ANDERSON
KREIGER

MEMORANDUM

TO: Dover Board of Selectmen
David Ramsay, Town Administrator

FROM: Stephen D. Anderson
Anderson & Kreiger, LLP

DATE: April 21, 2016

RE: Bay Colony Rail Trail – First Supplement to Memorandum entitled "Summary of Lease Terms and Environmental Issues," dated September 17, 2012

You requested that Town Counsel's office evaluate the contention, attributed to an attorney who is reportedly a citizen-advocate for the Bay Colony Rail Trail ("BCRT"), that the purchase of environmental insurance with a five-year term provides "absolute protection" to the Town of Dover were the Town to enter into the Massachusetts Bay Transportation Authority's standard form of Lease Agreement for the BCRT, and that any environmental liability would "revert back to the MBTA" at the end of the five year policy term.

Significant protections against environmental liability are afforded to the Town by exception 2(d)(1) to the definition of "owner or operator" in G.L. Chapter 21E, § 2, by the environmental insurance protections afforded by G.L. c. 23A, § 3I, and by compliance with DEP's Best Management Practices for Controlling Exposure to Soil during the Development of Rail Trails; ("BMPs").[1] The Town may well conclude that the benefits to the Town from the development of the BCRT outweigh any lingering risks of environmental liability associated with leasing and improving the trail. However, it is an oversimplification to state that the available protection is "absolute" and that any environmental liability would necessarily "revert back to the MBTA" at the end of the five year policy term.

Rail Trail Amendments to Chapter 21E

Under Section 5(a)(1) of Chapter 21E, with certain exceptions, the "owner or operator of a … site from or at which there is or has been a release or threat of release of oil or hazardous material" shall be strictly, jointly and severally liable, without regard to fault, for a variety of

[1] The BMPs were issued by DEP during Governor Romney's administration, to implement the rail trail amendments to Chapter 21E (discussed below) contained in The "Act Providing Relief and Flexibility to Municipal Officials," Chapter 46 of the Acts of 2003, §§ 8-8E. The BMPs were developed "specifically for situations where a municipality has acquired a property interest in a rail corridor from the Massachusetts Bay Transportation Authority (MBTA) in order to convert the corridor to a rail trail" and they summarize "Best Management Practices ('BMPs') that should be considered before, during, and after former railroad lines are converted to recreation trails." While not formally promulgated as regulations, and while subject to potential change over time, the BMPs provide important guidance with which the Town must comply throughout the term of any Lease Agreement for the BCRT.

specified costs and damages.[2] However, exception 2(d)(1) cited above provides that the Town "shall not be deemed an owner or operator" of such a contaminated site if the Town has acquired an interest in the site by lease from the MBTA for purposes of installation, operation, maintenance and use of a rail-trail[3] provided that the Town complies with a set of listed requirements. In such a case, under clause (10) of the definition of "owner or operator," when the Town is relieved of liability under the exception, the "owner or operator" is deemed to be "any person who owned or operated the site … immediately before the [MBTA] … obtaining ownership or possession of the site …."[4]

Our firm's Memorandum of September 17, 2012, summarizes (at page 3) the statutory requirements with which the Town must comply to gain the benefits of the exception from liability. Several of the requirements are objective and proving compliance should be relatively straightforward.[5] Other requirements are more subjective, may be more difficult to prove, and/or

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[2] This environmental liability includes liability (i) to the commonwealth for all costs of assessment, containment and removal relative to such release or threat of release, (ii) to the commonwealth for all damages for injury to and for destruction or loss of natural resources, including the costs of assessing and evaluating such injury, destruction or loss, incurred or suffered as a result of such release or threat of release, (iii) to any person for damage to his real or personal property incurred or suffered as a result of such release or threat of release, and (iv) to any person for any liability that another person is relieved of pursuant to the fourth paragraph of section four (i.e. person who without charge renders assistance at the request of a duly authorized representative of the department in removing oil or hazardous material).

[3] A rail trail is defined in the exception as a property converted from 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.

[4] The federal superfund statute, CERCLA, also governs the potential liability of owners and operators (and others) for a release or threat of release of hazardous substances at or from a facility. CERCLA and Chapter 21E are similar but by not means identical. While a discussion of federal environmental statutes and regulations is beyond the scope of this memorandum, one way to establish a defense to potential environmental liability under CERCLA is to undertake "all appropriate inquiries" under 42 USC §9601(35), prior to acquiring a leasehold interest in real property that may be contaminated. See EPA's "Brownfields All Appropriate Inquiries" website. It may be in the Town's interest to engage an LSP to determine whether inquiries performed by the Town to date satisfy the "all appropriate inquiries" standard and, if not, to perform such inquiries prior to the Town executing the Lease Agreement. However, the MBTA's prohibition of any testing prior to executing the Lease Agreement (discussed below) may be a potential impediment to completing "all appropriate inquiries" if testing is in fact required to do so. That said, residual contamination typically associated with a rail trail corridor ordinarily does not warrant the enforcement attention of the United States Environmental Protection Agency, and there are instances where rail trails have even been specifically developed as a post-closure use on certain federal superfund sites under the auspices of USEPA. *See, e.g.*, Troy Mills Landfill Superfund. Upon request by the Town, we will review and review in more depth on federal environmental requirements as they may apply to the BCRT.

[5] Demonstrating that (A) the Town has notified DEP "immediately upon obtaining knowledge of a release or threat of release for which notification is required pursuant to, and in compliance with, section seven or regulations promulgated pursuant thereto;" (B) the Town has provided "reasonable access to the site … to employees, agents, and contractors of the department to conduct response actions, and to other persons intending to conduct necessary response actions;" and (E) if the Town elected "to voluntarily undertake a response action or portion of a response action at a site or vessel, … conduct[ing] such response action in compliance with the requirements of this chapter and the Massachusetts contingency plan."

may cost time and money either to comply, to demonstrate compliance, or both. The more subjective criteria are:

- Demonstrating that "[n]o act of the … town, or of its employees or agents, causes or contributes to the release or threat of release or causes the release or threat of release to become worse than it otherwise would have been" (¶ 2).

    - Comment: While the Town will in all likelihood comply with this provision, allegations may be made that, during construction, the Town or its contractor exacerbated a release by unnecessarily moving residually-contaminated soils around the site.

- Demonstrating that the town has undertaken "reasonable steps to (i) prevent the exposure of persons to oil or hazardous materials by fencing, paving, installing geo-textile membrane, or otherwise suitably preventing access to the site or vessel or to the oil or hazardous materials present at the site (ii) contain the further release or threat of release of oil or hazardous materials from a structure or container" (¶ 3(C)).

    - Comment: While the Town will in all likelihood comply with this provision, allegations may be made that the Town should have used paving instead of a geo-textile membrane or should have used a membrane instead of a different method to prevent exposure to residual oil or hazardous materials present at the site. (Put another way, if there are alternatives from which to choose, whichever one is chosen may be second-guessed.)

- Demonstrating that, "if there is significant evidence of an imminent hazard to public health, safety, welfare, or the environment from oil or hazardous materials at or from the site …, the … town [has] take[n] action to control the potential for health damage, human exposure, safety hazards, and environmental harm through appropriate short term measures) (¶ 3(D)).

    - Comment: While the Town will in all likelihood comply with this provision if an imminent hazard exists (which is unlikely), allegations may be made that the Town did not implement sufficient short term measures in such a situation.

- Demonstrating that the town has acted "diligently to develop the rail-trail for its intended purpose" which "shall be determined by considering all pertinent circumstances of municipal financing, bidding, and construction of the rail-trail project, and of the availability of and rules governing the applicable state or federal funding program therefor, in light of the discovery of the release or threat of release of oil or hazardous materials at issue." (¶ 3(F)).

    - Comment: While the Town will in all likelihood comply with this provision, allegations may be made that the Town did not act diligently "considering all pertinent circumstances."

In short, it is entirely feasible for the Town to comply with these requirements; however, achieving, ensuring, documenting and demonstrating compliance will require both diligence by the Town and the assistance of an LSP, as well as potentially some assessment, containment, removal, or compliance costs, depending on actual test results or site conditions, as the project moves forward.[6] See also note 10 below.

Environmental Insurance

In addition to statutory liability and exclusions from liability under Chapter 21E, it is important to keep in mind that environmental liability can be reallocated from one party to another by contract, or in this case by a lease. Traditionally, the MBTA has drafted standard lease provisions in an effort to shift potential environmental liability from the MBTA as lessor to the municipality as lessee under its standard form of rail trail lease.

In response, the legislature adopted G.L. c. 23A, § 3I, which establishes matching grants to assist municipalities to purchase environmental insurance (with a BRAC subsidy). If a municipality purchases a qualifying policy, the municipality shall not be required to furnish to MBTA, EOT, 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 rail trail project site."

In response to G.L. c. 23A, § 3I, the MBTA's standard form of rail trail Lease Agreement now provides in Section 6.1 that the "Municipality will not be required to indemnify the MBTA, unless specifically required by Federal law[7] in connection with any grant for construction of a rail trail, provided the Municipality has purchased environmental insurance naming the MBTA as an additional insured with minimum coverage limits of $3,000,000.00 per incident, a maximum deduction of $50,000.00 per incident, and a term of at least 5 years."[8] However, if the "Municipality is unable to or chooses not to purchase environmental insurance consistent with the aforementioned terms," then extensive defense, indemnification and release provisions listed in Section 6.1 apply which "shall survive the termination or expiration of this Lease." Without limitation, the indemnity applies to "the discovery of pre-existing Hazardous Materials, defined below, or the release of any Hazardous Materials on the Premises (or other property of the MBTA adjacent to the Premises) which is the result of (i) the MUNICIPALITY's activities

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[6] Of course, even if the Town meets all of these requirements, the exclusion from statutory liability extends only "to releases and threats of release that first begin to occur before the … town acquires ownership or possession." The Town would still be "deemed an owner or operator with respect to any release or threat of release that first begins to occur at or from the site … during the time that the … town has ownership or possession of it for any purpose."

[7] In the absence of federal funding for the BCRT project, this exception is likely to be inapplicable.

[8] Statutory section 3I and Lease section 6.1 are best read as providing relief from indemnity obligations throughout the Lease term even though the insurance policy term is only five years. However, in the absence of a binding judicial interpretation to that effect, there is of course a risk that MBTA or a third party may in the future advance a different reading.

hereunder including the activities of those present from time to time on the Premises, or (ii) the migration from land now or previously owned, leased, occupied or operated by the MUNICIPALITY or for which the MUNICIPALITY is a potentially responsible party as defined under Chapter 21E, defined below." Since the purchase of a qualifying environmental insurance policy under G.L. c. 23A, § 3I, would relieve the Town of this indemnity obligation, the Town would be well-advised to purchase such a policy.[9]

As a separate provision, Section 6.2 of the Lease Agreement governs the "Remediation Obligation of the MUNICIPALITY." Among other matters, the Town's "Remediation Obligation" under Section 6.2 includes the following:

- The obligation during the design, construction and operation of the rail trail to "follow the provisions of BMP's for controlling Exposure to Soil during the Development of Rail Trails promulgated by the Massachusetts Department of Environmental protection in March 2004;"[10]

- The obligation "[w]henever the MUNICIPALITY is responsible for the remediation of Hazardous Materials on or below the Premises by law or pursuant to this Lease" and "upon written demand of the MBTA" to "conduct at its sole cost and expense (or, at the MBTA's election, reimburse the MBTA for the cost and expense incurred by the MBTA in connection with the MBTA's conduct of), all response actions required by Chapter

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[9] AIG Environmental recently announced a decision to no longer write standalone pollution legal liability (PLL) policies in the USA. See, e.g. http://www.environmentalriskmanagers.com/must-read-for-all-agents-aig-will-no-longer-be-offering-monoline-site-pollution-coverage. The decision may affect the availability and cost of a qualifying environmental insurance policy for the BCRT.

[10] To avail itself of the defense to liability under the rail-trail amendments to Chapter 21E and to comply with this provision of the Lease Agreement, the Town will need to comply with the BMPs before, during and after the development of the BCRT. In this context, Section 3 of the MBTA's form of Lease Agreement provides that, "No testing shall be made of the soil by the Municipality on the Premises … until this lease has been fully executed and entered into by an official Municipal authority … and the MBTA" and that, after the Lease is fully executed, the "Municipality shall be responsible for all costs associated with any such testing."

Based on Beals & Thomas ("B&T") reading of the BMPs, and using protocols developed by CSX Transportation, B&T in its draft Feasibility Study for the Dover Recreational Path dated December 17, 2015 (at pages 31-33) "recommend a limited testing program that samples the soil at various intervals in the corridor and at former switch locations" consisting of 33 composite soil samples … collected along the corridor approximately every 575 feet." An "additional sample should be collected from the area adjacent to the former station and the building adjacent to the rail line as depicted on the valuation maps. Finally, three composite samples should be collected from each of the two switches near Springdale Street." Because "[v] isual inspection of the site did not identify obvious signs of contamination," there is a question whether testing every 575'± is required under a strict reading of the BMPs. However, B&T has recommended this testing "to better understand the potential for contaminants to exist within the railbed," to "identify potential areas of contamination that exceed residual levels and require more extensive environmental remediation before path development," and to [r] ule out areas with no contamination or residual contamination levels in order to tailor the application of BMPs to site-specific conditions." As such, the Town would be well-advised to comply with this recommendation. Under the Lease Agreement and the BMPs, it will be the responsibility of the Town to bear the cost of any such testing and any associated response action required under the BMPs resulting from the testing. Such costs may be excluded by, or may fall within the deductible of, the environmental insurance policy.

21E and the MCP with respect to the Hazardous Materials (including the hiring of a Licensed Site Professional);"

- The obligation to perform any such response action "in accordance with Chapter 21E, the MCP, any other applicable statutes and regulations,[11] and in accordance with plans and specifications approved by the MBTA, … in a timely manner to the reasonable satisfaction of the MBTA …;" and

- The obligation to pay for "the reasonable costs incurred by the MBTA in hiring consultants to review, supervise and inspect any plans, specifications, proposed method of work, installation, operation and results" which "shall be presumed to be reasonable if the MBTA (1) provides the MUNICIPALITY with a notice that it intends to hire a consultant, a scope of work and a budget and (2) solicits three (3) price proposals from three (3) eligible consultants."

MBTA will presumably take the position that this Remediation Obligation in Section 6.2 is not subject to the exclusion in Section 6.1 even if the Town purchases of environmental insurance. The Town will certainly need to comply with the BMPs and with the requirements to qualify for the exception to the definition of owner/operator discussed above. Beyond that, it is an open legal question whether G.L. c. 23A, § 3I, and the purchase of environmental insurance would relieve the Town from other provision of Section 6.2 on the basis that Section 6.2 is a de facto indemnity provision that is trumped by the statute. If this argument is not successful, Section 6.2 would impose potential costs and obligations on the Town by contract that are not excluded by statute.

Finally, Chapter 21E and its exception to liability do not extend to bodily injuries allegedly resulting from contamination at or from the leased premises. While the Town may be afforded significant protections by Recreational Use Statute, G.L. c. 21, § 17C, the Tort Claims Act, G.L. c. 258, and the environmental insurance policy, the statutes' protections are qualified, not absolute, and the insurance policy will contain exclusions, will be written on a claims made basis, and will expire after five years.

Conclusion

The BCRT promises to bring a number of benefits to the Town of Dover; and the Town may consider that those benefits far outweigh the associated risks. Nothing in this memorandum argues a contrary position. However, for the Town to proceed with informed consent, it is

[11] This reference is a reminder that environmental laws and regulations can, and often do, change significantly over time, and that stricter environmental standards protections promulgated in the future may alter the risk/cost calculus. (A recent example of changing environmental regulations and requirements would be the legal evolution culminating in the 2016 Massachusetts Small MS4 General Permit which was signed April 4, 2016, was published in the Federal Register on April 13, 2016, and will become effective July 1, 2017.) The reference in the Lease to "Chapter 21E, the MCP, any other applicable statutes and regulations" may include the obligation for a response action to comply not only with current federal and state environmental statutes and regulations but also with applicable after-enacted environmental laws (i.e. those enacted after the date of the Lease Agreement) which are in effect at the time of the response action in question.

important not to overstate the available protections as "absolute." The protections are significant and the environmental risks are likely to be quite manageable, but the risks should not be trivialized as non-existent.

If the Town determines to pursue the BCRT and the Town is concerned about potential environmental liability, the Town should at a minimum:

1. Attempt, if possible, to negotiate more favorable Lease terms with MBTA to further protect the Town's interests;

2. Purchase environmental insurance in compliance with the G.L. c. 23A, § 3I; and

3. Engage a License Site Professional to ensure and document compliance with the Rail Trail Amendments to Chapter 21E and the BMPs leading up to, during and post-construction and as necessary throughout the term of the Lease.[12]

[12] See also note 4 above regarding the possibility of performing "all appropriate inquiries" within the meaning of CERCLA, 42 USC §96101(35), prior to signing the Lease Agreement.