

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CSX TRANSPORTATION, INC.,

Petitioner,

vs.

Case No. 15-6500

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

NEW PORT TAMPA BAY CDD HOLDINGS,
LLC, AND NEW PORT TAMPA BAY CDD,

Intervenors.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, on February 23 and 24, 2016, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Intervenors: Christopher Torres, Esquire
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STATEMENT OF THE ISSUE

Whether the opening of a public highway-rail grade crossing at the proposed intersection of Tyson Avenue and Bridge Street in Hillsborough County, Florida, meets the criteria set forth in Florida Administrative Code Rule 14-57.012(2)(a)(1-3).

PRELIMINARY STATEMENT

On December 8, 2014, the City of Tampa (City), filed an application with the Department of Transportation (Department) for a permit to open a public highway-rail grade crossing within the City of Tampa over a rail spur owned by CSX Transportation, Inc. (CSX), as part of a planned extension of Bridge Street terminating at Tyson Avenue. On September 30, 2015, the Department issued a Notice of Intent to Permit the crossing. CSX timely filed a Petition for Formal Administrative Hearing challenging the proposed highway-rail grade crossing.

On November 18, 2015, the Department referred the petition to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge to conduct a disputed-fact hearing. On November 23, 2015, New Port Tampa Bay CDD Holdings, LLC, and New Port Tampa Bay CDD (collectively referred to as

New Port) intervened in the proceeding as the owner of the property to be served by the proposed highway-rail grade crossing.

CSX presented the testimony of Thomas Beck Daniel, the corporate representative for New Port, and Jacob Smith, the corporate representative for CSX. CSX also presented the testimony of Richard Ryabik, an expert in traffic engineering. CSX Exhibits 1 through 6 were admitted into evidence. Joint Exhibits 1 through 5 were also admitted into evidence.

The Department presented the testimony of Calvin Thornton, an engineer with the City of Tampa, and Laura Regalado, the Department's representative and rail specialist. The Department's Exhibit 1, containing sixteen photographs, was admitted into evidence.

New Port presented the testimony of Randy Coen, an expert in traffic planning, and Thomas Beck Daniel, its corporate representative. New Port's Exhibits 1 through 26 were accepted into evidence. New Port's Exhibits 17 through 25 consist of train movement videos that are stored on a single flash drive.

The Transcript of the disputed-fact hearing was filed with DOAH on March 21, 2016. The parties filed Proposed Recommended Orders which were considered by the undersigned.

FINDINGS OF FACT

1. The Department has authority over public highway-railroad grade crossings in Florida, including the authority to issue permits for the opening and closing of crossings in accordance with section 335.141(1)(a), Florida Statutes (2015),^{1/} and rule 14-57.012.

2. New Port owns a 52-acre waterfront parcel (New Port parcel) in Tampa, Florida, bordered to the North by Gandy Boulevard, the east by Westshore Boulevard, to the south by Tyson Avenue and to the west by Tampa Bay, in an area known as Rattlesnake Point.

3. In 2007, the City of Tampa amended its comprehensive plan to encourage the redevelopment of Rattlesnake Point from industrial to a residential/commercial mixed-use waterfront community. The City re-zoned the New Port parcel through PD-A Zoning 07-48 to authorize redevelopment of the parcel in a manner consistent with the comprehensive plan, which includes residential, office, commercial, and hotel uses.

4. CSX owns and operates a rail spur that crosses over Tyson Avenue, just west of Westshore Boulevard and then runs parallel to the north side of Tyson Avenue (the Henry Spur). CSX operates trains, averaging five cars in length, along the Henry Spur transporting goods to and from the two remaining industrial users located on Rattlesnake Point. The trains generally travel

between 11 p.m. and 5 a.m., Sunday through Thursday, at a speed between five and ten miles per hour. Vehicular traffic is stopped by automatic crossbars for approximately one and one-half minutes when the train crosses the intersection at Westshore and Tyson.

5. The Henry Spur prevents public access to the New Port parcel from the south at Tyson Avenue. Two private highway-rail grade crossings over the Henry Spur allowed construction equipment to access the New Port parcel from the south during land clearing.

6. As a condition of the New Port re-zoning, the City required that Bridge Street, a north-south road located in the northern portion of the parcel, be extended to provide a north-south corridor through the entire parcel beginning at Gandy Boulevard and terminating at Tyson Avenue. PD-A zoning 07-48 provides, at item 32, that "[t]he property Owner/Developer shall, at no cost to the City, construct/reconstruct and extend Bridge Street from Gandy Boulevard to Tyson Avenue as part of the redevelopment of the site." The re-zoning further provides that Bridge Street would be a public right-of-way, deeded to the City, and after obtaining certificates of occupancies for retail, office, residential and hotel space, "the developer will be required to connect Bridge Street, from Price Avenue to Tyson

Avenue, with Transportation approval, across CSX property, at the developer's sole expense."

7. In 2007, CSX, the Department, the City of Tampa, New Port Tampa Bay CDD, and Ecoventure New Port II, LLC, entered into a Stipulation of Parties (Stipulation) to allow a new public highway-rail grade crossing over the Henry Spur at Bridge Street and Tyson Avenue (Crossing). The Stipulation authorized the Crossing upon the permanent closure of the two private highway-rail grade crossings along the Henry spur, and two public highway-rail grade crossings at 5th Avenue and 35th Street in Tampa, Florida. The Stipulation waived all administrative hearing rights provided that all covenants of the agreement were met within 24 months of execution of the Stipulation.

8. The two public crossings were closed in accordance with the Stipulation, but due to changes in the Tampa real estate market, the New Port project did not immediately advance. The crossing at Bridge Street and Tyson Avenue was not constructed within 24 months and the Stipulation expired. Ecoventure New Port II, LLC's, interest in the New Port parcel was later assumed by New Port Tampa Bay Holdings and interest in the project's development was re-ignited.

9. On December 18, 2014, the City of Tampa, submitted a Railroad Grade Crossing Application seeking the opening of a highway-rail grade crossing at Bridge Street and Tyson Avenue,

which is the same location previously authorized by the Stipulation. CSX did not agree to an amended stipulation to allow for the opening of the Crossing.

10. Laura Regalado has managed the Department's rail crossing opening-closure program since August 2014. Ms. Regalado received and reviewed the City of Tampa's application for the Crossing.

11. Ms. Regalado, in February 2015, visited the locations referenced in the application and examined Tyson Avenue where the Crossing was proposed and the two private crossings that were to be closed. The private crossings were unfinished, rough surfaces and had no gates, bells, or flashing lights to warn of oncoming trains. The proposed public Crossing would be required to have an active warning system of gates, bells, and flashing lights. Ms. Regalado concluded that although any new crossing presents a potential danger to the traveling public, the overall safety of the area would be improved by the opening of one gated crossing, in exchange for the closing of two public crossings and the closing of the two unsecured private crossings. To further improve safety in the area, the Department required improved signalization at two additional public crossings as a condition of approval of the Notice of Intent to Permit.

12. Ms. Regalado also examined three side streets to the west of Westshore Avenue for their potential as alternative

access routes to the New Port property. The three streets-- McElroy, Paul and Price--currently accommodate apartments, single-family houses, and light industrial uses. They are narrow side streets ranging from 16 to 18 feet wide, with on-street parking and drainage ditches. Ms. Regalado determined that the streets were not adequate alternative routes as they could not adequately support two-way traffic, construction vehicles, and emergency vehicles.

13. At buildout, the New Port development is anticipated to have an annual average daily traffic (AADT) count of 16,654 vehicles entering and exiting the development. Bridge Street at Gandy Boulevard is expected to be a primary access point at the northern portion of the New Port parcel. The Gandy Boulevard and Bridge Street intersection was reconstructed after 2008 to provide westbound traffic accessing the New Port parcel a left turn lane onto Bridge Street. Eastbound Gandy Boulevard traffic can turn right onto Bridge Street to access the New Port parcel. Vehicles leaving the New Port parcel from Bridge Street are prohibited from turning left (to go west), but can make a right onto Gandy Boulevard to travel east and can then turn at the signalized intersection at Gandy and Westshore to travel north, south or west (after making a u-turn).

14. For City approval of the New Port project, additional access points were required to accommodate westbound traffic and

allow for evacuation and traffic flow. Plans approved by the City required Bridge Street be extended across the Henry Spur to Tyson Avenue as the main north-south thoroughfare for the development. Tyson Avenue is a 24-foot wide east-west roadway designed for two-way traffic and heavy vehicles. The corner of Tyson and Westshore meets the criteria for signalization, which would allow controlled turns from Tyson onto Westshore. Once northbound on Westshore, vehicles desiring to proceed in a westbound direction can turn left on Gandy Boulevard.

15. Westshore Boulevard is approximately a half-mile long between Gandy and Tyson, has one north bound lane, one south bound lane, and a center lane. Northbound traffic on Westshore frequently backs up, even in the middle of the day, from Gandy Boulevard past McElroy, Paul and Price Avenues to as far south as Tyson Avenue. To address some of the congestion, the City has designed and budgeted for a dual left turn lane from Westshore onto Gandy Boulevard. The dual turn lanes will extend south of McElroy Avenue.

16. The City has classified Westshore Boulevard as a failed roadway because it is unable to accommodate traffic volumes that currently exist. Consequently, the City denied the developer's initial request to have Price Avenue be a gateway to the development as it would generate additional traffic entering directly onto Westshore Boulevard at an already congested point.

17. Of the current side streets providing access to Westshore Boulevard between Gandy Boulevard and Tyson Avenue, Paul Avenue will not be extended to connect to the New Port parcel and Hendry Street (referred to as Bridge Street on Google maps) cannot provide public access as it is a private drive with lateral parking. As for McElroy Avenue, only southbound right turns will be allowed onto Westshore Boulevard due to the installation of the dual turn lanes for northbound traffic on Westshore Boulevard. Price Avenue will accommodate southbound traffic making right turns into and out of the New Port parcel, but spacing requirements prevent placement of a traffic signal at Price and Westshore, so northbound vehicles would have difficulty making a left turn onto Price Avenue. Furthermore, the proximity of Price Avenue to Tyson Avenue, and the near chronic congestion on Westshore Boulevard, would make a left turn leaving Price Avenue onto Westshore Boulevard exceptionally dangerous. Without the Crossing at Tyson Avenue, Price Avenue is expected to have a queue of 16.8 cars waiting to access Westshore Boulevard during peak morning hours, and a queue of 23.7 cars during peak afternoon hours.

18. CSX contends that an entry point, identified as Retail Drive, to the New Port parcel could be an alternative route instead of the connection at Bridge Street and Tyson. Retail Drive connects to Westshore Boulevard at the southeastern portion

of the New Port parcel. New Port is under contract to develop a 12-acre parcel at that location as a multi-family apartment complex. To access the apartment complex, the plans contemplate Retail Drive as a gated, private driveway connected to Westshore Boulevard. Due to spacing requirements, traffic signals could not be constructed at both the intersections of Westshore Boulevard and Retail Drive and Westshore Boulevard and Tyson Avenue. Tyson Avenue has already met the requirements for a traffic signal at the Westshore Boulevard intersection and is preferred by the City for signalization because it would serve all of the traffic on Rattlesnake Point, instead of a single development. Absent a traffic signal, vehicles leaving Retail Drive are only permitted to make a right turn to head south on Westshore Boulevard. As only ten percent of the traffic leaving the New Port development is expected to travel south, Retail Drive, if reconstructed as a through road, would not provide an acceptable alternative route for traffic leaving the New Port development.

19. The Bridge Street extension over the Henry Spur is essential to the City's plan for redevelopment of the New Port development. The Bridge Street extension provides a north-south corridor parallel to Westshore Boulevard that allows traffic to enter onto Gandy Boulevard to the north and Tyson Boulevard to the south.

20. CSX agreed to the Crossing in 2007, but now objects and contends that the situation has changed. Specifically, CSX contends that the amount of rail traffic has increased from an estimated five train movements per week to an estimated ten train movements per week. The trains are still of short duration, with crossings taking approximately a minute and one-half, twice a night, four or five times a week. CSX also indicates it has felt increased pressure from the Federal Railroad Administration (FRA) to decrease its overall number of crossings in Florida. CSX has not approached FRA for its position on allowing this particular crossing to open, and the related offset of the closing of four CSX crossings. CSX expressed concern that they could be subject to FRA fines if the number of crossings is not reduced, but offered no credible evidence in support of this contention.

CONCLUSIONS OF LAW

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

22. The Department bears the burden of proving by a preponderance of the evidence that the Crossing should be allowed. Dep't of Transp. v. J. W. C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat. A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain

proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

23. The Department has regulatory authority over all public highway-railroad grade crossings under section 335.141(1)(a), Florida Statutes, including the authority to issue permits for the opening of any new crossings.

24. Rule 14-57.012(2)(a) provides, in part, as follows:

(a) Opening of Public Railroad-Highway Grade Crossings. In considering an application to open 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. Closure of one or more public railroad-highway grade crossings to offset opening a new crossing.
6. Design of the grade crossing and road approaches.
7. Presence of multiple tracks and their effect upon railroad and highway operations.
8. When the estimated highway traffic is 30,000 vehicles or more a day across main line tracks, an engineering and benefit-cost analysis must be performed by the applicant to determine if a grade separation is warranted.

25. CSX does not challenge the Department's determination that the proposed Crossing meets the criteria under subsections

four through seven of rule 14-57.012(2)(a). The criteria set forth in subsections one, two, and three are the only items in dispute.

26. The Crossing satisfies the first criterion concerning "safety." Regarding the issue of "safety," it is generally accepted that any public railroad-highway grade crossing will present a safety hazard, and that the Department's obligation in permitting a new crossing is to ensure that it is as safe as possible, within the bounds of reason. CSX Transp. Inc. v. Dep't of Transp. and Manatee Cnty., Case No. 06-1491 (Fla. DOAH Nov. 16, 2006; Fla. DOT Dec. 18, 2006). The Department has established that the proposed Crossing will be safe. Bridge Street will cross the rail line at 90 degrees, which is the preferred angle for the best sight distance. The Crossing is required by the Notice of Intent to Permit to be constructed in accordance with Department design standards to include a concrete surface, class III flashing lights, automatic gates, and pedestrian gates at the sidewalks.

27. The Crossing enhances the overall safety of the impacted area. The closing of two ungated, rough surfaced private crossings increases the safety of the Henry rail spur. The Crossing also provides an alternative evacuation route for Rattlesnake Point should Westshore Boulevard become blocked at Tyson Avenue.

28. The Crossing increases vehicle safety in the area by facilitating entry onto Westshore Boulevard through a controlled intersection. Lastly, the Crossing increases safety within Tampa Bay by providing for the closing of two public rail crossings and improved signalization at two other crossings.

29. The Crossing satisfies the second criterion concerning "necessity." A parcel does not need to be landlocked before a crossing will be deemed a necessity. As Chief Judge Cohen noted in CSX Transportation, Inc. v. Department of Transportation, a crossing will meet the criteria for necessity where "[t]he opening of the rail crossing will alleviate traffic burdens of [the] County, and fits within the County's transportation plan for traffic flow and emergency operations." Id. ¶ 44. The Crossing in this case meets that criteria.

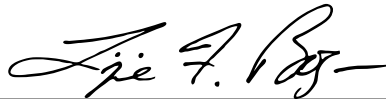
30. The Crossing satisfies the third criterion concerning "alternative routes." The Department properly determined that the existing alternative routes, as well as the planned alternative route through a private driveway, are insufficient to meet the needs of the new development.

31. The Department has met its burden of demonstrating that the City of Tampa's application, which seeks a permit to open a public highway-rail grade crossing as part of the planned extension of Bridge Street terminating at Tyson Avenue, meets the applicable criteria and should therefore be approved.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Department of Transportation enter a final order approving the opening of a public railroad-highway grade crossing at Bridge Street and Tyson Avenue in Hillsborough County, Florida.

DONE AND ENTERED this 22nd day of April, 2016, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2016.

ENDNOTE

^{1/} All statutory references are to 2015 Florida Statutes, unless otherwise indicated.

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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.