



The Commonwealth of Massachusetts
Office of the Inspector General

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April 29, 2009

David Ragucci
Town Administrator
Town of Stoneham
35 Central Street
Stoneham, MA 02180

Dear Mr. Ragucci:

The Office of the Inspector General is writing this letter regarding complaints the Office has received about the Town allegedly allowing private individuals to use Town-owned land for 25 years without following a fair and open process or with little or no compensation to Stoneham taxpayers.

This Office has determined that some of the complaints merit attention by the Town.

Although the Town has repeatedly addressed possible uses of the land in question, had leases in place for certain portions of the land in question between 1986 and 1996, and has notified encroachers that they are on public land, until recently the Town did not adequately address the encroachment issues.

This Office is primarily concerned with stopping this misuse of public land immediately and having the Town implement a process to prevent this sort of misuse from occurring again.

The Town has been responsive to this Office's concerns and has recently entered into discussions with the encroachers and the Massachusetts Bay Transportation Authority (MBTA) about how to lease or license the property in question and earn revenue from the property until an alternative public use is possible.

The Town property in question is a former railroad right of way (ROW). In 2006, the Massachusetts Highway Department funded the design of a bike trail that is proposed to extend through the three communities of Stoneham, Woburn, and Winchester. The estimated timetable for the start of bike trail construction is 2013. In Stoneham, the bike trail is to be built along an approximately 302,000

sq. ft. section of this ROW.¹ In 1984, the MBTA sold most of the ROW to the Town for \$1.00 and \$3,250 in expense reimbursements. In 2003, the MBTA leased the remaining smaller section of the ROW to the Town for 85 years. The MBTA retains certain rights to the entire ROW including the right to re-assume ownership for railroad purposes. This Office estimates that, based on the average assessed value of the private property that abuts the ROW, the value of the ROW is approximately \$4 million. [In 1995, the Town estimated the market value of this property at between \$1.3 million and \$2.4 million.]

Between 1987 and 1996, the Town leased five ROW sections to private abutters for only \$1.00 per year. However, once these leases lapsed for the five sections, this Office found that the Town took no action against abutters who continued to use the once leased sections without permission as well as abutters using other ROW sections never under a lease. The Town (and the MBTA) exercised little oversight and control over this activity and failed to protect taxpayer interests in this property. Specifically, the taxpayers were deprived of income from the ROW, estimated in 1993 by a former Town Administrator to be as much as \$14,000 per year (based on 1993 values) for the five leased sections and the use of the ROW for public purposes.

In the 25 years since the sale of the ROW to the Town, there has been an on-going discussion of how to use the ROW for a “public purpose.” For approximately 20 years the discussion has centered on the construction of a bike trail along the ROW. According to preliminary designs, bike trail construction will require the use of most but apparently not all the ROW footprint. The Town believes that the remaining portions could be available for other purposes including leasing or licensing to abutters for commercial activity.

According to the Town’s agreements with the MBTA, the MBTA is entitled to all “rent” collected from ROW use. Town officials have stated that this provision does not provide the Town with an incentive to pursue rental or other income from the ROW. The Town does not believe it is fair to use its resources to generate income for the MBTA. In documents obtained from the MBTA, the MBTA took the position in the 1980’s that it is entitled to the income because the MBTA sold the ROW to the Town for a minimal fee when the property had a significantly higher appraised value of approximately \$210,000 and the MBTA still held a mortgage on the property. According to both Town officials and the MBTA, they have had productive discussions regarding future uses of the property and how future revenues may be shared.

¹ The property deed identifies 328,300 sq.ft., but Town documents state 302,000 sq. ft.. The section leased to the Town by the MBTA in 2003 added an additional 50,000+/- sq.ft. to the total.

However, this Office remains concerned by the Town's previous lack of action to address encroachment along the ROW after the leases lapsed 13 years ago despite numerous citizen complaints, concerns raised by this Office in 2006, and a 2008 letter from the MBTA.

The private businesses encroaching upon the ROW are trespassing. The Town informed this Office that the private individuals have been informed numerous times by the Town that once construction is scheduled for the proposed bike trail or other public use along the ROW, they would have to vacate the public property. But, although discussed for many years, the concept of a bike trail has only recently received funding for design and no one knows for sure when and if funding for bike trail construction will be available. The Town's failure to act has:

- allowed trespass upon public property;
- allowed the alteration of public property [including the dumping of tons of fill and other material of unknown content on a section of the ROW leased by the Town from the MBTA. Under the lease the MBTA may have had oversight responsibility.];
- denied public access to this public property;
- exposed the Town to legal and financial liability by the actions of these trespassers in the event that a member of the public is harmed along the ROW;²
- allowed the use of public property by private interests without fair and reasonable compensation to the taxpayers;
- allowed the use of public property by private interests without the benefit of a fair and open public process;
- increased the costs of any future public use of the ROW by failing to secure legally binding commitments from abutters to "cure" whatever alterations they legally or illegally made to the ROW; and
- created the perception amongst some taxpayers that Town government gave preferential treatment to certain private property owners who benefited

² As early as 1984, a former Town Administrator informed the Board of Selectmen that: "There are several instances where people are using the right-of-way for their personal or business use and this condition should be corrected by us if for any other reason than insurance purposes."

economically from their use of public land. These allegations rest upon the Town granting \$1.00 per year leases, the Town's lack of action against these trespassers after leases lapsed, and the ability of these trespassers to obtain Town permits and favorable decisions from the Town regarding construction and site work that might not have been possible except for the use or availability of adjacent public land.

Town officials told this Office that the Town believes that this use of public property has been in the economic development interests of the Town and that removing these trespassers would interfere with this economic development.

Since the Summer of 2008, the Town has revisited the ROW use issue and has submitted a town meeting warrant article to amend the Town's zoning by-laws allowing the ROW to be used for business purposes and allowing the town administrator to lease sections of the ROW for these business purposes. According to the Town Counsel, the Town's inaction since 1996 has been due largely to the anticipated creation of the bike trail along the ROW.

Unfortunately, it may not be possible to remedy past inaction. However, the situation can be corrected moving forward. As a result, this Office makes the following recommendations regarding the current ROW situation:

- 1) The Town should continue its dialog with the MBTA regarding possible revenue sharing or other compensation from potential leases or licenses.
- 2) The Town should immediately put private parties using the ROW on notice that they are trespassing and are subject to local fines and removal. This notice should be enforced pending the approval and implementation of the Town Meeting warrant articles mentioned previously.
- 3) If the Town leases ROW portions in the future, it must use a M.G.L. c.30B process. Any leases or licenses should be entered into through a fair and open process, clearly state the MBTA's rights to the property and the proposed use of the property for a bike trail or other public purposes.
- 4) As a means of splitting ROW income with the MBTA, the Town might investigate the legality of including a payment in lieu of taxes or PILOT provision in future leases in addition to any "rent" charged to lessees.
- 5) The Town should secure legally binding promises from abutters who have altered public property to "cure" the property including making escrow payments. If the proposed bike trail is constructed, the Commonwealth should not be responsible for any added costs resulting from illegal work performed along the ROW by abutters.

- 6) The Town needs to identify and address where "permanent" encroachment has occurred. According to documents provided by the Town, in at least two locations, abutters may have constructed buildings that encroach upon the ROW. The Town and/or the MBTA need to address how to "cure" this type of encroachment.
- 7) The Town should require lessees or licensees to obtain the appropriate types and levels of insurance.
- 8) Either through independent legal action, negotiation, or through the lease/request for proposal process, the Town should attempt to recoup rent for prior unauthorized ROW use.

This Office requests that you provide us with: a) copies of any future agreements entered into by the Town for the ROW; b) inform this Office of any successful recoupment of money for the prior use of the ROW; and c) inform this Office of any commitments by abutters to cure previous encroachments on and/or alterations to the ROW.

Thank you for your cooperation during this review.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan
Inspector General

cc: Stoneham Board of Selectmen
William Solomon, Town Counsel
Michael Boyle, MBTA