


MEMORANDUM

TO: Central Florida Expressway Authority Board

FROM:  Joseph L. Passiatore, General Counsel

DATE: December 3, 2014

SUBJECT: Amendments to All Aboard Florida Agreements

In furtherance of its inter-city passenger rail project, All Aboard Florida (“AAF”) is requesting that the Board approve a First Amendment to Document Escrow Agreement and a Third Amendment to Contract for Sale and Purchase of Rail Line Easements (the proposed Amendments are attached hereto).

FIRST AMENDMENT TO DOCUMENT ESCROW AGREEMENT

The Document Escrow Agreement governs the effective date of the original Lease Agreement between AAF and CFX which contemplated AAF using existing CFX Beachline right of way. The Escrow Agreement required several preconditions to occur prior to the Lease Agreement becoming effective.

The most significant condition precedent was condition number 5 stating that the Authority’s consulting engineer must state that the leased property is no longer essential in connection with the operation of the Expressway System as required by Section 5.4 of the Authority’s Amended and Restated Master Bond Resolution. An acknowledgment by AAF and CFX as to such condition precedent was included on the cover page to the Lease Agreement along with a statement that there was not sufficient information as to the property description or the alignment under which CFX or its general engineering consultant could give assurance that such a determination could be made. The CFX general engineering consultant has never given an opinion that the current right of way is surplus and there is no present indication that one will be forthcoming.

Moreover, the Termination Date for the Document Escrow Agreement was June 30, 2014. Per Section 2(A) of the Agreement, if the Termination Date passed without the conditions precedent having occurred “the Lease will not be considered to have been delivered or become effective” and per Section 2(D), “if Escrow Agent has not received the Joint Break of Escrow Instructions with appropriate signatures on or before the Termination Date, Escrow Agent shall thereafter promptly return each document held by the Escrow Agent to the Party that provided such document to Escrow Agent.” Per Section 3(B) of the Agreement, upon the Termination Date (and the return of the Escrow Documents to each Party as provided therein) “this Document Escrow Agreement shall terminate.”

At this time it is the opinion of CFX General Counsel and Right of Way Counsel that the Document Escrow Agreement has terminated. There is marginal if any benefit to the Authority to reviving the Lease Agreement via a First amendment to the Document Escrow Agreement.

THIRD AMENDMENT TO CONTRACT FOR SALE AND PURCHASE OF RAIL
LINE EASEMENTS

The Contract for Sale and Purchase, wherein CFX would sell a 100 foot easement to AAF, more adequately represents the direction that the Board gave at its November 13, 2014 workshop session as well as taking into account CFX's pending Contract of Sale and Purchase with Suburban Land Reserve and Farmland Reserve, Inc. for the 200 ft. corridor south of existing SR 528 right of way.

Several of AAF's due diligence deadlines contained in the Second Amendment previously approved by the Board at its August 14, 2014 meeting have expired. Specifically the title commitment and survey deadlines were August 15, 2014 and the Inspection Period expired on September 1, 2014. The outside closing date of December 31, 2014 is also rapidly approaching.

Because of these missed deadlines, AAF's proposed Third Amendment seeks to extend the dates as follows:

Inspection Period	May 30, 2015
Outside Closing Date	June 30, 2015
Title Commitment	May 15, 2015
Survey	May 15, 2015
Initial Notice	May 30, 2015

CFX has demonstrated significant good faith as well as financial support in order to acquire the 200 foot multi-modal corridor that would in part accommodate AAF's plans for inter-city passenger rail. Based upon last month's workshop there does not appear to be any motivation on the part of the CFX Board to discontinue efforts to acquire the additional southerly right of way to create the corridor.

That being said, the legal landscape under which CFX is now undertaking negotiations with the "Additional Property Owners" i.e. Mattamy Homes, Carlsbad, Bal Bay and B&M Investments has changed significantly since the original agreement was signed. In particular, CFX now possesses condemnation power for rapid transit and fixed guideways. Thus, there is a possibility that CFX will need to file condemnation actions to secure title. Because the current Contract with AAF was negotiated and executed prior to July 1, 2014, the date upon which CFX was provided such condemnation powers by the Florida Legislature, it is silent as to how those related costs would be apportioned.

Also, in the event of a negotiated acquisition the current agreement contemplates that CFX will subsidize the purchase price and then recoup 40% of the average acre cost at such time as the AAF closing on the easement purchase. AAF's closing is dependent on several conditions precedent. It would be appropriate for AAF to fund its portion at the time of closing on these parcels, or posting funds with the court under a taking, as the case may be.

RECOMMENDATION: Legal does not recommend the First Amendment to the Document Escrow Agreement, but does support a limited extension of the Contract for Sale and Purchase of Rail Line Easements with AAF via a Third Amendment.

CFX, SLR and FRI have tentatively agreed to an extension of CFX's inspection period for the Ranch Properties until March 13, 2015 and this Amendment is on the December 11th consent agenda. The closing date for the Ranch Properties remains June 30, 2015.

Based on the above, CFX Legal counsel would be supportive of extending the dates in the Contract for Sale and Purchase of Rail Line Easements as follows:

Inspection Period	March 20, 2015
Outside Closing Date	March 30, 2015
Title Commitment	March 13, 2015
Survey	March 13, 2015
Initial Notice	March 20, 2015

The Board should also direct the parties to negotiate a Fourth Amendment to be brought forward at the March, 2015 meeting which would address the funding arrangements for the Additional Property acquisitions and establish updated realistic due diligence and closing date as circumstances warrant.

ACTION SUGGESTED: Motion to Approve the Third Amendment with the deadlines revised per this memo and direction to bring a Fourth Amendment at the March 2015 meeting addressing funding for Additional Property purchases.

JLP/ml
Attachments

cc: Ken Wright, Esq.
Steve Zucker, Esq.
Joseph A. Berenis
Laura Kelley

**FIRST AMENDMENT TO
DOCUMENT ESCROW AGREEMENT**

THIS FIRST AMENDMENT TO DOCUMENT ESCROW AGREEMENT (the “First Amendment”) is effective as of _____, 2014 (the “Amendment Effective Date”), by and between the CENTRAL FLORIDA EXPRESSWAY AUTHORITY, as successor to the ORLANDO–ORANGE COUNTY EXPRESSWAY AUTHORITY, a body corporate and politic existing pursuant to Chapter 348, Florida Statutes (the “Authority”) and All Aboard Florida – Operations LLC, a Delaware limited liability company (“AAF” and collectively with the Authority referred to as the “Parties”).

RECITALS:

WHEREAS, the Authority and AAF heretofore entered into that certain Document Escrow Agreement dated as of its Document Escrow Agreement Effective Date (the “Agreement”); and

WHEREAS, Authority and AAF desire to amend the Agreement in certain respects; and

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Authority and AAF hereby agree as follows:

AGREEMENTS:

1. Recitals. The recitals set forth above are true and correct and are hereby incorporated into this First Amendment in their entirety.
2. Definitions. Capitalized terms used but otherwise not defined herein shall have the meaning ascribed to such terms in the Agreement.
3. Termination Date. The extension of the Termination Date (as defined in Section 2(A)(ii) of the Agreement) to June 30, 2015 is hereby ratified. The first sentence of Section 2(A) of the Agreement is hereby amended to read as follows:

“Escrow Agent shall hold all Escrow Documents in escrow from the date hereof until the earlier of the following dates (the “Term”): (i) the satisfaction or waiver (any such waiver to be in the sole discretion of the waiving Party) of those certain conditions precedent enumerated on Exhibit B, attached hereto and made a part hereof (collectively, the “Conditions”) or (ii) June 30, 2015, as such date may be amended by the Parties in writing (the “Termination Date”).”

4. Waiver. In consideration for this First Amendment, both Authority and AAF unconditionally waive any right to claim or assert that the other has not timely and fully performed and observed all obligations accrued to date under the Agreement.

5. References to the Orlando – Orange County Expressway Authority. All references to the “Orlando – Orange County Expressway Authority” or “OOCEA” in the Agreement, as amended, shall hereafter be deemed to refer to the Central Florida Expressway Authority.
6. Ratification. Except as herein amended, the Agreement is hereby ratified and affirmed in its entirety by Authority and AAF.
7. Counterparts; Email Signatures. This First Amendment may be executed in any number of counterparts, each of which shall be considered an original, and all of such counterparts shall constitute one amendment. To facilitate execution of this First Amendment, Authority and AAF may execute and exchange by e-mail as a portable document format or other electronic imaging, counterparts of the signature page, which shall be deemed original signatures for all purposes.

[Signature Page Follows]

IN WITNESS WHEREOF, this First Amendment has been duly executed as of the Amendment Effective Date.

AAF

ALL ABOARD FLORIDA- OPERATIONS
LLC, a Delaware limited liability company

By: _____
Name: _____
Title: _____

Date executed by AAF: _____, 2014

AUTHORITY

CENTRAL FLORIDA EXPRESSWAY
AUTHORITY, as successor in interest to the
ORLANDO-ORANGE COUNTY
EXPRESSWAY AUTHORITY, a body
corporate and politic existing pursuant to
Chapter 348, Florida Statutes

By: _____
Name: _____
Title: _____

Date executed by Authority: _____,
2014

APPROVED AS TO FORM AND
LEGALITY

By: _____
Name: _____
Title: _____

Date executed by Legal _____, 2014

Escrow Agent acknowledges receipt of the First Amendment and agrees to hold the Escrow Documents pursuant to the Document Escrow Agreement as amended.

First American Title Insurance Company

By: _____

Name: _____

Title: _____

THIRD AMENDMENT TO
CONTRACT FOR SALE AND PURCHASE OF RAIL LINE EASEMENTS

THIS THIRD AMENDMENT TO CONTRACT FOR SALE AND PURCHASE OF RAIL EASEMENTS (the “Third Amendment”) is effective as of _____, 2014 (the “Amendment Effective Date”), by and between CENTRAL FLORIDA EXPRESSWAY AUTHORITY, as successor in interest to the ORLANDO–ORANGE COUNTY EXPRESSWAY AUTHORITY, a body corporate and politic existing pursuant to Chapter 348, Florida Statutes (the “Authority” or “Seller”) and All Aboard Florida – Operations LLC, a Delaware limited liability company (“AAF” or the “Buyer” and collectively with the Authority referred to as the “Parties”).

RECITALS:

WHEREAS, Seller and Buyer heretofore entered into that certain Contract of Sale and Purchase of Rail Line Easements dated as of its Effective Date (the “Agreement”); and

WHEREAS, Seller and Buyer desire to amend the Agreement in certain respects to extend certain time periods to allow, among other things, time to consider alternate approaches to the Additional Property, including those discussed at that certain CFX Board Workshop on November 13, 2014; and

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Buyer hereby agree as follows:

AGREEMENTS:

1. Recitals. The recitals set forth above are true and correct and are hereby incorporated into this Third Amendment in their entirety.
2. Definitions. Capitalized terms used but otherwise not defined herein shall have the meaning ascribed to such terms in the Agreement.
3. Inspection Period. The extension of the Inspection Period (as defined in Section 5(b) of the Agreement) to May 30, 2015 is hereby ratified. The first sentence of Section 5(b) of the Agreement is hereby amended to read as follows:

“Subject to its rights of entry onto the Ranch Property and Additional Property as set forth in Section 5(a) above, Buyer shall have a period commencing as of the Effective Date and terminating on May 30, 2015 (the “Inspection Period”), in which to determine, in Buyer’s sole discretion, whether the OOCEA Property and the Ranch Property is suitable to Buyer.”

4. Outside Closing Date. The extension of the Outside Closing Date (as defined in Section 6 of the Agreement) to June 30, 2015 is hereby ratified. The second sentence of Section 6 of the Agreement is hereby amended to read as follows:

"However, absent the written consent of Buyer and Seller, the Closing Date shall not be later than June 30, 2015 (the "Outside Closing Date") and should the Conditions Precedent not have occurred or been waived by the Outside Closing Date, then this Contract may be terminated as provided in Paragraph 11."

5. Title Commitment. The first sentence of Section 8(a) of the Agreement is hereby amended to read as follows:

"By May 15, 2015, Buyer shall obtain, at Buyer's expense, and deliver to Seller an ALTA commitment for the Title Policy (the "Title Commitment") issued on behalf of First American Title Insurance Company ("Title Company") to insure the easement rights set forth in the Easement."

6. Survey. The third sentence of Section 8(a) of the Agreement is hereby amended to read as follows:

"By May 15, 2015, Buyer may, at Buyer's expense, cause the OOCEA Property and Ranch Property to be surveyed by a Florida licensed surveyor (the "Survey")."

7. Initial Notice. The first sentence of Section 8(a)(i) of the Agreement is hereby amended to read as follows:

"Buyer shall have until May 30, 2015 to examine the Title Commitment, the Exception Documents and the Survey, and in which to give Seller written notice (the "Initial Notice") of objections which render Seller's title unsuitable or less than good and marketable to convey the easement rights set forth in the Easement in the OOCEA Property and the Ranch Property."

8. Waiver. In consideration for this Third Amendment, both Seller and Buyer unconditionally waive any right to claim or assert that the other has not timely and fully performed and observed all obligations accrued to date under the Agreement.

9. Ratification. Except as herein amended, the Agreement is hereby ratified and affirmed in its entirety by Seller and Buyer.

10. Counterparts; Email Signatures. This Third Amendment may be executed in any number of counterparts, each of which shall be considered an original, and all of such counterparts shall constitute one amendment. To facilitate execution of this Third Amendment, Seller and Buyer may execute and exchange by e-mail as a portable document format or other electronic imaging, counterparts of the signature page, which shall be deemed original signatures for all purposes.

[Signature Page Follows]

IN WITNESS WHEREOF, this Third Amendment has been duly executed by the Buyer and Seller as of the respective dates indicated below.

BUYER

ALL ABOARD FLORIDA- OPERATIONS
LLC, a Delaware limited liability company

By: _____

Name: _____

Title: _____

Date executed by Buyer: _____, 2014

SELLER

CENTRAL FLORIDA EXPRESSWAY
AUTHORITY, as successor in interest to the
ORLANDO-ORANGE COUNTY
EXPRESSWAY AUTHORITY, a body
corporate and politic existing pursuant to
Chapter 348, Florida Statutes

By: _____

Name: _____

Title: _____

Date executed by Seller: _____, 2014

APPROVED AS TO FORM AND
LEGALITY

By: _____

Name: _____

Title: _____

Date executed by Legal _____, 2014