

**STATE OF FLORIDA
BUILDING COMMISSION**

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| FILED | |
| <small>Department of Business and Professional Regulation</small> | |
| <small>Deputy Agency Clerk</small> | |
| <small>CLERK</small> | <small>Brandon Nichols</small> |
| <small>Date</small> | 12/30/2014 |
| <small>File #</small> | |

IN RE:

ALL ABOARD FLORIDA –
OPERATIONS, LLC

CASE NO.

DS 2014-163

**PETITION FOR DECLARATORY STATEMENT BEFORE
THE FLORIDA BUILDING COMMISSION**

A. INTRODUCTION

All Aboard Florida is an intercity passenger rail project being developed by Florida East Coast Industries, LLC (FECI) – owner of Florida’s premier passenger rail corridor – that will connect Miami to Orlando with intermediate stations in Fort Lauderdale and West Palm Beach. This rail service will provide Floridians and visitors a viable transportation alternative to congested highways and airport terminals. All Aboard Florida will provide a high quality experience for passengers and will be the first privately owned, operated and maintained passenger rail system in the United States. Because All Aboard Florida consists of a system that is being constructed at very significant expense, and will be constructed, maintained, and operated in and through numerous counties and municipalities in the State of Florida, All Aboard Florida seeks certainty as to the consistency of the application of the codes and standards pursuant to which the

project will be constructed throughout the state. Accordingly, it is filing this petition.

B. THE PETITIONER

Petitioner is All Aboard Florida – Operations, LLC. Petitioner’s address is 2855 Le Jeune Road, 4th Floor, Coral Gables, Florida 33134. Petitioner’s telephone number is (305) 520-2300, although Petitioner should be contacted through undersigned counsel.

C. COUNSEL FOR THE PETITIONERS

Petitioner is represented by: Robert S. Fine, Esq., AIA. Florida Bar Number 0155586. Greenberg Traurig, P.A., 333 Avenue of the Americas, Suite 4400, Miami, Florida 33131. Telephone: 305.579.0826. Facsimile: 305.961.5826. Email: FineR@gtlaw.com.

**D. THE STATUTES, RULES AND CODE PROVISIONS
AND THEIR EFFECT ON PETITIONER**

(1) The Florida Building Code

- (a) The Florida Building Code provisions that are the subject of this Petition are:
 - (i) FBC, 2010 Edition, Building Volume, Section 102.2(b); and
 - (ii) FBC, 2010 Edition, Building Volume, Section 202-Definitions (illustrating that the term *railroads and ancillary facilities associated with the railroad* is not defined in the FBC); and
 - (iii) FBC, 2010 Edition, Building Volume, Section 105.

(2) Statutory Provisions

- (a) The statutory provisions that are the subject of, or are implicated by, this Petition are:
 - (i) Section 553.73(10((b))), Florida Statutes (2013); and
 - (ii) Section 41, Chapter 98-287, Laws of Florida.

(3) Rule Provisions (of the Florida Administrative Code (“F.A.C.”))

- (a) The Rules provisions of the F.A.C. that are the subject of, or are implicated by, this Petition are:
 - (i) Rule 61 G 20-1.001, F.A.C. (The Florida Building Code).

(4) The effect of these statutory, regulatory and code provisions on Petitioner

Petitioner, a wholly-owned subsidiary of Florida East Coast Industries, LLC ("FECI"), is constructing an express, intercity passenger rail service scheduled to be in operation by 2016. The All Aboard Florida route is approximately 235 miles, with stops in Miami, Fort Lauderdale, West Palm Beach and Orlando International Airport. As such, it will be constructed in, and run through, at least eight counties and numerous local jurisdictions with (building) permitting authority. In order to meet the requirements of various federal regulations, and provide a high quality and safe system, Petitioner will be engaging the services of qualified private provider(s) to perform plan review and inspections of its construction.¹ By so doing, Petitioner will eliminate the risk of building code interpretations varying from jurisdiction to jurisdiction for what amounts to a single system tied to a continuous set of rails running through the numerous counties and cities described above. As will be set forth below, it is Petitioner's position that it is exempt from the provisions of the Florida Building Code ("FBC"), including its permitting requirements, because it is a *railroad*[] and *ancillary facilities associated with the railroad*. However, because there is no definition of *railroad*, or *railroad*[] and *ancillary facilities associated with the railroad* in the FBC, Petitioner is at risk that one or more of the jurisdictions All Aboard Florida runs through, has facilities

¹ The private provider plans reviewers and inspectors that are and will be employed by All Aboard Florida are Florida-licensed professionals, and include Florida-certified plans examiners, Florida-certified inspectors and Florida-certified building officials.

in, or provides service to, will take the position that All Aboard Florida is not a *railroad[] and ancillary facilities associated with the railroad* and seek to wrest it under local control in regard to building permitting and by extension, subject it to local control and code interpretations (which may be inconsistent with the code interpretations from neighboring or other jurisdictions along the line). While Petitioner may still choose to construct the project in accordance with the FBC (without waiving the position that it is exempt from it), the nature of the project is such that code consistency is of paramount importance so that what is essentially a 235 mile long single project spanning numerous jurisdictions can be governed by a single set of code interpretations. If each, or some, of the jurisdictions that Petitioner's rails and ancillary facilities run through (or are situated in) interpret and enforce various code provisions differently, then Petitioner is at risk of increased construction costs, scheduling delays resulting in a delayed completion of the "system," and the possibility of rail components in one jurisdiction being constructed differently in an adjacent jurisdiction potentially creating incompatibilities among various components of the railway. Accordingly, Petitioner seeks this declaratory statement in order to provide the necessary consistency in the construction of its system.

E. NATURE OF DECLARATORY STATEMENT SOUGHT

1. Is All Aboard Florida, the passenger rail system being constructed and to be operated by Petitioner (including the ancillary facilities associated with it), a *railroad[] and ancillary facilities associated with the railroad* that is exempt from

the FBC (including, but not limited to Section 105 of the FBC) by the language of the FBC itself at Section 102.2(b), and as mandated by Section 553.73(10)(b) of the Florida Statutes? (Please note that this Petition does not pose a similar question in regard to Chapter 633 of the Florida Statutes and the Florida Fire Prevention Code, or in regard to local land use regulations, which are not under the jurisdiction of the Commission.)

2. Do structures such as rail lines, rail beds, guideway structures, switches, parking facilities, power relays, switching houses and (notably) rail stations that are essential to the operation of the rail line fall within either the definition of railroad, or the definition of *ancillary facilities associated with the railroad* as set forth in Section 102.2 (b) of the FBC and therefore exempt from the FBC including its permitting requirements?

F. PETITIONER'S PROPOSED ANSWER TO THE QUESTION POSED IN THE PETITION

1. Yes, the passenger rail system (including the ancillary facilities associated with it) being constructed, and to be operated and maintained, by Petitioner is a *railroad and ancillary facilities associated with the railroad* as set forth in Section 102.2(b) of the FBC and Section 553.73(10)(b) of the Florida Statutes and is therefore exempt from the provisions of the FBC, including, but not limited to Section 105 of the FBC's permitting requirements. (This petition for declaratory statement does not address the question of whether Petitioner is subject to the Florida Fire Prevention Code or local planning and zoning regulations.)

2. Yes. As set forth in Section 341.8203, Florida Statutes, structures such as rail lines, rail beds, guideway structures, switches, parking facilities, power relays, switching houses and rail stations (as defined in Section 341.8203(6), Florida Statutes) that are essential to the operation of the rail line fall within the definition of *railroad* and are therefore exempt from the FBC and its permitting requirements based on the exemptions provided in Section 102.2 (b) of the FBC and Section 553.73(10)(b) of the Florida Statutes.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER’S PROPOSED ANSWERS TO THE QUESTIONS POSED IN THE PETITION

I. JURISDICTION AND SCOPE OF PETITION

A. “Upon written application by any substantially affected person or state agency or by a local enforcement agency, the commission shall issue declaratory statements pursuant to s. 120.565 relating to the enforcement or administration by local governments of the Florida Building Code or the Florida Accessibility Code for Building Construction.” § 553.775(3)(a), Fla. Stat.; Ch. 28-105, F.A.C.

B. “Local enforcement agencies, local building officials, state agencies, and the commission *shall* interpret provisions of the Florida Building Code and the Florida Accessibility Code for Building *Construction in a manner that is consistent with declaratory statements and interpretations entered by the commission...*” § 553.775(2), Fla. Stat. (emphasis added).

C. This Petition is intended to address the particular exemption set forth in Section 553.73(10)(b) of the Florida Statutes, and Section 102.2(b) of the FBC. The Petition does not raise, and Petitioner does not waive its right to raise, issues of federal preemption in an appropriate forum at some later time.²

II. ARGUMENT

A. Background

The Florida East Coast Railway has carried freight traffic for more than a century. Florida East Coast Railway is the parent company of Petitioner, but the

² Further, Petitioner is not waiving any claims that the FBC is preempted by the ICC Termination Act of 1995, which is also not being raised in this petition.

two ventures are independently funded and operated. All funds for the new passenger rail are exclusively used for that purpose, and each venture will continue to operate and grow independently. In addition, All Aboard Florida cannot operate freight, and FECR cannot offer passenger service on its property. Petitioner is designing and building a high-speed rail system that Petitioner will operate and maintain between South Florida and Central Florida. *See All Aboard Florida Fact Sheet*, attached as Exhibit “A”. The Florida Department of Transportation (“FDOT”) has confirmed that Petitioner is the “owner of the high-speed rail system that Petitioner is authorized to construct, operate and maintain” under the Florida Rail Enterprise Act. *See Letter from Robert M. Burdick, Deputy General Counsel, FDOT to Christopher M. Kise, dated March 12, 2014, attached as Exhibit ‘B’, at page 2.*

B. The Florida Building Code exempts railroads from its provisions and its permitting requirements

Section 102 of the FBC sets forth the types of buildings and facilities that are subject to its provisions. Section 102 also sets forth a list of buildings, structures and facilities that are exempt from the provisions of the FBC as follows:

The following buildings, structures and facilities are exempt from the Florida Building Code as provided by law, and any further exemptions shall be as determined by the legislature and provided by law:

* * *

(b) Railroads and ancillary facilities associated with the railroad.

* * *

§ 102.2(b), FBC (2010) (emphasis added).³ Therefore, if the intercity rail system being constructed and then operated by Petitioner (All Aboard Florida) constitutes a *railroad and ancillary facilities associated with the railroad*, then it is exempt from the Florida Building Code.

Section 105 of the FBC sets forth the requirements for permitting projects being constructed under the FBC. Section 105 contains comprehensive and detailed provisions for when and where permits are required under the FBC. However, if All Aboard Florida is exempt from the FBC, because it is subject to one or more of the exemptions in Section 102.2, then by extension, it must be exempt from the FBC's incorporated permitting requirements.

The exemptions from the FBC's requirements set forth in Section 102.2 are not the result of rulemaking but are the product of statutory mandate.⁴ Section 553.73 of the Florida Statutes sets forth the statutory basis for the exemptions:

The following buildings, structures, and facilities are exempt from the Florida Building Code as provided by law, and any further exemptions shall be as determined by the Legislature and provided by law:

* * *

(b) Railroads and ancillary facilities associated with the railroad.

³ All citations to the Florida Building Code shall be to the Building Volume, 2010 edition, unless otherwise cited.

⁴ The FBC is part of the Florida Administrative Code. Rule 61 G 20-1.001, F.A.C.

* * *

§ 553.73(10)(b), Fla. Stat.

Section 553.73 empowers the Florida Building Commission to “adopt ... the Florida Building Code which shall contain or incorporate by reference *all laws* and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and enforcement of such laws and rules, *except as otherwise provided in this section.*” § 553.73(1), Fla. Stat. (2014) (emphasis added). The rulemaking authority conferred by this provision under Section 120.536(1), Florida Statutes (2014), which is cited in Section 553.73(1), is strictly limited:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency’s class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

“The [a]gency’s rule and interpretation must comport with the specific authorizing statute.” § 120.536(1), Fla. Stat. (2014); *G.B. v. Agency for Persons with Disabilities*, 143 So. 3d 454, 457 (Fla. 1st DCA 2014).

a. All Aboard Florida is a railroad under Florida law

Florida Statutes define “railroad” as “any common carrier fixed-guideway transportation system such as the conventional steel rail-supported, steel-wheeled system *as well as the high-speed rail system defined in s. 341.8203* . § 341.301(12), Fla. Stat. (2012) (emphasis added). In the opinion of FDOT, the state agency with jurisdiction over the Florida Rail Enterprise Act, All Aboard Florida is a high speed rail system as defined in Section 341.8203, Florida Statutes. *See* Exhibit “B” at page 2. Because All Aboard Florida meets the definition of a railroad under Florida law, the Commission should issue a declaratory statement holding that All Aboard Florida is exempt from the provisions of the FBC including, but not limited to, the permitting requirements of Section 105.

b. Structures and facilities, including but not limited to rail stations, which are essential to the operation of the rail line, fall within the definition of *railroad* and are therefore exempt from the FBC and its permitting requirements

As discussed above, the FBC exempts *[r]ailroads and ancillary facilities associated with the railroad* from the FBC, including Section 105. § 102.2(b), FBC. Florida Statutes’ definition of “railroad” includes *the high speed rail system*

defined in s. 341.8203. § 341.301(13). Section 341.8203 provides, in pertinent part:

“High-speed rail system” means any high-speed fixed guideway system for transporting people or goods, which system is, by definition of the United States Department of Transportation, reasonably expected to reach speeds of at least 110 miles per hour, including, but not limited to, a monorail system, dual track rail system, suspended rail system, magnetic levitation system, pneumatic repulsion system, or other system approved by the enterprise. *The term includes a corridor, associated intermodal connectors, and structures essential to the operation of the line, including the land, structures, improvements, rights-of-way, easements, rail lines, rail beds, guideway structures, switches, yards, parking facilities, power relays, switching houses, and rail stations and also includes facilities or equipment used exclusively for the purposes of design, construction, operation, maintenance, or the financing of the high-speed rail system.*

§ 341.8203(4), Fla. Stat. (emphasis added). Within the definition in Section 341.8203(4) is the term *rail station*. That definition provides:

“Rail station,” “station,” or “high-speed rail station” means any structure or transportation facility that is part of a high-speed rail system designed to accommodate the movement of passengers from one mode of transportation to another at which passengers board or disembark from transportation conveyances and transfer from one mode of transportation to another.

§ 341.8203(6), Fla. Stat. Therefore, rail stations, as well as the other facilities and structures included in the definition of *high-speed rail system* in Section 341.8203(4), Florida Statutes, fall within the definition of

railroad itself. As such, rail stations and these other named structures and facilities should be exempt from the FBC and its permitting requirements. § 102.2(b), FBC; § 553.73(10)(b), Fla. Stat.

CONCLUSION

For the reasons set forth in the above Memorandum of Law in Support of Petitioner's Proposed Answers to the Questions Posed in the Petition, Petitioner respectfully requests that the Commission issue a declaratory statement holding:

1. All Aboard Florida, the passenger rail being constructed, and to be operated and maintained, by Petitioner is a *railroad and ancillary facilities associated with the railroad* as set forth in Section 102.2(b) of the FBC and Section 553.73(10)(b) of the Florida Statutes and is therefore exempt from the provisions of the FBC, including, but not limited to Section 105 of the FBC's permitting requirements. (This petition for declaratory statement does not address the question of whether Petitioner is subject to the Florida Fire Prevention Code or local planning and zoning regulations); and

2. As set forth in Section 341.8203, Florida Statutes, structures such as rail lines, rail beds, guideway structures, switches, parking facilities, power relays, switching houses and notably, rail stations (as defined in Section 341.8203(6), Florida Statutes), that are essential to the operation of the rail line fall within the definition of *railroad and* are therefore exempt from the FBC and its permitting

requirements based on the exemptions provided in Section 102.2 (b) of the FBC and Section 553.73(10)(b) of the Florida Statutes.

Respectfully submitted,

GREENBERG TRAURIG, P.A.

*Attorneys for Petitioner, All Aboard
Florida-Operations, LLC*

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Miami, Florida 33131

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By: /s/ Robert S. Fine

ROBERT S. FINE

Florida Bar No. 0155586

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by

REGISTERED EMAIL upon:

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This 29th day of December, 2014,

By: /s/ Robert S. Fine
Robert S. Fine

EXHIBIT 'A'

ALL ABOARD FLORIDA



BUILDING ON A LEGACY & SETTING A NEW STANDARD IN PASSENGER RAIL

An express, intercity passenger rail service arriving end of 2016. Leveraging a 100-year-old infrastructure backbone built by Henry Flagler. The project marks the beginning of a new era in Florida's rich rail history.

A project designed to serve tourists, business travelers and Florida residents

Connecting Miami and Orlando in just under three hours, with planned stops in Fort Lauderdale and West Palm Beach.

Bringing a total of 4 million square feet of new transit oriented development around the South Florida stations.

A service projected to improve the overall commuting experience in South Florida

- Competitive Pricing
- Smart Phone & Online Ticketing
- Conveniently Located Stations
- Connectivity to Major Transportation
- Oversized Storage Space
- Bike Storage Facilities
- High Speed Internet Access



ECONOMIC IMPACT



- \$6.4 billion in direct economic impact to Florida's economy over the next eight years
- \$653 million in federal, state and local government tax revenue through 2021
- Over 10,000 jobs on average per year through the rail line construction (mid-2014 through mid-2016)
- Over 5,000 jobs on average per year after the rail line construction is completed through 2021

ECO-FRIENDLY



- Up to 3 million vehicles removed from the roads each year
- Significant reduction in greenhouse gas emissions and fuel consumption
- Leveraging the existing corridor means minimal impact to natural resources

STATE-OF-THE-ART TRAINS & STATIONS

- Best-in-class innovation and technology by Siemens
- Designed to optimize passenger time and comfort with onboard amenities such as Wi-Fi
- Just as fast as flying but easier and more convenient
- A time savings of 25-30% vs. existing travel options

- Approximately 900' long
- Much lighter, quicker than the freight trains that operate in the corridor

- **FOUR STATIONS:** Miami, Fort Lauderdale, West Palm Beach and Orlando International Airport
- Intermodal connectivity at each station
- Nearby access to retail, dining, hotel and attractions





PROJECT FINANCING

- Privately owned and operated company—Financing through a mix of debt and equity
- No state or federal grant money requested
- Applied for a Railroad Rehabilitation and Improvement Financing (RRIF)-Program established for projects that make large scale improvements to the Nation's vital railroads
- No ongoing taxpayer subsidies required

GRADE CROSSINGS

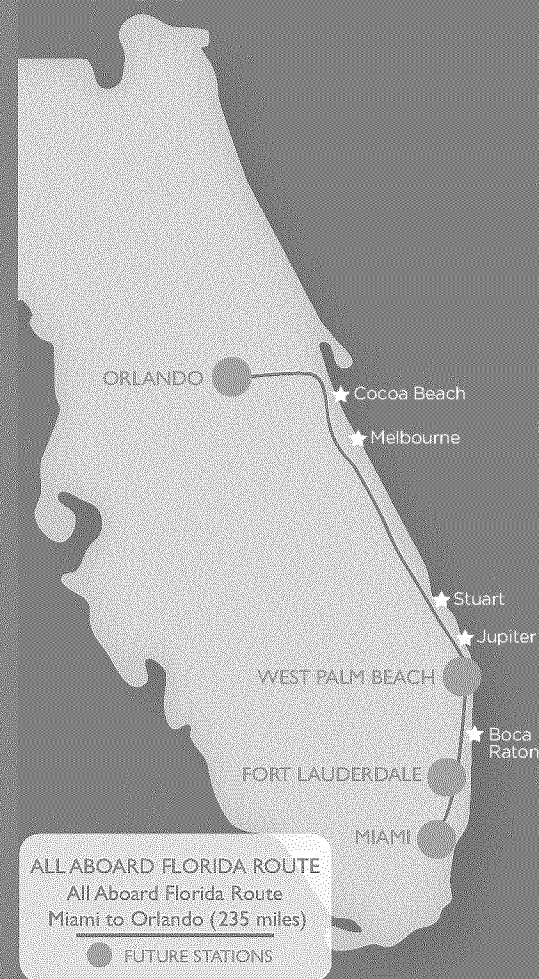
- All grade crossings examined to determine planned upgrades
- Safety measures to meet highest applicable standards set by FRA and FDOT
- Wait time at crossings is less than 60 seconds

SERVICE SCHEDULE & PRODUCT OFFERING

- 16 northbound and 16 southbound trains daily
- Service starting in the early morning and ending in the evening
- Competitively priced against other transportation options
- Specific timetables and pricing will be published closer to the operational service in late 2016

THE DEMAND

- Alternative way to move both residents and tourists throughout the state
- A transportation infrastructure to support Florida's growing population - Florida set to become third most populated state in the nation
- 100+ million visitors to the state (projected)
- 50 million currently making the trip along the planned route
- Relief for Florida's congested roadways



ALL ABOARD FLORIDA PROGRESS TO DATE

-Engineering and environmental reviews finalized

-FRA issued a Finding of No Significant Impact for Miami-to-West Palm Beach segment (2013)

-Meetings with more than 650 officials, business and civic groups

-Infrastructure agreements obtained

-Acquired all necessary properties and land

-Siemens Corporation manufacturing the trains in Sacramento, California

-Station and rail line construction - Fall 2014



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and get ready for the train!

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EXHIBIT 'B'



Florida Department of Transportation

RICK SCOTT
GOVERNOR

605 Suwannee Street
Tallahassee, FL 32399-0450

ANANTH PRASAD, P.E.
SECRETARY

March 12, 2014

Christopher M. Kise
Foley & Lardner LLP
106 East College Avenue, Suite 900
Tallahassee, Florida 32301-7732

Dear Mr. Kise:

The Florida Department of Transportation has considered your December 19, 2013, letter on behalf of All Aboard Florida – Operations LLC (AAF) concerning the escrowed Lease Agreement between the Department and AAF. Your letter asks the Department to acknowledge that AAF is an owner of the high speed rail system contemplated by the lease.

After receiving an unsolicited proposal from AAF, the Department advertised a Request for Proposals (RFP) to competitively procure a lease for right-of-way along State Road 528 for the purpose of constructing and operating an intercity passenger rail service between Orlando and Miami. The RFP included both Department right-of-way and, at the request of the Orlando Orange County Expressway Authority (OOCEA), SR 528 right-of-way owned by OOCEA. AAF submitted the only proposal in response to the RFP. AAF and the Department have agreed on lease terms for portions of the Department right-of-way needed for AAF to build and operate the passenger rail service. The lease is in escrow pending the satisfaction of several conditions.

The lease is for an initial term of fifty years and, subject to the conditions expressed in the lease, may be renewed by AAF for an additional forty-nine years. As provided in section 4 of the lease, the leased Department property is to be used for:

“...the construction, operation, and maintenance of intercity passenger rail service, initially contemplated between Orlando and Miami, and ancillary and incidental uses related thereto...”

Construction of the rail line will require 25 bridges, and will involve the reconstruction of a number of interchanges to avoid at-grade crossings and maintain target travel times. The rail line will cross Interstate 95 and SR 528. AAF will pay the cost of all improvements and will pay all

the costs of operating and maintaining the rail service. Section 8 of the lease requires that the rail improvements contemplated by AAF on the Department property:

“...be constructed consistent with Federal Railroad Administration (FRA) regulations and American Railway Engineering and Maintenance of Way Association (AREMA) standards, and, at a minimum, to FRA Class 6 (110 miles per hour operating speed).”

As you noted, Section 341.8203, Florida Statutes, provides that the term “high speed rail system”, as used in section 341.840, means “any high-speed fixed guideway system for transporting people or goods, which system is, by definition of the United States Department of Transportation, reasonably expected to reach speeds of at least 110 miles per hour...” The lease requires that the AAF system be constructed to federal standards which permit operation at 110 miles per hour or greater and AAF has indicated to the Department that it reasonably expects that its system will reach speeds in excess of 110 miles per hour. As such, the Department concurs that the AAF system is expected to be a high-speed rail system within the meaning of section 341.8203.

Section 6 of the lease specifies:

“AAF shall own all facilities, utilities and improvements constructed on the Property as part of the Project (the “Rail Improvements”), with it being understood that such Rail Improvements owned by AAF shall exclude those improvements to Department transportation facilities (including, but not limited to, the reconstruction of any ramps) constructed by or through AAF that will form a portion of the State Highway System (as defined in Chapter 334, Florida Statutes) (“Road Improvements”).”

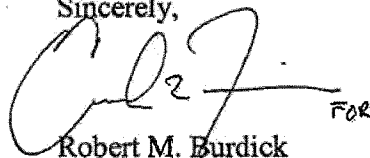
At the end of the lease, AAF is required to restore the Department’s right-of-way to its original condition at no cost to the state or the rail improvements will then become the Department’s property.

The question you asked is whether the Department considers AAF to be the owner of the high speed rail system that is contemplated by the lease. As you noted, section 341.840 does not define the term “owner” of a high-speed rail system as it is used in subsection (3) of that section. Therefore, the Department believes that the term “owner” should be construed in accordance with its plain and common meaning. The quoted portion of the lease clearly provides that AAF shall be the owner of the high speed rail system that will be constructed and operated on Department property (with the exception of the road improvements that are part of the State Highway System owned by the Department). The lease also clearly provides that AAF is solely responsible for the rail system until and unless the lease terminates and AAF fails to remove the rail improvements. Based on the plain meaning of the term “owner” and the provisions of the lease, the Department concurs that during the term of the lease AAF is the “owner” of the high-

Christopher M. Kise
March 12, 2014
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speed rail system that AAF is authorized by the lease to construct, operate, and maintain on Department property.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Burdick", with a stylized flourish at the end.

For
Robert M. Burdick
Deputy General Counsel