meyers | nave riback silver & wilson
professional law corporation

Michael Gogna
Attorney at Law
707.545.8009

February 13, 2008

Torgny Nilsson, General Counsel
Sierra Railroad Company
221 1st Street
Davis, CA 95616

RE: 100 West Laurel Street, Fort Bragg
Customer No. 0010442

Dear Mr. Nilsson:

I serve as the City Attorney for the City of Fort Bragg. Your two letters, dated January 11, 2008 and February 7, 2008, addressed to Rosana Cimolino have been forwarded to me for review and comment. In your letters to Ms. Cimolino, you requested a legal basis which allows the City of Fort Bragg to impose a business license requirement on Sierra Railroad Company or any of the various fictitious business names under which it may conduct business, including the "Skunk Train."

Initially, the "basis" upon which the City may impose its business license requirement is found in the City's Municipal Code, and specifically, section 5.04.040 of that code, which reads in pertinent part:

> It is unlawful for any person to transact and carry on any business, trade, profession, calling or occupation in the City without first having procured a license from the City to do so, and paying the tax hereinafter prescribed or without complying with any and all application (sic) provisions of this chapter.

This section goes on to indicate that the business license requirement does not apply where such requirement "conflicts with applicable statutes of the United States or the State of California." Thus, unless there is a conflicting state or federal statute, the Sierra Railroad Company is subject to the City's business tax license.

In your letters, reference is made to railroads being exempt from local regulation. The February 7, 2008 letter states that "railroads are exempt from state and local zoning, map acts, business license requirements and most other regulations." However, neither letter provides any specific reference to applicable federal statutes. You have also pointed out other cities in which Sierra Railroad Company does business "agree that we are not required to obtain any such license." I cannot speak to how other cities have treated their local regulations or have responded to federal preemption issues. However, I have pointed out in prior correspondence how the "Skunk Train" is different than many other railroads.

Regulation of "rail transportation" is federally preempted under 49 U.S.C. section 10501(b). The "rail transportation" referred to in 49 U.S.C. section 10501(b) means interstate rail transportation. There is no federal jurisdiction over rail transportation performed in a single state that is not part of the interstate rail

network. (See, 49 U.S. C. section 10501(a)(2)(A).) Further, the Surface Transportation Board has made it clear that " . . . section 10501(b) preemption does not apply to operations that are not part of the national rail network . . . ". (*Mid-American Locomotive and Car Repair, Inc. – Petition for Declaratory Order,* 2005 STB Lexis 233.) In the absence of STB jurisdiction, there is no legal basis for a contention that state or municipal laws and/or regulations are federally preempted. At least at this time, the Skunk Train is not involved in any level of interstate transportation. If I am incorrect regarding that issue, please advise.

As for state regulation of the Skunk Train, and its ancillary operations, the California Public Utilities Commission ("PUC") issued a decision in 1998 regarding the Skunk Train's singular status. Specifically, the PUC concluded that the Skunk Train operations constituted "excursion passenger services," and thus were not subject to PUC regulation.

As you may know, the issue of PUC regulatory authority over "excursion" trains was extensively litigated by the City of St. Helena and the Napa Valley Wine Train. The litigation, which commenced in the late 90's before the PUC, ultimately made its way into the state court system. Finally, in 2004, the First District Court of Appeals held that the Napa Valley Wine Train was an "excursion railroad," not a "common carrier providing transportation." The First District Court of Appeal determined that the Wine Train was not a "public utility" subject to regulation by the PUC and, thus, was subject to local land use regulations. (*City of St. Helena v. Public Utilities Commission* (2004) 119 Cal.App.4th 793; 14 Cal.Rptr.3rd 713.)[1] The decision also analogized the operation of the Wine Train to the Skunk Train, an excursion railroad which the PUC had previously held was not a public utility function.

I hope this information is sufficient to clarify for you that the City's business license requirement is not preempted by either federal or state law, and that the Skunk Train, as currently operated, is subject to local regulation, including the business license requirement.

If you have convincing contrary authority, I am certainly willing to consider such. Otherwise, I hope that this will eliminate any confusion that may exist as to the City's ability to require a business license from Sierra Railroad Company for its business activity within the City of Fort Bragg.

Very truly yours,

Michael Gogna

Michael Gogna, City Attorney
City of Fort Bragg

cc: Linda Ruffing, City Manager
Rosana Cimolino, Interim Finance Director ✓

1057693

[1] On September 29, 2004, the California Supreme Court denied a petition for a review.