

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CSX TRANSPORTATION, INC.,            )  
  )  
      Petitioner,                        )  
  )  
vs.                                        )     Case No. 06-1491  
  )  
DEPARTMENT OF TRANSPORTATION       )  
AND MANATEE COUNTY,                   )  
  )  
      Respondents.                     )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on August 22 and 23, 2006, in Bradenton, Florida.

APPEARANCES

For Petitioner: Lawrence N. Curtin, Esquire  
Holland & Knight, LLP  
315 South Calhoun Street, Suite 600  
Post Office Box 810  
Tallahassee, Florida 32302-0810

For Respondent Department of Transportation:

Bruce R. Conroy, Esquire  
Chief, Administrative Law  
& Real Property Division  
Department of Transportation  
Hayden Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0458

For Respondent Manatee County:

Rodney C. Wade, Esquire  
Robert M. Eschenfelder, Esquire  
Manatee County Attorney's Office  
Post Office Box 1000  
Bradenton, Florida 34206-1000

STATEMENT OF THE ISSUE

The issue is whether the application submitted by Manatee County to the Florida Department of Transportation to open a railroad-highway grade crossing in Bradenton, Florida, meets the criteria set forth in Florida Administrative Code Rule 14-57.012(2)(a)1-6.

PRELIMINARY STATEMENT

Respondent, Manatee County, Florida (the "County"), filed an application with Respondent, Department of Transportation ("FDOT" or the "Department"), on November 21, 2002, for a permit to open an at-grade railroad-highway crossing within the county at 44th Avenue East. The Department notified Petitioner, CSX Transportation, Inc., of the filing of the application by letter dated November 25, 2002. The Department issued a Notice of Intent to Permit the opening on October 5, 2004. Petitioner timely filed a Petition for Administrative Hearing on October 28, 2004. The Department referred the matter to the Division of Administrative Hearings for the assignment of an

Administrative Law Judge on April 21, 2006. A Notice of Hearing was issued on May 9, 2006, setting the matter for hearing in Bradenton, Florida.

At the hearing, FDOT presented the testimony of Janice Bordelon and offered Exhibit Nos. 1 through 5, which were admitted into evidence. Manatee County presented the testimony of Robert Shankle; Jeffrey Trim, P.E., who was accepted as an expert in the design of rail crossings and road design; G. Rex Nichelson, Jr., P.E., who was accepted as an expert in the opening and closing of railroad crossings; Jim Staples; Larry Mau, P.E.; and Harry Mendenhall, P.E.; and offered Exhibit Nos. 1 through 27 into evidence, all of which were received except for Exhibit Nos. 10 and 27. Petitioner presented the testimony of Clifton Stayton and Eric Gary Peterson, and offered no exhibits into evidence.

A Transcript was filed on September 19, 2006. After the hearing, Petitioner and Respondents filed their Proposed Findings of Fact and Conclusions of Law on October 30, 2006.

References to statutes are to Florida Statutes (2005) unless otherwise noted.

#### FINDINGS OF FACT

1. Respondent, Manatee County, filed an application with FDOT for the opening of a public highway-rail grade crossing between railroad mile posts SW 912.27 and SW 911.87, to cross

over the CSX Transportation rail line (the "Crossing"). The Crossing is proposed in connection with the expansion of a portion of 44th Avenue East, from 15th Street East extending eastward to 19th Street Court East. The extension of 44th Avenue is part of an east-west corridor within Manatee County that the County plans to extend east to U.S. 301, and is an extension of Cortez Road which terminates at the beaches of Manatee County to the west.

2. The Department's public railroad-highway grade crossing program conducts studies on the more than 3700 public highway-rail grade crossings in Florida and creates an inventory to determine crossings that might be improved for safety reasons and for closure. Florida Administrative Code Rule 14-57.012 establishes the standards for opening and closing public railroad-highway grade crossings.

3. The Department has endeavored to close or consolidate redundant, unsafe, and unnecessary crossings through an initiative from the Federal Railway Administration and the Federal Highway Administration to decrease the number of at-grade railroad crossings by 25 percent. The goal has not yet been met.

4. Petitioner's policies dictate that before it agrees to a new crossing of one of its tracks, three existing crossings should be closed in connection with the opening.

5. The County agrees that it is good policy to close as many existing crossings as possible when opening a new crossing. The closings help to decrease the potential for motor vehicle and train collisions, bicycle and train collisions, and pedestrian collisions with a train or flying debris from a train.

6. Janice Bordelon, the Department's Rail Specialist, oversees the opening and closing of all public highway-rail grade crossings throughout the State of Florida.

7. When she received the County's application for opening on November 21, 2002, she sent a copy of the application to Petitioner.

8. Ms. Bordelon visited the proposed opening site and the surrounding area on at least three occasions.

9. The Department sought input from both the County and Petitioner when considering the application for the Crossing.

10. The land in the vicinity of the Crossing is varied to the north and is designated as light manufacturing. The area to the south is designated as warehousing and vacant industrial. The area to the east of the terminus of the Crossing is agricultural land. Much of the property in the area north and south of the Crossing is vacant, but scheduled for future use as an operations center.

11. The railroad track in the vicinity of the Crossing is owned and operated by Petitioner. CSX Transportation, Inc., is the largest railroad in the eastern United States with approximately 22,000 route miles. Petitioner operates in 23 states, the District of Columbia, and two Canadian provinces. It is headquartered in Jacksonville, Florida.

12. Petitioner's operations in the vicinity of the Crossing currently involve the interchange of cars with the Seminole Gulf Railroad, just south of the Crossing. The purpose of the interchange is to exchange cars between two railroad companies. Current operations involve approximately eight train movements per week, consisting of 20 rail cars in each movement. Trains using this track travel at a speed of 20 miles per hour currently. The speed could change with the approval of the Crossing.

13. The potential exits for Petitioner to increase its utilization of the track in the area of the Crossing. This would occur as a result of increased utilization of rail as a result of growth in both Manatee County and Florida. Based upon the character of the area near the Crossing, the possibility exists for location of a manufacturing facility or distribution center that could result in increased rail traffic.

14. The Department reviewed and analyzed the safety of the proposed 44th Avenue Crossing, including the volume of rail and

vehicle traffic, the proximity of existing crossings, the angle of proposed crossing, and surrounding land uses. The Department proposed solutions for mitigation of the identified safety issues through traffic synchronization and other design features such as curbs and signalization.

15. The Intent to Permit issued by the Department recommends that the County pursue the consolidation of unnecessary rail crossings, especially those with light traffic and within a quarter mile of an existing crossing. The County's expert identified two such crossings for potential closure.

16. Mr. G. Rex Nicholson, an expert in railroad crossing openings and closings, testified that the Crossing would ultimately be designed by the joint efforts of Petitioner and the County, resulting in the safest feasible design for the Crossing. He noted that there would be no possibility of a hump at the Crossing and that the design would utilize either an attenuator known as Kwik Curb or a nine-inch, non-mountable median to minimize the opportunity for drivers to circumvent the crossing gates and place themselves in harm's way.

17. Petitioner would also be involved in the final design of the Crossing.

18. The design features would enhance the safety of the Crossing.

19. A flyover crossing, one that would divert traffic from direct contact with the rails at the Crossing, is prohibitively expensive and not justified in this case.

20. The tracks are visible upon approach of the Crossing.

21. The Department considered pedestrian and bicycle traffic at the Crossing, and determined it would not be significant.

22. Trespass can occur in the area of railroad tracks, regardless of whether the Crossing were opened.

23. The Department and the County collaborated to identify possible closures to offset the Crossing, and several were identified as a result.

24. The Department determined the Crossing is necessary to alleviate existing vehicular traffic and serve planned industrial land uses in the area of the Crossing.

25. The Crossing will draw a considerable amount of traffic from the existing roadway system onto a new roadway better designed to accommodate the traffic volume. Currently, traffic in the area of the proposed crossing is heavy, especially at peak times.

26. Alternative routes for east-west vehicular traffic were examined and considered, but the 44th Avenue extension appears to be the safest, most direct way for the County to complete an east-west corridor in the area of the Crossing.



27. The County considered alternative alignments for the Crossing, but none of these were preferable to the one selected due to sharp, unsafe crossing angles and increased right-of-way costs.

28. The Crossing will affect rail operations and expenses due to increased liability and some maintenance costs. The County would also bear increased liability and would bear most, if not all, of the costs of maintenance, operation, and construction.

29. The effect on rail operations would occur primarily during the construction phase of the Crossing. The effects on operations of the rail would be limited since no switching movements of trains in the area of the Crossing will occur, and based upon the fact that only a single track exists in the area of the Crossing. The parties did not attempt to quantify the extent of the effect on Petitioner's operations other than to anecdotally state that delays could occur, affecting crew overtime and the scheduling of cars, which could result in missed connections.

30. Safety hazards exist associated with a crossing during switching operations. When a train is stopped during switching operations, some motorists become impatient and attempt to pull around the train. Some pedestrians even attempt to crawl over or under the train. The locomotive and train engineer could be

20 to 30-car lengths away when this occurs, and not see the pedestrians or motorists when restarting the train. However, current rail switching north and south of the Crossing would not block the Crossing, and no evidence was produced to demonstrate that Petitioner planned to establish additional switching movements in the area.

31. Vehicles carrying hazardous materials or wastes present a concern since they could cause harm if the chemicals or waste were released. Additionally, these vehicles are required to stop at railroad crossings, which could lead to rear-end collisions. School buses approaching the railway must also stop before crossing, which can also lead to rear-end collisions by motorists.

32. The Department considered the design of the grade crossing and road approaches. The Department considered the angle of crossing and made recommendations to minimize any dangers associated with the Crossing. If necessary, modifications would be made to the crossing gates in order to sufficiently protect motorist, bicyclists and pedestrians from crossing the railway when a train approaches. The plans submitted by the County might require modification during the design phase of the project. The project meets or exceeds the Department's engineering and design criteria.

33. The angle of skew of the Crossing is reasonable.

34. The grade in the area of the Crossing is flat and the Crossing itself will be flat.

CONCLUSIONS OF LAW

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

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

37. To carry out its statutory duties, the Department has promulgated Florida Administrative Code Rule 14-57.012(1) and (2), which provide as follows:

(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 crossing 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 the 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, F.S., or upon a stipulation of the 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. 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.

38. FDOT has established criteria for opening a public railroad-highway crossing, as set forth in Florida

Administrative Code Rule 14-57.012(2)(a):

1. Safety.
2. Necessity for rail and vehicle traffic.
3. Alternate routes.
4. Affect on rail operations and expenses.
5. Design of the grade crossing and rail approaches.
6. Presence of multiple tracks and their affect upon Railroad and highway operations.

39. Manatee County and the Department have the burden of proving by a preponderance of the evidence that the Crossing should be opened. Fla. Admin. Code R. 14-57.012(2); Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

40. In considering Manatee County's application for opening of the Crossing, the Department considered the six criteria for opening mandated by Florida Administrative Code Rule 14-57.012. The opening of the Crossing, through an examination of the criteria, meets the stated purpose of Florida Administrative Code Rule 14-57.012, namely, to reduce accident frequency and severity and to improve rail and motor vehicle operating efficiency.

41. The evidence presented in this case demonstrates that the opening of the Crossing will present some safety hazards, but those hazards are no different from those typically found at

any railway crossing. Moreover, as the analysis below will demonstrate, Petitioner seeks to propose a crossing that will be as safe, within the bounds of reason, as a crossing can be.

42. The evidence demonstrates that the Department applied all six of the rule criteria to Petitioner's proposed Crossing.

43. The Crossing meets Criterion One concerning safety. The design and alignment of the Crossing includes features that will maximize the safety of the Crossing. The Department analyzed the relevant volume of rail and motor vehicle traffic, proximity of existing crossings, angle and grade of the proposed Crossing, surrounding land uses, and proposed mitigation of identified safety issues through the use of traffic synchronization, curbs, and signalization. The expected cooperative design efforts between Petitioner and the County will further ensure the safest design possible.

44. The Crossing meets Criterion Two concerning necessity. The opening of the rail crossing will alleviate traffic burdens within Manatee County, and fits within the County's transportation plan for traffic flow and emergency operations.

45. The Crossing meets Criterion Three concerning alternative routes. The County performed an alternative route study and found the alternatives not to be feasible or

preferable to the proposed Crossing. A flyover of the proposed crossing site is neither financially feasible nor justified for a crossing having this level of expected traffic.

46. The Crossing meets Criterion Four concerning the effect on rail operations and expenses. Based upon the evidence produced by Petitioner, the opening of the Crossing will have an adverse effect on Petitioner's rail operations only during the time of construction of the Crossing. The effect on Petitioner's rail operations will be minimal once the project is completed. The cost of maintaining the Crossing will be borne by the County, not Petitioner. The costs associated with the potential railway liability by both Petitioner and the County are not certain based upon the evidence produced at hearing. The potential costs due to accidents will be further mitigated by the safe crossing proposed by the County, as well as the County's intent to seek closure of other railway crossings in Manatee County. The potential liability costs posed by Petitioner do not outweigh the demonstrated necessity for opening the Crossing.

47. The Crossing meets Criterion Five concerning design of the grade crossing and road approaches. The proposed design for the Crossing will meet all applicable road-rail standards. The design will be completed as a joint effort between the County,

the Department, and Petitioner and will ensure the safety of the Crossing. No visibility factors were identified that should preclude the opening of the Crossing.

48. Criterion Six is not applicable to the Crossing. The proposed Crossing covers a single track, not multiple tracks as contemplated by this criterion.

49. On balance, the County has met its burden of demonstrating that its application meets the applicable criteria for approval and will provide a safe, well-designed crossing at 44th Avenue in Bradenton, Manatee County, Florida. Petitioner's challenge to the application is not sufficient to overcome the evidence presented by both the County and the Department at hearing and leads to the conclusion that the County's application for a public railroad-highway grade crossing should be approved.

#### RECOMMENDATION

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

RECOMMENDED that a Final Order be entered approving the requested permit for opening a public railroad-highway grade crossing at 44th Avenue East, between mile posts SW 912.27 and SW 911.87, in Manatee County, Florida.



DONE AND ENTERED this 16th day of November, 2006, in  
Tallahassee, Leon County, Florida.



---

ROBERT S. COHEN  
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 16th day of November, 2006.

COPIES FURNISHED:

Bruce R. Conroy, Esquire  
Chief, Administrative Law  
& Real Property Division  
Department of Transportation  
Hayden Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0458

Lawrence N. Curtin, Esquire  
Holland & Knight, LLP  
315 South Calhoun Street, Suite 600  
Post Office Box 810  
Tallahassee, Florida 32302-0810

Rodney C. Wade, Esquire  
Robert Michael Eschenfelder, Esquire  
Manatee County Attorney's Office  
Post Office Box 1000  
Bradenton, Florida 34206-1000

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

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

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

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.