

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CITY OF OZARK, a municipal corporation	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO: 2:14-cv-02196-TLB
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	
	)	

**UNION PACIFIC’S RESPONSE IN OPPOSITION TO THE CITY’S MOTION FOR
PARTIAL SUMMARY JUDGMENT.**

I. INTRODUCTION.

The City of Ozark (“City”) has filed a Motion for Partial Summary Judgment as to Count 1 of what it refers to as its “Amended and Restated Complaint, Request for Permanent Injunction, and Writ of Mandamus.” It should be noted that while originally styled as such, there is no motion for permanent injunction, and the request for a Writ of Mandamus was made against a dismissed party (the State Highway Department). With this motion, the City seeks a “[d]eclaration that an at-grade railroad crossing that was located in the downtown area of the Plaintiff was a public at-grade crossing that was known as the Oliver St. Crossing, as the at-grade crossing was part of a dedicated and platted city street known as Oliver St.” (Doc. 45, p.1).

Plaintiff’s motion should be denied for several reasons. First, the relief sought is not appropriate. Second, the lawsuit is— on its face—preempted by the ICCTA, as briefed in Union Pacific’s motion for summary judgment. Third, the lawsuit is barred by the equitable doctrines of laches, waiver, and estoppel, as briefed in Union Pacific’s motion for summary judgment. Fourth, the evidence relied on by the City is contrary to the factual evidence, to the stipulations

entered into by the City, and to the binding testimony of the City's Rule 30(b)(6) witnesses. Fifth, the evidence does not establish any easement, express or prescriptive, in which to award the declaration. Accordingly, the City's motion for partial summary judgment should be denied.

II. ARGUMENT: THE CITY IS NOT ENTITLED TO A PARTIAL SUMMARY JUDGMENT.

A. A declaratory judgment is not appropriate in this case.

The Court should deny the City's motion for partial summary judgment on the declaratory-judgment count because the requested relief is inappropriate, legally and procedurally. Whether to grant declaratory relief is discretionary with the Court. *Alsager v. Dist. Ct. of Polk Cnty. (Juvenile Div.)*, 518 F.2d 1160, 1163 (8th Cir. 1975). A declaratory judgment is generally proper "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings." *Id.* at 1163–64 (citations omitted). If neither of these results can be obtained, the court should decline to grant declaratory relief. *Id.* at 1164. Here, the City is requesting that the Court declare the former crossing a public at-grade crossing and further declare that Union Pacific illegally removed it. *See* Court Doc. 45 at 25, ¶¶ 73–74 & Court Doc. 46 at 9–10. A declaration to this effect would not serve the two criteria identified by the Eighth Circuit as necessary to the proper award of declaratory relief and should therefore be denied.

The declaration sought by the City would not serve any "useful purpose." Courts hold that when a declaratory-judgment action is duplicative of another claim, it is unnecessary and useless in resolving the parties' dispute, warranting dismissal. *See, e.g., O'Neil v. Simplicity, Inc.*, 553 F. Supp. 2d 1110, 1113 n. 4 (D. Minn. 2008) (dismissing claim for declaration as to

warranty obligations as duplicative of a breach-of-warranty claim); *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1199 (C.D. Cal. 2008) (dismissing action for declaratory relief on copyright-misuse claim where copyright misuse was also pleaded as an affirmative defense, concluding that declaratory action was “duplicative, and a needless waste of judicial resources.”); *Morningstar, LLC v. Hardee’s Food Sys.*, No. 4:08CV794-TIA, 2009 U.S. Dist. LEXIS 312, at *8–11 (E.D. Mo. Jan. 6, 2009) (dismissing declaratory-relief action as duplicative of four other counts in complaint).

In this case, the City’s claim for declaratory relief duplicates Count II of the City’s First Amended and Restated Complaint and is therefore not useful to the resolution of the parties’ dispute. *See* Court Doc. 14 at 47–48. Count II seeks an affirmative injunction, requiring Union Pacific to reinstall the crossing, and damages related to its removal. *See id.* at 48, ¶¶ 194–95. Hence, any interest the City may have had in the crossing will necessarily be resolved in the adjudication of Count II. The same is true with respect to the legality of Union Pacific’s removal of the crossing; indeed, the City repeatedly asserts in Count II that Union Pacific acted wrongfully by removing the crossing. *See id.* at 47–48, ¶¶ 189–193. Because Count II is duplicative of the declaratory-judgment claim, the latter will serve no useful purpose in settling the litigation between the parties.

Likewise, the declaratory-judgment action will serve neither of the aforementioned criteria because it seeks to adjudicate past conduct. Courts consistently hold that a declaratory judgment is improper solely to adjudicate past conduct. *See, e.g., Hodinka v. Del. County*, 759 F. Supp. 2d 603, 610 (E.D. Pa. 2010) (“Declaratory judgment is inappropriate solely to adjudicate past conduct . . . [n]or is declaratory judgment meant simply to proclaim that one party is liable to another.”) (quoting *Corliss v. O’Brien*, 200 F. App’x 80, 84 (3d Cir. 2006)); *Del. State Univ.*

Student Hous. Found. v. Ambling Mgmt. Co., 556 F. Supp. 2d 367, 374 (D. Del. 2008) (“A declaratory judgment is inappropriate solely to adjudicate past conduct.”) (quoting *Gruntal & Co., Inc. v. Steinberg*, 837 F. Supp. 85 (D.N.J. 1993)); *SEC v. Credit Bancorp, Ltd.*, 738 F. Supp. 2d 376, 388–89 (S.D.N.Y. 2010) (“[D]eclaratory judgment is inappropriate where the moving party seeks to adjudicate past conduct . . . There is no basis for declaratory relief where only past acts are involved.”) (citations omitted).

This conclusion follows from the purpose of a declaratory judgment, which “is ‘to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication, without waiting until his adversary should see fit to begin suit, after damage had accrued.’” *Nucor Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 577 (7th Cir. Ind. 1994) (quoting *Cunningham Bros., Inc. v. Bail*, 407 F.2d 1165, 1167 (7th Cir. 1969)). Thus, “the very purpose of a declaratory judgment is to provide *prospective* relief.” *White v. Califano*, 437 F. Supp. 543, 560 (D.S.D. 1977) (emphasis in the original). It is the prospective nature of the action that distinguishes a declaratory judgment from an impermissible advisory opinion. *Gruntal*, 837 F. Supp. at 89 (“The real value of the judicial pronouncement - what makes it a proper judicial resolution of a ‘case or controversy’ rather than an advisory opinion - is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.”) (quoting *Rhodes v. Stewart*, 488 U.S. 1 (1988)).

In this case, the City is seeking a declaration to adjudicate past conduct. In its Motion for Partial Summary Judgment, the City states “that it is entitled to a judgment as a matter of law against the Defendant, as the Defendant illegally removed a public at-grade crossing” Court Doc. 45 at 25, ¶ 74. Whether the crossing was a public crossing, and whether Union Pacific illegally removed it, would therefore necessitate an adjudication of conduct that has already

occurred and cannot alter the parties' behavior going forward. There is nothing prospective in the nature of the relief sought by the City, and granting its request for a declaratory judgment would neither be useful nor "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings." *Alsager*, 518 F.2d at 1163.

Instead, because the gravamen of the City's action is its attempt to require Union Pacific to re-install the crossing, and receive damages for its prior removal, a coercive remedy must be sought, not a declaratory judgment. As one court in this circuit has explained:

Declaratory judgments furnish the Court with a procedural device to provide a non-coercive remedy in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy (such as an injunction or damages award) and in cases in which a party who could sue for coercive relief has not yet done so.

Kirkhof v. Brown, No. 01-476, 2002 U.S. Dist. LEXIS 23661, at * 17–18 (D. Minn. Nov. 27, 2002) (citing *B. Braun Med. V. Abbott Lab.*, 124 F.3d 1419 (D.C. Cir. 1997); *Gruntal & Co. v. Steinberg*, 837 F. Supp. 85 (D. N.J. 1993)).

To this end, when litigation has reached a point where damages or an injunction are available and pleaded, courts have held that a declaratory judgment is not a proper remedy. *Id.* at *18 (declining to award declaratory relief on summary judgment where both parties were before the court seeking damages); *see also Credit Bancorp*, 738 F. Supp. 2d at 388 (holding motion for declaratory judgment procedurally improper and stating that "[a] motion for declaratory judgment is inappropriate where, as here, a party has 'already invoked its right to a coercive remedy.'" (quoting *Piven v. Wolf Haldenstein Adler Freeman & Herz LLP*, No. 08 Civ. 10578, 2010 U.S. Dist. LEXIS 27609 (S.D.N.Y. Mar. 12, 2010))).

Pursuant to the foregoing authorities, the Court should deny the City's Motion for Partial Summary Judgment. The declaratory relief it seeks would serve no useful purpose or terminate the controversy between the parties. It is an improper remedy here and should be denied.

B. The lawsuit is pre-empted by the ICCTA and barred by laches, estoppel, and waiver.

Most, if not all, of the City's alleged material, undisputed facts are not material at all to Union Pacific's own motion for summary judgment. A material fact is one, which depending on the applicable substantive law, might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Longen v. Waterous Co.*, 347 F.3d 685, 688 (8th Cir. 2003). An issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." *Longen*, 347 F.3d 685, 688 (8th Cir. 2003). Whether the crossing was public or private, however, is immaterial to the preemption analysis. Indeed, the City and Union Pacific agree on the standard for ICCTA preemption (as found in the City's Response to the Motion to Dismiss): if the action sought by the City would unreasonably interfere with railroad operations or pose undue safety risks, that action is preempted. The public/private distinction is not material. Accordingly, Union Pacific's own motion should be granted without the need to consider the long and largely unknown history of the street that traversed the train tracks.

In addition, none of the arguments made by the City rebut Union Pacific's *prima facie* case for summary judgment on the grounds of estoppel, waiver, and laches. Indeed, as discussed below, the City cannot deny its own Rule 30(b)(6) designees' testimony establishing the facts.

Union Pacific's Motion for Summary Judgment and its Memorandum of Law in Support of the Motion for Summary Judgment are hereby incorporated by reference.

C. “The FRA inventory” is not reliable and cannot be used as evidence for summary judgment.

The City relies upon an inventory by the Federal Railroad Administration (FRA) that lists the crossing as a public crossing (and ignores the State Highway Department’s designation as a private crossing). This FRA inventory is not reliable.¹ As background, in 2008, Congress adopted the Rail Safety Improvement Act, 49 U.S.C. §20160, and for the first time mandated that the crossing inventory should be updated on an annual basis. Thus, during the relevant time period here, the FRA crossing inventory was a compilation of information voluntarily and periodically submitted to the FRA by state highway agencies and railroads. It did not claim to be, nor was it, an accurate record of historical changes and crossing characteristics. The legislative history (through a report by the FRA to Congress dated February 2002) illustrates why the inventory may not be relied upon as an accurate historical record:

Unfortunately, the inventory data have not been kept up-to-date. Currently, the information is provided on a voluntary basis, and the accuracy varies from state to state and from railroad to railroad. Along with missing information for some crossings, in some cases the existing database does not accurately reflect the current status of a crossing. . . .

In [one] case, the FRA inspected 92 randomly selected crossings in a major metropolitan area. Based on the inspection of those crossings, FRA discovered that the US DOT Grade Crossing Inventory contained inaccurate data for 67 of the 92 crossings, including 39 that no longer existed.

See FRA Report, attached hereto as Exhibit A. A letter in this very case from the FRA to the City also makes clear that the FRA does not consider the inventory reliable. See Letter to Mayor Sneath from the FRA (noting that the database designation “alone does not mean that the

¹ The FRA Inventory is also not admissible pursuant to 23 U.S.C. § 409.

crossing was a public crossing.”), attached as Exhibit B. The inventory cannot be relied upon as summary judgment evidence.

D. “The Lost Public Documents”

Essentially, the City argues that there is no evidence of any documentation to prove that the street was public because it was lost. First, it is irrelevant whether the street that went over the tracks was public, as the issue is the crossing. (And, again, the nature of the crossing is not material to ICCTA pre-emption). Second, it is not enough to allege that such documents must have existed; the City has to prove the contents by clear and convincing evidence. This is akin to an argument regarding a lost deed. The Arkansas Supreme Court has stated that is a “settled principal that those who claim under a lost deed must prove its contents by clear, satisfactory and convincing proof.” *Thompson v. Graves*, 281 Ark. 492, 494 (1984). More recently, the court held that, “[i]t is a settled principle of law that those who claim under a lost deed must show by clear, satisfactory and convincing proof” the existence of the lost deed and also that “parole evidence should show the deed was duly executed as required by law, and should show all its contents.” *Witt v. Graves*, 302 Ark. 160, 162 (1990) (citing *Thompson*). The City has not proven the existence and contents of any documents by even a preponderance of the evidence, much less by clear and convincing evidence.

E. There is a dispute as to whether a street named “Oliver Street” existed.

The City states that it is undisputed that the street that crossed the tracks was called “Oliver Street.” Some witnesses testified that they had heard of an Oliver Street before; others testified that they had never heard it called Oliver Street.² None can set forth an official city

² It is undisputed that a family named Oliver lived in a neighborhood south of the tracks pre-1970. (Canady, 12:14—25, attached to Doc. 37 as Exhibit 6).

document establishing the street, and certainly none establishing it as “Oliver.” Former Ozark Postmaster Robert Trotter testified that he was familiar with the city streets and that Oliver Street was not a recognized city address. (15:10—21, attached to Doc. 37 as Exhibit 7).³ The current Mayor, T.R. McNutt, testified that he has lived in Ozark since 1962 and never remembered there being an Oliver Street. (McNutt Dep., 57:13—24, attached to Doc. 37 as Exhibit 1). Whether the street had an official name is indeed in dispute.

F. That witnesses testified they saw Bull Southerland brush hogging does not establish that the City maintained the street.

The City states, apparently as evidence of the alleged public nature of the street, that “there is undisputed evidence that at least one employee of the Plaintiff, Bull Southerland, used the Plaintiff’s 8N Ford Tractor with a box blade to grade and maintain the portion of Oliver St. that was located South of the Defendant’s railroad tracks and also brush hogged the grass around Peach Valley Gas Company’s tanks. . . .” (Doc. 46, p. 6). At most, however, the testimony establishes that he was seen, without any specificity on the years, grading and brush hogging in the area. But, no one can establish that he was doing it on behalf of the City. It is just as reasonable to infer that he was hired by a private company to perform this work. Indeed, the City has stipulated that it has no evidence of any maintenance that it performed to the road after 1975. See Stipulation, Milam Dep., 11:20—25, attached to Doc. 37 as Exhibit 8.

³ In fact, Ken Smith who was an owner of F&S Lumber Company in the 1950s and 1960s, had never heard of an “Oliver Street” despite the fact that he would have used the road to get to his company most every business day. (Smith, 14:14—25, attached to Doc. 37 as Exhibit 9).

G. The City cannot disavow the testimony of its Rule 30(b)(6) designees, which establishes that the Mayor asked Union Pacific to remove the Crossing without objection from the City Council.

On January 23, 2015, Union Pacific noticed Rule 30(b)(6) depositions. Included in the 13 categories were the following:

- Category 2: “The details and current existence of the letter read by former Mayor Timmerman as described by Mayor McNutt at the council meeting reflected in the attached Exhibit”; and
- Category 3: “The details of the meeting described by Mayor McNutt at the council meeting reflected in the transcript attached as Exhibit 1 hereto whereby former Mayor Timmerman read a letter from Union Pacific regarding the crossing at issue.”

(Exhibit 10 to Union Pacific’s Motion for Summary Judgment).

On February 20, 2015, the City responded. For Categories 2 and 3, the City’s designees included former Mayor Todd Timmerman, Mayor McNutt, Tom Edgin, and John Milam. (Exhibit 10 to Union Pacific’s Motion for Summary Judgment). The City, through its attorney Christopher Brockett, confirmed these designees on February 26, 2015 at the start of John Milam’s deposition. (Stipulation, Milan Dep., 5—9). Not only once then, but twice, the City designated Timmerman, McNutt, Edgin, and Milam as its Rule 30(b)(6) designees for the topics that the City now requests this Court to ignore. The effect of the designation is to bind the City to the admissions and testimony of its designees, as explained below.

A party responding to a Rule 30(b)(6) notice must not only produce such number of persons as will satisfy the request, but more importantly, it must prepare them so that they may give complete, knowledgeable, and binding answers on behalf of the corporation. FRCP 30(b)(6); *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989); *see also Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (“To satisfy Rule 30(b)(6), the corporate deponent has an

affirmative duty to make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf.” (internal quotations and citations omitted)).

"[T]he purpose of a Rule 30(b)(6) witness is to present the organization's position on the listed topic and that person, then, provides binding answers on behalf of the organization." *Aldridge v. Lake Cnty. Sheriff's Office*, No. 11 C 3041, 2012 U.S. Dist. LEXIS 102514, 2012 WL 3023340, *3 (N.D. Ill. July 24, 2012)(citing *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012)). One district court judge has concluded:

I find the latter position—that statements in a Rule 30(b)(6) deposition are binding on the corporation—to be the one most consistent with the purpose of the rule, which is to "permit[] the examining party to discover the corporation's position via a witness designated by the corporation to testify on its behalf." *Rosenruist-Gestao E Servicos LDA*, 511 F.3d at 440 n.2. It is all the more appropriate to bind a corporation to the testimony of its Rule 30(b)(6) designee, where the corporation itself selects the deponent who will speak for it and has the opportunity to prepare the deponent to testify to matters beyond his or her personal experience. *See* Fed. R. Civ. P. 30(b)(6); *Brazos River Auth.*, 469 F.3d at 433. Thus, in my view, some extraordinary explanation must be required before a corporation is allowed to retreat from binding admissions in the testimony of its Rule 30(b)(6) designee. *Contra A.I. Credit Corp.*, 265 F.3d at 637.

Estate of Thompson v. Kawasaki Heavy Indus., 291 F.R.D. 297, 302-304 (N.D. Iowa 2013). *See also Brown v. West Corp.*, 2014 U.S. Dist. LEXIS 62476 (D. Neb. May 6, 2014) (concluding that a party was bound by the deposition testimony of its Rule 30(b)(6) witnesses).

The City's designees testified that sometime around 2000 or 2001, Scott James, an Ozark resident, complained to Mayor Timmerman about the train horns that sounded for the crossing. (Timmerman Dep., 17:24—25, attached to Doc. 37 as Exhibit 16; McNutt Dep, 73:7, 74:2; Felkins Aff., attached to Doc. 37 as Exhibit 17; Gilmer Dep., 15—16, attached to Doc. 37 as Exhibit 18). The City's designees testified that following Mr. James' complaint, the council

voted and Mayor Timmerman was given authority by the council to contact Union Pacific. (McNutt Dep., 76:22; Milam Dep., 27:19—21; Timmerman Dep., 24:20—23). Subsequently, Mayor Timmerman spoke with Union Pacific’s Manager of Industry and Public Projects, Charlie Felkins, and asked him to remove the crossing. (Timmerman Dep., 18:16—17; 19:10—13; Felkins Aff.; McNutt Dep., 83:25). Mayor Timmerman subsequently went back to the council and showed a letter from Union Pacific, whereby the railroad stated that it would take out the crossing and stop the horn blowing. (Milam Dep., 26:1—10; McNutt Dep., 80:3—16; Timmerman Dep., 22:19-25; 23:1-2; Edgin Dep. 20:1-6, attached to the Motion as Exhibit 19). None of the council members objected. (Milam Dep., 26:13; Timmerman Dep., 23:2; McNutt Dep., 80:3—16; Edgin Dep. 20:14—22; 21:10—13, attached to Doc. 37 as Exhibit 19). Councilman Milam testified that “we were all in agreeance [sic].” (Milam Dep., 32:25). Shortly thereafter, Union Pacific removed the crossing. (McNutt Dep., 82:4).

This testimony was designated by the City as its Rule 30(b)(6) testimony. The City cannot now disavow it as it attempts to do in its Brief. The City cannot argue that “[t]here is a dispute regarding the existence of a potential letter that was sent to Mr. Timmerman regarding the removal of the Oliver St. Crossing that Mr. Timmerman may or may not have read to the members of the Plaintiff’s City Council” (Doc. 46, pp. 8—9). The Rule 30(b)(6) witnesses Timmerman, McNutt, Edgin, and Milam bind the City to the facts stated above regarding the removal of the crossing.

In addition, the City’s contention that it is “irrelevant whether this letter exists or whether Mr. Timmerman requested the Defendant to remove the Oliver St. Crossing,” (Doct. 46, p. 9) is wholly without merit. Of course it is relevant if the Mayor asked Union Pacific to remove the crossing. As briefed in Section B of Union Pacific’s Memorandum of Law in Support of Its

Motion for Summary Judgment, which is incorporated herein, the undisputed facts establish that the City's lawsuit is barred by estoppel, laches, and waiver *because* then-mayor Timmerman asked Union Pacific to remove the crossing.

H. The City is not entitled to summary judgment because it cannot show an easement.

At a minimum, the City must establish an easement. It has not and cannot do so, as discussed below.

i. The Court should not accept blanket legal conclusions.

The City makes sweeping factual and legal conclusions without so much as a single cite to the record or to the law. For example, the City states "there has been a dedication both expressly by the Plaintiff when it placed the Oliver St. and the Oliver St. Crossing on all maps created for the Plaintiff beginning in 1942 and continuing until at least 1980. In addition, there has been an implied dedication as the Plaintiff's residents utilized both Oliver St. and the Oliver St. Crossing from approximately 1876 until it was removed in 2001 for various public activities." (Doc. 46, p. 7).

This Court does not have to accept a blanket legal conclusion without supporting facts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (explaining that courts are not required to accept a plaintiff's legal conclusions and stating that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") Here, the facts (found in the actual record) do not support these legal conclusions, as discussed elsewhere.

- ii. *Contrary to the City's statements, A.C.A. Section 14-301-301 does not mention easements and does not apply to this case.*

The City relies heavily upon A.C.A. Section 14-301-301, stating that the statute “set[s] out the procedure for vacating or abandoning a public street, alleyway, and easement” and that “[a]bsent compliance with that special procedure, whereby the town council vacates or abandons the street, alleyway and/or easement, any abandonment or closure is not valid.” (Doc. 46, p.7) (emphasis added). *See also* (Doc. 46, p.8) (making the same statements).

The City misreads the statute; A.C.A. Section 14-301-301 does not even mention easements (and certainly not grade crossings). The statute provides:

(b) In all cases where the owner of property within a city or town shall have dedicated, or may hereafter dedicate, a portion of the property to the public use as streets or alleys by platting the property and causing the plat to be filed for record, as provided by law, and any street or alley, or section thereof, shown on the plat so filed shall not have been actually used by the public as a street or alley for a period of five (5) years and in all cases where all property abutting any street or alley, or section thereof, is owned by any educational institution or college, whether the property shall have been actually used by the public as a street or alley for a period of five (5) years or not, the city or town council shall have power to vacate and abandon the street or alley, or any portion thereof, by proceeding in the manner set forth in this subchapter.

Id. On its face, A.C.A. Section 14-301-301 does not apply in this case.

Moreover, the statute is inapplicable where there has been no city dedication. *Jones v. American Home Life Ins. Co.*, 293 Ark. 330, 738 S.W.2d 387 (1987); *Cernauskas v. Fletcher*, 211 Ark. 678, 201 S.W.2d 999 (1947). There is no evidence of a city dedication here. In fact, the City has provided a stipulation as to the evidence regarding dedication:

3 MS. JONES: Okay. Number ten is the
4 existence of any recorded plat purporting
5 to dedicate Oliver Street for a public
6 purpose. I don't have your letter in front
7 of me. Did you have a witness for that?

8 MR. BROCKETT: Tom, Tommy Watkins
9 {sic}, who was deposed yesterday, and Royce
10 Gattis, who was deposed yesterday, both
11 spoke regarding a plat.⁴

12 At this time no plat has been
13 obtained, but they testified to what they
14 remember of a plat.

15 MS. JONES: Okay. So do you agree
16 that Tommy Watkins [sic] and Royce Gattis'
17 testimony that's already on record will
18 stand as the city's 30(b)(6) testimony with
19 regards to category ten?

20 MR. BROCKETT: Yes.

21 MS. JONES: Okay. Eleven is the
22 existence of an ordinance accepting and
23 recording plat dedicating Oliver Street for
24 a public use.

25 Mr. Brockett, no witness has been
13

1 designated for this category. Do you agree
2 that the city has no evidence or
3 documentation regarding category 11?

4 MR. BROCKETT: Yes.

5 MS. JONES: Okay. Twelve is the
6 existence of any recorded easement or other
7 instrument giving the city the right to
8 cross Union Pacific's right-of-way at the
9 requested crossing.

10 Mr. Brockett, you have identified
11 Carol Sneath as the city's 30(b)(6)
12 designee for that category.

13 Do you agree that her testimony is
14 already of record and stands as the

⁴ Tommy Watson testified that he does not know of any plats that actually purport to dedicate "Oliver Street" for public use, of any document showing the City of Ozark accepted a recorded plat showing "Oliver Street," or of any ordinance by the City establishing "Oliver Street" or anything do with "Oliver Street." (Watson Dep., 68:10—69:22, attached to Doc. 37 as Exhibit 60). Royce Gattis only testified that he recalled seeing a "plat" but to his knowledge it had not been located by anyone. (Gattis Dep., 129:9—25, attached hereto as Exhibit F).

15 30(b)(6) testimony?⁵

16 MR. BROCKETT: Yes

(Stipulation, Milam Dep., 5—9). Accordingly, there is no evidence to establish a dedication.

The most provided was that Mr. Gattis had seen a “plat,” but no details exist to establish the contents of any alleged plat.

iii. *There is no evidence of an express easement.*

The City’s argument for an express easement is that it is evidenced by city maps. Specifically, the City states that “[b]eginning at least as early as 1942 and continuing until at least the 1980s, the Plaintiff designated on all city maps Oliver St., as a public city street.” (Doct. 46, p. 6) These maps do not legally or factually establish an express easement.

First, none of the maps relied upon by the City are competent summary judgment evidence. “To be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of Fed. R. Civ. P. 56(e). Documents which do not meet those requirements cannot be considered.” (quoting *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 635-36 n.20 (8th Cir. 2000)).” *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005). The maps relied upon by the City have not been authenticated. They are inadmissible hearsay. *Mays v. Rhodes*, 255 F.3d 644, 648 (8th Cir. 2001)(“While we review the record in the light most favorable to . . . the non-moving party, we do not stretch this favorable presumption so far as to consider as evidence statements found only in inadmissible hearsay.”). No one has established what these maps are, where they are from, who did them, if they were

⁵ Carol Sneath testified that she was not aware of any recorded easement or other instrument granting the City the right to cross Union Pacific’s right-of-way and tracks. (Sneath Dep., 89:3).

accurately done, or when they were done. It has not been shown that any map relied upon by the City is a map intended to plat a dedication for the property at issue. In fact, as Mayor T.R. McNutt pointed out in his deposition, at least one of the “maps” relied upon by the City looks as if “Oliver Street” was not contained on the original map:

Mayor McNutt: Will you agree that that’s a rough drawing on that? If that’s all—if we’re talking about the same street, I have seen the map where they are all nice and neat streets, and then, and then Oliver Street, as y’all call Oliver Street, is penciled in and don’t look like it was original.

(McNutt Dep., 161:5—10). It has not been shown who penciled in Oliver Street, or why, or when.

Second, the City ignores other city maps and documents which do not show an Oliver Street. Mayor T.R. McNutt produced and testified about these documents, including the following:

- Exhibit C, attached, is a Chamber flier showing an index of city streets. Oliver Street was not included;
- Exhibit D, attached, is a City of Ozark Base Map, which McNutt testified was a city project planning map from November 1994. Oliver Street was not included; and
- Exhibit E, attached, is a Map of Franklin County, Arkansas dated August 2009. It does not include Oliver Street.

(McNutt, Dep. 15—22) To suggest all City maps show an Oliver Street is contrary to the facts. These maps produced by Mayor McNutt belie the assertion that all City maps were somehow intended to dedicate Oliver Street.

iv. *There is no implied dedication, as there is no evidence of any appropriation.*

The City relies on a theory of an implied dedication, citing to cases such as *Town of Gilbert v. Fruehauf*, 2013 Ark. App. 17 (2013), as it admittedly cannot establish an express dedication. As *Fruehauf* points out, “there are two required elements for a valid dedication—the owner must appropriate the property specifically to its intended use, and the public must accept the land. *City of Sherwood v. Cook*, 315 Ark. 115, 865 S.W.2d 293 (1993).” *Id.* at 2—3. An “essential element of dedication is an intent on the part of the owner to dedicate. If such an intent cannot be found in the facts and circumstances of the particular case, no dedication can exist.” *Id.* at 3. While the City focuses its argument on the public acceptance, it does not offer any competent proof that the City appropriated the property for public use. Ultimately, in *Fruehauf*, there was insufficient proof of a dedication or of a prescriptive easement. The Court held:

The Town of Gilbert responds on appeal that the failure to name a street will not necessarily defeat dedication. This is correct. There can be an implied dedication. In *City of Cabot v. Brians*, 93 Ark. App. 77, 83-84, 216 S.W.3d 627, 631 (2005), we concluded that because an easement parcel shown on the plat was intended for public use, the plat and bill of assurance that referred to the dedication of “streets and easements” was sufficient to constitute a dedication of the parcel even though the parcel was not identified on the plat as a street. We also noted that the bill stated that the owners of the subdivision lots took title subject to the right of public utilities “and the public,” and that the dimensions of the easement were consistent with the city’s other streets. *Id.*, 216 S.W.3d at 631.

In contrast, here, the disputed land is neither referenced nor identified as a street, although all other streets are named and identified in the plat. Additionally, the disputed area is 200’ wide, whereas all other “streets” identified in the plat are 50’. The persuasiveness of the lack of the donor’s intent to dedicate the disputed area as a street is further amplified by the fact that the plat states its intent of “showing streets and alleys on same,” and in a

subsequent deed, Gilbert, trustee, deeded part of the disputed area away. This is a strong indicator that he had no intention of dedicating the area as a city street the year earlier. Furthermore, there was a railroad built through the center of the 200' strip, which supports the trial court's conclusion that the donor's true intent was to build a railroad through the disputed land, not to dedicate it as a street to the city—that the disputed area was nothing more than a railroad right-of-way, allowing roads and people to access the donor's railroad operation.

Without a dedication, this case becomes very simple. If the Town of Gilbert cannot show a dedication of the land as a street or a prescriptive easement, then its whole case rests not on the strength of the town's title, but on the weakness of Fruehauf's. However, the evidence shows that public use on the east half of the former railroad right-of-way ceased in the 1940s when it was fenced by Fruehauf's predecessors in title. The public use of the area transferred to the west half of the right-of-way, on the railroad-bed area. As the facts stand, regardless of whether at some prior point in time the Town of Gilbert could have had a claim to a prescriptive easement, any such claim has long since been abandoned. Because the evidence supports the trial court's conclusion that the area was never dedicated as a public street and there is no question of material fact left unresolved, we affirm the trial court's decision to award summary judgment in Fruehauf's favor and deny Gilbert's summary-judgment claim.

Id. at *3—5. Likewise, here, there is no competent proof which establishes any dedication—express or implied—and the City cannot then establish a claim to the property.

v. *There is no evidence of a prescriptive easement.*

Union Pacific has previously briefed this issue. It therefore incorporates by reference Section D of its Memorandum of Law in Support of its Motion for Summary Judgment.

vi. *Even if the crossing was a public crossing for a time, the flooding of the land south of the tracks in the 1960s/1970s destroyed any public use.*

Assuming arguendo that use of the road gave rise to an easement interest held by the public, any such easement was lost through non-use after the Army Corps of Engineers flooded the land south of Union Pacific's tracks in the 1960s or early 1970s. Generally, a public

prescriptive easement can be lost by non-use coupled with additional facts indicating an intent to abandon.⁶ *Shue v. Phillips*, No. CA 88-379, 1989 Ark. App. LEXIS 77, at *6 (Ark. Ct. App. Mar. 1, 1989) (citations omitted). *Shue* is instructive with regard to the facts in the present case.

Shue involved a dispute over use and ownership of a portion of a road now running adjacent to Allsopp Park in Little Rock. *Id.* at *1–2. Prior to 1960, the public used the roadway and the City maintained it. *Id.* at *2. In 1960, however, part of the road was re-routed, and the public began using the new segment to travel between the other principal roads. *Id.* Thereafter, the City maintained the re-routed segment of the road but not the former portion. *Id.* As a result, the former portion of the road became overgrown with brush and riddled with potholes, making it a virtually impassable. *Id.* at *3. Testimony in the case also established that people considered the old portion of the road a “‘dead end’ used by no one for any purpose” because after the relocation, it “led nowhere.” *Id.*

The lack of use of the old road played a critical part in the lower court’s finding, and the appellate court’s affirmance, that it had been abandoned and that any prescriptive easement held by the public had been lost. *Id.* at *5–7. In finding sufficient evidence of abandonment, the Arkansas Court of Appeals specifically pointed to the “cessation of public travel when the road was relocated in 1960, permitting the easement in question to return to its natural state without

⁶ The City relies on the case of *Bushmiaer v. City of Little Rock*, 231 Ark. 848, for the proposition that “a city of the first class does not abandon a publicly dedicated easement by non-use.” (Doc. 46, p. 7). As previously discussed, there is no evidence of a publicly dedicated easement. However, *Shue* was decided 29 years after *Bushmiaer*. Further, in *Bushmiaer*, unlike here, there was “no question of abandonment, for it is undisputed that the public has used part of the alleged right-of-way from the beginning, and has continued to so use it.” *Id.* at 854.

further use or maintenance by the public.” *Id.* at *7. The court also rejected the appellant’s argument that the easement had not been properly abandoned or vacated by the City because the former roadway was not a dedicated one and the City never acquired the easement. *Id.* at *8–9. (“The fact that the easement lay within the confines of a city or town might protect it from the ordinary rules of adverse possession . . . but does not make it one which the city held in trust for the public use.”)

Like *Shue*, any easement acquired by the public in the street or crossing in question was lost after the Corps flooded the area south of the tracks. The road, the crossing, and the property essentially became a “dead end” and “led nowhere.” *Shue*, 1989 Ark. App. LEXIS at *3. After the flooding, there was nothing on the property south of Union Pacific’s tracks, save for propane tanks stored there pursuant to a lease with a private gas company. (Rinker Aff., ¶ 11, McNutt Dep., 64:11–13, 64:25; Key Dep., 47:15–18). That company, Cornerstone Propane, terminated its lease effective 1998, and the tanks were removed by August of that year. (Rinker Aff. ¶ 4) By the late 1990s and early 2000s, the road and crossing were not used by anyone or for virtually any purpose. The City’s Rule 30(b)(6) designee and current mayor, T.R. McNutt admitted that after the flood, no public use existed for the crossing. (McNutt Dep., 68:6)

Moreover, just as in *Shue*, the road and crossing at issue were not dedicated by the city, rendering the statutory procedure for abandonment inapplicable. 1989 Ark. App. LEXIS at *8–9. The fact that members of the public, and later the City through its then-mayor, asked Union Pacific to close the crossing is further evidence of an intent to abandon any easement or interest that may have been acquired through the public’s use prior to the flooding by the Corps. This intent, coupled with the cessation of use by the public, establishes that any interest in the road or crossing was lost.

III. CONCLUSION.

The Rule 30(b)(6) testimony of the City is that it authorized then-mayor Todd Timmerman to ask the Railroad to take the crossing out. Years later, it regrets that decision. Regret is not a legally valid theory on which to bring a lawsuit. Instead, the lawsuit should be barred by estoppel, laches, and waiver as discussed in Union Pacific's Motion for Summary Judgment.

As further discussed in Union Pacific's Motion for Summary Judgment, the proposed crossing would unreasonably interfere with railroad operations by reducing rail line capacity, reducing siding storage capacity, eliminating train meets, increasing switching operations, increasing labor costs, and increasing transit times. The proposed crossing would also create undue safety risks, including the risk of death, injury, and contamination of the Arkansas River. For these reasons, the City's action is preempted by the ICCTA.

Thus, this Court need not reach the City's Motion for Partial Summary Judgment. If it does, however, it should be denied. The relief sought, declaratory judgment, is not appropriate under these circumstances. Further, the evidence the City relies on is contrary to the factual evidence, to the stipulations entered into by the City, and by the binding testimony of the City's Rule 30(b)(6) witnesses. Moreover, the City has not established any easement, express or prescriptive, through which to award the declaration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jamie Huffman Jones, hereby certify that the foregoing pleading was filed with the Clerk of Court using the CM/ECF Filing System on this 14th day of May, 2015, and said Clerk shall serve an electronic copy of same upon the following counsel of record:

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