MEMORANDUM

November 1, 2016

TO: Ben Stuckart, City Council President
Members of the City Council
Terri Pfister, City Clerk
Todd F. Eklof, Initiative Sponsor

FROM: Brian T. McGinn, Hearing Examiner

SUBJECT: Initiative No. 2016-6

CC: Mayor David Condon
Mike Piccolo, City Attorney

Background

On October 3, 2016, Todd F. Eklof, filed a proposed initiative, now designated as Initiative No. 2016-6, to amend the municipal code of the City of Spokane to make it a class 1 civil infraction for any person or entity to allow a rail car that it owns to ship uncontained coal and a certain type of oil[1] by rail through the downtown Spokane core, or within 2,000 feet of a school, hospital, or the Spokane River.

On October 17, 2016, the City Council referred Initiative No. 2016-6 to the Hearing Examiner for legal review. As a result, and in accordance with SMC 2.02.040, the Hearing Examiner is charged with preparing a formal written opinion as to the legal validity and effect of the proposed measure. This memorandum is intended to fulfill this responsibility.

Summary of Initiative 2016-6

Initiative 2016-6 proposes to amend the municipal code to add a new section, designated as SMC 10.08.068, which prohibits the shipment of coal and oil in specified areas in the City of Spokane. *See* SMC 10.08.068(D) (proposed). More specifically, such shipments are not allowed in the downtown zones, including the Downtown Core (DTC), Downtown General (DTG), Downtown South (DTS), and Downtown University (DTU). *See id.* Under the proposed amendment, such shipments are also prohibited within 2,000 feet of the Spokane River, or within 2,000 feet of any school or hospital. *See id.*

The first three subsections of the proposed measure describe the authority for the enactment as well as its underlying intent. The first subsection contains a general

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[1] The proposed initiative specifically regulates "uncontained coal." It further defines "oil" to mean "any petroleum substance having a vapor pressure of 8 psi or higher or a flash point below 73°F." For simplicity's sake, this opinion will use the term "coal and oil" to mean "uncontained coal" and "oil" as defined by the initiative.

statement of the police powers of a city. *See* SMC 10.08.068(A). The second and third subsections reveal the policies underlying the proposed measure, stating as follows:

> *B. The City declares that the distribution of coal dust and rocks onto railway tracks carrying highly flammable oil trains is an inherently dangerous and ultra-hazardous activity and essentially local danger, and the distribution onto private and government owned land outside any railway right of way within the boundaries of the City of Spokane is an illegal trespass and nuisance.*
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> *C. The City declares that the shipment of oil by rail is an inherently dangerous and ultra-hazardous activity and poses a grave danger that is essentially and uniquely local to the residents of the City of Spokane which must be mitigated.*

See SMC 10.08.068(B) & (C).

The civil infraction system is utilized to enforce the prohibitions of the proposed measure. More specifically, the owner of a railway car allowing a prohibited shipment, or an entity participating in an illegal shipment, is guilty of a class 1 civil infraction. *See* SMC 10.08.068(E)(1) & (3).

Initiative Law

The people of Spokane have the right to legislate directly, through the initiative process. *See* Spokane City Charter, Article IX, Section 81. The people's legislative authority is necessarily broad and includes the power to make and enforce any law or regulation in furtherance of the public health, safety, and welfare. *See e.g.* Const. art. 11, § 11 (conferring on cities the power to enact regulations not in conflict with general laws of the state). Although the power to legislate by initiative is far-reaching, there are limitations on the scope of that authority.

Initiatives cannot exceed the jurisdictional limits of the enacting body or transgress constitutional directives. *See City of Burien v. KIGA*, 144 Wn.2d 819, 824 (2001) (stating that the initiative power "is subject to the same constitutional restraints placed upon the Legislature when making laws."). In addition, Washington courts have described several specific limitations on initiative powers. Those limitations include the following:

1) An initiative may not include more than one subject matter. *City of Burien v. KIGA*, 144 Wn.2d 819, 824-25 (2001).

2) The power of initiative only extends to matters that are legislative in nature. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973). Administrative matters are not subject to initiative. *Port Angeles v. Our Water-Our Choice*, 170 Wn.2d 1, 8, 239 P.3d 589 (2010).

3) An initiative cannot interfere with the exercise of a power delegated by state law to the governing legislative body of a city. *City of Sequim v. Malkasian*, 157 Wash.2d 251, 264, 138 P.3d 943 (2006).

The proposed charter amendment satisfies most of the threshold questions under Washington's law on initiatives. The proposed measure concerns a single subject matter, i.e. restricting the transport of coal and oil through the City of Spokane. Therefore, the proposal does not run afoul of the single-subject rule. The proposal is legislative, rather than administrative, because it seeks to establish a new policy regarding the transport of coal and oil within the City of Spokane. Creating new policy is a legislative activity. To the Hearing Examiner's knowledge, there is no state law delegating the power to regulate the transport of coal or oil exclusively to the governing body of a city. Thus, the initiative power is not limited on that basis.

That being said, there are significant questions that must be addressed regarding jurisdiction to enact the code amendment and the limits of state and local law. The remainder of this opinion will therefore focus on those issues.

Analysis of Initiative 2016-6

The primary, operative provision of the proposed initiative, if enacted, restricts the transport of coal and oil to specific areas in the City of Spokane. After considering the applicable law in some detail, the Hearing Examiner concludes that the proposed initiative is not enforceable because it is preempted by federal law.

A. *Federal authority to regulate railroad operations, including the transportation of specific materials by rail, is exclusive. State and local governments are precluded from directly regulating railroad operations.*

"Congress and the courts have long recognized the need to regulate railroad operations at the federal level." *See Seattle v. Burlington N. R.R.*, 105 Wn. App. 832, 835, 22 P.3d 260 (2001); *see also City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (stating that "the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area."). In the Hearing Examiner's opinion, the federal legislation that most directly applies to the subject matter of the proposed initiative is the Interstate Commerce Commission Termination Act ("ICCTA").

The ICCTA grants the Surface Transportation Board ("STB") *exclusive* jurisdiction over the operation of railroad facilities. *See Seattle v. Burlington N. R.R.*, 105 Wn. App. 832, 836, 22 P.3d 260 (2001). Specifically, the ICCTA gives STB sole authority over:

> *(1)* ***transportation by rail carriers****, and the remedies provided in 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***
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> *(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…*

See 49 U.S.C. § 10501(b) (emphasis added). The term "transportation" is defined very broadly, and includes the "movement of passengers or property, or both, by rail" as well as "services related to that movement." *See* 49 U.S.C. 10102(A) & (B).

In addition, the ICCTA contains an express preemption clause regarding the regulation of rail transportation, which states as follows:

> *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****.*

See id. (emphasis added). The courts have characterized the language of this preemption clause as "clear, broad, and unqualified." *See Seattle v. Burlington N. R.R.*, 105 Wn. App. 832, 834, 22 P.3d 260 (2001). As one court put it: "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory activity over railroad operations." *See City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (*quoting CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F.Supp. 1573, 1581 (N.D. Ga.1996)).

Although federal authority on this subject is sweeping, state and local governments still possess general police powers and therefore can enforce certain regulations for the public health, safety, and welfare. *See Norfolk S. Ry. Co. v. City of Alexandria*, 608 F. 3d 150, 158 (4th Cir. 2010). For example, local electric, building, and fire codes are generally not preempted. *See id.* In addition, state or local laws that have merely an *incidental* impact on rail transportation are not preempted. *See id.* The said, it is clear that state or local laws that attempt to directly regulate or manage rail operations are preempted by the Act. *See id.*

B. *The proposed initiative is preempted by the Interstate Commerce Commission Termination Act, and therefore cannot be validly adopted.*

The proposed initiative, in essence, attempts to use zoning authority to directly prohibit the transport of coal and oil within designated areas of the city. The measure constitutes a direct regulation on *transportation*, *routes*, *operations*, and *services* of the railroad. *See* 49 U.S.C. § 10501(b). These subjects are the exclusive province of the Surface Transportation Board. *See id.* State or local laws which attempt to regulate within this field are preempted. The Fourth Circuit Court of Appeals has made this plain:

> *It is well established that* ***a state or local law that*** *permits a non-federal entity to* ***restrict or prohibit the operations of a rail carrier is preempted*** *under the ICCTA.*

See Norfolk S. Ry. Co. v. City of Alexandria, 608 F. 3d 150, 158 (4th Cir. 2010) (emphasis added).

Washington courts have reached conclusions similar to the Fourth Circuit. In *Seattle v. Burlington Northern*, the Washington Court of Appeals recognized that local governments may enact nondiscriminatory regulations to protect the public health and safety. *See Seattle v. Burlington N. R.R.*, 105 Wn. App. 832, 837, 22 P.3d 260 (2001).

However, federal authority over rail operations cannot be usurped through an exercise of local police powers. *See id.* Local governments cannot impose regulations that restrict a railroad's ability to conduct its operation or otherwise unreasonably burden interstate commerce. *See id.* (emphasizing that the police power could not be exercised to prohibit the operation of a rail line).

Initiative 2016-6 enforces its provisions through the civil infraction system. In other words, it backs up its restrictions with the threat of civil penalties. When local agencies have enacted similar enforcement provisions, the courts have not hesitated to conclude that such remedial measures constitute direct regulation of railroads, and that such regulations are preempted under the ICCTA. *See e.g. Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094 (9th Cir. 2010) (holding that local agency rules which required a railroad to reduce emissions, under the threat of civil penalties, were preempted under the ICCTA).

The foregoing authorities make it clear that a local government cannot enact an ordinance or regulation that effectively prohibits certain railroad operations. Further, local governments cannot enact an ordinance or regulation that dictates the location of railroad operations. However, this is what the proposed initiative effectively does, along with issuing penalties for noncompliance. If the proposed measure was enacted, the railroad would be precluded from transporting coal and oil through downtown Spokane. A primary railway through the city is located downtown. Other portions of the railroad system would also likely be become "no transport" zones due to their proximity to the Spokane River, a hospital, or a school. The effect is to require the transport of those commodities by other means or not at all, which will undoubtedly impact the economics of railroad operations. State and local laws that govern what can be done and where, or that impact the economics of railroad operations, are routinely held invalid and preempted under federal law.

For example, in *Texas Central Business Lines*, the Fifth Circuit Court of Appeals considered whether a railroad's facility expansion violated municipal ordinances governing building height (zoning), the slope of rail embankments (grading), and paving (construction), among other matters. *See Texas Central Business Lines Corporation v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012). The Court of Appeals held that the city's 35-foot height restriction had the effect of "managing" or "governing" rail transportation and therefore was expressly preempted by the ICCTA. *See Texas Central Business Lines*, 669 F.3d at 533. Similarly, the Court of Appeals determined that the city's requirements for grading and paving roads were expressly preempted, emphasizing that such regulations "...have the effect of managing the economic decisions of [the railroad] in the context of transportation covered under the ICCTA." *See id.*, at 534. With respect to rail embankments, the Court of Appeals noted:

> *The ICCTA prohibits the City from controlling how railroad track embankments are constructed. The district court found* ***the City's regulation would directly affect where rail lines could be situated****, as well as influence the distance between railroad tracks and the position of track-side equipment.*

See id., at 533 (emphasis added).

In another illustrative case, the Village of Ridgefield Park contended that a railroad facility constituted a public nuisance. *See Village of Ridgefield v. New York, Susquehanna & Western Railway Corporation*, 164 N.J. 446, 750 A.3d 57 (2000). Without applying for zoning or construction permits, the railroad built a facility which was used to refuel locomotives, and to add oil to crankcases, water to radiators, and sand to on-board reservoirs for traction in wet-rail conditions. *See Village of Ridgefield*, 750 A.3d at 59. There were up to thirteen locomotives idling at the facility for hours at a time. *See id.* The facility resulted in public complaints due to noise, fumes, soot, and ground vibrations. *See id.* The Village brought suit against the railroad, seeking a judgment requiring the railroad to obtain municipal permits and to cease the maintenance of a public nuisance until municipal requirements were met, among other things. *See id.*, at 60.

The Supreme Court of New Jersey ultimately held that because the zoning regulations could be used to defeat the railroad's maintenance and upgrading activities, those regulations were inconsistent with federal law. *See id.*, at 66-67. In explaining the rationale for its decision, the court noted:

> *According to the STB,* ***local land use restrictions are preempted*** *because they "can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent they are used in this way (e.g. that* ***restrictions are placed on where a railroad facility can be located****), courts have found that the local regulations are preempted by the ICCTA."*

See id., at 63 (emphasis added).

The ICCTA and other federal acts were designed to create a national, uniform regulatory scheme for railroads. Federal law was given primacy on the subject, largely to ensure that national transportation interests took precedence over local policies. The proposed initiative cuts against the federal scheme because it creates a patchwork of zones and buffers within which a railroad cannot conduct specific kinds of activities. And it does so in locations of existing railways in the city. This is precisely the type of local regulation that the federal laws and regulations intended to prevent, in the Hearing Examiner's opinion. If the City of Spokane could adopt local land use codes restricting the transportation of specific types of commodities, then every other municipality would be free to do the same. Such circumstances would not result in the uniformity that was intended when the railroads were deregulated under federal law.

In the Hearing Examiner's opinion, Initiative 2016-6 is preempted by the ICCTA. The ICCTA reserves exclusive authority over the operation of rail transportation to the federal level. As a result, the proposed measure is outside the scope of the initiative power and cannot be validly adopted.

C. Initiative 2016-6 is preempted by federal law even though the measure is expressly intended to ensure public safety and prevent environmental damage.

The recitals in the proposed initiative emphasize the dangers posed by the transportation of coal and oil. The dangers identified include the derailment hazards caused by coal dust; the contamination of property and drinking water; the risks of fire

and explosion; the potential harms to hospitals and schools; and other concerns. The initiative declares that the regulated activities are "inherently dangerous" as well as "ultra-hazardous." In short, the recitals describe the problems that the initiative is trying to address.

The operative provisions of the initiative, by contrast, present a proposed solution to the problems identified in the recitals. In this case, the proposed solution is in the form of *land use restrictions* on the transport of coal and oil. The proposed initiative, in the Hearing Examiner's view, is not in the form of *safety regulations*. The initiative does not, for example, require track maintenance, the covering or treatment of loads, the use of specific equipment or training, or similar measures. If the solution proposed through Initiative 2016-6 were in the form of specific safety regulations, then the Hearing Examiner's legal analysis of the measure would be significantly different. Undoubtedly, in such a case, the preemption analysis would require specific consideration of the Federal Railway Safety Act ("FRSA"), 49 USC 20101 *et seq.*, which creates a comprehensive, national scheme of safety regulations applicable to railroads. Here, however, Initiative 2016-6 addresses the perceived risks of the transport of coal and oil by imposing zoning restrictions and buffers. These restrictions affect the transport of commodities, railroad routes and facility locations, railroad operating procedures and services, and other subjects that squarely implicate the ICCTA rather than FRSA[2].

Given this understanding, the ICCTA governs the preemption analysis in this opinion. The question, then, is whether that state and local authority can be exercised, despite the general rule of federal control, because the railroad's activities may impact public safety or the environment. In other words, is there an exception to federal preemption under the ICCTA if the activities at issue may cause environmental damage or are considered "inherently dangerous" or "ultra-hazardous"? The Hearing Examiner answers this question in the negative.

The Hearing Examiner has already noted that state and local police power cannot be exercised in a manner that results in the direct regulation of railroad operations. Thus, a recital that an initiative is being undertaken for the purpose of "public health, safety, and welfare," however worded, is not enough to overcome the preemptive effect of federal law. Similarly, the fact that the railroad operation may include the risk of environmental damage or public safety hazards does not change the fundamental analysis. To the extent such risks arise from railroad operations, those issues must be addressed through the exercise of federal authority. There are a variety of cases that seem to support this conclusion. *See Village of Big Lake v. BNSF Railway Company*, 382 S.W.3d 125 (Mo. Ct. App. 2012) (dismissing the Village's claim that raised railroad beds caused flooding on a "vast number of properties" because the floodplain ordinance was preempted by the ICCTA); *see also Norfolk S. Ry. Co. v. City of Alexandria*, 608 F. 3d

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[2] The preemption rule under FRSA is materially different than the preemption rule under ICCTA. FRSA includes a narrow exception to federal preemption of safety legislation. Among other things, the FRSA exception to federal preemption can only apply when a state or local regulation is "necessary to eliminate or reduce an *essentially local safety hazard*." See 49 U.S.C. § 20106 (italics added). Undoubtedly based upon this provision, Initiative 2016-6 recites that the hazards of coal and oil transportation are "essentially and uniquely local." There is no such safe harbor for local legislation in the ICCTA. The Hearing Examiner has already opined that the preemption rule of ICCTA, rather than FRSA, applies to the proposed measure. As a result, the initiative's characterization of the hazards as "essentially and uniquely local" has no bearing on the preemption analysis.

150 (4th Cir. 2010) (holding the city's haul ordinance, which regulated the transport of ethanol on city streets in order to protect public safety, was preempted by the ICCTA); *see also Village of Ridgefield v. New York, Susquehanna & Western Railway Corporation*, 164 N.J. 446, 750 A.3d 57 (2000) (holding that the railroad was not required to obtain zoning or construction permits for its facility, despite off-site impacts including noise, fumes, soot, and ground vibrations.); *see also City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (holding that state and local environmental permitting laws were preempted by the ICCTA, and thus the railroad did not have to comply with those laws as a precondition to re-opening a rail line).

There is no exception to federal preemption based upon an activity being "inherently dangerous" or "ultra hazardous." These terms may be relevant to liability concepts in tort law, but they do not appear to have application in the context of federal preemption analysis. The Hearing Examiner concludes that Initiative 2016-6 is preempted by the ICCTA, irrespective of the apparent seriousness of the problems that the measure is intended to address.

Conclusion

This memorandum serves as the Hearing Examiner's written, legal opinion on the legal validity and effect of proposed Initiative 2016-6. In the Hearing Examiner's opinion, the proposed initiative is preempted by federal law and therefore cannot be validly adopted. Pursuant to the Interstate Commerce Commission Termination Act, the Surface Transportation Board has exclusive authority to regulate transportation by rail. The proposed restrictions on the transport of oil and coal by rail encroach upon federal authority and are therefore outside the scope of the initiative power. Given this conclusion, the Hearing Examiner does not have any suggestions on how to modify the initiative to bring it into compliance with the law. The primary, operative provision of the proposed initiative is precluded by federal law. As a result, minor adjustments will not be effective to cure the legal shortcoming, in the Hearing Examiner's view.

The Hearing Examiner expresses no opinion on whether Initiative 2016-6 *should* be adopted or not. That is a policy question that is beyond the scope of this memorandum.

DATED this 1st day of November, 2016.

Brian T. McGinn
City of Spokane Hearing Examiner