

**MULTISTATE PERFORMANCE TEST  
FEBRUARY 2011**

The MPT Question administered by the State Board of Law Examiners for the February 2011 Maryland bar examination was *In Re Magnolia County*. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website.

**Materials for an unsuccessful applicant:** An applicant who was unsuccessful on the February 2011 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the February 2011 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is July 5, 2011.

**Materials for anyone other than an unsuccessful applicant:** Anyone else may obtain the MPT Question and the “point sheet” only by purchasing them at the NCBE Online Store.

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**REPRESENTATIVE ANSWER 1**

**MEMORANDUM**

**To:** Lily Byron, Deputy County Counsel  
**From:** Applicant  
**Date:** February 22, 2011  
**Re:** Proposed Condemnation Action

You have asked me to analyze whether a condemnation action to acquire an easement for the at-grade crossing of Plymouth's railroad track would be preempted under the Interstate Commerce Commission Termination Act (ICCTA). Based on my analysis below, I believe such a condemnation action would not be preempted by the ICCTA.

First, it should be noted that exercise of the County's condemnation power to acquire this easement would be a proper exercise of its power to take private property for public use so long as it pays just compensation. *See Butte County*, n. 1. Construction of a public road is a recognized example of a proper public use and the power may be exercised to take land interests such as easements. *See id.* Furthermore, construction of the connector road would benefit the public by easing traffic congestion and enabling access to the new residential development, Red Bluff, which will include several public spaces (recreational and greenbelt). Therefore, the building of the road is clearly a public use and the condemnation here would be proper, absent any preemption concern.

A state or county action is preempted (and thereby invalidated) under the Supremacy Clause when it interferes with, or is contrary to, a federal law. *See id.* In determining whether a state action is preempted, courts must look to congressional intent, whether express or implied. *Id.* The Franklin Court of Appeals has noted that in passing the ICCTA, Congress "sought to ensure that states would not regulate rail transportation in a way that would conflict with or undermine the provisions of the ICCTA." *Id.* Thus, "[t]he preemption inquiry focuses on the degree to which the challenged state action burdens [interstate] rail transportation." *Id.* The Plymouth track at issue is an interstate rail because it goes between Franklin and Columbia. Thus the ICCTA applies and the County's condemnation action must not burden the rail line.

Generally, routine non-conflicting uses, such as nonexclusive easements for at-grade road crossings (like the one proposed here), are not preempted so long as they "do not impede rail operations or pose undue safety risks." *Id.* To analyze whether the planned condemnation would be preempted under the ICCTA, therefore, a court would assess whether: (1) the County's intended use of Plymouth's property would prevent or unreasonably interfere with railroad operations, and (2) whether the County's intended use would pose undue safety risks. *See id.* Whether a state action is preempted by the ICCTA is a fact-driven inquiry, determined on a case-by-case basis. *See Conroe County.*

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1. Interference with railroad operations

Given that the proposed at-grade crossing would traverse only a single-track segment of Plymouth's rail line, which does *not* include a passing track, is *not* used for staging trains for loading and unloading or parking railcars, the interference with the railroad operations seems too minimal to trigger a preemption. Unlike in *Morgan City v. Metro Railroad*, there is no loading and unloading of railcars that occurs at the segment of track at issue here. Therefore, the concern in *Morgan* about the condemnation leaving insufficient room for loading and unloading would not apply here. Similarly, although the proposed at-grade crossing in *Conroe County v. Atlantic RR. Co.* was held to be preempted by the ICCTA by the court, the segment of rail at issue in that case was much different from the segment of rail at issue in the present case. The segment of rail in *Conroe* included a passing track, which the rail company used to stage meets and passes of trains, to load and unload trains, and to park coal trains. Thus there was much more activity to be disrupted by a crossing. Furthermore, due to the parking activity involved in the segment of rail at issue in *Conroe*, multiple federal regulations relating to the "breaking" of trains (or requiring trains to be "broken") applies. Compliance with these regulations would have caused the rail company scheduling problems and timing delays throughout the line. No such compliance issue is implicated in our County's plans because the Plymouth's segment of rail at issue is not used for parking.

*Conroe* can also be distinguished from our County's situation in that the crossover planned in *Conroe* was to be used as an alternative method of entry to a proposed residential development. The court found it "hard to understand" why the County would insist on building a crossing over *two active* rail lines when there were other viable entrances to the proposed residential development. In our case, however, the crossing would be the only means of accessing Red Bluff, thereby making it a much more necessary project.

In addition, there is no evidence that construction of the crossing would disrupt rail service. In *City of Elk Grove v. B&R RR*, the court found that there was no interference warranting preemption despite a disruption of service for about one week during construction of the condemnation project. Thus it seems unlikely any disruption less than one week caused by construction would constitute sufficient interference. Plymouth might argue, however, that the railcar volume on the track in *City of Elk Grove* was much lower than its railcar volume (20 trains a day), therefore, a disruption in service would be much more destructive in its case. In addition, *Elk Grove* was brought to the court on B&R's motion for summary judgment; therefore it bore the greater burden of proof. Nevertheless, as in *Elk Grove* (where the City indicated it would work with the rail company to design and construct the proposed project to minimize rail interference), the County Road and Bridge Dep't plans to work with the railroad company to create an engineering study to determine the appropriate traffic control system. Such a partnership could help minimize interference, as in *Elk Grove*. Although Plymouth claims that the crossing would increase track maintenance costs and interfere with the company's rail operations, the company has provided no specific evidence thus far as to specifically how the crossing would interfere. While Plymouth has mentioned that it takes its freight trains a half mile to stop, it would not be required to stop. It would only need to slow down, and perhaps, if the County is able to designate the crossing a "Quiet Zone," it would only need to slow down by

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a few miles per hour in the area of the crossing (and the train crew would not have to sound the train's horn). Therefore, as in *City of Elk Grove*, Plymouth's complaints about interfering with rail speeds is "too speculative to justify preemption." Plymouth's concerns about increased track maintenance costs will also need to be substantiated with evidence. If Plymouth is able to produce evidence of increased track maintenance costs and delays, however, it may have a good argument for preemption.

2. Undue safety risks

Plymouth will likely claim that the County's use will pose undue safety risks and should therefore be preempted by the ICCTA. In particular, Plymouth has expressed concern about safety risks to vehicles and pedestrians at the proposed crossing, especially given how long it takes the freight trains to stop (even with the emergency brake). Nevertheless, the County has offered to mitigate these safety risks by installing passive and active devices such as warning signs and automatic gates. It is even considering "constant warning" technology which would prevent cars from driving around crossing gates. In *Butte County*, the court found that the County's fencing was sufficient to address safety risks of a bicycle path next to the rail line. A court might find the safety risks are similarly mitigated in this case. In addition, as in *Elk Grove*, Plymouth's demand that the County indemnify it in exchange for the easement does not clearly demonstrate undue safety risk. Instead, the indemnification provision merely involves "allocation of risk, not the regulation of rail transportation." *Id.* Any other safety concern might be too speculative to warrant preemption.

Conclusion

Although Plymouth may be able to produce evidence at some later point of delays and increased track maintenance costs that would result from the proposed crossing, it has yet to produce such concrete evidence. Given the great depth of safety measures the County is planning for the crossing, the strong public need for the crossing, and the fact that the rail line being interrupted if not used for parking, loading, or passing, I believe a court would likely find that the proposed condemnation to construct an at-grade crossing would not be preempted by the ICCTA.

**REPRESENTATIVE ANSWER 2**

**To:** Lily Byron, Deputy County Counsel  
**From:** Applicant  
**Date:** February 22, 2011  
**Re:** Proposed Condemnation Action

The ICCTA was passed to "promote a safe and efficient rail system and ensure development and continuation of a sound rail transportation system with effective competition among rail carriers. By including a provision that the ICCTA would preempt federal or state law, Congress sought to ensure that states would not regulate rail transportation in a way that would conflict with or

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undermine the ICCTA. *Butte County v. 105,000 Square Feet of Land.*

In order to build a four-lane road connecting SH44 and Sh50 as proposed by the County, requires the County to obtain a 60-foot wide easement from Plymouth RR over a portion of its railroad track in between the two highways. The only option is to construct an at-grade crossing. Because currently Plymouth will not agree to the easement, the County may have to exercise its eminent domain powers. State and local regulation is permissible where it does not interfere with rail operations. Routine, non-conflicting uses such as an easement for at-grade-crossings are not preempted so long as they do not (1) impede rail operations or (2) pose undue safety risks. *Butte County.* Whether a state action is preempted by the ICCTA is determined on a case-by-case and fact-specific inquiry. *Conroe County.*

**IMPEDING RAIL OPERATIONS**

Plymouth expressed concerns citing problems they have had elsewhere with at-grade crossings in other areas of the state. Without discussing specifics, Plymouth simply indicated that any traffic crossing would increase track maintenance costs and interfere with the company's rail operations. This is not sufficient to meet the RR's burden to show that the condemnation of the portion of the rail would impede rail operations.

In *Butte*, the Court of Appeals held that a bicycle and pedestrian trail would not impede railroad operations where the Railroad (RR) would still have vehicular access to its signal equipment from another side of the property and would have general access for purpose of railroad maintenance. Likewise, here, it appears that Plymouth would have access to its equipment and the rail.

In *City of Elk Grove*, the Court considered the effect that the construction of a sewer line would have on the rail track and held that where the track would be out of service for about one week, and possibly less, and that volume was low and railcars could be unloaded elsewhere, this was not burden to the RR's rail service. Here, Plymouth has not alleged any concerns regarding the construction of the crossing as a burden on rail operations.

In *Conroe County v. Atlantic RR*, the Court of Appeals held that the condemnation action was preempted under the ICCTA. In that case, the County condemned a strip of boulevard to access a residential development. The proposed crossing would have cut the passing track into two pieces and, as a result, would have affected the entire line of the rail by having to have parked trains which would block the crossing for an extended period of time. This would have caused scheduling problems and time delays through the track. Unlike in *Conroe* where the court held that placing the public crossing over regular and passing tracks would interfere with railroad operations, in our case, the proposed at-grade crossing will traverse only a single-track segment of the rail line, which does not include a passing track and is not used to stage trains for loading or unloading or to park railcars. All of which was a substantial consideration in the *Conroe* case.

Additionally in the *Conroe* case, the court noted that "it was hard to understand why the County insists on pursuing a crossing over two active railway lines that will interfere with railroad operations when other viable entrances to the proposed residential development are physically

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available. Here, the crossing will be the only means of access to the Red Bluff Development which is more than just a residential area as it will include retail, office, institutional and recreational spaces in addition to multi-and single-family residences. This connector is not being built simply for an access to a residential community. Currently, commuters traveling on these highways have to drive several miles out of their way and then make a big U-turn when utilizing the highways in order to get to certain parts of the county. Building this connector road will create a short cut and ease traffic congestion. The proposed connector road will be a four-lane boulevard designated as a major thoroughfare and will be an integral part of the regional mobility system for the area. There do not appear to be any other option but to build this highway as planned with the at-grade crossing. Building an overpass over the railroad track or an underpass under it are both cost-prohibitive. An at-grade crossing is the only viable and cost-effective option.

A state may not impose operating limitations on a railroad's economic decisions, such as those pertaining to train length, speed, or scheduling. *Conroe*. Here, while for safety reasons train speed may have to be reduced to between 5 and 15 miles per hours and required to sound a horn when approaching the crossing, it is speculative. The proposed at-grade crossing may qualify for designation as a "Quiet Zone" and if enhanced safety features are installed, train speed might need to only be reduced by a few miles per hour and the crew would not have to sound the horn. Any impact the reduction in speed may have on rail operations is "too speculative to justify preemption." See *City of Elk Grove*.

**UNDUE SAFETY RISKS**

Plymouth RR argues that the track between SH44 and SH50 is an active track, used by as many as 20 trains per day, most being heavy freight trains that take more than ½ a mile to stop, even in an emergency, and that due to the heavy anticipated use the connector road by commuters, this poses a potential safety risk.

In *Butte*, the court held that the county's maintenance of a 50-foot setback distance from the active railroad along with fencing to prevent access to the active rail would prevent any undue safety risk. In *Conroe*, the court held that the proposed crossing would create traffic hazards because the broken trains which would be required to sit near the crossing would create a visual hazard for drivers to see past the tracks, would therefore pose an undue safety risk.

Here, the at-grade crossing would require use of both passive and aggressive traffic safety and control devices designed to warn of the existence of a railroad track and prevent automobile and pedestrian access to the track immediately before, during and after the time that track is used by the train. These devices include warning signals, pavement markings, crossing signs, and number of track signs, as well as, active devices such as flashing-light signals, automatic gates and overhead flashing signals. Although there is no setback required or set forth for this project, the safety measures go far beyond the fencing which was upheld in *Butte*.

Further, Plymouth stated that they are concerned about potential liability issues and would consider granting an easement if the County agreed to indemnify Plymouth for any harm that might be caused to persons or vehicles as a result of the at-grade crossing. The court considered

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similar circumstances in city of *Elk Grove v. B&R RR*, and held that arguments raised over the terms of insurance coverage and indemnification provisions involve allocation of risk, not the regulation of rail transportation.

Here, the County is willing to have an engineering study involving both the government agency constructing the road and the railroad company to determine the appropriate safety devices necessary because there are a number of significant factors to be considered, thereby resolving any safety risks that may be of issue.