

**Bay Colony Rail Trail Lease
Summary of Changes to Standard MBTA Form of Lease
(1/30/17)**

§	Issue	Town's Changes (9/23/16)	MBTA Consultant's Response (1/5/17)	Town's Response (1/17/17)	MBTA's Consultant's Response (1/26/17)	Comments
2	Premises	The Town's edit divides the Bay Colony Rail Trail corridor into two sections: (1) Initial Leased Premises and (2) Optional Leased Premises.				To do: Verify that the reference to the corridor as the Dover Secondary Branch Right-of-Way is correct.
3	Testing	The Town's edit clarifies that the Town is only responsible for testing conducted by it during the Term of the Lease (not for other testing).				
4	Term	The Town's edit divides the Term into four periods of 25, 25, 25, and 24 years, with the extensions at the Town's option.				
4	Termination	The Town requests to be reimbursed for design and construction costs if MBTA terminates the Lease for "greater public good."	MBTA rejects the Town's request. MBTA will not be required to provide any reimbursement whatsoever for said termination.	The Town proposes to accept MBTA's language here (if MBTA terminates for "greater public good," MBTA will not be required to provide any reimbursement), provided that MBTA accepts the Town's change to § 12 (at termination or expiration, the Town will have no obligation to remove or reimburse the MBTA for costs of removal of any of the Town-installed improvements).	[See § 12 below.]	
5	Condition of Premises	The Town's edit specifies that the Town "does not assume any risk for damage or injury is caused by any person using or occupying all or any portion of the Premises pursuant to an existing easement, lease and/or license with the MBTA...."	MBTA rejects the Town's additional change that it does not assume the risk of "the gross negligence or willful misconduct of the MBTA or its agents, employees, or contractors acting within the scope of their agency, employment or contract."			

§	Issue	Town's Changes (9/23/16)	MBTA Consultant's Response (1/5/17)	Town's Response (1/17/17)	MBTA's Consultant's Response (1/26/17)	Comments
6.1	Indemnification and Release of MBTA	Since the Town will purchase environmental insurance, the Town requests that the entire Section 6.1(a) (except for a modified first sentence) be deleted. If not deleted, the Town asks for a number of changes to Section 6.1(a).	MBTA rejects the Town's proposed deletion or changes and restores Section 6.1, with the exception of 4(c), to its original form.			To do: Purchase environmental insurance to help mitigate this risk.
6.1	Exception to Indemnity and Release	The Town's edit excludes "Third party Transferees under § 6.1(d); third party lessees, licensees or easement holders under § 9.1; or third parties holding utility and/or communication rights (and their contractors, licensee, lessees, or grantees) under § 9.2" from the definition of "MBTA" as to the parties being indemnified.				
6.2	Remediation Obligation	The Town's edit specifies that the Town's remediation obligation is subject to and without waiver of its "defenses to liability under Chapter 21E including, without limitation, the rail-trail exception (clause (1) of subparagraph (d) of Chapter 21E section 2) and the eligible tenant exception (clause (1) of subparagraph (e) of Chapter 21E section 2) to the definition of owner or operator, the defenses to liability afforded by Section 5 of Chapter 21E, and the environmental insurance protections afforded by G.L. c. 23A, § 3I."	MBTA rejects the Town's additional change that the Town "may utilize an Activity and Use Limitation (AUL) to provide the basis for a Permanent Solution or Temporary Solution Statement under Chapter 21E and the MCP"	Town reinserts AUL language because an AUL is a common and well-recognized solution under Chapter 21E and the MCP.	This will need the MBTA Environmental Department's review and approval	Open Issue.
6.2	Remediation Obligation	The Town's edit attempts to rein in MBTA's costs of engaging consultants to review and supervise Town's work by adding conditions to the presumption of when the costs are reasonable.				
6.2	Remediation Obligation	The Town's edit adds the same exclusion as in § 6.1 above (re "Third party Transferees under § 6.1(d); third party lessees, licensees or easement holders under § 9.1; or third parties holding utility and/or communication rights (and their contractors, licensee,				

§	Issue	Town's Changes (9/23/16)	MBTA Consultant's Response (1/5/17)	Town's Response (1/17/17)	MBTA's Consultant's Response (1/26/17)	Comments
		lessees, or grantees) under § 9.2”).				
6.3	Insurance	The Town's edit distinguishes between the Town's insurance (through MIIA) and the Town's consultants/contractors' insurance (through companies that are reasonably acceptable to the MBTA).				
6.3	Insurance	The Town's edit deletes the Town's obligation to insure over the indemnity obligation in §§ 6.1(a)(1) and 6.1(a)(3).				
6.3	Insurance	The Town's edit limits MBTA's right to charge 18% interest on the expense of procuring replacement insurance to “any undisputed amount remaining unpaid by the MUNICIPALITY after thirty (30) days from notice by the MBTA.”				
6.5	Special Conditions		MBTA reserves its right to add special conditions after further review.			To do: Get MBTA's list of special conditions, if any.
9.1(a)	List of Existing Users					To do: Get the list of any leases or licenses along the Corridor.
9.1(b)	Reserved Rights	With respect to MBTA's reservation of rights, the Town's edit adds that “MBTA agrees to minimize any potential impact to the MUNICIPALITY-maintained Corridor including consultation with the MUNICIPALITY on public safety, rail trail use and operations, and proposed mitigation measure considerations.”	MBTA rejects the Town's additional proposed change that the Town “shall bear no responsibility for such easement, right of way or permitted crossing or for the acts or omissions of the owner or holder thereof or of the general public on such easement, right of way or permitted crossing.”			
9.1(b)	Existing Rights	The Town's edit specifies that, if an existing lease or license would prevent the creation of a contiguous Corridor, which problem the MBTA does not help cure, the Town can “terminate this Lease as to all or any portion of the Premises relating to the fact that the construction of a continuous Corridor cannot reasonably be achieved.”				

§	Issue	Town's Changes (9/23/16)	MBTA Consultant's Response (1/5/17)	Town's Response (1/17/17)	MBTA's Consultant's Response (1/26/17)	Comments
9.1(c)	Fees and Charges	The Town proposes some changes to the section on fees and charges charged by the Town to a lessee, licensee or grantee of the MBTA or any other party.	MBTA accepts some and reject other changes proposed by the Town to the section on fees and charges charged by the Town to lessee, licensee or grantee of the MBTA or any other party.			
9.1(e)	Abandoned RR Easement	The Town proposes a provision addressing issues concerning an abandoned railroad branch line easement discussed in the new SJC case <u>Murray v. Dep't of Conservation & Recreation</u> , 475 Mass. 99 (2016).	MBTA rejects the Town's provision. In particular, MBTA will not do a confirmatory taking. MBTA suggests that the Town do a title rundown.	Since a title search will not necessarily identify whether the MBTA or its predecessor has abandoned the RR corridor, the Town proposes modified language to address potential abandonment issues while removing the reference to a confirmatory taking in the Town's prior edit.	This revision would need to be approved by the MBTA's Real Estate Counsel.	Open Issue. Note: To help prove the negative (i.e. no abandonment), consider (1) FOIA request and/or (2) focused title rundown.
9.2	MBTA Contractor Insurance	The Town's edit adds parallel insurance obligations on MBTA's contractors, etc., to those required of the Town under Section 6.3.				
11	Default	The Town proposes to delete the phrase "the failure to fully indemnify the MBTA and its related parties as provided in Section 6.1" from the list of potential defaults under the Lease.	MBTA rejects the Town's proposed deletion.	The Town proposes to delete the word "fully" from the MBTA's clause.	OK.	To do: Purchase environmental insurance to help mitigate this risk.
11	Default	The Town's edit adds a right to cure a default: "No such default will be deemed to exist if the MUNICIPALITY has commenced to cure such default within such thirty (30) day period and such efforts are prosecuted to completion with reasonable diligence."	MBTA rejects the Town's additional edit that, "Delay in curing a default will be excused if due to causes beyond the reasonable control of the MUNICIPALITY."			
12	Premises at Termination	The Town proposes language that the Town "shall have no obligation to remove or reimburse the MBTA for costs of removal of any of the MUNICIPALITY-installed improvements; and such improvements shall not be considered a change to the grade existing at the commencement of this Lease."	MBTA rejects the Town's proposal. MBTA reverts to its requirement that "if the MBTA is terminating this Lease because it plans to use the Premises for transportation purposes, the MBTA may require the MUNICIPALITY to restore the Premises to the grade existing at the	In return for accepting the MBTA's language in Section 4 above, the Town proposes that: "On the expiration or termination of the Lease, the MUNICIPALITY shall have no obligation to remove or reimburse the MBTA for costs of removal of any of the MUNICIPALITY-installed	"Currently, I do not see the MBTA agreeing to this language."	Open Issue?

§	Issue	Town's Changes (9/23/16)	MBTA Consultant's Response (1/5/17)	Town's Response (1/17/17)	MBTA's Consultant's Response (1/26/17)	Comments
			commencement of this Lease.”	improvements.”		
13	Administrative Fee	The Town's edit reduces from 25% to 15% MBTA's fee for "administrative costs" tacked onto MBTA's cost of performing repairs for utilities damaged by the Town.				
13	Rail Removal	<p>The Town's edits clarify the rail removal requirements:</p> <ul style="list-style-type: none"> • If the MBTA chooses to remove the rail, the removal shall occur on or before the date on which the MBTA provides approval of the 90% Plan submission so that the Town can address removal of the rail infrastructure on the 100% Plan and in its construction bid package, if necessary. • If the MBTA chooses not to remove the rail within that time, the Town shall be entitled to remove the rail and use any revenue therefrom toward the rail trail. • The Town shall be responsible for removal and disposal of all other rail infrastructure. • The MBTA shall execute any necessary bills of lading, manifests, or other forms required from the landowner reasonably necessary for such disposal. 				
15	Results	The Town's edit creates an exception to giving advance notice to MBTA for reporting a release which requires notification to DEP within two hours under the MCP.				
16	Plan Approval	The Town proposes that MBTA's plan approval "shall not be unreasonably withheld, conditioned or delayed."	MBTA accepts the Town's edit that MBTA's plan approval "shall not be unreasonably withheld or delayed," but rejects the Town's edit that such approval "shall not be unreasonably conditioned."			

§	Issue	Town's Changes (9/23/16)	MBTA Consultant's Response (1/5/17)	Town's Response (1/17/17)	MBTA's Consultant's Response (1/26/17)	Comments
22	Limitation of Liability	The Town's edits incorporate limitations on liability under G.L. c. 258 (the "Tort Claims Act"), G.L. c. 21, § 17C (the "Recreational Use Statute"), and as to personal liability.				
23	Authority and Approvals	The Town's edits add Exhibits for the Town votes (ATM and BOS), the MBTA Board vote, and the Disclosure of Beneficial Interests.	MBTA needs to check on whether a Board vote is required.			To do: Check whether prior MBTA Board vote is sufficient or whether a new Board vote is required.
	Due Diligence, Design and Funding Contingency			The Town expects that private donations will fund all aspects of this Project (due diligence, design, permitting, construction, O&M, etc.). The Town cannot sign an unconditional Lease to undertake the Project until the funding is "in the bank." The construction costs will not be known with reasonable certainty until the design is completed and the Project is put out to bid. The Town proposes a practical solution to this "chicken and egg" problem under which the Town (with initial funding from the Friends) can develop the design documents (with MBTA's approval), obtain the necessary permits, and put the Project out to bid to obtain firm pricing after which the Friends group would be pledged to raise to construction costs (with a suitable contingency for cost overruns). This arrangement could take the form of an access agreement, option, license, or other mutually acceptable arrangement (such as opt-out contingencies in the Lease) to protect the parties during this design and permitting due diligence period. After the bids are in the Friends would have a	To address the "chicken-and-egg" problem, the MBTA could do an access license or an MOU. The MBTA access license is a standard form that would allow access to the site for non-construction activities. The license would only be valid until the selection of a contractor pursuant to the bid process. Once a contractor is selected, the Town would have to execute the Lease prior to the commencement of any construction activities.	Note: If environmental testing will be required for the design of the rail trail, will the MBTA's form of License accommodate this, and will the Friends' contributions cover any resulting environmental costs?

§	Issue	Town's Changes (9/23/16)	MBTA Consultant's Response (1/5/17)	Town's Response (1/17/17)	MBTA's Consultant's Response (1/26/17)	Comments
				reasonable period of time to raise the actual construction funds (and related funding). If the funds are not forthcoming, the Town would have the right to opt out of the Project.		
	Timing				<p>Typically, a Lease is not submitted to the MBTA until it is ready for execution.</p> <p>If the parties need the MBTA real estate counsel's review as to form only, it may be possible to submit a redlined document comparing the final proposed version to the MBTA's standard "approved form" of rail trail Lease.</p> <p>MBTA reserves the right to reject any or all proposed changes to its standard form.</p>	<p>Note: To put a draft Lease before Town Meeting in May, a final redlined version of the draft Lease should be submitted as soon as possible.</p>