

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

CITY OF OZARK, ARKANSAS, a municipal )  
corporation )

Plaintiff, )

vs. )

UNION PACIFIC RAILROAD COMPANY, )  
the ARKANSAS STATE HIGHWAY )  
& TRANSPORTATION DEPARTMENT )  
(an Agency of) The State of Arkansas, )  
AND THE ARKANSAS STATE HIGHWAY )  
COMMISSION )

Defendants, )

CIVIL ACTION NO:2:14-CV-02196-TLB

**PLAINTIFF, CITY OF OZARK'S, MEMORANDUM OF LAW IN SUPPORT OF ITS  
RESPONSE AND OPPOSITION TO SEPARATE DEFENDANT, UNION PACIFIC  
RAILROAD COMPANY'S, MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED  
AND RESTATED COMPLAINT**

The Plaintiff, City of Ozark's Complaint should not be dismissed, as the neither the doctrine of waiver nor the doctrine of estoppel apply in the facts and circumstance of this case or to the Plaintiff, a city municipal corporation. Further, the Plaintiff, did not request the removal of the Oliver St. Crossing, and Arkansas law is clear, that the only an affirmative vote by the Plaintiff's city council would authorize the Plaintiff to abandon the Plaintiff's easement held for the benefit of the Plaintiff's residents and citizens. Finally, the Separate Defendant, Union Pacific Railroad Company, ignores established Surface Transportation Board decisions, the Fifth Circuit Court of Appeals decisions and this Court's 2012 decision that all state the ICCTA **does not** preempt State law regarding disputes over routine at-grade crossings. The extensive facts set forth in the

First Amended and Restated Complaint (the "Complaint") clearly provides undisputed evidence that the Plaintiff had a public at-grade crossing known as the Oliver St. Crossing for a period of approximately 125 years prior to the Separate Defendant unilaterally and illegally removing the Oliver St. Crossing without any authority or authorization from the Plaintiff's city council. The law set forth in the Complaint supports the Plaintiff's position that this Honorable Court should Order the Separate Defendant to reinstall the Oliver St. Crossing and to cease any further interference of the Plaintiff's easement over the Separate Defendant's railroad tracks.

### I. FACTUAL BACKGROUND

The Plaintiff will not restate the extensive facts set forth in the Complaint, but Plaintiff incorporates all facts herein as if set forth word for word. Further, the Plaintiff will address various facts that appear to be inaccurate in the Separate Defendant's Memorandum of Law.

First, there is absolutely no evidence in the historical records of either (1) the City of Ozark; (2) the Federal Railroad Administration (the "FRA"); (3) the Arkansas Highway & Transportation Department; and/or (4) the Separate Defendant, to support the statement that "Before 2000, the site was a private crossing used by a propane company to access propane tanks located on property it leased from the railroad. Charles Felkins is a retired employee of the Separate Defendant and has executed a self-serving affidavit that apparently attempts to override historical data and evidence attached to the Plaintiff's Complaint, which includes, (1) various deeds; (2) affidavits of the Plaintiff's residents and citizens regarding the Oliver St. Crossing being a public crossing (3) the FRA's inventory crossing information showing the Oliver St. Crossing

as a public crossing; and (4) the Separate Defendant's own maps showing the Oliver St. Crossing as a public crossing. Mr. Felkins' affidavit appears to be the only source of the Separate Defendant's argument that the Oliver St. Crossing was a private crossing, and not a public crossing and this Honorable Court should ignore this self-serving statement.

Next, the Separate Defendant makes the unsupported argument that the Plaintiff requested the removal of the Oliver St. Crossing. Again, the only apparent evidence Separate Defendant presents on this issue is Mr. Felkins self-serving affidavit that stated the Mayor of Plaintiff contacted him several times to request the removal of the Oliver St. Crossing based on complaints of a local resident. Arkansas law is clear that a city can only abandon a public road, alleyway, or easement by an affirmative vote of the city council of the city. Plaintiff's city council did not vote on the removal of the public at-grade crossing known as the Oliver St. Crossing. The Separate Defendant is aware of the requirements in Arkansas to remove a crossing and has been involved in the removal of several crossings in Arkansas prior to the removal of the Oliver St. Crossing. Therefore, the Separate Defendant knew or should have known that Plaintiff's Mayor would not have the actual authority to request the removal of the Oliver St. Crossing without the affirmative vote of the Plaintiff's city council.

The Plaintiff has leased 1.8 acres of real property south of the Separate Defendant's railroad tracks for the purpose of developing a system of river trails and a park on this leased property. The reinstalled Oliver St. Crossing will mainly allow pedestrians and bicyclists to travel to the park and river trails, but will also allow maintenance and service vehicles to travel to the park and river trails for inspection and maintenance. When the service vehicle crosses the Separate Defendant's railroad

tracks at the Oliver St. Crossing, the service vehicle will have sufficient room to travel along the 1.8 acres of leased real property and not, as the Separate Defendant suggests, travel into the Arkansas River. In addition, the Separate Defendant fails to fully explain the Plaintiff's plan for the Arkansas River Development or does not understand the Plaintiff's plan. The Plaintiff has spent considerable time, money, and effort in planning a system of river trails, a park setting and permanent structure (probably bathrooms) on the 1.8 acres of leased land.

In addition, the Arkansas River Rail Connection recently has partnered with various cities in Arkansas to try and obtain grants to construct a transient dock, that will continue to develop the Arkansas River for economic and tourism purposes and the Plaintiff's 1.8 acre section of lease property is one of ten (10) designated spots that the U.S. Army Corps of Engineers is currently reviewing for approval. The only access to the Plaintiff's 1.8 acres of leased property is the Oliver St. Crossing to gain access by traveling across the Separate Defendant's railroad tracks.

Finally, Separate Defendant's various reasons to not reestablish the Oliver St. Crossing that it illegally removed are all self-serving. The Plaintiff's expert has provided an opinion that the reinstallation of the at-grade Oliver St. Crossing will not increase any harm to the general public at this location as compared to another public crossing. See Soliz's Affidavit ¶¶2. The additional safety issues and impediments that the Separate Defendant raises are all connected to the business operations and profit of the Separate Defendant and not a true safety issue. However, the Separate Defendant ignores the fact that the Oliver St. Crossing was in continual existence for approximately 125 years (from approximately 1876 until February 2001) and during this entire period of time, the

safety concerns raised by the Separate Defendant were already existing and not one accident was reported nor did the Separate Defendant have interference with its business operations. Reasonable interference of railroad business operations like those argued by the Separate Defendant are not the type envisioned by the ICCTA to preempt Arkansas state law, especially, when the Separate Defendant illegally removed a public crossing without any authority. The reality is that reinstallation of a public crossing that was in continual existence for 125 years, will not unreasonably interfere with the Separate Defendant's railroad operations or pose any undue safety issues to the general public. Those issues arise where a "new" crossing is being sought, not where a previous long-term crossing has shown no safety issues.

The Plaintiff's Complaint should be granted in its entirety. The doctrine of laches does not apply to the Plaintiff or to the facts and circumstance of this case. Further, the ICCTA does not preempt the Plaintiff's lawsuit involving a routine at-grade crossing dispute.

When the Court reaches the merits of this case, this Honorable Court should find that the Separate Defendant's Motion to Dismiss should be denied, as the doctrine of waiver is not applicable to the Plaintiff or to the fact and circumstances of this case, as the Plaintiff did not request the removal of the Oliver St. Crossing or waive its right to recover the Oliver St. Crossing. Further, as required by Arkansas law, the Plaintiff's city council did not affirmatively vote to abandon the Plaintiff's public interest in the Oliver St. Crossing. Therefore, the Plaintiff is not estopped from requesting this Honorable Court's assistances in forcing the Separate Defendant to reinstall the Oliver St. Crossing that was illegally removed by the Separate Defendant.

Pursuant to Arkansas law, Plaintiff as a city municipal corporation, has the power to condemn the property at issue in this civil matter for the benefit of the public to use as a perpetual public easement, as this property was previously used for approximately 125 years prior to the Separate Defendant's unauthorized and illegal actions. Finally, the Plaintiff's conversation claim was dropped and replaced with the claim of Unreasonable interference of the Plaintiff's easement, which is a valid cause of action under Arkansas law.

## **II. LEGAL STANDARD FOR A MOTION TO DISMISS**

Federal Rules of Civil Procedure ("FRCP") Rule 8 provides that a pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for relief sought, which may include relief in the alternative or different types of relief. Further, the allegation must be simple, concise, and direct. However a party may set out 2 or more statements of a claim, regardless of consistency. Finally, the pleadings must be construed so as to do justice.

To withstand a Rule 12(b)(6) motion, a complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *E-Shops Corp. v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659, 662 (8th Cir.2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

While the pleadings need not show relief is probable, they must show the plaintiff's claims are "plausible." *Id.* A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Courts must accept a plaintiff's specific factual allegations as true, but are not required to accept a plaintiff's legal conclusions. *Id.*

The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a "sheer possibility." *Braden v. Walmart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). It is not, however, a "probability requirement." *Id.* Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and "that a recovery is very remote and unlikely." *Id.*

Additionally, "documents attached to or incorporated within a complaint are considered part of the pleadings, and courts may look at such documents for all purposes, include determining whether a plaintiff has stated a plausible claim. *Retro Television Network, Inc. v. Luken Comm'ns, LLC*, 696 F.3d 766, 768 (8th Cir. 2012)(quoting *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459-60 (8th Cir. 2010)). Finally, the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. *Braden v. Walmart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009)(citing *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C. Cir. 2009)(factual allegations should be "viewed in their totality)).

In this civil action, the Plaintiff has filed a detailed Complaint with 165 paragraphs of specific factual allegations, and included an addition 50 exhibits that set forth clear and indisputable evidence to support the Plaintiff's causes of action against the Separate Defendant. The Plaintiff Complaint alleges sufficient facts to show not only that the Plaintiff's claims are plausible, but that the Plaintiff's claims are probable, as the Separate Defendant indisputably removed the Oliver St. Crossing without authority from the Plaintiff's city council, as required by law.

### **III. THE DOCTRINE OF LACHES DOES NOT APPLY IN THIS CASE OR TO THE PLAINTIFF**

The Separate Defendant argues the doctrine of laches as a defense to the Plaintiff's Complaint to reestablish the Oliver St. Crossing and further argues that since "the then-mayor of Ozark requested the crossing's removal in 2000 . . .," the city is barred. However, the Arkansas General Assembly has set out the specific procedure for vacating or abandoning an easement in cases such as the one before this Honorable Court. Ark. Code Ann. § 14-301-301 provides a clear and unambiguous procedure for vacating or abandoning an easement or street or alley. This procedure is binding on the Plaintiff, the Separate Defendant, and this Honorable Court. See the unpublished opinion of *Bateman v. City of Paragould*, 2000 WL 17832 (2000), which extended Ark. Code Ann. § 14-301-301 to easements. The Court of Appeals also stated "Absent compliance with that procedure whereby the town council vacates or abandons the street, we cannot hold that appellants' argument on appeal warrant reversal. *Id.* In addition, the Defendant argues that the Plaintiff's former mayor requested it, but does not allege or state that the city council followed the legal procedure to vacate the easement.

In *Hankins v. City of Pine Bluff*, Mr. Hankins' contended that the city is estopped to question the location of the curbing, for the reason that the city engineer approved it. 217 Ark. 226, 229 S.W.2d 231, 233. (1950). However, the Arkansas Supreme Court rejected the suggestion that the city engineer's erroneous approval could create an estoppel. *Id.* The Arkansas Supreme Court also reiterated its prior holdings that "we have often held that a public officer cannot bind the State or its subdivisions beyond the extent of his **actual** authority. All who deal with a public agent must at their peril inquire into his real power to bind his principal." [emphasis added] *Id.* The Separate Defendant cannot rely upon some alleged conversation or unwritten request from the former mayor of the Plaintiff to remove the Oliver St. Crossing, as the former mayor did not have the actual authority to authorize or request the removal of the Oliver St. Crossing without the affirmative vote of the city council of the Plaintiff.

#### A. LACHES

The Doctrine of Laches has been summarized by the Arkansas Supreme Court by stating that it is based on equitable principle that an unreasonable delay by the party seeking relief precludes recovery when the circumstances are such as to make it inequitable or unjust for the party to seek relief now. *Anadarko Petroleum Co. v. Venable*, 312 Ark. 330, 850 S.W.2d 302 (1993). The doctrine of laches is ordinarily applied to situations in which the complainant has **stood idly by while the other party has materially changed his position**. [emphasis added] See *Richards v. Ferguson*, 252 Ark. 484, at 486, 479 S.W.2d 852, at 853 (1972). The laches defense requires a detrimental change in the position of the one asserting the doctrine, as well as an

unreasonable delay by the one asserting his or her rights against who laches is invoked. See *Worth v. Civil Serv. Comm'n of El Dorado*, 294 Ark. 643, 746 S.W.2d364 (1988).

The doctrine of Laches has attempted to be applied to various cities and for the most part the Arkansas Supreme Court has found that laches does not apply to city municipal corporations. In 1960, the Arkansas Supreme Court addressed the doctrine of laches application to widening a street. *Bushmiaer et. al. v. City of Little Rock*, 231 Ark. 848, 333 S.W.2d 236 (1960). In the *Bushmiaer* case, the Appellants were property owners in a platted addition adjoining the north side of a street and they alleged that no dedication for public use exists north of the present curb line, and widening of a right-of-way would constitute a taking of private property for public use without just compensation. In addition, the Appellants argued the Defendant-City was estopped from widening the road as the city treated the property as private and not public. The Court found that the Appellants could not prevail upon the theory of laches or estoppel, "for in *Paragould v. Lawson*, supra, this Court said: "The equitable doctrine of laches cannot be successfully invoked to defeat the right of the city to open the street which was dedicated to that use." *Id.* at 854.

The Court of Appeals of Arkansas also addressed the doctrine of laches in the case of *Thomas, et ux. v. the City of Little Rock, et al.* 52 Ark. App. 24, 914 S.W.2d 328 (1996). In this case, the landowners in a subdivision brought action against the city and adjoining property owners, arising from adjoining owner's clearing and use of a portion of alley for primary access to adjoining property. The Court of Appeals framed the Appellants' primary argument as the westernmost thirty feet of the alley had been abandoned by the public, which argument was rejected. The Court of Appeals first

discussed Ark. Code Ann. § 14-301-301 that gives cities of the first class (now include cities of the second class as well) the power and authority to vacate public streets and alleys. Ark. Code Ann. § 14-301-301 provides, in part that “no street or alley, or any portion thereof, shall be abandoned or vacated unless there has been filed with the council the written consent of the owners of all lots abutting on the street or alley, or the portion thereof, to be vacated. *Id.* at 27 citing *Jones v. American Home Life Ins. Co.*, 293 Ark. 330, 738 S.W.2d 387 (1987). The Court of Appeals then went on to address the equitable doctrine of laches and reaffirmed that this doctrine cannot be successfully invoked to defeat the right of the city to open the street which was dedicated to that use. *Id.* citing *Bushmaier Supra*.

The Court of Appeals next addressed the doctrine of laches in the case of *Duchas v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999). This case was a dispute over enforcement of zoning ordinances to prohibit the use of a house as an apartment building. *Id.* The chancery court issued a permanent injunction against the use of the property for multi-family dwelling. *Id.* The Appellant contends that the city should be barred from enforcing the zoning ordinance by estoppel and laches because the city had waited for more than **thirty-five (35)** years to challenge the multi-family use of the house. *Id.* at 179. The Court of Appeals discussed laches and stated that “To apply laches there must be an unreasonable delay by the plaintiff, and the suffering of a detrimental change in position by the defendant.” *Id.* at 180. The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. *Id.* citing *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775 (1995). Appellant argued that if the

city enforced the zoning ordinances against Minginas, appellant would not have bought the property as an investment in rental property, and he would not have spent so much money in maintain and improving the property as a multi-family dwelling. *Id.* In addition, he argues that because of the delay, many witnesses have died or memories have faded and he was prejudiced by the lack of witnesses to prove his case. *Id.*

The Court of Appeals found these arguments unpersuasive. The Court of Appeals, relying upon *Bushmiaer Supra*, held the doctrine of laches cannot be successfully invoked to defeat the right of a city to enforce its ordinances. *Id.* citing *Bushmiaer Supra*, and *Township of Fairfield v. Likanchuk's Inc.*, 274 N.J. Super. 320, 644 A.2d 120 (1994), in which the court held:

"A municipality's "prior tolerance of a use in violation of a zoning ordinance . . . will not estop the municipality from later enforcing the ordinance." Thus, a municipality's enforcement of its ordinance ordinarily "may not be prevented on grounds of estoppel merely because a suit to terminate the illegal use could have been commenced earlier." Further, the application of laches as a defense to a municipality's attempt to enforce its ordinance does not "comport with salutary public policy," and the doctrine should not be permitted to frustrate the enforcement of a valid zoning regulation "except in the clearest and most compelling circumstances." This is because the municipality represents "all the people of the municipality and the zoning ordinance are presumably for the benefit of the community as a whole."

## **B. APPLICATION**

As the above cases clearly demonstrate, Arkansas Courts rarely apply the doctrine of laches as a defense against a city municipality to enforce its right to open a street, expend a street, or enforce city ordinances. As set forth in the *Bushmiaer case supra*, the equitable doctrine of laches cannot be successfully invoked to defeat the right of the Plaintiff to open the street which was dedicated for that use. Plaintiff has since early 1994 been developing a downtown redevelopment program that utilizes the

Oliver St. Crossing to obtain access to the Arkansas River and the Oliver St. Crossing is a catalyst to this development. The Oliver St. Crossing was a public crossing that has been in existence for approximately 125 years prior to the Separate Defendant illegally removing it in 2001. Further, the Separate Defendant has only stated that it spent thousands of dollars to remove the crossing at the request of the former mayor, but has not alleged any additional detrimental reliance. Further, any expenses the Separate Defendant expended were at its own risk, as the Separate Defendant did not have the authority to remove the crossing as the Plaintiff's former mayor lacked the actual authority to authorize the removal. The Arkansas cases cited above that relate to municipal corporations clearly show that Separate Defendant must show more than it removed the crossing in order to defeat the Plaintiff's right to reestablish the Oliver St. Crossing.

Further, the Separate Defendant has been on actual and constructive notice from the Plaintiff since approximately 2002 that Plaintiff sought the reinstallation of the Oliver St. Crossing. The Plaintiff made the conscious decision to negotiate with the Separate Defendant to reestablish the Oliver St. Crossing. The Plaintiff negotiated in good faith with the Separate Defendant to resolve the conflict, including raising money to reinstall the Oliver St. Crossing at Plaintiff's own cost, moving the crossing to another location approved by the Separate Defendant, but the oral agreements that were reached between the parties were never complied with by the Separate Defendant.

In addition, the Plaintiff sought assistance from the AH&TD to force the Separate Defendant to reinstall the Oliver St. Crossing and even with the AH&TD's written suggestion to reinstall the Oliver St. Crossing, the Separate Defendant has failed and

refused to reinstall the Oliver St. Crossing. The Plaintiff has kept the Separate Defendant on notice (actual and constructive) this entire period that it would exercise its right to reopen the Oliver St. and the Oliver St. Crossing, which included filing suit to force the reinstalling of the Oliver St. Crossing. Once it became clear that negotiations were not going to resolve the issue and with a new marina approved on the southern edge of the Arkansas River, Plaintiff chose to file this suit to obtain judicial relief.

For the various reasons set forth above, the Plaintiff's Complaint and the relief requested are not barred by the doctrine of laches.

#### **IV. THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT ("ICCTA") DOES NOT PREEMPT THE PLAINTIFF'S COMPLAINT**

##### **A. The ICCTA does not expressly preempt the Plaintiff's Cause of Action.**

The Separate Defendant does a thorough job of explaining the background of the ICCTA and the purpose behind the ICCTA. However, the Separate Defendant ignores the Surface Transportation Boards ("STB") direction regarding ICCTA's preemption of routine at-grade crossing disputes and this Court's own decision regarding the ICCTA preemption of Arkansas State law.

The STB has exclusive jurisdiction over the application of the ICCTA and in *Maumee & Western Railroad Corp. and RMW Ventures, LLC-Petition For Declaratory Order*, 2004 WL 395835 (S.T.B.), the STB addressed the ICCTA's preemption. In *Maumee*, the petitioners, sought a declaratory judgment whether the condemnation proceedings by the City of Napoleon, Oh (the "City"), to acquire an easement for a road crossing over and subsurface utilities under an 8,000 sq.ft. parcel of main line right-of-way, which is owned by RMW and operated by Maumee, are preempted by the ICCTA. *Id.* Maumee argued that the ICCTA preempted any exercise of state eminent domain

power with respect to railroad property, but the STB found that this interpretation is overbroad. *Id.* The STB declined to issue a declaratory order, but did issue discussion and conclusion. *Id.*

The STB stated the ICCTA protects railroad operations that are subject to the STB's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. *Id.* citing *City of Auburn v. STB*, 154 F.3d 1025, 1029-1031 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). The STB also acknowledged that "Courts have held that Federal preemption can shield railroad property from state eminent domain law, but these holdings have been in situations where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations." *Id.* citing *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp.2d 1009 (W.D. Wis. 2000)(state eminent domain action preempted where passing track necessary to railroad's operations would have been **eliminated**). [emphasis added] *Id.*

The STB went on to announce that ". . . this broad Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property." *Id.* The STB stated to the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. *Id.* citing Joint Petition for Declaratory Order--- Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 9 (STB served May 1, 2001). Finally, the STB stated ". . . , acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street **would not** implicate the Federal

preemption of 49 U.S.C. 10501(b) (the ICCTA), unless it would prevent or unreasonably interfere with railroad operations. [emphasis added] *Id.*

The STB also acknowledged that neither “the court cases, nor the Board’s precedent, suggested a blanket rule that any eminent domain action against railroad property is impermissible. Rather routine, non-conflicting uses, such as non-exclusive **easements for at-grade road crossings**, wire crossings, sewer crossing, etc., are **not** preempted so long as they would not impede rail operations or pose undue safety risks. [emphasis added]. *Id.*

In *City of Siloam Springs, Arkansas v. Kansas City Southern Railway Co.*, 2012 WL 3961346 (W.D. Ark. 2012) this Court addressed the issue of preemption of Arkansas State law by the ICCTA. The City of Siloam Springs (“Siloam Springs”) sought to exercise its power of eminent domain to acquire a permanent trail easement over land running **underneath** a railroad bridge owned by the Kansas City Southern Railway Company (“KCSR”). *Id.* KCSR argued that the matter was preempted by the ICCTA and only the STB had the jurisdiction to rule on the issue in the case. *Id.* Siloam Springs in response, relied on *Maumee Supra*, that the ICCTA was not as sweeping as claimed. *Id.* Siloam Springs asserted that state laws, such as eminent domain laws, are only preempted where their application would “prevent or unreasonably interfere with railroad operations. *Id.* citing *Maumee Supra*.

The Honorable District Court Judge Jimm Larry Hendren (“Judge Hendren”) addressed the general preemptive effect of a federal statute and noted “the party asserting federal preemption has the burden of persuasion. *Id.* citing *Elam v. Kansas City Southern Ry. Co.*, H635 F.3d 796, 802 (5th Cir. 2011)(holding that § 10501 [ICCTA]

only completely preempts claims attempting to “manage or govern a railroad’s decisions in the economic realm”). Judge Hendren acknowledged that “In cases involving state laws of eminent domain, particularly those involving non-exclusive easements for routine at-grade crossings, courts have held that § 10501(b)[ICCTA] does ***not*** preempt such laws unless the easement would “impede rail operations or pose undue safety risks.” [emphasis added] *Id.* at 2, citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 333 (5th Cir.2008). Judge Hendren determined that “. . . preemption applies only if the easement sought by the City “would unreasonably interfere with” KCSR rail operations, but not be required if it “only incidentally affects” KCSR railroad property. Judge Hendren determined the proposed trail easement contemplated structural modifications to a railroad bridge and the potential implications those structural modifications have on KCSR’s ability to inspect and maintain the bridge, which constitutes more than an “incidental effect” on the operation of the railroad. *Id.* Judge Hendren further determined that the risk to the trail users (bicyclists or pedestrians) of potential falling debris from passing trains or from the bridge itself created an unreasonable safety risk. *Id.* Therefore, Judge Hendren determined the case was preempted by the ICCTA. *Id.*

The Fifth Circuit Court of Appeals has agreed with this interpretation in *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010). In *Franks*, the Fifth Circuit determined that a possessory action brought by a property owner seeking to enjoin the railroad from removing two private crossings was neither expressly nor impliedly preempted by the ICCTA. *Id.* at 415. The Fifth Circuit explained that “for a state court action to be expressly preempted under the ICCTA, it must seek to regulate

the operations of rail transportation.” *Id.* at 413. The Fifth Circuit reasoned “. . . that the property owner’s possessory action, which involved a private servitude of passage over the railroad track, invoked laws, which merely incidentally affected rail transportation, and thus, did not manage or govern rail transportation.” *Id.* at 411. Further the Fifth Circuit rejected Union Pacific’s “. . . argument that railroad crossings were encompassed in the ICCTA’s definition of “transportation,” which would have resulted in federal preemption of the claims if that were the case.” *Id.* at 409

Based on the above, the Plaintiff’s action to seek the reinstallation of the Oliver St. Crossing is not preempted by the ICCTA, unless this Honorable Court finds that a routine at-grade crossing that was in existence for 125 years prior to its illegal removal by the Separate Defendant, unreasonably interferes with the Separate Defendant’s railroad operations or causes undue risk to the general public. The Plaintiff is not seeking to regulate the Separate Defendant’s operations of rail transportation and any laws that are applied in this matter will only incidentally affect the rail transportation.

#### **B. ICCTA Preempts an Action that Would Prevent or Unreasonably Interfere with Railroad Operations**

The Separate Defendant recites various cases to assert the established law that when an eminent domain case would prevent or unreasonably interfere with railroad operations that the ICCTA will preempt state law. However, the Separate Defendant continues to ignore the undisputed evidence that the Oliver St. Crossing was a public at-grade crossing in existence for approximately 125 years prior to the Separate Defendant illegally removing it in 2001.

In *Fort Bend County, Texas v. The Burlington Northern and Santa Fe Railway Company*, 237 S.W.3d 355 (2007), the Court of Appeals of Texas (“Texas Court”)

specifically found the eminent domain action of the County would unreasonably interfere with Burlington's railroad operations. In this case, Burlington operated a *private* crossing that had a "regular" railroad track and the Booth passing track. *Id.* at 358. The passing track is utilized by Burlington to stage meets and passes of trains for its rail operations, and to park coal trains. *Id.* The County condemned the crossing and made it a public crossing with a four lane boulevard and esplanade for use as an entrance to a planned private residential development. *Id.* This expanded crossing cut the Booth passing track into two almost equal pieces. *Id.* There was already an existing public crossing known as the Harrison crossing, available to access the proposed development that did not bisect the Booth passing track. *Id.* The Booth passing track was the only uncut passing track of that length within 30 miles, and it serves the area from Temple to Galveston with trains continuing to Los Angeles. *Id.*

The County, relying on *Maumee Supra*, argued no preemption; however, the Texas Court explained that *Maumee* states routine crossings with non-conflicting uses are not preempted so long as they would not impede rail operations or pose undue safety risks. *Id.* The Texas Court explained that this case was not a typical case. *Id.* The Texas Court found the record showed that the crossing condemned by the County cuts through the 1.86 mile Booth passing track that Burlington used to meet and pass trains and park 8500 feet long coal trains. *Id.* The Texas Court also found that to recover what it had prior to the taking, Burlington must move part of the passing track, or the crossing must be returned to its original configuration as a private crossing. *Id.* Based on these facts, the Texas Court determined that placing the public crossing over the regular and passing tracks, which was the only uncut passing track within 30 miles,

affected the entire line; therefore, the crossing would interfere with railroad operations and cause safety hazards. *Id.* at 359.

In *District of Columbia v. 109,205.5 Square Feet of Land, Et. Al.* 2005 WL 975745 (D.D.C. 2005), the U.S. District Court, District of Columbia (“DC Columbia”) addressed a condemnation action where the purpose was to acquire an easement on the defendant’s property for a pedestrian and bicycle trail. *Id.* The DC Columbia recited the established law that Acquisition of an easement by eminent domain to permit a crossing of railroad track in connection with construction of a new public street would not implicate the Federal preemption of [ICCTA] unless it would prevent or unreasonably interfere with railroad operations. *Id.* at 3., citing *Maumee Supra* at 3. The defendant railroad argued that the trail would interfere with railroad operations because the trail would impede its access to the signal boxes and prevent railroad maintenance. *Id.* at 3. However, the DC Columbia found that the railroad could still have access to its equipment by vehicular access and had general accessibility for the purpose of railroad maintenance. Therefore, the easement will not impede the railroad operations. *Id.*

The DC Columbia then addressed whether the District’s intended use poses an undue safety risk. *Id.* at 4. The defendant railroad argued that when an active railroad track is in close proximity to pedestrian and bicycle trails they maintain a 50 feet from the centerline of the track. *Id.* The defendant railroad further argued that the easement would reduce the distance to 25 feet and create a safety risk without the appropriate setback distance, fencing and other safety precautions. *Id.* The DC Columbia also acknowledged that a safety risk exists whenever an active railroad track is involved. *Id.*

The DC Columbia found that the District intended to provide security fencing between any trail facility and the active rail and the District's intent to maintain the 50 foot setback prevented this undue safety risk. *Id.* Therefore, the DC Columbia ruled that "because the use of the defendant's property would not interfere with railroad operations and the District's implementation of proper safety precautions would prevent an undue safety risk, this type of a crossing case is among those generally resolved in the state courts. *Id.* citing *Maumee Supra.*

**C. The Reestablishment of a Public At-Grade Crossing Illegally Removed by the Separate Defendant would not Unreasonable Interfere with the Separate Defendant's Railroad Operations Nor will it Create and Undue Safety Risk for the Public.**

Based on the above precedent and the various cases cited by the Separate Defendant, this Honorable Court should find the ICCTA does not preempt the Plaintiff's action to reestablish a routine at-grade public crossing over the Separate Defendant's railroad tracks. The Oliver St. Crossing that Plaintiff seeks to reestablish was an existing crossing that was a public at-grade crossing for approximately 125 years before its illegal removal by the Separate Defendant. For this entire period of time, the Separate Defendant (and its predecessors in interest) operated railroad without unreasonable interference. Further, this Oliver St. Crossing is the only access to the 1.8 acres that Plaintiff has leased south of the Separate Defendant's railroad tracks.

All of the cases cited by the Plaintiff and the Separate Defendant relate to (1) the installation of "new" previously uninstalled crossing; (2) the installation of a larger crossing that substantially changed the previous crossing; or (3) a condemnation of all or part of railroad's property, not just an easement to cross the railroad tracks.

Although for 125 years, the Oliver St. Crossing did not interfere with the Separate Defendant's railroad operations or cause safety issues, the Separate Defendant now argues that reinstalling this previous crossing somehow transforms it into an impediment that interferes with railroad operations and puts the public at risk. The Separate Defendant attempts to add additional requirements that its employees and equipment must also be free from any type of risk; however, no case law discusses safety as it relates to a defendant railroad's equipment or employees. Notwithstanding this fact, the Plaintiff's routine at-grade crossing that will be used mainly for pedestrian and bicyclists will not unreasonably interfere with the Separate Defendant's railroad operations; nor, will it pose undue risk to the general public.

**A. Railroad Operations**

The Separate Defendant argues in support of its Motion to Dismiss that the side track is the longest storage track on the Van Buren subdivision. Hudson Affidavit, ¶9. However, as George Soliz states in his affidavit there are two similar side tracks that could be utilized by the Separate Defendant that are more rural and less populated. Soliz Affidavit ¶9. Further, the sweeping curve that leads into the Plaintiff's downtown area, where the previous Oliver St. Crossing was located, actually assists in the sight clearance for Separate Defendant's train conductors and once the Plaintiff has access to clear the leased property located south of the Separate Defendant's railroad tracks, this sight clearance would expand so that a train could be seen for up to a mile away. Soliz Affidavit ¶10.

The Separate Defendant next argues that reinstallation of the Oliver St. Crossing will "divest the railroad of property to use for operations." However, the Oliver St.

Crossing should not have been removed by the Separate Defendant; therefore, the Plaintiff's action will not divest any property that the railroad uses for its operations. Notwithstanding this key fact, the Separate Defendant's reliance on *B&S Holdings, LLC v. BNSF Ry. Co.*, 89 F.Supp.2d 1252 (E.D. Wash. 2012) is misplaced, as that case relates to an adverse possession claim where B&S was attempting to obtain fee simple ownership of a part of the real property that BNSF had next to its railroad tracks. That is not the case in this matter, as the Plaintiff seeks the reinstallation of the at-grade crossing only. The 300 feet clearance is required by the Separate Defendant's operating rules and such rules were in place prior to the Separate Defendant's illegally removing the Oliver St. Crossing. Therefore, the Plaintiff's action is not taking the property that Separate Defendant's uses in its business operations.

Separate Defendant next argues that its business operations will be negatively impacted by the increased switching movements that would be required by the presence of the crossing. Prior to the Oliver St. Crossing being removed in 2001, by the illegal action of the Separate Defendant, the Separate Defendant was able to operate its railroad business through the Plaintiff's downtown area without any interference, including the routine and normal action of separating cars and trains. Plaintiff's expert agrees that the number of rail car hand brakes to be applied will be increased once the Oliver St. Crossing is reinstalled; however, the time needed is minimal and would not be unreasonable to the Separate Defendant, as they are required to perform separation action in other towns all across Region 5. Soliz Affidavit ¶13. In addition, the Separate Defendant is one of the largest North American railroad companies and uses some of the most advanced technology and practices to expedite train movements. Soliz

Affidavit ¶19. Further, the Separate Defendant can avoid the need for a Class I train air brake test and inspection when their trains are left standing for more than 4 hours by connecting them to a compressed air greater than 60 psi. Soliz Affidavit ¶12. One method that the Separate Defendant already implements is installing a pipe line that runs underneath and across the street just before the vehicular rail crossing that permits train crews to keep the train's air brakes system connected when separating the train at the vehicular rail crossing. Soliz Affidavit ¶19. The Separate Defendant also utilizes a telemetry link control technology that reduces the time in performing train air brake test and inspections; reduces stopping distance; and helps prevent train derailments. Soliz Affidavit ¶20. Based on the above, the Plaintiff's action to reinstall a routine at-grade public crossing will not unreasonably interfere with the Separate Plaintiff's business operations, and to the extent the Separate Defendant is required to modify its business operations, these modification are no more than they are required to perform at other crossings in small towns in Regions 5.

#### **B. Public Safety**

As in the *District of Columbia case, Supra*, the Plaintiff's acknowledges "safety risk exists whenever an active railroad track is involved;" however, for a period of 125 years, the Oliver St. Crossing existed without out any known accidents to pedestrians or vehicles. Further, the risk of vandalism to the Separate Defendant's property exists whether or not a crossing allows individuals to approach the Separate Defendant's railroad tracks. As set forth in the *District of Columbia Supra*, the Plaintiff "intends to provide security fencing between any trail facility and the active rail" that will be built at the edge of the Separate Defendant's easement and the Plaintiff "intends to maintain

the current set back to avoid any undue safety risk to the public.” Further, this safety fence will not prevent or interfere with the Separate Defendant’s accessing or inspecting the Separate Defendant’s equipment.

According to Mr. Soliz, the risk of safety to employees and the general public is slight at the Oliver St. Crossing location. Soliz Affidavit ¶¶2 Further, the Separate Defendant has numerous rail lines with the sweeping curves running parallel to waterways that cross public highway crossings and the hazards created by reopening the Oliver St. Crossing are no more than those faced every day at low volume vehicular traffic railroad crossings in other small towns. Soliz Affidavit ¶¶11. Separate Defendant’s argument that a pedestrian could not see the train is inaccurate, as once the 1.8 acres of leased property south of the Separate Defendant’s railroad tracks are cleared, a pedestrian will have an unobstructed view of any approaching train from approximately 1 mile. Soliz Affidavit ¶¶10.

The Separate Defendant’s final argument that there is risk of contamination due to the reinstallation of a 125 year old crossing is disingenuous. The Separate Defendant has a strong conductor and engineering training program, which reduces the risk for train accidents including derailments at railroad crossings. Soliz Affidavit ¶¶17. Further, the Separate Defendant has many trains that carry regulated or hazardous materials over its railroad each day, especially into and out of the Gulf Coast areas of Texas and Louisiana. Soliz Affidavit ¶¶16. These trains reach their destinations each day without incidences and the reinstallation of the Oliver St. Crossing will not increase the risk of an accident at this location. Soliz Affidavit ¶¶16. Further, in the event of an accident, the local volunteer fire department or specialized responders will be able to

utilize the crossing to cross the Separate Defendant's railroad tracks to reach the spill, as there is currently no access to the 1.8 acres of lease property or the Arkansas River.

The bottom line is Plaintiff's request to reinstall the Oliver St. Crossing will not create any unreasonable interference or safety issues as the Oliver St. Crossing was in existence for 125 years before the Separate Defendant illegally removed the crossing. The Separate Defendant's continued objection is strictly a business profit motive decision to not break apart cars or trains in this area and the Separate Defendant chooses not to utilize the other two rail yards that are in close proximity. Finally, the Arkansas Attorney General Opinion No. 2012-134, 2012 Ark. AG Lexis 137, which was issued in 2012 was based on the *Anderson v. BNSF Railway Co.*, 375 Ark. 466, 476, 291 S.W.3d 586, 594 (2009), where the Arkansas Supreme Court relied upon *Franks Investment Co. v. Union Pacific Railroad Co.*, 534 F.3d 443 (5th Cir. 2008)(reversed on rehearing) to determine that **all** Arkansas state law relating to crossing disputes was preempted by the ICCTA.

As Judge Hendren has already determined, the Supreme Court of Arkansas' decision was incorrect, as the ICCTA is not as sweeping and only preempts when the routine at-grade crossing prevents or unreasonably interferes with railroad operations or poses undue safety risks. As the Oliver St. Crossing was an established public crossing for 125 years prior to its illegal removal by the Separate Defendant, the reinstallation of the Oliver St. Crossing will not cause unreasonable interference of railroad operations or pose undue safety issues to the general public. Based on the above, the Plaintiff's Complaint is not preempted by the ICCTA and this Honorable Court has jurisdiction to decide this matter.

**V. THE CITY HAS NOT WAIVED ITS RIGHT TO THE CROSSING AND THE ELEMENTS OF ESTOPPEL ARE NOT PRESENT IN THIS FACTUAL SITUATION**

**A. If the Mayor Requested the Oliver St. Crossing's Removal, the Mayor Lacked the Authority for this Request.**

The Separate Defendant has made assertions that the former mayor of Ozark requested the removal of the Oliver St. Crossing. However, other than a self-serving affidavit from a now retired employee of the Separate Defendant, there is no additional evidence to support this allegation. Notwithstanding this lack of evidence, it does not matter whether the former mayor requested the removal, as the former mayor lacked actual authority to make this request. The Arkansas Supreme Court has often held that a public officer cannot bind the State or its subdivisions beyond the extent of his actual authority. *Hankins Supra*. "All who deal with a public agent must at their peril inquire into his real power to bind his principal." *Id*. The Separate Defendant failed to inquire into the former mayor's actual authority to bind the Plaintiff and the General Assembly has set out a specific procedure for the Plaintiff to follow to abandon a street, alley or public easement, which was not followed in this case. Therefore, any request by the former mayor is void, and the Separate Defendant did not have the authority to remove the public at-grade crossing known as the Oliver St. Crossing. The Separate Defendant as a matter of law, cannot rely upon the request from the mayor or residents of the Plaintiff to remove a public at-grade crossing without the approval of the Plaintiff's city council.

**B. The Plaintiff Did not Waive any Claim to the Crossing.**

"The terms 'waiver' and 'estoppel' are often used indifferently in the same sense, as if they were interchangeable terms; but there is a distinction which it is often

important to keep in mind.” *Bethell v. Bethell* 268 Ark. 409, 420, 597 S.W.2d 576, 581 (1980). “Waiver presupposes a full knowledge of a right existing and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights, or varies or changes the terms and provisions of a contract; but not so with estoppel.” *Id.* ‘Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert it from the mischief that has followed. *Id.*

Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead. Waiver involves the acts and conduct of only one of the parties; estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice, or into an altered position; an estoppel always involves this element.” *Id.* at 582.

Here, the Separate Defendant argues that waiver applies, because a former mayor of the Plaintiff made a request, along with a resident of the Plaintiff, that the Separate Defendant remove the Oliver St. Crossing. However, as stated throughout this memorandum of law, the mayor did not have the actual authority to make this request or to authorize the removal of this public easement, as the General Assembly has set forth a procedure that must be followed by municipal corporations to abandon or vacate a public street, alley or easement. Therefore, this argument is without merit.

Further, from the time that the Plaintiff discovered that the Separate Defendant intended not to reinstall the Oliver St. Crossing, the Plaintiff has kept the Separate Defendant on notice that it would seek all available means to reestablish the Oliver St. Crossing. After the Plaintiff’s good faith negotiations failed with the Separate

Defendant, the Plaintiff has sought judicial assistance to force the Separate Defendant to reestablish the Oliver St. Crossing, so the Plaintiff can move forward with its downtown river front development projects.

### **C. Estoppel Does not Apply to the Plaintiff's Claims for Relief.**

The Arkansas Supreme Court has held that estoppel can be applied against a city. *Miller v. City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990). In *Hope Educ. Ass'n v. Hope School Dist.*, 310 Ark. 768, 839 S.W.2d 526 (1992), applied the elements to estoppel to a sovereign, which provided some word changes.

#### **A. ELEMENTS**

In *Hope Educ. Ass'n Supra*, the Arkansas Supreme Court stated "To apply estoppel to a sovereign, there are four requirements: (1) the party to be estopped must know the facts; (2) he or she must intend that his or her conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must rely on the other party's conduct to his or her injury. *Id.* citing *Miller v. City of Lake City*, 302 Ark. 267, 789 S.W.2d 440 (1990); *Foote's Dixie Dandy v. McHenry, Adm'r*, 270 Ark. 816, 607 S.W.2d 323 (1980).

In *Duchac Supra*, the Court of Appeals applied the elements against the plaintiff city in that case. *Id.* at 179. According to the Court of Appeals, the first element of estoppel is that a party to be estopped must know the facts. The Appellant argued this element was satisfied because (1) the city knew the zoning ordinances; (2) the city had received complaints about his use of the house as a multi-family dwelling; (3) he had

paid occupation taxes on the nonconforming use since 1973, and the city never returned the money. *Id.* at 106. The chancellor assumed the city knew the facts.

The Court of Appeals next addressed the second element of estoppel, that the party to be estopped must intend that the conduct be relied on. The Appellant argued that his was satisfied because the city billed and collected occupational taxes, thereby acquiescing in appellant's use of the house as an apartment building. However, the Court of Appeals rejected this argument, as "The Arkansas Supreme Court has held that estoppel may only be applied against the State when there has been an affirmative misrepresentation by an agent or agency of the State." *Id.* citing Arkansas Dep't of Human Servs. V. Estate of Lewis, 325 Ark. 20, 922 S.W.2d 712 (1996). Estoppel should not be applied where there was no clear proof of an affirmative misrepresentation. *Id.* citing *Everett, Director v. Jones*, 277 Ark. 162, 639 S.W.2d 739 (1982). These requirements are equally applicable to municipal corporations. *Id.* citing *Miller v. City of Lake City Supra*. The Court of Appeals found that there was no allegation of any affirmative misrepresentation by any agent of the city; therefore, estoppel did not apply.

The Court of Appeals then addressed the third elements of estoppel, that the party asserting estoppel must be ignorant of the fact. The Appellant argued "that he was justifiably ignorant of the zoning violation because the house was divide into apartments that were fully occupied when he purchased it, and, in the thirty years he has owned the house, the city never informed him that he was violating a zoning ordinance." *Id.* at 179. However, the Court of Appeals again rejected this argument, as the appellant ". . . is not claiming an affirmative misrepresentation by an agent of the

city, only acquiescence.” *Id.* The Court of Appeals affirmed the chancellor’s determination that “since the zoning ordinance was law, and one is presumed to know the law, the appellant could not rely on his ignorance.” *Id.* at 180. The Court of Appeals reiterated that “It has long been held that every person is presumed to know the law and that ignorance of its mandates is no excuse. *Id.* citing *Henderson v. Gladish*, 198 Ark. 217, 128 S.W.2d 257 (1939).

Finally, the Court of Appeals addressed the fourth and final element of estoppel, that the party asserting the estoppel must rely on the other’s conduct and be injured by that reliance. The Appellant argued this element was “. . . satisfied because he relied on the conduct of the city to his detriment by expending large sums of money paying the taxes and in purchasing and maintaining the house as an apartment building.” *Id.* “The chancellor found the city had done nothing appellant was justified in relying on,” which the Court of Appeals found was not clearly erroneous. *Id.*

## **B. APPLICATION**

Applying the above elements to the Plaintiff, a municipal corporation, the Separate Defendant’s defense of estoppel should be denied. First, the Separate Defendant fails to establish the first element that the Plaintiff knew the facts. As set forth in the Plaintiff’s Complaint, the Plaintiff’s representative, Sandy Key, believed that the Separate Defendant removed the Oliver St. Crossing for construction of high speed rails. It was not until after the Plaintiff asked about the status of the reinstallation of the public crossing that Plaintiff discovered that Separate Defendant was not planning to reinstall the Oliver St. Crossing. However, the Plaintiff has kept the Separate Defendant

on notice since this discovery that it intended to obtain the reinstallation of the Oliver St. Crossing.

The Separate Defendant fails to establish the second element of estoppel, as the Separate Defendant cannot show that the Plaintiff intended that its conduct be relied on or acted so that the Separate Defendant could rely upon its conduct. From the moment that Plaintiff discovered that Separate Defendant did not intend to reinstall the public Oliver St. Crossing, the Plaintiff has kept the Separate Defendant fully apprised of its intent to obtain the reinstallation of the Oliver St. Crossing. Further, the Separate Defendant has not alleged any affirmative misrepresentation by an agent or agency of the Plaintiff. The fact that the Plaintiff did not rush to the courthouse and file a lawsuit against the Separate Defendant does not give rise to the Separate Defendant's estoppel argument.

Further, the Separate Defendant fails to establish the third element of estoppel, that it, the Separate Defendant, was ignorant of the facts. The Separate Defendant has not alleged any affirmative misrepresentation by an agent of the Plaintiff, but only that a former mayor requested the removal of the Oliver St. Crossing. The Separate Defendant is presume to know the law and should have known that the Arkansas General Assembly had prepared a specific procedure for the Plaintiff to abandon or vacate the Oliver St. and the Oliver St. Crossing. Further, since the Separate Defendant is presumed to know the law, then the Separate Defendant cannot rely on its ignorance and claim that the Plaintiff's former mayor's request was the proper procedure for the Plaintiff to abandon or vacate the Oliver St. Crossing.

Finally, the Separate Defendant fails to establish the fourth element of estoppel, that the Separate Defendant relied upon the other's conduct and it was injured by that reliance. The Separate Defendant has stated that it incurred thousands of dollars removing the Oliver St. Crossing at the request of the Plaintiff's former mayor; however, as stated above, this apparent unwritten request was not the proper procedure. Therefore, the Separate Defendant did not have any authority to remove the Oliver St. Crossing and such action was illegal. The Separate Defendant did not have a reasonable basis to rely on this request or to remove Oliver St. or the Oliver St. Crossing without requiring an affirmative vote of the Plaintiff's city council.

**VI. ARKANSAS LAW PROVIDES THE PLAINTIFF THE AUTHORITY TO CONDEMN RAILROAD PROPERTY FOR THE PUBLIC USE**

The Plaintiff has alleged as an alternative claim for relief, eminent domain and condemnation, and requested authority from this Honorable Court for the authority to enter the Separate Defendant's land to survey the limited area needed to reinstall the Oliver St. Crossing. Unless this Honorable Court grants the Plaintiff the authority to enter the Separate Defendant's land, the Plaintiff's representative will be arrested by Separate Defendant's railroad police for trespassing. This alternative argument is only applicable in the unlikely event that this Honorable Court finds the Separate Defendant was authorized to remove the Oliver St. Crossing and is not required to replace it.

The Separate Defendant correctly sets forth the limitations on a municipality's power to condemn property for the use of the public. First, there must be an established need to take the property for a public use or purpose. *Pfeifer v. City of Little Rock*, 346 Ark. 449, 460, 57 S.W.3d 714, 721 (2001). "This is a judicial question which the owner has a right to have determined by the courts." *Id.* citing *Ark. State Highway*

*Comm. v. Alcott*, 260 Ark. 225, 539 S.W.2d 432 (1976). Second, the “condemnation must be according to the law.” *Robinson v. Ark. State Game and Fish Comm.* 263 Ark. 462, 465, 565 S.W.2d 433, 435 (1978). This means the condemning authority must comply with the statutory scheme. In *Robinson*, *Supra*, employees of the Commission entered onto private property to survey for a lake, which the court determined was a taking. *Id.* at 466, 435.

**A. There is an Established Need for the Taking for a Public Crossing.**

Contrary to the assertion of the Separate Defendant, the Plaintiff has stated an established purpose for the easement more than simply for a boat dock that has not been approved. As stated in specificity in the Plaintiff’s Complaint, since 1994, the Plaintiff has been working towards the development of a river front that utilizes the 1.8 acres of real property that the Plaintiff has leased from the U.S. Army Corps of Engineers. The 1.8 acres will have a park established, along with a system of river trails that will allow the public to walk along the Arkansas River, fishing from the north shore of the Arkansas River and just enjoy the serene beauty of this part of the Arkansas River. The Arkansas Supreme Court has stated that “In determining whether the taking of property is necessary for public use, not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered. *Pfeifer supra* at 346 Ark. at 460, 57 S.W.3d at 721 citing *Woollard v. Ark. State Highway Comm’n*, 220 Ark. 731, 249 S.W.2d 564 (1952). Based on the clear and concise statements of facts contained in the Plaintiff’s Complaint that clearly set forth the Plaintiff’s established public purpose for this alternative claim for eminent domain, the Plaintiff has satisfied this element of eminent domain.

**B. The Plaintiff has Complied with Established Arkansas Law and This Eminent Domain is Not a Taking of Land Already Devoted to Public Use.**

The Separate Defendant attempts to make a novel argument that the Plaintiff is attempting to condemn property that is already used by the public for another public use. However, Arkansas has not adopted the “Prior Public Use” doctrine and in the event this Honorable Court chooses to adopt this judicial rule, the facts of this civil action, will clearly show this doctrine is inapplicable. The Plaintiff, as an alternative claim for relief, is requesting eminent domain to reestablish a public at-grade crossing that was previously in existence for approximately 125 years prior to its illegal removal by the Separate Defendant.

The Separate Defendant relies upon the Missouri Supreme Court case of *State of Mo. V. Hodge*, 878 S.W.3d 819 (Mo. 1994) to support its opposition to the Plaintiff’s proposed condemnation of Separate Plaintiff’s property to recreate an at-grade public crossing. This reliance is misplaced as the facts are distinguishable and the law supports the Plaintiff’s condemnation.

In *Hodge*, the City of Mexico, Missouri attempted to condemn a privately owned waterworks system that was providing the residences water services, so the city could began to operate the same system at a cheaper rate to its residents. *Id.* The Separate Defendant correctly recites the court’s analysis regarding that property already devoted to a public use cannot be taken for another public use which will destroy or materially impair or interfere with the former use. See *Separate Defendant’s Memorandum of Law Page 25*. However, that court also explained that if an existing public use will not be harmed by a new and different public, condemnation will be allowed under a general

form of authority, **both uses** being “necessary” and not necessarily inconsistent or destructive. [emphasis added] *Id.*

Next, the Separate Defendant asserts the Eighth Circuit Court of Appeals case *Union Center Redevelopment Corp. v. Nat’l R.R. Passenger Corp.*, 103 F.3d 62 (8th Cir. 1997) also supports its opposition to the Plaintiff’s proposed condemnation of Separate Plaintiff’s property to recreate an at-grade public crossing. Again, the facts of this situation are distinguishable and this “judicial rule” supports the Plaintiff’s proposed condemnation. Union Center sought to acquire two parcels of real property from Amtrak that was planned to be used for a rail passenger service station. *Id.* The district court found against Union Center and on appeal, the Eighth Circuit Court of Appeals affirmed as “Union Center failed to establish that its proposed use will not materially interfere with Amtrak’s plan to use the property in the future for an intercity rail passenger station.” *Id.*

In this case, the Plaintiff, alternatively, has sought to use the power of eminent domain to condemn the same section of real property that was previously used as an at-grade public crossing for a period of approximately 125 years prior to the Separate Defendant’s removal of such crossing. The reestablishment of a routine at-grade public crossing in the same location that one existed for approximately 125 years will not materially impair or interfere with Separate Defendant’s railroad operations. The railroad operations that Separate Defendant alleges that must change are normal operations that exist at all routine at-grade crossings. The Plaintiff’s Oliver St. Crossing is not unique to the Separate Defendant’s railroad operations and prior to the Separate Defendant’s illegal removal, the Separate Defendant continued business operations in

the Plaintiff's downtown area without incident. Additionally, based on the Separate Defendant's Motion to Dismiss and Memorandum of Law, the Separate Defendant would not have removed the crossing, but for, the request of Plaintiff's former mayor and complaints from a resident of the Plaintiff, which request lack authority.

Based on the above, the "Prior Public Use" doctrine is not applicable in Arkansas and the Plaintiff has statutory authority to utilize eminent domain to condemn a small portion of the Separate Defendant's property to reestablish a public at-grade crossing. In addition, should this Honorable Court adopt the "Prior Public Use" judicial rule, the Plaintiff will still have authority to utilize eminent domain, as the routine at-grade crossing will not materially impair or interfere with the Separate Defendant's railroad operations.

#### **VII. THE PLAINTIFF DROPPED THE COUNT OF CONVERSION AND REPLACED IT WITH UNREASONABLE INTERFERENCE OF EASEMENT**

Arkansas has recognized that a party may unreasonably interfere with the easement of the owner of the easement. *Campbell v. Carter*, 93 Ark. App. 341, 219 S.W.3d 665 (2005). Further, the owner of the easement may recover damages resulting from interference by the servient owner. *Id.* at 349,670 citing 28A C.J.S. Easements § 209 (1996). The owner of a servient tenement may use the easement consistent with the exercise of the easement granted, *Id.* citing *Howard v. Cramlet*, 56 Ark. App. 171, 939 S.W.2d 858 (1997), but he cannot do anything to diminish the easement's use or make it inconvenient or hazardous to use. *Id.* citing *Hatfield v. Ark. W. Gas Co.*, 5 Ark. App. 26, 632 S.W.2d 238 (1982). The question of the right of a servient owner to obstruct or remove an easement is one of fact to be determined based on the terms of the easement, the parties' intentions as reflected by the

circumstances, the situation of the property, manner the easement has been used, and the location of the obstruction. *Id.* citing *Jordan v. Guinn*, 253 Ark. 315, 485 S.W.2d 715 (1972). The Plaintiff's cause of action against the Separate Defendant for unreasonable interfering with its easement to cross the Separate Defendant's railroad tracks should proceed and damages should be assessed against the Separate Defendant for such interference.

### **VIII. CONCLUSION**

For all of the various foregoing reasons, this Honorable Court should deny the Separate Defendant, Union Pacific Railroad Company's, Motion to Dismiss. The Separate Defendant illegally and without authority removed a "public" at-grade railroad crossing known as the Oliver St. Crossing and the Separate Defendant has, even after reasonable demand, failed and refused to replace the crossing. The doctrine of laches, does not apply to this factual situation, as the Plaintiff has kept the Separate Defendant on notice since approximately 2002 that it sought the reinstallation of the Oliver St. Crossing. The Plaintiff was in constant communication with the Separate Defendant to try and resolve the conflict and obtain the reinstallation of the Oliver St. Crossing. Further, the Arkansas Supreme Court has consistently refused to assert the doctrine of laches against a municipality to open or reopen a city street or road.

Further, this action is not preempted by the ICCTA, as the ICCTA does not preempt disputes over routine at-grade crossings and the reinstallation of an at-grade crossing that was in existence for 125 years does not unreasonably interfere with the Separate Defendant's railroad business operations or pose a safety issue to the general public.

Once this Honorable Court reaches the merits of this case, the Court should determine that neither waiver nor estoppel apply in this case. The Plaintiff clearly did not intentionally surrender or relinquishment its right to recover the Oliver St. Crossing, as the Plaintiff continued to negotiate with the Separate Defendant to reinstall the Oliver St. Crossing. Further, the Separate Defendant is unable to satisfy the elements of estoppel, as the former mayor of Ozark that allegedly requested the removal of the Oliver St. Crossing lacked actual authority to make this request. In the alternative, the Plaintiff's condemnation claim should be successful, as the Plaintiff has the necessary public purpose for the taking and has complied with the required statutory process. In addition, the Plaintiff is entitled to recover damages from the Separate Defendant for unreasonable interference with the Plaintiff's easement in an amount to be determined at trial. For all of these reasons, the Separate Defendant's Motion to Dismiss should be denied.

Respectfully submitted:

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### CERTIFICATE OF SERVICE

I, Christopher D. Brockett, hereby certify that a copy of the foregoing Amended Complaint has this date been served by U.S. Mail on the following:

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Done at Ozark, Arkansas, this 13th day of November 2014.

/s/ Christopher D. Brockett  
Christopher D. Brockett



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

|                                                  |   |                                   |
|--------------------------------------------------|---|-----------------------------------|
| CITY OF OZARK, ARKANSAS, a municipal corporation | ) |                                   |
|                                                  | ) |                                   |
| Plaintiff,                                       | ) |                                   |
|                                                  | ) |                                   |
|                                                  | ) |                                   |
| vs.                                              | ) |                                   |
|                                                  | ) |                                   |
|                                                  | ) |                                   |
| UNION PACIFIC RAILROAD COMPANY,                  | ) |                                   |
| the ARKANSAS STATE HIGHWAY                       | ) |                                   |
| & TRANSPORTATION DEPARTMENT                      | ) |                                   |
| (an Agency of) The State of Arkansas,            | ) | CIVIL ACTION NO:2:14-CV-02196-TLB |
| AND THE ARKANSAS STATE HIGHWAY                   | ) |                                   |
| COMMISSION                                       | ) |                                   |
|                                                  | ) |                                   |
| Defendants,                                      | ) |                                   |

**PLAINTIFF, CITY OF OZARK'S, RESPONSE AND OPPOSITION TO SEPARATE  
DEFENDANT, UNION PACIFIC RAILROAD COMPANY'S, MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED AND RESTATED COMPLAINT**

Comes now the Plaintiff, the City of Ozark, Arkansas, a municipal corporation by and through its undersigned counsel, Christopher D. Brockett of Sayre & Brockett, and for its Response and Opposition to the Separate Defendant, Union Pacific Railroad Company's, Motion to Dismiss the Plaintiff's First Amended and Restated Complaint alleges and states as follows:

1. Plaintiff admits the allegations contained in Paragraph 1 of the Separate Defendant's Motion.
2. The Plaintiff denies that its First Amended Complaint should be denied for:
  - (1) laches, as laches does not apply in this case as the parties have been discussing the reinstallation of the crossing for the entire period after the Plaintiff

learned the Separate Defendant unilaterally removed the public crossing; further, laches does not apply to the Plaintiff as a city municipal corporation;

(2) the City's claims are not preempted by the ICCTA as this matter involves a routine at-grade public crossing that was illegally removed by the Separate Defendant;

(3) the Plaintiff did request the removal of the at-grade public crossing known as Oliver St. Crossing, as this crossing was a necessity for the Plaintiff's downtown development. Further, Arkansas law is clear that only a vote by the city council of the Plaintiff would have allowed the Plaintiff to abandon a public easement and no vote or discussion was ever taken on this issue (See attached Affidavit of Sonya Eveld, City Clerk of City of Ozark and Carol Sneath, former City Clerk of the City of Ozark, which are attached as **Exhibit A-1 and A-2** and incorporated herein as if set forth word for word);

(4) the Plaintiff did not request the removal of the crossing and further, the doctrine of estoppel does not apply as the Separate Defendant cannot satisfy the elements of estoppel;

(5) the Plaintiff has condemnation authority under Arkansas law and pursuant to this authority, the Plaintiff may condemn the property for the use of a public crossing; and

(6) the Plaintiff dropped the conversation claim in the First Amended and Restated Complaint to assert the Count of Unreasonably Interference of Plaintiff's Easement and Reestablishment of the Public Oliver St. Crossing.

3. Paragraph 3 of the Separate Defendant's Motion does not require a response from the Plaintiff. However, to the extent Paragraph 3 attempts to assert liability or a cause of action against the Plaintiff for dismissal, the Plaintiff generally denies the allegations contained in Paragraph 3 of the Separate Defendant's Motion.

4. Plaintiff generally and specifically denies the allegations set forth in Paragraph 4 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that Plaintiff clearly shows success on the merits, as the Separate Defendant unilaterally removed a 125 year old public crossing without any authority from the Plaintiff's city council as required by Arkansas law.

5. Plaintiff admits that the Separate Defendant illegally removed the crossing and ignored the 2005 suggestion from the Separate Defendant, Arkansas Highway & Transportation Department, to reinstall the public crossing. The Plaintiff generally and specifically denies the remaining allegations contained in Paragraph 5 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that in the likely event that Plaintiff is successful and Separate Defendant is required to reinstall the Oliver St. Crossing, then the permanent injunction is the proper remedy to prevent the current and future interference of the Plaintiff's easement by the Separate Defendant.

6. Plaintiff generally and specifically denies the allegations contained in Paragraph 6 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that Plaintiff and representatives of the Separate Defendant were in discussion for replacement of the Oliver St. Crossing along with various State and Federal elected officials. Plaintiff pleads further in the affirmative that until all other means were exhausted, the Plaintiff attempted to avoid a contentious lawsuit against the Separate

Defendant, but this does not discount the fact that the Separate Defendant will continue to unreasonably and illegal interfere with the Plaintiff's easement, unless this Honorable Court issues a permanent injunction to prevent this action by the Separate Defendant.

7. Plaintiff generally and specifically denies the allegations contained in the Paragraph 7 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that Plaintiff's retained expert, George B. Soliz, has provided his own opinion that the reinstallation of the Oliver St. Crossing will not create any safety issue for the public in excess of any other railroad crossing; nor will it interfere with the Separate Defendant's personal railroad operations. See attached Affidavit of George B Soliz attached hereto as **Exhibit B** and incorporated herein. Plaintiff pleads further in the affirmative that for the entire 125 year period that the Oliver St. Crossing was in existence, there was no recorded accident at this crossing.

WHEREFORE, the Plaintiff, the City of Ozark, Arkansas, a municipal corporation, respectfully prays that this Honorable Court issue an Order denying the Separate Defendant, Union Pacific Railroad Company's, Motion to Dismiss the Plaintiff's First Amended and Restated Complaint, for its reasonable attorney's fees and costs for responding to the Separate Defendant's Motion; and for any and all other relief to which this Court finds the Plaintiff is entitled.

Respectfully submitted:

By: /s/ Christopher D. Brockett  
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**ATTORNEYS FOR THE PLAINTIFF**

**CERTIFICATE OF SERVICE**

I, Christopher D. Brockett, hereby certify that a copy of the foregoing Amended Complaint has this date been served by U.S. Mail on the following:

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Done at Ozark, Arkansas, this 13<sup>th</sup> day of October 2014.

/s/ Christopher D. Brockett  
Christopher D. Brockett

## **EXHIBIT A-1**

AFFIDAVIT OF SONYA EVELD  
CITY CLERK OF CITY OF OZARK

**EXHIBIT A-2**  
AFFIDAVIT OF CAROL SNEATH  
FORMER CITY CLERK OF CITY OF OZARK

## **EXHIBIT B**

AFFIDAVIT OF GEORGE B. SOLIZ  
GBS RAILROAD CONSULTING SERVICES LLC