COUNTY AGENDA REQUEST

Department:	Public Works	Presenter(s):	Phil Mallon
Meeting Date:	Thursday, July 28, 2011	Type of Request:	Consent

Wording for the Agenda:

Approval of staff's request for the Chairman to sign a Temporary Right of Entry Agreement with CSX Transportation, Inc. for pavement improvements at the CSX Railroad Crossing on Sandy Creek Road, and to approve staff's request to obtain related insurance coverage as required.

Background/History/Details:

The intersection of the CSX rail line and Sandy Creek Road requires resurfacing. Fayette County has asked CSX Transportation, Inc. for authorization to do work at that intersection. CSX is willing to grant Fayette County access onto their property in order to do the needed work, but has required terms and conditions contingent upon the County doing the work.

The terms and conditions state the county is responsible for the project and its entire cost, that the county will indemnify CSX, that the county will procure and maintain general liability insurance of available limits not less than $1,000,000, that the county will purchase Railroad Protective Liability Insurance, and other conditions. Staff needs authorization to move forward with securing those related insurance coverages.

This railroad crossing has been problematic for years and the county has made improvements toward "raising" the approaches to the crossing to make the crossing flatter and less likely to do damage to vehicles.

What action are you seeking from the Board of Commissioners?

Approval of staff's request to authorize the Chairman to sign a Temporary Right of Entry Agreement with CSX Transportation, Inc. for asphalt resurfacing work at the CSX Railroad Crossing on Sandy Creek Road, and to approve staff's request to obtain related insurance coverage as required.

If this item requires funding, please describe:

The cost estimate for insurance and other conditions is between $6,000 and $6,500. Actual costs will depend on time spent for field work and corresponding staff time required by CSX personnel. Funding is available from Road Department - Technical Services.

Has this request been considered within the past two years?	No	If so, when?	
Is Audio-Visual Equipment Required for this Request?	No	Backup Provided with Request?	Yes

STAFF USE ONLY

Approved by Finance	Yes	Reviewed by Legal	Yes
Approved by Purchasing	Yes	County Clerk's Approval	Yes
Administrator's Approval	Yes		

Staff Notes:

CSX Transportation, Inc.
Temporary Right of Entry Agreement

THIS AGREEMENT, made as of _____, 20_, effective _____, 20__, by and between CSX TRANSPORTATION, INC., a Virginia corporation, whose mailing address is 500 Water Street, Jacksonville, Florida 32202, hereinafter called "**CSXT,**" and Fayette County Road Department, whose mailing address is 115 McDonough Road, Fayetteville, GA 30214, hereinafter called "**Licensee**," WITNESSETH:

WHEREAS, Licensee has submitted a written application to CSXT requesting permission to enter CSXT's property located within the Atlanta Division, Atlanta Terminal Subdivision, at DOT#: 639498T, MP: ANB 838.35/Sandy Creek Road, in Tyrone, FayetteCounty,Georgia, (the "**Property**"), for the purpose of CSXT to resurface Sandy Creek Road, (the "**Project**"); and

WHEREAS, CSXT is willing to grant to Licensee the limited right and permission to enter upon the Property for the limited purpose of performing the Project.

NOW THEREFORE, CSXT hereby grants to Licensee the right and permission to enter upon the Property for the purpose of performing said Project, subject to the terms and conditions set forth below:

1. **PROJECT**: The Project shall be performed at the entire cost and expense of Licensee, in accordance with good and sound engineering practices, to the satisfaction of CSXT's Division Engineer or his or her duly authorized representative ("Division Engineer") and in a manner to avoid accidents, damages, unnecessary delays to or interference with train traffic of CSXT. Prior to entry, Licensee shall notify the Division Engineer's representative and arrange for flagging protection in accordance to Sections 5 and 6 of this Agreement. Licensee shall not dig in the ballast line or within the tracks loading influence area, or otherwise disturb the track structure. Licensee and Licensee's employees, agents, contractors and other representatives (collectively, "Agents") shall maintain in their possession a copy of this Agreement at all times during their occupation of the Property.

2. **INDEMNITY:**

2.1 Licensee hereby assumes risk of and agrees to indemnify, defend, protect and save CSXT and CSXT's Affiliates harmless with respect to any and all attorneys' fees, liability, claims, demands, payments, suits, actions, recoveries, penalties, costs, legal expenses, judgments, settlements, and damages of every nature, degree, and kind (including direct, indirect, consequential, incidental, and punitive damages) for:

2.1.1 personal injury, including, but not limited to bodily injury to or death of any person or persons whomsoever, including the agents, servants, Affiliates or employees of the parties;

2.1.2 the loss or damage to any property whatsoever, including property owned or in the care, custody or control of the parties hereto or their respective Affiliates;

2.1.3 any environmental damage and any related remediation brought or recovered against CSXT or any of its Affiliates; and

2.1.4 any and all other losses or damages; arising directly or indirectly from the presence of Licensee or its Agents on or about the Property, whether or not attributable in whole or part to the negligence, gross negligence, or intentional misconduct of CSXT or its Affiliates.

2.2 The parties waive any and all right or opportunity to contest the enforceability of this Section and agree that, in the event this Section, or any part of this Section, is found unenforceable by the final, unappealable judgment of a court of competent jurisdiction, this Section shall be construed so as to be enforceable to the maximum extent permitted by applicable law. In the event that such court of competent jurisdiction finds that Florida statutory construction contract indemnity monetary limits apply to this Agreement with respect to Licensee's indemnification of CSXT and its Affiliates for liability caused in whole or in part by any act, omission or default by CSXT or its Affiliates, the parties hereto agree that such limit shall be equal to the limits (exclusive of deductibles) of the applicable insurance required by Sections 3 and 4 of this Agreement. The parties acknowledge and agree that this monetary limit, if required, bears a commercially reasonable relationship to this Agreement, in so far as, among other factors, the parties have taken into account the availability and cost of insurance and other risk transference devices, the scope of the Project, the risks associated with the Project, and the compensation and any other benefits exchanged between the parties in connection with this Agreement.

2.2.1 Licensee shall comply with any federal, state, or local laws, statutes, codes, ordinances, rules, and regulations applicable to its presence or performance of any activity on the Property and agrees to indemnify, defend, and hold CSXT and its Affiliates harmless with respect to any fines, penalties, liabilities, or other consequences for its failure to so comply.

2.2.2 For the purpose of this Agreement, the term "Affiliates" includes all entities, directly or indirectly owned or controlled by, or under common control of a party or its respective officers, directors, employees and agents, and in the case of CSXT, includes CSX Corporation, CSXT and their Affiliates and their respective officers, directors, employees and agents.

2.2.3 The provisions of this Section shall survive the termination or expiration of this Agreement.

3. **GENERAL LIABILITY INSURANCE**: Licensee shall procure and maintain, at its expense: (i) statutory Worker's Compensation and Employers Liability Insurance with available limits of not less than $1,000,000.00, which insurance must contain a waiver of subrogation against CSXT and its Affiliates; (ii) Commercial General Liability coverage (inclusive of contractual liability) with available limits of not less than $5,000,000.00 in combined single limits for bodily injury and property damage and covering the contractual liabilities assumed under this Agreement; (iii) business automobile liability insurance with available limits of not less than $1,000,000.00 combined single limit for bodily injury and/or property damage per occurrence; and (iv) such other insurance as CSXT may reasonably require. Upon request, Licensee shall provide CSXT with a copy of Licensee's applicable insurance policies. A policy endorsement naming CSXT as an additional insured and specifying such coverage shall be furnished to CSXT prior to the execution of this Agreement, and the required coverage will be kept in force until all of Licensee's obligations under this Agreement have been fully discharged and fulfilled, or until Licensee shall have been specifically released by a written instrument signed by an authorized officer of CSXT. Licensee shall also provide CSXT with a copy of the insurance policies. The insurance policies shall provide that the insurance carrier must give CSXT notice at least thirty (30) days in advance of cancellation of coverage, of any change in coverage, or of cancellation of the policy. Notwithstanding any provisions of this Section, the liability assumed by Licensee shall not be limited to the required insurance coverage.

4. **RAILROAD PROTECTIVE LIABILITY INSURANCE:** Licensee agrees to purchase Railroad Protective Liability Insurance in accordance with CSXT's requirements (attached as Exhibit A and incorporated into this Agreement) for the benefit of CSXT for Licensee's operations under this

Agreement. Licensee shall furnish an appropriate Insurance policy (and required endorsements), as the case may be, with the return of this executed Agreement.

5. **PRIOR NOTIFICATION: Licensee or Licensee's Agents shall notify CSXT's Roadmaster** at least 10 days prior to requiring entry on the Property and shall abide by the instructions of the Division Engineer, or his or her authorized representative. The Roadmaster, Bruce Skinner, can be contacted at: 770-862-4768, or Bruce_Skinner@csx.com to schedule flagging services.

6. **CLEARANCES**: Neither Licensee nor Agents shall perform any Project or place or operate any equipment of Licensee or Agents at a distance closer than fifty (50) feet from the center of any track, without the prior approval of the Division Engineer. The Division Engineer may require protective services or such other services as deemed necessary or appropriate. Equipment shall be moved across CSXT's track(s) only at a public crossing unless prior arrangements have been made with the Division Engineer and a Private Crossing Agreement is fully executed and in place. Licensee and Agents shall take all precautions necessary to avoid interference with or damage to CSXT's property and signal and communication facilities during their performance of the Project.

7. **PROTECTIVE SERVICES**: If protective services, such as flagging protection, are required by CSXT, Licensee shall make arrangements with the Roadmaster to furnish such personnel, flagman or watchman, that in the Roadmaster's opinion may be necessary to protect the facilities and traffic of CSXT during the performance of the Project. Licensee shall pay for the cost of such services, including all applicable surcharges and additives. These services are estimated to be $1,808.00, as supported by the attached estimate.

8. **PAYMENT FOR PROTECTIVE SERVICES**: Payment shall be made by Licensee in accordance with the following designated option:

   ( ) **Option 1**: Licensee shall make an advance deposit of funds based on an estimate of the cost of protective or other services as determined by CSXT. The cost for CSXT's services shall then be assessed by CSXT against this advance deposit. Upon completion of the Project, any unused funding will be returned to Licensee. If CSXT's costs exceed the advance deposit(s), a request will be made to Licensee for additional funds or an invoice will be issued to Licensee for final payment. Licensee shall remit payment to CSXT within thirty (30) days of receipt of either a request for additional funds or an invoice.

   (X) **Option 2**: Licensee shall promptly reimburse CSXT for the cost of protective or other services on an as-incurred basis, including all applicable surcharges, upon receipt of bill(s) therefor.

9. **ENVIRONMENTAL**: **This Agreement does not include and expressly excludes the performance of any site investigation activities designed to determine environmental conditions on, about or beneath the Property**. Precluded activities include performing soil borings for purposes other than geotechnical investigation, obtaining soil, sediment, groundwater and surface water samples, and conducting field or laboratory analyses of any soil, sediment, groundwater or surface water samples obtained from CSXT property to identify chemical composition or environmental condition. *If any type of environmental investigation is desired, a separate right of entry agreement issued through CSXT's Environmental Department must be secured.*

10. **CLAIMS:** Licensee shall, or shall require Agents, to promptly notify the Division Engineer of any loss, damage, injury or death arising out of or in connection with the Project.

11. **REMEDIATION**: It is understood and agreed that, upon completion of the Project, the Property shall be left in a condition satisfactory to Division Engineer or his or her duly authorized representative.

12. **SAFETY:**

12.1 All personnel entering the Property must comply with CSXT safety rules and requirements to include, without exception, the wearing of hard hats and approved safety shoes and safety glasses with side shields. Anyone not in compliance with these rules and regulations will be asked to leave the Property.

12.2 Before performing any work authorized by this Agreement, Licensee, at its sole cost and expense, shall obtain all necessary permit(s) (including but not limited to zoning, building, construction, health, safety or environmental matters), letter(s) or certificate(s) of approval. Licensee expressly agrees and warrants that it shall conform and limit its activities to the terms of such permit(s), approval(s) and authorization(s), and shall comply with all applicable ordinances, rules, regulations, requirements and laws of any governmental authority (state, federal or local) having jurisdiction over Licensee's activities, including the location, contact, excavation and protection regulations of the Occupational Safety and Health Act (OSHA) (29 CFR 1926.651(b), et al.), and State "One Call" -"Call Before You Dig" requirements.

13. **TERM:** This Right-of-Entry Agreement and the permission conferred and the license granted by it does not constitute a grant of permanent easement and shall terminate upon completion of the Project or at midnight,_____ ,whichever occurs first, unless extended in writing by CSXT. In the event Licensee fails to comply with terms and provisions of this Agreement, Licensee agrees to pay and agrees that CSXT shall be entitled to recover costs and expenses incurred by CSXT, including legal fees and expenses, to enforce the terms of this Agreement.

14. **SEVERABILITY**: The parties agree that if any part, term or provision of the Agreement is held to be illegal, unenforceable or in conflict with any applicable federal, state, or local law or regulation, such part, term or provision shall be severable, with the remainder of the Agreement remaining valid and enforceable. If any provision or any part of a provision of the Agreement shall be finally determined to be superseded, invalid, illegal, or otherwise unenforceable pursuant to any applicable law, ordinance, rule or regulation, such determination shall not impair or otherwise affect the validity, legality, or enforceability of the remaining provision or parts of the provision of the Agreement, which shall remain in full force and effect as if the unenforceable provision or part were deleted.

15. **ENTIRE AGREEMENT:** This Agreement embodies the entire understanding of the parties, may not be waived or modified except in a writing signed by authorized representatives of both parties, and supersedes all prior or contemporaneous written or oral understandings, agreements or negotiations regarding its subject matter.

16. **NOTICES:** All notices, consents and approvals required or permitted by this agreement shall be in writing and shall be deemed delivered; upon personal delivery, upon the expiration of three (3) business days following mailing by U.S. first class mail, or upon the next business day following mailing by a nationally recognized overnight carrier, to the Licensee at the address above, and to Licensor at the address shown on Page 1, or at such other addresses as either party may designate by delivery of prior notice to the other party .

17. **TERMINATION:** CSXT shall have the right at any time and at its sole discretion to terminate this Agreement upon notice to Licensee.

18. **WAIVER:** If either party fails to enforce its respective rights under this Agreement, or fails to insist upon the performance of the other party's obligations hereunder, such failure shall not be construed as a permanent waiver of any rights or obligations in this Agreement.

19. **GOVERNING LAW; VENUE:** This Agreement shall be governed by and construed under the laws of the State of Florida, without regard to the choice of law provisions thereof. Venue for any action arising from, or brought to enforce, this Agreement, shall vest exclusively in the state or federal courts located in Duval County, Florida, and the parties agree to submit to the personal jurisdiction of any state or federal court located in Duval County, Florida.

20. **NO ASSIGNMENT:** Notwithstanding anything to the contrary contained in this Agreement, Licensee shall not permit Agents to enter the Property without first requiring Agents to agree in writing to comply with all of the terms of this Agreement. Notwithstanding the foregoing, Licensee shall continue to be responsible for insuring that Agents comply with all of the terms and conditions of this Agreement and shall indemnify and hold CSXT harmless for any damages described in Section 2 above caused in whole or in part by such subcontractor. Assignment of this Agreement to any party other than Agents in accordance with this Section shall not be permitted except upon the prior written consent of CSXT, which consent may be granted or withheld at CSXT's sole discretion. This Agreement shall be binding upon the parties and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

Witness for CSX Transportation: **CSX TRANSPORTATION, INC.**

_____ By: _____

Dale W. Ophardt
Assistant Vice President Engineering

Witness for: Fayette County Road Department **FAYETTE COUNTY ROAD DEPARTMENT**

_____ By: _____

Who, by the execution hereof, affirms that he/she has the authority to do so and to bind the [*] to the terms and conditions of this Agreement.

Print/Type Name: _____
Print/Type Title: _____

[*]

CSX TRANSPORTATION

Jonathan MacArthur
Manager- Insurance Projects
Insurance Department
500 Water Street- C-907
Jacksonville, FL 32202
EMAIL Jonathan_MacArthur@CSX.com
PHONE (904) 359-3394
FAX (904) 306-5325

RAILROAD PROTECTIVE LIABILITY INSURANCE

Evidence required by CSX Transportation, Inc.
You are required to furnish Railroad Protective Insurance to protect CSX Transportation, Inc. in connection with activities to be performed on or adjacent to CSX Transportation's Right of Way.

The following summarize CSXT's specifications for proper evidence of insurance:

1. The insurer must be financially stable and rated A- or better in Best's insurance.
2. The policy must be written using the ISO/RIMA Form of Railroad Protective Insurance – Insurance Services Office (ISO) Form CG 00 35.
3. Named Insured and Address:

   CSX Transportation, Inc.
   500 Water Street C907
   Jacksonville, FL 32202

4. Limits of Liability: $5,000,000/$10,000,000.
5. Name and address of Contractor must be shown on the Declarations page.
6. Name and address of the Project Sponsor must be shown on the Declarations page.
7. Description of operations must appear on the Declarations page and must match the project description, including project or contract identification numbers. Location of work to be performed must be included in description.
8. Authorized endorsements must include the Pollution Exclusion Amendment – CG 28 31 unless using form CG 00 35 version 96 and later
9. Authorized endorsements may include:
   (a) Broad Form Nuclear Exclusion – IL 00 21
   (b) 30-day Advance notice of Non-renewal or cancellation
   (c) Required State Cancellation Endorsement
   (d) Quick Reference or Index – CL/IL 240
10. Authorized endorsements may not include:
   (a) Any Pollution Exclusion Endorsement except CG 28 31
   (b) Any Punitive or Exemplary Damages Exclusion
   (c) A "Common Policy Conditions" Endorsement
   (d) Any Endorsement not named in A or B
   (e) Any type of deductible policy
11. Such additional or different insurance as CSXT may require.

The original policy must be submitted for our approval and filing prior to the commencement of any work activities. No work may commence without obtaining written approval of insurance.

CSX TRANSPORTATION, INC.
FORCE ACCOUNT ESTIMATE

ACCT. CODE : 709 -

ESTIMATE SUBJECT TO REVISION AFTER: 11/12/2011 **DOT NO.:** 639498T
CITY: Tyrone **COUNTY:** Fayette **STATE:** GA
DESCRIPTION: Resurfacing of Sandy Creek Road.

DIVISION: Atlanta **SUB-DIV:** Atlanta Terminal **MILE POST:** ANB 838.35
AGENCY PROJECT NUMBER: __

	PRELIMINARY ENGINEERING:			
200	Labor (Non Contract)		$	-
200	Additive	31.34%	$	-
230	Expenses		$	-
212	Contracted & Administrative Engineering Services		$	-
	Subtotal		$	-
	CONSTRUCTION ENGINEERING/INSPECTION:			
200	Labor (Non Contract)		$	-
200	Additive	31.34%	$	-
230	Expenses		$	-
212	Contracted & Administrative Engineering Services		$	-
	Subtotal		$	-
	FLAGGING SERVICE: (Contract Labor)			
070	Labor (Conductor-Flagman)		$	-
050	Labor (Foreman/Inspector)		$	672
070	Additive	73.76% (Transportation Department)	$	-
050	Additive	97.95% (Engineering Department)	$	658
230	Per Diem	(Engineering Department)	$	150
230	Expenses		$	-
	Subtotal		$	1,480
	SIGNAL & COMMUNICATIONS WORK:	(Details Attached)	$	-
	TRACK WORK:	(Details Attached)	$	-
	ACCOUNTING & BILLING:			
040	Labor		$	100
040	Additive	63.03%	$	63
	Subtotal		$	163
	PROJECT SUBTOTAL		$	1,643
900	**CONTINGENCIES:**	10.00%	$	164
	GRAND TOTAL	**********	$	1,808

DIVISION OF COST:

Agency	100.00%	$	1,808
Railroad		$	-
TOTAL	**********	$	1,808

NOTE: Estimate is based on FULL CROSSING CLOSURE during work by Railroad Forces.

This estimate has been prepared based on site conditions, anticipated work duration periods, material prices, labor rates, manpower and resource availability, and other factors known as of the date prepared. The actual cost for CSXT work may differ based upon the agency's requirements, their contractor's work procedures, and/or other conditions that become apparent once construction commences or during the progress of the work

Office of Assistant Chief Engineer Public Projects--Jacksonville, Florida

Estimated prepared by: Amanda Acosta **Approved by:** **CSXT Public Project Group**
DATE: 5/16/2011 **REVISED:** **DATE:**

Form Revised 03-02-2010-LLS