, 6, and 8. The DEPARTMENT'S analysis and conclusions regarding those exceptions are adopted and incorporated herein. Moreover, the testimony of Mr. McLaughlin, Mr. Hall, and area residents supports the finding that the track curves as it approaches the Crossing, that the Crossing is super-elevated, that the track contains two main lines, that Landon Avenue curves as it approaches the Crossing, and that a building is present near the track which obstructs visibility. The fact that motorists often ignore the signals and crossing gates, electing to drive around them, supports a finding of a safety hazard in the curving double-track configuration of the Crossing. The record contains competent, substantial evidence serving as a factual basis for the Conclusion of Law.

Conclusion of Law 45, that there is a significant safety hazard due to visibility obstructions to train crews and motorists, is supported by competent, substantial evidence and directly relates to criteria listed in the Rule.

JACKSONVILLE'S twenty-second exception is rejected.

JACKSONVILLE'S twenty-third exception is to that portion of Conclusion of Law 45, which reads:

The Crossing has **significant safety hazards**, including:

....

**(d) Motor vehicles and motorcycles leaving the road surface due to the elevation at the Crossing;**

JACKSONVILLE asserts that the objective of Rule 14-57.012, Florida Administrative Code, is to reduce the accident frequency and severity at public railroad-highway grade crossings.

JACKSONVILLE asserts that the fact that cars and motorcycles sometimes leave the road surface at the Crossing is not relevant to an analysis under that Rule because cars and

motorcycles leaving the roadway surface do not contribute to train-vehicle accidents.

The Rule is not limited, as urged by JACKSONVILLE, only to reducing train-vehicle accidents nor only to a reduction in the frequency of accidents. The Rule states in pertinent part that its purpose is to “reduce the accident frequency and severity at public railroad-highway grade crossings and improve rail and motor vehicle operating efficiency.” The Rule further provides that criteria for closure include design of the crossing and design of the road approaches. The evidence was unrebutted that, due to the elevated, ramped configuration of the roadway approaches and the crossing itself, cars and motorcycles use the approach to the Crossing and the elevation of the Crossing to “catch air.” The evidence was unrebutted that this is a dangerous situation because once the vehicle or the motorcycle leaves the driving surface, it is not certain to come back down safely within the driving lane. There was also testimony that there are gouge marks in the pavement around the Crossing where the undercarriages of vehicles have scraped against the pavement.

The record contains competent, substantial evidence that the Crossing has significant safety hazards due to this situation. This conclusion is not negated or rendered erroneous, as JACKSONVILLE urges, by the evidence that FEC and JACKSONVILLE have a License Agreement under which FEC could contract for improvements to the Crossing and require JACKSONVILLE to pay for them.

JACKSONVILLE’S twenty-third exception is rejected.

JACKSONVILLE’S twenty-fourth exception is to that portion of Conclusion of Law 45, which reads:

The Crossing has **significant safety hazards**, including:

....  
**(e) School bus use of the Crossing;**

**JACKSONVILLE** asserts there is no competent evidence in the record to support the conclusion that the Crossing is dangerous to school buses and that testimony of Mr. Solomon that school buses have no difficulty going over the Crossing was unrebutted, thereby making this portion of Conclusion of Law 45 erroneous.

Testimony of area residents and Mr. Solomon established that the buses stack up on Landon Avenue while waiting for children. Mr. Nicholson testified that the stacking of buses on Landon Avenue could possibly result in a train-school bus collision. Residents testified that Landon Avenue is used as a high-speed cut through. Mr. Solomon testified that School Board policies provide that insofar as possible, buses are to be routed over main roads and all-weather roads and that Landon is not a main road. He testified that as bus supervisor he would try to avoid railroad crossings due to the potential for collision. He further agreed in his testimony that a safety concern exists when cars go around buses which are lined up on Landon Avenue.

Safety is the first criterion of a closure analysis under the Rule. The safety criterion set forth in the Rule apply to safety issues immediately at the crossing, adjacent to the crossing, and in the approaches to the crossing resulting from vehicular use of the crossing. The record contains competent, substantial evidence, which was properly applied within the Rule analysis, to support Conclusion of Law 45 that a safety hazard is present at the Crossing by virtue of school bus use of the Crossing.

**JACKSONVILLE'S** twenty-fourth exception is rejected.

JACKSONVILLE'S twenty-fifth exception is to that portion of Conclusion of Law 45, which reads:

The Crossing has **significant safety hazards**, including:

....

(f) **Narrow road width;**

JACKSONVILLE asserts that this conclusion is erroneous because it relates to the width of the roadway up and down Landon Avenue and not at the Crossing itself. JACKSONVILLE urges that the objective of Rule 14-57.012, Florida Administrative Code, is only to reduce accident frequency and severity at public railroad-highway grade crossings and that road width along Landon Avenue is not relevant to this objective.

The Rule is not limited, as urged by JACKSONVILLE, to reducing accidents within a crossing. The Rule states in pertinent part that its purpose is to "reduce the accident frequency and severity at public railroad-highway grade crossings and improve rail and motor vehicle operating efficiency." The Rule further provides that criteria for closure include design of the crossing and design of the road approaches.

The evidence is un rebutted that Landon Avenue is a narrow, 20 foot wide road and would not meet today's standards for city road construction. Testimony of area residents and Mr. Solomon indicates that buses stack up on Landon Avenue while waiting for children. Mr. Nicholson testified that vehicles parked on the sides of Landon Avenue contribute to the weaving of vehicles using Landon, which increases the chance for a collision in the approach to the Crossing. Residents also testified that Landon Avenue is used as a high-speed cut through and that motorists sometimes speed to beat a train. This combination of narrow road



width, speed, and weaving on the approach to the tracks is evidence of a safety hazard which includes the narrow road width in the road approaches to the Crossing. Consideration of the road approach is one of the listed Rule criteria for closure.

The Rule specifically and expressly requires consideration of safety and the design of a crossing and the road approaches. Competent, substantial evidence establishes that road width, combined with the other aspects of road usage by motorcycles, cars, buses, and pedestrians, forms the basis for the conclusion that there are significant safety hazards associated with the Crossing. The DEPARTMENT'S interpretation of statutory and administrative rule provisions over which it has substantial jurisdiction is entitled to great weight. That portion of Conclusion of Law 45 challenged by exception 25 is supported by competent, substantial evidence, and correctly applies the criteria contained in the Rule.

**JACKSONVILLE'S** twenty-fifth exception is rejected.

**JACKSONVILLE'S** twenty-sixth exception is to that portion of Conclusion of Law 45, which reads:

The Crossing has **significant safety hazards**, including:

.....

(g) **High speed motor vehicle traffic through a residential neighborhood.**

**JACKSONVILLE** asserts that the safety of the Crossing cannot properly be evaluated by consideration of high speed or reckless driving along Landon Avenue because other techniques are available to reduce or eliminate speeding or reckless driving. **JACKSONVILLE** asserts that highway-railroad crossing closure as a general traffic calming measure is not authorized by the Florida Administrative Code, and would be illegal.

Competent, substantial evidence and testimony are contained in the record to support the finding that Landon Avenue is 20 feet wide and would not meet current standards for city road construction. Residents have testified that Landon Avenue is used as a high-speed cut through and that motorists sometimes speed to beat the train through the Crossing.

Competent, substantial evidence exists in the record that Landon Avenue curves as it approaches the Crossing and that the train tracks also curve coming into the Crossing.

Competent, substantial evidence exists that sight distance is limited both to train personnel and to motorists. Speeding vehicles in the approach to this super-elevated crossing under these circumstances create a safety hazard at the Crossing. The Rule criteria includes the design of the crossing and the road approaches, which criteria are broad enough to encompass the effects upon the safety of a crossing caused by speeding or reckless drivers approaching a crossing. The existence of other ways to reduce the speeding does not negate the facts nor the proper application of the Rule to those facts.

The safety criterion of the Rule is broader than simple consideration of safety immediately within the Crossing. The criterion includes issues of safety related to the crossing and the approaches to the crossing, with objectives which include both rail and motor vehicle operating efficiency. The **DEPARTMENT'S** interpretation of a statute or an administrative rule provision over which it has substantial jurisdiction are entitled to great weight.

Competent, substantial evidence is contained in the record to support this portion of Conclusion of Law 45, wherein the criteria of the Rule have been correctly analyzed and applied.

**JACKSONVILLE'S** twenty-sixth exception is rejected.

JACKSONVILLE'S twenty-seventh exception is to that portion of Conclusion of Law 50, which reads:

**The evidence failed to prove that the closure of the Landon Avenue crossing will cause an "excessive" restriction to emergency type vehicles.**

Without challenging the evidence which underlies this finding, JACKSONVILLE asserts that this finding impermissibly shifts the burden of proof to JACKSONVILLE.

To the extent that Conclusion of Law 50 appears to misstate the burden of proof, it is contrary to applicable law and is erroneous. The DEPARTMENT agrees it was not JACKSONVILLE'S burden to prove that the closure of the Landon Avenue crossing will cause an excessive restriction to emergency type vehicles. The burden of proof on all issues in this proceeding is on the applicant. Rule 14-57.012(2), Fla. Administrative Code; Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981)(holding that the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal).

The evidence and the testimony by Chief Mock and Mr. Nicholson constitute competent, substantial evidence that the closure would not cause an excessive restriction to emergency vehicles. The administrative law judge correctly recognizes in Conclusions of Law 41 and 53 of the Recommended Order that McLAUGHLIN, the DEPARTMENT, and FEC had the burden of proof to establish all closure criteria. The administrative law judge's Conclusion of Law 50 should be amended only to correct the statement as it relates to burden of proof.

JACKSONVILLE'S twenty-seventh exception is accepted and Conclusion of Law 50

is corrected to clarify that the burden of proof was upon the applicant to provide competent, substantial evidence that closure of the Crossing would not cause an excessive restriction to the transportation of emergency vehicles.

**JACKSONVILLE'S** twenty-eighth exception is to that portion of Conclusion of Law 51, which reads:

**The design of the grade crossing and road approaches are not optimal based upon visibility obstructions for motorists and the elevation at the Crossing.**

**JACKSONVILLE** asserts that there is no requirement in Rule 14-57.012, Florida Administrative Code, or applicable case law, that the design of a railroad crossing or road approach must be "optimal" to remain open. Thus, according to **JACKSONVILLE**, this portion of Conclusion of Law 51 impermissibly imposes an unauthorized criterion upon a party affirming a highway railroad crossing closure.

The design of both the Crossing and the road approaches to it are expressly listed criteria within the Rule. The record contains competent, substantial evidence of the narrow road width of Landon Avenue and that the crossing must be super-elevated, thereby creating a ramp effect for motorists and motorcyclists desiring to "catch air." The design of both the road and the track, both with curves which limit sight distance, support the finding in Conclusion of Law 51 that those designs are not "optimal." Since the Rule allows consideration of the design of the crossing and road approaches, consideration of the road design of Landon Avenue and the manner in which it intersects with the design of the Crossing, along with the resulting use of the road and the Crossing by motorists, are proper facts for consideration in determining if the criteria of the Rule have been met.

**JACKSONVILLE'S** twenty-eighth exception is rejected.

**JACKSONVILLE'S** twenty-ninth exception is to that portion of Conclusion of Law 53, which reads:

In this case, DOT, McLaughlin, and FEC have successfully borne their burden of proof by showing that the closing of the Landon Avenue crossing effectuates DOT's policy of improved safety at railroad crossings through elimination, **where reasonably convenient**, of the interaction of motor vehicle traffic with rail traffic.

**JACKSONVILLE** asserts that this conclusion impermissibly creates and applies an ultra-low burden of proof upon the applicants that is not authorized by law.

**JACKSONVILLE** is correct that there is no criterion in the current Rule which cites reasonable convenience as a consideration for closure.<sup>3</sup> The remainder of Conclusion of Law 53 is accurate to the extent that it finds that the **DEPARTMENT, McLAUGHLIN, and FEC** have borne their burden of proof to show that the closing of the Crossing effectuates the **DEPARTMENT'S** policy of improved safety at railroad crossings (regardless of convenience) by elimination of the interaction of motor vehicle traffic with rail traffic.

The Findings of Fact and the Conclusions of Law, in their totality, establish that the administrative law judge did not apply an erroneous burden of proof. The phrase "where reasonably convenient" is not supported in the law and is, therefore, stricken as mere surplusage in light of the totality of those Findings of Fact and Conclusions of Law. The record contains competent, substantial evidence; and provides a basis to conclude that the

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<sup>3</sup> Former Rule 14-46.003(3)(b), Florida Administrative Code, did provide for consideration of the effect of closure on convenience of rail and vehicle traffic. The current Rule 14-57.012, Florida Administrative Code, does not provide for that consideration.

purpose of Rule 14-57.012(1) and the criteria contained in subsection (2)(c) of the Rule have been met; and that the applicants have carried their burden, as found in Conclusion of Law 53. As modified by the correction striking the reference to “where reasonably convenient,” the remainder of Conclusion of Law 53 will not be disturbed.

**JACKSONVILLE’S** twenty-ninth exception is accepted in part and Conclusion of Law 53 is herein modified by the deletion of the words “where reasonably convenient.” Any objection to the remainder of Conclusion of Law 53 is rejected.

### FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the administrative law judge’s Findings of Fact 1 through 32, 34 through 36, 38, and 39 of the Recommended Order are supported by competent, substantial evidence, and are, therefore, accepted and incorporated as if fully set forth herein.

2. That portion of Finding of Fact 33, that there are 14 buses in the morning and 16 buses in the afternoon that come to Landon Middle School, is rejected as not supported by competent, substantial evidence. The remainder of the findings in Finding of Fact 33 are supported by competent, substantial evidence, and are accepted and incorporated as if fully set forth herein.

3. Finding of Fact 37 is accepted as modified by removal of that portion of the finding that Chief Mock said “there ‘would be no issue at all in the crossing closure’ if it were involved with fire responses using the Atlantic [Boulevard] crossing instead of the Crossing.” The remainder of Finding of Fact 37 is supported by competent, substantial evidence, and is, therefore, adopted and incorporated as if fully set forth herein.

## CONCLUSIONS OF LAW

1. The DEPARTMENT has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapter 120, Chapter 334, and Section 335.141, Florida Statutes.

2. Rule 14-57.012, Florida Administrative Code, states in pertinent part that its purpose is to “reduce the accident frequency and severity at public railroad-highway grade crossings and improve rail and motor vehicle operating efficiency.” The Rule further provides that criteria for closure include design of a crossing and design of the road approaches. The safety criterion of Rule 14-57.012, Florida Administrative Code, applies to safety issues immediately at the Crossing and adjacent to the Crossing resulting from vehicular use of the Crossing. The criteria of the Rule also expressly include consideration of the presence of multiple tracks and their effect both on the railroad and highway operations. The expense criterion of the Rule is not limited to expenses only of the railroad, but is broad enough to, and does, encompass all expenses associated with the crossing. The Rule is not limited, as urged by JACKSONVILLE, to reducing only “train-vehicle” accidents. Each criterion of the Rule is to be considered both separately and in combination with the other criteria in order to make the decision whether closure of the Crossing is justified.

The DEPARTMENT’S interpretation of statutory and administrative rule provisions over which it has substantial jurisdiction is entitled to be given great weight. DAB Constructors, Inc. v. Dep’t of Transp., 656 So. 2d 940, 944 (Fla. 1st DCA 1995); State Contracting & Eng’g Corp. v. Dep’t of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). An agency’s construction of its own rules is entitled to considerable deference, Colonnade Medical Center, Inc. v. State, Agency For Health Care Admin., 847 So. 2d 540, 542 (Fla. 4th

DCA 2003), and will not be overturned unless clearly erroneous. Republic Media v. Dep't of Transp., 714 So. 2d 1203, 1205 (Fla. 5th DCA 1998).

Conclusion of Law 50 is accepted as herein modified to correct and clarify that the burden of proof for the facts supporting a finding that closure will not cause excessive restriction to emergency vehicles is upon **McLAUGHLIN, FEC**, and the **DEPARTMENT**. The **DEPARTMENT** finds that this interpretation of the Rule and Conclusion of Law 50 is more reasonable than that which has been rejected and corrected herein. It is further found that the record contains competent, substantial evidence this burden has been met and closure of the Crossing will not cause excessive restriction upon emergency vehicles.

3. Conclusions of Law 40 through 49, 51, and 52 of the Recommended Order are adopted and incorporated as if fully set forth herein.

4. Conclusion of Law 53 is accepted as modified herein to remove the reference therein to reasonable convenience, found to be mere surplusage in light of the totality of the other Findings of Fact and Conclusions of Law. The **DEPARTMENT** finds that this interpretation of the Rule and Conclusion of Law 53 is more reasonable than that which has been rejected and corrected herein. The remainder of Conclusion of Law 53 is supported by competent, substantial evidence correctly analyzed under the Rule criteria.

### **ORDER**

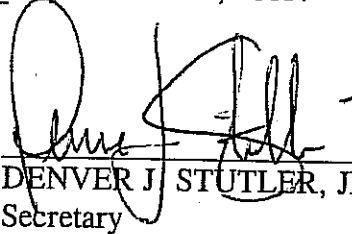
Based upon the foregoing Findings of Fact and Conclusions of Law, it is

**ORDERED** that the administrative law judge's Recommended Order is adopted in its entirety as herein corrected. It is further



**ORDERED** that the permit for closure of the Landon Avenue railroad-highway grade crossing number 271815X in Jacksonville, Florida, be and hereby is approved and shall issue.

**DONE AND ORDERED** this 21<sup>st</sup> day of October, 2005.



DENVER J. STUTLER, JR., P.E.  
Secretary

Department of Transportation  
Haydon Burns Building  
605 Suwannee Street  
Tallahassee, Florida 32399

FILED D.O.T. CLERK  
2005 OCT 21 AM 10:01

**NOTICE OF RIGHT TO APPEAL**

**THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.100(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.**

Copies furnished to:

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