

IN THE SUPREME COURT OF FLORIDA

Case No.: SC11-396

THAD ALTMAN and
ARTHENIA L. JOYNER,

Petitioners,

v.

HON. RICHARD SCOTT, GOVERNOR,

Respondent.

PETITIONERS' NOTICE OF SUPPLEMENTAL AUTHORITY

Petitioners, by and through their undersigned counsel, and pursuant to Rule 9.225, *Florida Rules of Appellate Procedure*, hereby give notice to the Court of the following supplemental authority that are significant to the issues raised in the parties' briefs and that were discovered after Petitioners' Reply was filed on March 2, 2011.

1. **Section 341.302(6), Fla. Stat. (2010).** This statute relates to the Petitioners' arguments regarding the Florida Rail Act, and states that the Florida

Department of Transportation shall, among other things, secure and administer federal grants for rail projects within Florida.

2. **Section 341.303(6)(b), Fla. Stat. (2010).** This statute relates to the Petitioners' arguments regarding the Florida Rail Act, and states that the Governor of Florida shall each year certify forward all unexpended funds appropriated or provided pursuant to § 341.303 for the Florida Rail Enterprise.

3. **Section 341.842, Fla. Stat. (2010).** This statute states: "This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof." It relates to the Petitioners' arguments stated above.

Copies of the supplemental authorities are attached hereto.

McClelland, Jones, Lyons, Lacey &
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail and U.S. Mail this 3rd day of March, 2011, to: Charles M. Trippe, Jr., Executive Office of Governor Rick Scott, The Capitol, Tallahassee, FL 32399-0001.

CLIFTON A. McCLELLAND, JR.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Petition complies with Rule 9.100(1), *Florida Rules of Appellate Procedure*.

CLIFTON A. McCLELLAND, JR.
Florida Bar No. 119792



Effective: December 16, 2009

West's Florida Statutes Annotated [Currentness](#)

Title XXVI. Public Transportation (Chapters 334-349)

[Chapter 341](#). Public Transit ([Refs & Annos](#))

→ **341.302. Rail program; duties and responsibilities of the department**

The department, in conjunction with other governmental entities, including the rail enterprise and the private sector, shall develop and implement a rail program of statewide application designed to ensure the proper maintenance, safety, revitalization, and expansion of the rail system to assure its continued and increased availability to respond to statewide mobility needs. Within the resources provided pursuant to chapter 216, and as authorized under federal law, the department shall:

- (1) Provide the overall leadership, coordination, and financial and technical assistance necessary to assure the effective responses of the state's rail system to current and anticipated mobility needs.
- (2) Promote and facilitate the implementation of advanced rail systems, including high-speed rail and magnetic levitation systems.
- (3) Develop and periodically update the rail system plan, on the basis of an analysis of statewide transportation needs.
 - (a) The plan may contain detailed regional components, consistent with regional transportation plans, as needed to ensure connectivity within the state's regions, and it shall be consistent with the Florida Transportation Plan developed pursuant to [s. 339.155](#). The rail system plan shall include an identification of priorities, programs, and funding levels required to meet statewide and regional needs. The rail system plan shall be developed in a manner that will assure the maximum use of existing facilities and the optimum integration and coordination of the various modes of transportation, public and private, in the most cost-effective manner possible. The rail system plan shall be updated no later than January 1, 2011, and at least every 5 years thereafter, and include plans for both passenger rail service and freight rail service, accompanied by a report to the Legislature regarding the status of the plan.
 - (b) In recognition of the department's role in the enhancement of the state's rail system to improve freight and passenger mobility, the department shall:
 1. Work closely with all affected communities along an impacted freight rail corridor to identify and address anticipated impacts associated with an increase in freight rail traffic due to implementation of passenger rail.
 2. In coordination with the affected local governments and CSX Transportation, Inc., finalize all viable alternatives from the department's Rail Traffic Evaluation Study to identify and develop an alternative route for through freight rail traffic moving through Central Florida, including the counties of Polk and Hillsborough, which would address, to the extent practicable, the effects of commuter rail.
 3. Provide technical assistance to a coalition of local governments in Central Florida, including the counties of Brevard, Citrus, Hernando, Hillsborough, Lake, Marion, Orange, Osceola, Pasco, Pinellas, Polk, Manatee, Sarasota, Seminole, Sumter, and Volusia, and the municipalities within those counties, to develop a regional rail system plan

that addresses passenger and freight opportunities in the region, is consistent with the Florida Rail System Plan, and incorporates appropriate elements of the Tampa Bay Area Regional Authority Master Plan, the Metroplan Orlando Regional Transit System Concept Plan, including the SunRail project, and the Florida Department of Transportation Alternate Rail Traffic Evaluation.

(4) As part of the work program of the department, formulate a specific program of projects and financing to respond to identified railroad needs.

(5) Provide technical and financial assistance to units of local government to address identified rail transportation needs.

(6) Secure and administer federal grants, loans, and apportionments for rail projects within this state when necessary to further the statewide program.

(7) Develop and administer state standards concerning the safety and performance of rail systems, hazardous material handling, and operations. Such standards shall be developed jointly with representatives of affected rail systems, with full consideration given to nationwide industry norms, and shall define the minimum acceptable standards for safety and performance.

(8) Conduct, at a minimum, inspections of track and rolling stock; train signals and related equipment; hazardous materials transportation, including the loading, unloading, and labeling of hazardous materials at shippers', receivers', and transfer points; and train operating practices to determine adherence to state and federal standards. Department personnel may enforce any safety regulation issued under the Federal Government's preemptive authority over interstate commerce.

(9) Assess penalties, in accordance with the applicable federal regulations, for the failure to adhere to the state standards.

(10) Administer rail operating and construction programs, which programs shall include the regulation of maximum train operating speeds, the opening and closing of public grade crossings, the construction and rehabilitation of public grade crossings, and the installation of traffic control devices at public grade crossings, the administering of the programs by the department including participation in the cost of the programs.

(11) Coordinate and facilitate the relocation of railroads from congested urban areas to nonurban areas when relocation has been determined feasible and desirable from the standpoint of safety, operational efficiency, and economics.

(12) Implement a program of branch line continuance projects when an analysis of the industrial and economic potential of the line indicates that public involvement is required to preserve essential rail service and facilities.

(13) Provide new rail service and equipment when:

(a) Pursuant to the transportation planning process, a public need has been determined to exist;

(b) The cost of providing such service does not exceed the sum of revenues from fares charged to users, services purchased by other public agencies, local fund participation, and specific legislative appropriation for this purpose; and

(c) Service cannot be reasonably provided by other governmental or privately owned rail systems.

The department may own, lease, and otherwise encumber facilities, equipment, and appurtenances thereto, as necessary to provide new rail services; or the department may provide such service by contracts with privately owned service providers.

(14) Furnish required emergency rail transportation service if no other private or public rail transportation operation is available to supply the required service and such service is clearly in the best interest of the people in the communities being served. Such emergency service may be furnished through contractual arrangement, actual operation of state-owned equipment and facilities, or any other means determined appropriate by the secretary.

(15) Assist in the development and implementation of marketing programs for rail services and of information systems directed toward assisting rail systems users.

(16) Conduct research into innovative or potentially effective rail technologies and methods and maintain expertise in state-of-the-art rail developments.

(17) In conjunction with the acquisition, ownership, construction, operation, maintenance, and management of a rail corridor, have the authority to:

(a) Assume the obligation by contract to forever protect, defend, indemnify, and hold harmless the freight rail operator, or its successors, from whom the department has acquired a real property interest in the rail corridor, and that freight rail operator's officers, agents, and employees, from and against any liability, cost, and expense, including, but not limited to, commuter rail passengers and rail corridor invitees in the rail corridor, regardless of whether the loss, damage, destruction, injury, or death giving rise to any such liability, cost, or expense is caused in whole or in part, and to whatever nature or degree, by the fault, failure, negligence, misconduct, nonfeasance, or misfeasance of such freight rail operator, its successors, or its officers, agents, and employees, or any other person or persons whomsoever, provided that such assumption of liability of the department by contract shall not in any instance exceed the following parameters of allocation of risk:

1. The department may be solely responsible for any loss, injury, or damage to commuter rail passengers, or rail corridor invitees, or trespassers, regardless of circumstances or cause, subject to subparagraphs 2., 3., 4., 5., and 6.

2. In the event of a limited covered accident, the authority of the department to protect, defend, and indemnify the freight operator for all liability, cost, and expense, including punitive or exemplary damages, in excess of the deductible or self-insurance retention fund established under paragraph (b) and actually in force at the time of the limited covered accident exists only if the freight operator agrees, with respect to the limited covered accident, to protect, defend, and indemnify the department for the amount of the deductible or self-insurance retention fund established under paragraph (b) and actually in force at the time of the limited covered accident.

3. When only one train is involved in an incident, the department may be solely responsible for any loss, injury, or damage if the train is a department train or other train pursuant to subparagraph 4., but only if when an incident occurs with only a freight train involved, including incidents with trespassers or at grade crossings, the freight rail operator is solely responsible for any loss, injury, or damage, except for commuter rail passengers and rail corridor invitees.

4. For the purposes of this subsection, any train involved in an incident that is neither the department's train nor the freight rail operator's train, hereinafter referred to in this subsection as an "other train," may be treated as a department train, solely for purposes of any allocation of liability between the department and the freight rail operator only, but only if the department and the freight rail operator share responsibility equally as to third parties outside the rail corridor who incur loss, injury, or damage as a result of any incident involving both a department train and a freight rail operator train, and the allocation as between the department and the freight rail operator, regardless of whether the other train is treated as a department train, shall remain one-half each as to third parties outside the rail corridor who

incur loss, injury, or damage as a result of the incident. The involvement of any other train shall not alter the sharing of equal responsibility as to third parties outside the rail corridor who incur loss, injury, or damage as a result of the incident.

5. When more than one train is involved in an incident:

a. If only a department train and freight rail operator's train, or only an other train as described in subparagraph 4. and a freight rail operator's train, are involved in an incident, the department may be responsible for its property and all of its people, all commuter rail passengers, [\[FN1\]](#) and rail corridor invitees, but only if the freight rail operator is responsible for its property and all of its people, and the department and the freight rail operator each share one-half responsibility as to trespassers or third parties outside the rail corridor who incur loss, injury, or damage as a result of the incident.

b. If a department train, a freight rail operator train, and any other train are involved in an incident, the allocation of liability between the department and the freight rail operator, regardless of whether the other train is treated as a department train, shall remain one-half each as to third parties outside the rail corridor who incur loss, injury, or damage as a result of the incident; the involvement of any other train shall not alter the sharing of equal responsibility as to third parties outside the rail corridor who incur loss, injury, or damage as a result of the incident; and, if the owner, operator, or insurer of the other train makes any payment to injured third parties outside the rail corridor who incur loss, injury, or damage as a result of the incident, the allocation of credit between the department and the freight rail operator as to such payment shall not in any case reduce the freight rail operator's third-party-sharing allocation of one-half under this paragraph to less than one-third of the total third party liability.

6. Any such contractual duty to protect, defend, indemnify, and hold harmless such a freight rail operator shall expressly include a specific cap on the amount of the contractual duty, which amount shall not exceed \$200 million without prior legislative approval, and the department to purchase liability insurance and establish a self-insurance retention fund in the amount of the specific cap established under this subparagraph, provided that:

a. No such contractual duty shall in any case be effective nor otherwise extend the department's liability in scope and effect beyond the contractual liability insurance and self-insurance retention fund required pursuant to this paragraph; and

b. The freight rail operator's compensation to the department for future use of the department's rail corridor shall include a monetary contribution to the cost of such liability coverage for the sole benefit of the freight rail operator.

(b) Purchase liability insurance, which amount shall not exceed \$200 million, and establish a self-insurance retention fund for the purpose of paying the deductible limit established in the insurance policies it may obtain, including coverage for the department, any freight rail operator as described in paragraph (a), commuter rail service providers, governmental entities, or any ancillary development, which self-insurance retention fund or deductible shall not exceed \$10 million. The insureds shall pay a reasonable monetary contribution to the cost of such liability coverage for the sole benefit of the insured. Such insurance and self-insurance retention fund may provide coverage for all damages, including, but not limited to, compensatory, special, and exemplary, and be maintained to provide an adequate fund to cover claims and liabilities for loss, injury, or damage arising out of or connected with the ownership, operation, maintenance, and management of a rail corridor.

(c) Incur expenses for the purchase of advertisements, marketing, and promotional items.

Neither the assumption by contract to protect, defend, indemnify, and hold harmless; the purchase of insurance; nor the establishment of a self-insurance retention fund shall be deemed to be a waiver of any defense of sovereign immunity for torts nor deemed to increase the limits of the department's or the governmental entity's liability for torts as

provided in [s. 768.28](#). The requirements of [s. 287.022\(1\)](#) shall not apply to the purchase of any insurance under this subsection. The provisions of this subsection shall apply and inure fully as to any other governmental entity providing commuter rail service and constructing, operating, maintaining, or managing a rail corridor on publicly owned right-of-way under contract by the governmental entity with the department or a governmental entity designated by the department. Notwithstanding any law to the contrary, procurement for the construction, operation, maintenance, and management of any rail corridor described in this subsection, whether by the department, a governmental entity under contract with the department, or a governmental entity designated by the department, shall be pursuant to [s. 287.057](#) and shall include, but not be limited to, criteria for the consideration of qualifications, technical aspects of the proposal, and price. Further, any such contract for design-build shall be procured pursuant to the criteria in [s. 337.11\(7\)](#).

(18) Exercise such other functions, powers, and duties in connection with the rail system plan as are necessary to develop a safe, efficient, and effective statewide transportation system.

CREDIT(S)

Laws 1984, c. 84-333, § 2; [Laws 1989, c. 89-301, § 18](#). Amended by [Laws 1992, c. 92-152, § 72, eff. April 8, 1992](#); [Laws 1993, c. 93-164, § 53, eff. May 5, 1993](#); [Laws 1995, c. 95-257, § 58, eff. June 11, 1995](#); [Laws 1999, c. 99-385, § 35, eff. July 1, 1999](#); [Laws 2009, c. 2009-271, § 6, eff. Dec. 16, 2009](#).

[\[FN1\]](#) The word “and” was inserted by the division of statutory revision.

Current through Chapter 274 (End) of the 2010 Second Regular Session of the Twenty-First Legislature and Chapter 283 of the 2010 Special "A" Session of the Twenty-Second Legislature.

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C**Effective: July 1, 2010**West's Florida Statutes Annotated [Currentness](#)

Title XXVI. Public Transportation (Chapters 334-349)

[Chapter 341](#). Public Transit ([Refs & Annos](#))**→ 341.303. Funding authorization and appropriations; eligibility and participation****(1) Appropriations requests.--**

(a) Rail funds shall be requested on the basis of the funding required for the implementation of the rail component of the work program.

(b) No state funds shall be allocated or expended for operation deficits of any intercity or commuter rail projects except as specifically allowed for approved rail service development projects.

(2) Project eligibility.--Any project that is necessary to carry out those duties and responsibilities enumerated in [s. 341.302](#), that is consistent with the approved local government comprehensive plan of the unit of government of the areas served by the rail service, and that is contained in the adopted work program is eligible for the expenditure of state funds in accordance with the fund participation rates established in this section.

(3) Fund participation; capital assistance.--

(a) The department may fund up to 50 percent of the nonfederal and nonprivate share of the costs of any eligible railroad capital improvement project that is local in scope.

(b) The department is authorized to fund up to 100 percent of the cost of any eligible railroad capital improvement project that is statewide in scope or involves more than one county if no other governmental unit of appropriate jurisdiction exists.

(c) The department is authorized to fund up to 100 percent of the costs of any railroad capital improvement project involving the acquisition of rights-of-way for future transportation purposes. Departmental fund participation in such project shall be credited as part of the appropriate share of the participation by the department in total project cost for any future project involving such rights-of-way.

(4) Fund participation; operating costs.--

(a) The department is authorized to fund up to 100 percent of the net operating costs of any eligible intercity or commuter rail system for up to 7 years, beginning from the open-to-service date.

(b) The term “net operating costs” means all operating costs of the project less any federal funds, fares, or other sources of income to the project.

(5) Fund participation; Florida rail enterprise.--

(a) The department, through the Florida Rail Enterprise, is authorized to use funds provided under [s. 201.15\(1\)\(c\)](#)1.d. to fund up to 50 percent of the nonfederal share of the costs of any eligible passenger rail capital improvement project.

(b) The department, through the Florida Rail Enterprise, is authorized to use funds provided under [s. 201.15\(1\)\(c\)](#)1.d. to fund up to 100 percent of planning and development costs related to the provision of a passenger rail system, including, but not limited to, preliminary engineering, revenue studies, environmental impact studies, financial advisory services, engineering design, and other appropriate professional services.

(c) The department, through the Florida Rail Enterprise, is authorized to use funds provided under [s. 201.15\(1\)\(c\)](#)1.d. to fund the high-speed rail system.

(d) The department, through the Florida Rail Enterprise, is authorized to use funds provided under [s. 201.15\(1\)\(c\)](#)1.d. to fund projects necessary to identify or address anticipated impacts of increased freight rail traffic resulting from the implementation of passenger rail systems as provided in [s. 341.302\(3\)\(b\)](#).

(6) Florida rail enterprise; budget.--

(a) The Florida Rail Enterprise shall be a single budget entity and shall develop a budget pursuant to chapter 216. The enterprise's budget shall be submitted to the Legislature along with the department's budget. All passenger rail funding by the department shall be included in this budget entity.

(b) Notwithstanding the provisions of [s. 216.301](#) to the contrary and in accordance with [s. 216.351](#), the Executive Office of the Governor shall, on July 1 of each year, certify forward all unexpended funds appropriated or provided pursuant to this section for the enterprise. Of the unexpended funds certified forward, any unencumbered amounts shall be carried forward. Such funds carried forward shall not exceed 5 percent of the original approved operating budget of the enterprise pursuant to [s. 216.181\(1\)](#). Funds carried forward pursuant to this section may be used for any lawful purpose, including, but not limited to, promotional and market activities, technology, and training. Any certified-forward funds remaining undisbursed on September 30 of each year shall be carried forward.

CREDIT(S)

Laws 1984, c. 84-333, § 3; Laws 1985, c. 85-81, § 21; [Laws 1988, c. 88-168, § 23](#); [Laws 1989, c. 89-301, § 19](#); [Laws 1989, c. 89-351, § 2](#). Amended by [Laws 1992, c. 92-152, § 74, eff. April 8, 1992](#); [Laws 1993, c. 93-164, § 37, eff. May 5, 1993](#); [Laws 2009, c. 2009-271, § 8, eff. July 1, 2010](#).

Current through Chapter 274 (End) of the 2010 Second Regular Session of the Twenty-First Legislature and Chapter 283 of the 2010 Special "A" Session of the Twenty-Second Legislature.

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C**Effective: July 1, 2002**West's Florida Statutes Annotated [Currentness](#)

Title XXVI. Public Transportation (Chapters 334-349)

[Chapter 341](#). Public Transit ([Refs & Annos](#))→ **341.842. Liberal construction**

This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof.

CREDIT(S)

Added by [Laws 2002, c. 2002-20, § 50, eff. July 1, 2002](#).

Current through Chapter 274 (End) of the 2010 Second Regular Session of the Twenty-First Legislature and Chapter 283 of the 2010 Special "A" Session of the Twenty-Second Legislature.

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