

CITY OF MILWAUKEE

Form CA-43

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June 28, 2005

To the Honorable Common Council
of the City of Milwaukee
Room 205, City Hall

Re: File No. 041093 (Quiet Zone West Layton Avenue and
West Holt Avenue/South 6th Street)

Dear Council Members:

This ordinance has been referred to this office for the purpose of obtaining the City Attorney's opinion that the ordinance is legal and enforceable. However, as a result of our research into this matter, we are unable at this time to offer an opinion that the ordinance is legal and enforceable.

The problem arises from Section 5 of the proposed ordinance, entitled "Penalty." In that section, particular forfeiture amounts are set forth for a violation of the ordinance, and in addition, a recitation against whom such forfeitures might be imposed is set forth. However, 49 C.F.R. § 222.45 (2004), the federal rule imposing upon a railroad the duty to cease routine use of a locomotive horn at a grade crossing carries a different penalty.

Appendix G 70 Fed. Reg. 21, 919 (2005) (to be codified at 49 C.F.R. app. G to pt. 222). 222-Schedule of Civil Penalties sets forth the penalty amount of \$5,000 for the routine sounding of locomotive horn at grade crossing within a quiet zone. In addition, the same section limits the assessment of such penalty against an individual only where there has been a willful violation of the rule.

As the result of the differences, it is possible that our ordinance could be found to be legally infirm under the doctrine of preemption. Under that doctrine, where a superior authority has occupied a field, an inferior authority must give way to the superior authority. There is no doubt

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that in this instance that the Federal Railroad Administration has primary jurisdiction in establishing, and regulating quiet zones on Class 1 railroads engaged in interstate commerce.

We suggest that this matter be held for a reasonable period so that this office can engage in further research, and consultation with the Federal Railroad Administration to ensure that the final draft of the ordinance is lawful in all respects.

Very truly yours,



GRANT F. LANGLEY
City Attorney



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