

WILLIAM C. HORNER
(RETIRED)
WILLIAM L. HORNER
wlh@hornerlaw.net

HORNER & HORNER, L.L.C.
ATTORNEYS AT LAW
67 MARKET STREET
P.O. BOX 66
SALEM, NJ 08079
—
TEL (856) 935-0958
FAX (856) 935-1708

March 26, 2025

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Via Electronic Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
U.S. Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
March 26, 2025
Part of
Public Record

**Re: Response to SMS Rail Service, Inc. Motion for Leave to File Sur Reply
by Intervenor Mannington Township, County of Salem, New Jersey,
with respect to Petition for Declaratory Order of Township of Pilesgrove,
County of Salem, New Jersey (In re SMS Rail Services, Inc.)
Docket No.: FD 36770**

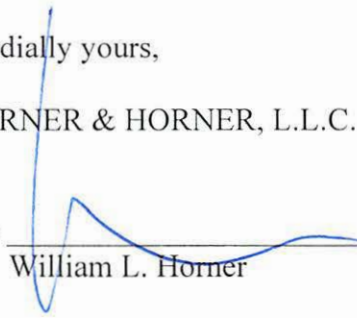
Dear Ms. Brown:

I represent Intervenor Township of Mannington in the above declaratory order proceeding. As stated in my March 10, 2025 letter, I am in receipt of the motion filed on March 6, 2025, by SMS Rail Service, Inc., for leave to file a Sur Reply to the recent submissions of the Township of Mannington and the Township of Pilesgrove.

Mannington Township is amenable to the Surface Transportation Board granting SMS's motion and considering SMS's Sur Reply, but only if the Board also accepts and considers Mannington Township's Response to the Sur Reply, which is being filed herewith, for the purpose of developing a more complete record. Conversely, Mannington Township objects to SMS's motion and Sur Reply if the Board is unwilling also to accept and consider Mannington Township's Response.

Cordially yours,

HORNER & HORNER, L.L.C.

By: 
William L. Horner

WLH:jcc
Cc: All parties on Service List

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36770

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

**RESPONSE OF INTERVENOR TOWNSHIP OF MANNINGTON,
COUNTY OF SALEM, NEW JERSEY, TO SMS RAIL SERVICE, INC.,
MOTION FOR LEAVE TO FILE SUR REPLY**

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 initially adopted a procedural schedule October 24, 2024, 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 6, 2024, in response to the parties’ requests, the Board adopted a modified procedural schedule, 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 (ASLRRRA) (Comments)
- California Short Line Railroad Association (CSLRA) (Comments)

On January 14, 2025, Mannington and Pilesgrove filed their respective rebuttal statements as allowed by the Board's December 6, 2024 decision.

On March 6, 2025, SMS filed a motion for leave to file a "Sur Reply of SMS Rail Service, Inc., Regarding Recent Developments and Rebuttal Statements of Pilesgrove Township and Mannington Township to SMS's Reply and Interested Persons' Comments and Amicus Curiae Briefs to the Townships' Petitions for Declaratory Order and Supplemental Evidence and Argument" (the "Sur Reply"). A copy of the Sur Reply was included with SMS's motion.

The Sur Reply addresses issues of concern relating to SMS's operations in Pilesgrove Township and in Mannington Township. As to the Mannington Township issues, Mannington asks the Board to accept and consider this "Response of Intervenor Township of Mannington, County of Salem, New Jersey, to SMS Rail Service, Inc., Motion for Leave to File Sur Reply" ("Mannington's Response") for the purpose of developing a more complete record. Mannington does not object to the Sur Reply if the Board is willing also to consider Mannington's Response. By the same token, however, Mannington *does* object to the Sur Reply if the Board is *not* willing also to consider Mannington's Response. Mannington hopes the Board will consider the Sur Reply and Mannington's Response (and any response filed by Pilesgrove Township) in order help resolve as many issues as possible in this proceeding.

Mannington will respond to three issues presented in the Sur Reply, in the following order:

1. Intermodal Container Repair/Refurbishing. SMS has confirmed, in its Sur Reply, that it is operating an intermodal container repair and refurbishing facility in Mannington Township without municipal approvals. SMS contends that the ICCTA preempts Mannington Township's land use regulations with respect to SMS's intermodal repair and refurbishing operations. Mannington disagrees for reasons explained below.

2. Rail Bikes. SMS contends, in its Sur Reply, that the preemption issues raised by Pilesgrove, and briefed by Pilesgrove, Mannington, SMS and two of the Amici regarding recreational rail bike operations, are “not ripe for decision” and should not be considered by the Board. Mannington disagrees for the reasons explained below and urges the Board to render a non-preemption determination as to rail bike excursion operations.
3. Interstate Rail Operations. SMS has presented further verified statements in an attempt to support its contention that SMS operates interstate, rather than intrastate, freight rail service, but, as explained below, SMS’s representatives still have not provided statements to that effect.

MANNINGTON RESPONSE TO SMS SUR REPLY – POINT 1

SMS’S INTERMODAL CONTAINER REPAIR AND REFURBISHING OPERATIONS ARE NOT “TRANSPORTATION” REGULATED BY THE BOARD PER THE ICCTA AND ARE THEREFORE SUBJECT TO MANNINGTON TOWNSHIP’S LAND USE AND DEVELOPMENT REGULATIONS

Background:

On page 8 of SMS’s reply evidence and argument brief, counsel for SMS explained that SMS rebuilds intermodal boxes for Environmental Rail Services (ERS) “at a shop along the Salem Branch.” Counsel for SMS did not, however, disclose where, specifically, the “shop” was located along the Salem Branch. The verified statement of SMS’s representative Mr. James R. Pfeiffer, which was included with SMS’s brief as SMS Exhibit C, explained (in paragraph 5) that ERS’s intermodal boxes must move through both Pilesgrove and Mannington Townships to reach their

destinations. Based on this information, and the fact that, with respect to the Salem Branch, Pilesgrove Township lies between Mannington Township and “the interstate rail network,” counsel for Mannington surmised, in footnote 1 on page 6 of Mannington’s rebuttal statement, that SMS’s refabrication shop was probably located somewhere in Mannington Township.¹

Counsel for Mannington also asserted in footnote 1 that a Class III carrier’s fabrication or refabrication of a third-party non-carrier’s intermodal boxes is not “transportation that is conducted under the Board’s jurisdiction as part of the interstate rail network,” and that Mannington’s Land Development Ordinance (LDO) is not preempted by ICCTA with respect to such an operation or activity, despite its apparent relation to railroading. Mannington’s counsel further noted that Mannington was unaware of the existence of any such “shop” within Mannington Township, or that any municipal development approvals had been issued for any such shop, and that Mannington would therefore investigate as necessary to determine whether SMS might be operating its intermodal box refabrication shop somewhere in Mannington Township in violation of Mannington’s zoning and site plan regulations, in which case SMS and the land owner would be notified accordingly.

After filing its aforesaid rebuttal statement, and prior to receipt of SMS’s motion and Sur Reply, Mannington received confirmation that SMS’s intermodal container refabrication shop is, in fact, located in Mannington Township, at property owned by Mannington Mills, Inc., and is being operated without land use and development approvals, in violation of the LDO. SMS’s realization that Mannington had discovered the violation has, in part, precipitated SMS’s motion and Sur Reply, in which SMS itself has confirmed that its intermodal container refabrication operations are being conducted at the Mannington Mills property.

¹ Footnote 1 of Mannington’s rebuttal statement contained an incorrect citation to page 2 of SMS’s reply evidence and argument brief. The citation should have been to **page 8** of that brief.

SMS's Operations at the Mannington Mills Property:

Mannington Mills, Inc. (MM) is a flooring manufacturing company that has its headquarters and a manufacturing facility at 75 Mannington Mills Road in Mannington Township, on property designated as Tax Map Block 53, Lots 41 and 44; Block 60, Lots 1, 4, 6, 8.01, 9 and 10; Block 67, Lots 2, 15 and 17; and Block 72, Lot 2 (the "MM Property"). The MM Property is extensive, and has numerous buildings and improved areas, including three buildings that are designated as Buildings 70, 90, and 115, at which SMS conducts various business operations.

The MM Property is located within a CONS-Conservation and an I-Industrial zoning district in which SMS's 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, *N.J.S.A. 40:55D-1, et seq.* ("MLUL"). Mannington's 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. As explained in the Third Certification of Robert L. Schmid, the Mannington Township Zoning Officer (EXHIBIT AAA²), MM has applied for and obtained Planning Board approvals for SMS's operations at Building 70 (for storage of sunflower oil), and for SMS's operations at Building 115 (for delivering and handling raw materials to be received via rail by third-party company Annandale Truss in connection that company's building truss manufacturing operations at the MM Property). The Planning Board resolutions memorializing these two approvals have been provided as EXHIBIT

² The attached exhibit references begin with Exhibit AAA 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, and Exhibits QQ through ZZ in Mannington's rebuttal statement.

SS (regarding Annandale Truss, filed previously with Mannington's rebuttal statement), and EXHIBIT BBB (regarding sunflower oil storage, attached hereto).

Also as confirmed in Mr. Schmid's Third Certification, SMS is conducting its intermodal container repair, refurbishing, and refabrication operations at Building 90 on the MM 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 MLUL by which the LDO is statutorily authorized.

Specifically, based on his March 18, 2025 inspection of the MM Property, and his on-site conversations with MM and SMS representatives, Mr. Schmid has described SMS's operations at Building 90 as follows:

1. Since October 2023, MM Building 90 has been leased to and utilized by SMS for repairing and refurbishing intermodal cargo shipping containers that belong to SMS's customer ERS.
2. The actual work on the intermodal containers at Building 90 is done by TB Enterprises (TBE), a company with which SMS has contracted to repair, weld, paint, and otherwise refurbish the intermodal containers.
3. Building 90 is about 1,500 square feet in size, and is located alongside and approximately 60 feet from the SMS rail line. Although the intermodal containers are repaired and refurbished inside the building, the operations include a staging area of approximately 1,500 square feet that is just outside Building 90, where the intermodal containers are stored before and after repair and refurbishing.

4. TBE conducts the repair and refurbishing operations at Building 90 Monday through Friday from 5:00 a.m. to 1:00 p.m., and an SMS employee is onsite at Building 90 during all hours of operations to handle the movement of the intermodal containers.
5. ERS is currently the only SMS customer for whom SMS and TBE perform intermodal container repair and refurbishing services at Building 90.
6. Most of the intermodal containers arrive at and leave from the MM Property by rail, but SMS's onsite representatives did not know where the intermodal containers are sent from, or where they are taken after they have been repaired and refurbished, or whether their points of origination or destination are within or outside of the state of New Jersey.
7. Mr. Schmid took photographs during his inspection, and provided screen-shot images relating to SMS's operations, Building 90, and the MM Property, all of which are attached hereto as follows:
 - a. a screen shot map image showing the location of Building 90 and its surrounding area within the MM Property is attached as EXHIBIT CCC;
 - b. photos of the interior of Building 90 are attached as EXHIBITS DDD and EEE;
 - c. photos of ERS intermodal containers on railcars alongside Building 90 are attached as EXHIBITS FFF, GGG and HHH;
 - d. a photo of ERS intermodal containers that have been placed just outside of Building 90, and equipment used by SMS employees to load and unload intermodal containers, is attached as EXHIBIT III; and
 - e. a screen shot map image, and an aerial photo, both of which show a larger portion of the MM Property and its environs for context, are attached as EXHIBITS JJJ and KKK.

As explained in Mannington's previously filed supplemental evidence and argument brief, the MLUL requires Mannington to enforce its land use regulations uniformly, not selectively. Consequently, as stated in his Third Certification, Mr. Schmid has issued notices of violation and orders to cease the aforesaid operations to SMS, MM, and TBE (see attached EXHIBIT LLL).

SMS's Contentions Regarding ICCTA Preemption:

SMS contends in its motion and Sur Reply that its intermodal container repair and refurbishing operations at Building 90 are "transportation by rail carrier covered by the federal preemption provisions contained in 49 U.S.C. § 10501,³ as broadened by the ICCTA" and are thus "under the Board's exclusive jurisdiction." Accordingly, SMS has asked the Board to "confirm that site plan, zoning, and permit requirements are preempted, and that local administrative delays, permits, fees, and stop work/cease and desist orders are not permitted." See page 8 of SMS motion and page 5 of Sur Reply. SMS provides no Board decisions or court opinions to support these contentions except for a citation to page 7 of *Denver & Rio Grande Railway Historical Foundation – Pet. for Declaratory Order*, FD 35496 (STB served March 24, 2015) (referred to in Mannington's rebuttal statement as *DRGHF 3*) for the general proposition that the Board has exclusive jurisdiction over "property and facilities related to the movement of passengers or property by rail." (See Sur Reply at page 18.)

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.

SMS's Building 90 Operations are not "Transportation" Under the Board's Jurisdiction:

1. Summary of applicable ICCTA provisions; "related services":

The ICCTA starts with a broad definition of "transportation" in §10102(9) 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. In order for SMS's Building 90 operations to enjoy ICCTA preemption (in other words, for the Building 90 operations to be included in the ICCTA definition of "transportation"), the Building 90 operations must be "services" provided by SMS "in relation to" SMS's "movement of passengers and property by rail."

Several court opinions and Board decisions have addressed, and provided useful guidance, in situations where questions have arisen as to whether various types of "related services" are "transportation" that is subject to the Board's exclusive jurisdiction. A few of those opinions and decisions which are most applicable to this case are discussed as follows.

2. *Borough of Riverdale – Petition for Declaratory Order*, STB Docket No. 33466 (September 10, 1999):

One of the issues addressed in the Board's 1999 *Riverdale* decision (and as to which the Board required more information from the parties in order to make a decision) involved whether disputed trackside facilities relating to corn syrup involved the "manufacturing" of corn syrup, or the "transloading" of corn syrup. Near the end of its decision, under the heading "Non-Transportation Facilities," the Board made it clear that to qualify for ICCTA preemption, "related services" must be "integrally" related to the "transportation" in which they allege to be included:

Finally, it should be noted that manufacturing activities and facilities not *integrally related* to the provision of interstate rail services are not subject to our jurisdiction or subject to federal preemption. According to the Borough, NYSW has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad's *ability to provide transportation services*, and even when the Board does not necessarily have direct involvement in the construction and maintenance of these facilities. We cannot determine from the current record with this facility is actually a corn processing plant or some sort of transloading operation (for the transfer of corn syrup, for example) that is related to transportation services. Accordingly, NYSW, in its opening statement should describe the exact nature of this facility.

Id. at 9 (italic emphasis added; internal citation omitted).

In considering the above passage it must be borne in mind that an “integral” relation is a direct, significant, and substantial relation, and not one that is remote, minor, or inconsequential. To be “integral” is to be a necessary, *indispensable* part of a whole, without which the whole would be incomplete. Here is the definition:⁴

integral

Adjective:

1. of, relating to, or belonging as a part of the whole; constituent or component: integral parts.
2. necessary to the completeness of the whole: This point is integral to his plan.

Synonyms: requisite, indispensable, essential

1. consisting or composed of parts that together constitute a whole.
2. entire; complete; whole: the integral works of a writer.

Applying the Board's *Riverdale* analysis to the facts of the instant matter with the above definition in mind leads to the logical conclusion that SMS's repair, refurbishing, and refabricating services are not “integrally related” to its provision of rail services, interstate or otherwise. In order to determine that SMS's repair, refurbishing, and refabrication services are “integrally related” to the “transportation” SMS provides, one must determine that the “transportation” could

⁴ <https://www.dictionary.com/browse/integral> (03-23-25)

not be provided without the “services,” which is simply not the case. As explained by David A. Ardito, President and CEO of ERS, the intermodal containers are shipped “clean” to SMS for storage and/or repair or refurbishment before they are “ordered back into service” by ERS for use by ERS’s customers throughout the country. See SMS Exhibit DDD, paragraph 4. Thus, the intermodal containers, in this context, are not being *used to transport* articles of commerce; rather the containers themselves *are* the articles of commerce. Moreover, although the stated purpose of sending the containers to SMS’s Building 90 facility is for the containers to be repaired, refurbished, and/or refabricated by SMS, and although SMS apparently provides some part of the “transportation” that is necessary to deliver the ERS containers to Building 90 for that purpose, it is obvious that SMS’s Building 90 operations and facilities are not “part of SMS’s *ability to provide*” that transportation service. Indeed, SMS’s Building 90 operations could be performed by *anyone* at Building 90, including a non-railroad entity, without any impact whatsoever on SMS’s *ability* to provide the transportation that is required to deliver the ERS containers to Building 90, and regardless of whether the intermodal containers are delivered to Building 90 by train or by truck. As discovered by Mannington’s Zoning Officer, SMS itself does not even provide the repair, refurbishing, and refabrication services, but rather only stands by to assist with the movement of containers while SMS’s subcontractor TBE does that work.

It should be noted that, if the Board determines that SMS’s overall freight operations qualify for ICCTA preemption, and if the transportation of ERS’s intermodal containers to the MM Property for repair is included in such preempted interstate movements, then Mannington is prepared to recognize, also as ICCTA-preempted, SMS’s *storage* of ERS’s intermodal containers at the MM Property in connection with SMS’s Building 90 operations, *but only if all applicable municipal land use approvals are first obtained for the Building 90 operations*. (This is consistent

with Mannington’s regulatory stance regarding the Annandale Truss manufacturing facility at MM Building 115, which was approved by the Mannington Township Planning Board with the understanding that SMS would be delivering materials to Annandale Truss at the MM Property from out-of-state by rail.)

3. *New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238 (2007):

In *New York Susquehanna* the Third Circuit Court of Appeals considered the Board’s *Riverside* analysis, with particular focus on the distinction between “manufacturing” and “transloading.” *New York Susquehanna* involved the question of whether the trackside sorting and processing of bulk waste while transferring the waste from trucks to trains was sufficiently related to “transportation” to fall within ICCTA preemption. Although the court seemed to take a dim view of the Board’s “integrally-related” concept (see *Id.* at 248), the court nonetheless concluded that “transloading” qualifies as “transportation”; that the waste sorting and processing in question were “incidental to” the transloading; and that the waste sorting and processing activities thus also qualified as “transportation.” *Id.* at 247-50.

In the present case SMS’s repair, refurbishing, and refabrication operations at Building 90 do not qualify as “transloading” because these services do not “facilitate” the transfer of intermodal containers from one mode of transportation to another. Building 90 is, in fact, the end destination for these particular articles of commerce. For these same reasons, the repair, refurbishing, and refabrication services provided by SMS are not “incidental to” SMS’s transportation of the containers. Indeed, if SMS were transporting containers for ERS that were being used to *ship* articles of commerce (i.e., rather than *as* articles of commerce), and if while in SMS’s custody a component of a container broke and SMS brought in a welder to repair it, such a service could arguably be “incidental to” the transportation. For that matter, if SMS maintained facilities along

the Salem Branch to provide these sorts of *ad hoc* “in-transit” intermodal container repairs, such facilities could arguably be subject to ICCTA preemption. But SMS’s Building 90 facility is not being used for such *ad hoc* in-transit repairs. Building 90 is an end-destination manufacturing facility, not a transloading facility, and SMS’s operations in Building 90 are neither “integrally related” to, nor “incidental to,” SMS’s transportation of ERS’s intermodal containers.

4. *Diana Del Grosso, et al. – Petition for Declaratory Order*, STB Docket No. 35652 (July 31, 2017):

The Board’s *Del Grosso* decision involved the question of whether a rail carrier’s “added value” operations conducted during transloading were subject to ICCTA preemption. The cargo at issue in *Del Grosso* was wood pellets of the sort burned in woodstoves and electric generating plants, and the operations at issue were the carrier’s track-side bagging, palletizing, and shrink-wrapping of the pellets, and the screening, vacuuming, and re-pelletizing (i.e., pressing new pellets) of the sawdust and chips that were scraped and broken from the pellets during bulk shipment. The Board determined that the bagging, palletizing and shrink-wrapping came within the broad statutory definition of “transportation” at §10102(9) because such operations “facilitate” the transloading of the pellets from rail cars to trucks, and were not done solely for another, unrelated purpose, and also because these operations were part of the “handling” of property at a rail facility. As for the screening, vacuuming, and re-pelletizing of sawdust and chips, the Board determined that these were activities “related to” “the movement of...property...by rail,” and therefore part of “transportation” under §10102(9), because they “remedy the problems caused by rail movement.” *Id.* at 10-11.

Although the *Del Grosso* decision seems generally reasonable and consistent with *Riverdale* and *New York Susquehanna*, there was at least one Board member who believed that the

Board had gone too far with regard to the re-pelletizing activities. Board Member Miller concurred in part, and dissented in part, with a separate expression. Here are excerpts from that dissent:

Today's decision further expands the scope of the [ICCTA's] preemption provision, §10501(b), concluding that the process of repelletization is transportation and thus functionally unregulated. Section 10501(b) should not be used as a sword – freeing rail carriers from regulatory restraints that would apply to any other entity engaging in precisely the same economic activity – but rather as a shield against unreasonable interference with interstate commerce, as was intended by Congress. Because in this case §10501(b) is being used as a sword, and because I believe that repelletizing clearly constitutes manufacturing rather than transportation, I respectfully dissent in part.

[I]n order to come within the Board's jurisdiction and qualify for federal preemption, "an activity must be...part of rail transportation." On this record, I find it difficult to conclude that pressing broken pieces of wood through a die is "part of rail transportation," or that the preemption of state and local regulation of such activities is required to avoid a patchwork of regulation from unreasonably interfering with interstate commerce.

Even if one were to believe the questionable factual assumptions presented by the carrier here, the decision's "spot repair" test casts too wide a net, in that it would allow rail carriers to repair, for example, automobiles or televisions purportedly damaged in transit, or even the repelletization of pharmaceuticals, while preventing states and localities from regulating such activities.

[I] remain concerned that extending preemption to include activities whose only real relationship to rail transportation is the fact that they are conducted by rail carriers will continue to encourage carriers to engage in such ancillary business activities simply because their involvement brings the protection of preemption.

[In a footnote, Board Member Miller also observed that "repair of transported items" is not included in the statutory list of services "related to" the movement of passengers or property by rail.]

Id. at 11-13, incl. n. 1 (italic and underlined emphasis added).

SMS should not be allowed to use §10501(b) "as a sword" to free itself from regulatory restraints that would apply to any other person or entity engaging in precisely the same intermodal container repair, refurbishing, and refabricating operations that SMS is conducting at Building 90. SMS's Building 90 operations are simply not "transportation" as contemplated by Congress. The

preemption of state and local regulation with respect to SMS's Building 90 operations is not necessary to avoid "a patchwork of regulation from unreasonably interfering with interstate commerce" as intended by Congress. "Repair of transported items" is not included in the §10102(9)(B) definitional list of "services related to" the movement of passengers or property by rail.

Meanwhile, Mannington is constitutionally and statutorily required to administer and enforce its land use regulations uniformly. SMS (and MM and TBE) must comply with the LDO in the same manner as any other person or entity who seeks to operate an intermodal container refabricating facility in Mannington Township's Conservation or Industrial zoning districts.

For the above reasons Mannington requests the Board to render a decision confirming that Mannington's land use and development regulations are not preempted by the ICCTA with respect to SMS's intermodal container repair, refurbishing, and refabricating operations at the MM Property.

MANNINGTON RESPONSE TO SMS SUR REPLY – POINT 2

THE ISSUE OF ICCTA PREEMPTION OF RAIL BIKE EXCURSIONS IS RIPE FOR
DECISION BECAUSE THE ISSUE WAS RAISED BY PILESGROVE FOR
DETERMINATION BY THE BOARD AND ADDRESSED IN THE BRIEFS OF
PILESGROVE, MANNINGTON, SMS, AND TWO OF THE FOUR INTERESTED PARTIES
WHO HAVE FILED SUBMISSIONS WITH THE BOARD; THE QUESTION OF ICCTA
PREEMPTION OF RAIL BIKES HAS CREATED, AND WILL CONTINUE TO CREATE,
CONTROVERSY AND UNCERTAINTY IN PILESGROVE TOWNSHIP AND

MANNINGTON TOWNSHIP WHICH THE BOARD CAN AND SHOULD TERMINATE
AND REMOVE BY DECLARATORY ORDER

On page 3 of Pilesgrove's Petition for Declaratory Order, Pilesgrove explains that, among the subjects of its petition is the issue of whether the ICCTA preempts municipal land use regulation of rail bike excursion operations. Pilesgrove notes on page 4 of its petition that, despite the fact that SMS made application to the Pilesgrove Township Planning Board for approval of a rail bike excursion operation, and despite a use variance having been granted, SMS nonetheless claimed that "federal preemption prohibited the planning board from rendering a zoning decision," and that, despite the planning board's approval of the use variance, "*there remains questions* as to whether this non-common carrier activity would fall under federal preemption." In light of these concerns, Pilesgrove Township properly requested a declaratory order from the Board to terminate and remove this and other SMS-related controversies and uncertainties.

On page 23 of SMS's reply evidence and argument brief, counsel for SMS responded to the issue of rail bike preemption, stating that "Pilesgrove well knows that SMS has been attempting [to] resolve with Pilesgrove's planning board issues relating to the possibility of a rail bike tour facility," and that "the financial benefits from a rail bike facility to SMS's freight operations would support preemption of rail bike activities and facilities..." Further, SMS states "[t]he fact that in the future a rail bike facility, if pursued, may use a portion of Lot 1 from time to time should not change the fact that the property is currently part of the railroad and thus federally preempted." Reading between the lines it appears as though SMS might possibly attempt, at some point in the future, to defy the requirement for site plan review that was imposed as a condition of the planning board's use variance approval for the rail bike concession (see Pilesgrove Exhibit E – Resolution condition 2 on page 5). In any event, and for whatever reason, SMS elected not to brief the matter

any further in its reply evidence and argument brief, and SMS raised no objection in that brief as to the “ripeness” of the rail bike issue.

Two of the four interested parties who filed submissions with the Board also responded to the rail bike issue. On pages 5 and 10 of its brief, MRY asserted that its rail bike operations are “*integral* to its role as a common carrier”⁵ and “cannot, and should not” be subjected to municipal regulation. MRY also provided a thorough explanation of its own rail bike operations on pages 13 and 14, and stated that it “wholeheartedly agrees with SMS that Pilesgrove is preempted from regulating SMS’s rail bike tour facilities.” Meanwhile, SNR, the other of the Amici to address the rail bike issue, also explained, in footnote 14 on page 9, and on page 10 of its brief, that its excursion operations include rail bikes. Like MRY, SNR asserted, on pages 15 and 21 of its brief, that its rail bike operations are “*integral* to its role as a common carrier” and “cannot, and should not” be subjected to municipal regulation. Like MRY, SNR stated that it “wholeheartedly agrees with SMS that Pilesgrove is preempted from regulating SMS’s rail bike tour facilities.”

On pages 2 and 3 of Pilesgrove’s rebuttal statement there is further explanation of Pilesgrove’s need for the requested declaratory order regarding rail bikes:

Further troublesome is SMS’s request to the Board to hold open its pursuit of rail bikes in Pilesgrove Township under the possibility of having such activity covered under federal preemption. The rail bikes...should not fall under this Board’s jurisdiction and under federal preemption regardless of the Board’s decision as to whether SMS is a rail line entitled to federal preemption and its subsequent review of the structures and electricity which are at issue between Pilesgrove and SMS.

On page 21 of Pilesgrove’s rebuttal statement, at the end of the “Conclusion” section in which Pilesgrove summarizes its requested relief, Pilesgrove states:

Further, Pilesgrove *requests that the STB make clear* that any endeavors by SMS as to *rail bike*, warehousing (if indeed the claimed “engine house” is being held out for this purpose), or other such activities unrelated to railroading *would be subject*

⁵ See, again, the definition of “integral” as “indispensable” on page 11, above.

to all state, county, and municipal laws and regulations, including the Township of Pilesgrove's zoning and site plan review requirements.

The question of ICCTA preemption with respect to rail bike excursions having thus been raised by Pilesgrove, and briefed by SMS, MRY and SNR as aforesaid, Mannington also briefed the issue, in pages 34 through 36 of its rebuttal statement. For the same reasons expressed by Pilesgrove, "and also because SMS might at some point want to use the Mannington Property for a rail bike concession and related trackside activities," Mannington asked 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."

After all of the aforesaid petitioning and briefing, SMS now blithely asserts, on page 14 of its Sur Reply that, "while SMS had discussions with Pilesgrove's planning board in 2023 about the possibility of a rail bike facility, there are no current plans for rail bikes." Further, despite Pilesgrove's and Mannington's plainly stated requests for a decision on rail bike non-preemption, and despite the parties' briefing of the issue, SMS goes on to say: "The issue of rail bike jurisdiction has not been briefed by the Townships or SMS, nor are there any facts to consider in this regard. Thus, rail bikes are not ripe for decision by the Board in this proceeding." This an astonishingly cavalier false statement that the Board should simply disregard.

5 U.S.C.A. § 554(e) provides that the Board "with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." Contrary to SMS's contentions, the essential "facts" in this case are: (1) despite whatever its "current plans" might involve, SMS has proposed, and may in the future again propose, a rail bike excursion concession in Pilesgrove Township, a municipality as to which Mannington Township is adjoined and otherwise similarly situated; and (2) SMS has clearly asserted to Pilesgrove, and to the Board, that Pilesgrove (and Mannington) cannot regulate rail

bike excursion operations due to ICCTA preemption. SMS should not be allowed now, after the rail bike issue has been raised by the Petitioner and briefed by all parties, to direct the Board *not* to render the requested decision. SMS could have provided more in the way of briefing on the subject of rail bike preemption, but it elected not to do so. SMS could have argued against “ripeness” before the briefing even began, but it elected not to do so. It is too late now to do either.

Moreover, it should be noted that, last spring and summer, when Mannington was attempting to enforce its land use and development regulations against SMS’s trackside customer entertainment and recreation area in Mannington Township, SMS’s attorney convinced the municipal court judge that the issue of preemption as to *that* component of SMS’s operations must first be determined by the Board. And here we are, nearly a year later, still diligently working our way toward Board decisions – including a decision on rail bikes – that Pilesgrove originally requested “on an expedited basis.” (See Pilesgrove Petition at page 6.) The Board should not decline this opportunity to “terminate controversy and remove uncertainty” and thus subject Pilesgrove and Mannington to the possibility – indeed, the likelihood – of another, potentially year-long round of expensive and time-consuming petitioning and briefing if and when SMS decides to change its “current plans” and starts running rail bike concessions in either or both municipalities. It should also be noted that the need for the requested decision is made more acute by the dearth of precedential guidance – indeed, the apparent lack of any prior Board decisions or court opinions – on the subject of ICCTA preemption or non-preemption of rail bike operations.

For all of the above reasons, Mannington urges the Board to render a decision on the rail bike non-preemption as requested. The issue is ripe, and the opportunity to decide it should not be missed.

MANNINGTON RESPONSE TO SMS SUR REPLY – POINT 3

SMS’S REPRESENTATIVES STILL HAVE NOT STATED THAT SMS’S FREIGHT OPERATIONS ON THE SALEM BRANCH CONSTITUTE TRANSPORTATION BETWEEN THE SALEM BRANCH AND AREAS OUTSIDE THE STATE OF NEW JERSEY AS PART OF THE INTERSTATE RAIL NETWORK; THE FEDERAL DEFINITION OF “INTERSTATE COMMERCE” WITH RESPECT TO THE STATUS OF *FREIGHT* IS NOT RELEVANT TO THE BOARD’S JURISDICTIONAL DETERMINATION AS TO WHETHER SMS’S OPERATIONS ON THE SALEM BRANCH CONSTITUTE TRANSPORTATION BETWEEN THE SALEM BRANCH AND AREAS OUTSIDE THE STATE OF NEW JERSEY AS PART OF THE INTERSTATE RAIL NETWORK

SMS’s motion, Sur Reply, and related exhibits do not contain any statement that SMS’s operations on the Salem Branch constitute freight transportation by SMS *between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network* as required for the Board jurisdiction pursuant to §10501(a)(2). Mr. Pfeiffer, in SMS Exhibit AAA, again says that he “anticipates” that lumber will be delivered to Annandale Truss at the MM Property “from outside New Jersey,” but otherwise he only refers to “freight traffic on and along the Branch,” and not to “freight transportation by SMS between the Salem Branch and areas outside the state of New Jersey as part of the interstate rail network.”

Counsel for SMS cites the definition of “interstate commerce” from 49 C.F.R. § 390.5 as support for the assertion, on page 6 of the Sur Reply, that “...SMS’s rail *freight* on the Branch is *transportation in interstate commerce* and does not become intrastate simply by SMS only handling part of its journey while on the Branch” (italics added). This statement further reinforces the presumption that SMS’s transportation operations are, indeed, confined to New Jersey, but it

is otherwise irrelevant because the issue before the Board does not involve determining the status of any particular *freight* as “interstate commerce” based on where it has been before SMS transported it and where it is going afterward, but rather involves the question of whether SMS’s transportation *operations* extend to areas outside of the state of New Jersey “as part of the interstate rail network.”

As suggested in Mannington’s rebuttal statement, the Board should presume that, if SMS’s representatives *could* have stated truthfully and correctly that SMS’s transportation operations on the Salem Branch extend to areas outside of the State of New Jersey as part of the interstate rail network they *would* have, and that the absence of such statements indicates that SMS’s transportation operations on the Salem 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. No waybills or other discovery is needed if such statements cannot be provided truthfully and correctly.

In response to SMS’s contention on page 12 of the Sur Reply, the fact that ERS’s intermodal containers are, after being refurbished by SMS, “ordered back into service by ERS for use by ERS’s customers throughout the country,” is not a basis for the Board to determine that *SMS’s transportation operations* extend to areas outside of the State of New Jersey as part of the interstate rail network.

CONCLUSION

For the above reasons, if the Board elects to grant SMS’s motion and consider SMS’s Sur Reply, the Board should also consider Mannington’s Response and determine, in addition to the

determinations requested by Mannington and Pilesgrove in their respective previous submissions, that:

1. Mannington Township's land use and development regulations are not preempted by the ICCTA with respect to SMS's intermodal container repair, refurbishing, and refabricating operations at the Mannington Mills property; such operations are subject to state, county, and local regulations, including Mannington Township's land use and development regulations;
2. The issue of recreational rail bike excursion non-preemption is ripe for decision by the Board, and Mannington Township's and Pilesgrove Township's land use and development regulations are not preempted by the ICCTA with respect to rail bike operations for excursion or recreational purposes; 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 rail bike operations for excursion or recreational purposes, including all related trackside activities and services, are subject to state, county, and local regulations, including Mannington Township's and Pilesgrove Township's land use and development regulations; and
3. SMS has not provided sufficient evidence to prove that its *freight* operations and activities on the Salem Branch, and at the Mannington Property, and at the Pilesgrove property, or its *passenger* operations and activities on the Salem Branch, and at the Mannington Property, and at the Pilesgrove property, are part

of the interstate rail network; Mannington Township's and Pilesgrove Township's land use regulations are thus 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, and all such operations and activities are also subject to all other applicable state, county, and local regulations.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 26, 2025, I am filing Mannington Township's "Response of Intervenor Township of Mannington, County of Salem, New Jersey, to SMS Rail Service, Inc., Motion for Leave to File Sur Reply," including all attachments and filing correspondence, 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 Pilesgrove, and the attorneys for the four interested persons who have filed submissions with the Board, to be served with copies of Mannington Township's "Response of Intervenor Township of Mannington, County of Salem, New Jersey, to SMS Rail Service, Inc., Motion for Leave to File Sur Reply," including all attachments and filing correspondence, 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)

Robert A. Klein, Esq. (Attorney for SMS Rail Service, Inc./Woodstown Central Railroad)
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
Phone: (856) 223-9990

Sarah Yurasko, Esq., Senior Vice President – Law & General Counsel
American Short Line and Regional Railroad Association
50 F Street, NW, Suite 500
Washington, DC 20001-1537
Email: syurasko@aslrra.org
Phone: (202) 585-3448

Torgny Nilsson, Esq., Vice President & General Counsel
Sierra Northern Railway
1745 Enterprise Boulevard
West Sacramento, CA 95691
Email: tnilsson@sierraenergy.com
Phone: (530) 304-1044

Torgny Nilsson, Esq., Vice President & General Counsel
Mendocino Railway
100 West Laurel Street
Fort Bragg, CA 95437
Email: tnilsson@sierraenergy.com
Phone: (530) 304-1044

Donald G. Norton, Esq., Executive Director
California Short Line Railroad Association
1127 11th Street, Suite 242
Sacramento, CA 95814-3809
Email: executivedirector@cslra.org
Phone: (310) 863-4573

EXHIBIT AAA

(Third Certification of Zoning Officer)

EXHIBIT AAA

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36770

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

THIRD CERTIFICATION OF

ROBERT L. SCHMID, MANNINGTON TOWNSHIP ZONING OFFICER

IN SUPPORT OF

**RESPONSE OF THE TOWNSHIP OF MANNINGTON, COUNTY OF SALEM, NEW
JERSEY, TO SMS RAIL SERVICE, INC., MOTION FOR LEAVE TO FILE SUR REPLY**

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 March 18, 2025, at approximately 10:00 a.m., I conducted inspections of the operations of SMS Rail Service, Inc. ("SMS") at property owned by Mannington Mills, Inc. ("MM"). MM is a flooring manufacturing company having its headquarters and a manufacturing facility at 75 Mannington Mills Road in Mannington Township, on property designated as Tax Map Block 53, Lots 41 and 44; Block 60, Lots 1, 4, 6, 8.01, 9 and 10; Block 67, Lots 2, 15 and 17; and Block 72, Lot 2 (the "MM Property").

3. Upon my arrival at the MM Property I was met by Mr. Scott Salerni, Esq., MM V.P. & General Counsel, and Mr. Victor Giudice, MM Manager of Safety, Health and Environment. Mr. Salerni and Mr. Giudice both escorted me to the locations of the three SMS operations discussed in this Certification.

Building 115 – Annandale Truss Manufacturing:

4. MM Building 115 is leased to a company called Annandale Truss (AT), in which AT manufactures, or will manufacture, roof trusses. MM has applied for and received Mannington Township Planning Board approval for AT's operations at Building 115, which include SMS's related rail operations, as memorialized in the Planning Board's Resolution 14-2024, a copy of which has been previously provided to the Surface Transportation Board as Mannington Township EXHIBIT SS. During my inspection I saw no AT or SMS employees at Building 115. The building was quiet, and there was no indication that AT's truss-building activities had commenced. Based on the Planning Board approval and what Mr. Salerni and Mr. Giudice told me during my inspection, AT will receive lumber and other raw materials by trains via the SMS rail line (which is located approximately 180 feet from the entrance of Building 115); the raw materials will be handled by SMS and stored along the rail line; and the finished roof trusses will be shipped from the MM Property by truck, not by rail.

Building 70 – Sunrise Sunflower Oil Storage:

5. A part of MM Building 70 is leased by SMS to store intermediate bulk containers ("IBC totes") of sunflower oil for its customer Sunrise Foods. Although SMS's rail line is located approximately 750 feet from the entrance of Building 70, all IBC totes of sunflower oil are delivered to and removed from the MM Property by truck. The remainder of Building 70, which is not used by SMS, is used by MM for MM's

operations. MM has applied for and received Mannington Township Planning Board approval for SMS's sunflower oil storage operations, as memorialized in the Planning Board's Resolution 09-2023, a copy of which is attached as Mannington Township's EXHIBIT BBB.

Building 90 – Intermodal Container Repair/Refurbishing for Environmental Rail Solutions:

6. Since October 2023, MM Building 90 has been leased to and utilized by SMS for repairing and refurbishing intermodal cargo shipping containers that belong to SMS's customer, Environmental Rail Solutions (ERS). At Building 90 I met two SMS employees, Mr. Jim Morris and Mr. Chris Morris (unrelated), and also Mr. Tom Butts, who is the owner of a refurbishing company, TB Enterprises (TBE), with whom SMS has contracted to repair, weld, paint, and otherwise refurbish the intermodal containers at Building 90. Several TBE employees were also present and appeared to be conducting intermodal container repair and refurbishing operations at Building 90 during my inspection.
7. Building 90 is about 1,500 square feet in size, and is located alongside and approximately 60 feet from the SMS rail line. Although the intermodal containers are repaired and refurbished inside the building, the operations include a staging area of approximately 1,500 square feet that is just outside Building 90, where the intermodal containers are stored before and after repair and refurbishing. According to Mr. Butts, the repair and refurbishing operations are conducted Monday through Friday from 5:00 a.m. to 1:00 p.m. According to Mr. Jim Morris, an SMS employee is onsite at Building 90 during all hours of operations to handle the movement of the intermodal containers.

8. Mr. Jim Morris explained that ERS is currently the only SMS customer for whom SMS and TBE perform intermodal container repair and refurbishing services at Building 90. Mr. Jim Morris explained that most of the intermodal containers arrive at and leave from the MM Property by rail. Mr. Jim Morris told me that he does not know where the intermodal containers are sent from, or where they are taken after they have been repaired and refurbished, or whether their points of origination or destination are within or outside of the state of New Jersey.
9. The image attached as Mannington Township's EXHIBIT CCC, which is a screen shot from my phone, shows the location of Building 90 and its surrounding area within the MM Property.
10. The photos attached as Mannington Township's EXHIBITS DDD and EEE, which I took during my inspection, show the interior of Building 90.
11. The photos attached as Mannington Township's EXHIBITS FFF, GGG and HHH, which I took during my inspection, show ERS intermodal containers on railcars alongside Building 90.
12. The photo attached as Mannington Township's EXHIBIT III, which I took during my inspection, shows finished ERS intermodal containers that have been placed just outside of Building 90, and equipment used by SMS employees to load and unload intermodal containers.
13. The images attached as Mannington Township's EXHIBITS JJJ and KKK, which are screen shots from my phone, show a larger portion of the MM Property and its environs, for context.

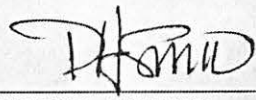
14. Mr. Salerni and Mr. Giudice both told me there are no other SMS operations being conducted at any other location within the MM Property.

15. No zoning permit, certificate of occupancy, Planning Board approval, or other land use approval has been issued to SMS, TBE, or MM for the intermodal container repair and refurbishing operations that are being conducted at the MM Property.

16. On March 25, 2025, I mailed a Notice of Violation and Order to Cease the intermodal container repair and refurbishing operations to SMS, TBE, and MM, a copy of which notice is attached as Mannington Township's EXHIBIT LLL. I asked Mr. Salerni for TBE's address before preparing the notice, but he told me he does not have it, so I issued the notice to TBE care of MM and SS, as indicated on the notice.

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: 3/26/25



ROBERT L. SCHMID

EXHIBIT BBB

RESOLUTION 09-2023

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 a Use Variance and Waiver of Site Plan Approval to allow an existing building to be used by a third party as a warehouse 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 July 13, 2023. 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, 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. Application for Development Review & Application for Variance (Use) with Site Plan Waiver, dated June 8, 2023; and
2. Statement in support of Use Variance; and
3. Affidavit of Ownership; and
4. Stockholder Disclosure Statement; and
5. Aerial Photo; and
6. VCT Bldg. SMS Area Base Map; and
7. Three (3) photos of inside and outside building; and
8. Lease Agreement.

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 representatives, David Kitts and Amy Bailey, the Tenant's representative, James Pfeiffer and the Applicant's Attorney, Adam I. Telsey, Esq., at the time of the hearing before the Board on July 13, 2023; and

3. A letter from the Board's Engineer, Corey Ronald Gaskill, PE, CME, CFM, dated July 11, 2023, 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 July 13, 2023; and

5. At the time of the hearing the following members of the public spoke:

A. Donald Asay. Mr. Asay inquired about whether the Applicant intended to eventually use the entire building for warehousing since the current tenant was only using a portion. The Applicant requested that they be authorized to use the entire building for warehousing by third parties, which was ultimately granted by the Board, subject to it not being refrigerated or housing hazardous materials.

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 Variance and for a Waiver of Site Plan Approval in order to utilize a portion of an existing building for use by a third party as a warehouse.

2. The property is located in the Industrial Zoning District. A warehouse is not a permitted use in this zone. Additionally, the use of the building as a warehouse would constitute a second principal use on the property which also requires a Use Variance.

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 a Use Variance and Waiver of Site Plan Approval to utilize an existing building on site as a warehouse to be used by a third party. A portion of the warehouse is being used by SMS Rail Service, Inc., ("SMS") for the storage of sunflower oil and wheat gluten. It is not a refrigerated building. They have been using the warehouse for a period of time as the Applicant was unaware that a Use Variance was required.

4. Mr. Telsey noted that the building was particularly suited for the use as a warehouse. The building had been empty for some time. The proposed use does not require any changes to the building or the outside surrounding area. He noted that the current tenant is SMS but that could change over the years, however, the type of product being stored in the warehouse would be similar in nature. Mr. Telsey noted that the proposed use is very similar to other uses which are permitted in the Industrial Zoning District and in many ways less intensive. There will be no negative impact as the building is located within the 500 acre Mannington Mills complex, with no visibility to the general public. The Applicant is seeking a Waiver of Site Plan Approval as there are no changes being proposed or made to the outside of the building.

5. The Applicant's representative Mr. Kitts gave the Board an overview of the history of the building in question. The building had been used in the past to make tiles. The building has been vacant for over a year which is not good for a company such as Mannington Mills. The tenant, SMS occupies one-half of the building or approximately 55,000 square feet. The other half of the building is currently vacant. The Applicant would like to be able to rent the other half of the building for warehousing as well. Mr. Kitts confirmed that the building is not refrigerated.

6. Mr. Kitts went on to describe the SMS operation. There are 3 to 4 employees. Operations are Monday to Friday from 7:00am to 5:00pm. No operations take place on weekends. The materials arrive by ship and are moved by tractor trailer to the building, unloaded and divided for distribution to their customers by tractor trailer. The truck traffic is nothing close to the truck traffic that was present when the building was being used for tile production. No rail is involved. Product comes in a tote and goes out to the customer in a tote.

7. A representative of SMS, James Pfeiffer testified that there would be no need for signage.

8. A discussion took place with the Applicant and the Board regarding the use of the balance of the building which is currently vacant. The Board in determined that the Use Variance would extend to allow the Applicant to rent the balance of the building to third parties for use as a warehouse, so long as the building is not refrigerated, no hazardous material is stored and the product that is being stored is substantially similar to the type of product being store by SMS.

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 as a warehouse, 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. 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 substantially similar to the permitted uses 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: Richman, Culver, Sakewicz, Colletti, Schneeman 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, 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 July 11, 2023, 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; and

7. The Use Variance Approval extends to permit the Applicant to rent out the balance of the existing building for use as a warehouse, subject to the requirements that the building cannot be refrigerated, no hazardous material may be stored and the product stored must be substantially similar to the type of product being stored by the current tenant.

THE PLANNING/ZONING BOARD OF THE
TOWNSHIP OF MANNINGTON

JOHN SAKEWICZ, 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 13th day of July 13, 2023; and such resolution was adopted by the Planning/Zoning Board of the Township of Mannington at a regular meeting held on August 10, 2023, by a vote ____ to approve, ____ to oppose and ____ to abstain.

REBECCA FERGUSON, Secretary

In favor of the resolution:

Opposed to the resolution:

Abstained:

10:06

5G 70



(Mannington Mills Building 90)



43°
AQI 23

Search Maps



EXHIBIT CCC



EXHIBIT DDD



EXHIBIT EEE



EXHIBIT FFF

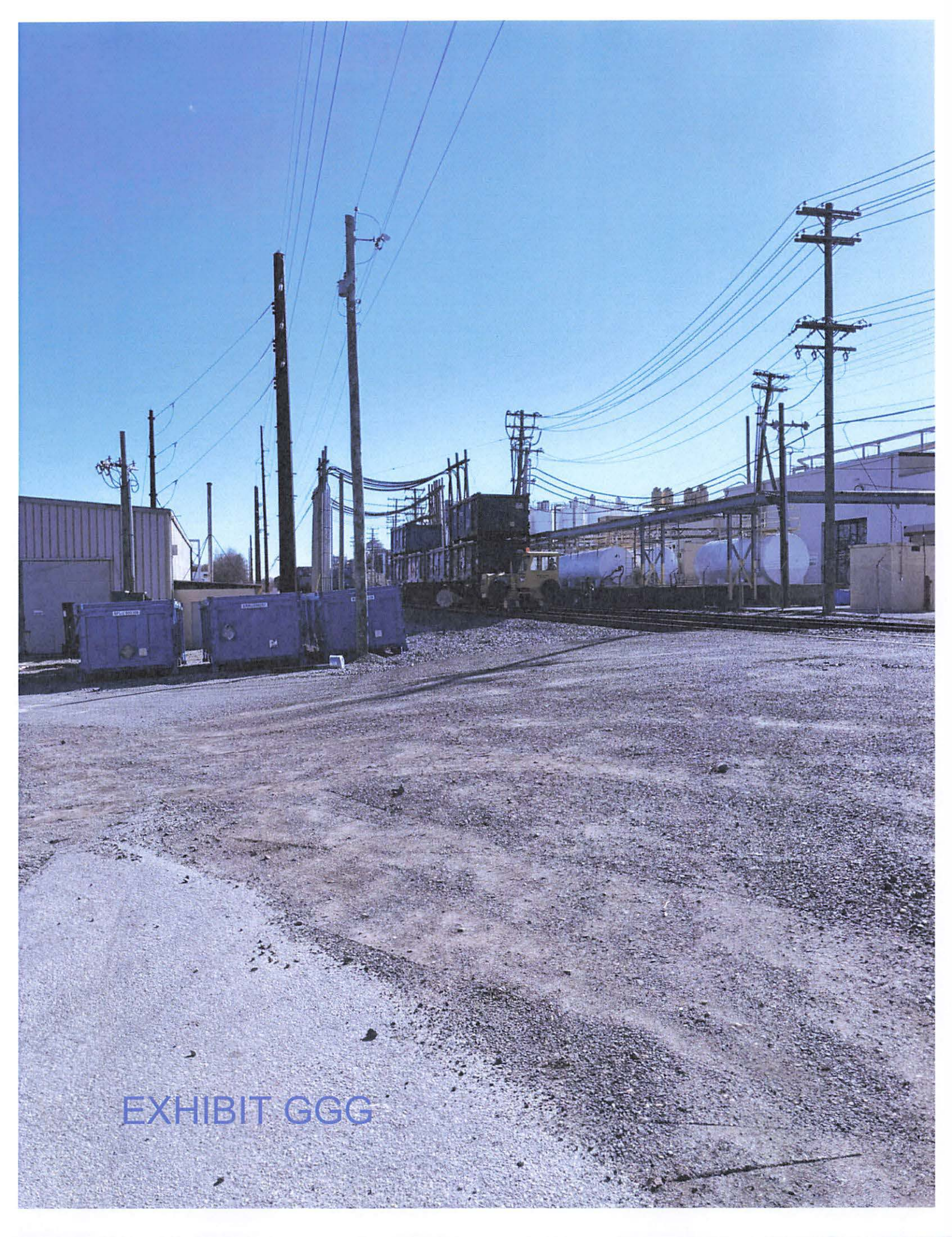
A photograph of an industrial facility, likely a power plant or refinery, under a clear blue sky. In the foreground, there is a gravel-covered area. To the left, several large blue storage containers are visible. In the background, there are large white storage tanks, industrial buildings, and a complex network of high-voltage power lines supported by tall wooden poles. The overall scene depicts a large-scale industrial operation.

EXHIBIT GGG



EXHIBIT HHH



EXHIBIT III



EXHIBIT JJJ (Mannington Mills Property)

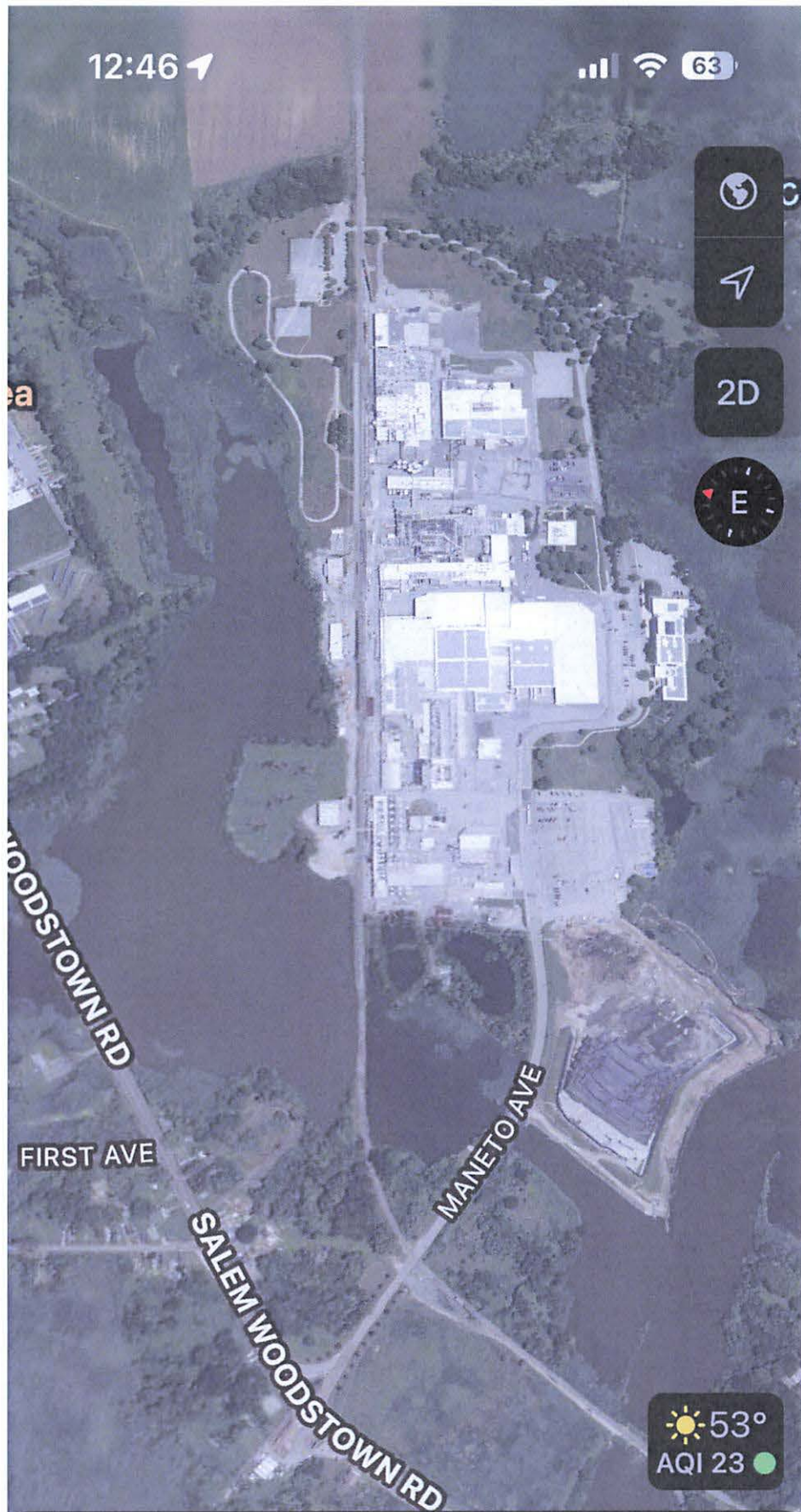
12:46

63



EXHIBIT KKK

(Mannington Mills Property)



53°
AQI 23

Search Maps



EXHIBIT LLL

MANNINGTON TOWNSHIP

MUNICIPAL BUILDING

491 Route 45

Mannington, NJ 08079

(856) 935-2359 Ext. 104

NOTICE OF VIOLATION AND ORDER TO CEASE

MANNINGTON MILLS, INC.
C/O SCOTT SALERNI, VP & GENERAL COUNSEL
75 MANNINGTON MILLS ROAD
SALEM, NJ 08079

SMS RAIL SERVICE, INC.
C/O JEFFREY L. SUTCH, PRESIDENT
P.O. BOX 711
BRIDGEPORT, NJ 08014

TB ENTERPRISES
C/O JEFFREY L. SUTCH, PRESIDENT
SMS RAIL SERVICE, INC.
P.O. BOX 711
BRIDGEPORT, NJ 08014

TB ENTERPRISES
C/O SCOTT SALERNI, VP & GENERAL COUNSEL
MANNINGTON MILLS, INC.
75 MANNINGTON MILLS ROAD
SALEM, NJ 08079

TB ENTERPRISES
75 MANNINGTON MILLS ROAD
SALEM, NJ 08079

RE: 75 MANNINGTON MILLS ROAD, BLOCK: 60 LOT: 6, 4 & 1

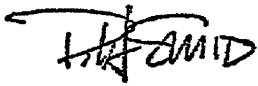
It has been determined that activities and improvements related to the operation of SMS Rail Service, Inc. (SMS), TB Enterprises (TBE), and Mannington Mills (MM) in and around Building #90 on the subject property referenced above are not a permitted principal, accessory, or conditional use in the Conservation or Industrial Districts. Those activities and improvements are being conducted in violation of the following township ordinances:

1. Ordinance §70-35 prohibits a change of use or occupancy of any building, structure or land, or construction of buildings or structures, unless in conformity with all the regulations specified for the district. Repairing and refurbishing intermodal containers is not a permitted use in the district, and no variance approval has been obtained for repairing and refurbishing intermodal containers in Building #90 or elsewhere on the subject property.

2. Ordinance §70-70 requires site plan review for all new or expanded uses. Site plan review/approval has not been obtained for repairing and refurbishing intermodal containers in Building #90 or elsewhere on the subject property.
3. Ordinance §70-68.C requires issuance of a zoning permit and certificate of occupancy before use or occupancy of any building or premises. No zoning permit or certificate of occupancy has been issued for repairing or refurbishing intermodal containers in Building #90 or elsewhere on the subject property.

I am hereby instructing you to immediately cease all operations related to repairing and refurbishing intermodal containers in Building #90 or elsewhere on the subject property, and to remove all related improvements, equipment, and intermodal containers from Building #90 and elsewhere on the subject property. The operations may be resumed only after such uses and improvements have been granted variance and site plan approval from the Mannington Township Planning Board.

Should you have any questions you may contact me by phone or email at zoning@manningtontwp.com. I am in the Mannington Municipal Building Thursdays from 3:45 to 4:30 pm.



ROBERT SCHMID, ZONING OFFICER

MARCH 25, 2025