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Office of Senator Resor
Information on Rail Trail Environmental Liability Legislation

In May of 2001, the Senate Post Audit and Oversight Committee released a report entitled "Common Sense Ideas to Expedite Rail Trail Development in Massachusetts". This report recognized that rail trails, created when abandoned rail lines are converted into public trails for use as pedestrian walkways and bicycle paths, provide a safe place for families to ride bikes or walk, and encourage people to exercise outdoors. The report also recognized that rail trails offer very positive benefits to the communities in which they are located, including the revitalization of town centers, increasing business opportunities, decreasing traffic congestion and air pollution, and increasing tourism.

However, Massachusetts at that time had a poor track record of completing rail trails. That same year, an independent national report ranked Massachusetts last in completing projects like rail trails. One of the major impediments to rail trail development at that time was MBTA policy with respect to transferring land under its control to communities. Prior to December 2000, communities were forced to pay market value for abandoned rail lines. This policy was reversed in December 13, 2000, when the MBTA approved the transfer of two rail lines in Peabody and Plymouth for no fee. However, the MBTA continues to insist on certain onerous provisions, including the policy that the municipalities must indemnify the MBTA from lawsuits.

Liability for Pre-Existing Environmental Contamination

Since the policy reversal in 2000, the MBTA has entered into good faith negotiations for the lease or fee transfer of various abandoned rail lines for rail trail purposes. However, the matter of indemnification for pre-existing environmental contamination continues to stand as a significant impediment to the transfer of properties and the construction of rail trails.

Simply put, the MBTA wants to transfer to cities and towns by means of defense and indemnity obligations any liability, costs and risks of lawsuits arising from the discovery of pre-existing hazardous materials found during rail trail construction. The MBTA has also refused to allow any testing for these contaminants before a city or town executes the standard MBTA lease. Cities and towns have understandably balked at taking on environmental liabilities that they can neither test nor plan for in advance.

The Legislature and the Department of Environmental Protection have previously addressed rail-trail environmental liability and related issues in several ways, but the core concern over environmental indemnification remains a stumbling block to the shared efforts of the legislature, the MBTA and cities and towns to make new rail-trails a reality in the Commonwealth. As a result, the legislature is considering further action to resolve the difficulties posed by unknown environmental hazards.

Previous Enactments

In 2003, in the Municipal Relief Act, (Chapter 46 of the Acts of 2003) Senator Pam Resor of Acton sponsored language that amended Chapter 21E of the General Laws, which is the State's Hazardous materials release and response act. These changes:

1. added former MBTA rights of way being used as rail trails to the definition of economically distressed areas for the purposes of the section;
2. specified that the "owner" of such land for the purposes of responsibility under the bill would be the owner of the land immediately before the MBTA obtained ownership, thereby providing a defense to the MBTA for "status liability" as a former owner/operator under Chapter 21E;
3. specified that cities and towns would NOT be deemed owner or operator if that town has acquired an interest in the rail trail from the MBTA for rail trail purposes AND IF no act of the city or town causes or contributes to a hazardous release worse than other wise would have been the case AND IF the city or town takes reasonable steps to prevent the exposure of persons to oil or hazardous materials by fencing, paving, installing geo-textile membrane, or otherwise preventing access to any hazardous materials that might be present on the site; and
4. specified terms to define whether the city or town has acted diligently to develop the rail trail if hazardous materials are discovered.

Following the passage of the Municipal Relief Act, the Department of Environmental Protection issued a detailed guidance document entitled "Best Management Practices (BMP) for Controlling Exposure to Soil during the Development of Rail Trails" which summarized the BMPs that should be considered before, during, and after former railroad lines are converted to recreation trails. These BMPs were developed to eliminate or minimize exposures to hazardous materials commonly found along railroad rights of way,

specifically for those situations addressed under Chapter 46 of the Acts of 2004. The BMPs include specific design guidelines to reduce exposure to hazardous materials.

As a result of the Municipal Relief Act and the development of the BMPs, the MBTA has modified its standard lease agreement to permit testing, but only after a lease has been signed by a city or town. The MBTA did not alter its policy requiring cities and towns to defend and indemnify the MBTA for pre-existing environmental contamination which, by definition, the city or town did not cause or exacerbate. Although some communities are seriously considering executing the revised lease, we have not seen confirmation that any community has yet voted to accept it and several communities remain unwilling to sign a lease that includes an environmental indemnification clause for pre-existing contamination.

About a year later, in the Transportation Bond Bill of 2004, Senator Resor and others in the Legislative Rail Trail Caucus sponsored language that amended Chapter 82 of the General Laws, adding a section that authorized towns to “lay out” rail trails in the same way that roads and highways are “laid out” in the Commonwealth. The section authorized these trails to be laid out on property acquired by the Town by fee, easement, lease, license, or otherwise, even if subject to reversion by the railroad or MBTA for future rail purposes. Most importantly, the language stated: “The owner of such reversion shall be exempt from liability for any claims associated with use of any such rail trail including claims for damages that may arise under Section 15 of Chapter 84 (*personal injury or property damage resulting from defective ways*) and section 38 of Chapter 161A (*MBTA liability for personal injury, death, or property damage*).

Proposed Solutions to The Indemnification Impasse

Despite the significant protections offered to the MBTA in these two pieces of enacted legislation, the stalemate between the MBTA and cities and towns over rail trail environmental liability persists. Moreover it is important that the provisions for MBTA rail lines be extended to rail lines under the control of the Executive Office of Transportation.

Setting aside the question of whether cities and towns can legally defend and indemnify at all – which involves complex issues of municipal law and the limits on municipal contracting authority – Senator Resor has proposed several avenues to address the ongoing concerns related to environmental indemnification and liability. These are currently pending in the Legislature, the most promising of which is an environmental insurance measure added to the Senate’s proposed Economic Stimulus Package now pending in conference committee..

- **Extend chapter 21E provisions to EOT rail lines.**

In addition to these efforts, Senator Resor and other legislators have been working with many towns trying to use the former route of the New Haven Railroad between

Framingham and Lowell for use as the Bruce Freeman Rail Trail. The route includes portions in Lowell, Chelmsford, Westford, Carlisle, Acton, Concord, Sudbury, and Framingham. The Massachusetts Executive Office of Transportation (EOT) owns the rail bed north of Route 20 to Lowell. EOT is willing to lease or sell the right of way to the towns at no cost or token cost.

In 2003, in the Municipal Relief Act, the Legislature passed an amendment to Chapter 21E of the General Laws that allowed former MBTA rights of way being used as a rail trail to be added to the definition of economically distressed areas for the purposes of that section of the law. This amendment provided a qualified defense to the MBTA and cities and towns for Ch 21E liability.

Senator Resor now seeks to extend this definition to rights of way under the control of the EOT. This would extend the same qualified defense to cities and towns and the EOT. Senator Resor believes that there is every reason to extend to the Commonwealth's EOT the same level of protection that the Legislature extended to the MBTA in the original rail-trail amendments to Chapter 21E.

THIS BILL (Senate docket 2636) WAS FILED IN APRIL BUT HAS NOT YET BEEN ADMITTED.

- **The Environmental Insurance Model**

Senator Resor has proposed to provide a total of up to \$500,000 for grants of up to \$50,000 each to cities and towns to be used to purchase environmental insurance on rail trails. The insurance would name and protect both the municipality and the MBTA. Under this win-win solution, the state grants would be supplemented by contributions from cities, towns and/or the MBTA to purchase environmental insurance against liability for hazardous material releases. In turn, the cities and towns would be relieved from the obligation to provide "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 at or from the project site ... in connection with its design, acquisition, construction, use or maintenance of the Rail-trail"

Language to accomplish this insurance is **PENDING IN THE ECONOMIC STIMULUS BILL**, which has been held up in Conference Committee since November. We hope that the bill will be reported out of committee after the FY07 budget is acted on, possibly in June. The pending language (a) puts the insurance program under Chapter 23A (the Chapter that concerns the Brownfields Redevelopment Access to Capital Fund (BRAC), capitalized in 1998 under Chapter 206, Section 32 and recapitalized in 2003 under Chapter 141, Section 75), (b) includes the important "non-indemnification"

provision, and (c) requires the department of economic development under Chapter 23A to receive and expedite grant applications.

A number of Senators and Representatives have been actively working to advocate for the inclusion of this program in the Economic Stimulus bill.

In the event the economic stimulus bill does not move forward, **SENATOR RESOR HAS ALSO REQUESTED THIS LANGUAGE IN THE FY07 BUDGET.**

- **The Level Playing Field Model**

In the alternative, the Senator nearly two years ago introduced Senate Bill 1947, which would level the playing field between the MBTA on the one hand and cities and towns on the other with respect to pre-existing contamination. **THIS BILL WAS PUT IN A STUDY, EFFECTIVELY ENDING ITS CONSIDERATION DURING THIS SESSION.**

The bill's purpose was as follows: since the MBTA will not allow testing on its land before the contract is signed, S. 1947 would have relieved municipalities of the requirement to indemnify the MBTA or any other person or entity with respect to environmental releases that first begin to occur before the city or town acquires ownership or possession of the property. The city or town would still comply with DEP's Best Management Practices, but would not face the added burden of contractual indemnification liability. The purpose of the bill was to avoid the fundamental unfairness of imposing on cities and towns "blank check" defense and indemnity obligations where they are not allowed to conduct due diligence testing in advance. To ensure that the Commonwealth's policies of encouraging the development of rail-trails and protecting the environment are fulfilled, the bill provided that if the governing body of any city or town formally requests the MBTA to convey the fee, easement, lease, license, or other real property interest in an inactive, former railroad right of way to be revitalized for rail trail purposes, then MBTA must either transfer that property in "as is" condition for nominal consideration to the city or town for such purposes within six months or else undertake a Phase I Initial Site investigation, and perform all necessary and appropriate assessment, containment, and removal actions with respect to hazardous materials on the property. So the MBTA would have a choice of how to proceed, but either way needs to proceed responsibly.

S. 1947 provided additional liability protections for cities and towns acquiring an interest in a former MBTA property. First, the city or town would be eligible for the recreational defense to liability provided under *Chapter 21, Section 17C, public uses of land for recreational, conservation, scientific, educational and other purposes* from the moment of transfer from the MBTA. Second, the bill limits to \$100,000 the amount of any

judgment or punitive damages a city or town is liable for under Chapter 258, as a result of the interest in the former MBTA site.