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New Suit Challenges Florida Train Bonds

by [Shelly Sigo](#)

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BRADENTON, Fla. — A second Florida county has filed a federal lawsuit in an attempt to stop All Aboard Florida from funding a major portion of its private passenger train service with private activity bonds.

The action comes as the owners of the \$3.2 billion project continue to make progress developing stations in Miami, Fort Lauderdale, and West Palm Beach. A future station is also planned at Orlando International Airport.

In its [35-page suit](#), Martin County told the U.S. District Court for the District of Columbia that the U.S. Department of Transportation incorrectly based the approval of the largest private activity bond allocation in its history on a statute that does not permit funding for the passenger rail project.

Transportation Under Secretary Peter Rogoff approved the \$1.75 billion allocation on Dec. 22. Martin County names the USDOT, Rogoff, and Transportation Secretary Anthony Foxx in its suit, filed Monday.

On March 31, Indian River County filed a federal lawsuit also attempting to block the issuance of the tax-exempt private activity bonds.

The USDOT said no other PAB allocations have been litigated since Congress authorized the financing in 2005 for qualified highway and surface freight transfer facilities.

"We don't comment on legal matters," All Aboard Florida spokeswoman Lynn Martenstein said Monday when asked about the latest lawsuit.

In its legal challenge, Martin County said that AAF does not meet the definition of a rail project for which exempt facility bonds can be used because it will not be a high-speed intercity rail facility that can reach speeds in excess of 150 miles per hour.

All Aboard Florida has said its trains will reach speeds up to 125 mph.

"The DOT tried to force, or rather hide, an elephant in a mouse hole by allocating \$1.75 billion in PABs to a passenger rail project that does not qualify for the bonds as high speed rail under the applicable federal statutes," said Martin County Attorney Michael Durham.

The county's suit also said that the bond allocation was approved in violation of the National Environmental Policy Act since the train project has not received final environmental clearance from federal agencies.

The USDOT's bond approval was "arbitrary, capricious [and] an abuse of discretion in excess of statutory authority," the county's filing said.

The petition also seeks to cast doubt on whether the Florida Development Finance Corp. properly approved documents agreeing to be the conduit issuer for the bonds.

On Aug. 20, 2014, the FDFC board voted 3-0 for a resolution agreeing to be the conduit for AAF's bonds. The approval was necessary for AAF to apply for the USDOT bond allocation.

Only one FDFC board member was properly seated at the time the vote was taken, according to Martin County's lawsuit.

Based on the agreement to be the conduit, the FDFC sought amendments to interlocal agreements with Brevard and Miami-Dade counties in order to permit bond proceeds to be used in those counties for the train project.

Both counties relied on the FDFC board's authority to issue the private activity bonds, the suit said. "Without that authority, neither county action is valid," it said.

Martin County said the passenger train project will have "multiple adverse effects" on the county and residents, including impacts on traffic congestion, marine vessel congestion, noise, air quality, public safety, economic development plans, and historic and cultural resources.

All Aboard, which is being developed by Florida East Coast Industries, plans to run 32 passenger trains a day on a 235-mile route between Miami and Orlando, mostly on tracks used by Florida East Coast Railway; Florida East Coast Industries and Florida East Coast Railway are owned by Fortress Investment Group.

Where stations are planned in Miami, Fort Lauderdale, West Palm Beach and Orlando, communities have largely embraced the project hailing it as an economic expansion opportunity, a congestion reliever on crowded roadways, and for its job creation potential.

No stations are planned in Martin, St. Lucie, and Indian River counties along the east coast, through which the trains will travel. Opponents have cited the potential for trains to delay ambulances trying to get to hospitals, increased boating congestion on waterways, concerns over aging bridges that trains must cross, and property values.

Florida Development Finance Corp. continues preparing to issue the bonds that will finance a large portion of the train project.

On April 20, the FDFC held a public hearing on the PAB allocation to comply with the Tax Equity and Fiscal Responsibility Act of 1982, also known as TEFRA. Gov. Rick Scott is required to sign off on the TEFRA documentation.

FDFC has also scheduled a meeting for May 28 for its recently reconstituted board to consider the bond resolution for the borrower, AAF Holdings LLC. Approval of the resolution is expected to pave the way for the bonds to be issued.

On Monday, Indian River County filed a motion in its lawsuit asking a federal judge to act

immediately to prevent FDFC from issuing the bonds.

"If the court does not stay the USDOT approval, the bonds may be issued before this case can be adjudicated on the merits," said Indian River County attorney Dylan Reingold.

"The sale of the tax-exempt bonds would cause irreparable harm to Indian River County, the other plaintiffs, and the residents of Florida because once almost \$2 billion of investors' money has been sunk into the project the federal agencies will no longer be in a position to fairly weigh the project" and its impacts, he said.

All Aboard, which was not named in Indian River County's suit, filed a motion to intervene in the case, which the court accepted on Tuesday.

The company said in its filing that time is of the essence because the provisional allocation from the USDOT requires that the bonds be issued by July 1.

"AAF would suffer numerous financial harms from any delay" in the ability to issue the bonds, the company said.

U.S. District Judge Christopher R. Cooper, who is presiding in both lawsuits, ordered defendants and AAF to file briefs by May 11 on Indian River County's request for a preliminary injunction.

A hearing is set for May 29 on Indian River's motion, as well as a motion for preliminary injunction that is expected to be filed by Martin County, according to court records.

Martin County is being represented in its federal lawsuit by McDermott Will & Emery LLP. Indian River County is being represented by Bryan Cave LLP.

Florida East Coast Industries is continuing to negotiate with municipalities in south Florida for developing of its train stations and adjoining transit-oriented developments.

Last week, AAF inked a deal with West Palm Beach for approval of a residential tower in conjunction with its downtown train station. All Aboard also agreed to purchase land for an access road that the city will eventually own.



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