

Much is riding on Brightline's debut

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Brightline, the Miami-to-Orlando passenger train formerly known as All Aboard Florida, garners more credence and fanfare with each passing day. Backed by a private company, the project promises to connect two of the state's biggest commerce and tourism hubs, while ushering in a new era of economic prosperity along a 235-mile stretch of land.

In South Florida, the newfound connectivity to Orlando is expected to bring tourism dollars, spur real estate development and facilitate business trips. (One would be hard-pressed to avoid Brightline chatter among the white-collar crowd.) For the average worker, whose daily commute across county lines can take more than an hour, the prospect is equally enticing.

Alongside mounting anticipation, however, is a legal battle that has been raging in federal courts since 2015, bogging down Brightline's progress.

Financing for the second phase of the project is tied up in litigation as two counties on Florida's Treasure Coast duke it out with the U.S. Department of Transportation, its sub-agencies and All Aboard Florida, the company working to make Brightline a reality.

AAF insists Brightline is on schedule and that, if original financing plans for Phase II fall through, alternatives are within reach, it says. Others are more skeptical, citing the legal proceedings and fluctuating financial markets.

Laying the groundwork

AAF accomplished in about three years what others couldn't do in 10.

Florida East Coast Industries' longstanding ownership of much of the state's railroad infrastructure enabled AAF, a subsidiary of FEIC, to make swift progress cobbling together land and securing approvals to build a project of such scale.

"If it wasn't for that head start, this, as a private-sector venture, would've been much, much more challenging – if not perhaps impossible – under a fully sort of private sector way that we've approached this project," Brightline President Michael Reininger said in an October 2016 interview with the *Business Journal*.

The foundation of Brightline is bolstered by more than just Henry Flagler's legacy. The endeavor is under the umbrella of New York hedge fund Fortress Investment Group, which has a reported \$70.2 billion in assets under management.

The grand vision was to reintroduce passenger rail to Florida, where the service was discontinued almost five decades ago by Florida East Coast Railway. And it would be done without government subsidies – a private, for-profit venture.

"It's almost like a gift, that we don't have to pay for it," said Mitch Bierman, a partner in the Miami office of Weiss Serota Helfman Cole & Bierman. "You have to pay to use it, but there are no capital expenditures."

Bierman's work revolves primarily around handling government affairs and administrative law matters in an array of industries, including transportation. His client list has included AAF, for which he negotiated a contract about four years ago and did some more recent work for the southern portion of Brightline.

"I am not aware of any other project in the U.S. in which a private entity is building a railroad as a private, for-profit [endeavor]," he said. "All railroads, centuries ago, were private, but not anymore. This is a unique project."

David and Goliath

AAF's mission to revamp interstate transportation won't come cheap. The payoff, though, could be similarly hefty.

The price for developing "intercity passenger service" will be as high as \$3 billion, excluding about \$600 million in land easements already obtained, according to court documents pertaining to the project. (As of August 2016, AAF and FEIC had spent more than \$600 million on development and construction for Brightline.)

Meanwhile, revenue is projected to reach nearly \$400 million by 2021, growing at an average clip of 27 percent annually. (A lion's share of the revenue is projected to come from ridership – an average of 85 percent annually over the first five years.)

Brightline will have four stops: downtown Miami, downtown Fort Lauderdale, downtown West Palm Beach and Orlando International Airport. Miami Central Station will be a multimodal hub, linking Brightline, Tri-Rail, Metrorail and Metromover. All three South Florida stations will feature transit-oriented development – retail, office and residential.

"The Brightline railroad station will be an asset to Miami and will open people's eyes to the opportunities," Suffolk Construction Senior VP Rick Kolb said at a *Business Journal* panel discussion in December. (Suffolk Construction is Miami Central Station's general contractor.)

Phase I, well underway across the tri-county region, is slated to debut this year, AAF says. Stations across South Florida are taking shape and, on Jan. 11, the first train set was unveiled. Days later, additional phases of testing were announced. But the timeline for Phase II – slated to begin operations by year-end – is less certain.

Originally, financing to expand the rail line north from West Palm Beach to Cocoa Beach, and then inland to Orlando, was to come in the form of a Railroad Rehabilitation & Improvement Financing loan administered by the Federal Railroad Administration. Midway through the application process, however, AAF switched gears. In August 2014, it filed an application for \$1.75 billion worth of tax-exempt private activity bonds.

PABs are allocated by the federal government and issued by state or local government agencies to help finance projects of public utility.

They've been issued to build, among other things, the Barclays Center in Brooklyn, the National Corvette Museum in Kentucky, and a winery in North Carolina. In all, more than \$65 billion have been allocated since 2003, according to a 2013 *New York Times* analysis of Bloomberg bond data.

In the case of transportation projects, the DOT allocates the bonds and can designate up to \$15 billion worth as tax-exempt, giving private companies access to lower-interest debt than might otherwise be available, and spurring development of transportation projects.

In all cases, it holds that the federal government forgoes tax revenue in exchange for a public utility when issuing tax-exempt PABs. It is therefore up to legislators to determine whether a project provides sufficient public benefit to qualify for the financing, said Bryant Miller Olive public finance lawyer JoLinda Herring, who specializes in bond counseling.

In the case of Brightline, an economic impact study made a strong case.

The report, compiled by Coral Gables-based Washington Economics Group, estimates Brightline would create \$6.4 billion in direct economic impact for Florida's economy over the next eight years, add \$3.5 billion to the state gross domestic product through 2021, and create more than 10,000 new jobs during and after construction.

Tax-exempt PABs are frequently issued in South Florida to help finance the development of housing projects, Herring said. But they are less common in transportation.

Nationwide, PABs have been issued to finance 16 transportation projects totaling \$5.9 billion, according to a 2016 report by the Federal Highway Administration.

Attorneys for Indian River and Martin counties are hard at work trying to block project No. 17.

In a lawsuit filed in 2015, the counties allege the DOT violated federal law when

it provisionally authorized PAB allocation for Brightline Phase II.

Qualified by a federal judge as a major federal action, Brightline is subject to review by several government agencies, including the FRA, a sub-agency of DOT.

Projects deemed major federal actions or under consideration for certain forms of government-authorized financial assistance must comply with the National Environmental Policy Act.

Brightline Phase I checked off all the boxes. The FRA studied its environmental effects and issued a Finding of No Significant Impact. However, the FRA did not follow the same protocol with Phase II.

Therein lies the plaintiffs' primary grievance in the suit.

"Our complaint was that one of the conditions [to secure PABs] is that they comply with the environmental impact studies – that they finalize that environmental impact statement," said Steve Ryan, a Washington D.C.-based lawyer representing Martin County and CAREFL, a Brightline-opposition coalition, in court.

Court documents state the FRA did not issue a Record of Decision on Phase II's environmental impact, as required. The DOT declined to comment for this story, citing ongoing litigation. It is unclear why AAF or the FRA haven't moved to finalize the steps required by NEPA for Phase II.

AAF would not comment.

The lawsuit goes on to allege that construction and operation of Brightline in towns across Martin and Indian River counties would pose environmental harms – endangering the lives of residents and animals, damaging historic sites and diminishing property values, among other supposed risks.

"The word that has spread is 'This is going to be this great, transformational project,' but we feel there's a lot underneath that just hasn't been brought out," Indian River County Attorney Dylan Reingold said.

Speaking to the *Business Journal* in October, Reininger refuted the claims.

"We're talking about operating 16 roundtrips a day on a railroad system that's been in continuous operation for 100 years exactly where it is," he said.

U.S. District Court Judge Christopher R. Cooper initially ruled against the Treasure Coast counties. The plaintiffs did not have legal standing, he said in June 2016.

That essentially meant their attempt to block PAB allocation for Brightline Phase II would not resolve their grievances, Brightline was on its way, with or without tax-exempt bonds.

Reininger echoed that assertion, stressing the project is on solid footing.

"Ultimately, we will put the financing plan together that will allow us to move into the full-phase construction process," he said in the October interview. "I would take exception to any remote characterization [that Phase II is in any sort of lim-

bo phase] at all."

Given the opportunity to submit additional information for consideration in a process called jurisdictional discovery, Ryan and Reingold hoped to convince Cooper to reassess his stance and give them the green light to press on with the suit. They were successful.

"We said, 'Judge, give us an opportunity to drill down on this issue,'" Reingold recalls. "Based upon ... the arguments presented, the judge then took a very different position than he did in his initial decision in the summer of '15. That was a key turning point."

In a 39-page memorandum opinion filed in August 2016, Cooper sided with the Treasure Coast counties and challenged whether Phase II was on solid footing.

For one, AAF's application letter to the DOT describes PAB financing as "the linchpin for completing our project" and "a crucial factor in ensuring our project is financed and completed."

The company has also said that blocking "allocation of federal tax-exempt status would certainly disrupt the current financing plan, make the project more expensive to complete, and may delay its progress."

Tax-exempt, bond-based financing, Cooper concluded, "is not just the 'current financing plan' for the project – it appears to be the only financing plan."

Additionally, the availability of other financing sources – such as an RRIF loan, additional equity contributions from Fortress or others, a sale of equity interests to third parties and other forms of corporate debt – is dubious, he said.

The memorandum opinion indicates the company struggled to sell the bonds on four occasions:

► On August 2015, All Aboard Florida released a Preliminary Limited Offering Memorandum on the PABs, indicating an interest rate of 6 percent for a single tranche, or portion, of up to \$1.75 billion. The company found it could not sell the bonds at that rate on the terms it wanted.

► It restructured the offering a month

later to increase the projected interest rate to 7.5 percent and issued the bonds in two tranches: one for \$1.35 billion and the other for \$400 million. Again, there was insufficient interest from investors to close on the sales at those terms.

► AAF followed up with a second supplement in October and a third in November, keeping the interest rate at 7.5 percent, but with "additional terms that were arguably more favorable to investors."

"Each time it was either unable to conclude a deal or chose not to do so, depending on whose framing of the issue one prefers," Cooper wrote. "Either way, the fact remains that the AAF project repeatedly did not generate sufficient interest to result in a sale of all bonds at the 7.5% rate."

Bond investors, unlike their stock market counterparts, tend to be risk-averse, says Jordan Niefeld, an adviser with Raymond James Financial in Aventura.

"They tend to enjoy the predictability of what a bond has to offer in terms of cash flow and maturity," he wrote in an email.

As for Brightline, Reininger says investors were hesitant simply because it was too soon.

"If you look at it from the point of view of capital markets, we had a vision, but we hadn't proven ourselves. We didn't have trains. We didn't have people," he said in October. "You fast-forward to today and, in a handful of days, and every day thereafter, [the] profile of our risk looks very different."

Moving forward

AAF maintains its position that Phase II is on schedule.

The company renewed its push for tax-exempt bonds in November, splitting its request for \$1.75 billion into two tranches: \$600 million for Phase I and \$1.15 billion for Phase II.

It has also petitioned the courts to dismiss the lawsuit brought by Indian River and Martin counties, on the grounds that the split-tranche bond allocation renders the plaintiffs' argument moot. The plaintiffs disagree and have since filed legal action to strike AAF's petition for the courts to dismiss the case.

To date, the lawsuit stands. The allocation of the \$600 million tranche has been approved. Lawyers interviewed for the story decline to speculate on how the battle might end.

"This is the first of this type of case that has been filed," Bryant Miller Olive's Herring said. "To my knowledge, this is the first time someone has challenged the U.S. DOT on these merits."

AAF, which reiterates Phase II is on track, declined to be interviewed for this story, but issued the following statement: "Our current focus is launching train ser-

Vice for Phase I, operating between Miami and West Palm Beach beginning next summer. We continue to evaluate and review Phase II financing strategies.



The Brightline train is on display at its railroad operations facility in West Palm Beach



Brightline's Smart coaches feature 66 seats in a double-seat configuration.



Tim Leiner points out some of the innovative technology and safety features employed on the Brightline train.



The Select coach section of the Brightline train features 21-inch leather seats and a varied seating configuration.