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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423

Re: Finance Docket No. FD 36161, *City of Sammamish, Washington –
Petition for Declaratory Order*

Dear Ms. Brown:

The City of Sammamish (“Sammamish” or “City”) seeks leave to submit this brief reply to the replies to Sammamish’s Petition for Declaratory Order (“Petition”) filed by Rails to Trails Conservancy, Cascade Bicycle Club, Friends of the East Lake Sammamish Trail, and Friends of the Burke Gilman Trail (collectively, “RTC”) and King County, Washington (“County”) on January 26 and 29, 2018, respectively.

Sammamish respectfully submits that good cause exists to accept its filing. RTC and the County both attempt to cloud and distort the record, and grossly misstate the City’s position, in order to divert attention from the narrow preemption issues raised in City’s Petition. These efforts, in combination with their glaring misstatements on the law of preemption, only buttress the need for the Board to act and provide appropriate guidance in this particular matter and for the issue of local regulatory authority generally.¹ Good cause also exists in light of the County’s failure to file on time, notwithstanding the significant extension it previously requested and received. While Sammamish did not oppose the original extension (for both the County and RTC) and does not seek to strike the County’s belated filing,² fairness and completeness should allow Sammamish an opportunity for this short reply.

¹ See *Otter Tail Power Co. v. The Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42071 (STB served Nov. 15, 2002) (surreply authorized to address “alleged mischaracterization” and to provide a more complete record).

² The County’s reply was clearly untimely filed. The Board’s rules require timely filing of documents (49 C.F.R. § 1104.6), and any requests for extensions by parties must be made not less than 10 days before the due date, and only on a showing of “good cause” (*id.* at § 1104.7). If the Board approves its extension motion, and decides to accept the County’s delinquent filing out of time, then fairness requires it to also accept this reply.

Sammamish filed its Petition because the District Court's ruling granting the County a preliminary injunction misconstrued, rather badly, the scope of preemption of local land-use and development regulations under 49 U.S.C. § 10501(b) as it applies to a rail-banked trail. While the County and RTC desperately attempt to divert attention from it, the preemption elements of the District Court's ruling granting the County's preliminary injunction cannot be minimized as merely gratuitous "dicta," and are at direct odds with STB preemption precedent. Even as the County finally concedes, but attempts to downplay, "Judge Coughenour acknowledged that the City may regulate the ELST within certain limits. He stated only that 'like any active railroad line, state and local attempts to *control* a railbanked corridor are preempted by the ICCTA.'" County at 20 (emphasis in Reply, footnote omitted).

The reality is that the County included § 10501(b) preemption as a central component of its district court Complaint and Motion for Preliminary Injunction, and initially relied on preemption as the basis for alleging federal question jurisdiction. See County's Complaint, Amended Complaint, and Motion for Preliminary Injunction at Exhibits D, E, and F of RTC's Reply. Also, while repeatedly attempting to minimize the District Court's preemption findings, the County ultimately engages in 3-4 pages of a detailed, word-by-word assessment of those determinations in an unsuccessful attempt to rationalize them and show how they are purportedly "in line with precedent." County at 17-21.

Moreover, on behalf of some 175,000 total members, and in a transparent attempt to avoid what it describes as "multi-million-dollar local permitting processes," RTC asserts that the Petition "will have a much broader – more deleterious impact" and upset established precedent "that federal preemption principles apply to railbanked railroad rights of way." RTC at 1, 22, 25. RTC turns the STB's carefully delineated preemption principles upside down. In other words, RTC intends to rely on the District Court's overbroad preemption pronouncements to claim that similar preemption applies elsewhere to all trails corridors. In doing so, RTC grossly mischaracterizes the Board's established preemption interpretation when boldly declaring that "[t]his Board has consistently held that preconstruction review and permitting requirements for activities it authorizes are categorically preempted." RTC at 25.³ Under this reasoning, all trail construction activities within the ELST, as well as tens of thousands of miles of trails corridors throughout the country, are already under the exclusive and preemptive regulatory purview of the STB, even though the STB has consistently pronounced that it is the job of local governments, not the Board, to regulate trail corridors. There is thus more than

³ Perhaps bolstered by the District Court's expansive decision, RTC's witnesses go so far as to argue that, because "railbanked trails are found throughout the country," federal preemption requires that the Board ensure that railbanked trails always have the right-of-way at crossings over possibly conflicting uses because the Agency is required to "treat the trail corridor as an active rail line to act consistently with possible future rail reactivation of this rail facility." Joint Declaration of Ken Withers, P.E. and Ted Johnston at 3. Such a proposition has no support under ICCTA or the Trails Act. The impacts and results of such an outlandish proposition are potentially far reaching, and further support the need for the Board to issue a declaratory order or appropriate guidance to eliminate the significant confusion and error created by the District Court's decision.

ample need for the Board to address the matter and eliminate the obvious and considerable confusion and uncertainty created by the District Court's decision, and possibly avoid a new avalanche of potential complaints.

Indeed, the issue here poses no substantive difficulty. Preemption applies under § 10501(b) when a common carrier by rail provides transportation. The County is not a common carrier by rail, and the trail is not providing transportation that is cognizable under ICCTA. There is no colorable claim that Sammamish's activities to ensure that the County's construction of trail improvements complies with local environmental and public safety standards will impede rail transportation common carriage or the possible future restoration of rail service. Preemption does not possibly apply or preclude application of basic municipal development regulations to the design and operation of a recreational trail's street crossings simply because the trail is located in a railbanked corridor.⁴

Also, while the County and RTC attempt a hasty retreat by pretending that preemption is "irrelevant" and "moot," they do so on the grounds that the County has evaded permitting and unilaterally dug up, and re-paved two City streets and altered adjacent traffic control devices that have been in place for over a decade. The matter is ripe with the proceedings continuing, even if the District Court has issued only a preliminary and not a final injunction determination, particularly inasmuch as the categorical preemption findings have been framed as final when the Court ruled that "railbanked corridors are regulated the same as a railway would be. . . . The Court will not entertain this argument any further." Order at 5 n.2.

Additionally, the County's assertion that the "City[] argu[es] that the Board should address state law issues that are not in the Board's jurisdiction *at all*" (at 23, emphasis in original) is completely fabricated, and RTC makes similar diversionary arguments that "state property law disputes are generally more appropriately resolved by the courts" (at 21). In fact, because the issue presented in Sammamish's Petition is so narrow – does § 10501(b) preemption extend to local regulation of crossings of a rail-banked trail – virtually all of what the County and RTC attempt to assert is irrelevant.⁵ Ironically, it is ultimately the County that suggests that the Board dive deeply into state law issues and conduct a "close factual analysis of the trail design." County at 26.⁶ However, the Board is *not* being asked by the City to weigh in on whether the proposed safety restrictions are reasonable, whether they unreasonably impinge of use of the trail, whether Sammamish has a sufficient property interest, etc.

⁴ Despite dozens of pages of arguments, neither the County nor RTC seriously challenge these well-established preemption principles. The County ultimately merely contends that these principles are "incorrect," but fails to cite any supporting contrary authority.

⁵ Of course, all property within the City limits is subject to local land-use, zoning, and safety regulations, including the ELST and its crossings, regardless of land ownership.

⁶ When filing its original motion for extension to file a reply, counsel for the County represented that it would use the extra time to submit its full response to Sammamish's case-in-chief. Apparently, the County has now changed its mind.

Further, because of the narrowness of the matter, Sammamish suggested that the Board might provide guidance short of a full declaratory order.⁷ While the County criticizes this alternative request (County at 26), Sammamish was simply being mindful of the Board's limited resources, and obviously not seeking to deprive the Board of an adequate record (which all attachments now surely provide). RTC even agrees: "Trail Users do not object to a restatement of the Board's general preemption principles as guidance here." RTC at 24.

Finally, Sammamish agrees that preemption can normally be resolved by the courts or the Board. However, the District Court has created obvious and considerable controversy and uncertainty by pronouncing, incorrectly, that "[t]he Trails Act makes it abundantly clear that railbanked corridors are regulated the same as a railway would be." Order at 5 n.2. In the unusual and compelling circumstances presented here, where courts, along with major Trails Act stakeholders, have miscomprehended the fundamental scope and nature of preemption, it is fully appropriate, efficient, and consistent with established precedent and practice for the Board to make its views known, even more with a discrete issue that is capable of replication in similar situations elsewhere.

Accordingly, the City of Sammamish respectfully requests that the Board grant the requested relief.

Respectfully submitted,



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cc: Service List for FD 36161

⁷ In a recent decision served after the filings were made in this docket, the Board issued appropriate guidance on its preemption principles, even without court referral, reiterating that even state condemnation actions affecting currently active rail corridors are not categorically preempted. *Adrian & Blissfield R.R. Co. Petition for Declaratory Order*, STB Docket No. FD 36148 (STB served Jan. 31, 2018). However, because of the absence of unusual circumstances, unlike here, the Board declined to issue a declaratory order.

CERTIFICATE OF SERVICE

I hereby certify that this 2nd day of February, 2018, I served copies of the foregoing by First Class United States Mail and/or more expedited means upon counsel of record, as follows:

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