

BEFORE THE SURFACE TRANSPORTATION BOARD

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June 27, 2016
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**THE ATLANTA DEVELOPMENT
AUTHORITY D/B/A INVEST ATLANTA
and ATLANTA BELTLINE, INC.**

FINANCE DOCKET NO. 35991

**RESPONSE OF INTERESTED PARTIES IN OPPOSITION TO
VERIFIED PETITION FOR A DECLARATORY ORDER AND
REQUEST FOR EXPEDITED CONSIDERATION**

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5 U.S.C. § 554(c)(1)

Dated: June 27, 2016

BEFORE THE SURFACE TRANSPORTATION BOARD

**THE ATLANTA DEVELOPMENT
AUTHORITY D/B/A INVEST ATLANTA
and ATLANTA BELTLINE, INC.**

FINANCE DOCKET NO. 35991

APPEAL OF THE DECISION GRANTING A PROTECTIVE ORDER

Pursuant to 49 C.F.R. § 1011.2(a)(7), CYNTHIA VICK; GORDON B. RAGAN, JR.; JANE G. POWELL; LORAN M. POWELL; ELIZABETH A. ALBERT; MICHAEL LOVING; DAWN SMITH; RODERICK SMITH; ROBIN TUBBS; JASON GODWIN; STEVEN R. GREEN; STACEY E. CLAY; SANDY FLORES; CHRISTOPHER DRAPER; DENNIS SABO, JR.; LAURA M. SHEPARD; ANGELA FOX; HANNIBAL HEREDIA; PATRICIA S. JONES; JAY JONES; DONNA M. FITZMAURICE; PATRICK J. FITZMAURICE; SAMANTHA C. BONTRAGER; DEWAYNE M. BONTRAGER; MOLLY TAYLOR; JOSH B. TAYLOR; THOMAS R. MARKOVIC; MEGAN COCHARD; MATTHEW R. COCHARD; AMANDA K. SAPRA; NEIL K. SAPRA; MARGARET N. CORBETT; NICOLAS ALBANO; ERIC BYMASTER; FULTON D. LEWIS, III; S. NEIL RHONEY; TOM PHILPOT; ANNA L. LENTZ; KURT LENTZ; LEE S. PRINCE; LOUISE P. MULHERIN; and, JEFF CULLEY (collectively, the “Flagler Owners”)¹ file and submit this *Appeal of the Decision Granting a Protective Order* (the “Appeal”), as interested parties, respectfully requesting that the Board rescind its approval of the decision entered by the Surface Transportation Board (the “Board”) on June 15, 2016, granting the *Motion for Protective Order* (the “Motion”) filed by the Atlanta

¹ Mary Lou Saye, Earl Saye, and Alan B. Patricio no longer join in this matter as interested parties under 5 U.S.C. § 554(c)(1) and hereby withdraw their entrance in this matter.

Development Authority D/B/A Invest Atlanta (the “Authority”) and Atlanta Beltline, Inc. (“ABI”) (collectively, the “Atlanta Parties”) on June 14, 2016 (the “Decision”).

FACTUAL BACKGROUND

On June 7, 2016, the Board entered a decision that, in relevant part, ordered the Atlanta Parties “to submit copies of any and all operating agreements, and other related agreements, if any, pertaining to those transactions for which they have requested a Board determination by June 15, 2016” (the “Order to Compel Transaction Documents”).² The Board failed to serve the Flagler Owners with the Order to Compel Transaction Documents.

On June 14, 2016, the Atlanta Parties filed the Motion to challenge the Order to Compel Transaction Documents on the limited basis that “[p]ublic disclosure of this information could be damaging to the parties to those transactions, notwithstanding the lack of any competitive rail industry issues in this matter.”³ The Motion failed to provide any substantive argument in support of this conclusory statement.⁴ The Flagler Owners only learned of the Order to Compel Transaction Documents when the Atlanta Parties’ emailed a copy of the Motion upon the Flagler Owners.

On June 15, 2016, merely hours after the Atlanta Parties filed the Motion, the Board entered the Decision without any opportunity afforded to the Flagler Owners whatsoever to issue a response.⁵ Again, the Board failed to serve the Flagler Owners with the Decision from the Board, and only learned of the Decision when the Atlanta Parties served counsel for the Flagler Owners with a copy of the *Undertaking – Highly Confidential Material*.

² See, the Order to Compel Transaction Documents at Page 4.

³ See, the Motion at Page 1.

⁴ See, *Id.* at Page 1.

⁵ See, the Decision.

On June 15, 2016, counsel for the Flagler Owners investigated the Board's lack of service of both the Order to Compel Transaction Documents and the Decision, and learned that the Board had not only failed to provide the correct address for the Flagler Owners in the Service List of Finance Docket 35991 (the "Service List"), but it had also failed to correctly enter a valid email address for the Flagler Owners.⁶ A true and correct copy of the Service List is attached hereto as "Exhibit A."

Specifically, the Service List provides the following address for counsel of the Flagler Owners: "Williams Teusink, LLC, The High House, Decatur, GA 30030."⁷ The Board failed to enter the street address of "309 Sycamore Street," contained on the first page of each and every pleading submitted by the Flagler Owners in this action.⁸ Moreover, the email for counsel of the Flagler Owners contained in the Service List appears as "Rbohorquez@williamsteusink.com."⁹ This was not and is not a valid email address for counsel of the Flagler Owners.

After notice and complaint from counsel of the Flagler Owners, the Board has since corrected the contact information for counsel of the Flagler Owners, and an updated Service List now appears in the Service list of Finance Docket 35991 (the "Updated Service List").¹⁰ A true and correct copy of the Updated Service List is attached hereto as "Exhibit B."

LEGAL ARGUMENT AND CITATION TO AUTHORITY

Under 49 C.F.R. § 1011.2, the Board reserves for itself, broad discretionary power to regulate its internal proceedings. Under 49 C.F.R. § 1011.2(a)(7), "[t]he Board [has] reserve[d] to itself for consideration and disposition....[a]ll appeals of initial decisions issued by the Director of the Office of Proceedings."

⁶ See, the Service List.

⁷ See, Id.

⁸ See, Id.

⁹ See, Id.

¹⁰ See, the Updated Service List

The Motion completely failed to demonstrate the need for a Protective Order pursuant to 49 C.F.R. § 1104.14(b). Moreover, in granting the Decision, the Board substantively failed to consider public interest in the ABI trail project (the “Trail Project”), and procedurally failed to serve the Flagler Owners with the Order to Compel Transaction Documents and the Decision. Accordingly, the Flagler Owners file this appeal of the Decision pursuant to 49 C.F.R. § 1011.2(a)(7).

I. THE DECISION COMPLETELY IGNORES THE PUBLIC’S INTEREST IN THE TRAIL PROJECT, THE STB ACTION, AND THE STATE COURT ACTION.

In the Motion, the Atlanta Parties assert that “[p]ublic disclosure of [the transaction documents] could be damaging to the parties to those transactions, notwithstanding the lack of any competitive rail industry issues in this matter,” without providing any support for the conclusory statement.¹¹

Merely hours after the Atlanta Parties filed the Motion, the Board entered the Decision that unnecessarily suppressed the transaction documents at issue from the public eye.¹² The Decision completely disregarded the Atlanta Parties’ previous touting of public interest with regard to the Trail Project throughout the proceedings before this Board (the “STB Action”), and the action filed by the Atlanta Parties in the Superior Court of Fulton County (the “State Court Action”).

In a continued effort to undermine the arguments raised by the Flagler Owners, the Atlanta Parties have repeatedly cited to the significant public interest generated by the Trail Project and its anticipated impact on the Georgia economy, socioeconomic impact, and the national perception of the City of Atlanta. In their initial filing of the *Verified Petition for a*

¹¹ See, the Motion at Page 1.

¹² See, the Decision.

Declaratory Order (the “Petition”) in the STB Action, the Atlanta Parties introduced the Trail Project to this Board as “an economic development effort that combines transit, green space, trails and new commercial, residential and public facility development along a 22- mile ring of current or former rail segments encircling Atlanta's urban core.”¹³ The Atlanta Parties continued:

“[The Trail Project] is among the largest, most wide-ranging urban redevelopment and mobility projects currently underway in the United States, and the underlying real estate supplies its backbone: a spine of coordinated redevelopment efforts that will link a network of uses and opportunities for living, employment, entertainment, and recreation through public and private investment and development projects.”¹⁴

The Atlanta Parties reaffirmed the importance of public interest in the Trail Project through their *Verified Complaint* (the “Complaint”) in the State Court Action, stating that the “[The Trail Project is] the most comprehensive transportation and economic development effort ever undertaken in the City of Atlanta and among the largest, most wide-ranging urban redevelopment programs currently underway in the United States.”¹⁵

In the Motion, the Atlanta Parties for the first time in both the STB Action and the State Court Action, have retreated from their position that attempts to leverage the importance of public interest in the Trail Project to defeat the claims asserted by the Flagler Owners. Instead, the Atlanta Parties now assert a veiled attempt to argue that their interests in the transactions at issue, overshadow the public’s interest in the same. Simply, the Atlanta Parties contend that the emphasis they previously placed on public interest for the Trail Project should cease at the very transactions that made “the most comprehensive transportation and economic development effort ever undertaken in the City of Atlanta”¹⁶ a viable project in the first place.

¹³ See, the Petition at Page 2.

¹⁴ See, the Petition at Page 3.

¹⁵ See, the Complaint at Page 1.

¹⁶ See, *Id.* at Page 1.

The citizens of the State of Georgia, and the residents of the City of Atlanta have a vested interest and a right to understand the underlying transactions giving rise to the Trail Project. Moreover, a simple conclusory statement by the Atlanta Parties that “[p]ublic disclosure of [the transaction documents] could be damaging to the parties to those transactions,” completely fails to provide any sufficient basis that the transacting parties to the Trail Project should be shielded from the public.

Accordingly, the Board should reverse the Decision, and incorporate the transaction documents requested by the Board in the Order to Compel Transaction Documents into the public record of the STB Action.

II. THE BOARD’S FAILURE TO SERVE THE FLAGLER OWNERS WITH THE ORDER TO COMPEL TRANSACTION DOCUMENTS AND THE DECISION HANDICAPPED THE FLAGLER OWNERS’ ABILITY TO CHALLENGE THE SAME.

Due to internal failure of the Board, the Board completely failed to serve the Flagler Owners with a copy of the Order to Compel Transaction Documents, as well as a copy of the Decision. As stated above, the Board failed to properly enter the contact information of the Flagler Owners on the Service List. Specifically, the Service List failed to reflect the street address of “309 Sycamore Street,” contained on the first page of each and every pleading submitted by the Flagler Owners in this action, and further represented the email address for the Flagler Owners as “Rbohorquez@williamsteusink.com” – an email address that was not and is not a valid email address at the office of Williams Teusink, LLC.¹⁷

As a result of the Board’s internal deficiency to adequately maintain the Service List, the Flagler Owners learned of the Order to Compel Transaction Documents on June 14, 2016, seven

¹⁷ See, The Service List.

(7) days after the Board entered the same, and only because of the Atlanta Parties' service of the responsive Motion upon the Flagler Owners.

In the second instance of the Board's failure to serve the Flagler Owners, the Board issued the Decision granting the Motion the morning of June 15, 2016, only hours of the Atlanta Parties' filed the Motion. The Board issued the Decision without any opportunity afforded to the Flagler Owners to issue a response, and again failed to serve the Flagler Owners with the same. The Flagler Owners only learned of the Decision when counsel for the Atlanta Parties served them with a copy of the *Undertaking – Highly Confidential Material*.

Pursuant to 49 C.F.R. § 1104.13, generally, “[a] party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board.” As the Board issued the Decision granting the Motion only hours after the Atlanta Parties filed the Motion, the Board effectively stripped the Flagler Owners of the twenty (20) day period afforded to them to file a reply to the Motion pursuant to 49 C.F.R. § 1104.13. Accordingly, the Board forced the Flagler Owners to file their responsive pleading to the Motion in the form of this Appeal pursuant to the more restrictive ten (10) day filing deadline required by 49 C.F.R. § 1011.2(a)(7).

More egregiously, as a result of the Board's failure to adequately maintain the Service List, the Flagler Owners may never have been served with the Decision, and as such, may have missed the opportunity to file this Appeal altogether. Accordingly, the Flagler Owners respectfully request that the Board overturn the Decision, as the Flagler Owners had no opportunity to represent their interests before the Decision was rendered.

CONCLUSION

The Atlanta Parties substantively failed to assert a sufficient basis for placing the interest of the transacting parties at issue in this action above the public's interest in the Trail Project.

Moreover, procedurally, the actions of the Board severely handicapped the Flagler Owners' opportunity to challenge the Order to Compel Transaction Documents, the Motion, and the Decision. Accordingly, the Flagler Owners respectfully request that this Board reverse the Decision, and incorporate the transaction documents requested by the Board in the Order to Compel Transaction Documents into the public record of the STB Action.

This the 27th day of June, 2016.

WILLIAMS TEUSINK, LLC


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Counsel for Interested Parties under 5 U.S.C. § 554(c)(1)

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel in the foregoing matter with a copy of the foregoing by depositing a copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon, as follows:

Charles A. Spitulnik, Esq.
Allison I. Fultz, Esq.
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1001 Connecticut Avenue, NW, Suite 800
Washington, DC 20036

Maquiling Parkerson
NORFOLK SOUTHERN RAILWAY COMPANY
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Norfolk, VA 23510

This the 27th day of June, 2016.

WILLIAMS TEUSINK, LLC


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Counsel for Interested Parties under 5 U.S.C. § 554(c)(1)

EXHIBIT A



Surface Transportation Board

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Docket #: **FD_35991_0**

Case Title: **THE ATLANTA DEVELOPMENT AUTHORITY D/B/A INVEST ATLANTA AND ATLANTA BELTLINE, INC. - VERIFIED PETITION FOR A DECLARTORY ORDER**
4 Service List entries found.

<u>Code Desc</u>	<u>Filed By</u>	<u>Address</u>	<u>Email</u>	<u>Filed For</u>
Party Of Record	Fultz, Allison I.	Kaplan Kirsch Rockwell 1001 Connecticut Ave., N.W., Suite 800 Washington, DC 20036 Tel: 202-955-5600 Fax: 202-955-5616	Afultz@Kaplankirsch.Com	Atlanta Development Authority And Atlanta Beltline, Inc.
Party Of Record	Parkerson, Maquiling	Three Commercial Place Norfolk, VA 23510 Tel: Fax:	Maqui.Parkerson@Nscorp.Com	Norfolk Southern Railway Company
Party Of Record	Spitulnik, Charles A	Kaplan Kirsch & Rockwell Llp 1001 Connecticut Avenue, N.W. Suite 800 Washington, DC 20036 Tel: (202) 955-5600 Fax:	Cspitulnik@Kaplankirsch.Com	Atlanta Development Authority And Atlanta Beltline, Inc. Atlanta Development Authority D/B/A Invest Atlanta And Atlanta Beltline, Inc.
Party Of Record	Williams, R. Kyle	Williams Teusink, Llc The High House Decatur, GA 30030 Tel: (404) 373-9590 Fax: (404) 379-6049	Rbohorquez@Williamsteusink.Com	Adjacent Property Owners Along Flagler Avenue, Ne, Atlanta, Fulton County, Georgia 30309

Surface Transportation Board, 395 E Street, SW, Washington, DC 20423

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EXHIBIT B



Surface Transportation Board

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Party Of Record	Fultz, Allison I.	Kaplan Kirsch Rockwell 1001 Connecticut Ave., N.W., Suite 800 Washington, DC 20036 Tel: 202-955-5600 Fax: 202-955-5616	Afultz@Kaplankirsch.Com	Atlanta Development Authority And Atlanta Beltline, Inc.
Party Of Record	Parkerson, Maquiling	Three Commercial Place Norfolk, VA 23510 Tel: Fax:	Maqui.Parkerson@Nscorp.Com	Norfolk Southern Railway Company
Party Of Record	Spitulnik, Charles A	Kaplan Kirsch & Rockwell Llp 1001 Connecticut Avenue, N.W. Suite 800 Washington, DC 20036 Tel: (202) 955-5600 Fax:	Cspitulnik@Kaplankirsch.Com	Atlanta Development Authority And Atlanta Beltline, Inc. Atlanta Development Authority D/B/A Invest Atlanta And Atlanta Beltline, Inc.
Party Of Record	Williams, R. Kyle	Williams Teusink, Llc The High House 309 Sycamore Street Decatur, GA 30030 Tel: (404) 373-9590 Fax: (404) 379-6049	Kwilliams@Williamsteusink.Com Nbohorquez@Williamsteusink.Com	Adjacent Property Owners Along Flagler Avenue, Ne, Atlanta, Fulton County, Georgia 30309

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