

**SUMMARY OF LEGAL ASPECTS OF
WAKEFIELD / LYNNFIELD RAIL TO TRAIL INITIATIVE
LYNNFIELD RECREATIONAL PATH COMMITTEE
REPORT TO LYNNFIELD BOARD OF SELECTMEN**

Disclaimer: This summary information is only a brief outline of liability protections in Massachusetts. It is provided for educational purposes only and is not to be construed as legal advice.

Key topics covered under this summary:

- Lease: What are the next steps if the lease is to be signed?
 - Section II: Ownership Rights to the Railroad Corridor
- Costs: What are the financial considerations for signing the lease?
 - Section III: Proposed Rail Trail Lease Agreement
- Contamination: What testing is permitted prior to the signing of the lease?
 - Section IV: Environment Concerns

I. INTRODUCTION

Many trails are being built in urban, suburban, and rural areas on former rail corridors like the one traversing the Town of Lynnfield. People use trails for walking, jogging, biking, in-line skating, skiing and people in wheelchairs use them. The need for open space to recreate in a safe environment prompts the need for legal analysis highlighting some legal aspects impacting a rail-to-trail initiative.

These multi-form uses trigger legal concerns about physical injury and property damage suffered by trail users and abutters. Most jurisdictions have laws that immunize and limit public and private landowner liability under recreational use statutes and state tort claims acts. Private landowners with land adjacent to a trail also have some form of protection under trespass laws and liability insurance.

II. OWNERSHIP RIGHTS TO THE RAILROAD CORRIDOR

The MBTA holds absolute title to the land in the railroad corridor that traverses the Town of Lynnfield (hereafter, "Municipality") under a 1977 order of taking recorded with the Essex South District Registry of Deeds. See Book 6333, Page 298. Examination of the order confirms that the interest vested constitutes a complete ownership right and title to the Corridor. This should dispel any popular belief that the MBTA retains a mere easement subject to reversionary rights in a third party other than the MBTA. This was recently confirmed by Thomas Mullen, Esquire and Town Counsel and has independent legal significance because if the Municipality decides to enter into a lease agreement, absolute ownership by the MBTA guarantees that no third party can successfully assert a superior interest in the corridor with adverse consequence to the Town of Lynnfield.

No monetary consideration is required by the MBTA to enter into its proposed 99-year term. The significance here is that the Lynnfield Town Meeting vote authorizing such a lease was

accomplished by a mere majority rather than the 2/3 vote that would be required under M.G.L. chapter 40, section 14 if an appropriation were required in connection with the lease.

III. PROPOSED RAIL TRAIL LEASE AGREEMENT- AN OVERVIEW OF TERMS

The proposed MBTA lease to the Municipality includes a linear Corridor defined under M.G.L. C.82 §35A as a property converted from a former use as a railroad right-of-way to a revitalized “use as a publicly owned, improved and maintained corridor for bicycle, pedestrian and other non-motorized public transportation, recreation and associated purposes . . .” See Proposed Rail Trail Lease (2004). Some significant provisions include the following: that the lease term shall be for a period of ninety-nine (99) years in return for consideration of one (\$1) dollar; that the Corridor shall be open to the public, and no fee or other consideration shall be charged for use thereof; that the Municipality agrees to accept the Corridor “as is”; that the MBTA makes no warranty of any kind, express or implied, as to the condition of the Premises or its suitability for its agreed upon intended uses as a rail trail. Further, the Municipality must exercise best efforts to diligently secure funds necessary to fulfill its obligations under the Lease for the design, bidding and construction of the rail-trail project. See Proposed Rail Trail Lease.

The terms of the proposed lease also include an environmental liability disclaimer requiring the Municipality to assume all risk of entry on the Premises, including, but not limited to the liability for the presence of oil and/or hazardous material, if any, as defined under M.G.L. c. 21E. In this regard, the Municipality will be required to purchase environmental insurance naming the MBTA as an additional insured with minimum coverage limits of \$5,000,000.00 per incident, a maximum deduction of \$50,000.00 per incident, and a term of at least 5 years. The Municipality must agree to release the MBTA from any responsibility for the Municipality’s losses or damages related to the condition of the Corridor. Further, the Municipality will be required to purchase general liability insurance that includes umbrella liability coverage with limits of not less than five million (\$5,000,000.00) dollars covering all work performed and worker’s compensation Insurance for all municipal contractors. The Municipality must agree to release the MBTA for any losses sustained. See Proposed Rail Trail Lease at par. 6.1(a)(3)(b). *Id.*

Other significant lease terms include that the MBTA shall have no obligation to provide security services or lighting on the Corridor; that the MBTA reserves the right to remove the rail infrastructure and agrees, if it chooses to do so, that removal shall be within 180 days of the date the Municipality notifies the MBTA to be the date of the trail construction commencement and: that the Municipality shall be responsible for removal and disposal of all other rail infrastructure. *Id.*

IV. ENVIRONMENTAL CONCERNS

• Contamination Issues

Contamination is a chief concern that was addressed in the Wakefield/Lynnfield Feasibility Study (hereafter “Feasibility Study”). See Contamination Issues at Page 7-1. Contamination along any rail bed is the result of either a residual contamination from railroad operations or other forms of contamination unrelated to railroad operations and associated with adjacent uses along the corridor. Common reported contaminants along rail corridors generally include herbicides to control weeds, metals and constituents of oil or fuel, which were released from the rail cars as

they travelled over the corridor. Other contaminants include coal ash and existing railroad ties that were likely treated with creosote. The ties will need to be removed and transported in accordance with local, state, and federal hazardous waste disposal requirements.¹

A hazardous waste and contamination screening for this rail bed was limited to a brief visual inspection along the corridor and was further based upon a review of the following databases as of June 30, 2007:

- Massachusetts Department of Environmental Protection (DEP) Bureau of Waste Site Cleanup (BWSC) database current as of July 30, 2007.
- Comprehensive Environmental Compensation Liability Act (CERCLA) List (Federal Superfund Site List) for sites.
- DEP Solid Waste Facility (landfills, transfer stations, and combustion facilities) datalayer obtainable from MassGIS.

- Environmental Assessment and Recommendations

There were eleven sites of concern. Ten included sites with addresses in Wakefield and one in Lynnfield that identified an above-ground transformer at the intersection of Summer and Westover Streets that posed “no significant risk”. See Wakefield Lynnfield Rail Trail Feasibility Study, 2007 at Page 7-4. The Feasibility Study concluded that the database searches above did not indicate any overt sources of contamination within the limits of the corridor itself. However, the review did locate contamination issues on sites located directly adjacent or in close proximity to the project corridor as follows:

- o Main Street and Water Street Wakefield (Route 129). “There are a number of active release reports on abutting properties and this area has been characterized by industrial use for a long time.” A recommendation was made to review DEP’s files on the sites in the vicinity of this section during the next phase of the project to determine if the design should consider any related contamination issues. See Page 7-4.
- o The Wakefield Center Depot at Water Street (Route 129). It is expected that the small stretches along the corridor in this area would be expected to have contamination due to more frequent/intense use of pesticides to improve sight lines and greater frequency/intensity of human activities. This conclusion was based upon the DEP’s “Best Management Practices for Controlling Exposure to Soil during the Development of Rail Trails.”
- o Coal Ash. Coal ash is residual contamination from former railroad operations. This by-product is exempt from the Massachusetts Contingency Plan (MCP). The MCP (310 CMR 40.0000) includes regulations that govern the reporting, assessment and

¹ During the construction phase the rails and ties must be removed. While the metal rails have a salvage value, the wooden ties treated with creosote do not and must therefore be disposed of through special arrangements. Any residual contamination of the rail bed due to the creosote will be dealt with as part of the approval, design and construction process.

cleanup of oil and hazardous material spills in Massachusetts. While it is acceptable to both leave and re-use soil containing coal ash along a corridor, the DEP's anti-degradation policy restricts off-site reuse to a similar setting. Consequently, leftover materials may need to be transported to an approved landfill at additional costs to the Contractor, which ultimately increases the overall cost of the trail project to the Town. It is therefore important for the trail design to balance cut and fill volumes to minimize any transportation of material off-site. This policy does not apply to contamination "hot spots" where contamination other than residual contamination is present. For example, if an oil or hazardous material spill has contaminated the soil along a portion of the corridor, this soil cannot be left or place or re-used and must instead be cleaned up and/or removed and disposed of pursuant to the MCP.

Identifying and mitigating contamination along this rail trail will be addressed again during the next phase of the project. As part of the negotiated lease or purchase agreements between the towns and the current owners of the rail bed, contamination liabilities will be addressed. The Commonwealth of Massachusetts has published the Best Management Practices for Controlling Exposure to Soil during the Development of Rail Trails.

- Reedy Meadow

Formerly known as the "Lynnfield Marsh", Reedy Meadow is the largest freshwater cattail marsh in Massachusetts. It is located in the towns of Lynnfield and Wakefield. The majority of the Lynnfield portion of the meadow is owned by the Conservation Commission - Town of Lynnfield and **National Development**. The U. S. Department of the Interior designated Reedy Meadow as a National Natural Landmark. It is the major water retention area for the Saugus River Watershed, as well as a natural wildlife refuge. Pillings Pond drains into the meadow. Like any construction project, plans for the rail trail must pass approval of town boards, including, the Conservation Commission, State and Federal Agencies. Construction techniques and mitigation is accomplished with the boards' guidance and approval. In most cases, filling of wetlands can be avoided. Where the flat surface on the top of a rail bed through wetlands needs to be widened for a rail trail, soil can be removed to obtain adequate width. Current proposed designs minimize disturbance through the use of an elevated boardwalk structure engineered above high water levels.

- Environmental Liability and Insurance

Hazardous waste visual screening conducted in 2007 found no incidents of contamination within the Lynnfield portion of the rail trail. See Wakefield /Lynnfield Feasibility Study Page 7-4. Significantly, the MBTA will not agree to pay for any environmental clean-up costs arising from the construction of the rail trail. See Proposed Rail Trail Lease. The MBTA also prohibits any environmental testing until after the municipality enters into the lease. While toxic waste exposure is a paramount concern, the Municipality can reduce future financial costs for removal of pre-existing contaminants by purchasing environmental liability insurance in accordance with the protections afforded under Massachusetts General Laws. See G.L. c. 23A section 3I. Under this law, if a municipality purchases a qualifying policy it can then shield itself from claims, injuries, costs, damages or other relief arising out of or related to the pre-existing release of hazardous materials as defined pursuant to G.L. c. 21E. Typical coverage is \$5,000,000 per occurrence with

a deductible of \$50,000.00, for a term of 5 years. The policy names the MBTA as an additional insured. Five years is sufficient to cover the typical construction period plus an additional period during initial operation of the rail trail. In the past, quotes for this insurance have been provided by the Miniter Group located in Rockland, MA. The one-time cost of this insurance is expected to be approximately \$40,000. In an effort to defray insurance costs the Massachusetts Office of Business Development accepts qualifying applications for matching grants to assist municipalities when purchasing environmental insurance. See G.L. c. 23A section 3I at Appendix of Statutes, *Infra*.

V. TORT LIABILITY CONCERNS AND PROTECTIONS

Ownership and maintenance of a rail trail by a municipality or a nonprofit creates a multitude of liability considerations. The safety of trail users and the management and reduction of foreseeable risks and liability exposure is a primary goal for rail managers. Rail corridors are covered by city, county or state self-insured policies, and public liability risks from trails are small compared to the liability risks of roads, playgrounds and swimming pools. See Rail-to-Trails Conservancy, Liability and Trail Insurance Report, September 2000. In the same manner, private landowners who permit public access to their property are protected by recreational use statutes in all 50 states. Under these statutes, no landowner is liable for recreational injuries resulting from trail user carelessness if they have provided public access to their land for recreational purposes without charging a use fee.

- Duty Of Care and Abolition of Class Distinctions

In many states, the liability of a landowner for injury to another was determined by the class of person who sustained an injury, i.e. whether the injured party was an invitee or licensee, a child or a trespasser. In Massachusetts, the landowner's duty of care to an injured party is no longer based upon the status of the injured party as either a licensee or invitee. Instead the law creates a common duty of reasonable care which the landowner/occupier owes to all lawful visitors to the premises. "[Where] a trespasser is in a position of peril and his presence becomes known, the owner then has a duty to use reasonable care . . . in the circumstances." Pridgen v. Boston Housing Authority, [364 Mass. 696](#), 707 (1974). An occupier of land will also be held to a duty of ordinary care.
Id.

- **The Recreational Use Statute; G.L. c. 21 section 17C:**

The Massachusetts recreational use law provides that individuals owners of land who make their land available to the public for "recreational . . . purposes without imposing a charge or fee therefor, . . . shall not be liable for personal injuries . . . sustained by such members of the public . . . in the absence of willful, wanton, or reckless conduct by [the landowner]." M.G.L. c. 21, § 17C(a). The owner who imposes a charge or fee for the use of his land by the public for recreational purposes shall not be protected under the law.

- **The Mass Tort Claims Act; Protection for Public Employees Chapter 258**

The Massachusetts Tort Claims Act permits claims by injured persons against the government for the negligence of its "public employees." Section 2 of the Act states that "public employees shall be liable for injury or loss of property or personal death" caused by negligence,

wrongful acts, or omissions. However, the Act also limits government liability by imposing a \$100,000 cap on damages per plaintiff in most cases.

The liability exposure of state government for negligent acts under the Massachusetts Tort Claims Act creates an exception to the traditional rule of "sovereign immunity." This rule, which finds its source in England and the United States for hundreds of years, held that the "sovereign" (here, the municipal government) could not be sued for its acts or decisions, even if harm came to individuals as a result.

VI. LIABILITY PROTECTION FOR VOLUNTEERS

Volunteers support risk management efforts to promote safety awareness on the rail trail. Many volunteers acting as trail managers inventory potential hazards along corridor, record inspections, warn path users about potential hazards, post trail regulations on path, conduct regular inspections, document maintenance issues and assist with implementing the municipal procedures for handling medical emergencies. Depending on the volunteer's role and responsibilities, there may be protections afforded under insurance coverage for injuries to volunteers and to path users injured by volunteer malfeasance under general liability policy or under one or more of the following laws.

➤ Doctors and Nurses Working in Public Health Programs (Mass. General Laws, chapter 112, § 12C)

A volunteer may have immunity from liability in any civil suit for damages if the individual is a physician or nurse "administering immunization or other protective programs under public health programs" (government programs). The volunteer can be paid or unpaid. Protection is not limited to emergencies.

➤ Protection for EMS Personnel (Mass. General Laws, c. 111C, § 21)

Massachusetts Law protects certified, accredited, or approved Emergency Medical Service (EMS) personnel under G.L. c. 111C, s. 9, when they are on duty and in good faith render first aid, CPR, transportation, or other emergency medical services.

➤ Good Samaritan Laws: G.L. c. 258 section 13

Massachusetts Laws also protect physicians, nurses, physician assistants, and respiratory therapists from liability when they give emergency care or treatment other than in the ordinary course of practice, in good faith and without charging a fee. The law protects any person, whose regular duties do not include the provision of emergency medical care, from liability when they attempt to render emergency care, including, but not limited to, cardiopulmonary resuscitation or defibrillation, in good faith and without compensation. These specific volunteers are not protected from acts or omissions that are grossly negligent, willful, or wanton.

➤ Protection for Public Employees (Mass. Tort Claims Act, Chapter 258)

Volunteers are only considered public employees when they are so designated by a government entity, e.g., special (unpaid) municipal employees appointed by a select board or city council. Volunteers must be under the direction and control of the government entity and must act within the scope of their official duties. There must be adequate supervision and clear work assignments to enjoy the limited protection under the Mass Tort Claims Act.

➤ **Federal Volunteer Protection Act (42 U.S.C. § 14501)**

A volunteer may have immunity from (no liability for) negligence if the individual volunteers for a nonprofit organization or governmental entity. There is no need for federal funding in order for protection to apply. Volunteers must act within the scope of their responsibilities in the organization, must be properly licensed, certified, or authorized to act. Protection is not limited to emergency situations only. There is no protection if the harm occurred through the operation of a motorized vehicle or for conduct deemed reckless or gross negligence.

VII. APPENDIX OF STATUTES

- **RECREATIONAL USE STATUTE (MASSACHUSETTS)**

G.L. c. 21 Section 17C: Public use of land for recreational, conservation, scientific educational and other purposes; landowner's liability limited; exception

Section 17C. (a) Any person having an interest in land including the structures, buildings, and equipment attached to the land, including without limitation, railroad and utility corridors, easements and rights of way, wetlands, rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of wilful, wanton, or reckless conduct by such person.

- **MASS TORT CLAIMS ACT**

GL c. 258; Section 2: Liability; exclusiveness of remedy; cooperation of public employee; subsequent actions; representation by public attorney

Section 2. Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of \$100,000; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a \$100,000 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the

estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter.

- **ENVIRONMENTAL INSURANCE – STATE MATCHING GRANTS**

Section 3I: Rail-trail construction; matching grants to municipalities; environmental insurance

Section 3I. (a) Notwithstanding any other provisions of this chapter, the Massachusetts office of business development shall upon receipt of qualifying applications, expend not less than \$500,000 annually in matching grants to assist municipalities to purchase environmental insurance naming as an additional insured the Massachusetts Bay Transportation Authority or the office of planning and programming and construction, as applicable, for purposes of establishing and maintaining rail-trails, as defined in section 2 of chapter 21E and section 35A of chapter 82, utilizing the Brownfield's Redevelopment Access to Capital Policy Form or similar or replacement form, with terms, conditions, amendments and endorsements as appropriate under the circumstances of the proposed rail-trail project, and with coverage limits of at least \$3,000,000 per incident, a deductible of at most \$50,000 per incident, and a term of at least 5 years.

(b) Unless specifically required by federal law in connection with any grant for construction of a rail-trail, a municipality that has applied for and received a grant and has purchased the environmental insurance as described in subsection (a) shall not be required to furnish to the Massachusetts Bay Transportation Authority, the executive office of transportation and public works or any person having an interest in the rail-trail project site, any other form of environmental insurance, or any defense, indemnification or hold-harmless agreement with respect to any claims, injuries, costs, damages or other relief arising out of or related to the pre-existing release or threat of release of oil or hazardous materials, as those terms are defined in chapter 21E, at or from the project site in connection with the design, acquisition, construction, use or maintenance of the rail-trail for which the application is made.

(c) This section shall only apply to rail-trail projects on land in which a city or town acquires or has acquired an interest by deed, easement, lease, license or otherwise from the Massachusetts Bay Transportation Authority or the executive office of transportation and public works or a successor agency of either of them for the design, installation, construction, operation, maintenance or use of a rail-trail, as defined in section 2 of chapter 21E. The Massachusetts office of business development shall promulgate regulations, policies, or directives necessary to expedite the receipt and approval of grant applications from municipalities under this section.

**VIII.
STATEMENT OF AUTHORITIES
LEGAL ASPECTS OF RAIL TRAIL INITIATIVE**

STATE

- The Proposed Rail Trail Lease (2004 Copy) from Transit Realty Associates, LLC, license administrator for the MBTA and forwarded to William Gustis Town Administrator, Town of Lynnfield, dated November 8, 2004;

- Mass General Laws chapter 23A section 3I, Environmental Insurance Coverage and Premium Funding;
- Mass Office of Business Development for Grant Procedures (funding environmental liability Insurance);
- Mass Brownfields Program, State Incentives for Cleanup and Redevelopment;
- Mass Gen Laws c. 84 section 15 Defect in Public Ways;
- Recreational Use Statute G.L. c. 21 section 17C; Public use of land for recreational, conservation, scientific educational and other purposes; landowner's liability limited; exception;
- Good Samaritan Laws, Mass Gen Laws c. 258c, section 13;
- Mass. General Laws, c. 112, § 12C, Doctors and Nurses Working in Public Health Programs;
- Mass. General Laws, c. 111C, § 21, Protection for EMS Personnel when they are on duty and in good faith render first aid, CPR, transportation, or other emergency medical services;
- Mass General Laws c. 258; Mass Tort Claims Act; Protection for Public Employees; Liability; exclusiveness of remedy; cooperation of public employee; subsequent actions; representation by public attorney;
- Mass General Laws c 21e Massachusetts Oil and Hazardous Material Release Prevention and Response Act

FEDERAL

- Federal Volunteer Protection Act (42 U.S.C. § 14501.

ACKNOWLEDGEMENTS

- Rails-to-Trails Conservancy
- Bruce Freeman Rail Trail Resources Commentary
- Wakefield/Lynnfield Rail Trail Feasibility Study 2007