

**AGENDA**  
**BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND**  
**FEBRUARY 24, 2010**

Attachments to the items below can be viewed at the following link:

[http://www.dep.state.fl.us/secretary/cab/public\\_notices.htm](http://www.dep.state.fl.us/secretary/cab/public_notices.htm)

**2<sup>nd</sup> Substitute Page**

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**Item 1 Minutes**

Submittal of the Minutes from the December 8, 2009 Cabinet Meeting.

(See Attachment 1, Pages 1-25)

**RECOMMEND APPROVAL**

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**2<sup>nd</sup> Substitute Item 2 Harbor Branch Oceanographic Institution Foundation, Inc./ License Agreement/Alternate Access/Indemnity/Indian River Lagoon Blueway Florida Forever Project**

**REQUEST: Approval to proceed to closing on the Harbor Branch Oceanographic Institution Foundation, Inc., acquisition within the Indian River Lagoon Blueway Florida Forever Project, by accepting from Seller a form of access different from that required by the contract and with Seller indemnifying the Board of Trustees from any future loss of access.**

**COUNTY:** St. Lucie

**LOCATION:** Sections 05, 08, and 09, Township 34 South, Range 40 East

**CONSIDERATION:** N/A

<u>PARCEL</u>	<u>ACRES</u>	<u>ORIGINAL APPROVED VALUE</u>	<u>MODIFIED APPROVED VALUE</u>	<u>PURCHASE PRICE</u>
Harbor Branch - BOT	134.74	\$29,562,000	\$25,362,000	\$18,000,000**
Harbor Branch - FCT	268.44	\$7,776,000	\$7,617,600	\$6,300,000
Totals	403.18	\$37,338,000	\$32,980,000*	\$24,300,000

\* The modified approved value accounts for the acceptance of an alternate form of access and its effect on the Highest and Best Use of the property.

\*\* The Trustees' purchase price of \$18,000,000 is 71% of the allocated value for the 134.74 acres.

**STAFF REMARKS:**

**Summary**

On May 27, 2009, the Board of Trustees approved an Option Agreement for Sale and Purchase of approximately 134.74 acres of the Harbor Branch Oceanographic Institution Foundation, Inc., (Seller or Institution) property within the Indian River Lagoon Blueway Florida Forever project. The remainder of the site (approximately 268.44 acres) was acquired by Florida Communities Trust (FCT) through a separate Option Agreement executed on June 10, 2009. At closing, title to all of the property (approximately 403.18 acres) will vest with the Board of Trustees. The closing on each Option Agreement is expressly contingent on the closing of the other, compelling simultaneous closings. Each Option Agreement requires the Seller to provide at closing legal access to the property over public roads or valid, recorded easements. The Seller

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**2<sup>nd</sup> Substitute Item 2, cont.**

has been unsuccessful in its attempts to obtain the level of required access outlined in the contract. The Department of Environmental Protection (DEP) has concluded that an alternate form of access to the property is sufficient to warrant closing. However, because the terms have changed from what was originally approved by the Board of Trustees, DEP is now requesting that the Board of Trustees accept the alternate form of access.

**Details**

The Option Agreement approved by the Board of Trustees and the FCT Option Agreement contain the following provision regarding access: “Seller warrants that at closing there shall be legal and practical ingress and egress for the Property over public roads or valid, recorded easements for the use and benefit of and as an appurtenance to the Property”.

The easterly portion of the subject property is bounded on the west by a railroad corridor belonging to Florida East Coast Railway, LLC (FEC), and on the east by the Indian River. Access to the easterly portion of the property is by an at-grade public road over the railroad corridor, which crossing is pursuant to the terms of a License Agreement between FEC’s predecessor, Florida East Coast Railway Company, a Florida corporation (Railway), and St. Lucie County (Second Party) dated June 1, 1966 (License). The Railway License for access to the easterly portion of the subject property contains the following provision: “...this agreement is for the term of one (1) year; if said Second Party holds over and remains in possession of the hereby licensed privileges after the expiration of such term, or of any renewal thereof this Agreement shall be considered as renewed unless sixty (60) days written notice of the termination of the same has been or is given by said Railway or Second Party and shall continue in effect from year to year....”

A license agreement is characterized generally by its revocability, no matter how long it has been in existence, as compared with an easement, which is generally permanent and runs with the land. Revocation of a license agreement may be estopped under certain circumstances, such as by the licensee’s expenditure of large sums or his incurring heavy obligations to permanently improve the licensed property.

With particular respect to at-grade railroad crossings, the Florida Legislature has vested in the Department of Transportation the authority to issue permits for the closing of such crossings, through F.S. 335.141 (2009). Rule 14-57.012(2), F.A.C., provides in pertinent part that closure of public at-grade railroad crossings “shall be based upon Notices of Intent issued by the Department [of Transportation], administrative hearings conducted pursuant to Chapter 120, F.S., or upon a Stipulation of Parties....”

Additionally, “[t]he governmental entity [having jurisdiction at the location] should provide a public forum for community involvement and contact affected individuals or groups to obtain input on impacts to the community”. The rule requires the application of seven criteria in considering an application to close an at-grade public road crossing, such as safety, alternate routes, and the necessity for rail and vehicular traffic. No alternate routes other than over the railroad corridor exist for access to the easterly portion of the subject property.

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**2<sup>nd</sup> Substitute Item 2, cont.**

The License has been in existence and has been the means for access for the easterly portion of the subject property since prior to the establishment of the Institution in 1971. It is noteworthy that every public road that crosses the railroad is subject to the same license. The only means to obtain legal access to the easterly portion of the subject property, as required by the Option Agreements, is to acquire an easement for ingress and egress from FEC.

**Access Request**

The attorney for Harbor Branch, William J. Stewart, made a formal request to FEC, the successor in title to the railway that issued the License, for an ingress and egress easement to comply with the requirements of the Option Agreements. However, FEC denied Mr. Stewart's request and submitted a letter dated December 9, 2009, to Mr. Stewart stating, "This crossing is covered under an existing License Agreement with St. Lucie County and is filed with the Florida Department of Transportation as a public crossing....[A]lthough the License Agreement is not as permanent as an easement, there is a process the Railway would have to follow in order to close or remove the crossing and the Florida Department of Transportation would make the final determination through an administrative judge". Mr. Stewart also spoke with Janice Bordelon, Rail Program Specialist with the Florida Department of Transportation, to confirm the process involved in closing a public crossing. According to Ms. Bordelon, it is a long process involving specified criteria, administrative hearings under Chapter 120, F.S., and possible litigation. According to Mr. Stewart, Ms. Bordelon's opinion is that FEC's chances of success, if it were to make application to request closure of the public crossing, would be slim.

**Indemnity**

Based on the available information, it appears unlikely for access to the property to be denied simply because it is provided by a License Agreement rather than an easement. The Seller has offered to indemnify the state against the loss of access should such occur. As a part of closing, an indemnity agreement would be entered into between the Seller and the Board of Trustees, to be executed by DEP on its behalf, by which the Seller agrees to indemnify and hold harmless the state from and against the lack of access to the property, to include as necessary prosecuting any actions, including appeals, to obtain access for the property. The Harbor Branch Oceanographic Institution Foundation, Inc. Board of Directors met on February 19, 2010 and gave conceptual approval to an indemnity agreement. Therefore, DEP recommends that the acquisition proceed to closing.

**Access Value**

According to DEP's Bureau of Appraisal, the modified approved value total for this acquisition will be \$32,980,000; however, this will have no effect on the purchase price. The modified approved value of \$25,362,000 for the BOT portion is still substantially higher than the purchase price of \$18,000,000, so under the provisions of the Option Agreement the price will be unaffected by this change.

**Closing Information**

A title insurance commitment, an environmental site assessment, and a survey have been obtained for this property. Access will not be insured by the title insurance company.

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**2<sup>nd</sup> Substitute Item 2, cont.**

**Management**

The 134.74 acres approved for acquisition by the Board of Trustees will be managed by FAU. The 268.44 acres purchased by FCT will be managed by St. Lucie County. Title to all of the property will be held by the Board of Trustees.

(See Attachment 2, Pages 1-64)

**RECOMMEND APPROVAL**