MEMORANDUM

February 17, 2017

TO: Ben Stuckart, City Council President
Members of the City Council
Terri Pfister, City Clerk
Gunnar Holmquist, M.D., Initiative Sponsor

FROM: Brian T. McGinn, Hearing Examiner

SUBJECT: Initiative No. 2017-1

CC: Mayor David Condon
Mike Piccolo, Assistant City Attorney

Background

On January 20, 2017, Gunnar Holmquist, M.D., filed a proposed initiative, now designated as Initiative No. 2017-1, to amend the City Charter to declare that people have a right to a healthy climate free from the transportation of coal and crude oil by rail within the City of Spokane.

On February 8, 2017, the City Council referred Initiative No. 2017-1 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 2017-1

Initiative 2017-1 proposes to amend the City Charter to recognize the people's right to a healthy climate, including the right to climate system capable of sustaining human life. *See* Section 120(A). That right is defined to include the right of the people of Spokane to be free from rail transportation of coal and crude oil through the city. *See* Section 120(A). The sponsor's lawyers, in commenting on the proposed initiative, made the intent of the initiative plain:

> *The recently-filed initiative seeks to codify the right to a livable climate and specifically, seeks to legislatively establish that "right to climate" within the Spokane City Charter. It then seeks to protect that right by banning an activity—the transportation of fossil fuels by rail—which infringes on that right.*

See Letter of T. Linzey, 2-6-17, p. 2.

The proposed charter amendment includes two enforcement provisions. The first provision states that if the City of Spokane fails to enforce or defend the enactment, any person may enforce the measure through "nonviolent direct action." *See* Section 120(B)(1). "Direct action" is defined to mean "...any nonviolent activities carried out to enforce the right to be free from the rail transportation of coal and crude oil." *See id.* In addition, City law enforcement personnel are prohibited from arresting or detaining persons engaged in "nonviolent direct action." *See id.*

The second provision states that any corporation or other business entity that "violates this section": (1) shall not be deemed a "person" to the extent such treatment would interfere with the rights and prohibitions enumerated in the proposed measure; and (2) shall not possess any legal rights which would interfere with the rights and prohibitions adopted through the proposed initiative. *See* Section 120(B)(2). Such "interference" is defined to include the "power to assert state or federal preemptive laws in an attempt to overturn" the initiative, as well as the "power to assert" that the people "lack the authority to adopt" the initiative. *See id.*

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) 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).

2) 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).

3) To be valid, an initiative must be within the authority of the jurisdiction passing the measure. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719 (1996). Thus, a local initiative that conflicts with state law is invalid because it is outside the scope of the authority of a city to enact. *Seattle Bldg & Constr. Trades Council*, 94 Wn.2d 740, 747-748 (1980) (citizen initiative could not prohibit the state from constructing limited access highways because the city had no jurisdiction over State facilities).

4) An initiative may not include more than one subject matter. *City of Burien v. KIGA*, 144 Wn.2d 819, 824-25 (2001). However, when an initiative has a general title, the body of the initiative may embrace several incidental subjects or subdivisions and not violate the single subject rule. *City of Burien,* 144 Wn.2d at 826.

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. recognizing the right to a healthy climate free from coal and crude oil transportation by rail. The proposal is legislative, rather than administrative, because it articulates a specific policy regarding the right to a healthy climate. Policymaking is a legislative activity. In addition, Washington courts have concluded that a charter amendment may be proposed via initiative, and that such a proposal is legislative in nature. *See Maleng v. King County Corr. Guild*, 150 Wn.2d 325, 332-33, 76 P.3d 727 (2003). Finally, to the Hearing Examiner's knowledge, there is no state law delegating the exclusive power to regulate in this field 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 charter amendment, the limits of state law, and the constitutionality of the proposed measure. The remainder of this opinion will therefore focus on those issues.

Analysis of Initiative 2017-1

The proposed initiative officially recognizes the right to a healthy climate, which includes the right to live an environment that is free from the effects of the transportation of crude oil and coal by rail through the City of Spokane. The proposed initiative intends to ban the transport of certain fossil fuels by declaring that such activity violates a fundamental, individual right. Because a fundamental right is involved, according to the sponsor, any governmental action restricting that right can only be sustained if that action is narrowly tailored to serve a "compelling state interest." If the government action cannot pass this test, it will be deemed an unconstitutional violation of due process. This makes the proposed initiative materially different than previous attempts to restrict or ban oil and coal trains through the initiative process, according to the sponsor. The key distinction, it is asserted, is that this initiative is based upon the constitutional right to a healthy climate, a right which cannot be preempted under the applicable federal law.

After considering the issues in some detail, the Hearing Examiner respectfully disagrees with the sponsor's analysis of the law. The Hearing Examiner comes to the following conclusions. First, current law does not recognize a fundamental right to a healthy climate. Since a fundamental right is not involved, the proposed initiative is subject to the same legal analysis as previous initiatives covering this subject matter. Second, the proposed initiative is preempted by federal law, specifically under the terms of the Interstate Commerce Commission Termination Act ("ICCTA"). Third, the authorization for "non-violent direct action" conflicts with state criminal law, and therefore is invalid. Finally, the provisions stripping corporations or other business entities of their rights as a legal "person" violate the state constitution. Therefore, those provisions are also unenforceable. Each of these conclusions is discussed in more detail below.

A. *Under the current law, the "right to a healthy climate" is not a fundamental right protected by the constitution.*

The proposed initiative is intended to codify the "right to a healthy climate." *See* Letter of T. Linzey, 2-6-17, p. 2. If the initiative is approved, this right will be recognized through an amendment to the city charter. It is important to emphasize, however, that the fundamental right to a healthy climate, if it exists, is a creature of constitutional law and cannot be created by a local initiative. Indeed, the Hearing Examiner does not believe the sponsor actually intends to "create" a constitutional right via local legislation. Rather, the sponsor seeks to officially *recognize* that *preexisting* right as part of the city charter. In short, the proposed measure necessarily assumes that the fundamental right to a healthy climate exists in the first instance.

In support of the premise that a right to a healthy climate is a fundamental right, the sponsor's lawyers cite to a recent order of the U.S. District Court for the Eugene Division of the District of Oregon, namely *Kelsey Cascadia Rose Juliana, et al. v. United States of America*, Civ. No. 6:15-cv-1517. In that case, a group of plaintiffs sued the federal government, alleging that the federal government had substantially contributed to climate change through a wide variety of decisions. *See* Opinion and Order, pp. 3-4. In response to the lawsuit, the defendants filed motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. *See* Opinion and Order, pp. 2-3. The judge ultimately denied the motions to dismiss, holding that the plaintiffs had properly stated a due process claim. In reaching this decision, Judge Aiken determined, among other things, that the right to a climate capable of sustaining human life is a fundamental, constitutional right. *See* Opinion and Order, p. 32.

Despite the fact that Judge Aiken's opinion is very well-reasoned, the Hearing Examiner does not believe that this case generally establishes the existence of a fundamental right to a healthy climate. Every case that the Hearing Examiner could find concluded that no such fundamental right exists. *See e.g. Concerned Citizens of Nebraska v. United States Regulatory Commission*, 970 F.2d 421 (8th Cir. 1992) (holding that there was no fundamental right to an environment free of non-natural radiation); s*ee also "Agent Orange" Product Liability Litigation*, 475 F.Supp. 928, 934 (E.D. New York 1979) (dismissing constitutional claims because there is no constitutional right to a healthful environment under the fifth, ninth, or fourteenth amendments); *see also Federal Employees for Non-Smokers' Rights v. United States*, 446 F.Supp. 181, 185 (D.D.C. 1978) (recognizing that the courts have never held the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments); *see also Pinkney v. Ohio Environmental Protection Agency*, 375 F.Supp. 305 (N.D.Ohio 1974) (dismissing the complaint, in part, because the right to a healthful environment is not a fundamental right under the Constitution). As one District Court put it: "...the only cases on the issue clearly state that there is no constitutional right to a healthful environment." *See McNamara v. County Council of Sussex County*, 738 F.Supp. 134, 138 (D.Del. 1990), aff'd by 922 F.2d 832 (3rd Cir. 1990) (granting a motion to dismiss the complaint).

The Oregon decision, which was provided to the Hearing Examiner by the sponsor's lawyers, appears to be one-of-a-kind. The Hearing Examiner's research did not reveal any other cases that reached the same conclusion as the Oregon District Court. Judge Aiken highlighted that fact that that the case was extraordinary, and tacitly

acknowledged that the decision was breaking new constitutional ground. The case appears, on first impression, to be factually and legally unique. The Hearing Examiner believes it is fair to say that the Oregon District Court's order is against the weight of authority on the issue.

The Oregon decision does not establish precedent for Washington courts. Nonetheless, the decision is fairly considered as persuasive authority on the salient issue. The other cases discussed above are also persuasive authority, however. It should also be acknowledged that the Hearing Examiner did not uncover any Washington cases that were on-point. Of course, this also means that there are no Washington cases affirmatively adopting the Oregon court's reasoning. In any case, after reviewing all the authorities that appeared to be germane, the Hearing Examiner concludes that the Oregon decision does not represent the generally accepted view. Under the current law, there is no general recognition of a constitutional right to a healthy climate.

The Hearing Examiner concludes that the fundamental right which the initiative relies upon is not yet recognized in the law. It may be that the Oregon District Court's view will prevail in the future. It is also possible that the recently filed federal litigation[1] challenging the constitutionality of the federal preemption clause under the ICCTA will also prevail. However, as of today, the "right to a healthy climate" is not a fundamental right protected by the constitution. Similarly, federal preemption law sill applies to the proposed initiative, in the same fashion as it did to previous measures seeking to prohibit oil and coal cars in the city. In the Hearing Examiner's view, the legal analysis will not change until the law changes.

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

In the Hearing Examiner's opinion, the proposed initiative encroaches upon federal authority to regulate and control the operation of railways. "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."). Although the proposed initiative may be preempted by more than one law, 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,*

[1] The sponsor's lawyers advised that Dr. Holmquist and others brought suit against the federal government challenging the constitutionality of the preemption provisions of the ICCTA. See Letter of T. Linzey, 2-6-17, p. 2. This action was commenced on January 31, 2017, approximately one week before the proposed initiative was submitted to the Hearing Examiner for review.

> *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…*

See 49 U.S.C. § 10501(b) (emphasis added). 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)).

In the Hearing Examiner's opinion, the proposed initiative is preempted by the ICCTA and therefore is unenforceable. The initiative is specifically designed to impose a ban on oil and coal transportation through the city. This is a direct and unequivocal regulation of rail operations, a power that is exclusively reserved to federal authority. The case law on this subject makes it plain that local governments cannot impose regulations that have the effect of prohibiting rail operations that local authorities deem undesirable. For example, the Fourth Circuit Court of Appeals has stated:

> *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.

Courts considering this issue have repeatedly held that local regulations of rail operations are preempted by the ICCTA. *See e.g. 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). The Washington courts agree.

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).

The ICCTA reserves exclusive authority over the operation of rail transportation to the federal level. The proposed ban on the transport of oil or coal by rail is preempted by federal law, and therefore is outside the scope of the initiative power. As a result, the proposed initiative is not legally valid.

C. *The enforcement provisions of Section 120(B)(1) are unenforceable because they conflict with the state statutes defining criminal conduct.*

Section 120(B) provides that, in the absence of government action, "any person" may enforce the right to a healthy climate through "nonviolent direct action." When "nonviolent direct action" is taken:

> *...law enforcement personnel employed by the City of Spokane shall be prohibited from arresting or detaining persons engaged in that enforcement.*

See Section 120(B)(1) (emphasis added). "Direct action" is defined to mean any nonviolent activities undertaken to directly enforce the right to be free from the rail transportation of coal and crude oil. *See id.*

The Hearing Examiner believes that this provision has the effect of decriminalizing any activities that could qualify as "nonviolent direct action," even though such actions are defined as criminal behavior under state law. The initiative is legally defective as a result, because an initiative cannot be used to modify or supersede state statutes.

The initiative attempts to make all "nonviolent direct actions" legal by prohibiting city law enforcement from arresting or detaining individuals who violate the law while attempting to enforce the initiative. This provision is contrary to an array of state statutes that define criminal conduct. A short and non-exhaustive list of examples includes the following:

> It is criminal trespass in the second degree to enter and remain unlawfully on the premises of another. *See* RCW 9A.52.080. Criminal trespass of the second degree is a misdemeanor. *See id.*
>
> It is a misdemeanor for any person to willfully obstruct, hinder, or delay a railroad car. *See* RCW 81.48.020.
>
> It is a Class B felony to tamper with any railroad equipment or structure. *See* RCW 81.60.070. Such railroad equipment or structure includes any switch, rail, roadbed, culvert, embankment, structure, or appliance, among other things, pertaining to or connected with a railway, or any train, engine, motor, or car on such railway. *See id.*

It is a Class C felony to sabotage rolling stock. *See* RCW 81.60.080. This includes removing, damaging, altering, or interfering with any part of a rail car, with intent to damage the rail car or deprive the owner of the rail car. *See id.*

If the initiative was enacted, a person could trespass onto railroad property, tamper with rails or other facilities to obstruct safe passage, disable oil or rail cars so that those products could not be transported, and take any number of other actions that are defined as crimes, and the police department would be prohibited from detaining or arresting that person. As an obvious corollary, no prosecutions for such offenses can take place either. Whether that is a good thing or not is irrelevant to this analysis. The point here is that the initiative has the effect of sanctioning behavior that is forbidden by state law.

The State Supreme Court has stated that a proposed initiative must be within the authority of the jurisdiction passing the measure. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719 (1996). An initiative cannot enact legislation that is in conflict with existing statutes. *See e.g. King County v. Taxpayers of King County*, 133 Wn.2d 584, 608, 949 P.2d 1260 (1997). Initiatives that conflict with state law are outside of the initiative power. *Seattle Bldg & Constr. Trades Council*, 94 Wn.2d 740, 747- 748 (1980).

Because Section 120(B)(1) attempts to decriminalize behavior, contrary to state statute, this provision of the initiative is unenforceable.

D. *Section 120(B)(2) of the proposed initiative, which purports to eliminate the legal rights of corporations, is unenforceable because it violates the Washington State Constitution.*

The enforcement provision in Section 120(B)(2) attempts to insulate the initiative from legal challenge by declaring that corporations or business entities have no legal rights which may interfere with the individual rights established by the initiative. In the Hearing Examiner's view, this provision violates the Washington State Constitution and therefore is unenforceable.

The equal protection clause[2] of the Washington State Constitution states as follows:

> *No law shall be passed granting to any citizen, class of citizens,* ***or corporation*** *other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens,* ***or corporations****.*

See Const. art. 1, § 12 (emphasis added). Under the equal protection clause, persons similarly situated under the law must receive similar treatment. *See Holbrook, Inc. v. Clark County*, 112 Wn.App. 354, 368, 49 P.3d 142 (2002). The initiative ignores this basic principle by attempting to define corporate rights out of existence, and in the process ignores well-established constitutional principles.

A corporation is a "person" within the meaning of the equal protection clause. *See American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 594,

[2] This provision has consistently been construed as being substantively identical to the federal equal protection clause. *See Holbrook, Inc. v. Clark County*, 112 Wn.App. 354, 367, 49 P.3d 142 (2002). Thus, the initiative is likely vulnerable to challenge based upon the federal equal protection clause as well.

192 P.3d 306 (2008). The "privileges and immunities" referenced in the equal protection clause implicate certain fundamental rights. *See id.*, at 607-8. Those fundamental rights include:

> *...the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights...*

See id., at 608. Thus, a corporation has a constitutional right to assert certain claims, including the deprivation of a property interest without due process, the violation of equal protection, and to assert that a law is void for vagueness. *See id.*, at 594. In addition, the state constitution "makes no distinction between corporations and natural persons in the matter of access to the courts." *See State ex rel. Long v. McLeod*, 6 Wn. App. 848, 849, 596 P.2d 540 (1972). The state constitution, rather, specifically states that "**all corporations shall have the right to sue** and shall be subject to be sued, **in all courts**, in like cases **as natural persons**." *See* Const. art. 12, § 5 (emphasis added).

The initiative attempts to strip corporations (and other business entities) of any "legal rights, privileges, immunities, or duties" that could "interfere" with the individual rights enumerated in the initiative. *See* Section 120(B)(2). It declares that corporations or business entities "shall not be deemed a 'person' to the extent that such treatment would interfere" with the rights or prohibitions set forth in the initiative. The initiative also precludes corporations or business entities from contesting the initiative as preempted by state or federal law, or even to contend that the city lacks jurisdiction to adopt the initiative.

All of these provisions directly conflict with the state constitution. Under the constitution, corporations are treated as a "person," and are therefore entitled to equal protection under the law. Corporations have a right to protect and defend their interests, and are granted access to the courts to do so. This includes the ability to challenge the validity of the initiative on whatever legal grounds might apply, such as preemption or lack of jurisdiction. A local initiative certainly cannot operate to amend the state constitution to change these principles.

Initiatives, just like enactments of the legislature, must be consistent with the state constitution. *See City of Burien v. KIGA*, 144 Wn.2d 819, 824 (2001). In the Hearing Examiner's opinion, Section 120(B)(2) violates the state constitution and therefore is unenforceable.

Conclusion

This memorandum serves as the Hearing Examiner's written, legal opinion on the legal validity and effect of proposed Initiative 2017-1. In the Hearing Examiner's opinion, the proposed initiative is legally flawed for a number of reasons.

First, the initiative is based upon the premise that there is a constitutional "right to a healthy climate." The weight of the authority, however, has declared that no such right

exists. Therefore, the proposed ban on the transport of crude oil or coal is not enforceable as a matter of constitutional law.

Second, the proposed initiative is preempted by federal law. Pursuant to the Interstate Commerce Commission Termination Act, the Surface Transportation Board has exclusive authority to regulate transportation by rail. The proposed ban on the transport of oil and coal by rail is therefore outside the scope of the initiative power.

Third, the enforcement provisions of the proposed initiative are not legally effective. Section 120(B)(1) attempts to decriminalize any activity that can be characterized "nonviolent direct action," even though that behavior constitutes a crime under state law. This is not legally effective, because an initiative cannot modify or superseded state law. Section 120(B)(2), meanwhile, purports to eliminate corporate rights that might interfere with the rights of individuals to enforce the initiative. This provision overlooks the fact that it deprives corporations of recognized constitutional rights, including the right to equal protection under the law.

Given the foregoing conclusions, 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 shortcomings, in the Hearing Examiner's view.

The Hearing Examiner expresses no opinion on whether Initiative 2017-1 *should* be adopted or not. That is a policy question that is beyond the scope of this memorandum.

DATED this 17th day of February 2017.

Brian T. McGinn
City of Spokane Hearing Examiner