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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED

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January 14, 2025
Part of
Public Record

Docket No. FD 36770

**PETITION FOR DECLARATORY ORDER OF TOWNSHIP OF PILESGROVE,
COUNTY OF SALEM, NEW JERSEY**

**REBUTTAL STATEMENT OF
INTERVENOR TOWNSHIP OF MANNINGTON,
COUNTY OF SALEM, NEW JERSEY**

On April 22, 2024, the Township of Pilesgrove, a New Jersey municipal corporation located in Salem County, New Jersey (“Pilesgrove”), filed a petition requesting a declaratory order from the Surface Transportation Board (“Board”) as to whether and to what extent the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) preempts Pilesgrove’s municipal zoning and site plan regulations, and certain requirements of New Jersey’s Uniform Construction Code (“UCC”), with regard to the land development and land use activities of SMS Rail Service, Inc. (“SMS”) within Pilesgrove Township in connection with SMS’s recently commenced entertainment-based intrastate railroad excursions.

On June 10, 2024, the Township of Mannington, a New Jersey municipal corporation also located in Salem County, New Jersey (“Mannington”), which shares a municipal boundary with Pilesgrove, and through which SMS’s rail line also extends, petitioned the Board for leave to intervene in Pilesgrove’s proceeding, and requested that the Board’s declaratory order also address SMS’s development and use of land within Mannington Township designated as Tax Map Block

67, Lots 14.01, 14.02 and 18 (the “Mannington Property”) for trackside customer entertainment and recreation activities in connection with the same SMS intrastate rail excursion services that are the subject of Pilesgrove’s petition. Mannington’s petition to intervene was granted on September 13, 2024, as set forth in the Board’s decision served on that date.

The Board’s September 13, 2024 intervention decision directed Pilesgrove and Mannington to confer with counsel for SMS and jointly submit a proposed procedural schedule to govern this proceeding, or if the parties failed to agree, for each party to file its own proposed procedural schedule. The parties were unable to reach agreement on a proposed schedule, and each filed its own proposed schedule, whereupon the Board adopted a procedural schedule as set forth in its October 24, 2024 decision (same service date), by which Pilesgrove and Mannington were allowed to file supplemental evidence and argument by November 8, 2024; SMS’s reply evidence and argument, and submissions by other interested persons, were due by December 9, 2024; and Pilesgrove’s and Mannington’s rebuttal statements, and SMS’s response to submissions by other interested persons, were due by January 7, 2025.

On November 8, 2024, Mannington and Pilesgrove filed their respective supplemental evidence and arguments as allowed by the Board’s October 24, 2024 decision.

On December 5, 2024, SMS requested an additional week for submission of its reply evidence and argument, and also for the submissions of other interested persons. On December 6, 2024, Mannington and Pilesgrove each requested a one-week extension for filing their respective rebuttal statements if the Board were to grant SMS’s request.

In response to the parties’ requests, the Board adopted a modified procedural schedule as set forth in its December 6, 2024 decision (same service date), by which SMS’s reply evidence and argument, and submissions by other interested persons, were due by December 16, 2024, and

Pilesgrove's and Mannington's rebuttal statements, and SMS's responses to submissions by other interested persons, were due by January 14, 2025.

As allowed by the Board's December 6, 2024 decision, SMS filed its reply evidence and argument on December 16, 2024, and the following interested persons (hereafter referred to generally as the "Amici") also filed submissions with the Board on that date:

- Sierra Northern Railway (SNR) (*Amicus Curiae* Brief)
- Mendocino Railway (MRY) (*Amicus Curiae* Brief)
- American Short Line and Regional Railroad Association (ASLRRA) (Comments)
- California Short Line Railroad Association (CSLRA) (Comments)

This filing constitutes Mannington's rebuttal statement as allowed by the Board's December 6, 2024 decision.

BACKGROUND SUMMARY

Since the fall of 2023, and perhaps longer, SMS has been using land in Mannington Township (owned by the County of Salem – hereafter the "County") as a point of train turn-around and debarkation for SMS's "Woodstown Central Railroad" ("WCR") excursions, and as a trackside customer entertainment and recreation area in connection with such excursions. As explained in Mannington's prior submissions to the Board, the Mannington Property consists of about 2.57 acres owned by the County, located near Mannington Mills Road and New Jersey State Highway Route 45 (also known as Salem-Woodstown Road), and designated as Block 67, Lots 14.01, 14.02 and 18 on the Mannington Township Tax Map. The railroad tracks constituting the Salem Branch, including the tracks that are configured as the "wye" turnaround, are located within the Mannington Property.

The Mannington Property is located within a CONS-Conservation zoning district in which SMS's WCR trackside customer entertainment and recreation operations are not permitted unless "use variance" approval is granted by the Mannington Township Planning Board pursuant to *N.J.S.A. 40:55D-70.d.* of New Jersey's Municipal Land Use Law. Mannington's Land Development Ordinance ("LDO") also requires site plan review and approval by the Mannington Township Planning Board for all land uses and developments except for detached one- and two-family dwellings. SMS has cleared and developed the Mannington Property with various structures, facilities, improvements, and installations, and is conducting its ongoing WCR excursion-related operations at the property without having obtained any land use or development approvals from the Mannington Township Planning Board as required by the LDO, and as required by the Municipal Land Use Law, *N.J.S.A. 40:55D-1, et seq.* ("MLUL") by which the LDO is statutorily authorized. As explained in Mannington's Supplemental Evidence and Argument brief, the MLUL requires Mannington to enforce its land use regulations uniformly, not selectively.

REBUTTAL POINT I

SMS HAS NOT PROVIDED EVIDENCE OF FREIGHT TRANSPORTATION ON THE SALEM BRANCH AS PART OF THE INTERSTATE RAIL NETWORK

Before receiving SMS's reply evidence and argument Mannington's representatives had assumed that SMS's *freight* operations constitute ICCTA-preempted transportation between New Jersey and other states as part of the interstate rail network. Yet SMS's carefully-worded certifications and brief do not support this assumption.

Paragraph 2 of the Verified Statement of James R. Pfeiffer (SMS Exhibit C) presents the number of "freight train miles" that have been traveled on the Salem Branch since 2021, but Mr.

Pfeiffer does *not* say that the miles reflect *transportation between New Jersey and other states as part of the interstate rail network*. Given the large number of documents filed with SMS's Reply Evidence and Argument brief, and the comprehensiveness of the information contained therein, the Board should presume that, if Mr. Pfeiffer *could* have made such a statement truthfully and correctly, he *would* have. Accordingly, the Board should find that the *absence* of such a statement in the context of SMS's voluminous filings indicates that SMS's freight train miles *do not* reflect interstate transportation.

In Paragraph 3 of his verified statement, Mr. Pfeiffer states that records of SMS's separate "West Jersey Division, Pureland Branch" reveal that an average of 6,000 freight cars (per year?) have been serviced on the Pureland Branch over the past two decades. However, Mr. Pfeiffer does *not* say that any of those "services" constitute freight transportation by SMS *between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network*. The Board should presume that, if Mr. Pfeiffer could have made such a statement truthfully and correctly, he would have, and that the absence of such a statement indicates that SMS's services on the Pureland Branch do not constitute freight transportation by SMS between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network.

SMS's brief contains assertions by counsel on pages 4 through 6 that Pureland and the Salem Branch are connected in Gloucester County by a line owned by Conrail; that the proximity of Pureland to the Salem Branch presents "opportunity" for freight on the Salem Branch; and that other freight business from Pureland is "anticipated" to utilize the Salem Branch. Counsel's conclusions as to "anticipated opportunities" are not supported by any evidence, nor do any of these three assertions indicate that anticipated freight business from Pureland would constitute *transportation by SMS between the Salem Branch and areas outside the state of New Jersey as*

part of the interstate rail network. Moreover, SMS has provided no evidence of any agreement with Conrail regarding movement of freight between the Pureland Branch and the Salem Branch. The Board should presume that if such evidence *existed* it would have been *provided*. In the absence of such evidence the Board should *not* simply presume that any anticipated future freight business from Pureland would constitute freight transportation by SMS between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network.

In Paragraph 5 of his verified statement Mr. Pfeiffer provides the number of “freight carloads” that have traveled on the Salem Branch since 2021, but Mr. Pfeiffer does *not* say that the carloads reflect *transportation between New Jersey and other states as part of the interstate rail network*. Specifically, Mr. Pfeiffer does *not* explain:

1. what types of freight, specifically or generally, have been transported to and from South Jersey Farmers Exchange (SJFE);
2. to and from what locations outside the state of New Jersey, and by what routes and interchanges, the SJFE freight, the Toys for Tots (TFT) toys, and the Environmental Rail Solutions (ERS) intermodal boxes¹ were transported to and from SJFE, TFT, and ERS; and

¹ Although not noted in Mr. Pfeiffer’s verified statement, counsel for SMS explains, on page 2 of SMS’s brief, that SMS rebuilds intermodal boxes for ERS “at a shop along the Salem Branch.” Consistent with the careful wording that appears elsewhere in SMS’s brief and certifications with respect to factual representations, counsel does not disclose where, specifically, the “shop” is located along the Salem Branch. However, Mr. Pfeiffer explains in Paragraph 5 of his verified statement that ERS’s intermodal boxes must move through both Pilesgrove and Mannington Townships to reach their “destination.” Based on this bit of information, and the fact that, with respect to the Salem Branch, Pilesgrove Township lies between Mannington Township and “the interstate rail network,” SMS’s refabrication shop is probably located somewhere in Mannington Township. There is no indication in SMS’s filings that ERS is a Class I, Class II, or Class III rail carrier subject to the Board’s jurisdiction, and SMS makes no argument that a Class III carrier’s fabrication or refabrication of a third-party non-carrier’s intermodal boxes is “transportation that is conducted under the Board’s jurisdiction as part of the interstate rail network.” It is thus reasonable to conclude that Mannington’s LDO is not preempted by ICCTA with respect to this specific operation or activity, despite its apparent relation to railroading. Mannington is unaware of the existence of any such “shop” within Mannington Township, or that any municipal development approvals have been issued for any such shop, and Mannington will therefore investigate as necessary to determine whether SMS might be operating its intermodal box refabrication shop

3. whether and to what extent the cars carrying the freight were “full” or, in the parlance of cited Board decisions, “less-than-one-carload” or “more-than-minimum.”

Given the obvious relevance of such information to the Board’s ICCTA preemption analysis, and the unquestionable availability of the information to SMS, the Board should presume that, if SMS could have provided the information truthfully and correctly (without detriment to SMS’s arguments), it would have. The absence of such information indicates that SMS’s “freight carload numbers” do not reflect interstate freight transportation, regardless of the extent to which the cars may have been filled.

The descriptions of SMS’s Pilesgrove operations as set forth in Mr. Pfeiffer’s verified statement, and in the Verified Statement of Paul C. Harland (SMS Exhibit K), are also carefully worded insofar as these statements do *not* include any representation that SMS’s activities and facilities in Mannington or Pilesgrove are, or are conducted and used in support of, freight or passenger transportation by SMS *between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network*. Mr. Pfeiffer states only that SMS’s activities and facilities at the Pilesgrove property are in connection with SMS’s common carrier activities “on the Salem Branch,” and that the engine house at the Pilesgrove property contains tools, supplies, and equipment to maintain SMS’s locomotive fleet for freight and passenger service “on the Salem Branch.” (See SMS Exhibit C, paragraphs 6 and 7.) Mr. Harland only states (in paragraph 4 of his verified statement) that motive power for the WCR excursions is provided by SMS locomotives “used in both freight and passenger service.” He does not go on to say that either the freight service or the passenger service for which the locomotives are used is “part of the interstate rail network.”

somewhere in Mannington Township in violation of Mannington’s zoning and site plan regulations, in which case SMS and the land owner will be notified accordingly.

It is understandable that SMS uses the Pilesgrove property exclusively for its isolated Salem Branch operations, particularly considering the Salem Branch's above-mentioned lack of connection with the Pureland Branch or other parts of the interstate rail network, and it therefore seems appropriate for Mr. Pfeiffer and Mr. Harland to limit their representations in this manner. However, taking the statements at face value, the Board should presume that, if Mr. Pfeiffer and Mr. Harland *could* have explained truthfully and correctly whether and how the activities and facilities at the Pilesgrove property or the Mannington Property are, or are conducted and used in support of, transportation by SMS *between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network*, they *would* have. The absence of such explanations indicates that SMS's activities and facilities at the Pilesgrove property and the Mannington Property do not constitute or support interstate transportation.

In addition to what is not said in Mr. Pfeiffer's and Mr. Harland's verified statements, the Reply Evidence and Argument brief submitted by SMS also lacks any supported assertion as to whether or how SMS's freight or passenger operations might constitute transportation between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network. In his representations to the Board, counsel for SMS makes numerous references to freight service *on the Salem Branch*, but he is very careful never to assert, at least not directly, that SMS provides freight transportation *between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network*. This is done, perhaps, in hope that the Board (and Mannington and Pilesgrove) will assume that *all* of SMS's freight- and freight-related operations along the Salem Branch, by virtue of simply *being* such, are somehow automatically entitled to ICCTA preemption, whether or not the freight is actually transported to or from areas outside of New Jersey. Indeed, there are only four indirect and unsupported references in counsel's brief suggesting that SMS's

operations constitute ICCTA-preempted interstate transportation, beginning on page 33 (the specific references are set forth in italic text in the following citations for convenient identification):

1. “Also, the fact that some of the facilities along the Branch have dual purposes – for freight and the seasonal excursions – does not change the fact that the facilities are integral to *interstate commerce*.” (Page 33 of SMS brief – unsupported by evidence.)
2. “Indeed, in contrast to SMS’s freight and *interstate connections*, All Aboard Florida was not intended to be a part of the national rail network and did not plan to be involved in freight traffic or interstate commerce of any sort.” (Page 35 of SMS brief – unsupported by evidence.)
3. “And that principle [citing *Denver & Rio Grande Railway*] applies here in favor of federal preemption, as shown by SMS’s investment in the Salem Branch that has already inarguably restored freight service to the Branch that currently exceeds and will continue to exceed ‘minimal freight operation in *interstate commerce*.’” (Pages 35-36 of SMS brief – unsupported by evidence.)
4. “[SMS] currently exceeds and will continue to exceed ‘minimal freight operation in *interstate commerce*’ on the Salem Branch, the standard by which the Board determines to maintain its jurisdiction under the facts presented here.” (Pages 38-39 of SMS brief – unsupported by evidence, except for a footnoted reference to “anticipated” interstate freight service at the proposed Mannington Mills transloading facility.)

Otherwise, in all references to SMS’s freight and passenger operations on the Salem Branch, the word “interstate” is carefully omitted from SMS’s brief.

For the above reasons the Board should not presume that SMS is currently providing freight transportation between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network, but rather should determine that none of SMS's operations on the Salem Branch have been proven to be part of the interstate rail network.

REBUTTAL POINT II

SMS AND THE AMICI URGE THE BOARD TO EXPAND ICCTA PREEMPTION BEYOND THE LIMITS ESTABLISHED BY CONGRESS

SMS incorrectly urges the Board to determine that:

1. if a rail carrier is a Class III rail carrier subject to the Board's regulatory jurisdiction pursuant to the ICCTA then all of the carrier's operations and activities are automatically entitled to ICCTA preemption from municipal land use regulations by virtue of that Class III rail carrier status; and/or
2. if a Board-regulated Class III rail carrier engages in *any* operation or activity as to which ICCTA preemption applies, then *all* of the carrier's operations and activities are automatically entitled to ICCTA preemption.

The first of these incorrect assertions contemplates a status-based type of preemption; the second contemplates an associative or "bundled" preemption. Relying on these theories, SMS and the Amici characterize Mannington's arguments in support of enforcing its municipal land use regulations against SMS's non-preempted intrastate passenger excursion operations and activities as an attempt to "bifurcate" the Board's jurisdiction.²

² See SMS brief, footnote 15 on page 14; ASLRRRA brief page 10; SNR brief page 15; MRY brief page 10; and SCLRA letter page 2.

The ICCTA, however, does not provide the sort of status-based or associative preemption that SMS seeks, nor have SMS or the Amici cited any Board or court decisions that discuss examples of improper (or “artificial”) bifurcation of ICCTA preemption, Board jurisdiction, or rail transportation operations. To the contrary, as discussed below, the ICCTA provides federal preemption only as applied to a regulated carrier’s *specific operations and activities*, and to that extent it is the ICCTA itself that requires such “bifurcation.” As explained in *Texas Central Business Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012) (quoting *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, FD 35057 (STB served February 1, 2008)), “whether a *particular activity* constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination” (italic emphasis added). Considering this requirement to examine each of a rail carrier’s specific activities to determine whether each is ICCTA-preempted, it could be concluded that any “bifurcation” of jurisdiction or operations is not improper or artificial, but rather statutorily mandated.

1. Summary of applicable ICCTA provisions:

The ICCTA starts with a broad definition of “transportation” in 49 U.S.C. § 10102(9)³ which includes “the movement of passengers and property by rail,” and also the “services” that are provided by the carrier in relation to “that movement.”

Then, §10501(b)(1) and (2) gives the Board exclusive jurisdiction over such “transportation” (and over certain remedies with respect to various aspects of rail carriers’ transportation operations), and also gives the Board exclusive jurisdiction over tracks and track-related facilities.

³ All citations and references in this brief to the United States Code will be to subtitles, parts, and chapters under Title 49 so, for the sake of brevity and easier reading, the designation “49 U.S.C.” will from this point forward be omitted from all such citations and references.

Considered within the interstate/intrastate context, the Board’s exclusive jurisdiction over trackage under §10501(b)(2) is quite broad because it applies to tracks and track-related facilities “even if the tracks are located, or intended to be located, entirely in one state.”

However, unlike trackage jurisdiction, the Board’s exclusive jurisdiction over “transportation” pursuant to §10501(b)(1) is *limited* by the prefacing language of §10501(a)(2) which provides that the Board’s jurisdiction over transportation does *not* extend to transportation “between a place in a state and a place in the same state” if such transportation is *not* “part of the interstate rail network.”

Based on the foregoing, if the transportation provided by a regulated rail carrier, whether interstate or intrastate, is part of the interstate rail network, then the Board has exclusive jurisdiction over that transportation, and municipal regulations are thus effectively preempted. However, in court opinions such as *Riverdale* and *Ridgefield Park* (discussed below), even this preemption is not “complete” because municipalities may, under some circumstances, exercise a limited degree of inquiry, inspection, and oversight with respect to a rail carrier’s preempted operations and activities to promote public health, safety, and welfare.

At this point in time Mannington’s concerns do not relate to any ICCTA-preempted operations or activities that SMS might be conducting on the Salem Branch, and Mannington thus does not seek the sorts of inquiry, inspection, or oversight that is allowed by *Riverdale* and *Ridgefield Park* with respect to any preempted operations or activities that SMS might be conducting on the Salem Branch.

2. Magner-O’Hara Scenic Railway:

According to the pre-ICCTA decision *Magner-O’Hara Scenic Ry. – Operation – in the State of Michigan* (not printed), served May 12, 1981, *aff’d sub nom. Magner-O’Hara Scenic Ry.*

v. ICC, 692 F.2d 441 (6th Cir.1982), which is cited in the submissions of ASLRRA, SNR, and MRY,⁴ the principles discussed above were applicable to that case even though the statutory language was different at that time. In its review of the Interstate Commerce Commission's decision in *Magner-O'Hara*, the United States Court of Appeals cited the applicable language of former pre-ICCTA §10501(a) as follows:

The Interstate Commerce Commission has jurisdiction over transportation...by rail carrier...to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in...a State and a place in another State.

Id. at 444.

The Court of Appeals then cited the applicable language of former pre-ICCTA §10501(b) as follows:

The Commission does not have jurisdiction under subsection (a) of this section over...the transportation of passengers or property...entirely in a State.

Id.

The Court of Appeals confirmed that the ICC had correctly determined that the ICC's jurisdiction was defined by §10501; that the ICC lacked jurisdiction under that statutory section because *Magner-O'Hara* proposed to operate over tracks located entirely within Michigan and would not establish interstate operations by connecting with other carriers; and that *Magner-O'Hara's* application for a certificate of public convenience and necessity thus involved intrastate—not interstate—transportation and had to be dismissed. *Id.* at 443-44.

The Court of Appeals noted that, despite this “unambiguous exclusion” of jurisdiction over transportation “entirely in a state,” *Magner-O'Hara* had urged that its proposed intrastate *passenger* railway would be “inextricably intertwined” with interstate commerce through the use

⁴ ASLRRA brief page 8; SNR brief page 14; MRY brief page 9.

of tracks owned by interstate *freight* carriers; however, the Court confirmed that the ICC had correctly concluded that *Magner-O'Hara's* proposal would not affect interstate activity sufficiently to overcome the bar contained in §10501(b). *Id.* In other words, even under the pre-ICCTA version of the applicable statute, a rail carrier's otherwise non-preempted intrastate passenger transportation operations could not attain preempted status solely by virtue of an associative "bundling" of those operations with preempted interstate freight transportation operations. The Amici's arguments based on the "dicta" in *Magner-O'Hara* therefore constitute no basis for the Board finding ICCTA preemption as to SMS's operations in the instant case.

3. Napa Valley Wine Train:

SMS and three of the Amici cite the decision in *Napa Valley Wine Train, Inc. – Pet. for Declaratory Order*, 7 I.C.C.2d 954 (1991), which was rendered by the former Interstate Commerce Commission prior to enactment of the ICCTA, to suggest that if the Wine Train had carried more than minimal freight the ICC would have found a "nexus" between Wine Train's federally preempted interstate freight transportation and Wine Train's non-preempted intrastate passenger service to cause the otherwise preempted passenger service also to become preempted (i.e., the "bundled preemption" theory).⁵

The ICC did not, however, say that such bundled preemption would apply to the Wine Train, because the ICC never reached the point at which such a statement was needed. Rather, the ICC found that Wine Train's freight was minimal; that there was insufficient nexus between Wine Train's freight operations and its passenger operations to permit Congress to regulate the passenger operations if Congress had chosen to do so; and that there was no indication that Congress chose to do so. In other words, contrary to what is now being urged by SMS and the Amici, the ICC did

⁵ SMS brief pages 11 and 34; ASLRRRA brief pages 8 and 9 footnotes; SNR brief page 14 and page 16 footnote; MRY brief page 9.

not find that a nexus between Wine Train’s two distinct operations would have entitled Wine Train’s intrastate passenger operations to a “bundled” preemption with Wine Train’s freight operations if only Wine Train had conducted “more than minimal” interstate freight operations. *Id.* at 966-67. The ICC simply determined that the “bundled preemption” analysis urged by Wine Train was unwarranted because Wine Train’s freight operations were so minimal.

4. Enactment of ICCTA:

The ICCTA became effective in 1996, a few years after the ICC’s *Wine Train* decision. Notably, although Congress presumably knew about Wine Train’s unsuccessful “bundled preemption” arguments in that case, Congress nonetheless elected *not* to include any “nexus” or “integration” provision in the amended preemption language of §10501. Rather, the ICCTA reconfirmed but slightly relaxed the prior limitation against federal preemption of intrastate transportation by providing preemption for transportation “between a place in a state and a place in the same state” if such transportation is “part of the interstate rail network.” If Congress, due to Wine Train’s arguments or for any other reason, had wanted to revise §10501 to extend preemption to a carrier’s intrastate passenger transportation if the carrier also conducted interstate freight transportation, or vice versa, it could have. But Congress did not do so. The language of the ICCTA does not support SMS’s and the Amicis’ arguments for status-based or associative “bundled” preemption.

5. CSX v. Georgia Public Service:

Three of the Amici cite *CSX Transp., Inc. v. Georgia Public Service Com’n*, 944 F.Supp. 1573 (1996), for the proposition that, where a rail carrier’s tracks, stations, and facilities are used for both the carrier’s passenger operations and the carrier’s freight operations, there is an

“integration” of operations that satisfies a “nexus” requirement for bundled preemption.⁶ But *CSX* did not involve any inquiry as to whether CSX’s freight operations, passenger operations, or both, were conducted as part of the interstate rail network. It appears that the parties in that case all agreed as a fundamental matter that CSX was an interstate rail carrier, and that the dispute in the case involved whether CSX could shut down one of its local agencies. Without making any distinction between freight and passenger operations, the *CSX* court focused on the provisions relating to “services” in subpart (B) of the §10102(9) definition of “transportation,” and also the following language from the ICCTA jurisdictional provisions at §10501(b):

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Id. at 1581.

The *CSX* Court did not have to consider the “exception” noted in the aforesaid language (i.e., the limitation on preemption for intrastate transportation that is not “part of the interstate rail network”) because the closing of a rail carrier agency that is operated by an interstate rail carrier does not implicate that exception. Nowhere in the decision does the Court say, or need to say, that CSX’s freight and passenger operations were “integrated” because they ran on the same tracks (or involved the same “agency” that was being proposed for closure), nor did the Court base its finding of preemption on any such integration. Indeed, the word “freight” does not appear anywhere in the *CSX* decision, and the word “passenger” appears only three times, but only in the Court’s direct quotations of ICCTA language.

For these reasons the Board should conclude that the *CSX* decision does not support SMS’s or the Amici’s arguments for either “bundled” or rail-carrier-status-based preemption.

⁶ SNR brief page 4 and page 12 footnote; MRY brief page 4 and page 7 footnote; CSLRA letter page 2 footnote.

6. Fun Trains, Inc.; All Aboard Florida:

In the case of *Fun Trains, Inc. – Operation Exemption – Lines of CSX Transportation, Inc. and Florida Department of Transportation*, FD 33472 (STB served March 5, 1998), the Board interpreted the recently-enacted ICCTA consistent with the ICC’s decisions in *Wine Train* and *Magner-O’Hara* by focusing on the *specific operation* of the train and basing its determination of no preemption on the fact that the operation at issue was not part of the interstate rail network. But despite the Board’s straightforward analysis and instructive conclusion, SMS and three of the Amici cite *Fun Trains* as distinguishable or nonapplicable to the instant case.⁷ SMS asserts that *Fun Trains* is distinguishable because that operator had no intention of providing interstate service, and SMS also asserts, together with SNR and MRY, that *Fun Trains* is distinguishable because, unlike, SMS’s operations on the Salem Branch, the Fun Train did not carry freight. However, the Fun Train’s future intentions, and its passenger-only business model, were not points of concern for the Board; rather, *Fun Trains* is instructional and applicable to the instant case because, as explained on page 2 of that decision, the Board appropriately considered the Fun Train’s *specific transportation operations* and confirmed that those operations were solely intrastate and not part of the interstate rail network. The Board should conduct the same analysis to reach the same conclusion as to SMS’s intrastate passenger excursion service in the instant case, and reject SMS’s and the Amici’s arguments of bundled or status-based preemption.

Along with *Fun Trains*, SMS also cites the Board’s decision in *All Aboard Florida – Operations LLC and All Aboard Florida – Stations – Construction and Operations Exemption – In Miami, Fla. and Orlando, Fla.*, FD 35680 (STB served December 21, 2012), to assert that *AAF*

⁷ SMS brief pages 33, 34, 35 and 38; ASLRRRA brief page 9 footnote; SNR brief page 14 and page 16 footnote; MRY brief page 9 footnote.

and *Fun Trains* provide “no support for the Townships’ side” because “in both cases, the railroads operated solely interstate passenger rail lines and requested the Board to find that they are outside of the Board’s jurisdiction.” See SMS brief at page 34. However, in *AAF*, as in *Fun Trains* as explained above, the Board properly focused on *specific railroad operations and activities*, not on any sort of status-based or associative preemption as urged by SMS and the Amici. *Id.* at 3-4. This same focus should be applied separately to SMS’s specific freight operations and activities on the Salem Branch, and to SMS’s specific passenger operations and activities on the Salem Branch, to determine whether either or neither is entitled to ICCTA preemption. Given the factual presentations in the instant case, and contrary to SMS’s assertions, *AAF* and *Fun Trains* provide ample support for the Township’s side and little if any for SMS.

7. Trinidad Railways, Inc.; American Orient Express Railway Company LLC:

The case of *Trinidad Railways, Inc. – Abandonment Exemption – In Las Animas County, CO*, AB-573X, (STB served August 13, 2001), cited by three of the Amici,⁸ involved an abandonment determination in which the Board did not need to make a distinction between freight and passenger operations (or a determination as to whether the preemption of one operation that was interstate might result in an associative or “bundled” preemption of another operation that was not), but rather simply acknowledged that if *either* operation was conducted as part of the interstate rail network then the Board had jurisdiction to the extent necessary to prevent the rail line in question from being dismantled.

SNR and MRY urge the Board to use this case as a point from which federal preemption might, for the sake of a rail carrier’s financial viability, be extended beyond the limits of the ICCTA, stating “the fact that the Board considers passenger operations as part of abandonment

⁸ SNR brief page 23 footnote and page 24; MRY brief pages 15-16; CSLRA letter page 2 footnote.

proceedings – to ascertain whether ‘sufficient traffic’ exists for the carrier to support the continued operation of a line – *suggests* that the Board’s jurisdiction extends to non-freight rail operations provided by a ‘rail carrier’ providing ‘transportation’ subject to the Board’s jurisdiction.” SNR brief at 23; MRY brief at 15 (*italic emphasis added*).

Despite what the *Trinidad* holding might suggest to any particular reader, that case did *not* involve any such extension of preemption, nor does the ICCTA confer any associative or “bundled” preemption that might extend from a preempted operation conducted by a rail carrier to such carrier’s other non-preempted operations, whether to “keep the doors open” or for any other reason that might be grounded in the overall purposes of the ICCTA. See *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 338 (2008) (“In essence, the Railroad’s broad argument on this point attempts to establish federal jurisdiction on the basis of the general federal interest in interstate railroad transportation.”)

SNR and MRY also cite *American Orient Express Railway Company LLC – Petition for Declaratory Order*, FD-34502, (STB served December 29, 2005) and *Midwest Rail d/b/a Toledo, Lake Erie and Western Railway – Lease and Operation Exemption – Toledo, Lake Erie and Western Railway and Museum, Inc.*, FD-35555, (STB served October 14, 2011) in support of the above contention,⁹ but in addition to these cases’ inapplicability for the same reasons as *Trinidad*, reliance on *American Orient Express* is misplaced because that case did not involve regulation of operations, but rather just the question of whether AOERC was a “rail carrier subject to the Board’s jurisdiction” for purposes of the Railroad Retirement Act. The Board specifically states at the end of its decision “our finding that AOERC is a rail common carrier subject to our jurisdiction does not mean that we must fully regulate its operations.”

⁹ SNR brief page 22 and page 23 footnote; MRY brief page 15 and page 16 footnote.

For these reasons the Board should conclude that the *Trinidad* and *American Orient Express* decisions do not support SMS's or the Amici's arguments for either "bundled" or rail-carrier-status-based preemption.

8. **DesertXpress Enterprises, LLC:**

SMS cites *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, FD-34914, (STB served May 7, 2010) for the principle that the ICCTA provides a "new, explicit statutory grant of jurisdiction to the Board over intrastate rail transportation."¹⁰ But SMS neglects to point out that the new, explicit statutory grant is subject to a *necessary qualification* that highlights the inquiry the Board must now make in the instant case, but which is not dispositive of the decision that will result from such inquiry. Specifically, the Board in its *DesertXpress* decision provided the following explanation of the new phrase "as part of the interstate rail network" in connection with the expansion of ICCTA jurisdiction:

[C]ongress added [the phrase "as part of the interstate rail network"] as a *necessary qualification* to its contemporaneous *expansion* of the Board's jurisdiction under section 10501(a)(2)(A) to apply to *intrastate* rail transportation: transportation between places in the same state would be within the Boards' jurisdiction *as long as that transportation was related to interstate commerce* – i.e., performed "as part of the interstate rail network."

Id. at 8 (some italic emphasis added).

The question before the Board in *DesertXpress* did not involve an associative preemption of passenger and freight operations, but rather had to do with whether the Board had jurisdiction over DesertExpress's proposed new passenger line, whose tracks would unquestionably extend across the state boundary between Nevada and California. The petitioners in the *DesertXpress* case were incorrectly urging that the new rail line's lack of "connection" with other interstate passenger service deprived the Board of jurisdiction *despite* the clearly interstate trackage – in

¹⁰ SMS brief pages 13 and 40; see also the indirect citations in SNR brief page 12 and MRY brief page 7.

essence arguing that, rather than expanding the Board’s jurisdiction, the ICCTA actually imposed an additional jurisdictional limitation for railroads that cross state boundaries without connection to Amtrak service.

Considering the above, it is clear that nothing in *DesertXpress* supports SMS’s arguments that SMS’s purely intrastate operations on the Salem Branch are automatically entitled to ICCTA preemption by virtue of SMS’s status as a Class III rail carrier, or that SMS’s purely intrastate passenger operations are automatically entitled to ICCTA preemption by virtue of any ICCTA preemption to which SMS’s freight operations might be entitled.

9. Denver & Rio Grande Railway:

At several points in its brief, beginning on page 9, SMS cites the cases *Denver & Rio Grande Railway Historical Foundation D/B/A Denver & Rio Grande Railroad, L.L.C. – Pet. for Declaratory Order*, FD 35496 (STB served February 23, 2012); *Denver & Rio Grande Railway Historical Foundation – Pet. for Declaratory Order*, FD 35496 (STB served August 18, 2014); and *Denver & Rio Grande Railway Historical Foundation – Pet. for Declaratory Order*, FD 35496 (STB served March 24, 2015 (referred to hereafter respectively as *DRGHF 1*, *DRGHF 2*, and *DRGHF 3*, and collectively as “the *DRGHF* decisions,”). SMS cites these cases to support its assertion that the ICCTA’s federal preemption over a rail carrier’s interstate *freight* operations, if the freight is “more than minimum,” automatically extends to that carrier’s purely intrastate passenger operations which otherwise would not meet the “necessary qualification” discussed above in *DesertXpress*.¹¹

This, however, was not the Board’s point of inquiry in the *DRGHF* decisions. Rather, the Board’s inquiry in the *DRGHF* decisions, and its discussion of the “more than minimum” freight

¹¹ The DRG opinions are also cited by three Amici: ASLRRRA brief page 8 footnote; SNR brief page 14, page 16 footnote, and page 17; MRY brief pages 9 and 11.

concept, pertained to the Board's attempt to determine whether DRGHF conducted *any* transportation operations, passenger or freight, having sufficient "relation to interstate commerce" to establish ICCTA jurisdiction over DRGHF's transportation on the Creede Branch and, in turn, DRGHF's railcar rehabilitation and storage operations at the isolated Monte Vista parcel located thirty miles to the east (where the municipality of Monte Vista was attempting to enforce its zoning regulations).

Contrary to SMS's assertions, the Board in the *DRGHF* decisions was *not* trying to ascertain whether DRGHF's freight operations *or* its passenger operations were "part of the interstate rail network" for the purpose of extending whatever jurisdiction the Board might have over an interstate operation to include also an intrastate operation; rather, the Board was looking for *either* freight or passenger operations along the Creede Branch by which DRGHF's Monte Vista rail railcar rehabilitation and storage operations might also be subject to ICCTA preemption. In its decisions, the Board analyzed both of DRGHF's operations (passenger and freight) for that purpose and found that neither was ICCTA-preempted due to both operations' purely intrastate scope, and also due to the minimal and somewhat questionable nature of DRGHF's "freight."

In its *DRGHF 3* decision the Board summed up its holdings in the *DRGHF* decisions, and in so doing confirmed that ICCTA preemption is not derived from an operator's *status* as a regulated Class III rail carrier, nor are otherwise non-preempted operations entitled to preemption just because they are conducted by a carrier that also conducts preempted operations. Rather, the Board confirmed that preemption analysis pursuant to the ICCTA looks to each specific operation or activity to determine whether the operation or activity qualifies as "transportation under the Board's jurisdiction." Specifically, the Board in *DRGHF 3* found as follows:

[The Board's] jurisdiction over transportation by rail carrier (and thus transportation within the reach of §10501(b) preemption) only extends to

transportation between, among other things, “a place in a State and a place in the same or another State as part of the interstate rail network.” [The] limited, wholly intrastate excursion passenger and related raft *operations* that DRGHF has conducted over the Line to date are not transportation under the Board’s jurisdiction at §10501. Accordingly,...the activities taking place on the [Monte Vista parcel] are not transportation that is conducted under the Board’s jurisdiction “as part of the interstate rail network” and thus provide no basis for finding [Monte Vista’s] ordinance preempted under §10501(b).

Id. at 3-4 (internal citations omitted; italic emphasis added).

In *DRGHF 3* the Board also specifically addressed and rejected the concepts of associative (i.e., “bundled”) and “status-based” preemption:

As the Board noted in its August 18, 2014 decision, because [DRGHF] bought a line in an OFA sale, DRGHF is indeed considered to be a Class III rail carrier. However, *not all of a rail carrier’s activities are inherently transportation falling under the Board’s jurisdiction* and thus covered under §10501(b). The Board found that DRGHF was conducting only intrastate passenger excursion service and related movement of rafts. As those *activities* are not transportation under the Board’s jurisdiction, neither are DRGHF’s *supporting activities* on the [Monte Vista parcel]. *DRGHF’s status as a Class III rail carrier does not change the non-jurisdictional character of those activities.*

Id. at 5 (internal citations omitted; italic and underlined emphasis added.)

For all of the above reasons the *DRGHF* decisions confirm that the Board does not look *generally* at rail carriers, but rather at their various specific operations to determine whether, in each instance, the specific operations fall under the Board’s jurisdiction and are thus entitled to ICCTA preemption.

10. California High-Speed Rail Authority:

SNR and MRY cite *California High-Speed Rail Authority – Construction Exemption – In Merced, Madera and Fresno Counties, Cal.*, FD-35724, (STB served June 13, 2013) (together with *DesertXpress*) as support for ignoring the “necessary qualification” imposed by Congress, and for improperly expanding ICCTA preemption beyond the limits established in §10501.¹² *CHSRA*

¹² SNR brief page 12 and MRY brief page 7.

involved a proposed intrastate rail line that would have sufficient connections to Amtrak and other interstate rail services for the Board to conclude that the line would obviously be part of the interstate rail network and thus entitled to ICCTA preemption. SNR asserts (subject to some footnoted qualifications) that such precedent “strongly *suggests* that Congress intended – to the maximum extent possible – for the Board’s jurisdiction to apply to *any* activity conducted by a Board-jurisdictional carrier over jurisdictional track, particularly when the activity is integrally related to the provision of freight service.” See SNR brief at page 13 (*italic emphasis added*). (A modified version of this precatory statement is presented on page 8 of MRY’s brief.)

The Amicis’ invitation to expand the limits of ICCTA preemption should be declined because *CHSRA* and *DesertXpress* do not stand as precedent for such expansion. Although the Board provided lengthy written support for its *CHSRA* and *DesertXpress* decisions, neither case necessitated a complicated analysis of §10501’s preemptive effect: the CHSRA line was being constructed as part of the interstate rail network, and the DesertXpress line would cross a state line. And, in any event, if Congress had intended – to the maximum extent possible – for the Board’s jurisdiction to apply to *any* activity conducted by a Board-jurisdictional carrier over jurisdictional track, it would have re-written §10501 accordingly. But Congress did not broaden federal preemption in the manner proposed by the Amici, instead electing to impose the “necessary qualification” noted in *DesertXpress* which continues to allow state and local regulation of intrastate transportation operations that are *not* part of the interstate rail network.

For all of the above reasons the Board should conclude that the decisions cited by SMS and the Amici do not support their arguments that SMS’s purely intrastate operations on the Salem Branch are automatically entitled to ICCTA preemption by virtue of SMS’s status as a Class III rail carrier, or that SMS’s purely intrastate passenger operations are automatically entitled to

ICCTA preemption by virtue of any ICCTA preemption to which SMS's freight operations might be entitled.

REBUTTAL POINT III
THE BOARD'S DECISION IN *RIVERDALE* AND
THE NEW JERSEY SUPREME COURT'S DECISION IN *RIDGEFIELD PARK*
ARE NOT APPLICABLE TO THE INSTANT CASE

SMS and three of the Amici cite the Board's decision in *Borough of Riverdale – Petition for Declaratory Order*, STB Docket No. 33466 (September 10, 1999), and also the subsequent New Jersey Supreme Court decision of *Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp.*, 163 N.J. 446 (2000), which provide that, where state and local regulation of a rail operation is preempted by the ICCTA, the preemption does not necessarily extend to *all* state and local regulations.¹³ These cases entitle state and local agencies to certain notifications and inspection opportunities, and permit limited state and local regulation that does not interfere with interstate rail operations (based on the particular facts of each case) to protect public health and safety. Accordingly, although SMS's and the Amicis' representations of these case holdings are correct, they are inapplicable to the instant case. Mannington understands that when municipal land use ordinances are preempted with respect to specific rail carrier operations, the municipality is nonetheless entitled to notification, inspection opportunities, and perhaps some limited regulatory control to protect public health and safety.

In connection with its citations to these cases SMS has informed the Board that SMS sent notice to Mannington Township of SMS's proposed transloading facility at the Mannington Mills

¹³ SMS brief pages 10, 16 and 31; ASLRRRA brief page 7 footnote; SNR brief page 6 footnote; MRY brief page 6 footnote.

property. Mannington was aware of SMS's plans for its proposed Mannington Mills transloading facility before receiving SMS's notice, and to date has refrained from any regulatory involvement pursuant to *Riverdale* and *Ridgefield Park*. Mannington's Solicitor was first informed of SMS's proposed Mannington Mills transloading facility on September 27, 2024, by the attorney for Mannington Mills, who was at that time preparing a Mannington Township Planning Board application for use variance and site plan approval to allow a third-party building-truss manufacturer to develop and use a portion of the Mannington Mills property that adjoins SMS's proposed transloading facility. Mannington Mills's attorney explained to Mannington's Solicitor that the lumber for the trusses would be supplied to the manufacturer by SMS via the Salem Branch, and that the lumber would be transported to the Mannington Mills facility from out-of-state (Maine and Canada). See Second Certification of Mannington Township Solicitor, attached as EXHIBIT QQ.¹⁴

When SMS subsequently notified Mannington of its plans for the Mannington Mills transloading facility, Mannington's Solicitor informed Mannington Township's Acting Clerk and Mayor that these operations, as explained by Mannington Mills's attorney, would be subject to ICCTA preemption, and that the Mannington Township Planning Board would be receiving a land use application from Mannington Mills for the truss manufacturer's proposed non-preempted operations, at which point the planning board could inquire as to SMS's involvement. See Second Certification of Mannington Township Solicitor (EXHIBIT QQ), and email exchanges dated October 22-23, 2024, between the Mannington Township Solicitor and Mannington Township's Acting Clerk and Mayor (EXHIBIT RR).

¹⁴ The attached exhibit references begin with Exhibit QQ to continue the lettering sequence that began with Exhibits A through D in Mannington's Petition for Leave to Intervene, and continued with Exhibits E through PP in Mannington's Supplemental Evidence and Argument brief.

The truss manufacturer's use and development of the Mannington Mills site has since been approved as memorialized by the Mannington Township Planning Board's Resolution No. 14-2024 dated December 12, 2024 (EXHIBIT SS). If SMS engages in interstate freight service by bringing timber from Maine and Canada to the truss builder via the Salem Branch without incident, then Mannington will likely have no interest in attempting to assert any local regulatory authority pursuant to *Riverdale* or *Ridgefield Park*.

SNR and MRY also cite *New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238 (2007), to support the above propositions.¹⁵ However, similar to the *Riverdale* corn processing facility, the *New York Susquehanna* case involved only a question of whether an arguably non-railroad operation (third-party handling of solid waste) should be considered sufficiently *part of* railroad operations for purposes of ICCTA preemption. In the instant case the question is not whether or to what extent third party operations are related to preempted railroad operations, but rather whether the railroad's operations themselves are entitled to ICCTA preemption.

For these reasons the Board should disregard SMS's and the Amicis' invocation of the limited regulatory allowances of *Riverdale* and *Ridgefield Park* because those allowances only apply in situations where ICCTA preemption exists. There is no ICCTA preemption of Mannington's land use regulations with respect to SMS's intrastate passenger excursion operations and related customer entertainment and recreation activities at the Mannington Property, and there also appears to be no ICCTA preemption of SMS's freight operations at the Mannington Property. Accordingly, Mannington neither seeks nor requires such limited regulatory authority pursuant to

¹⁵ SNR brief page 6 footnote; MRY brief page 6 footnote.

Riverdale, Ridgefield Park, and New York Susquehanna in connection with any of SMS's non-preempted operations and activities.

REBUTTAL POINT IV

THE SHARED USE OF TRACKS AND FACILITIES FOR A CARRIER'S PREEMPTED AND NON-PREEMPTED OPERATIONS DOES NOT EXTEND PREEMPTION FROM THE PREEMPTED OPERATIONS TO THE NON-PREEMPTED OPERATIONS

Similar to their assertions regarding associative or "bundled" jurisdiction (whereby SMS and the Amici urge that a carrier's non-preempted rail operation are automatically converted to preempted operations by virtue the carrier's preempted operations), SMS and the Amici also urge the Board to determine that if a rail carrier's *facilities or structures* are used for *any* preempted railroad-related operation or activity, then such facilities and structures may also be used for non-preempted railroad-related activities without municipal regulation. This concept of shared-use preemption is most clearly expressed by SMS on pages 39 and 40 of its brief, where SMS explains that the Mannington Property is used both as a turnaround for its passenger excursion trains and as a location to transload freight, and that the firepits, picnic tables, corn-hole games, and other facilities at the Mannington Property are used by excursion passengers and employees, and also by SMS's freight employees.

This "shared-use" preemption concept also seems to be urged with respect to the new prefabricated shed that SMS installed at the Mannington Property to replace the "old rail tool shed" that had been there previously.¹⁶ Based on SMS's Exhibit O photographs, the former shed clearly had the appearance of "old rail tool shed," but the new shed does not. This is because, despite

¹⁶ The "old rail tool shed" and the new prefabricated shed at the Mannington Property are discussed on pages 16 and 40 of SMS's brief.

containing some tools and supplies that might be used in connection with SMS's freight operations, the new shed is also utilized as a concession stand in connection with SMS's passenger excursion operation, and perhaps for other passenger excursion-related, non-freight-related purposes.

On December 30, 2024, Robert L. Schmid, the Mannington Township Zoning Officer, visited the Mannington Property and took photographs of the exterior of the new shed, and also of the interior of the shed through the shed's windows. See the Second Certification of Robert L. Schmid, attached as EXHIBIT TT, and six photographs attached as EXHIBITS UU through ZZ. The photographs disclose features normally associated with a concession stand, not a "rail tool shed," including two large sliding windows with an exterior shelf beneath them that serve as a customer service counter. The large customer service window and multiple access doors do not appear to provide the kind of security that might typically be expected for storage of tools and equipment. Indeed, the photographs of the shed's interior show that the shed contains very few tools and supplies, and is in fact mostly empty. Here is the Zoning Officer's description:

At first glance the shed appears to be a standard storage shed, but there are features that undermine that conclusion. In addition to three small windows and two large barn-type doors, the shed has two large sliding windows, an exterior shelf under the sliding windows, a man-door, and fire extinguisher. These are features consistent that one would expect to find at a concession stand. The shed is empty of all but a six-foot step ladder and a few other unrecognizable items.

Second Certification of Robert L. Schmid (EXHIBIT TT).

As discussed at pages 11 and 12 of Mannington's Supplemental Evidence and Argument brief, Section 70-35 of the Mannington Township LDO,¹⁷ entitled "Use regulations," provides that "[n]o *use* or *occupancy* of any building, structure or land shall hereafter be changed to a different use or occupancy and no building or structure or part thereof shall hereafter be erected, constructed,

¹⁷ The Mannington Township Code, which includes Land Development Chapter 70 and its attached schedules, is available online at <https://ecode360.com/MA1835>, or by selecting "Municipal Code" on Mannington Township's website manningtontwp.com.

reconstructed, moved or structurally altered, *unless in conformity with all of the regulations herein specified* for the district in which it is located...” (Italic emphasis added.) Accordingly, when enforcing its land use regulations, Mannington looks not just to whether a building or structure lawfully exists, but also whether the *occupancy and/or use* of the building or structure is lawful.

To understand and appreciate this distinction between a lawful or unlawful *structure* and a lawful or unlawful *use*, one could consider, as a hypothetical, a typical single-family house with a two-car concrete driveway for off-street parking, located in a residential neighborhood that is zoned exclusively for detached single-family residential use. For purposes of this hypothetical one should presume that the house, as a structure, conforms to all structure-related zoning requirements in every way, including minimum lot size, lot width/depth requirements, yard setbacks, and off-street parking, and maximum impervious lot coverage and building height. The house, if occupied and used by a “household” for single-family residential purposes, would thus be fully compliant with all municipal zoning regulations governing both the *structure* and its *use*.

But suppose the household moved out of the house and the property owner removed all of the furniture, appliances, and other contents, and installed product display shelving and coolers, customer counters, and cash registers and, without any outdoor signage or change in appearance or ornamentation of the house and grounds, began operating a 24-hour convenience store. All advertising would be on-line and word-of-mouth, and except for the two on-site driveway spaces, all parking would be on the street. The house in this scenario would still be a conforming *structure*, but its *occupancy and use* as a convenience store would be violative of the residential-only zoning requirements. Accordingly, the municipality in this scenario would bring an enforcement action not against the structure, but rather only against the use. The fact that the house is, by all outward appearances, a conforming residential structure would not constitute a valid defense by the owner

of the structure's unlawful use as a convenience store. The municipality would continue to allow the house to remain on the lot unchanged, but its occupancy and use would have to be returned to single-family residential.

At this point it is also appropriate to revisit the concept of rail carrier "services" that are included in "transportation" over which the Board may have preemptive jurisdiction pursuant to §10501 if the specific transportation operation or activity to which the services relate is in fact "part of the interstate rail network." In *DRGHF 1* the Board noted that the term "transportation" also includes all of the *services* related to the movement of passengers or property by rail. The Board's procedural schedule in *DRGHF 1* required the parties to provide "sufficient evidence to determine whether the activities currently taking place on the Monte Vista parcel are part of 'transportation' by a 'rail carrier.'" In establishing the procedural schedule, the Board explained that, "in presenting its case, DRGHF should submit evidence documenting with specificity the *activities* it claims are part of 'transportation' by a 'rail carrier' and should identify the *specific transportation* of which these activities are allegedly a part." The Board went even further in explaining the specific nature of proofs that were required with respect to DRGHF's activities thirty miles away on Monte Vista parcel, noting that "DRGHF is not limited to providing these *categories* of information; it should also provide any other information and evidence necessary to present a complete *prima facie* case that its activities on the Monte Vista parcel fall within the statutory definition of 'transportation' by a 'rail carrier.'" *Id.* at 4.

Later, in *DRGHF 3*, the Board emphasized that, in addition to falling within the statutory definition of "transportation" by a "rail carrier," the "transportation" must also be "transportation under the Board's jurisdiction at §10501." *Id.* at 3.

So, applying the municipal structure/use analysis explained above to the instant case, coupled with the foregoing *DRGHF* transportation “services” preemption analysis, the Board should conclude that, if SMS’s *freight* operations on the Salem Branch are, in fact, part of the interstate rail network and thus entitled to ICCTA preemption, then the Mannington Property can be used for those *freight* operations, and the structures and facilities at the Mannington Property that are related to the *freight* operations (including the picnic tables, fire pits, corn-hole games, and shed) may be used for the *freight* operations, subject to whatever notification, inspection, and public health and safety regulation to which Mannington might be entitled under *Riverdale* and *Ridgefield Park*.

However, in conjunction with the above determination the Board should also conclude that, unless SMS’s WCR *passenger* excursion operations on the Salem Branch and at the Mannington Property are part of the interstate rail network and thus constitute “transportation under the Board’s jurisdiction at §10501,” then neither the Mannington Property nor the structures and facilities at the Mannington property can be used for SMS’s *passenger* excursion operations without municipal land use approvals, despite the fact that the Mannington Property and its structures and facilities can be used lawfully for the ICCTA-preempted *freight* operations. The picnic tables, fire pits, corn-hole games, and shed could thus be used by SMS’s freight employees for freight-related operations, but not by SMS’s excursion employees or SMS’s excursion passengers, unless such excursion-related *use* is approved by the Mannington Township Planning Board. In other words, if SMS’s freight operations are determined to be part of the interstate rail network, and if the Mannington Property is truly being used as an ICCTA-preempted freight transloading facility, then use variance and site plan approval from the Mannington Township Planning Board would

nonetheless be required for the dual use of the freight transloading facility as an intrastate passenger excursion entertainment and recreation area.

This analysis would also apply to the buildings, structures, and facilities at the Pilesgrove property: the two prefabricated sheds and engine house described on page 15 of SMS's brief can be used for any freight operations under the Board's jurisdiction, but any *shared use* of these buildings or the other structures and facilities at the Pilesgrove property for operations and activities relating to SMS's non-preempted intrastate passenger excursions (such as the ticket office, gift shop, and gift shop storage uses referred to on page 15 of SMS's brief) are prohibited unless approved by the Pilesgrove Township Planning Board. In other words, the buildings, structures and facilities at the Pilesgrove property might exist lawfully if used only for preempted freight operations, in which case their construction and use would be subject only to notification, inspection, and limited regulation as permitted by *Riverdale* and *Ridgefield Park*. However, such lawful existence and use of the buildings, structures, and uses at the Pilesgrove property for ICCTA-preempted freight operations would not automatically confer "shared" preemption upon SMS's otherwise non-preempted passenger excursion operations. Rather, such dual use of an ICCTA-preempted rail freight facility at the Pilesgrove property for non-preempted intrastate passenger excursion operations would require municipal land use approvals.

For the above reasons, in addition to its determinations as to whether ICCTA preemption applies to SMS's freight operations on the Salem Branch, and to SMS's passenger excursion operations on the Salem Branch, the Board should confirm that, if the former are entitled to ICCTA preemption but the latter are not, then neither the Mannington Property nor the structures or facilities located at the Mannington Property, may be used or occupied for the passenger excursion operations and activities without approval from the Mannington Township Planning Board.

REBUTTAL POINT V

RAIL BIKE OPERATIONS ARE NOT SUBJECT TO ICCTA PREEMPTION

EXCEPT AS PART OF TRACKAGE OPERATIONS

PURSUANT TO 49 U.S.C. 10501(b)(2)

According to SMS's brief, an existing or proposed rail bike excursion concession might be a point of contention in Pilesgrove. Also, a review of Board decisions and case law to date suggests that the Board and the courts have not yet subjected rail bike operations to analysis under the ICCTA. For these reasons, and because SMS might at some point want to use the Mannington Property for a rail bike concession and related trackside activities, Mannington asks the Board to determine whether and to what extent a rail bike concession for recreational customers, whether interstate or intrastate, constitutes "transportation under the Board's jurisdiction at §10501."

Mannington understands and agrees that, to the extent rail bikes are used as maintenance-of-way vehicles in connection with a rail carrier's jurisdictional trackage operations, then such rail bike usage is clearly subject to ICCTA preemption. But similar to the distinction between "structure" and "use" as explained in the foregoing section of this brief, a rail bike is not inherently subject to preemption, or inherently violative of municipal any zoning regulations. It is the "use" to which a rail bike is put that necessitates ICCTA preemption analysis and municipal zoning analysis. If SMS's freight operations on the Salem Branch are subject to ICCTA preemption, and if SMS uses rail bikes for track maintenance in connection with those freight operations, such usage, and SMS's storage, maintenance, and repair of the MOW rail bikes at the Mannington Property and/or the Pilesgrove property would also be subject to ICCTA preemption, with the Townships being entitled only to the notification, inspection, and limited regulation as permitted by *Riverdale* and *Ridgefield Park*.

However, the very nature of a rail bike – the fact that its motive power is provided either by the rider or an electric motor (not the rail carrier), and the fact that the rider is not a “passenger” – strongly suggests that Congress did not intend to include rail bike concessions for recreational customers, whether interstate or intrastate, within the §10501(9) definition of “transportation,” and that such concessions therefore cannot qualify as “transportation under the Board’s jurisdiction at §10501.”

The word “passenger” does not appear to be defined in U.S.C. Title 49, so the Board should resort to common parlance. The Wikipedia definition for passenger is “a person who travels in a vehicle, but does not bear any responsibility for the tasks required for that vehicle to arrive at its destination or otherwise operate the vehicle, and is not a steward.”¹⁸ This definition of passenger, which is consistent with our common understanding and usage of the word, if considered in connection with the §10102(9) definition of “transportation,” leads to the conclusion that the “movement” of a rail bike by rail would not involve the “movement of *passengers* or property” by a rail carrier unless the rail bike were a rickshaw driven by a rail carrier employee to transport one or more riding passengers and their luggage or other personal effects. A rail bike that is rented to a rider to ride on the carrier’s rail line is thus no more “transportation” than would be hiking boots that are rented to a hiker for a hike on the carrier’s rail line, regardless of whether the same boots might also be worn from time to time by rail carrier employees while maintaining the line.

Accordingly, Mannington requests the Board to determine that any use of rail bikes other than as MOW vehicles operated by rail carriers in connection with transportation that is otherwise under the Board’s jurisdiction does not qualify as “the movement of passengers or property by

¹⁸ <https://en.wikipedia.org/wiki/Passenger>

rail” and is thus not under the Board’s jurisdiction, and that any such operations, including all related trackside activities and services, are therefore subject to municipal regulation.

REBUTTAL POINT VI

THE TOWNSHIPS’ ENFORCEMENT EFFORTS ARE REQUIRED BY LAW AND ARE NOT “ATTACKS” OR ATTEMPTS TO “UNDERMINE OR HINDER THE RAILROAD”

SMS makes allegations against Mannington and Pilesgrove at various points in its brief which can be summed up fairly well with a citation to page 14:

“[The Townships’ allegations] reveal a pattern of deliberate attacks against SMS for the Townships’ purpose of undermining and hindering the railroad, which serves no governmental policy.

However, as explained on pages 10 and 11 of Mannington’s Supplemental Evidence and Argument brief, the Townships’ policies are entirely valid, derived from New Jersey’s Constitution, delegated with authorization from the state’s legislature, and duly enacted by municipal ordinance pursuant to the MLUL. Also as explained on pages 10 and 11 of Mannington’s brief, Mannington and Pilesgrove are *required* to administer and enforce land use regulations *uniformly* to promote public health, safety and welfare. The requirement for uniformity prohibits the Townships from refraining from their land use administration and enforcement duties, or selectively administering and enforcing their duly enacted land use regulations. The Townships seek determinations from the Board to confirm the existence and limits of any ICCTA preemption regarding SMS’s operations and fill any regulatory void that may exist with respect to SMS’s operations that are not ICCTA preempted.

Also, as stated in Mannington’s prior filings, at this point in time Mannington has no concerns about SMS’s operation of jurisdictional trackage, which operation is broadly preempted

pursuant to §10501(b)(2) irrespective of whether the tracks are interstate, intrastate, or part of the interstate rail network. Nonetheless, it is possible that, if SMS applies to the Mannington Township Planning Board for use variance and site plan approval for its excursion-related customer entertainment and recreation activities at the Mannington Property, the Planning Board might have concerns about the frequency and durations of the excursion train movements along the tracks within the Mannington Property; the times of day during which the movements occur; and whatever noise or other disturbances might attend such movements. If so, the Planning Board will likely consider imposing reasonable conditions on such movements to mitigate detrimental impacts on people and other properties in the vicinity of the Mannington Property, and any substantial impairment of the intent and purpose of the CONS-Conservation zoning district and zone plan. Accordingly, Mannington requests confirmation from the Board that, for purposes of the Board's ICCTA jurisdiction over "transportation," the movement of trains on the tracks is governed by §10501(b)(1) and thus subject to the "necessary qualification" noted in *DesertXpress*, and not included within the "operation of tracks" under §10501(b)(2) as to which that necessary qualification does not apply.

SMS also asserts that Mannington's officials and representatives have demonstrated incivility or hostility toward SMS and its representatives, and that Mannington's enforcement efforts are motivated by animus against SMS. Mannington disagrees with this characterization of its officials' and representatives' actions and the imputed motivation but, as noted in *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324 (2001), even if Mannington's officials and representatives wanted SMS to cease its Mannington Property operations for non-land-use-regulatory reasons (which is not the case), such improper motivation would not be relevant to the Board's analysis because, in evaluating whether a local regulation is pre-empted by federal law the

Board must focus on the federal statute. See *id.* at 1339 n.12. So, even if Mannington's intentions were hostile as SMS suggests (which they are not), the Board should nevertheless conclude for all of the reasons explained above that there is no ICCTA preemption of SMS's intrastate passenger excursion operations, and that the application of Mannington's land use regulations to those operations must be upheld.

CONCLUSION

For the above reasons the Board should determine, in addition to the determinations requested by Mannington and Pilesgrove in their respective previous submissions, that:

1. SMS has not provided sufficient evidence to prove that its freight operations and activities on the Salem Branch, at the Mannington Property, and at the Pilesgrove property, or its passenger operations and activities on the Salem Branch, at the Mannington Property, and at the Pilesgrove property, are part of the interstate rail network;
2. SMS's freight and passenger operations and activities on the Salem Branch, at the Mannington Property, and at the Pilesgrove property, are not automatically entitled to ICCTA preemption by virtue of SMS's status as a Board-regulated Class III rail carrier;
3. for the above reasons, Mannington Township's and Pilesgrove Township's land use regulations are not preempted by the ICCTA with respect to SMS's Salem Branch freight-related operations and activities, or with respect to SMS's Salem Branch passenger-related operations and activities;

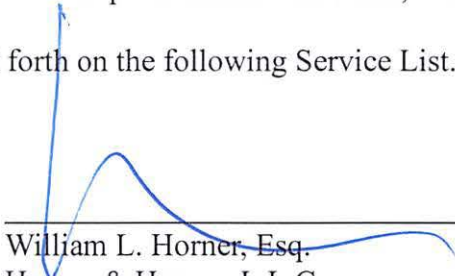
4. if SMS's *freight* operations and activities on the Salem Branch, at the Mannington Property, and at the Pilesgrove property are, in fact, part of the interstate rail network and therefore entitled to ICCTA preemption, such preemption does not automatically extend to SMS's non-ICCTA-preempted *passenger* operations and activities on the Salem Branch, at the Mannington Property, or at the Pilesgrove property, and the Townships' land use regulations are thus not preempted by the ICCTA with respect to SMS's *passenger*-related operations and activities.
5. the Mannington Property and the Pilesgrove property, and any buildings, structures, facilities, and other improvements thereon, may not be used by SMS for its non-ICCTA-preempted Salem Branch *passenger* operations and activities without municipal land use approvals from the Townships, despite SMS's use of the Mannington Property and the Pilesgrove property, and the buildings, structures, facilities, and other improvements thereon, for any ICCTA-preempted *freight* operations and activities;
6. any use of rail bikes other than as maintenance-of-way vehicles operated by rail carriers in connection with transportation that is otherwise under the Board's jurisdiction does not qualify as "the movement of passengers or property by rail" and is thus not under the Board's jurisdiction, and therefore any such rail bike operations, including all related trackside activities and services, are subject to state, county, and local regulations;
7. for purposes of the Board's ICCTA jurisdiction over "transportation," the movement of trains on jurisdictional trackage is governed by §10501(b)(1) and

thus subject to the “necessary qualification” noted in *DesertXpress*, and such “movement” is *not* included within the “operation of tracks” under §10501(b)(2) as to which the “necessary qualification” does not apply; and

8. all allegations that Mannington’s and Pilesgrove’s enforcement efforts are “attacks” or “attempts to undermine or hinder the railroad” by the Townships’ officials and representatives should be disregarded as unsupported, and also because Mannington and Pilesgrove are constitutionally and statutorily required to enforce their respective land use regulations uniformly in the interest of public health, safety, and welfare; moreover, such allegations, even if true, are irrelevant to the Board’s determinations in this case.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on January 14, 2025, I am filing Intervenor Mannington Township's Rebuttal Statement, including all attachments, using the Surface Transportation Board's online filing portal, and that, pursuant to agreement by the parties, I am causing the attorneys for SMS and Piles Grove, and the attorneys for the four interested persons who have filed submissions with the Board, to be served with copies of Mannington Township's Rebuttal Statement, including all attachments, by email at their email addresses as set forth on the following Service List.



William L. Horner, Esq.
Horner & Horner, L.L.C.
67 Market Street / P.O. Box 66
Salem, New Jersey 08079
Email: wlh@hornerlaw.net
Phone: (856) 935-0958
Fax: (856) 935-1708

SERVICE LIST
(Docket No. FD 36770)

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Berkowitz-Klein, LLP
433 West Market Street, Suite 100
West Chester, PA 19382
Email: rak@berklein.com
Phone: (215) 880-6913

Ekaterine N. Eleftheriou, Esq. (Attorney for Township of Pilesgrove)
The Vigilante Law Firm, P.C.
99 North Main Street
Mullica Hill, NJ 08062
Email: kat@thevigilantelawfirm.com
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Phone: (310) 863-4573

EXHIBIT QQ

(Second Certification of Township Solicitor)

EXHIBIT QQ

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36770

PETITION FOR DECLARATORY ORDER OF TOWNSHIP OF PILESGROVE, COUNTY OF SALEM, NEW JERSEY

SECOND CERTIFICATION OF

WILLIAM L. HORNER, MANNINGTON TOWNSHIP SOLICITOR

TO PROVIDE

**REBUTTAL EVIDENCE FOR THE
TOWNSHIP OF MANNINGTON, COUNTY OF SALEM, NEW JERSEY
PETITION FOR DECLARATORY ORDER**

I, WILLIAM L. HORNER certify as follows:

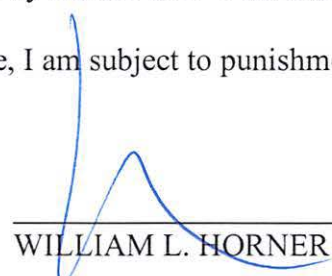
1. I am the Mannington Township Solicitor and have full knowledge of the matters set forth in this certification.
2. I was first informed of SMS Rail Service, Inc.'s proposed Mannington Mills transloading facility on September 27, 2024, by Adam I. Telsey, Esq., the attorney for Mannington Mills, who was at that time preparing a Mannington Township Planning Board application for use variance and site plan approval to allow a third-party building-truss manufacturer to develop and use a portion of the Mannington Mills property that adjoins SMS's proposed transloading facility. Mr. Telsey explained to me that the lumber for the trusses would be

supplied to the manufacturer by SMS via the Salem Branch, and that the lumber would be transported to the Mannington Mills facility from out-of-state (Maine and Canada).

3. When SMS subsequently notified Mannington of its plans for the Mannington Mills transloading facility, I informed Mannington Township's Acting Clerk and Mayor that these operations, as explained by Mr. Telsey, would be subject to ICCTA preemption, and that the Mannington Township Planning Board would be receiving a land use application from Mannington Mills for the truss manufacturer's proposed non-preempted operations, at which point the planning board could inquire as to SMS's involvement. A copy of my October 22-23, 2024, email exchanges with Mannington Township's Acting Clerk and Mayor are attached as EXHIBIT RR.
4. The truss manufacturer's use and development of the Mannington Mills site has since been approved as memorialized by the Mannington Township Planning Board's Resolution No. 14-2024 dated December 12, 2024, a copy of which is attached as EXHIBIT SS.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 1/14/25



WILLIAM L. HORNER

EXHIBIT RR

From: William L. Horner <wlh@hornerlaw.net>
Sent: Wednesday, October 23, 2024 10:48 AM
To: 'Don Asay' <dasay@manningtontwp.com>; 'Amber Ayars' <townshipclerk@manningtontwp.com>
Cc: 'Robert Schmid' <zoning@manningtontwp.com>; William L. Horner (wlh@hornerlaw.net) <wlh@hornerlaw.net>
Subject: RE: EXTERNALRE: EXTERNAL Notice from SMS Rail Service, Inc.

Adam Telsey met with me a few weeks ago and explained that the area depicted on the SMS plan Amber received would be operated by SMS for delivery of lumber from out-of-state, which he says (and I am inclined to agree) is a federally-preempted railroad activity. Adam explained that the planning board application would be a request for site plan/use variance for a different, non-railroad entity -- a building truss manufacturer who wants to use some additional MM land that adjoins the railroad depot area to build trusses using the lumber SMS delivers. The truss manufacturing activity is not a federally-preempted protected railroad operation. Mike Aimino is aware of all this, and everything would have to be satisfactorily explained on the record at the Planning Board hearing for the truss manufacturer's application.

Best Regards,

Bill

-----Original Message-----

From: Don Asay <dasay@manningtontwp.com>
Sent: Wednesday, October 23, 2024 9:58 AM
To: wlh@hornerlaw.net; Amber Ayars <townshipclerk@manningtontwp.com>
Cc: Robert Schmid <zoning@manningtontwp.com>; Don Asay <dasay@manningtontwp.com>
Subject: RE: EXTERNALRE: EXTERNAL Notice from SMS Rail Service, Inc.

Bill, My expectation was the Mill was going to take it to PB.
Thanks,
Don

-----Original Message-----

From: William L. Horner <wlh@hornerlaw.net>
Sent: Tuesday, October 22, 2024 2:17 PM
To: Amber Ayars <townshipclerk@manningtontwp.com>
Cc: Robert Schmid <zoning@manningtontwp.com>; Don Asay <dasay@manningtontwp.com>; William L. Horner <wlh@hornerlaw.net>
Subject: EXTERNALRE: EXTERNAL Notice from SMS Rail Service, Inc.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thank you, Amber. This does not relate to the Woodstown Central Railroad entertainment area. It is part of a project for which Mannington Mills and/or a truss-construction company will be applying for Planning Board approval.

Best Regards,

Bill

-----Original Message-----

From: Amber Ayars <townshipclerk@manningtontwp.com>

Sent: Tuesday, October 22, 2024 8:58 AM

To: 'Wm. L. Horner' <wlh@hornerlaw.net>; Robert Schmid <zoning@manningtontwp.com>; Don Asay <dasay@manningtontwp.com>; Kenny Dunham <kdunham@manningtontwp.com>; Richard Eber Jr <reber@manningtontwp.com>

Subject: FW: EXTERNAL Notice from SMS Rail Service, Inc.

Sending over as an FYI, see the email below and the attachment.

Thank you,
Amber

Amber Ayars
Acting Clerk, Administrator
Mannington Township
491 Route 45
Mannington, NJ 08079
P - 856-935-2359 ext. 150 F - 856-935-6557

PRIVACY NOTICE:

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WARNING:

E-mail received by or sent to Township Officials is subject to the Open Public Records Act (OPRA). This means that absent some specific privilege, all such communications are considered a public record and are subject to publication and/or dissemination to the public upon request.

From: Jim Pfeiffer <jpfeiffer@smsrail.com>
Sent: Monday, October 21, 2024 5:13 PM
To: Amber Ayars <townshipclerk@manningtontwp.com>
Subject: EXTERNALNotice from SMS Rail Service, Inc.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good Afternoon, Ms. Ayars:

Please see the attached Development Plan for the yard that is to be used by SMS Rail Service, Inc., a Class III rail carrier, in connection with transportation by rail of inbound lumber. The subject yard includes

a portion of Block 60, Lot 5, and the area within Block 60, Lots 4 and 6 denoted by the "Property Limit of Gravel" (referred to in the Legend) and will be prepared in accordance with the drawing. Federal preemption applies to the foregoing.

Kind regards,

Jim Pfeiffer

SMS Rail Service, Inc.

Office: (856) 467-4800, ext. 303

Mobile: (610) 739-3729

[A yellow and black sign Description automatically generated]

EXHIBIT SS

RESOLUTION 14-2024

RESOLUTION OF THE PLANNING/ZONING BOARD OF THE TOWNSHIP OF MANNINGTON REGARDING AN APPLICATION FROM MANNINGTON MILLS INC. GRANTING A USE VARIANCE AND WAIVER OF SITE PLAN APPROVAL FOR PROPERTY LOCATED AT 75 MANNINGTON MILLS ROAD, DESIGNATED AS BLOCK 60, LOT 4

WHEREAS, an application has been submitted by Mannington Mills Inc., (the "Applicant"), 75 Mannington Mills Road, Mannington, New Jersey 08079, for Use Variance Approval and Waiver of Site Plan Approval to allow an existing building to be used by a third party as manufacturing facility for component packages including wall panels, floor trusses, and roof trusses., which would constitute a second primary use on the site, on property known as Block 60, Lot 4, on the Tax Map of the Township of Mannington, commonly known as 75 Mannington Mills Road, Mannington, New Jersey 08079, which property is owned by the Applicant; and

WHEREAS, the application was deemed complete by the Mannington Township Planning/Zoning Board, sitting as a Zoning Board of Adjustment, by a vote of six (6) in favor, zero (0) opposed and zero (0) abstentions, at its meeting on November 14, 2024. No waivers were required or granted with the exception of the Applicant's request for Waiver of Site Plan Approval.

WHEREAS, the Applicant has given legal Notice as required by and in accordance with N.J.S.A. 40:55D-12 and Mannington Township Ordinances, by serving proper Notice to property owners within 200 feet of the site, serving Notice on all required governmental agencies and public utilities and by publishing a proper Notice in the newspaper, all at least ten (10) days prior to the hearing; and

WHEREAS, in support of the presentation, the Applicant provided the following:

1. Cover Letter from Telsey Law, LLC dated 10/22/2024; and
2. Application for Development Review & Application for Variance (Use) with Site Plan Waiver, dated 10/11/2024; and
3. 200 foot property ownership list; and
4. Affidavit of Ownership, Use Variance Narrative, Witness List, Stockholder Disclosure and Aerial/Site Photos; and
5. Schedule A (General Requirements) form; and
6. At the time of the hearing the Applicant marked and entered into the record the following:
A-1 Proposed floor plan.

WHEREAS, the Mannington Township Planning/Zoning Board, sitting as a Zoning Board of Adjustment, has made its determination in this matter based on the following:

1. The documents set forth above; and
2. The representations made by the Applicant in its application and by the Applicant's representative, Zach Zehner, Chairman of the Board for Mannington Mills, the

Tenant's representative, Robert Frogle and the Applicant's Attorney, Adam I. Telsey, Esq., at the time of the hearing before the Board on November 14, 2024; and

3. A letter from the Board's Engineer, Corey Ronald Gaskill, PE, CME, CFM, dated November 8, 2024, which is incorporated and made a part of this resolution by way of reference; and

4. Comments made by Corey Ronald Gaskill, PE, CME, CFM, the Board Engineer, and by Michael A. Aimino, Esq., the Board Solicitor, at the time of the hearing on November 14, 2024; and

5. At the time of the hearing the matter was opened to the public, however, no one from the public spoke.

WHEREAS, based upon the information provided at the time of the hearing and in the application, the Mannington Township Planning/Zoning Board, sitting as a Zoning Board of Adjustment, makes the following findings of fact and conclusions of law:

1. The Applicant has filed an application for a Use Variances and for a Waiver of Site Plan Approval in order to permit a third party to use an existing building as a manufacturing facility for component packages including wall panels, floor trusses, and roof trusses. The Applicant had previously obtained Use Variance approvals with respect to the same building to allow for warehousing by a different end user.

2. The property is located in the Industrial Zoning District. Manufacturing of component packages including wall panels, floor trusses, and roof trusses is a permitted use in this zone. It is the fact that there will be two (2) distinct principal uses, but two (2) different entities that a Use Variance is required. The Use Variances was ultimately granted by the Board.

3. The Applicant's attorney, Adam Telsey, Esq. gave the Board an overview of the project and the approvals being sought. The Applicant is seeking Use Variances and Waiver of Site Plan Approval permit in order to allow a third party to use an existing building as a manufacturing facility for component packages including wall panels, floor trusses, and roof trusses. Manufacturing of component packages including wall panels, floor trusses, and roof trusses is permitted in the zone. It is the fact that there will be two (2) primary uses on the property that triggers the need for a Use Variance. The Applicant is also seeking a Waiver of Site Plan Approval as there will be no changes to the exterior of the property. It is good for the proposed use as it currently is set up.

4. Mr. Zack Zehner, the Chairman of the Board of Mannington Mills testified regarding the property and the proposed use of the building in question. The building was previously used by Mannington Mills for nearly 20 years in connection with their production of VCT vinyl panels. The product is no longer used – other products have come along to replace it. They had obtained a tenant who was using the building to store gluten products, however, that business has fallen through. Mannington Mills is looking to rent the building to Annadale Millwork and Allied Systems Corporation ("Annadale") for their wooden truss manufacturing business.

5. Mr. Zehner testified that the building is well suited for their manufacturing business. It is located towards the edge of the property and is bordered by the railroad line, which will be utilized in connection with this business. There is no need to modify the exterior of the building or the surrounding area with the exception of expanding or creating three large bay doors and two openings to be used by conveyor belts. The inside of the building will be modified to meet Annadale's manufacturing process. Mr. Zehner noted that the building is approximately 100,000 square feet in size. Approximately 50,000 square feet will be used by Annadale. The remaining 50,000 square feet still houses the heavy equipment from the VCT operation. Truck traffic will still be way below the type of truck traffic that was generated by Mannington Mills when they were using the building in question. This manufacturing facility will have no impact on the current operations of Mannington Mills.

6. Robert Frogale from Annadale testified regarding the proposed manufacturing operations on the site. Annadale is a family owned business that has been in operation since 1952. It currently operates out of Annandale, Virginia. They manufacture a number of construction items including doors, wall panels and wooden roof trusses. They have a number of national builders that they supply in New Jersey, Pennsylvania and Delaware, as well as, in the home state of Virginia. By opening up this facility they will be able to be closer to their customers in New Jersey, Pennsylvania and Delaware. They expect to employ approximately 50 employees. It will likely take about six (6) months to get their people trained and the operation up and running. They will start with one (1) shift but hope to grow to two (2) shifts.

7. Regarding the operation on site, they will have wood shipped in, primarily by rail, from their current suppliers in North Carolina and Canada. It is a clean wood product. All manufacturing operations take place inside the building. Most of the time it will be a six (6) days a week operation. At times it could be seven (7) days a week. Wood will arrive by rail, the wooden trusses will be manufactured inside the building and the finished product will be trucked off site to the builders. Waste, typically in the form of small pieces of wood, will be taken to a local mulching facility. Trucks will typically take Route 45 to Route 540 and then to Route 295 north. There will be a small office crew on site, typically 3-4 office employees. Utilizing A-1, Mr. Frogale reviewed the proposed floor plan with the Board.

8. The Applicant submitted a document entitled "Use Variance" in its application submission which contained their justifications for the granting of the Use Variance. Mr. Telsey reviewed those standards with the Board noting again that the manufacturing of wooden trusses is permitted in this zoning district and that it is solely due to having two (2) principal uses on one property that the Use Variance is needed. There is no negative impact to the surrounding neighborhood as this site will continue to operate as his has for years. There will be no increase in use from what has occurred on the property for many years and no impact between the various operations that take place on site. Again, there is no substantial detriment to the zoning code or master plan as this type of use is permitted in this zoning district.

9. The Board weighed the positive and negative criteria and determined that special reasons exist for the granting of the Use Variance requested. The use of the building for the manufacturing of component packages including wall panels, floor

trusses, and roof trusses as a second primary use, on this very large 500 acre complex, is substantially similar to the uses that are permitted in the Industrial Zoning District, such as wholesalers or distributors, baking food and dairy processing. The two uses will not in any way negatively impact each other. Utilizing a building which would otherwise remain vacant is a positive use of an existing building. There will be no negative impact to the surrounding community as the use will be less intensive that previously occurred in the building and the operations will take place on the large Mannington Mills complex which will be out of sight of the general public. There is no substantial impact to the zoning code or master plan as the propose use is a permitted use in the zoning district.

10. The Board further determines that a Waiver of Site Plan Approval is appropriate for the situation in question, as there are no proposed changes to the site. As such, the Board determined that the criteria for the granting of a site plan waiver were met and the Board granted the Waiver of Site Plan Approval, subject to the conditions set forth herein.

WHEREAS, upon motion duly made and seconded to Grant the "Application for Land Development" to GRANT the Use Variance and for Waiver of Site Plan Approval, the Board, by a vote of 6 in favor, 0 opposed and 0 abstentions, (Voting for: Colletti, Schneeman, Sakewicz, Emel, Richman and Schmid), voted to **GRANT** the application; and

NOW, THEREFORE, BE IT RESOLVED, by the Planning/Zoning Board of the Township of Mannington, sitting as a Zoning Board of Adjustment, the application of Mannington Mills Inc., 75 Mannington Mills Road, Mannington, New Jersey 08079 requesting a Use Variance and Waiver of Site Plan Review Approval, to allow the construction of component packages including wall panels, floor trusses, and roof trusses in an existing buildings by a third party tenant, which would constitute a second primary use, for property located at 75 Mannington Mills Road and known as Block 60, Lot 4, is **HEREBY APPROVED**, subject, however, to the testimony, representations and stipulations of the Applicant and their representatives, professionals and witnesses at the time of the hearing and in their submissions, and further specifically, subject to the following terms and conditions:

1. Subject to the Applicant complying with and obtaining any and all necessary approvals from any other local, county, state and/or federal government or administrative body, having jurisdiction over all or part of this land use development approval; and

2. In accordance with the code provisions of the Township of Mannington, no permits, approval or certificate shall be issued until all contingencies provided for herein are satisfied and no Certificate of Occupancy shall be issued, until all other contingencies provided for herein are satisfied and all bills and escrows relating to this property have been paid in full; and

3. The Applicant will comply with all provisions of the Township Engineer's letter of November 8, 2024, unless specifically modified herein or on the record at the time of the hearing; and

4. The Board Engineer shall review all plans and amended plans and inspect the site of the development (inspections by the Twp. Engineer as appropriate) in order to determine compliance with the terms and conditions of the Board approval. Any shortcomings noted by either shall be addressed to the satisfaction of the professionals before the issuance of a Certificate of Occupancy. The Applicant shall submit appropriate escrow amounts, as determined by the Board Engineer or Township Engineer and applicable law, for inspections; and

5. The Applicants will comply with all of the representations, findings and agreements set forth in the Board's findings of facts set forth above, as well as, all agreements and representations made by the Applicant on the record at the time of the hearing; and

6. The Applicant shall pay all escrows, costs and professional fees associated with the application pursuant to the Mannington Township ordinances and the MLUL within thirty (30) days of notice of said fees and costs, absent any challenge by the Applicant as to the correctness or amounts of such fees and costs.

THE PLANNING/ZONING BOARD OF THE
TOWNSHIP OF MANNINGTON


JOHN SAKIEWICZ, Chairman

ATTEST:

The foregoing Resolution was a memorialization of action taken at a regular meeting of the Planning/Zoning Board of the Township of Mannington held on the 14th day of November 2024; and such resolution was adopted by the Planning/Zoning Board of the Township of Mannington at a regular meeting held on December 12, 2024, by a vote 0 to approve, 3 to oppose and 0 to abstain.


REBECCA FERGUSON, Secretary

In favor of the resolution: M.C., J.S., & D.E.

Opposed to the resolution: 0

Abstained: 0

EXHIBIT TT

(Second Certification of Zoning Officer)

EXHIBIT TT

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36770

PETITION FOR DECLARATORY ORDER OF TOWNSHIP OF PILESGROVE, COUNTY OF SALEM, NEW JERSEY

SECOND CERTIFICATION OF

ROBERT L. SCHMID, MANNINGTON TOWNSHIP ZONING OFFICER

TO PROVIDE

**REBUTTAL EVIDENCE FOR THE
TOWNSHIP OF MANNINGTON, COUNTY OF SALEM, NEW JERSEY
PETITION FOR DECLARATORY ORDER**

I, ROBERT L. SCHMID certify as follows:

1. I am the Mannington Township Zoning Officer and have full knowledge of the matters set forth in this certification.
2. On December 30, 2024, at approximately 3:45 p.m., I visited the property located in Mannington Township, Salem County, New Jersey, designated as Tax Map Block 67, Lots 14.01, 14.02, and 18 (the "Property") to further inspect the shed that has been installed there.
3. No one was present at the Property during my inspection. I did not enter the shed but rather only photographed its exterior, and the areas of its interior that are visible through the

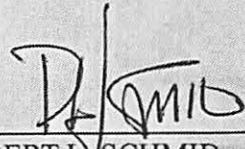
windows. Copies of those photographs, which I later sent to the Mannington Township Solicitor, are attached as EXHIBITS UU through ZZ.

4. At first glance the shed appears to be a standard storage shed, but there are features that undermine that conclusion. In addition to three small windows and two large barn-type doors, the shed has two large sliding windows, an exterior shelf under the sliding windows, a man-door, and fire extinguisher. These are features consistent that one would expect to find at a concession stand. The shed is empty of all but a six-foot step ladder and a few other unrecognizable items.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: _____

1/13/25



ROBERT L. SCHMID



EXHIBIT UU

December 30, 2024



EXHIBIT VV

December 30, 2024



EXHIBIT WW

December 30, 2024



EXHIBIT XX

December 30, 2024



EXHIBIT YY

December 30, 2024

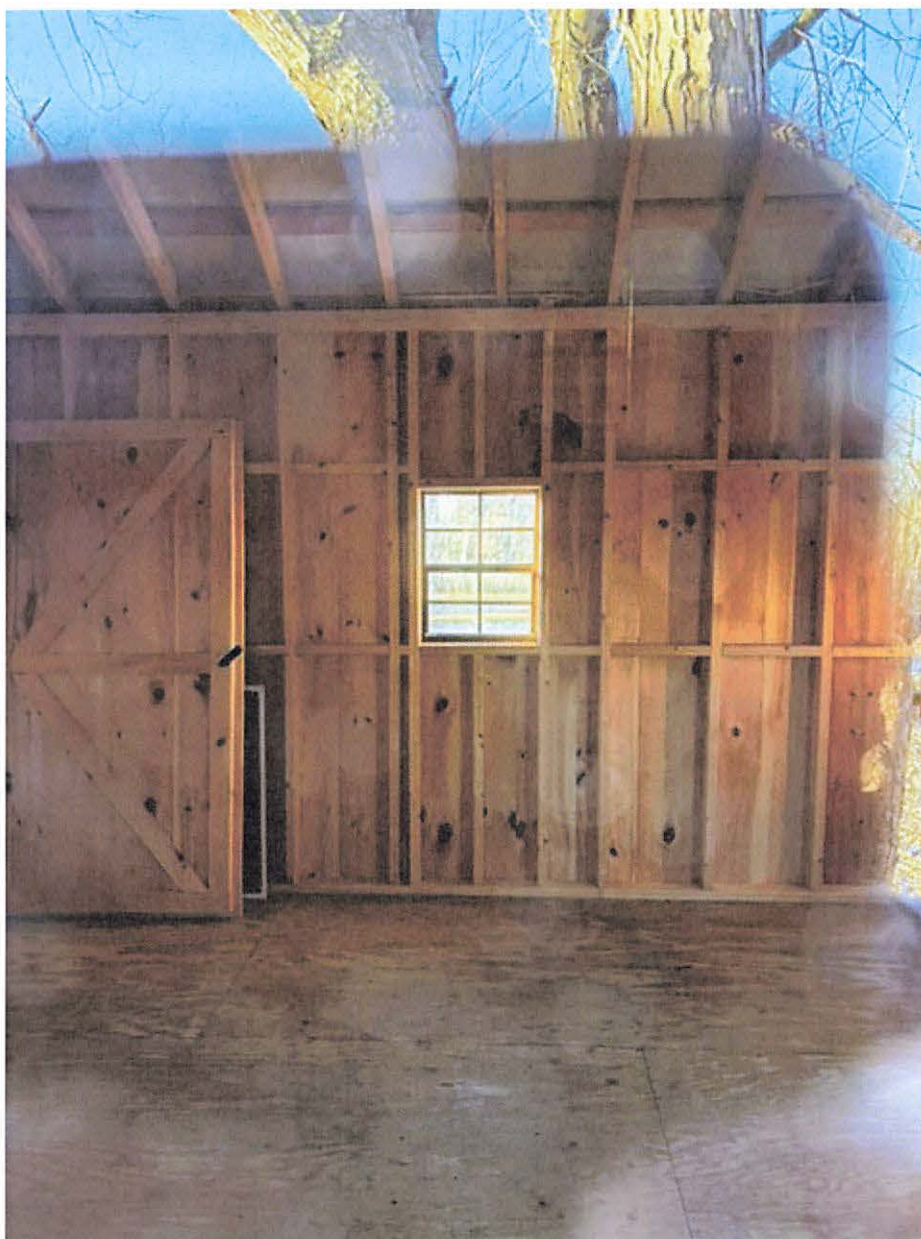


EXHIBIT ZZ

December 30, 2024