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Legal Opinion 2012-002

TO: Mayor John Engen, City Council, Bruce Bender, Steve King, Kevin Slovarp, Jessica Miller, Mark Muir, Mike Brady, Chris Odlin, Scott Hoffman, Scott Brodie, Mike Colyer, Marty Rehbein, Nikki Rogers, Kelly Elam, Jason Diehl, Jeff Brandt

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE January 11, 2012

RE: The Supremacy Clause of the United States Constitution generally prevents local government regulation of railroads, except as authorized by law.

FACTS:

During recent months, some citizen concern has been expressed to City elected officials about railroad operations within the City of Missoula. However, municipal local government regulation of railroads is quite limited because of federal preemption pursuant to both the Supremacy and the Commerce Clauses of the United States Constitution and other federal laws enacted in the United States Code.

ISSUE:

Are there any restrictions on a local government's ability to adopt regulations pertaining to railroads?

CONCLUSION:

Yes, pursuant to Article VI of the United States Constitution, the United States Constitution and the laws of the United States "shall be the supreme law of the land." Further, Article I, section 8 of the United States Constitution states that Congress shall have the power to regulate commerce among the several states. Federal preemption pursuant to both the United States Constitution and the United States Code greatly restrict the ability of local governments to adopt local government regulations concerning the operation of railroads within their jurisdiction.

LEGAL DISCUSSION:

The second paragraph of Article VI of the United States Constitution states as follows.

“This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” (Emphasis added).

This provision of the United States Constitution is commonly known as the Supremacy Clause of the United States (federal) Constitution.

Railroads are carriers that are involved in interstate commerce and interstate transportation. When addressing activities that are active in interstate commerce, it is also important to note that Article I, section 8 of the United States Constitution provides in pertinent part as follows.

“8. The Congress shall have the power [. . .] to regulate commerce, with foreign nations, and among the several states and with the Indian tribes.” (Emphasis added).

The existence of the two above quoted United States Constitution provisions as well as the existence of numerous provisions of the United States Code addressing various specific potential public safety, health, or general welfare topics means that federal preemption exists with respect to many areas of potential regulatory interest, including topics such as railroads, railroad noise emission standards, and interstate commerce. Federal preemption is a legal doctrine that logically follows from the Supremacy Clause of the United States Constitution and means that there is preemption of state or local government powers by federal law, whether the federal law is the United States Code or United States Constitution.

American Jurisprudence, Second Edition, Municipal Corporations, Counties, other political subdivision, section 169 is entitled “Preemption of power by federal law.” This section indicates that any municipal law that is inconsistent with federal/United States law is without legal effect. It is then noted that basically municipal ordinances/regulations may be preempted in one of the following three ways.

- (1) Whenever the United States Congress through its Congressional actions expressly preempts the municipal ordinance/regulation;
- (2) Whenever the United States congress implicitly preempts a local government ordinance/regulation; and
- (3) Whenever a local government regulation conflicts with federal law by the local government regulation/ordinance conflicting with the United States Constitution, the United States Code, or the Code of Federal Regulations.

See for example United States Code, title 42 entitled “The Public Health and Welfare,” pursuant to chapter 65 entitled “Noise Control.” This law is known as the “Noise Control Act.” See 42 U.S.C.S., sections 4901. et. seq. The United States Environmental Protection Agency (EPA) has promulgated regulations pursuant to the “Noise Control Act.” These EPA regulations include regulations relating to noise emissions from the operation of any equipment or facility of a railroad engaged in interstate commerce. Pursuant to these regulations, state and local

governments are prohibited from adopting or enforcing noise emission standards applicable to any equipment or facility of a railroad, unless the state or local government law/ordinance is identical to the EPA adopted standard. See 61C American Jurisprudence, Second Edition (Am Jur 2d) "Pollution Control" section 1416 entitled "Preemption of State Law with Respect to Noise Emissions from Interstate Carriers."

42 USCS of these United States laws sets forth section 4916 entitled "Railroad noise emission standards." Subsection 4916 (c) provides the following.

(c) State and local standards and controls:

(1) subject to paragraph 2 but notwithstanding any other provision of this Act, after the effective date of a regulation under this section applicable to noise emission resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no state or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section." (Emphasis added).

The administrator referred to within subsection 4916 (c) is the EPA administrator. Further, a basically identically worded section of United States Code is set forth in subsection 4917 (c) pertaining to motor carrier emission standards.

There are some very narrow, limited areas in which state and local governments may adopt an ordinance or regulation with respect to railroads, such as to address the speed of railroad trains as they pass through a municipality. For example title 7, chapter 14, part 43 MCA is entitled "Municipal regulation of railways and street railroads." Subsection 7-14-4301(1) MCA pertaining to regulation of railways allows a city to grant right-of-way through streets, avenues, etc. and includes an authorization "to regulate the speed of railroad engines, and require railroad companies to station flag persons at street crossings." (Emphasis added). 7-14-4302 MCA pertains to municipal regulation of lighting for railway right-of-way crossings. 7-14-4303 MCA pertains to municipal authorization for and regulation of street railroads.

Further, 69-14-629 MCA, pertaining to railroads, establishes a statutory process for the establishment of quiet zones with respect to the railroad's use of horns and bells at railroad crossings that meet the requirements established in the rules adopted to implement 49 United States Code 20153 (c). The process requires the municipality to petition the United States Department of Transportation to establish a quiet zone. Further, in developing the petition, the municipality must consult with the railroad corporations that operate rail lines in the municipality. "The petition must include how the municipality or county intends to implement the supplemental safety measures that are required by the United States Department of Transportation at railroad crossings within quiet zones." (Emphasis added).

69-14-620 MCA provides the following.

69-14-620. Establishment of railroad quiet zones. (1) For the purposes of this section, "quiet zone" means a segment of a railroad within which is situated one or a number of consecutive railroad crossings at which locomotive horns and bells are not routinely sounded.

(2) A governing body of a municipality or a board of county commissioners may petition to the secretary of the United States department of transportation to establish quiet zones at railroad crossings that meet the requirements established in the rules adopted to implement 49 U.S.C. 20153(c). In developing the petition, the governing body of the municipality or the board of county commissioners shall consult with the railroad corporations that operate the rail lines through crossings that are within the proposed quiet zone. The petition must include how the municipality or county intends to implement the supplemental safety measures that are required by the United States department of transportation at railroad crossings within quiet zones.

(3) A quiet zone may not be established at a railroad crossing unless the governing body of a municipality or a board of county commissioners follows the procedure provided in subsection (2) and receives the approval of the secretary of the United States department of transportation or the secretary's designee. (Emphasis added).

CONCLUSION:

Yes, pursuant to Article VI of the United States Constitution, the United States Constitution and the laws of the United States "shall be the supreme law of the land." Further, Article I, section 8 of the United States Constitution states that Congress shall have the power to regulate commerce among the several states. Federal preemption pursuant to both the United States Constitution and the United States Code greatly restrict the ability of local governments to adopt local government regulations concerning the operation of railroads within their jurisdiction.

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/s/

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