

April 27, 2022

Hon. Jennifer S. Roberts and
Members of the Select Board
Flynn Building
278 Old Sudbury Road
Sudbury, MA 01776

Re: Bruce Freeman Rail Trail Project

Dear Members of the Select Board:

You have asked for a legal opinion in response to various questions and concerns raised by residents of the Town regarding the Bruce Freeman Rail Trail (“BFRT”) project, which I will summarize and offer the following responses.

1. Has the railroad right-of-way been abandoned? The answer to this question is relevant because where a railroad right-of-way (“R-O-W”) has been legally abandoned, it may result in sections of the R-O-W that were subject to easements, rather than a fee ownership interest, reverting back to the underlying landowners. In other words, if a railroad has only an easement to operate over property, the easement could terminate if the R-O-W is abandoned. That scenario could compromise the ability to construct and operate a rail trail on the R-O-W.

I have attached the legal opinion of Attorney Louis E. Gitomer, an expert in matters of railroad and transportation law. I requested his analysis of this question because of his experience and knowledge of the subject matter. Having researched the relevant filings, Attorney Gitomer located no records indicating that the R-O-W where the BFRT is proposed to be constructed in Sudbury has been either authorized for abandonment or, in fact, legally abandoned. In addition, MassDOT has informed me that their staff also did not locate any records indicating that the R-O-W has either been authorized for abandonment or legally abandoned.

In my opinion, because the R-O-W has not been abandoned, any sections of the R-O-W that are held as easements rather than a fee ownership interest by the Massachusetts Department of Transportation (“MassDOT”) remain so held and such easements have not been terminated. Therefore, in my further opinion, MassDOT has sufficient legal rights to enter into a lease of the R-O-W with the Town and to enable the BFRT to be constructed and used by the general public.

I add for clarification that the section of the BFRT proposed to be leased from MassDOT differs factually from the southerly section of the proposed BFRT that the Town purchased on November 30, 2020, from CSX Transportation, Inc. (“CSX”). With the CSX corridor, CSX previously filed a Notice of Interim Trail Use or Abandonment with the Surface Transportation

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Board (“STB”). Once the Purchase and Sale Agreement and acquisition of the property were consummated, the Town agreed to assume responsibility for the corridor, subject to rights of reactivation of rail service. This effectively “rail banked” the former CSX section of the corridor pursuant to STB regulations and permits the development of a rail trail on that section.

The northerly section of the BFRT in Sudbury, roughly between near Route 20 and the Concord town line, is proposed to be leased by the Town from MassDOT and thereafter constructed as a continuation of the BFRT and then maintained by the Town. As stated in Attorney Gitomer’s opinion, because there has been no filing of an intent to abandon the R-O-W for the northerly section in Sudbury, the “rail banking” process sometimes referred to as Notice of Interim Trail Use or “NITU” does not apply. He further opined that under these circumstances, there is no prohibition against using the R-O-W for trail purposes.

2. Will there be an eminent domain “taking” of property in connection with the northerly section of the BFRT in Sudbury? Article 19 of the 2022 Annual Town Meeting seeks authorization to allow the Select Board to “acquire by gift, purchase, eminent domain or otherwise, fee, leasehold, easement, license or other interests in real property” needed for construction of the rail trail. KP Law, P.C. typically recommends including authorization for the Town’s acquisition of property rights by eminent domain in warrant articles because, if approved by Town Meeting, it provides broader authority to the Select Board, if it subsequently votes to so act, to acquire the necessary rights to the subject property if other means are not available or if a taking is preferred.

The primary rights needed by the Town for the BFRT will be granted by a negotiated lease for a 99-year term for nominal consideration of \$10.00 from MassDOT to the Town. There is no need for an eminent domain taking in order to enter into the lease as the form of the lease has already been largely agreed upon as to form by MassDOT and the Select Board.

In connection with the construction of the BFRT, seven temporary easements are expected to be needed. In the event that consent for the temporary construction easements is not able to be obtained from the landowners, the Town may desire to acquire the rights needed to build the trail by taking the easements by eminent domain. If this were to occur, the landowners would be financially compensated for their “damages” in a sum supported by appraisals obtained by the Town indicating the value of the damages resulting from the taking. If a landowner does not agree with the amount of damages offered to them for the taking, they have the statutory right to challenge the amount of damages offered.

While the motion on Article 19 has not yet been finalized, it can exclude the request for authorization to acquire interests in real property by eminent domain, however, that could result in some risk to the project in the event that the temporary construction easements cannot be acquired by mutual agreement of the landowners and the Select Board.

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With respect to any potential takings of interests in land within the R-O-W by MassDOT, its staff have informed the Town that in its opinion, MassDOT presently has sufficient rights to construct and permit the operation of the rail trail by the general public by virtue of its deed from Penn Central Corporation ("Penn Central") recorded in 1982. In their further opinion, such rights have been confirmed by virtue of an Order of Taking recorded in 2014 by MassDOT.

In my opinion, the Order of Taking has the effect of MassDOT (1) acquiring whatever right, title and interest Penn Central had to the subject property as of the 1982 deed to the Commonwealth, (2) acquiring whatever right, title and interest that may continue to be held by predecessors and successors to Penn Central as of the 1982 deed, and (3) acquiring the fee title (ownership) interest in the R-O-W in any portions of the R-O-W that Penn Central may have not held as of the date of the 1982 deed to the Commonwealth.

I note again that the MassDOT Order of Taking was recorded and became effective as of August 20, 2014. There is no change in ownership of any real property contemplated by the Town in connection with the 2022 Annual Town Meeting warrant articles, or by MassDOT. No additional takings of property by eminent domain have been proposed in our discussions on this project with MassDOT.

In my further opinion, any challenges to the MassDOT Order of Taking would be properly made against MassDOT rather than the Town as the Town would be a leaseholder of the R-O-W for rail trail purposes and not the owner of the R-O-W.

Very Truly Yours,



Lee S. Smith, Esq.

LSS/dmm

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April 8, 2022

Lee S. Smith, Esq.
KP | LAW
101 Arch Street, 12th Floor
Boston, MA 02110

Re: Sudbury, MA Railroad Right-of-way

Dear Lee:

You have asked whether the railroad line identified in the USRA Line No. 13, a portion of the Lowell Secondary Track between South Sudbury, milepost 4.0, and Lowell, MA, milepost 26.5, a distance of 22.5 miles in Middlesex County, MA (the “Line”) (United States Railway Association Final System Plan, Volume II, page 141 of 1975 (the “FSP”)) has been abandoned.

A railroad line may only be abandoned with the advance approval of the Interstate Commerce Commission (the “ICC”), prior to January 1, 1996 (pursuant to 49 U.S.C. 1(18) prior to October 17, 1978 and 49 U.S.C. 10903 on and after October 17, 1978), or the Surface Transportation Board (the “STB”), after December 31, 1995 (pursuant to 49 U.S.C. 10903). We have not found evidence that any of the actual or potential owners of the Line received authority from either the ICC or the STB to abandon the Line.

In preparing this opinion, we have reviewed: (1) the following laws: (a) the Regional Rail Reorganization Act of 1973, (b) the Railroad Revitalization and Regulatory Reform Act of 1976, and (c) the Staggers Rail Act of 1980; (2) the following reports: (a) the Preliminary System Plan of 1975, (b) the FSP, and (c) the FSP Supplemental Report of 1975; and readily available decisions of the ICC and the STB of abandonments filed by the: (a) Penn Central Transportation Company (“PC”), (b) Consolidated Rail Corporation (“CR”), and (c) CSX Transportation, Inc. (“CSXT”) through November 29, 1982; and (4) the Deed dated as of November 29, 1982 from the Penn Central Corporation to the Commonwealth of Massachusetts, transferring two segments of the Lowell Secondary Track rail corridor between MP 4.65 at South Sudbury and MP 11.50 at West Concord and MP 16.80 at Acton and MP 24.50 at Chelmsford.

Our review of the abandonment filings by PC were with docket number AB-5 and sub-numbers thereto. Our review of the abandonment filings by CR were with docket number AB-167 and sub-numbers thereto. Our review of the abandonment filings by CSXT were with docket

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number AB-55 and sub-numbers thereto. Our search encompassed the period between 1973 and 1982 and involved hundreds of ICC dockets.

We found no records indicating that the Line has been authorized for abandonment by the ICC or the STB. Since the Line has not been abandoned, it remains subject to the jurisdiction of the STB as a railroad line and “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under federal or State law.” 49 USC 10501(b)(2).

Our search did not reveal an abandonment pending for the Line. There is no need to seek a Notice of Interim Trail Use under 49 CFR 1152.29(a) because an abandonment is not pending before the STB. There is no prohibition against using the Line for a trail.

Sincerely yours,

/s/ *Louis E. Gitomer*