



October 14, 2022

Craig Meidl
Chief of Police, Spokane Police Department
1100 W. Mallon Ave.
Spokane, WA 99260

Subject: Washington State Department of Transportation Response to
"Chronic Nuisance Notice," dated October 5, 2022

Chief Meidl:

The Washington State Department of Transportation (WSDOT) responds to the City of Spokane's "Chronic Nuisance Notice" dated October 5, 2022, as follows.

WSDOT objects to the unlawful "Chronic Nuisance Notice" and the proposed "Chronic Nuisance Abatement Agreement," which purport to hold WSDOT responsible for a situation that resulted from the City of Spokane's own failure to provide beds/housing and social and health services for people experiencing homelessness in Spokane.

Nevertheless, WSDOT is, and has been, coordinating in good faith with the Washington State Department of Commerce (Commerce), the Washington State Patrol (WSP), Empire Health Foundation (EHF), the City of Spokane (City) and other interested stakeholders in accordance with the State's Right-of-Way Safety Initiative (ROWSI) to compassionately transition persons currently residing without authority on WSDOT's right-of-way to safer, long-term housing opportunities. In fulfilling the legislative directive of the ROWSI, the State has consistently sought to work in partnership with local governments and non-profit partners to help transition persons at Camp Hope "to safer housing opportunities, with an emphasis on permanent housing solutions," as required by the Legislature. Laws of 2022, ch. 297, § 128 (132)(a).

Unfortunately, instead of engaging in meaningful collaboration with the State and other local partners to address this important local issue, the City served an unlawful Chronic Nuisance Notice on WSDOT for alleged violations of the Spokane Municipal Code, presenting an unreasonable and unrealistic "Chronic Nuisance Abatement Agreement" with an arbitrary and significantly truncated timeline. The City's counterproductive approach of seeking to shift blame onto WSDOT rather than working collaboratively ignores not only the complex challenges at Camp Hope but is also constitutionally suspect. Moreover, the City's approach and artificial deadlines will not benefit the people living within or outside of the encampment and will very likely continue the cycle of displacement and encampments within City limits on the eve of the holiday season.

I. The Creation of Camp Hope and WSDOT's Efforts to Coordinate a Response with the City of Spokane

As you are no doubt aware, Camp Hope began in December 2021 as a protest on the steps of Spokane City Hall intended to bring attention to the City's failure to provide sufficient resources for people experiencing homelessness. More specifically, the protest resulted from the lack of shelter beds and other housing options and the dearth of social and health services to assist those most in need. This protest then, following its threatened removal by the City of Spokane, relocated to its current location on WSDOT property. It is without dispute that WSDOT did not allow, authorize, permit, or in any other way condone the protest moving to its property or the establishment of an encampment of displaced individuals on this site.

Following the protesters' trespass onto WSDOT property, the agency sought to work with the City to coordinate an effort to humanely remove those individuals from the property. Indeed, WSDOT immediately contacted the Spokane Police Department and Code Enforcement to attempt to coordinate a plan to close off the property. The Spokane Police Department and Code Enforcement, however, advised WSDOT they were directed to not respond to trespass calls involving WSDOT's property or its surrounding parcels. Instead of partnering together to address a situation borne from the City's failures to address homelessness, the City made unreasonable and unrealistic demands including full and complete indemnification, which is not allowed under state law, for assisting with clearing the site. WSDOT continues to this day, as it has over the past nine months, with the goal of partnering with the City to proactively and productively address the encampment and the challenges facing those individuals currently located at the site. The City's unilateral "abatement plans" and threats undermine that goal.

II. WSDOT's Current Work to Address Conditions at Camp Hope

In the continuing spirit of collaboration on these efforts, WSDOT is glad to provide an update in response to your request for the State's plan to clear the encampment. As the City knows, members of WSDOT, Commerce, WSP and EHF have met regularly with City Administration and Police Department over the last few months — more recently, averaging a meeting once per week — to address the plan to transition those currently trespassing on the site to secure housing. This planning will ultimately result in the closure and removal of Camp Hope pursuant to the goals of the ROWSI.

There are four benchmarks that must be met to effectively remove encampments like Camp Hope from state rights of way:

1. Offer shelter space and services to those displaced individuals residing in the encampment (local jurisdiction and service/outreach providers; funding available from Commerce);

2. Develop a plan to securely store the personal property of those at the encampment (local jurisdiction and service/outreach providers);
3. Provide safety and security for the people on site who are providing the displaced individuals with assessments for services and housing and those work crews working to clear the encampment (local law enforcement, WSP, and enhanced by private security forces hired by WSDOT or its partners); and
4. Restoration and cleanup of the property (WSDOT).

WSDOT cannot meet these benchmarks alone, nor is it obligated to under the law. Instead, it will require proactive, productive coordination between the City of Spokane, Commerce, WSDOT, WSP and community outreach partners like EHF. To that end, Commerce and EHF have executed a contract to work towards housing stability for individuals and families being relocated from Camp Hope. By utilizing the funding from Commerce, EHF will work to assess the needs of individuals living homeless at the site, provide them with opportunities and access to stable housing and determine further assistance and services as necessary. This agreement results from the ROWSI which provides grant opportunities managed by Commerce. The initiative creates an unprecedented opportunity for local jurisdictions, like the City of Spokane, to utilize State funding to provide shelter and housing options to displaced individuals. The City is eligible to receive additional funding from the initiative as an investment towards creating sorely needed shelter and housing options. Disappointingly, the City thus far apparently remains unwilling to work cooperatively and productively in partnership with the State to identify and implement a full and complete resolution to Camp Hope.

In contrast to the City's current blame-shifting approach, WSDOT continues to partner proactively with WSP, Commerce and EHF to pursue proactive solutions and take major steps towards those solutions. This includes installing screened fencing surrounding the site in late September 2022 (causing some people to leave the encampment) and issuing a temporary permit for EHF to run an operation center on adjacent WSDOT property to conduct assessments and provide other outreach services to stop the cycle of displacement and encampment. This process requires EHF's skilled outreach. Additionally, EHF is implementing a badging system and compiling a census to improve the accountability of those currently at the site and to prevent the encampment from expanding.

Additionally, removal efforts have already begun as WSDOT has also entered into an agreement with Divine's Towing Company to remove vehicles and RVs from the property. WSDOT has also contracted with private security to provide perimeter control and access management. Moreover, the site population is beginning to further decrease as limited shelter beds have become available (although WSDOT disputes that Trent Resource and Assistance Center has capacity for "250 minimum with additional flex space to 400," as you assert at page 4 of the Notice).

WSDOT continues its efforts to coordinate with the City, which recently finally agreed to a “Memorandum of Understanding Between City and Washington State Department of Transportation,” acknowledging the City’s law enforcement’s authority to “enter, issue no trespass orders, and to enforce state and municipal law” at Camp Hope. In addition, the City finally professed to agree to “cooperate in efforts to address homeless encampments” and “utilize its social services outreach resources to connect at-risk populations with critical housing and social services.” The following day, however, the City issued this purported Notice of Nuisance.

WSDOT, Commerce, and EHF are making solid progress towards reducing the population of the site and ultimately removing the encampment in its entirety. However, this is not something that can be completed overnight or in a few short weeks and it must be done in compliance with both federal and state law. Ignoring those realities, the City’s October 5, 2022 Notice purportedly requires full site closure and displacement by or before October 31, 2022. As an initial matter, as you well know, a number of the City’s proposed corrective actions have already been implemented, including: (1) “posting and maintaining ‘no trespassing’ warning signs in visible, exterior, high traffic areas,” (2) working to “transition[] persons [located on] the Property to safer housing opportunities,” (3) implementing planning to “fund outreach, assessment, housing, transportation, and other services needed to assist” the individuals located on the property, and (4) issuing “orders excluding and prohibiting persons from remaining on or entering the Property” which takes the form of the aforementioned Memorandum of Understanding. However, WSDOT neither agrees, nor is required to agree, to a number of the requested corrective actions including the October 31, 2022 deadline, requiring WSP to conduct overnight patrols, and the November 15, 2022 deadline to remove all trash and to address the personal belongings of any individual at the site. City’s “Chronic Nuisance Abatement Agreement” at p. 4.

WSDOT intends to continue to coordinate with its state, local and community partners, consistent with the ROWSI, to effectuate the current planning in place to address the site. However, to achieve that shared goal, there must be documented and sufficient shelter bed space available for those individuals currently living on the site. The City’s Notice appears to quantify potentially available shelter beds, but WSDOT’s understanding is that a significant number of those beds are not currently available. Clarity and confirmation surrounding how many beds and where those beds are available is key to solving this complex issue — a discussion that should have taken place long ago but for the City’s resistance to coordinating efforts.

Courts have increasingly looked to the number of homeless persons in a community and the shelter space available in assessing the constitutionality of actions being taken by

governmental actors. *See, e.g., Johnson v. City of Grants Pass*, No. 20-35752, ---F.4th---, 2022 WL 4492090, at *20 (9th Cir. Sept. 28, 2022) (affirming the ruling that the city defendant could not, consistent with the Eighth Amendment, “enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go”); *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019) (Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter). Moreover, ensuring persons at Camp Hope are transitioned “to safer housing opportunities, with an emphasis on permanent housing solutions,” Laws of 2022, ch. 297, § 128 (132)(a), is consistent with State law. Ignoring these complex considerations, the City’s administration has instead recently made vague assertions that it may go in and clean out the encampment, in apparent blatant disregard of the potential legal implications of such an action.

III. WSDOT’s Objections to the October 5, 2022 “Chronic Nuisance Notice”

Further, although WSDOT remains committed to continuing discussions with the City of Spokane, WSDOT strenuously objects to the “Chronic Nuisance Notice” served pursuant to SMC 10.68, as well as the proposed “Chronic Nuisance Abatement Agreement” attached thereto. Specifically, WSDOT raises the following objections, which it reserves the right to supplement and/or amend.

First, as previously noted, WSDOT objects to the “Chronic Nuisance Notice” and the proposed “Chronic Nuisance Abatement agreement” as both purport to hold WSDOT responsible for a situation that resulted from the City of Spokane’s own failure to provide beds/housing and social and health services for people experiencing homelessness in Spokane. Moreover, your failure to work effectively with the State when Camp Hope was first established, and contained less than 100 residents, led to its growth and the conditions that you complain of now. Because the City both caused and contributed to the conditions at Camp Hope through its own actions and inactions, its attempts to shift blame to the State must fail.

Second, WSDOT objects to the application of the Spokane Municipal Code and its civil penalty scheme as applied to it, an agency of the State. In particular, while the State has waived sovereign immunity for damages claims, that waiver is limited. *See* RCW 4.92.090; *H.B.H. v. State*, 192 Wn.2d 154, 178, 429 P.3d 484 (2018) (“[L]egislature waived the State’s sovereign immunity with respect to tort actions.”); *see also Wilson v. City of Seattle*, 122 Wn.2d 814, 823, 863 P.2d 1336 (1993) (“Although RCW 4.96.010 abolishes sovereign immunity for tort liability, it does not necessarily abolish sovereign immunity for other kinds of liability.”). Nor may the City impose its own ordinances on a State agency where those ordinances frustrate State policy. *See Snohomish County v.*

Anderson, 123 Wn.2d 151, 158-59, 868 P.2d 116 (1994); *Massie v. Brown*, 84 Wn.2d 490, 492, 527 P.2d 476 (1974). Further, even if the State’s sovereign immunity had been waived here, the City has not complied with the mandatory process required for filing a tort claim, including failing to submit the form required by RCW 4.92.020.

Third, WSDOT objects that the civil penalty scheme established in SMC 10.68.040 and SMC 10.68.050 fails to comport with due process. It is axiomatic that “the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). SMC 10.68.040 and SMC 10.68.050 provide neither. For instance, although SMC 10.68.040 mandates a response to Chronic Nuisance Notice, it provides no timelines, process, or standards for consideration of the response. Moreover, the code further provides that after a response is submitted, “[t]he person in charge *shall enter into* an abatement agreement or otherwise produce a plan approved by the chief of police or his designee to abate the nuisance within fifteen days of the issuance of the chronic nuisance notice”—irrespective of whether the respondent objects to the Chronic Nuisance Notice. Here, for instance, WSDOT contests the Chronic Nuisance Notice and does not agree with the proposed “Chronic Nuisance Abatement Agreement” drafted by the Spokane Police Department. But the code provides no mechanism by which respondents can challenge the proposed agreement. Instead, the code purports to require WSDOT to agree to the “agreement” drafted by the City without any input from WSDOT or meaningful legal process whatsoever, produce a plan approved by the chief of police or his designee (in their sole discretion, apparently), or else be guilty of a class 1 civil infraction. *See* SMC 10.68.050.B (“It is a class 1 civil infraction for any person in charge to fail to enter into an abatement agreement or otherwise produce an approved plan to abate the nuisance within fifteen days of the issuance of the chronic nuisance notice.”). Requiring a respondent to enter into a contested “Chronic Nuisance Abatement Agreement” with no means by which to challenge it or else be subject to civil penalties, falls far short of the minimum due process required by our State’s constitution. So too does SMC 10.68.050.C, which imposes further class 1 civil infractions, without providing a process by which the underlying Chronic Nuisance Notice can be challenged or appealed. *See, e.g., Post*, 167 Wn.2d at 314 (“Where a local jurisdiction assesses civil penalties for noncriminal violations of law but provides no opportunity for civil defendants to be heard, the fundamental due process right to an opportunity to be heard at a meaningful time is violated”; further holding that “where local jurisdictions issue infractions (finding violations and assessing penalties), there must be some express procedure available by which citizens may bring errors to the attention of their government and thereby guard against the erroneous deprivation of their interests”).

Fourth, WSDOT objects to the Chronic Nuisance Notice based on its discretionary immunity, which shields it from liability here. *See, e.g., Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1965). As the City is aware, WSDOT has long been engaged with the City, County, and numerous other stakeholders in efforts to humanely address the situation at Camp Hope, and provide housing for individuals in Spokane experiencing homelessness. *See* Notice at 4 (discussing the “high-level plan of action” by WSDOT, the Department of Commerce, and the Washington State Patrol to “strategically decrease the size and footprint of Camp Hope”). While WSDOT understands the City wishes the process were going faster, it cannot use a Chronic Nuisance Notice and the threat of fines to force WSDOT to adopt its preferred policies. To the contrary, the discretionary immunity doctrine absolutely forbids the City from seeking to impose liability on WSDOT for core discretionary government functions. *See Avellaneda v. State*, 167 Wn. App. 474, 480–81, 273 P.3d 477 (2012); *Taggart v. State*, 118 Wn.2d 195, 214–215, 822 P.2d 243 (1992).

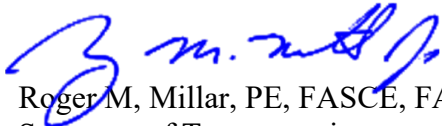
Fifth, WSDOT also objects to the Chronic Nuisance Notice based on the public duty doctrine. *See, e.g., Cummins v. Lewis Cty.*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). “To establish a duty in tort against a governmental entity, a plaintiff must show that the duty breached was owed to an individual and was not merely a general obligation owed to the public.” *Ehrhart v. King Cnty.*, 195 Wn.2d 388, 398, 460 P.3d 612 (2020) (citing *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550 n.8, 442 P.3d 608 (2019)). General State duties owed to the public – duties to regulate, to legislate, to enforce laws, to govern – are not enforceable by private parties in tort. *Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 887, 288 P.3d 328 (2012) (Chambers, J. concurring). Under the public duty doctrine, the City may not hold WSDOT liable for its alleged failure to enforce the law in a particular way, including laws against trespassing, drug use, and the like. *See, e.g., Ehrhart*, 195 Wn.2d at 392; *Donohoe v. State*, 135 Wn. App. 824, 846–49, 142 P.3d 654 (2006); *Garibay v. State*, 131 Wn. App. 454, 461, 128 P.3d 617 (2005), *as amended* (Feb. 14, 2006); *Baerlein v. State*, 92 Wn.2d 229, 231–32, 595 P.2d 930 (1979).

Sixth, the City’s attempt to hold WSDOT liable for alleged nuisance conflicts with RCW 7.48.160, which provides: “Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance.” The State’s Supplemental Operating Budget for 2022, places specific requirements on State agencies governing the transition of individuals living in WSDOT rights of way to permanent housing. Chapter 297, Laws of 2022, § 128 (132). Because the actions of which the City now complains — and in particular, the alleged delays in transitioning Camp Hope residents to permanent housing — are done under the express authority of the Supplemental Operating Budget, the City’s alleged nuisance claim is foreclosed by State law.

Craig N. Meidl, Chief of Police, Spokane Police Department
October 14, 2022
Page 8

Notwithstanding these objections, WSDOT remains ready and committed to finding a meaningful solution to Camp Hope and looks forward to continuing this discussion with the City of Spokane and its other partners, consistent with the State's authority and obligations under applicable state and federal law, by implementing the approaches contemplated in the ROWSI and described in this letter. In that spirit, WSDOT further requests that the City withdraw its "Chronic Nuisance Notice" and reserves its right to consider legal action should the City fail to do so.

Sincerely,



Roger M. Millar, PE, FASCE, FAICP
Secretary of Transportation

RM:jd

cc: Johnnie Perkins, City Administrator
Lynden Smithson, Interim City Attorney
Amy Scarton, WSDOT