

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF JACKSONVILLE,)
)
 Petitioner,)
)
 vs.) Case No. 04-4577
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent,)
)
 and)
)
 KEVIN MCLAUGHLIN AND FLORIDA)
 EAST COAST RAILWAY, L.L.C.,)
)
 Intervenors.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) conducted a formal administrative hearing in the above-styled matter on June 14 and 15, 2005, in Jacksonville, Florida. The parties appeared as follows:

APPEARANCES

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

For Respondent: Bruce R. Conroy, Esquire
Chief Administrative Law Counsel
605 Suwannee Street
Tallahassee, Florida 32399

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

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.

PRELIMINARY STATEMENT

Intervenor Kevin McLaughlin (McLaughlin) filed an application with DOT on July 14, 2002, to close a public railroad-highway grade crossing located in Jacksonville, Florida.

On November 13, 2004, DOT issued a Notice of Intent to Issue Permit to close the Crossing. Petitioner, City of Jacksonville (Jacksonville), timely filed a petition for a formal administrative hearing on December 8, 2004, opposing the closing.

On December 21, 2004, DOT referred the matter to the Division of Administrative Hearings for assignment of an Administrative Law Judge and conduct of formal administrative

proceedings. FEC filed a Motion to Intervene on December 30, 2004, and applicant McLaughlin filed a Motion to Intervene on January 3, 2005. Both motions were granted on March 28, 2005. A Notice of Hearing was issued on January 24, 2005, scheduling the matter for June 14 through 17, 2005, in Jacksonville, Florida.

During the final hearing, Jacksonville presented the testimony of Richard McCubbin, David B. Solomon, and Lorin Mock. Jacksonville offered Exhibits 1-4, 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 Arthur Shad. FEC also offered Exhibits 1-27, which were admitted into evidence.

DOT presented the testimony of Janice Bordelon and expert witness, G. Rex Nicholson. Of DOT's offered Exhibits 1-17, Exhibits 1-9 and 11-17 were admitted into evidence.

The Transcript of the proceeding was filed with the Division of Administrative Hearings on July 5, 2005. Subsequently the parties timely submitted Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On July 14, 2002, McLaughlin filed an application with DOT for closure of the Crossing located in Jacksonville. Subsequently, on November 13, 2004, DOT issued a Notice of Intent to Issue a Permit (Notice) to authorize the closure of the Crossing. On December 8, 2004, Jacksonville timely filed a petition challenging the proposed granting of the permit and these proceedings ensued.

2. DOT's closure program conducts studies on over 3700 public highway-rail grade crossings and creates an inventory to determine crossings that could use improvement for safety reasons and for determining crossing closure. Florida Administrative Code Rule 14-57.012 outlines the standards for opening and closing of railroad-highway grade crossings. Florida Administrative Code Rule 14-57.012(2) states that:

[T]he Department will accept applications for the opening and closing of public railroad-highway grade crossing from the governmental entity that has jurisdiction over the public street or highway, any railroad operating trains through the crossing . . . The Department, on behalf of the State of Florida, will also open or close public railroad-highway grade crossings in accordance with the criteria set forth herein. Closure applications will also be accepted from individual citizens or groups, such as neighborhood associations. Opening or closure of public railroad-highway grade crossings shall be based upon Notices of Intent issued by the Department, administrative hearings conducted pursuant

to Chapter 120, Florida Statutes, or upon a Stipulation of the Parties executed by any applicant, governmental entity, the appropriate railroad, and the Department If the applicant chooses to pursue the opening or closure of the public railroad-highway crossing, the railroad and governmental entity having jurisdiction at the location are notified and provided a copy of the application. The governmental entity should provide a public forum for community involvement and contact affected individuals or groups to obtain input on impacts to the community

The criteria for closing include safety, necessity for rail and vehicle traffic, alternative routes, effect on rail operations and expenses, excessive restriction to emergency type vehicles resulting from closure, design of the grade crossing and road approaches, and the presence of multiple tracks and their effect upon railroad and highway operations. The criteria for opening are the same except for the excessive restriction to emergency type vehicles.

3. Through an initiative from the Federal Railway Administration (FRA), and the Federal Highway Administration (FHWA) to decrease the number of at-grade railroad crossings by 25 percent, DOT has made a concerted effort to close or consolidate, redundant, unsafe, and unnecessary crossings. Crossing closure presents substantial benefit, inclusive of a decrease in the funding and liability for the city and railroad, which in turn can reroute the funding to improve other

transportation routes in the area, and most of all increase the safety to the traveling public because there are fewer intersections where cars and trains can collide.

4. Janice Bordelon, DOT's Rail Specialist oversees the openings and closings of all public highway-rail grade crossings throughout the State of Florida. Bordelon received McLaughlin's application for closure on July 14, 2002. On August 14, 2002, she sent a copy of the application to Chief Ray Alfred, Jacksonville Fire Department; Mr. Lynn Westbrook, Jacksonville Public Works Department; Mr. Fred Kyle, Chief of Jacksonville Traffic Engineering Division; Mr. Charles A. Stone, Director of Engineering services for Florida East Coast Railway; and Principal Carole Benson, Landon Middle School. In addition, she visited the site on at least nine occasions where she met with the community, with Jacksonville's officials, with the school and school board, and participated in meetings of Jacksonville's safety, transportation and finance committees.

5. Bordelon requested input from Jacksonville officials and gathered information from a variety of sources and eventually moved forward in working with Landon Avenue Residents and the professionals from Jacksonville to get to a Stipulation of Parties that would result in closure of the Crossing. In this process, Bordelon compiled a Closure Application Analysis applying all the Rule criteria to the Crossing. Once the

analysis was compiled, she provided it to Jacksonville officials, the district Jacksonville councilman, the applicant, and the School Board.

6. The Stipulation of Parties was eventually withdrawn and Bordelon issued a Notice of Intent substantially adopting the closure analysis she had done earlier. The Notice of Intent concluded through findings of fact and conclusions of law that the application to close the crossing at Landon Avenue met the requirements of the Florida Administrative Code criteria. In summary, Bordelon found that the Crossing was located on a blind curve, was an elevated crossing with low traffic volume, close to alternatives routes, and was unsafe, unnecessary, and redundant. The closure of the Crossing effectuates DOT's policy of promoting improved safety at railroad crossings by eliminating chances where a train and car can collide.

7. Landon Avenue is located in the northeast part of the San Marco neighborhood across the St. Johns River from Jacksonville's downtown in the core of the original city area. Jacksonville's public works department maintains Landon Avenue. On both sides of the Crossing, Landon Avenue is a two-lane road with no sidewalks and would not meet Jacksonville's construction standards if it were built today.

8. Landon Avenue is a narrow (20 feet wide) city street that begins at Kings Avenue and runs west past the north-south

streets of Faragut Place, Dewey Place and Perry Place, all of which have direct access to Atlantic Boulevard. Landon Avenue makes a southwesterly turn and then crosses two railroad tracks. On the western side of the railroad tracks Landon Avenue passes Arcadia Place, Minerva Avenue (a one-way south street), Thacker Avenue (a one-way north street) all with access to and from Atlantic Boulevard. Landon Avenue continues west and runs through Hendricks Avenue and ends at River Road.

9. G. Rex Nicholson, qualified as an expert witness in forensic engineering, rail safety and design, as well as highway safety and design, agreed with DOT's rail specialist Jan Bordelon and opined that the Crossing is unsafe, unnecessary and redundant because it is located on a residential street, has low traffic volume, is a non-necessity for travel, and is relatively close to alternatives routes. He indicated that the first step in the analysis of a crossing closure is whether a grade separation (bridge for either automobiles or trains) is feasible. In this instance, such an alternative is not available. Additionally, active safety measures of four-quadrant gates could not be installed at Landon Avenue due to the need for the installation of a non-mountable median and the lack of right-of-way. The expert testimony of Nicholson that grade separation is not feasible, and that only way to improve safety at the Crossing is to proceed with closure, is un-

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

10. After safety, the second applicable criterion is the need for traffic. Testimony and data indicates that the necessity for vehicle traffic on Landon Avenue is minimal. There is an Average Daily Traffic (ADT) of 1473 vehicles a day that use the crossing. Another study by DOT approximates the Average Daily Traffic to be 1841. These are both considered low traffic counts.

11. It is rare for residents of Landon Avenue to have a destination on the immediate other side of the crossing. The main travel use for Landon Avenue is as a "cut through" by non-residents to more distant areas and to beat train traffic.

12. The third applicable criterion to Landon Avenue is whether the closing constitutes an excessive restriction to the transportation of emergency type vehicles. Nicholson and Bordelon found that closing Landon Avenue would not create an excessive restriction to emergency type vehicles. 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. It is not a main road. Residents park in the street, and Jacksonville has proposed traffic-calming devices on the street.

13. Landon Avenue is not a road that is conducive to emergency type vehicles. For the same reasons the road is unsafe for speeding impatient motorists, it is unsafe for an emergency vehicle cut-through. As the majority of the Petitioner's case against closure revolved around the restriction to emergency vehicles, that issue is further addressed below.

14. The next applicable criterion for closure is the approach of the road to the Crossing. The design of the road approach of Landon Avenue creates a safety hazard. 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. As Landon Avenue approaches the crossing heading east, from Hendricks Avenue, the view of the tracks to the north is obstructed by a building and plants. These obstructions make it very difficult for a speeding motorist to see an approaching train.

15. The Crossing at Landon Avenue meets DOT and FRA initiatives for closure. It is not an arterial road, is used by high risk motorists, and is a safety risk for train-car collisions. Closure of the Crossing will effectuate the policy of improved safety at railroad crossings by eliminating the chance for train and car collisions.

16. The Crossing is a public at-grade railroad crossing, designated by DOT as Crossing No. 271815X. It consists of two mainline tracks, a northbound mainline and southbound mainline that transport approximately 26 trains a day through the Crossing. In addition to FEC, Norfolk Southern Railway and CSX, also both class one railroads, operate trains over the Crossing.

17. Present signalization at the Crossing consists of cantilevered flashing lights and gates; and reflective cross bucks.

18. Safety is the first criterion in closure analysis. The Crossing is located at Railroad Mile Post 1.45, just south of a banked curve in the double tracks that makes it a "blind turn" for the conductor and engineer of a southbound train. 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 distance in the super-elevated banked curve create a safety hazard at the Crossing.

19. One accident occurred at the Crossing when a train collided with a car, even though the standard cross bucks, lights and bells were operating. The train's headlight was working and on, the train's bell was working and the proper whistle signals were blown at the time of the accident; however, the train could not stop in time.

20. The curve in the tracks delays the time a train operator has to avoid a collision with a car at the Crossing. Over 50 percent of train-car collisions result from cars avoiding passive devices and crossing tracks regardless. Accidents at railroad crossings often occur because the road hump over the track serves as a launching ramp for thrill seekers traveling through such intersections with trains at a high speed. This specifically occurs because a speeding automobile's front wheels lift off the ground and the vehicle continues in the direction it was last going. When motorists sue over accidents in these situations, it is the municipalities or governmental entities with jurisdiction over the road that are usually held responsible. The Crossing is a perfect candidate for this type of accident.

21. 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. In this regard, Residents saw a filming crew documenting motorcycles jumping the Crossing. They also have witnessed some individuals turn their bikes and vehicles around and repeatedly jump the Crossing. 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.

22. The next criterion in the closure analysis is whether there are alternative routes available. The Crossing is located in a residential area near six crossings within one mile of track. The next crossing to the north is located at 1/4 of a mile at four-lane Hendricks Avenue and the next crossing to the south is 1/5th of a mile or 900 feet at four-lane Atlantic Boulevard. These main artery roads, along with Kings Road, allow for easy access to both sides of the Crossing.

23. Closure of the Crossing would disperse traffic onto three different roads: Atlantic Boulevard, Hendricks Avenue and Kings Road. Regardless of the index ratings for these roads, DOT's goal of eliminating the interaction of vehicular traffic with rail traffic would be accomplished. Hendricks Avenue and Atlantic Boulevard 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. It would enhance safety to have traffic crossing the railroad tracks at Hendricks Avenue and Atlantic Boulevard rather than at Landon.

24. 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; logic shared, incidentally, with the United States Federal Government program named "Gradec," that supports traffic safety enhancement through closure of rail crossings.

25. The next criterion in the closure analysis examines how the closure would affect rail operations and expenses. The closure of the Crossing would decrease operating expenses for FEC and Jacksonville. The cost of maintaining the signal equipment and proper maintenance of the crossing would be avoided. The substantial savings realized by Jacksonville would include savings of \$70,000.00 due to rehabilitation of the Crossing that is necessary every six or seven years. Further, FEC and Jacksonville liability and the associated litigation costs exposure would diminish.

26. A criterion in the closure analysis examines the design of the crossing and the road approach. As previously noted, the design of the Crossing and road approach creates an unsafe condition because of the super-elevated nature of the tracks, and the Crossing. There are gouge marks in the pavement at the point of street and rail intersection at the Crossing

where the undercarriages of vehicles have scraped against the pavement due to the elevation from the grade of Landon Avenue to the elevated area of the track location. 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 "super-elevated curve" this would be a difficult task.

27. The next criterion examines the presence of multiple tracks and its effect on operations. The presence of multiple tracks and their effect on the railroad and highway operations increase the safety risk at the Crossing. Testimony of Landon Avenue residents and the FEC Claims Director establish that motorists go around the gates at the Crossing. Motorists expect that when one train passes the gates will immediately lift up and allow their vehicles to cross. When two tracks are involved, impatient motorists often misunderstand that there can be two trains coming from different directions at almost the same time. This is especially true where there is a blind corner and two quadrant gates. An impatient driver, unaware of the double track, may easily go around the gate and be caught off guard by the second train.

28. Double tracks also increase the risk of accidents because the train operator of a several ton train doing 25 miles per hour on the southbound mainline has only 457 to 522 feet to

avoid a collision with an impatient driver at the Crossing. This is not enough time to stop a locomotive engine, or a train.

29. Closing the Crossing would save the railroad and Jacksonville operating expenses of maintaining the railroad while enhancing safety and achieving DOT's goal of reducing the probability of a train-automobile collision.

30. In 2000, McLaughlin inquired with DOT about closing the Crossing. He then consulted with Jacksonville. Jacksonville set up a formal meeting with the Lorin Mock, Jacksonville Fire Department; Jim Suber, Jacksonville Police Department; and the Jacksonville councilman who was the district representative at that time. At that meeting, the Jacksonville professional representatives acknowledged that there were no major problems with the closure of the crossing. The councilman at the time did not follow up on sending out letters to request community input.

31. In July 2002, after a period of inactivity regarding the Crossing's closure and after discovering DOT had authority to close the Crossing, McLaughlin filed an application with DOT for closure.

32. City officials had no problem with closure of the Crossing, and the School Board Chairperson had no difficulty with such closure. A Stipulation of Parties for the closure of the Crossing was drafted and introduced to the City Council by

Councilman Art Shad. The proposal was discussed at length before the City Council's Transportation Committee, which Bordelon attended on behalf of DOT. The legislation to close the Crossing was then submitted to the City Council, but before a vote could be obtained the legislation was withdrawn and Jacksonville decided to oppose the closure. As established by testimony of the Director of Public Works, the withdrawal of the Stipulation of Parties was based on politics, not on any factual findings or meaningful opposition from any Jacksonville professional employee.

33. Considering that a school bus is not an "emergency response type vehicle" the closure analysis regarding the bus goes to the criteria of safety, alternative routes, and effect on operations. There are 14 buses in the morning that come to Landon Middle School, and 16 buses in the afternoon that come to the school. These buses could use Arcadia Place or Hendricks Avenue or some other combination to cross the tracks and exit and enter the school. Additionally, buses stack up on Landon Avenue while waiting for the children which could possibly result in a train-school bus collision which, as established by testimony of David Solomon, an employee of the Duval County School, would be "the worst nightmare an organization can have."

34. The Duval County School Board had previously addressed the closure of the Crossing and indicated approval prior to

Jacksonville's reversal and decision to oppose that action. Kris Barnes, the Duval County School Board Chair, wrote an October 27, 2003, letter to Ms. Bordelon stating on behalf of the School Board that, after having spoken with the Landon Middle School principal and the Duval County School Board Safety Department, there would be no problem with the closing of the Crossing. 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.

35. Nicholson's un-rebutted expert testimony concluded that if Jacksonville were applying to install a new crossing at Landon Avenue it would not meet the criteria for an opening, which contains six of the seven criteria for closure. The seventh criterion is whether the closure would cause an excessive restriction to emergency type vehicles. Jacksonville presented testimony, but no data, regarding the fire and rescue vehicles using the crossing. DOT applies the word "excessive restriction" in its rule to mean an excessive restriction for travel. Bordelon's analysis concluded that the ambulances and other vehicles could easily use the alternative non elevated crossings at Hendricks and Atlantic without being excessively restricted from traveling to an emergency.

36. In processing McLaughlin's application for closure, Bordelon conducted an independent review of the distance and

first response times by fire and emergency vehicles to the Crossing. Bordelon found that fire station 12 and fire station 13 were very close to the Crossing and could easily be reached within the time limit goal of four to six minutes.

37. Since the Landon Avenue/ San Marco area is close to downtown Jacksonville, there is overlapping fire and rescue coverage from fire stations 12 and 13. Using the Atlantic Boulevard railroad crossing, fire station 13 is approximately 0.6 miles from the 1700 block of Landon Avenue. Using the Atlantic Boulevard railroad crossing, fire station 12 is approximately 1.5 miles from the 1500 block of Landon Avenue. The alternative routes that a fire/rescue response from station 13 would have to take to avoid the Crossing are minimal, or approximately an additional fourteenth (.14) of a mile. The alternative routes that a fire/rescue response from station 12 would have to take to avoid the Crossing are minimal, or approximately an additional tenth (.10) of a mile. 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 Avenue crossing instead of the Crossing. The average response time from either of these stations to the Crossing is 3.9 minutes. The goal average response time by the Jacksonville Fire Department is six minutes. The response time is calculated from the time a call

is made to the time the emergency vehicle arrives on the scene and includes the 911 call and response.

38. Chief Mock and the Jacksonville Fire Department oppose any closure of a railroad crossing, regardless of the safety need for the closure. In the words of Chief Mock, rail crossings are a "string of pearls" that the fire department uses to cross the railroad tracks and the more opportunities to cross the better. He acknowledged that he was looking at the definition from an emergency response standpoint.

39. Per Nicholson's un-rebutted expert testimony, there is no appreciable difference in response times and distances and no excessive restriction to the transportation of emergency vehicles. Chief Mock's acknowledgement that the residents of Landon Avenue have "pretty good" overlapping fire coverage because the spacing of fire stations are closer in the core city area, and fire hydrants are available on both sides of the track serves to corroborate this determination. The closure would not result in excessive restriction to the transportation of emergency vehicles.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. § 120.57(1), Fla. Stat.

41. McLaughlin, FEC and DOT have the burden of proving by a preponderance of the evidence that the Crossing should be closed. Dep't. of Transp. v. J.W.C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

42. DOT exercises regulatory authority over all public railroad-highway crossings in the State of Florida pursuant to Section 335.141, Florida Statutes. City of Plant City v. Department of Transportation, 399 So. 2d 1075 (Fla. 2d DCA 1981).

43. To carry out its responsibility, DOT has promulgated Florida Administrative Code Rule 14-57.012, which provides in pertinent part:

(1) Purpose. To establish standards for the opening and closing of public railroad-highway grade crossings. The objectives of these uniform standards will be to reduce the accident frequency and severity at public railroad-highway grade crossings, and improve rail and motor vehicle operating efficiency.

(2) Opening and Closing Public Railroad-Highway Grade Crossings. The Department will accept applications for the opening and closing of public railroad-highway grade crossings from the governmental entity that has jurisdiction over the public street or highway; any railroad operating trains through the crossing; any other applicant for a public railroad-highway grade crossing provided there is in existence an agreement between the applicant and governmental entity to assume jurisdiction as a public crossing. The Department, on behalf of the State of Florida, will also open or close

public railroad-highway grade crossings in accordance with the criteria set forth herein. Closure applications will also be accepted from individual citizens or groups, such as neighborhood associations. Opening or closure of public railroad-highway grade crossings shall be based upon Notices of Intent issued by the Department, administrative hearings conducted pursuant to Chapter 120, Florida Statutes, or upon a Stipulation of Parties executed by any applicant, governmental entity, the appropriate railroad, and the Department. The burden of proof for the opening or closing of a crossing is on the applicant. Acceptance of any application for processing by the Department shall not be construed as indicating the Department's position regarding the application. If the preliminary review of the application does not support the crossing opening or closure, the applicant will be advised of these findings. The applicant may choose to withdraw the application or continue the process. If withdrawn, the process is concluded. An applicant may suspend an application at any time. If the applicant chooses to pursue the opening or closure of the public railroad-highway crossing, the railroad and governmental entity having jurisdiction at the location are notified and provided a copy of the application. The governmental entity should provide a public forum for community involvement and contact affected individuals or groups to obtain input on impacts to the community. The expense of crossing closures or openings, which shall include installation, maintenance, and replacement of grade crossing traffic control devices and grade crossing surfaces, will be the responsibility of the applicant, unless otherwise negotiated and accepted by all parties.

* * *

(c) Closure of Public Railroad-Highway
Grade Crossings

In considering an application to close a public railroad-highway grade crossing, the following criteria will apply:

1. Safety.
2. Necessity for rail and vehicle traffic.
3. Alternate routes.
4. Effect on rail operations and expenses.
5. Excessive restriction to emergency type vehicles resulting from closure.
6. Design of the grade crossing and road approaches.
7. Presence of multiple tracks and their effect upon railroad and highway operations.

44. In determining whether the Application should be approved, DOT considered all of the regulatory criteria for closure. Further, the agency substantially complied with those procedures for the handling of crossing closure applications.

45. The Crossing has significant safety hazards, including:

- (a) visibility obstructions for train crews and motorists;
- (b) Inability of southbound trains to stop in advance of the Crossing based upon the location of the Crossing in a super-elevated curve;
- (c) Motorists regularly driving around the crossing gates at the Crossing;
- (d) Motor vehicles and motorcycles leaving the road surface due to the elevation at the Crossing;

- (e) School bus use of the Crossing;
- (f) Narrow road width; and
- (g) High speed motor vehicle traffic through a residential neighborhood.

46. There is an existing reliable, alternate route for vehicle traffic over Atlantic Boulevard that roughly parallels Landon Avenue.

47. The alternate route connects to cross streets that provide good access for residents on both sides of the Crossing.

48. The City of Jacksonville Public Works Department determined the Crossing was not necessary for motor vehicle traffic based upon the low traffic volume and existence of reliable, alternate routes.

49. The closure of the Crossing will have a beneficial effect on rail operations and expenses based upon the railroad's potential liability exposure for accidents at the crossing and the regular presence of motorists crossing around lowered crossing gates in front of trains.

50. The evidence failed to prove that the closure of the Landon Avenue crossing will cause an "excessive" restriction to emergency type vehicles. To the contrary, response times for emergency vehicles would not be materially impacted by the closure.

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

52. Finally, the Crossing has multiple tracks, which creates additional safety risks for train crews and motorists. When speaking of risk and determining whether a risk is excessive, the words of President John F. Kennedy are appropriate to consider:

There are risks and costs to a program of action. But they are far less than the long-range risks and costs of comfortable inaction.^{1/}

53. 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.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law,
it is

RECOMMENDED that a Final Order be entered approving the
requested permit for closure of Department of Transportation
Crossing No. 271815X in Jacksonville, Florida.

DONE AND ENTERED this 5th day of August, 2005, in
Tallahassee, Leon County, Florida.



DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of August, 2005.

ENDNOTE

^{1/} John F. Kennedy
The Classic Quotation Collection
http://www.quotationspage.com/quotes/John_F._Kennedy/

COPIES FURNISHED:

James C. Myers, Clerk of the Agency Proceedings
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Pamela Leslie, General Counsel
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Jose Abreu, Secretary
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Bruce R. Conroy, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Eric L. Leach, Esquire
Milton, Leach, Whitman, D'Andrea,
Charek and Milton, P.A.
815 South Main Street, Suite 200
Jacksonville, Florida 32207-8157

Thomas M. Beverly, Esquire
117 West Duval Street, Suite 480
Jacksonville, Florida 32202

Kevin McLaughlin
1662 Landon Avenue
Jacksonville, Florida 32207

Marlene Hammock
Florida East Coast Railway, L.L.C.
One Malaga Street
St. Augustine, Florida 32084

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.