



SETTI D. WARREN  
MAYOR

City of Newton, Massachusetts  
Office of the Mayor

#356-12

Telephone  
(617) 796-1100

Telefax  
(617) 796-1113

TDD  
(617) 796-1089

[swarren@newtonma.gov](mailto:swarren@newtonma.gov)

December 14, 2012

Honorable Board of Aldermen  
Newton City Hall  
1000 Commonwealth Avenue  
Newton, MA 02459

RE: MBTA 99-Year Lease for Right of Way, Docket Item #302-12

Dear Ladies and Gentlemen:

This letter addresses questions raised most recently in the Public Facilities Committee of December 5, 2012 pertaining to anticipated NSTAR work in the MBTA Right-of-Way (ROW) along Needham Street. This same ROW is under consideration by the City to enter into a 99-year lease for conversion to a recreational pathway. The questions posed by the Honorable Board are grouped below into two categories: (1) legal considerations and (2) engineering scope, with explanations provided for each.

In light of this new information of NSTAR project, it is the intention of the Administration to continue to pursue the 99-Lease agreement with the MBTA along with the purchase of a 5-year, \$10M environmental insurance policy, closely monitoring the timing of the utility excavation work and timing the execution of the ROW lease agreement at a time that is most favorable to City while protecting its interests.

**1. Legal Considerations** (narrative provided by Bob Waddick, Assistant City Solicitor)

The Public Facilities Committee raised questions about work anticipated by NSTAR in the ROW as it pertained to the City's environmental insurance coverage.

*Response:* The environmental insurance policy explicitly excludes coverage for the cost of clean-up of contamination resulting from sub-surface utility excavations such as that proposed by NSTAR. Under the rail trail lease agreement, as the owner, the MBTA retains the right to permit utility work in, over and under the ROW as long as it does not reasonably interfere with a municipality's use. Therefore, the MBTA can effectively permit utility work now, or any time in the future after the lease is executed.

As such, while the insurance does not cover the cost of any contamination clean-up, the City will not necessarily be liable for such costs either. The Massachusetts Oil and Hazardous Material Release Prevention and Response Act, commonly referred to as

Chapter 21E, sets forth the framework for addressing and assessing liability for the release or threat of release of hazardous substances. An amendment to Chapter 21E passed by the legislature in 2003, exempted cities and towns that lease a site from the MBTA for the purpose of maintaining a rail trail.<sup>1</sup> This is significant because the liability provisions of Chapter 21E, which are set forth under Section 5 of the statute, are triggered by the “owner” or “operator” status.

A city or town is not considered an “owner” or “operator” under the statute with respect to releases or threats of releases of hazardous materials that first begin to occur before the city or town is in possession of the MBTA property. Therefore, if a release or threat of release of hazardous material is unrelated to the city’s use of the property and occurred before the city took possession, it does not appear that the city would be liable as an “owner” or “operator” under Chapter 21E.

However, because the timing of a release or threat of release is a factual determination, the city could be involved in defending its position even if it is ultimately determined that the release of hazardous material is unrelated to the city’s use of the property and occurred at a time when the city was not in possession.

**2. *Engineering Scope*** (narrative provided by John Daghlian, Assistant City Engineer)

NSTAR filed for a grant of location in Committee for work to upgrade their underground distribution line and questions as to how such work may impact the City’s interest in conversion of this ROW to a rail trail were raised.

*Response:* NSTAR is planning to install conduit from Easy Street (a private way) to their substation across the ROW in question. The installation will be insitu technique known as “jacking” where two pits will be dug on either side of the ROW, a driving pit and a receiving pit, and a hole bored through the ground and a conduit sleeve fit through the small tunnel. This process minimizes the disturbance of the site, reducing the potential settlement when compared to an open trenching technique.

This process takes about two weeks of preparation and actual construction time to cross the ROW in question. The engineering office will also recommend that a larger sleeve than currently needed be emplaced in the event that in the future additional conduit is desired to go underground across this ROW, thereby precluding further disturbance. While there is no indication or measure of contamination currently on the ROW, the likelihood of exposure is reduced by the construction techniques employed by NSTAR.

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<sup>1</sup> Chapter 21E sets forth the conditions that a municipality must adhere to in order to maintain its exemption from the status of “owner” or “operator.” Among them are the following: a municipality cannot cause or contribute to the hazardous release or threat of release; a municipality must take reasonable steps to prevent the exposure of persons to hazardous materials; must notify the Department of Environmental Protection of releases or threats of releases; and must take the appropriate action to protect the health and safety of the public if there is an imminent hazard.

The Engineering Division is working with both NSTAR and the MBTA realty office to coordinate the timing of this portion of the project and there is a good possibility that this section can be accomplished on the front end of the project, possibly completing the ROW work before the City is ready to sign a long term lease agreement. This construction work by NSTAR could be completed in the spring of 2013.

With these responses, I hope that answers the concerns raised about this additional work proposed by NSTAR. They are valid questions as certainly over the next 99 years, we are assured that similar situations will arise, and the legal and engineering research done to date will assist with the expectations pertaining to those specific excavation projects on the ROW. I am happy to address any further questions you may have pertaining to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert R. Rooney". The signature is fluid and cursive, with a large initial "R" and "R".

Robert R. Rooney  
Chief Operating Officer

Cc: Donnalyn Kahn, City Solicitor  
Dave Turocy, Commissioner of Public Works  
Lou Taverna, City Engineer