

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHANE HENRY,)
)
 Petitioner,)
)
 vs.) Case No. 12-1959
)
 CSX TRANSPORTATION, INC., AND)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on August 3, 2012, in Hawthorne, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David Petrano, Esquire
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Hawthorne, Florida 32640

For Respondent Department of Transportation:

John A. Minnick, Esquire
Susan Schwartz, Esquire
Department of Transportation
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For Respondent CSX Transportation, Inc.:

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STATEMENT OF THE ISSUE

The issue is whether the Department of Transportation ("Department") may issue a permit authorizing CSX Transportation, Inc. ("CSXT") to close public-railroad highway-grade crossing 627445-K (the "Crossing") located at SE 222nd Street in Hawthorne, Florida.

PRELIMINARY STATEMENT

On June 30, 2010, CSXT submitted a Railroad Grade Crossing Application to close the Crossing as redundant to other crossings in the vicinity. On October 28, 2010, the Department issued a Notice of Intent to Permit Closure (the "Notice") to authorize the closure of the Crossing. On November 15, 2010, Petitioner Shane Henry timely filed a petition opposing the proposed granting of the permit. On November 17, 2010, the City of Hawthorne timely filed a petition opposing the granting of the permit.

On May 30, 2012, the Department forwarded both petitions to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge and the conduct of a formal administrative hearing. The petition filed by Mr. Henry was given DOAH Case No. 12-1959. The petition filed by the City of Hawthorne was given DOAH Case No. 12-1961. Both cases were assigned to the undersigned. By order dated June 12, 2012, the

cases were consolidated for hearing. By order dated June 13, 2012, the case was scheduled for hearing on August 3, 2012.

On July 30, 2012, the City of Hawthorne filed a Notice of Withdrawal of Petition for a Formal Administrative Hearing, pending execution of a settlement agreement. By order dated July 30, 2012, the file in DOAH Case No. 12-1961 was closed. DOAH Case No. 12-1959 went forward for hearing on August 3, 2012, on which date the hearing was convened and completed.

On the morning of August 3, 2012, prior to the convening of the hearing, the undersigned and the parties conducted an informal viewing of the site of the Crossing. At the outset of the hearing, Joint Exhibits 1 and 2 were admitted by stipulation.^{1/}

At the hearing, the Department presented the testimony of Janice Bordelon, a Department rail specialist. The Department's Exhibits 1 through 7 were admitted into evidence. CSXT presented the testimony of Cliff Stayton, its director of community affairs and safety. CSXT's Exhibit 1 was admitted into evidence. CSXT also submitted four publications from the U.S. Department of Transportation without objection as matters for judicial notice: "Highway-Railroad Grade Crossings: A Guide to Crossing Consolidation and Closure" dated July 1994; the Secretary of Transportation's "Action Plan" for "Highway-Rail Crossing Safety and Trespass Prevention" dated June 13, 1994;

"Rail-Highway Crossing Safety Action Plan Support Proposals" dated May 2004; and the "Railroad-Highway Grade Crossing Handbook" dated August 2007. Mr. Henry testified on his own behalf and offered no exhibits into evidence.

The one-volume transcript of the hearing was filed at DOAH on August 27, 2012. At the hearing, the parties agreed that their proposed recommended orders would be filed no later than 30 days after the filing of the transcript. The Department timely filed its Proposed Recommended Order on September 25, 2012. CSXT filed its Proposed Recommended Order on October 2, 2012, beyond the agreed time limit for filing of proposed recommended orders. However, because no party objected to the late filing, the undersigned has considered CSXT's Proposed Recommended Order in the writing of this Recommended Order. Petitioner Shane Henry did not file a proposed recommended order.

FINDINGS OF FACT

1. The Department has authority over public railroad-highway grade crossings in Florida, including the authority to issue permits for the opening and closing of crossings.

§ 335.141(1)(a), Fla. Stat.^{2/}

2. The Federal Railroad Administration ("FRA") has an "Action Plan" to improve grade-crossing safety. A key element of that plan is the consolidation of redundant and unnecessary

highway-rail grade crossings. The FRA's goal is for each state to reduce railroad crossings by 25 percent.

3. The Department's criteria for closing railroad-highway grade crossings are set forth in Florida Administrative Code Rule 14-57.012(2)(c), as follows:

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.

4. On June 30, 2010, CSXT submitted a Railroad Grade Crossing Application seeking closure of the Crossing, based on the redundancy of the Crossing in relation to other available crossings.

5. The Crossing is located at SE 222nd Street in Hawthorne. 222nd Street is a two-lane urban local road running north and south, beginning at 69th Avenue and ending at 75th Avenue. The street crosses CSXT railroad tracks between SE 73rd

Avenue and 74th Lane in a north-south direction. The surrounding area consists of residences, a veterinary hospital, a city-owned park, and some small commercial uses. The railroad right-of-way at the Crossing is operated by CSXT.

6. The Crossing includes a timber and asphalt surface over a single mainline track. It has no sidewalk and is designed for automobile use only.

7. The rail speed limit at the Crossing is 20 to 25 miles per hour. Petitioner, Dr. Shane Henry, is the owner of the veterinary hospital near the Crossing and was the only testifying witness familiar with the actual movement of the trains at the Crossing. Dr. Henry credibly testified that their actual speed at the Crossing is no greater than 5 miles per hour.

8. Two local trains pass through the Crossing three times per week. A Department traffic study showed that 53 vehicles crossed the track at the Crossing in a 24-hour weekday period. No school buses use the Crossing. The posted speed limit for vehicles at the Crossing is 10 miles per hour.

9. There are no active warning signals such as flashing lights or crossbars at the Crossing. Reflective crossbuck signs have been installed at the Crossing to alert drivers that they are approaching a railroad track. Train crews are required to sound their horns in warning as they approach the Crossing.

10. Approximately 264 feet to the east of the Crossing is another railroad crossing at U.S. 301, which is the main north-south thoroughfare in Hawthorne. U.S. 301 is a four-lane highway that is heavily traveled in comparison to SE 222nd Street.

11. Approximately 475 feet to the west of the Crossing is another railroad crossing at SE 221st Street. Southeast 221st Street is a two-lane north-south connector for Hawthorne's business district.

12. The railroad crossings at U.S. 301 and SE 221st Street have active signals with crossbars lowering and lights flashing when trains pass.

13. The Department sent a diagnostic team to examine and evaluate the Crossing. The team recommended that the Crossing be closed as redundant to the safer crossings nearby. The Department presented the proposed closure to the Hawthorne City Commission at a public meeting on July 20, 2010.

14. Dr. Henry attended the meeting and voiced his opposition to the closure. Dr. Henry's Lake Area Animal Hospital is located at the corner of U.S. 301 and 74th Lane. The animal hospital is open on Tuesdays and Wednesdays. A small city park is located across the Crossing from the animal hospital. Dr. Henry testified that he tells his clients to walk their pets to the park to calm them down. Clients needing stool

or urine samples are also advised to walk their pets to the park while waiting.

15. Dr. Henry testified that closing the Crossing would limit his clients' access to the park and force them onto U.S. 301, which is heavily traveled by vehicles. However, there are alternative places to walk animals near the hospital that would not force the clients directly onto U.S. 301, including a side yard of the hospital premises. Dr. Henry may consider these less calming for the animals than the park, but they do not appear to endanger the animals.

16. In deciding whether to authorize the closure of the Crossing, the Department considered the seven criteria listed in rule 14-57.012(2)(c): safety; necessity for rail and vehicle traffic; alternate routes; effect on rail operations and expenses; excessive restrictions to emergency vehicles resulting from closure; design of the grade crossing and road approaches; and presence of multiple tracks and their effect on railroad and highway operations. These criteria were considered in light of the overall objective "to reduce the accident/incident frequency and severity at public railroad-highway grade crossings, and improve rail and motor vehicle operating efficiency."

Fla. Admin. Code R. 14-57.012(1).

17. As to the "safety" criterion, the Department's first consideration was the potential for collisions of vehicles and

trains at the Crossing. The Department made the following credible findings concerning safety at the Crossing:

The SE 222nd Street crossing is signalized with crossbucks only (i.e., passive signalization) without any active warning devices (i.e., lights and gates). Cautious drivers would stop at the subject crossing and look both ways along the track to determine whether a train is approaching and to estimate its speed. In the event that following vehicles do not anticipate such stops and/or fail to maintain safe-stopping distance, collisions may result. In addition, the presence of the crossing itself may cause non-train collisions. Exemplified by a driver stopping suddenly to avoid collision with an oncoming train, the driver may lose control of the vehicle and collide with a roadside object. These types of potential collisions would be avoided with the elimination of the crossing.

Currently there are no recorded accidents at the crossing; however, the opportunity exists for collisions, train and non-train, when a crossing exists. Although accident history is taken into account, it is not the sole determining factor, in as much as the prospective crossing closure has relatively low vehicular use and, thereby, fewer accidents. An accident does not have to occur before considering a crossing closure.

18. Janice Bordelon, a Department rail specialist, was a member of the Department's diagnostic team. At the final hearing, Ms. Bordelon testified that the timber and asphalt surface of the Crossing was in poor condition and could cause a driver to focus his attention on finding a smooth pathway rather than looking for oncoming trains.

19. As to the "necessity for rail and vehicle traffic" and "alternate route" criteria, the Department concluded that the Crossing is not a necessity for rail or vehicular traffic because of the ready availability of alternate routes. The Department determined that there were alternate routes and parallel roads on each side of the Crossing, and residents, schools, emergency response, and businesses would not be negatively affected by the closure of the Crossing. Closure of the Crossing to vehicular traffic would have no effect on rail traffic.

20. Florida guidelines for public crossing closures provide that closure should be considered where there are fewer than 3,000 vehicles per day using the crossing and where there are crossings located closer than one-half mile apart. As noted above, only 53 vehicles were recorded at the Crossing over a 24-hour weekday period. The Department determined that rerouting such a low volume of vehicles to other roads would not have a significant impact on the level of service of the alternate routes.

21. The Department specifically considered Dr. Henry's objections and concluded as follows:

A veterinarian clinic at the corner of 74th Lane and N. Main Street (US 301/SR 200) has stated that closure would require their clients to be rerouted onto N. Main Street (US 301/SR 200), a more hazardous route.

However, a timing study of the location shows that clients visiting the clinic have a safe alternate by traveling one block south on SE 222nd Street to 75th Avenue and proceeding north on SE 221st Street or south on Johnson Street. This route takes less than two minutes and does not require traveling onto N. Main Street (US 301/SR 200).

22. Ms. Bordelon testified that she performed the referenced timing study and confirmed the findings thereof. She stated that alternative routes are simple to find in Hawthorne because the city's streets are laid out in grid fashion. There are parallel roads on either side of the Crossing, and the closing of the Crossing would not leave any property landlocked.

23. Ms. Bordelon's timing study established that there are at least two alternate routes for vehicles, each of which would add a driving time of less than two minutes. As noted above, the 221st Street crossing is about 475 feet from the Crossing and the U.S. 301 crossing is about 264 feet from the Crossing, providing nearby alternatives to the Crossing after its closure.

24. As to the "effect on rail operations and expenses" criterion, the Department made the following findings:

The elimination of the rail crossing at SE 222nd Street would benefit the Railroad and the City in the reduction of liability and maintenance expenses. The removal of the crossing would eliminate the cost of upgrading and maintaining the crossing. The Department's Code of Federal Regulations (CFR) Part 130 funds are annually distributed and utilized on crossings within

each District based on a diagnostic team's evaluation of the prioritized crossings' need for safety enhancement.³

Hawthorne has been the recipient of a major safety project with the construction of the \$42 million grade separation project at SR 20/Hawthorne Road and US 301/SR 200. The Department has also scheduled a \$375,000 crossing surface project at US 301/SR 200 to be installed in the coming fiscal year. The US DOT Action Plan specifically states: when improving one crossing (i.e., grade separation or crossing improvements) consider the elimination of the adjacent crossing. The closure of SE 222nd Street reflects the guidance of the Federal Railroad Administration's crossing consolidation plan.

The elimination of the SE 222nd Street crossing would positively impact rail operations in the reduction of horn blowing and the elimination of trains blocking the roadway. The elimination of both of these factors at this site would reduce complaints received from motorists and nearby homeowners.

25. Cliff Stayton, director of community affairs and safety for CSX, testified that at any public crossing, federal regulations require the operating railroad to sound the horn at least 15 seconds but no more than 20 seconds before the train enters the crossing.^{4/} Mr. Stayton pointed out that here there are three crossings within a half-mile of each other, each of which requires the sounding of the horn. Eliminating the Crossing would reduce the nuisance factor of the horn to the nearby residents.

26. As to the "excessive restrictions to emergency vehicles resulting from closure" criterion, the Department found that the closure of the Crossing would have no effect on emergency vehicle access. Alachua County provides EMS service to Hawthorne, and the vehicles come from a county fire and rescue station eight miles west on S.R. 20. The vehicles could access any residence on SE 222nd Street by taking S.R. 20 to U.S. 301. The hospitals serving Hawthorne are all located in the Gainesville area. Ms. Bordelon testified that emergency vehicles use main arterial roads such as U.S. 301 rather than urban local roads such as SE 222nd Street, and the closure of the Crossing would have no adverse impact to the provision of emergency services on either side of the Crossing.

27. As to the "design of the grade crossing and road approaches" criterion, the Department found that the Crossing's timber and asphalt surface provides a rough transition from the road surface, with noticeable dipping and bouncing. The approaches to the Crossing are cracked and patched, adding to the rough transition. As noted above, the uneven surface may cause a driver to pay more attention to choosing a smooth path over the Crossing rather than determining whether a train is approaching. Though there are no recorded accidents at the Crossing, its design and state of repair lead to the finding

that closing the Crossing would offer at least some incremental safety enhancement to motorists.

28. As to the "presence of multiple tracks and their effect on railroad and highway operations" criterion, Ms. Bordelon testified that it did not apply in this case because the Crossing has only a single track.

29. In addition to his argument that his practice will be inconvenienced by having access to the park cut off, Dr. Henry alleged that disabled persons may have difficulty accessing his clinic via wheelchair if they are forced to cross at U.S. 301 rather than at the Crossing. Dr. Henry alleges that this constitutes a failure to offer a reasonable accommodation under the Americans with Disabilities Act. No direct evidence was presented to support this speculative claim.

30. In summary, the Department's findings leading to the recommendation that the Crossing be closed are supported by competent substantial evidence. Mr. Henry's concerns regarding the impact of closure on his business were sincere and well expressed at the hearing, but were insufficient to rebut the Department's prima facie showing that the criteria set forth in rule 14-57.012(2)(c) have been satisfied and the Crossing should be closed.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

32. Section 335.141(1), Florida Statutes, provides as follows:

(1) (a) The department shall have regulatory authority over all public railroad-highway grade crossings in the state, including the authority to issue permits which shall be required prior to the opening and closing of such crossings.

(b) A "public-railroad highway-grade crossing" is a location at which a railroad track is crossed at grade by a public road.

33. In furtherance of its regulatory authority, the Department has promulgated Florida Administrative Code Rule 14-57.012, which provides as follows, in relevant 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/incident 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 and closure of public railroad-highway grade crossings shall be based upon Notices of Intent issued by the Department, Final Orders of the Department following administrative hearings conducted pursuant to Chapter 120, F.S., 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. A Final Order or a Stipulation of Parties concludes the application process. 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, or the application does not demonstrate a material change of circumstances has occurred at the crossing since the execution of a Final Order or a Stipulation of Parties, 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.

34. In its Proposed Recommended Order, the Department for the first time has raised the question of Mr. Henry's standing to pursue this matter. Section 120.52(13)(b), Florida Statutes, provides that a "party" includes any person "whose substantial interests will be affected by the proposed agency action, and who makes an appearance as a party." To demonstrate a substantial interest, the person must demonstrate: (1) that he

will suffer injury in fact which is of sufficient immediacy to entitle him to an administrative hearing; and (2) that his substantial injury is of a type or nature that the proceeding is designed to protect. Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Further, a party must demonstrate that the agency action will affect him individually rather than as a member of the general public. Grove Isle Ltd. v. Bayshore Homeowners' Ass'n, Inc., 418 So. 2d 1046, 1047-48 (Fla. 1st DCA 1982).

35. The Department argues that Dr. Henry has not asserted that he will be individually affected by the closing of the Crossing; rather, he suggests that his animal patients and their owners will be inconvenienced by not having direct access from the hospital to the park. The Department states that Dr. Henry cannot assume standing on behalf of clients who may desire such direct access. See Fla. Soc. of Ophthalmology v. State Bd. of Optometry, 532 So. 2d 1279, 1286 (Fla. 1st DCA 1988) (physicians lack general authority to represent their patients' interests in administrative proceedings; physicians must allege that agency action would prevent them from performing needed medical services sought by their patients).

36. The undersigned concludes that Dr. Henry is arguing on his own behalf as well as that of his clients. Accepting at face value his contention that his clients will be greatly

inconvenienced by lack of access to the park, Dr. Henry may face a significant loss of business as clients move on to more easily accessible service providers after the closing of the Crossing.

37. However, this asserted business interest is not the type of injury that this proceeding is designed to prevent. The objective of this proceeding is "to reduce the accident/incident frequency and severity at public railroad-highway grade crossings, and improve rail and motor vehicle operating efficiency." Rule 14-57.012(2) suggests that the local government entity provide a public forum for community involvement, and it requires that the presence of alternate routes and emergency vehicle access be considered, but it does not require the Department to consider the economic impact of railroad crossing closure to each individual business in the vicinity. The Department is therefore correct in its belated assertion that Dr. Henry lacks standing to bring this proceeding.

38. Even if Dr. Henry had established his standing, CSXT produced competent substantial evidence that rail efficiency and safety would be enhanced by closure of the Crossing.

39. The Department considered each of the seven criteria listed in rule 14-57.012(2) for closure of a public railroad-highway grade crossing. The evidence produced at hearing established that the Crossing is not necessary for vehicular

traffic. Alternate routes are readily available and have sufficient capacity to accommodate the small number of cars that currently use the Crossing. Closure of the Crossing will enhance safety and have a positive effect on rail operations and expenses. The Crossing is not necessary to accommodate emergency vehicles, which can reach the area via alternate routes. The design of the grade crossing and road approaches, with the lack of active signalization and rough surface, supports the decision for closure, particularly given the proximity of two well-designed crossings with active signalization. Multiple tracks are not present and therefore are not a consideration.

40. The Department's initial determination that the Crossing should be closed was correct and should become final.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a final order approving the requested permit for closure of public railroad-highway grade crossing 627445-K located at SE 222nd Street in Hawthorne, Florida.

DONE AND ENTERED this 26th day of October, 2012, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2012.

ENDNOTES

^{1/} Joint Exhibit 1 was the Notice. Joint Exhibit 2 was an undated Addendum to the Notice. These exhibits were also admitted as Department Exhibits 3 and 4.

^{2/} All references to the Florida Statutes are to the 2010 edition, unless otherwise noted.

^{3/} The "Part 130" reference is actually to 23 U.S.C. § 130, which sets forth the formula for the distribution of federal funds to the states for elimination of hazards at railway-highway crossings, as well as the incentive program for closure of at-grade crossings. The implementing rules may be found at 23 C.F.R. §§ 646.200-646.220.

^{4/} See 49 C.F.R. § 222.21(2).

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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.