

**NORFOLK SOUTHERN RAILWAY COMPANY and CENTRAL OF GEORGIA  
RAILROAD COMPANY, Plaintiffs, v. CITY OF AUSTELL, GEORGIA, THE  
CITY COUNCIL OF AUSTELL, GEORGIA, JOE JERKINS, CATHY  
DAMERON, R.T. GODFREY, DENISE HUCKEBA, BEVERLY BOYD,  
VIRGINIA REAGAN, and BO TRAYLOR, Individually and as Mayor and  
Members of the City Council of Austell, Georgia, and JIM GRAHAM, Community  
Affairs Director of the City of Austell, Defendants.**

**CIVIL ACTION NO. 1:97-cv-1018-RLV**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
GEORGIA, ATLANTA DIVISION**

**1997 U.S. Dist. LEXIS 17236**

**August 18, 1997, Decided**

**August 19, 1997, Filed**

**DISPOSITION:** [\*1] Judgment entered in favor of plaintiffs against defendants. No attorney's fees or costs awarded, and the action dismissed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff railroad companies and defendants, city and city officials, filed motions for summary judgment in the action that the railroad companies brought seeking a declaration that the city's zoning ordinance and land-use permitting requirement, as applied to the railroad companies' construction of an intermodal facility, was preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C.S. § 10101 et seq.

**OVERVIEW:** The railroad companies wanted to construct an intermodal facility, which would be used to transfer containers of cargo between trains and trucks, on land in the city that had a general commercial zoning classification. The city took the position that the railroad companies had to obtain a land-use permit and that unless the property was rezoned to a light industrial classification, the construction was prohibited by the zoning ordinance. In the action that the railroad companies brought for declaratory relief, the court entered summary judgment in favor of the railroad companies. The court held that 49 U.S.C.S. § 10501(b)(2) of the Interstate Commerce Commission Termination Act of 1995 (ICCTA) expressly preempted the city's authority to regulate the construction,

development, and operation of the proposed intermodal facility because the facility came within the ICCTA's definition of "transportation by rail carriers" over which the Surface Transportation Board was given exclusive jurisdiction under 49 U.S.C.S. § 10501(b)(1).

**OUTCOME:** The court granted the railroad companies' motion for summary judgment, denied the city's motion for summary judgment, and held that the Interstate Commerce Commission Termination Act of 1995 preempted the city's zoning ordinance and land-use permitting requirement in so far as the city's regulation prevented the construction and operation of the railroad companies' intermodal facility.

**CORE TERMS:** intermodal, summary judgment, land-use, zoning ordinance, rail, transportation, preempt, preemption, regulation, railroad, state law, preempted, industrial, carriers, zoned, railroad industry, motion to strike, acre tract, construct, ordinance, genuine, exclusive jurisdiction, regulatory authority, remedies provided, federal law, track, authority to regulate, oral argument, matter of law, twenty-five

**LexisNexis(R) Headnotes**

***Civil Procedure > Summary Judgment > Supporting Papers & Affidavits***

[HN1] Fed. R. Civ. P. 56(e) provides: Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

***Civil Procedure > Summary Judgment > Summary Judgment Standard***

[HN2] Fed. R. Civ. P. 56(c) authorizes summary judgment when all pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

***Constitutional Law > Supremacy Clause***

[HN3] U.S. Const. art. VI provides that the laws of the United States shall be the supreme Law of the Land. U.S. Const. art. VI, cl. 2. Consequently, any state law that conflicts with a valid federal law is without effect. In deciding a preemption issue, however, a district court must assume that the historic police powers of the state are not superseded by federal law unless preemption is found to be the clear and manifest purpose of Congress.

***Constitutional Law > Supremacy Clause***

[HN4] There are three circumstances in which state law is preempted by federal law: (1) express preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, where state law regulates conduct in a field that Congress intended the federal government to exclusively occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

***Transportation Law > Interstate Commerce > Federal Preemption***

[HN5] The Interstate Commerce Commission Termination Act of 1995, 49 U.S.C.S. § 10101 et seq., contains an express preemption clause. This clause provides: Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law. 49 U.S.C.S. § 10501(b)(2).

***Transportation Law > Rail Transportation***

[HN6] The Interstate Commerce Commission Termination Act of 1995 grants exclusive jurisdiction to the Surface Transportation Board over (1) transportation by rail carriers, and the remedies provided by this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers;

and, (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. 49 U.S.C.S. § 10501(b)(1) and (2).

***Transportation Law > Rail Transportation***

[HN7] The definition of the term "transportation," as it is used in 49 U.S.C.S. § 10501(b)(1), includes (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. 49 U.S.C.S. § 10102(9)(A) & (B).

***Constitutional Law > Civil Rights Enforcement > Costs & Attorney Fees***

[HN8] In any action or proceeding to enforce a provision of 42 U.S.C.S. § 1983, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as a part of costs. 42 U.S.C.S. § 1988.

***Civil Procedure > Costs & Attorney Fees***

[HN9] The expenses of litigation generally shall not be allowed as a part of the damages; but where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. Ga. Code Ann. § 13-6-11.

***Constitutional Law > Civil Rights Enforcement > Costs & Attorney Fees***

[HN10] A federal preemption claim premised upon a violation of the Supremacy Clause is not cognizable under 42 U.S.C.S. § 1983 and, as such, a plaintiff is not entitled to attorney's fees and costs under 42 U.S.C.S. § 1988 for such a claim.

**COUNSEL:** For NORFOLK SOUTHERN RAILWAY COMPANY, CENTRAL OF GEORGIA RAILROAD COMPANY, plaintiffs: Eileen Margaret Crowley, Keith J. Reisman, Jeanine L. Gibbs, Holland & Knight, Atlanta, GA.

For CITY OF AUSTELL, Georgia, CITY COUNCIL OF AUSTELL, GEORGIA, JOE JERKINS, CATHY DAMERON, R. T. GODFREY, DENISE HUCKEBA, BEVERLY BOYD, VIRGINIA REAGAN, BO TRAYLOR individually and as Mayor and members of the City Council of Austell, Georgia, JIM GRAHAM,

Community Affairs Director of the City of Austell, defendants: John Howard Moore, John Kevin Moore, Moore Ingram Johnson & Steele, Marietta, GA.

**JUDGES:** ROBERT L. VINING, JR., Senior United States District Judge.

**OPINIONBY:** ROBERT L. VINING, JR.

**OPINION:**

**ORDER**

This matter is currently before the court on the plaintiffs' motion for summary judgment [11-1], the defendants' motion for summary judgment [12-1], the defendants' motion to strike a portion of one of the plaintiffs' affidavits [15-1], the defendants' motion for oral argument [16-1], and the plaintiffs' motion for the court to consider their brief in support of their [\*2] motion for summary judgment which exceeds twenty-five pages in length [20-1].

For the reasons set forth below, the court **GRANTS** the plaintiffs' motion for summary judgment, **DENIES** the defendants' motion for summary judgment, and **DENIES** the defendants' motion to strike. In addition, the court hereby **DENIES** the defendants' motion for oral argument and **GRANTS** the plaintiffs' motion to consider their brief in support of their motion for summary judgment which exceeds twenty-five pages in length. n1

n1 Because the parties have adequately briefed the issues in this case and because the court shall resolve such issues as a matter of law, the court finds that oral argument is unnecessary in this matter.

Pursuant to LR 7.1D, NDGa., briefs filed in support of a motion are limited in length to twenty-five double-spaced pages. Although the plaintiffs' brief in support of their motion for summary judgment exceeds this page length limitation, the court, in its discretion, shall consider the plaintiffs' thirty-seven page brief.

[\*3]

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

The plaintiffs, Norfolk Southern Railway Company and Central of Georgia Railroad Company, are interstate common carriers by rail and operate railroads in both interstate and intrastate commerce in the state of Georgia. The plaintiffs own an 830 acre parcel of land

located in Austell, Georgia, on which they desire to construct, develop, and operate an intermodal facility. They wish to construct and develop the intermodal facility on a designated 110 acre portion of the property. The undisputed purpose of an intermodal facility is to transfer containers or trailers of cargo being shipped in interstate and foreign commerce between trains and tractor-trailer trucks in a manner which permits and promotes effective competition and coordination between rail and motor carriers.

The defendants, the City of Austell, Georgia, its elected officials, and its community affairs director, have contended, and continue to assert, that it would be illegal for the plaintiffs to construct, develop, and operate their intermodal facility on this 110 acre tract unless and until the 110 acre portion of the property is rezoned from the city's general [\*4] commercial zoning classification to a light industrial classification. Accordingly, the plaintiffs requested that the zoning classification for this 110 acre tract of property be rezoned from general commercial to light industrial. On October 7, 1996, the defendants denied the plaintiffs' rezoning request. n2

n2 The parties dispute what the permitted uses of property zoned general commercial and light industrial are under the City of Austell's current zoning ordinance. The plaintiffs contend that the city's zoning ordinance allows them to construct, develop, and operate the subject intermodal facility on property zoned either general commercial or light industrial. The defendants, on the other hand, claim that the construction of such a facility on property zoned general commercial would violate the city's zoning ordinance. This dispute, however, is not germane to the controversy currently before this court, and the parties have not requested the court to resolve such a controversy.

Further, even if the parties had requested the court to resolve such a dispute, the court would be without jurisdiction to adjudicate such a local zoning issue, absent other contentions by the parties. See *Grant v. Seminole County*, 817 F.2d 731 (11th Cir. 1987) (holding that it is not the function of federal courts to serve as zoning appeal boards and that zoning ordinances are permissible uses of local police power which are generally not reviewable by federal courts unless such ordinances are clearly arbitrary and unreasonable).

[\*5]

Believing that the general commercial zoning classification on the their 110 acre tract permitted the construction, development, and operation of an intermodal facility, the plaintiffs applied for a land-use permit which would allow them to commence the construction and development of the intermodal facility. In response to the plaintiffs' permitting request, the defendants notified the plaintiffs that as a result of defendant Graham's review of the plaintiffs' permit application, the defendants had scheduled a hearing to determine whether a special land-use permit was required in order for the plaintiffs to construct, develop, and operate the subject intermodal facility.

The defendants thereafter adopted a resolution requiring the plaintiffs to obtain a special land-use permit from the city before the plaintiffs could commence construction of the proposed intermodal facility. On February 21, 1997, the defendants informed the plaintiffs of their decision to require the plaintiffs to apply for and obtain a special land-use permit and reiterated that the plaintiffs would also be required to have the 110 acre tract of land rezoned from a general commercial to a light industrial classification [\*6] prior to the commencement of the construction of the proposed intermodal facility.

The defendants maintained, and still maintain, that the construction, development, and operation of the proposed intermodal facility and related amenities on that part of the property zoned general commercial are prohibited under the city's zoning ordinance. They assert that the commercially zoned property must be zoned light industrial in order for the construction and development of the intermodal facility to proceed. In this regard, the defendants contend that the subject zoning ordinance and land-use permitting requirement are valid exercises of the city's traditional police powers. Specifically, the defendants argue that the zoning ordinance and land-use permitting requirement, as applied to the plaintiffs' 110 acre tract of property, represent a valid exercise of the city's historic police power to protect the health and welfare of the local citizenry.

On April 17, 1997, the plaintiffs filed the instant action for a declaratory judgment. In their complaint, the plaintiffs request this court to declare that the defendants' zoning ordinance and land-use permitting requirement are preempted by federal [\*7] law and that such laws and regulations, as applied to them, violate the Commerce Clause of the United States Constitution. In their complaint, the plaintiffs seek only declaratory relief; they do not request injunctive or monetary relief of any kind. The plaintiffs also seek attorney's fees and costs associated with the filing of this declaratory

judgment action pursuant to 42 U.S.C. § 1988 and O.C.G.A. § 13-6-11.

On June 18, 1997, the plaintiffs moved the court for summary judgment, arguing that there are no genuine issues of material fact to be tried and that they are entitled to judgment as a matter of law, as the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempts the subject zoning ordinance and land-use permitting requirement and that such laws and regulations violate the Commerce Clause. The defendants oppose the plaintiffs' motion and have filed a cross motion for summary judgment, contending that Austell's zoning ordinance and land-use permitting requirement, as a matter of law, are not preempted by the ICCTA and are not violative of the Commerce Clause. They assert that the instant zoning ordinance and land-use permitting requirement are valid exercises [\*8] of the city's traditional police powers.

## II. LEGAL DISCUSSION

### A. The Defendants' Motion To Strike

The defendants have moved the court to strike a portion of the affidavit of Thomas Finkbiner, the Vice-President of plaintiff Norfolk Southern. The plaintiffs filed Finkbiner's affidavit in support of their motion for summary judgment. In their motion to strike, the defendants contend that Finkbiner's statement that "few locations in Georgia are suited for the construction and operation of an intermodal facility," contained in paragraph 8 of his affidavit, should be stricken by the court. They argue that the Finkbiner affidavit does not contain facts which sufficiently demonstrate that he has personal knowledge to support such a conclusion. Further, the defendants assert that Finkbiner's conclusion is not supported by any factual basis in his affidavit.

[HN1] Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

[\*9]

After a careful review of the Finkbiner affidavit, the court concludes that the subject statement is based upon personal knowledge and that the affidavit, taken as a whole, sufficiently demonstrates that Finkbiner is competent to testify with regard to such a matter. Accordingly, the court hereby denies the defendants' motion to strike. n3

n3 The court observes that the instant statement does not materially affect the court's disposition of the pending summary judgment motions.

## **B. The Motions For Summary Judgment**

### **1. The legal standard**

[HN2] Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. *Adickes v. S.H.* [\*10] *Kress & Co.*, 398 U.S. 144, 156, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir. 1996). The moving party's burden is discharged merely by "'showing'-- that is, pointing out to the District Court -- that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Clifton*, 74 F.3d at 1090. Once the moving party has adequately supported its motion, the nonmovant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). n4

n4 The Eleventh Circuit has held that the nonmoving party need not necessarily "produce evidence in a form that would be admissible at trial . . . to avoid summary judgment"; instead, its evidence must be "reducible to admissible evidence." *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1444 (11th Cir. 1991) (quoting *Celotex*, 477 U.S. at 324-27, 106 S. Ct. 2553-55). When a party has given clear answers to unambiguous deposition questions which negate the existence of any genuine issue of material fact, however, that party cannot thereafter create such issue and thereby defeat summary judgment with an affidavit that merely contradicts, without explanation, the deposition testimony. *Van T. Junkins and Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 658 (11th Cir. 1984). Moreover, the mere verification by

affidavit of one's own conclusory allegations is insufficient to oppose a motion for summary judgment. *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984).

[\*11]

In deciding a motion for summary judgment, it is not the court's function to decide genuine issues of material fact but to decide only whether there is such an issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). The applicable substantive law will identify those facts that are material. *Anderson*, 477 U.S. at 247, 106 S. Ct. at 2510. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will not preclude the entry of summary judgment as those facts are not material. *Id.*

Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* In order for factual issues to be "genuine" they must have a real basis in the record. *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356. When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (citations omitted).

### **2. The ICCTA and preemption**

The ICCTA, 49 U.S.C. § 10101, et seq., which became effective on January 1, 1996, extensively revised the transportation [\*12] laws in the United States. The ICCTA was passed in an effort to reduce the regulation of railroads and other modes of surface transportation. See 49 U.S.C. § 10101. The Act abolished the Interstate Commerce Commission ("ICC") and created the Surface Transportation Board ("STB") to perform many of the functions previously performed by the ICC.

A primary dispute in this matter is whether the ICCTA preempts the City of Austell's zoning ordinance and land-use permitting requirement, as such laws apply to the construction, development, and operation of the plaintiffs' proposed intermodal facility. The doctrine of preemption originates from the Supremacy Clause of the United States Constitution. *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996). [HN3] Article VI of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Consequently, any state law that conflicts with a valid federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). n5 In deciding a preemption issue, however, a district court must assume that the [\*13] historic police powers of the state are not superseded by federal law unless preemption is found to be "the clear and manifest

purpose of Congress." *Id.* at 516, 112 S. Ct. at 2617; see also *Jones v. Rath Packing Company*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).

n5 A court's preemption analysis is identical in cases involving state statutes and in matters concerning local ordinances. See *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988).

In *English v. General Electric Company*, 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990), the Supreme Court identified [HN4] three circumstances in which state law is preempted by federal law: (1) express preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, where state law regulates conduct in a field that Congress intended the federal government to exclusively occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, [\*14] or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *English*, 496 U.S. at 78-80; 110 S. Ct. at 2274-76; see also *Teper*, 82 F.3d at 993. In its preemption analysis, a district court must give overriding consideration to the issue of whether Congress intended to preempt state law. *Medtronic, Inc. v. Lohr*, 135 L. Ed. 2d 700, U.S. , 116 S. Ct. 2240, 2255 (1996); *English*, 496 U.S. at 80, 110 S. Ct. at 2275-76. Consistent with this legal principle, a court should find preemption if the intent of Congress is either explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 2899 n.14, 77 L. Ed. 2d 490 (1983).

The plaintiffs contend that the ICCTA expressly preempts Austell's authority to regulate, through zoning ordinances and other land-use permitting regulations, the construction, development, and operation of railroad intermodal facilities. In addition, the plaintiffs argue that field and conflict preemption also bar Austell from engaging in such regulatory activities. [HN5] [\*15]

The ICCTA contains an express preemption clause. This clause provides:

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b)(2).

In interpreting this statutory provision, at least one other court has observed that "it is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (holding that the language of the ICCTA and the ICCTA's underlying policy, purpose, and legislative history express Congress' clear intent to preempt state regulatory authority over railroad agency closings). The only other courts that have addressed the preemptive effect of the ICCTA have reached similar conclusions. See *Burlington Northern Santa Fe Corporation v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997) (holding that the ICCTA, under all three theories of preemption, preempts a state law which authorizes a state agency to exercise regulatory [\*16] authority over railroad activities); *Georgia Public Service Commission v. CSX Transportation, Inc.*, 225 Ga. App. 787, 484 S.E.2d 799 (1997) (holding that the ICCTA expressly preempts a state agency's authority to regulate rail transportation); *In re Application of Burlington Northern Railroad Company v. Page Grain Company*, 249 Neb. 821, 545 N.W.2d 749 (1996) (same); *Borough of Riverdale v. New York Susquehanna & Western Railroad, No. MRS-L-2297-96* (N.J. Super. Ct. Law Div. August 21, 1996) (holding that the ICCTA largely preempts local zoning and land-use ordinances and regulations) (copy of court order and transcript attached as Exhibits C and D to the plaintiffs' brief in support of their motion for summary judgment).

The local regulation, via a zoning ordinance and a land-use permitting requirement, of the construction, development, and operation of an intermodal facility, a facility which is operated in order to transfer containers or trailers of cargo between trains and tractor-trailers so that the cargo may be shipped in interstate commerce, certainly appears to come within "regulation of rail transportation," which is explicitly preempted by section 10501(b)(2). [\*17] n6 The plain meaning of this statutory preemption provision, and the language of the entire Act, support such a conclusion. Cf. *CSX*, 944 F. Supp. at 1581. "The most natural reading of section 10501(b)(2) is that the federal remedies provided by the [ICCTA] are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the [ICCTA] has expressly provided otherwise." *Id.*

n6 This court is aware that municipalities may generally zone land to pursue legitimate objectives that are related to the health, safety,

morals, and general welfare of its citizenry. See *Scurlock*, 858 F.2d at 1525; *Grant v. Seminole County*, 817 F.2d 731 (11th Cir. 1987). A city may not, however, attempt to regulate land use and planning via local laws when Congress' intent to preempt such local laws is clear and manifest. See *Pacific Gas & Electric Company v. State Energy Resources Commission*, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); *Scurlock*, 858 F.2d at 1525.

[\*18]

The court's conclusion is also consistent with the ICCTA's grant of exclusive jurisdiction over the majority of all matters of rail regulation to the STB. Cf. *Id.*; *Burlington Northern*, 959 F. Supp. at 1294. [HN6] The ICCTA grants exclusive jurisdiction to the STB over:

(1) transportation by rail carriers, and the remedies provided by this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and,

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. § 10501(b)(1) & (2).

Congress defines [HN7] the term "transportation," as it is used in section 10501(b)(1), very broadly. Its definition includes:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; [\*19] and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9)(A) & (B).

Likewise, Congress defines "railroads" in an expansive fashion in the Act. Specifically, a "railroad" includes, inter alia, a "track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." 49 U.S.C. § 10102(6)(C).

Based upon the clear and unambiguous language of the ICCTA, the court concludes that the instant intermodal facility comes within the ICCTA's definition of "transportation by rail carriers" over which the STB is given exclusive jurisdiction under 49 U.S.C. § 10501(b)(1). It is uncontroverted that intermodal facilities are facilities that are operated in order to transfer containers or trailers of cargo being shipped in interstate and foreign commerce between trains and tractor-trailer trucks in a manner which permits and promotes effective competition and coordination between rail and motor carriers. This undisputed description of an intermodal facility certainly [\*20] falls within Congress' definition of "transportation" contained in subsections 10102(9)(A) & (B) of the ICCTA, as the subject intermodal facility is clearly a "yard, property, facility, [or] instrumentality . . . related to the movement of passengers or property" and the services related to that movement "include receipt, delivery, elevation, transfer in transit . . . storage, handling, and interchange of passengers and property." Similarly, the court finds that the construction, development, and operation of the subject intermodal facility comes within the exclusive jurisdiction of the STB since it involves and relates to the "construction" and "operation" of "industrial, team, switching, or side tracks, or facilities," as contemplated by section 10501(b)(2). Further, there can be no serious dispute that the intermodal facility falls within the Act's definition of a "railroad." Consequently, the court holds that the language of the ICCTA expresses Congress' unambiguous and clear intent to preempt the City of Austell's authority to regulate and govern the construction, development, and operation of the plaintiffs' intermodal facility via the instant zoning ordinance and land-use [\*21] permitting requirement.

The court also concludes that express preemption in this case is consistent with the purpose and underlying policy of the ICCTA, which is to promote the deregulation of the railroad industry. Cf. *Burlington Northern*, 959 F. Supp. at 1293; *CSX*, 944 F. Supp. at 1583. The ICCTA was enacted as part of a movement to deregulate the railroad industry. See S. Rep. No. 176, 104th Cong., 1st Sess. 3 (1995); *CSX*, 944 F. Supp. at 1583. The policy statement of the ICCTA focuses upon competition within and deregulation of the railroad

industry in the United States. The Act provides in pertinent part:

In regulating the railroad industry, it is the policy of the United States Government --

(1) To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

....

(4) To ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

....

(7) To reduce regulatory barriers to entry into and exit from the industry.

[\*22]

49 U.S.C. § 10101.

The City of Austell's attempt to regulate the construction, development, and operation of the plaintiffs' intermodal facility via its zoning ordinance and land-use permitting requirement exemplifies one manner by which local regulation can interfere with Congress' attempt to "ensure the development and continuation of a sound rail transportation system" and to "reduce regulatory barriers to entry into . . . the industry." *Id.* Austell's zoning ordinance and land-use permitting requirement at issue in this action frustrate and conflict with Congress' policy of deregulating and rejuvenating the railroad industry.

The court's interpretation of the ICCTA as preempting the instant local zoning ordinance and land-use permitting requirement is also supported by the STB's interpretation of the Act. n7 During the course of the last twelve months, the STB has issued several rulings which support the court's finding of preemption in this case. In *Cities of Auburn and Kent, WA -- Petition for Declaratory Order, Surface Transportation Board, STB Finance Docket No. 33200, 1997 STB LEXIS 141 (July 1, 1997)*, the STB ruled that state and local zoning and permitting [\*23] requirements are

preempted by the ICCTA. See also *King County, WA -- Petition for Declaratory Order, Surface Transportation Board, STB Finance Docket No. 32974, 1996 STB LEXIS 236 (September 25, 1996)*. The STB found that state and local laws that seek to impose a local permitting or environmental process on a railroad's maintenance, development, or operation are preempted by the express language of the ICCTA. *Cities of Auburn, WA, at 13-25*. Consistent with the STB's rulings and interpretations, another district court has aptly observed:

As the agency with authority delegated from Congress to implement the provisions of the [ICCTA], the STB is uniquely qualified to determine whether state law [or local law] . . . should be preempted. The STB's interpretation of the Act is persuasive and corroborative of the Court's own, and in accord with the . . . other judicial interpretation[s] of the preemptive effect of the [ICCTA] of which the Court is aware.

*CSX, 944 F. Supp. at 1584* (citations and internal quotations omitted).

The court concurs with this assessment.

n7 While the court concurs with the STB's interpretation of the ICCTA and finds it persuasive, the court does not find that the STB's interpretation of the Act is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*. See *CSX, 944 F. Supp. at 1584 n.8*. *Chevron* is applicable only when the plain meaning of the terms of a federal statute is unclear. *Chevron, 467 U.S. at 843-44, 104 S. Ct. at 2782*. Since this court concludes that Congress has spoken directly to the issue of the preemptive effect of the ICCTA, the legal principles enunciated in *Chevron* are not pertinent. See *CSX, 944 F. Supp. at 1584 n.8*.

[\*24]

In summary, the court holds that the City of Austell's zoning ordinance and land-use permitting requirement upon which the defendants have relied and continue to rely to prevent the plaintiffs from constructing, developing, and operating the proposed intermodal facility are expressly preempted by the ICCTA. The language of the ICCTA expresses Congress' clear intent

to preempt state and local regulatory authority over the construction, development, and operation of intermodal facilities. In addition, the ICCTA's underlying policy and purpose buttress this finding. n8 In large part, the plaintiffs' construction, development, and operation of the proposed intermodal facility is subject only to such regulations and requirements as may be imposed by the STB pursuant to the ICCTA. Of course, the construction, development, and operation of such a facility by the plaintiffs are also subject to other valid, applicable federal laws and regulations and to other relevant, non-preempted state laws. See CSX, 944 F. Supp. at 1584. n9 Because the court has concluded that Austell's local zoning ordinance and land-use permitting requirement at issue in this matter are preempted by the ICCTA, that [\*25] is, that such local laws are "without effect" as applied to the construction, development, and operation of the proposed intermodal facility, the court abstains from ruling upon the merits of the plaintiffs' Commerce Clause argument. See *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445, 108 S. Ct. 1319, 1323, 99 L. Ed. 2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

n8 Because the court concludes that the ICCTA expressly preempts the City of Austell's authority to regulate, through the instant zoning ordinance and land-use permitting requirement, the construction, development, and operation of the proposed intermodal facility, the court need not address the other two theories of preemption.

n9 The plaintiffs agree with this proposition. See Plaintiffs' Brief In Support Of Their Motion For Summary Judgment, at 11, 32; Plaintiff's Reply Brief in Support of Their Motion For Summary Judgment, at 6.

[\*26]

### **C. The Plaintiffs' Request For Attorney's Fees and Costs**

In their complaint, the plaintiffs request that this court award them costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988. n10 In addition, the plaintiffs allege in their complaint that the defendants have acted in bad faith, have been stubbornly litigious, and have caused them unnecessary trouble and expense. Consequently, the plaintiffs assert that they are entitled to reasonable attorney's fees and litigation costs pursuant to O.C.G.A. § 13-6-11. n11

n10 Section 1988 provides in pertinent part:

[HN8]

In any action or proceeding to enforce a provision of section[] 1983, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as a part of costs.

42 U.S.C. § 1988(b).

n11 O.C.G.A. § 13-6-11 provides in relevant part:

[HN9]

The expenses of litigation generally shall not be allowed as a part of the damages; but . . . where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

[\*27]

Because the court concludes that the record is devoid of sufficient evidence which demonstrates that the defendants have acted in bad faith, have been stubbornly litigious in defending this action, and have unnecessarily caused the plaintiffs trouble and expense, the court shall not award the plaintiffs attorney's fees and costs under O.C.G.A. § 13-6-11. In addition, since the court did not reach the merits of the plaintiffs' Commerce Clause claim and since the plaintiffs are not entitled to reasonable attorney's fees and costs pursuant to section 1988 on their preemption claim, the court hereby denies the plaintiffs' request for such an award under section 1988. n12 See generally *Scurlock*, 858 F.2d at 1529 n.9 [HN10] (a federal preemption claim premised upon a violation of the Supremacy Clause is not cognizable under 42 U.S.C. § 1983 and, as such, a plaintiff is not entitled to attorney's fees and costs under section 1988 for such a claim); *Pirollo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983) (a federal preemption claim premised upon a violation of the Supremacy Clause is not cognizable under 42 U.S.C. § 1983); *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th [\*28] Cir. 1996) (a federal preemption claim premised upon a violation of the Supremacy Clause is not cognizable under 42 U.S.C. § 1983 and, as such, a plaintiff is not entitled to attorney's fees and costs under section 1988 for such a claim).

n12 The plaintiffs concede, explicitly and implicitly, that they are not entitled to an award of reasonable attorney's fees and costs pursuant to section 1988 on their preemption claim. See Plaintiffs' Brief In Support Of Motion For Summary Judgment, at 32-34; Plaintiffs' Reply Brief In Support Of Plaintiffs' Motion For Summary Judgment And Responsive Brief In Opposition To Defendants' Motion For Summary Judgment, at 14-15.

### III. CONCLUSION

For all of the foregoing reasons, the court **GRANTS** the plaintiffs' motion for summary judgment, **DENIES** the defendants' motion for summary judgment, and **DENIES** the defendants' motion to strike. In addition, the court **DENIES** the defendants' motion for oral argument and **GRANTS** the plaintiffs' [\*29] motion to consider their brief in support of their motion for

summary judgment which exceeds twenty-five pages in length.

SO ORDERED, this 18th day of August, 1997.

ROBERT L. VINING, JR.

Senior United State District Judge

**JUDGMENT** - August 21, 1997, Filed, Entered

This action having come before the court, Honorable Robert L. Vining, Jr., United States District Judge, for consideration of plaintiffs' Motion for Summary Judgment, and the court having granted said motion, it is

**Ordered and Adjudged** that judgment is entered in favor of plaintiffs against defendants. No attorney's fees or costs are awarded in this action, and the action is hereby **dismissed**.

Dated at Atlanta, Georgia, this 21st day of August, 1997.