




Office of
**INDIAN RIVER COUNTY
ATTORNEY**

Dylan Reingold, County Attorney
William K. DeBaal, Deputy County Attorney
Kate Pingolt Cotner, Assistant County Attorney

MEMORANDUM

TO: Board of County Commissioners
FROM: Dylan Reingold, County Attorney 
DATE: November 29, 2018
SUBJECT: Brightline Construction and Maintenance Cost Litigation

BACKGROUND.

On November 20, 2018, the Indian River County Board of County Commissioners ("Board") voted to allocate an additional \$1 million to addressing and preventing Brightline from traveling through Indian River County. As the Board is aware, on November 21, 2018, Judge Cooper held an oral argument on the pending summary judgement motions in the federal litigation relating to Brightline. Judge Cooper indicated that an order will be rendered before December 31, 2018.

Since November 20, 2018, the County Attorney reached out to Murphy & Walker, P.L. concerning the issue of the costs that Brightline expects Indian River County (the "County") to bear relating to its higher speed passenger rail project. The Final Environmental Impact Statement for the Brightline project, dated August 2015, states that "AAF will pay the cost of the recommended grade crossing safety improvements related to the introduction of passenger rail service, in conjunction with county and municipal execution of amendments to existing crossing license agreements." As the Board is aware, Indian River County has crossing agreements with Florida East Coast Railway Company ("FECR") for the highway railroad crossings in the unincorporated areas of Indian River County. In 2013, Indian River County was requested to execute amendments to these agreement, which would make Brightline "an intended third-party beneficiary of the Crossing Agreement, with the right to enforce the terms and conditions thereof." The Board has not authorized the execution of such amendments.

Mr. Walker has already discussed with me the initial research he has performed concerning the legal theories relating to the ability of FECR to pass along the costs of Brightline onto the County. Mr. Walker believes that in the absence of amendments to the crossing agreements, neither AAF/Brightline nor FECR is entitled to seek County reimbursement of capital expenditures or maintenance costs incurred as a result of AAF/Brightline's higher speed passenger rail service. First, AAF/Brightline is an entirely separate entity from FECR, is not a party to the crossing agreements and has no ownership interest in the FECR right of way. Second, the County has not agreed to reimburse AAF/Brightline's expenses, but only those of FECR. Third, even if these were FECR expenses, any reading of the crossing agreements to require such reimbursement would be inconsistent with the reasonable commercial expectations of the County at the

time it entered into them with FECR, which discontinued passenger rail service altogether in 1968. Mr. Walker believes that for these reasons the appropriate step would be to file a complaint for declaratory relief asking the court to declare that the crossing agreements do not require the County to reimburse capital expenditures or maintenance costs incurred as a result of AAF/Brightline's higher speed passenger rail service.

In connection with this potential lawsuit Murphy & Walker, P.L. has provided the attached retainer agreement. Under the retainer agreement, the firm will bill for Casey Walker's time at the rate of \$290.00 per hour. The rate for associate attorneys will not exceed \$200.00 per hour. And the rate for law clerks and paralegals will not exceed \$125.00 per hour.

FUNDING.

Funds for this expenditure are available as a result of the November 20, 2018 additional \$1 million funding allocation in the General Fund/County Attorney/Legal Services/All Aboard Florida, Account # 00110214-033110-15023.

RECOMMENDATION.

The County Attorney's Office recommends that the Indian River County Board of County Commissioners vote to authorize the County Attorney to execute the retainer agreement and authorize the County Attorney's Office to file a complaint for declaratory judgement and other relief concerning the ability of FECR to pass along costs of Brightline onto Indian River County.

ATTACHMENT(S).

Retainer Agreement