



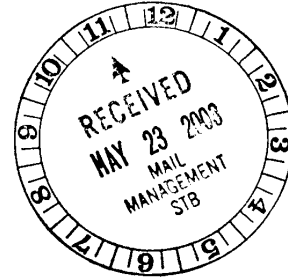
BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

207871

May 23, 2003

Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



RE: STB Finance Docket No. 34354, *Emergency Petition of Maumee & Western Railroad Corporation and RMW Ventures, LLC for Declaratory Order – Condemnation of Main Line Tracks by the City of Napoleon, Ohio*

Dear Secretary Williams:

Enclosed please find an original and ten (10) copies of the “Opposition to Emergency Petition for Declaratory Order” respectfully submitted by the City of Napoleon in the above-referenced docket.

Also enclosed is one additional copy of the pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact me. My office telephone number is (202) 331-8800.

Sincerely,

Jeffrey O. Moreno
Michael H. Higgins

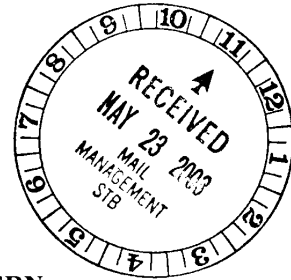
*Attorneys for
The City of Napoleon*

ENTERED
Office of Proceedings
MAY 23 2003
Part of
Public Record

207871

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34354



**EMERGENCY PETITION OF MAUMEE & WESTERN
RAILROAD CORPORATION AND RMW VENTURES, LLC FOR DECLARATORY
ORDER – CONDEMNATION OF MAIN LINE TRACKS BY
THE CITY OF NAPOLEON, OHIO**

**THE CITY OF NAPOLEON'S
OPPOSITION TO EMERGENCY PETITION FOR DECLARATORY ORDER**

Jeffrey O. Moreno
Michael H. Higgins
THOMPSON HINE LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

*Attorneys for
The City of Napoleon*

Dated: May 23, 2003

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34354



**EMERGENCY PETITION OF MAUMEE & WESTERN
RAILROAD CORPORATION AND RMW VENTURES, LLC FOR DECLARATORY
ORDER – CONDEMNATION OF MAIN LINE TRACKS BY
THE CITY OF NAPOLEON, OHIO**

**THE CITY OF NAPOLEON’S
OPPOSITION TO EMERGENCY PETITION FOR DECLARATORY ORDER**

Comes now, the City of Napoleon (“Napoleon”), pursuant to 49 C.F.R. § 1104.13, and, through its undersigned counsel, submits its Opposition to the Emergency Petition for Declaratory Order (the “Petition”) filed by Maumee & Western Railroad Corporation (“M&W”) and RMW Ventures, LLC (“RMW”) (collectively “Petitioners”). The Board should deny and dismiss the Petition because (1) the parties’ local dispute can be resolved fully and fairly in the condemnation proceeding before the Common Pleas Court of Henry County, Ohio (the “Ohio Court”); (2) the Ohio laws at issue in that proceeding will protect M&W’s rail operations from unreasonable interference; and (3) federal law does not preempt Napoleon’s use of eminent domain in this dispute, which will not result in the taking of M&W’s rail property or the cessation or unreasonable restriction of rail service over its rail line.

I. Background.

Napoleon is a municipal corporation organized and existing under the Laws of the State of Ohio. It is located in an agricultural region of northwest Ohio on the Maumee River and has approximately 9,300 residents. Its local industry includes machine tool manufacturing, plastics industries, and automotive component production.¹

¹ See <http://www.napoleonohio.com>.

Commerce Drive, upon completion, will be a newly-constructed, two lane public street that connects property under development as an industrial park to the city. See Verified Statement of David M. Grahn, attached hereto as Exhibit A, (“Grahn V.S.”), ¶¶3-4. The planned right-of-way for Commerce Drive, which will also contain subsurface utilities necessary for the industrial park, crosses M&W’s mainline and requires construction on an 8,000 square foot parcel of M&W’s property at the intersection. Id. The road will establish a second access route to the park, which is necessary for both efficient service and sufficient police and fire protection. Id., ¶4. The industrial park itself will foster Napoleon’s economic growth. Id., ¶3.

Napoleon’s recent efforts to acquire the parcel from Petitioners have been unsuccessful primarily because of Petitioners’ insistence upon blanket indemnification from claims arising from the crossing and an unfettered right to block the crossing. Id., ¶5. Under Ohio law, Napoleon cannot agree to the former, while the latter would frustrate the purpose of the crossing. Id. Thus, on September 16, 2002, the Council of the City of Napoleon (the “Council”) passed Resolution No. 121-02 (attached hereto as Exhibit B) to appropriate a fee simple interest and/or right-of-way interest in the parcel. Id., ¶6. On October 7, 2002, the Council passed Ordinance No. 126-02 (attached hereto as Exhibit C) to proceed with the appropriation of only an easement, as opposed to a fee simple interest, for public purposes. Id. On May 16, 2003, Napoleon filed a Petition for Appropriation in the Court (attached hereto as Exhibit D²), seeking to acquire the easement by eminent domain under Ohio Revised Code (“ORC”) §§ 161.01 – 163.22 and § 719.01. Id. Pursuant to ORC § 719.01(A), the Court may grant Napoleon’s condemnation upon finding that “such appropriation will not unnecessarily interfere with the [railway’s] reasonable use of [the] property.” Under ORC §§ 4955.16 and 4955.20, the Court may apportion crossing construction costs for Commerce Drive. Napoleon’s petition remains pending at this time. Id.

² For the sake of simplicity, Resolution Nos. 121-02 and 126-02, which are attached hereto as Exhibits C and D, have been removed from the copy of the Petition for Appropriation, which is attached hereto as Exhibit D, as have certain other documents required for service of the Petition for Appropriation by the Clerk of the Court.

II. The Board Should Decline to Issue a Declaratory Order Absent a Judicial Referral.

The Board, under the Administrative Procedure Act, “in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” STB Finance Docket 34052, Green Mountain Railroad Corp.—Petition for Declaratory Order, Slip Op. at 4 (Served May 28, 2002), quoting 5 U.S.C. 544(e). The Board, however, typically has declined to declare that a particular local or state statute or ordinance is preempted, finding that such issues are best left to the courts.

The seminal STB decision on preemption is STB Finance Docket No. 33200, Cities of Auburn and Kent, WA – Petition for Declaratory – Burlington Northern R.R. Co. – Stampede Pass Line (Served July 2, 1997) (“Stampede Pass”). In that decision, the Board declined to analyze any particular ordinance or local regulatory requirement. Instead, the Board presented its overall view of the appropriate role of state and local regulation of BN’s reactivation of its Stampede Pass line. In doing so, the Board expressly held that “*the review of individual ordinances or state or local regulations is beyond the scope of our limited inquiry in this case and is more appropriately an issue for the courts.*” Id., Slip Op. at 7 [emphasis added].

When the Board has issued a declaratory order regarding the preemption of a particular state or local action, it usually has done so at the request of a referring court. E.g., STB Finance Docket No. 33466, Borough of Riverdale – Petition for Declaratory Order – The New York and Susquehanna and Western Ry. Corp., (Served Sept. 10, 1999); STB Finance Docket No. 33971, Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, 2001 STB Lexis 782 (Served Oct. 3, 2001).

In Green Mountain R.R., the Board declined to issue a declaratory order in a case that is in a similar procedural posture to the instant proceeding. Specifically, petitioner filed its Petition with the Board and then sought injunctive and declaratory relief in federal court the very next day. Id., Slip Op. at 3. The court, however, declined to refer the matter to the STB. Id. Since the court possessed enforcement authority and had made clear its desire to resolve the issues without assistance from the Board, the Board denied the petition. Id. at 4. In the instant

proceeding, Petitioners sought a declaratory order from the Board in anticipation of the City's initiation of condemnation proceedings in the Ohio Court, which in fact occurred only ten days later. A declaratory order from the Board, however, would not be binding on the Ohio Court, and the Board therefore should not entertain Petitioners' petition absent a clear indication from the Court that the Board's opinion is desired.

III. Ohio Condemnation Laws Protect M&W's Rail Service From Unreasonable Interference.

Petitioners inappropriately seek a declaration from the Board that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA")³ preempts Napoleon's condemnation action primarily because of personal concerns they have about the Ohio Court's ability to construe and apply the terms "unnecessary interference" and "reasonable use," to M&W's rail operations, as required by ORC §719.01(A). Petition at 4. These personal misgivings provide no support for declaratory relief. On the contrary, Ohio's condemnation laws safeguard M&W's rail operations by requiring the Court to apply very similar standards to those applied by the Board in its preemption analyses.

Petitioners ignore the fact that Ohio law requires the Court to conduct virtually the same inquiry regarding the effect of the proposed taking on M&W's rail operations that the STB otherwise would conduct, were this matter to evolve into a full declaratory proceeding. Ohio Revised Code § 719.01(A) requires the Court to find that the condemnation will not "unnecessarily interfere with the reasonable use of [M&W's property]." [Emphasis added.] Similarly, in King County, WA – Pet. For Decl. Order – Burlington R.R. Co. – Stampede Pass Line, 1 S.T.B. 731, 736-37 (1996), the STB held that:

A key element in the preemption doctrine is the notion that only "unreasonable" burdens are stricken down. Not all state and local regulations that affect interstate commerce fail. Only those that "conflict with" federal regulation, "interfere with" federal authority, or "unreasonably burden" interstate commerce.

³ Pub. L. No. 104-88, 109 Stat. 803 (1995).

See also, Stampede Pass, Slip Op. at 8-9. The Board inquires into “all of the facts and circumstances” to determine if the local entity’s orders “unduly restrict the railroad’s operations or unreasonably burden interstate commerce.” See STB Finance Docket No. 33971, Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, 2001 STB Lexis 782, at *7, *9 (Served Oct. 3, 2001); STB Finance Docket 34052, Green Mountain Railroad Corp.—Petition for Declaratory Order, Slip Op. at 6-7 (Served May 28, 2002) (“Whether [a challenged regulation] is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question.”) [Emphasis added.] The evident similarities between the Ohio and STB standards demonstrate that Petitioners will be able to present the same factual evidence and enjoy the same protections before the Ohio Court, as before the STB. Thus, Petitioners face no substantive unfairness before the Court that would warrant the Board’s involvement in this dispute.

Petitioners’ misgivings about the Court’s legal acumen are equally unpersuasive. Federal and state forums have concurrent jurisdiction over preemption issues arising under ICCTA, and state courts—from New Jersey to California—routinely interpret terms such as “unduly burden,” “reasonable use,” and “unreasonable interference” in that context. See, e.g., Ridgefield Park v. New York, Susque. & W. Ry., 750 A.2d 57 (N.J. 2000) (analyzing whether local regulations caused unreasonable interference with rail operations); Oklahoma v. Burlington Northern and Santa Fe Ry., 24 P.3d 368, 371 (Okla. Civ. App. 2000) (finding that an Oklahoma Corporation Commission order requiring BNSF to fence 3/10 mile portion of right-of-way did not significantly impact rail operations); and, Jones v. Union Pacific R.R., 79 Cal. App. 4th 1053 (Cal. Ct. App. 2000) (considering whether challenged activities furthered UP’s rail activities). The fact that the Board has cited Ridgefield Park favorably in no less than seven decisions

proves that state courts, including those in Ohio⁴, are competent to resolve rail preemption matters. Thus, Petitioners' claim that the Board must accept jurisdiction rings hollow.

IV. Federal Law Does Not Preempt Napoleon's Condemnation Action Because It Will Neither Affect M&W's Ability To Provide Rail Service Nor Take Its Rail Assets.

Petitioners contend that this local dispute implicates federal preemption, under 49 U.S.C. § 10501(b), because Napoleon's condemnation action purportedly involves the "the regulation and control of the acquisition, construction, and operation of common carrier railroad facilities" and the imposition of costs associated with construction and operation of Commerce Drive on a common carrier. Petition at 4. However, M&W misapplies both the statute and the case law in concluding that preemption precludes the City's exercise of eminent domain on the facts raised in this dispute, where the interest sought is merely an easement.

Napoleon's condemnation action, if successful, will neither unreasonably affect M&W's ability to provide rail service over the parcel, nor take its rail assets and track materials. Indeed, the Court proceeding is limited to an easement interest for crossing purposes. It does not pursue a fee simple interest in Petitioners' property or seek to acquire any ownership of the rail assets thereon. Thus, the City is not regulating the acquisition, construction, or operation of rail facilities. To the extent that construction and use of Commerce Drive has any impact on the "operation" of rail facilities, such effects are merely incidental to the City's exercise of its legitimate police powers, and the Ohio Court must by law ensure that such effects are reasonable and not unduly burdensome. Accordingly, Napoleon's eminent domain proceeding does not implicate the "acquisition," "construction," or "operation" of rail facilities so as to warrant assertion of paramount federal jurisdiction.

In fact, the cases cited by M&W illustrate this point. In Wisconsin Central Ltd., v. City of Marshfield, 160 F. Supp.2d 1009 (W.D. Wis. 2000), the Court held that federal preemption precluded the City of Marshfield's condemnation of 6,800 feet of WCL's passing track along its

⁴ See e.g., City of Fairfield v. CSX Transp., Case No. CA95-09-149, 1996 Ohio Lexis 424 (Oh. Ct. App. 1996) (apportioning costs for movement of switch and turnout against rail carrier pursuant to ORC § 4955.20 in conjunction with road widening project over rail line.)

mainline that would have terminated rail operations over the segment. Similarly, in Columbiana County Port Authority v. Boardman Township Park District, 154 F. Supp.2d 1165 (N.D. Ohio 2001), the Court rejected the park district's purported taking of a rail easement through eminent domain that would have discontinued rail service. Here, Napoleon's action will not terminate or discontinue M&W's rail operations over the line. Thus, neither Wisconsin Central Ltd. nor Columbiana County Port Authority lends any support for M&W's argument that the Board should declare Napoleon's action preempted on these facts.⁵ Furthermore, since both cases are judicial decisions, they undermine M&W's assertion that the Board should exercise jurisdiction to declare the City's actions preempted.

Consistent with these judicial decisions, in those cases where the Board has made general declarations regarding preemption, it has directed its criticism to actions that could be used to frustrate or defeat an activity that is regulated at the Federal level. For example, in Stampede Pass, the Board concluded that local permitting requirements for rail construction could frustrate or defeat construction that the Board already had approved. Slip Op. at 10. In the instant case, however, Napoleon is not attempting to frustrate or defeat any M&W activity over which the Board has exclusive jurisdiction. Rather, the City simply is trying to construct a public road and appurtenant utilities across the rail line to serve a planned industrial park. In fact, the City has no desire or interest to frustrate M&W's rail service, because such service is important to the development of the industrial park. Thus, the concerns raised by the Board in past preemption decisions are not present in this case.

Finally, the law is conclusive that federal preemption under ICCTA may not be invoked to shield a rail common carrier, like M&W, from local laws, or court actions, assessing a reasonable financial contribution against a rail carrier for a public works project related to the carrier's line. See Wheeling & Lake Erie Ry. v. Pennsylvania Pub. Utilities Comm., 778 A.2d 785, 791 (Pa. Comwlth. Ct. 2001) ("[W]e conclude that the PUC's authority under the Code to

⁵ Petitioner's citation to Hayfield Northern Railroad Co., v. Chicago, & Northwestern Transportation Co., 467 U.S. 662 (1984), which involved condemnation of an abandoned rail line, is simply inapposite.

regulate the safety of the subject bridge and allocate the costs of its reconstruction has not been preempted, either explicitly or implicitly by the ICC Termination Act.”); STB Finance Docket No. 34020, Fletcher Granite Co.,—Petition for Declaratory Order, 2001 STB Lexis 590, at *11 (Served June 29, 2001) (stating that under ICCTA “localities retain certain police powers to protect the public health and safety.”)

Indeed, ICCTA’s legislative history makes plain that “States retain the police powers reserved by the Constitution.” See H. Rep. No. 104-311 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808. And, the Supreme Court long ago held that such powers include assessing the costs of crossings, or like projects, against railroads:

[T]he improvements at bar were instituted by the State to meet local transportation needs and further safety and convenience, made necessary by rapid growth of communities. In such circumstances, this Court has consistently held that in the exercise of police power, the cost of such improvements may be allocated all to the railroads. There is a proper limitation that such allocation of costs must be fair and reasonable.

A.T.&S.F. Ry. v. Public Utilities Comm., 346 U.S. 346, 353 (1953).⁶ Thus, Petitioners’ concerns about costs do not support their preemption claims.

⁶ The Court also explained, “the railroad tracks are in the streets not as a matter of right but by permission of the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.” A.T.&S.F., 346 U.S. at 353.

WHEREFORE, the City of Napoleon, respectfully asks the Board to deny the declaratory relief requested by Petitioners and to dismiss the Petition.

Respectfully submitted,

The City of Napoleon

By its representatives,



Jeffrey O. Moreno
Michael H. Higgins
THOMPSON HINE LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

*Attorneys for
The City of Napoleon*

May 23, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 23rd day of May, 2003, a copy of the foregoing
The City of Napoleon's Opposition to the Emergency Petition for Declaratory Order by first-
class mail, postage prepaid, at the address set forth below:

Richard R. Wilson, Esq.
Richard R. Wilson, P.C.
Attorney at Law
127 Lexington Avenue, Suite 100
Altoona, PA 16601



Jeffrey O. Moreno

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 34354

**EMERGENCY PETITION OF MAUMEE & WESTERN
RAILROAD CORPORATION AND RMW VENTURES, LLC FOR
DECLARATORY ORDER – CONDEMNATION OF MAIN LINE TRACKS BY
THE CITY OF NAPOLEON, OHIO**

**VERIFIED STATEMENT OF DAVID M. GRAHN
IN SUPPORT OF THE CITY OF NAPOLEON’S OPPOSITION TO
EMERGENCY PETITION FOR DECLARATORY ORDER**

1. My name is David M. Grahn. I am over eighteen years of age and competent to provide this Verified Statement in Support of the City of Napoleon’s Opposition to the Emergency Petition for Declaratory Order.
2. I am an attorney licensed to practice law in the State of Ohio. I am currently the City Attorney of the City of Napoleon (“Napoleon”), a municipal corporation organized and existing under the Laws the State of Ohio. I have personal knowledge of the facts and circumstances of the dispute between Napoleon and Maumee & Western Railroad Corporation (“M&W”) and RMW Ventures, LLC (“RMW”) (collectively “Petitioners”).
3. The dispute concerns Commerce Drive, a roadway that is being constructed by Napoleon and the Community Improvement Corporation of Henry County, Ohio. The purpose of building Commerce Drive is to provide additional and necessary access to

Napoleon's industrial park, which is under development and, once completed, will foster economic growth in and around Napoleon.

4. Commerce Drive will establish a second means of ingress and egress to the industrial park that will allow for efficient service by automobile and promote public safety and welfare by virtue of increased accessibility for police and fire protection. The planned right-of-way for the road crosses the mainline of M&W and requires construction on an 8,000 square foot parcel of M&W's property at the point of intersection. The right of way will also contain subsurface utilities serving the park.

5. At various times, Napoleon has engaged in negotiations with the Petitioners to purchase an easement over and under the land at issue. However, those negotiations have been unsuccessful. Most recently, the primary areas of dispute have been the allocation of construction costs related to the crossing and liability as between the parties for claims arising from operation of the crossing. Petitioners sought an agreement under which they would incur no costs and no liability, and would have an unfettered right to block the roadway. While Napoleon could agree to pay installation and future maintenance costs, it could not, under Ohio law, agree to a blanket indemnification (nor did it believe this concession was reasonable). Also, Napoleon did not want to agree to unfettered blocking, as this would frustrate the purpose of Commerce Drive. As a solution to the indemnification issue, Napoleon explored insurance options. However, the associated premium payments were beyond what Napoleon could afford. Because of the impasse, Napoleon began to explore options available under its power of eminent domain.

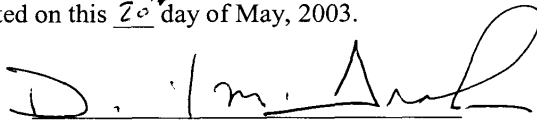
6. On September 16, 2002, the Council of the City of Napoleon (the "Council") passed Resolution No. 121-02 to appropriate a fee simple interest and/or right-of-way

interest in the parcel. On October 7, 2002, the Council passed Ordinance No. 126-02 to proceed with the appropriation of the property by way of an easement for public purposes. On May 16, 2003, Napoleon filed a Petition for Appropriation in the Court of Common Pleas of Henry, Ohio, seeking to acquire the easement by eminent domain, which petition is pending at this time.

7. Napoleon is not aware of Petitioners' current property interest in the parcel at issue. From reviewing a deed on file in the Henry County Records Office, Napoleon understands that Petitioners acquired the line by quitclaim deed from the Norfolk and Western Railroad Company. Inquiries made by Napoleon to Petitioners' counsel have not clarified the extent of the interest held by Petitioners.

VERIFICATION

I, David M. Grahn, verify under penalty of perjury, under the laws of the United States, that the foregoing statements are true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on this 20th day of May, 2003.

A handwritten signature in black ink, appearing to read "D. M. Grahn", written over a horizontal line.

David M. Grahn
Law Director
City of Napoleon

EXHIBIT B

Exhibit "A"

RESOLUTION NO. 121-02

A RESOLUTION OF INTENT TO APPROPRIATE CERTAIN REAL ESTATE [MAUMEE AND WESTERN RAILROAD CROSSING AT COMMERCE DRIVE]; AND DECLARING AN EMERGENCY

WHEREAS, the Council deems it necessary to appropriate the hereinafter described real estate for the purposes as hereinafter set forth;

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NAPOLEON, OHIO:

Section 1. That, this Council hereby declares the necessity and intent to appropriate a fee simple interest and/or right-of-way in the real estate described in the legal description marked as "Appendix A", attached hereto and incorporated into this Resolution in order to promote the public health, public safety, public convenience, and public welfare of the City, as authorized by the Charter of the City of Napoleon, the Ohio Revised Code, and the Ohio Constitution. The purpose of the appropriation is as follows: (a) to open and/or extend streets; (b) to allow for construction and maintaining of sewers and drains; (c) to allow for the placement and maintenance of public utilities, including natural and/or artificial gas lines, electric lines and lighting and for supplying the product thereof; (d) to allow for the protection of public buildings and their environs and the usefulness of public grounds occupied by public buildings; (e) to allow for the providing of a water supply for the City and its inhabitants by the construction and/or maintaining of water pipes, and for the protection thereof; and, (f) to the extent permitted by law, to promote economic development and/or to allow for the placement and maintenance of other public utilities not specifically named in (c) above.

Section 2. That, in the event that a scrivener error should exist in the attached legal description as reference in §1 of this Resolution, said error may be freely corrected by the Clerk of Council without necessity of further legislation. Further, in the event that one or more of the reasons for the taking of the property is found invalid by a court of competent jurisdiction, such reason(s) shall become null and void in this Resolution; however, all other reasons shall remain valid.

Section 3. That, the Mayor of the City be and is hereby authorized and directed to cause notice of the adoption of this Resolution to be given immediately to the known owners of, or persons having an interest of record in, the above described real estate, and said notice shall be served by such person as the Mayor may designate, and such person shall make return of the service of notice in the manner provided by law. Where such owner, person, or agent thereof cannot be found, the Mayor or his designee is authorized and directed to give notice by publication once a week for three (3) consecutive weeks in a newspaper of general circulation in the City of Napoleon.

Section 4. That, the City Manager be and is hereby authorized and directed to take such action as is necessary and proper, directly or through agents, to determine the value of the above described real estate in any reasonable manner, including without limitation appraisal by a professional independent appraiser, and to negotiate with the owners of said real estate, if any can be found, to purchase said real estate based upon said valuation.

Section 5. That, it is found and determined that all formal actions of this City Council concerning and relating to the adoption of this Resolution were adopted in open meetings of this City Council, and that all deliberations of this City Council and any of its committees that resulted in such formal actions were in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code and the Codified Ordinances of Napoleon, Ohio.

Section 6. That, if any other prior Ordinance or Resolution is found to be in conflict with this Resolution, then the provisions of this Resolution shall prevail. Further, if any portion of this Resolution is found to be invalid for any reason, such decision shall not affect the validity of the remaining portions of this Resolution or any part thereof.

Section 7. That, this Resolution is declared to be an emergency measure necessary for the immediate preservation of the public peace, health or safety of the City and its inhabitants, and for the further reason that this legislation must be in effect at the earliest possible time to allow for the eminent domain action to proceed expeditiously so that streets and utilities may properly be created and/or continue to exist, a process deemed by this Council essential; therefore, provided it receives the required number of votes for passage as emergency legislation, it shall be in full force and effect immediately upon its passage; otherwise, it shall be in full force and effect at the earliest time permitted by law.

Passed: Sept. 16, 2002

Michael J. DeWit
Michael J. DeWit, Council President

Approved: 16 SEPT 02

J. Andrew Small
J. Andrew Small, Mayor

VOTE ON PASSAGE 7 Yea 0 Nay 0 Abstain

Attest:

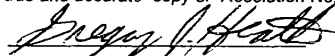
Gregory J. Heath
Gregory J. Heath, Clerk/Finance Director

I, Gregory J. Heath, Clerk/Finance Director of the City of Napoleon, do hereby certify that the foregoing Resolution No. 121-02 was duly published in the Northwest Signal, a newspaper of general circulation in said City, on the 24 day of September, 2002; & I further certify the compliance with rules established in Chapter 103 of the Codified Ordinances Of Napoleon Ohio and the laws of the State of Ohio pertaining to Public Meetings.

Gregory J. Heath
Gregory J. Heath, Clerk/Finance Director

CERTIFICATION

I, Gregory J. Heath, Finance Director of the City of Napoleon, Ohio, do hereby certify that the attached Resolution No. 121-02 is a true and accurate copy of Resolution No. 121-02 of the City of Napoleon, Ohio.


Gregory J. Heath, Finance Director

05/15/03
Date

Appendix "A"

Res. 121-02

RAILROAD CROSSING – LEGAL DESCRIPTION

A parcel of land being part of the West one-half (1/2) of Section seven (7), Township five (5) North, Range seven (7) East, Liberty Township, City of Napoleon, Henry County, Ohio and being more particularly described as follows:

Commencing at a 1/2" x 30" iron pin set on the Southerly right-of-way line of the Maumee & Western Railroad, said iron pin being located South forty-eight (48) degrees, twenty-nine (29) minutes, and forty-eight (48) seconds West, a distance of one thousand, six hundred two and fifty-three hundredths (1,602.53) feet from the intersection of the said Southerly right-of-way line with the East line of the West one-half (1/2) of Section seven (7), said iron pin also being the **TRUE POINT OF BEGINNING**;

Thence Southerly along the Southerly right-of-way line of the Maumee & Western Railroad, having a bearing of South forty-eight (48) degrees, twenty-nine (29) minutes, and forty-eight (48) seconds West, a distance of eighty and zero hundredths (80.00) feet to a 1/2" x 30" iron pin set;

Thence Northwesterly along a line having a bearing of North forty-one (41) degrees, twenty-three (23) minutes, and fifty-two (52) seconds West, a distance of one hundred and zero hundredths (100.00) feet to a 1/2" x 30" iron pin set;

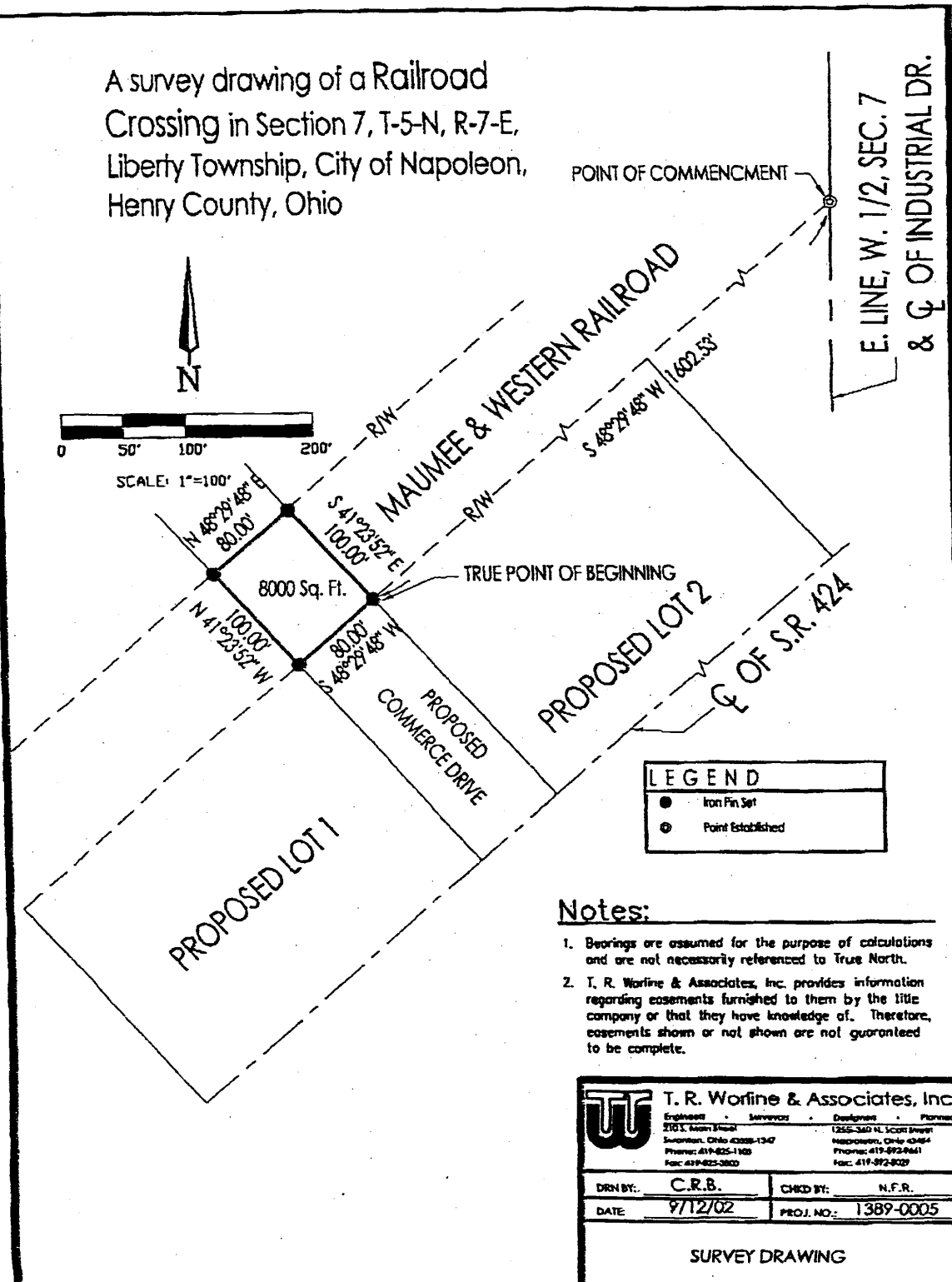
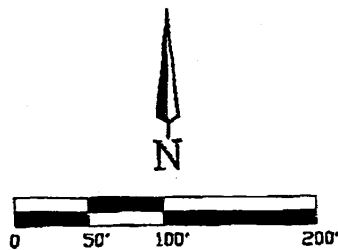
Thence Northeasterly along the Northerly right-of-way line of the Maumee & Western Railroad, having a bearing of North forty-eight (48) degrees, twenty-nine (29) minutes, and forty-eight (48) seconds East, a distance of eighty and zero hundredths (80.00) feet to a 1/2" x 30" iron pin set;

Thence Southeasterly along a line having a bearing of South forty-one (41) degrees, twenty-three (23) minutes, and fifty-two (52) seconds East, a distance of one hundred and zero hundredths (100.00) feet to the **TRUE POINT OF BEGINNING**.

Containing 8,000 square feet, which is equal to zero and one hundred eighty-four thousandths (0.184) acres of land, more or less. Subject, however, to all legal highways and easements of record.

This legal description dated September 11, 2002 was prepared by Nicholas F. Ronau, Ohio registered Surveyor No. 6735, from a survey performed by T. R. Worline & Associates, Inc., under his direction in June of 2002.

A survey drawing of a Railroad
Crossing in Section 7, T-5-N, R-7-E,
Liberty Township, City of Napoleon,
Henry County, Ohio



LEGEND

- Iron Pin Set
- ⊙ Point Established

Notes:

1. Bearings are assumed for the purpose of calculations and are not necessarily referenced to True North.
2. T. R. Worline & Associates, Inc. provides information regarding easements furnished to them by the title company or that they have knowledge of. Therefore, easements shown or not shown are not guaranteed to be complete.



T. R. Worline & Associates, Inc.

Engineers	Surveyors	Designers	Planners
210 S. Main Street	1255-340 N. Scott Street		
Napoleon, Ohio 43650-1347	Napoleon, Ohio 43644		
Phone: 419-825-1100	Phone: 419-825-8641		
Fax: 419-825-3800	Fax: 419-825-8029		

DRN BY: C.R.B.

CHKD BY: N.F.R.

DATE: 9/12/02

PROJ. NO.: 1389-0005

SURVEY DRAWING

EXHIBIT C

Exhibit "C"

ORDINANCE NO. 126-02

AN ORDINANCE AUTHORIZING THE APPROPRIATION OF CERTAIN
REAL ESTATE [MAUMEE AND WESTERN RAILROAD CROSSING AT
COMMERCE DRIVE]; DECLARING AN EMERGENCY

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF NAPOLEON, OHIO:

Section 1. That, a right-of-way in, over, below and through the described parcel of real estate as found in Appendix "A", attached hereto and incorporated in this Ordinance, by way of an easement, is hereby authorized to appropriate for the public purposes as follows: (a) to open and/or extend streets; (b) to allow for construction and maintaining of sewers and drains; (c) to allow for the placement and maintenance of public utilities, including natural and/or artificial gas lines, electric lines and lighting and for supplying the product thereof; (d) to allow for the protection of public buildings and their environs and the usefulness of public grounds occupied by public buildings; (e) to allow for the providing of a water supply for the City and its inhabitants by the construction and/or maintaining of water pipes, and for the protection thereof; and, (f) to the extent permitted by law, to promote economic development and/or to allow for the placement and maintenance of other public utilities not specifically named in (c) above, pursuant to the Charter of the City of Napoleon, Ohio, the Ohio Revised Code and the Ohio Constitution.

Section 2. That, the Council finds that the appropriation is necessary for the stated public purposes, that the City has been unable to agree with the owner of the property, and that the City intends to obtain immediate possession of the property, which immediate possession is necessary for the stated public purposes.

Section 3. That, the City Law Director is directed to cause to be filed a petition for appropriation in the court of competent jurisdiction, to have a jury impaneled to assess the compensation to be paid for the real estate as described in Appendix "A".

Section 4. That, it is found and determined that all formal actions of this City Council concerning and relating to the adoption of this Ordinance were adopted in open meetings of this City Council, and that all deliberations of this City Council and any of its committees that resulted in such formal actions were in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code and the Codified Ordinances of Napoleon Ohio.

Section 5. That, if any other prior Ordinance or Resolution is found to be in conflict with this Ordinance, then the provisions of this Ordinance shall prevail. Further, if any portion of this Ordinance is found to be invalid for any reason, such decision shall not affect the validity of the remaining portions of this Ordinance or any part thereof.

Section 6. That, this Ordinance is declared to be an emergency measure necessary for the immediate preservation of the public peace, health or safety of the City and its inhabitants, and for the further reason that this legislation must be in effect at the earliest possible time to allow for immediate extension of a street; therefore, provided the required number of votes for passage as emergency legislation, it shall be in full force and effect immediately upon

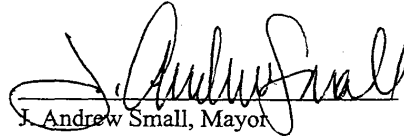
Passed: 10/07/02

Michael P. Deloit

Ordinance No. 126-02

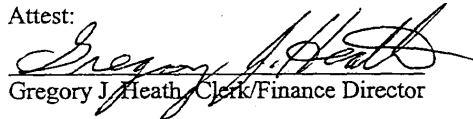
Michael J. DeWit, Council President

Approved: 07 OCT 02

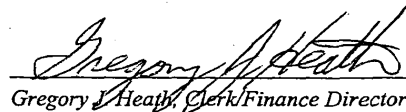

J. Andrew Small, Mayor

VOTE ON PASSAGE 5 Yea 0 Nay 0 Abstain

Attest:


Gregory J. Heath, Clerk/Finance Director

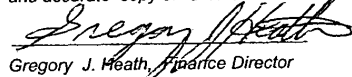
I, Gregory J. Heath, Clerk/Finance Director of the City of Napoleon, do hereby certify that the foregoing Ordinance No. 126-02 was duly published in the Northwest Signal, a newspaper of general circulation in said City, on the 14 day of October, 2002; & I further certify the compliance with rules established in Chapter 103 of the Codified Ordinances Of Napoleon Ohio and the laws of the State of Ohio pertaining to Public Meetings.


Gregory J. Heath, Clerk/Finance Director

M:\mcc&w\estern\Appropriation L:\LA\W\locust\wordpro\lawdirec\ordinances\2002 10\4\02 1:49 PM

CERTIFICATION

I, Gregory J. Heath, Finance Director of the City of Napoleon, Ohio, do hereby certify that the above Ordinance No. 126-02 is a true and accurate copy of Ordinance No. 126-02 of the City of Napoleon, Ohio.


Gregory J. Heath, Finance Director

05/15/03
Date

Ordinance No. 126-02

EXHIBIT D

COPY
IN THE COMMON PLEAS COURT OF HENRY COUNTY, OHIO
- GENERAL DIVISION -

CITY OF NAPOLEON, OHIO
c/o City Manager, Jon A. Bisher
255 W. Riverview
Napoleon, Ohio 43545

PLAINTIFF.

CASE NO. 03CV087

VS.

PETITION FOR APPROPRIATION

MAUMEE AND WESTERN RAILROAD, LLC
205 North Capital Avenue, Suite A
Corydon, Indiana 47112

DEFENDANT.

AND,

MAUMEE AND WESTERN RAILROAD, INCORPORATION
c/o Richard Wilson, Statutory Agent of Maumee and Western Railroad, Inc.
817 Fifth St.
Defiance, Ohio 43512.

DEFENDANT.

AND,

RMW VENTURES, LLC
205 North Capital Avenue
Corydon, Indiana 47112

DEFENDANT.

FILED
HENRY COUNTY
COMMON PLEAS COURT
03 MAY 16 AM 11:54
JUDY SONNENBERG
CLERK OF COURTS

1. Plaintiff is a municipal corporation organized and existing under the Laws of the State of Ohio, and the power to appropriate real property in accordance with RC 161.01 to RC 163.22 has been conferred upon Plaintiff by RC 719.01 and applicable sections of the Napoleon City Charter and the Ohio Constitution.
2. On September 16, 2002, the Council of the City of Napoleon, Ohio passed Resolution No. 121-02, notice of which was given according to law, to appropriate a fee simple interest and/or right-of-way interest in the real property described in attached Exhibits "A" and "B". Thereafter, on the Council of the City of Napoleon, Ohio on October 7, 2002 passed Ordinance No. 126-02 to proceed with the appropriation of the

property by way of an Easement [of right-of-way] for public purposes. A copy of the Ordinance, marked as Exhibit "C" is hereby attached.

3. The owners, and others having, claiming, or appearing to have an interest in the property, are:

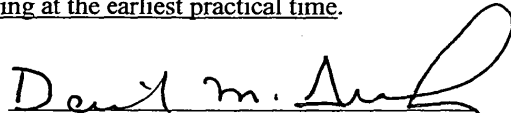
a. Maumee and Western Railroad Corporation, a foreign corporation licensed to do business in Ohio, c/o Richard Wilson, Statutory Agent of Maumee and Western Railroad, Inc., 817 Fifth St., Defiance, Ohio 43512.

b. RMW Venture LLC, an Indiana Limited Liability Company, 205 North Capital Avenue, Corydon, Indiana 47112.

c. Maumee and Western Railroad, LLC, an Indiana Limited Liability Corporation, 205 North Capital Avenue, Suite A Corydon, Indiana 47112.

4. Plaintiff has made reasonable effort to do so, but has been unable to agree with the owners of the premises as to the appropriation of the premises or as to the compensation to be paid.

Plaintiff prays for an order of this Court directing the appropriation, and the determination by a jury of the value of the easement of right-of-way interest in the property described, and the damages, if any, to any residue and awarding possession, and for such other and further relief to which Plaintiff may be entitled. Further, this matter is of immediate public interest and concern; therefore, the Plaintiff requests the court to advance the proceedings for immediate hearing at the earliest practical time.


David M. Grah
Napoleon City Law Director
255 W. Riverview, Napoleon, Ohio 43545
419-592-3503
Supreme Court Registration No. 0043925

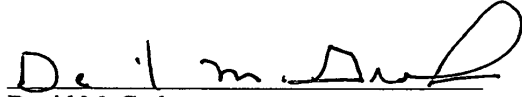
INSTRUCTIONS TO CLERK

To the CLERK of Courts of Henry County, Ohio:

Your are directed to make service pursuant to the Civil Rules of this Petition and a summons setting for the date, time, and place of hearing and any instructions as to the filing of an answer to the following Defendant and any other owners or parties of interest as follows:

1. Maumee and Western Railroad, Inc., c/o Chief Corporate Officer, CEC, Spencer Wendelin at the address of 205 North Capital Avenue, Suite A, Corydon, Indiana 47112.
2. Maumee and Western Railroad, Inc., c/o Richard Wilson, Statutory Agent of Maumee and Western Railroad, Inc., 817 Fifth St., Defiance, Ohio 43512.
3. RMW Ventures, LLC, c/o Spencer Wendelin Company, 205 North Capital Avenue, Corydon, Indiana 47112.
4. Maumee and Western Railroad, LLC, an Indiana Limited Liability Corporation, Suite A, 205 North Capital Avenue, Corydon, Indiana 47112.
5. Richard Wilson, Statutory Agent, of Maumee and Western Railroad, LLC, and Attorney for RMW Ventures, LLC, 127 Lexington Ave., Suite 100, Altoona, PA, 16601.

SPECIAL NOTICE: You are also directed to publish the attached notice in the Northwest Signal, a news paper of general circulation in Henry County, Ohio, once a week for two consecutive weeks.



David M. Grahn
Napoleon City Law Director
255 W. Riverview, Napoleon, Ohio 43545
419-592-3503
Supreme Court Registration No. 0043925