STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **DISTRICT COURT**
SIXTH DIVISION

2 BaT, LLC :
:
v. : **A.A. No. 6AA-2012-00119**
:
CITY OF PAWTUCKET :

DECISION

CLIFTON, J. This matter is before the Court on the Complaint of 2 BaT, LLC (the Appellant or Owner), seeking judicial review of a final decision rendered by the State of Rhode Island Building Code Board of Standards and Appeals (the State Board). Jurisdiction is pursuant to G.L. 1956 § 23-27.3-127.1.4.

Facts & Travel

The facts are mostly undisputed. The Owner owns an unoccupied former train station at least partially located in the City of Pawtucket, at 309 Broad Street. (Board Decision at 1.) The one-story structure (Building), which is elevated over active Amtrak railway tracks below, is further described as Tax Assessor's Plat 43, Lot 604 in the City of Pawtucket. (Pawtucket Building Official's 11/01/11 Letter at 1.)

The Building is in a general state of disrepair. Among other things, the State Board found (1) that the brick façade of the Building is crumbling and falling on the railway tracks below, (2) that the roof is leaking, allowing for water infiltration and accelerated deterioration of the Building, and (3) that windows on the Building were "originally unprotected." (Board Decision at 1-2.) In addition, the State Board found that the Owner has addressed many of the Building's deficiencies. Id. at 2. However, fixing the remaining deficiencies in the Building would require extensive work over the electrified railway tracks. Id. Such work cannot be

completed without the consent of Amtrak, which, among other things, would need to systematically deactivate and reactivate portions of the track while repair work is underway. Id. The State Board heard uncontroverted testimony that Amtrak's estimated fee for such supervision of the remaining repair work is $115,000. (Hrn'g Audio Tr., Feb. 9, 2012.) The Owner maintains that Amtrak's fee would make the remaining repair work cost-prohibitive. Id.

On November 1, 2011, a Building Official from the City of Pawtucket's Division of Zoning and Code Enforcement (City) sent the Owner a written notice alleging that the Building was in violation of G.L. §§ 23-27.3-124.1(1), (3), (4), (5), (6), (7), (8), (11) and (12) (Building Code), prohibiting "unsafe conditions." The notice stated that the "[b]rick façade [of the Building] is crumbling and falling on tracks below." The notice also stated that "[t]he roof is leaking and windows are unprotected permitting unauthorized entry and water infiltration and rapidly eroding the structure."

By letter dated November 9, 2011, the Owner appealed the notice of violation to the City of Pawtucket Building Code Board of Appeals (the Pawtucket Board) pursuant to §§ 23-27.3-124.3 and 23-27.3-126.1. The matter was heard by the Pawtucket Board on December 5, 2011. The Pawtucket Board denied the appeal, stating in its decision only that "[b]ased upon the testimony and evidence presented by the Building Official and the Board Members [sic] site visit, the Board finds that the Building Official was correct in issuing the violation for the unsafe conditions of the building."

On December 19, 2011, the Owner appealed the Pawtucket Board's decision to the State Board, pursuant to § 23-27.3-127.2.5. On February 9, 2012, the State Board conducted a hearing on the matter, voting to deny the Owner's appeal. The State Board's written decision, dated May 5, 2012, briefly described the facts underlying the case and reached several conclusions in

denying the Owner relief. The State Board first recognized that the Owner had "presented a strong case based upon the significant economic issues the [Owner] will face in complying with the Building Official's Order." The State Board then noted that "[i]f the façade and/or other portions of the building are allowed to further deteriorate, there is the future possibility that a portion of the building may fall upon a passing individual, train, or on the track with the potential of derailing a passing train." As a result, the State Board decided to "den[y] the requested relief and uphold[] the order of the Pawtucket Building Official."

A timely Complaint appealing the State Board's decision was filed with this Court on May 29, 2012, pursuant to § 23-27.3-127.1.4. A decision is herein rendered.

Standard of Review

Judicial review of the Board's decision by this Court is authorized under § 23-27.3-127.1.4. The standard of review which the Sixth Division District Court must apply is set forth in G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act, which provides as follows:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Under § 42-35-15(g), this Court may not substitute its judgment for that of the Board with respect to the credibility of witnesses or the weight of the evidence concerning questions of fact. Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers, 824 A.2d 1282, 1286 (R.I. 2003) (citing Rocha v. State Pub. Utils. Comm'n, 694 A.2d 722, 725 (R.I. 1997)). Instead, the Court "must confine itself to review of the record to determine whether 'legally competent evidence' exists to support the [State Board's] decision." Baker v. Dep't of Emp't and Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1994) (citing Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). Thus, the District Court may reverse the factual conclusions of the Board "only when they are totally devoid of competent evidentiary support in the record." Id. (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)). "Questions of law, however, are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts." Narragansett Wire Co. v. Norberg, 376 A.2d 1, 6 (R.I. 1977).

Analysis

A

Preemption

The Owner's main argument calls into question the federal preemption doctrine. The Owner argues that 49 U.S.C. § 20103 et seq, the Federal Railroad Safety Act (Act), preempts the City's enforcement of the Building Code against the Owner's Building.

The bedrock of preemption doctrine is Article VI, clause 2 of the U.S. Constitution, the Supremacy Clause. Verizon New England Inc. v. Rhode Island Pub. Util. Comm'n, 822 A.2d 187, 192 (R.I. 2003). Preemption means that "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663 (1993) (citing U.S. Const., Art. VI, cl. 2; Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

There are three basic categories of preemption. Verizon New England, Inc., 822 A.2d 187, at 192 (citing Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95-96 (1983)). The first, "express preemption," exists when a federal statute "expressly provide[s] that it shall supersede related state law," and that the state law in question "falls within the class of law that Congress intended to preempt." Id. (citing Gade v. Nat'l Solid Wastes Mgmt. Assoc., 505 U.S. 88, 95-97 (1992)). The second, "conflict preemption," exists "when compliance with both federal and state regulations is a physical impossibility [and] when under the circumstances of a particular case, [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (internal quotations omitted)). The third, "field preemption," exists if "Congress implemented a comprehensive regulatory framework, thereby indicating its intention to reserve that area solely for federal control." Id. Field preemption renders any state regulation in that same field invalid. Id.

With respect to its preemption argument, the Owner asserts that "safety issues are within the exclusive jurisdiction of the Federal Railroad Administration," and therefore, "the Pawtucket Building Official does not have jurisdiction over matters relating to railroad safety." The Owner also contends that "railroad safety is a matter which has been comprehensively legislated by Congress," and that Congress "occup[ied] the entire field of regulation and [left] no room for other governmental units to supplement federal law." The Owner states that the Building Code "stand[s] as an obstacle to the accomplishment and execution of the full objectives of Congress." Although the Owner does not identify precisely the type of preemption that applies to this case, this Court will look to the substance, not the labels, of the Owner's contentions. See Sch.

Comm. of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 649 (R.I. 2009) (citing Sarni v. Meloccaro, 636, 324 A.2d 648 (R.I. 1974)).

The City contends that the Act does not preempt the Building Code's enforcement against the Owner because the Building Official was lawfully enforcing a state law on property situated within the City's borders. The City asserts that enforcement of the Building Code is not the same thing as the exercise of jurisdiction over the railroad tracks, and the fact that the Owner's neighbor happens to be a federally regulated railroad does not prevent the City's enforcement of a statute intended to protect a neighbor's property from being damaged or interfered with because of an owner's lack of compliance.

This Court will consider whether any of the three forms of preemption—express, conflict, or field—applies to these particular circumstances. For the reasons set forth below, this Court finds that the Building Code is not preempted by the Act under any of the three preemption theories.

1

Express Preemption

a

Standard

To determine whether the Act expressly preempts the Building Code, the Court must ascertain whether the Act "expressly provide[s] that it shall supersede related state law" in the first place. Verizon New England, Inc., 822 A.2d 187, at 192. In preemption cases, courts "start with the assumption that the historic police powers of the States were not to be superseded" by a federal statute unless it was the "clear and manifest purpose of Congress" to do so. California v.

ARC Am. Corp., 490 U.S. 93, 101 (1989). The Court presumes that "Congress does not cavalierly pre-empt" state law, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996), particularly when Congress passes a statute "in a field which the States have traditionally occupied." Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (internal quotations omitted)). "If a statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause which necessarily contains the best evidence of Congress' pre-emptive intent." Easterwood, 507 U.S. 658, at 664.

b

Analysis

This Court finds that Congress had a "clear and manifest purpose" to supersede state laws related to railroad safety when it passed the Act. Section 20106 calls for "[l]aws, regulations, and orders related to railroad safety [to] be nationally uniform to the extent possible." 49 U.S.C. § 20106. Congress was concerned about "the truly interstate character" of the railroad industry, which it found had "very few local characteristics." Baltimore & Ohio R. Co. v. City of Piqua, Ohio, CIV.A. C-3-85-312, 1986 WL 8254 (S.D. Ohio June 30, 1986) (citing H.R. Rep. No. 1194, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4104, 4108). Accordingly, Congress vested the Secretary of Transportation with authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103. Congress intended to preempt state laws related to railroad safety when it passed the Act. See Sisk v. Nat'l R.R. Passenger Corp., 647 F. Supp. 861, 864-865 (D. Kan. 1986) (citing National Association of Regulatory Utility Comm'rs v. Coleman, 542 F.2d 11 (3rd Cir. 1976); Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973), cert denied 414 U.S. 855; Atchison, Topeka &

Santa Fe RR. Co. v. Illinois Commerce Comm., 453 F.Supp. 920 (N.D. Ill. 1977)). Accordingly, the Court concludes that the Act "expressly provide[s] that it shall supersede related state law." Verizon New England, Inc., 822 A.2d 187, at 192.

As Congress intended to supersede state laws related to railroad safety, the Court next considers whether the Building Code "falls within the class of law that Congress intended to preempt." Verizon New England, Inc., 822 A.2d 187, at 192. To determine whether Congress intended to preempt state statutes like the Building Code, the Court looks to "whether there is the requisite connection with or reference to railroad safety." CSX Transp., Inc. v. City of Plymouth, Mich., 86 F.3d 626, 629 (6th Cir. 1996) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) (internal quotations omitted)). Here, the Owner must show more than that the Building Code "touches upon" or "relates to" the mere subject matter covered by the Act. Haynes v. Nat'l R.R. Passenger Corp., 423 F. Supp. 2d 1073, 1081-1082 (C.D. Cal. 2006) (citing Easterwood, 507 U.S. 658, at 664-665). The Owner has to demonstrate that the Act and the Building Code, in fact, "cover" the same subject matter. Easterwood, 507 U.S. 658, at 664. "Covering" is a relatively restrictive term that requires a showing that the Act's regulations "substantially subsume the subject matter" of the Building Code. Haynes, 423 F. Supp. 2d 1073, at 1081; see also Morales, 504 U.S. 374, at 383-384.

The Owner concedes that "the [B]uilding [C]ode does not control railroad safety." (Emphasis supplied.) In fact, the Court finds that the subject matter that the Building Code deals with does not even fall within the same sphere as the subject matter regulated under the Act. See Morales, 504 U.S. 374, at 387. The Building Code's subject matter is the "construction and alteration of buildings and structures within the state." G.L. 1956 § 23-27.3-100.1.2. The subject matter of the Act's Federal Track Safety Standards (Regulations) is the "minimum safety

requirements for railroad track that is part of the general railroad system of transportation." 49 C.F.R. § 213.1. (Emphasis supplied.) The Regulations purport to control the safety of the track; the Building Code purports to control the physical integrity of buildings and structures in Rhode Island. G.L. 1956 § 23-27.3-100.1.2. The concerns addressed by the Building Code and the concerns addressed by the Act are thus not the same. To the extent that the Building Code and the Act do deal with the same subject matter—railroad safety—this Court finds that the Building Code does no more than merely "touch upon" railroad safety, or "relate to" railroad safety. Haynes, 423 F. Supp. 2d 1073, at 1081. The loose bricks on the façade of the Owner's Building did not trigger the Building Code when they (allegedly) fell—or threatened to fall—onto the federally regulated railroad tracks. The loose bricks on the Building's façade triggered the Building Code when they (allegedly) came loose in the first place. The Act falls far short of "fall[ing] within [the Act's] sphere" to permit the Court to find preemption. Morales, 504 U.S. 374, at 387. Any connection between the Building Code and railroad safety is "too tenuous, remote or peripheral" to constitute the basis for a preemption finding. Id., at 390; see also Alshrafi v. Am. Airlines, Inc., 321 F. Supp. 2d 150 (D. Mass. 2004) (Massachusetts federal District Court held that the state's anti-discrimination statute had a "tenuous, remote, or peripheral" effect on airline services and therefore was not preempted by a federal airline deregulation statute).

The content of the Regulations further evidences that the Standards and the Building Code do not "cover" the same subject matter. The Regulations divide their control over "track safety" into six distinct categories (collectively, Subparts): (1) the Roadbed (Subpart B); (2) Track Geometry (Subpart C); (3) Track Structure (Subpart D); (4) Track Appliances and Track Related Devices (Subpart E); (5) Inspection (Subpart F); and (6) Train Operations at Track

Classes 6 and Higher (Subpart G). Only Subparts B, E, and F are even potentially relevant to this case. The Court finds that none of the these Subparts purports to control the physical integrity of the Owner's Building, even though the Owner, by complying with the Building Code, could be said to influence the safety of the railroad track underneath his Building. Such an incidental connection is "too tenuous, remote or peripheral" to support a finding that the Building Code and the Act cover the same subject matter. Morales, 504 U.S. 374, at 390.[1]

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[1] Even if the Act and the Building Code share a sufficiently viable connection in terms of the subject matter that they cover, the Court still finds that the Building Code falls outside the class of laws that Congress intended to preempt when it passed the Act because the Building Code qualifies as an exception under the Act's "savings clause." 49 U.S.C. § 20106.

Not all aspects of railroad safety necessarily come under the purview of the Act. Under the "savings clause," "States are permitted to adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." Easterwood, 507 U.S. 658, at 662. (Filling the Void Exception.) The States are also allowed to "adopt more stringent safety requirements when necessary to eliminate or reduce an essentially local safety hazard" as long as "those standards are not incompatible with federal laws or regulations and not an undue burden on interstate commerce." Id. (Local Safety Hazard Exception.) In other words, "Congress expressly intended that the Act preempt all railroad safety legislation except state law governing an area in which the Secretary of Transportation has not issued a regulation or order and state law more strict than federal regulations when necessary to address local problems." CSX Transp., Inc. v. City of Plymouth, Mich., 86 F.3d 626, 628 (6th Cir. 1996). Because this Court finds that the Building Code qualifies under the Filling the Void Exception expressly provided for in the Act, the Building Code survives preemption, even if it can be found that the Act and the Building Code cover the same subject matter, and even if the connection to this subject matter is not "too tenuous, remote, or peripheral." Morales, 504 U.S. 374, at 390.

The Filling the Void Exemption permits the regulation of railroad safety by a state if the Secretary of Transportation has not regulated the subject matter of the state regulation. City of Plymouth, Mich., 86 F.3d 626, at 628. Even assuming that the Building Code does indeed regulate railroad safety, as the Owner suggests, the Court is satisfied, from its review of the Act's regulations, discussed *infra*, that the regulation of maintenance standards of privately owned buildings not on railroad property is not covered by any of the Act's regulations, and thus the Filling the Void Exemption applies. Compare Tyrrell v. Norfolk S. Ry. Co., 248 F.3d 517, 520 (6th Cir. 2001) (holding that a state administrative rule regulating the distance of clearance between the centers of railroad tracks used in rail switching was a permissible gap-filler in the federal rail safety scheme, even though the rule referenced rail construction and was related to

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Subpart B: The Roadbed

With respect to the Regulations' purported connection to property on or adjacent to railroad property, Subpart B regulates the "roadbed and areas immediately adjacent to the roadbed" itself. 49 CFR § 213.31.[2] In this section, the Regulations purport to control "Drainage" (§ 213.33) and "Vegetation" (§ 213.37) "on the roadbed" and on "areas immediately adjacent to the roadbed." Drainage systems and vegetation are the only two features that are regulated by Subpart B. It is well established that "[w]hen the language of a statute is plain and unambiguous, it is not the function of [a] court to add to or detract from its plain meaning." State v. Bucci, 430 A.2d 746, 748-49 (R.I. 1981) (citing State v. Angell, 405 A.2d 10 (R.I. 1979); New England Die Co. v. General Products Co., 168 A.2d 150 (R.I. 1961); Spear v. Respro, Inc., 129 A.2d 785 (R.I. 1957). Reviewing courts will not "insert in a statute words or language that does not appear therein except in those cases where it is plainly evident from the statute itself that the [L]egislature intended that the statute contain such provisions." In re Proposed Town of New Shoreham Project, 25 A.3d 482, 515 (R.I. 2011) (internal quotations and citations omitted). Here, we are presented with a federal statute, but the principle remains the same: Congress clearly knew how to regulate areas immediately adjacent to a roadbed and,

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rail safety, but governed subject matter not addressed by any regulation or action under the Act). See also Haynes, 423 F. Supp. 2d 1073 (holding that a railroad company's warning to passengers about potential health hazards that they could develop from sitting in seats on trains for long periods of time was not preempted by the Act's emergency safety plans or passenger safety regulations).

The Court does not, and need not, reach a finding on the issue of whether the Building Code satisfies the criteria to qualify Essentially Local Safety Hazard.

[2] Even though the Owner's property is located immediately above--not immediately adjacent to--the roadbed, the Court will liberally construe the Property as situated "immediately adjacent" to the roadbed for the purposes of this analysis.

possibly, areas that are not themselves on railroad property.[3] The Regulations in Subpart B are silent about privately owned buildings, like the Owner's Property, that overhang, or are even adjacent to, railroad track. Since "the language of [Subpart B] is plain and unambiguous, it is not the function of [this] [C]ourt to add to or detract from its plain meaning." State v. Bucci, 430 A.2d 746, at 748-49. The language of Subpart B is strong evidence that the subject matter of the Act's Regulations does not overlap with—and therefore does not "cover"—the same subject matter as the Building Code. Moreover, the omission of language about privately owned structures on, adjacent to, or hanging over the roadbed—when considered in light of the explicit mention of drainage and vegetation in these very areas—indicates a lack of any purpose whatsoever—let alone a "clear and manifest" one—of Congress to preempt state-level regulation of these kinds of structures. To the contrary, this Court finds that the omission of privately owned structures like the Owner's Property manifests a clear intent by Congress that those structures be regulated at a non-federal level.

A closer inspection of § 213.37 is particularly illuminating. Section 213.37 controls "vegetation on railroad property which is on or immediately adjacent to [the] roadbed." 49 C.F.R. § 213.37. This regulation calls for federal control of vegetative overgrowth that could impair railroad safety. The Federal Railroad Administration (F.R.A.), which promulgated the Regulations, recognizes that § 213.37 is not a panacea for ensuring that the railroads are safe from the hazards posed by vegetative overgrowth. See, e.g., F.R.A. Report MH-2007-044.

[3] The court notes that § 213.33 regulates "[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed." Section 213.37 regulates "[v]egetation on railroad property which is on or immediately adjacent to roadbed." While § 213.37, on its face, controls only vegetation that is, in fact, on railroad property, the Federal Track Safety Standards can at least plausibly apply to the regulation of fixtures that are not located on railroad property, as suggested by the wording of § 233.33. For the purposes of this opinion, the court will assume, without deciding, that the Railroad Safety Standards can reach privately owned, non-railroad property, such as that owned by the Owner.

Federal regulations, by themselves, are not enough to keep the railroads safe; automobile drivers at railroad crossings, for instance, necessarily rely on property owners adjacent to the roadbed to "voluntarily" control overgrowth beyond the area immediately adjacent to the railroad's right of way. Id. States and even private landowners have a role to play to ensure complete safety for those who work on, use, and interact with the railroads. See e.g. Missouri Pacific Railroad Co. v. Railroad Commission of Texas, 833 F.2d 570 (5th Cir. 1987) (holding no preemption of state regulation addressing overgrowth beyond the "immediately adjacent limit" of the Track Safety Standard regulation); Bowman v. Norfolk Southern Ry. Co., 832 F. Supp. 1014 (D.S.C. 1993), aff'd, 66 F.3d 315 (4th Cir. 1995) (finding preemption of state law negligence claim against railroad for failure to remove vegetation from its right of way only to the extent that the claim related to vegetation on the railroad's right of way near the tracks, but not beyond the area covered by the federal regulation). The Regulations, by themselves, do not completely ensure the railroads are safe, and it is clear that state laws, like the Building Code, are part of a broader fabric that keeps the tracks safe for workers on, and users of, the railroads. As such, the omission of privately owned structures from the Act's regulatory language—in combination with the recognition of the F.R.A. and the courts that federal, state, and private regulation work in tandem to keep the railroads safe—further demonstrates that Subpart B does not preempt the Building Code, because preemption was not the clear and manifest intention of Congress. ARC Am. Corp., 490 U.S. 93, at 101.

Subpart F: Inspection

The Owner further contends that the Act expressly preempts enforcement of the Building Code against the Owner through Subpart F of the Act's Regulations. The Owner claims that the Secretary of Transportation "has enacted extensive and comprehensive regulations" that cover the maintenance, repair and inspection of the railroad tracks, including through Regulations contained in Subpart F, and that consequent enforcement of the Building Code is preempted. The Owner seems to argue that Subpart F covers the same subject matter as the Building Code, therefore, the Building Code falls within the class of laws that Congress intended to preempt when it passed the Act.

Within Subpart F, § 213.231 of the Regulations "prescribes requirements for the frequency and manner of inspecting track." 49 C.F.R. § 213.231. As the wording of § 213.231 makes clear, however, § 213.231 does not call for the control of debris from privately owned dilapidated buildings falling onto the roadbed, but rather refers to "the frequency and manner" of track inspections. Nothing in the language of § 213.231 purports to establish regulations governing the construction and alteration of buildings and structures like the Owner's. Id. As such, § 213.231 cannot be said to "cover" the same subject matter so as to require preemption of the Building Code. Because the language used in § 213.231 is plain and unambiguous, this Court will not add or detract from its plain meaning. State v. Bucci, 430 A.2d 746, at 748-49.

Also within Subpart F, the Owner cites § 213.239, "Special Inspections," as a regulation that purportedly addresses the same safety concerns (and therefore covers the same subject matter) as the Building Code. 49 C.F.R. § 213.239. Section 213.239, in pertinent part, calls for a "special inspection" of railroad track that might be damaged after a "fire, flood, severe storm, or other occurrence." Id. However, the Owner's assertion that § 213.231 and the Building Code address the same safety concerns is without merit. The legislative history of § 213.239

evidences that the safety concerns contemplated by the F.R.A. in promulgating this Regulation were those that potentially arise after "sudden events . . . . that affect the safety and integrity of track." Track Safety Standards, 63 FR 33992-01. (Emphasis supplied.) By contrast, inasmuch as the Building Code contemplates any safety concerns in the first place, the Building Code's concern is for the maintenance of structures and buildings in Rhode Island and purports to establish "adequate and uniform regulations governing" their construction and alteration. G.L. 1956 § 23-27.3-100.1.2. The Building Code does not call for "special" inspections after "sudden" events that could impact the integrity of buildings that fall under the Building Code's jurisdiction. Instead, the Building Code prescribes maintenance standards that owners of buildings and structures in Rhode Island must adhere to perpetually. Under § 213.239, only after the occurrence of a "sudden event" are railroad employees required to inspect a track for damage. Despite the Owner's argument to the contrary, it is clear to the Court that § 213.239 does not deal with the same safety concerns as those of the Building Code. As such, the Building Code and § 213.239 do not cover the same subject matter, State v. Bucci, 430 A.2d 746, at 748-49, and therefore, § 213.239 cannot be a basis for finding that the Building Code was the type of law that Congress intended to preempt when it passed the Act.

The Court finds that the Regulations related to railroad track inspection promulgated in Subpart F do not cover the same subject matter as the Building Code. Therefore, Subpart F is not a basis for finding that the Building Code is preempted by the Act.

iii

Subpart G: Train Operations at Track Classes 6 and Higher

With respect to railroad safety and maintenance, the Owner refers to § 213.361 of the Regulations to further argue that the Act covers the same subject matter as the Building Code. The Owner argues that § 213.361 is an example of the Secretary of Transportation's promulgation of "extensive and comprehensive regulations" that cover track maintenance, repair, and inspections, and that the Building Code is preempted because the Building Code covers the same subject matter as the Regulations in § 213.361.

The Owner's reliance on § 213.361 is misplaced. Section 213.361 addresses "the prevention of vandalism by trespassers and intrusion of vehicles from adjacent rights of way." 63 FR 33992-01. The subject matter that concerned the F.R.A. when it contemplated and subsequently promulgated § 213.361 was intentional acts of trespassing—vandalism, the defacement of railroad property, and unauthorized entry onto the tracks—not maintenance, repair, or inspection even of the tracks themselves, let alone a privately owned overhanging building, such as the Owner's. Clearly, this regulation does not cover the same subject matter as the Building Code, which is concerned with the regulation of the construction and alteration of buildings and structures in Rhode Island. Sec. 23-27.3-100.1.2. The Building Code does not contemplate intentional trespasses onto railroad property. Moreover, § 213.361 directs the owners of railroad tracks to "submit a barrier plan" to the F.R.A., detailing "provisions" for the prevention of intentional trespasses onto railroad property. 49 C.F.R. § 213.361. (Emphasis supplied.) The Regulation does not prescribe inspection or enforcement of building or construction standards that could permit this Court to find that the Building Code was in the class of law that Congress intended to preempt. In short, the subject matter covered in § 213.361 is of a wholly different nature than the subject matter covered in the Building Code. See State v. Bucci, 430 A.2d 746, at 748-49. The Owner's recitation of § 213.361 is unavailing.

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Conflict Preemption

Next, the Court considers whether it should find that the Act preempts the Building Code under a theory of conflict preemption. To determine whether conflict preemption exists, the Court looks to see if "compliance with both federal and state regulations is a physical impossibility [and] when under the circumstances of a particular case, [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Verizon New England, Inc., 822 A.2d 187, at 192 (quoting Florida Lime & Avocado Growers, Inc., 373 U.S. 132, at 142-143; Crosby, 530 U.S. 363, at 373).

The Owner does not specify how precisely the Building Code "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Id. "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Id., at 193 (quoting Crosby, 530 U.S. 363, at 373). Having examined the Act as a whole and identified "its intended purpose and intended effects," this Court concludes that compliance with both the Act's Regulations and the Building Code is not a physical impossibility.

Compliance with the Regulations and the Building Code is not physically impossible because the Regulations do not require the Owner to do anything. The Building Code requires the Owner to prevent his "building sign, or structure" from becoming "unsafe." G.L. 1956 § 23-27.3-124.1. The Regulations contain no language whatsoever prescribing duties or obligations to the owners of buildings or other structures along or adjacent to a railroad right of way. This Court agrees with the proposition that "[w]hen Congress passes a law that operates via the

Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do." Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 2013 WL 5184139 (3d Cir. Sept. 17, 2013). Here, the Act is silent with respect to the obligations of private property owners to maintain their buildings when they overhang, or even abut, railroad tracks. Congress was not barring the state of Rhode Island from enacting and enforcing a statute like the Building Code, if that is something the state of Rhode Island wants to do. As such, the Owner's compliance with the Building Code does not make it impossible for him to also comply with the Act. Therefore, there is no conflict preemption.

3

Field Preemption

The Owner argues that Congress "occup[ied] an entire field of regulation . . . . leaving no room for other governmental units to supplement federal law." The Owner seemingly argues that Congress intended to occupy the field of railroad safety, and therefore, the Building Code—as a state regulation ostensibly in the same field as the Act—is rendered invalid under the field preemption doctrine.

Field preemption exists if "Congress implemented a comprehensive regulatory framework, thereby indicating its intention to reserve that area solely for federal control." Verizon New England, Inc., 822 A.2d 187, at 192 (quoting Florida Lime & Avocado Growers, Inc., 373 U.S. 132, at 142-143; Crosby, 530 U.S. 363, at 373). Field preemption renders any state regulation in that same field invalid. Id.

This Court has already determined that the Building Code does not cover the same subject matter as the Act. Therefore, the Owner's proposition that the Building Code is a state

regulation in the same field fails. Moreover, with respect to the Owner's argument that Congress "occupied an entire field of regulation" when it implemented the Act, the Court has found that Congress and the F.R.A. contemplated an important role for federal, state, and private actors to play in the field of railroad safety. See Section A.1.b.i, supra. The Owner's argument is directly contradicted by the plain language of the Act itself. The Act's "savings clause" explicitly spells out two situations when states may implement regulations that relate to railroad safety: the Filling the Void Exception and the Local Safety Hazard Exception. See n.1, supra. It is well-settled that "pre-emption of local authority cannot be implied since the [Act] does not occupy the field of railroad safety regulation." Burlington N.R. Co. v. City of Connell, 811 F. Supp. 1459, 1464 (E.D. Wash. 1993) (citing Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983); Consolidated Rail Corp v. Pennsylvania Public Utilities Comm'n, 536 F. Supp. 653 (E.D. Pa. 1982)); see also CSX Transp. Inc. v. Pub Utilities Comm'n of Ohio, 701 F. Supp 708, 611 (S.D. Ohio 1988) (finding that the Act specifically contemplates a "limited state role in enforcement" of the Act through certification provisions in the Act that are not at issue in this case). The Owner acknowledges that the Act "creates a narrow exception to preemption through its savings clause." Accordingly, field preemption does not apply to the Act.

B

The Building Official's Jurisdiction to Enforce the Building Code

The Owner also argues that the City's building official does not have jurisdiction to enforce the Building Code against the Owner because by doing so, the Owner would be exercising jurisdiction over railroad safety, which is not an area within his jurisdiction. However, the building official, by enforcing the Building Code, would not be exercising

jurisdiction over railroad safety, but would be enforcing the Building Code.[4] That enforcement of the Building Code might possibly impact railroad safety in some manner does not preclude its enforcement by the City's building official. The Court has already determined that any connection between the Building Code and railroad safety is "too tenuous, remote, or peripheral" to permit the Court to find that the Act and the Building Code indeed cover the same subject matter. Morales, 504 U.S. 374, at 387. By the same reasoning, the Court finds that the connection between enforcement of the Building Code and the "exercise of jurisdiction over the issue of railroad safety" is far too attenuated to find the building official lacks the authority to enforce the Building Code. Id., at 390.

C

Sufficiency of the Evidence Presented to the Pawtucket Board

The Owner also contends that the State Board's decision to uphold the decision of the Pawtucket Board was "clearly erroneous" because, according to the Owner, "there was no direct testimony or other evidence" that was presented to the Pawtucket Board showing that the Owner's Building was crumbling. Though the Owner presented a photograph of the Building to

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[4] See G.L. 1956 § 23-27.3-108. The Local Building Official's "enforcement duties" are described as follows:

> "The building official shall enforce all the provisions of this code and any other applicable state statutes, rules, and regulations, or municipal ordinances and act on any question relative to the mode or manner of construction, and the materials to be used in the construction, reconstruction, alteration, repair, demolition, removal, installation of equipment, and the location, use, occupancy, and maintenance of all buildings and structures, including any building or structure owned by any authority, except as may otherwise be specifically provided for by statutory requirements or as provided in this code." (Emphasis supplied.)

the Pawtucket Board, he contends that this photograph, although clearly showing that the Building is old, does not evidence that bricks or other debris was loose and falling.

This Court disagrees. The State Board reviewed the picture before it. This Court "may reverse the factual conclusions of the Board only when they are totally devoid of competent evidentiary support in the record." Baker, 637 A.2d 360, at 363 (internal quotation omitted). Accordingly, the Court is satisfied that the State Board's decision was not clearly erroneous.

D

Impossibility Defense

The Owner's final contention is that it cannot afford Amtrak's $115,000 access fee that would permit the Owner to make the repairs to his Building and allow it to meet the Building Code's standards. The Owner argues that because it is impossible for the Owner to pay the access fee, it is therefore impossible for the Owner to comply with the building official's order, and, as a result, the Owner is excused from complying with the Building Code.

It is axiomatic that "government may execute laws or programs that adversely affect recognized economic values." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). While the Owner may not be able to afford to undertake the repairs, mandating compliance with the maintenance and upkeep standards articulated in the Building Code is a valid exercise of the state's police power to preserve the "health, safety, morals, or general welfare" of its citizens. Id., at 126 (quoting Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)). In fact, if a property owner disregards a notice of an unsafe condition and fails to abide by an order to bring his property into compliance, the Building Code calls for the Building Official to undertake necessary repairs and for the property owner to be billed for the work, or a

lien to be imposed against the property. See § § 23-27.3-124.5 and 23-27.3-125.7. The Owner's inability to pay Amtrak's access fee does not make the State Board's decision an abuse of discretion or a violation of statutory or constitutional provisions. This Court "must confine itself to review of the record to determine whether 'legally competent evidence' exists to support the [State Board's] decision." Baker, 637 A.2d 360, 363 (citing Envtl. Scientific Corp., 621 A.2d 200, 208). Accordingly, this Court will not disturb the decision of the State Board which is supported by competent evidence.

Conclusion

After reviewing the entire record, this Court concludes that the substantial rights of the Owner have not been prejudiced. Accordingly, the State Board's decision is affirmed. Counsel shall submit the appropriate judgment for entry.