

BOARD OF SELECTMEN
February 15, 2011
Needham Public Services Administration Building
Revised Agenda

	6:45	Informal Meeting with Citizens
1.	7:00	Town Manager ▪ Accept and Refer Zoning Amendment ▪ Land Exchange Agreement for Property ▪ Massachusetts Bay Transportation Authority Use and Occupancy Agreement- MBTA #10243 Railroad Properties

Board of Selectmen

AGENDA FACT SHEET for 2/15/2011

Agenda Item: **Accept and Refer Zoning Amendment**

Presenter(s): **Kate Fitzpatrick, Town Manager**

1. BRIEF DESCRIPTION OF TOPIC TO BE DISCUSSED:

The Planning Board has voted to place five zoning change articles on the Annual Town Meeting warrant. Under State law, the Board has 14 days to accept the proposed amendment and refer the amendment back to the Planning Board for its review, hearing, and report.

2. VOTE REQUIRED BY BOARD OF SELECTMEN: [YES] NO (circle one)

Suggested Motion: That the Board vote to accept and refer five proposed zoning articles: 1. Amend Zoning By-law: Outdoor Seating; 2. Amend Zoning By-law: Schedule of Use Regulations; 3. Amend Zoning By-law: Neighborhood Business District; 4. Amend Zoning By-law: Technical Amendments for New England Business Center, Highland Commercial-128 and Mixed Use-128; and 5. Amend Zoning By-law: Corrective Zoning Amendments to the Planning Board for review, public hearing, and report.

3. BACK UP INFORMATION ATTACHED:

- a. Letter from Lee Newman, Planning Director, February 11, 2011
- b. Text of Zoning Articles
- b. M.G.L. c. 40A Section 5

4. SIGN OFF/APPROVAL REQUIRED:

a.	Town Manager	yes	[no]	NA	_____
b.	Town Counsel	yes	[no]	NA	_____
c.	Finance Director	yes	[no]	NA	_____
d.	DPW _____	yes	[no]	NA	_____

Disposition by BOS

Action taken: _____ **Present on future Agenda:** _____

Refer to/Inform: _____ **Report back to BOS on:** _____



TOWN OF NEEDHAM, MA

PLANNING AND COMMUNITY
DEVELOPMENT DEPARTMENT

500 Dedham Ave
Needham, MA 02492
781-455-7500

PLANNING

February 11, 2011

Ms. Kate Fitzpatrick
Town Manager
Town Hall
Needham, MA 02492

Re: Zoning Articles for 2011 Annual Town Meeting

Dear Kate:

The Planning Board at its meeting of February 8, 2011 voted to place the following articles on the warrant for the May 2011 Annual Town Meeting: (1) Amend Zoning Bylaw: Outdoor Seating, (2) Amend Zoning Bylaw: Schedule of Use Regulations, (3) Amend Zoning Bylaw: Neighborhood Business District, (4) Amend Zoning Bylaw: Technical Amendments for New England Business Center, Highland Commercial-128 and Mixed Use-128, and (5) Amend Zoning Bylaw, Corrective Zoning Amendments. Accordingly, please find the above-named articles as approved by the Board for inclusion in the warrant of the 2011 Annual Town Meeting.

As you know, the Board of Selectmen will need to accept the articles and to then forward them to the Planning Board for review, public hearing and report. Please have the Selectmen act on the enclosed articles at their next meeting of Tuesday, February 15, 2011, so that the Planning Board can meet its statutory obligations. The Planning Board plans to schedule the public hearing on the articles for Tuesday, March 8, 2011.

Should you have any questions regarding this matter, please feel free to contact me directly.

Very truly yours,

NEEDHAM PLANNING BOARD

Lee Newman A.C.

Lee Newman
Planning Director

cc: Planning Board

Enclosure

Article 1: PB Amend Zoning By-Law – Outdoor Seating

To see if the Town will vote to amend the Needham Zoning By-Law as follows:

1. In Section 3, Use Regulations, Subsection 3.1, Basic Requirements, by adding a new designation which shall read as follows:

“Y* allows for the use upon administrative review by the Planning Board or Board of Selectmen in accordance with Section 6.9”
2. In Section 3.2, Schedule of Use Regulations, Subsection 3.2.2, Uses in Business, Chestnut Street Business, Center Business, Avery Square Business and Hillside Avenue Business Districts, by adding to Accessory Uses “Seasonal temporary outdoor seating for restaurants serving meals for consumption on the premises and at tables with service provided by waitress or waiter” Y* in B, CSB, CB, and ASB.
3. In Section 6, Special Regulations, by inserting a new Subsection 6.9, Outdoor Seating, to read as follows:

“6.9. Outdoor Seating

6.9.1. Applicability

Section 6.9.2 shall apply in any business district in which restaurants serving meals for consumption on the premises and at tables with service provided by waitress or waiter is permitted under Section 3.2.2 of this By-Law.

6.9.2 Basic Requirements Seasonal Outdoor Seating

Seasonal temporary outdoor seating, including but not limited to tables, chairs, serving equipment, planters, and umbrellas, for restaurants serving meals for consumption on the premises and at tables with service provided by waitress or waiter is permitted during normal hours of operation, subject to administrative review by the Planning Board in the case of (a) below and the Board of Selectmen in the case of (b) below, provided that:

- (a) It is within the front yard, rear yard, or side yard of the restaurant’s owned, licensed, or leased property, but only if said yard abuts a public right-of-way, public property, or other public uses, provided that:
 - (i) Such use is clearly related to the restaurant conducted inside the principal building;
 - (ii) A minimum width of forty-two inches (42”) shall be continuously maintained and unobstructed on the sidewalk or entrance into the principal building, or any other designated sidewalks or pedestrian paths, as shown on the plan provided to the Planning Board;
 - (iii) Outdoor seating is prohibited in designated or required landscaped areas, parking lots, or drive aisles;
 - (iv) Such use does not obstruct or otherwise interfere with visibility at intersections;
 - (v) Except as otherwise provided in subsection (b), the outdoor seating must be on the same lot as the establishment;

- (vi) The Planning Board may impose such conditions on the use of the property as it deems necessary to protect the public interest; and;
 - (vii) At the close of business, the area of outdoor seating must be cleaned, including clearing of all tables and removal of all trash.
- (b) It is within the public sidewalk abutting the front, rear, or side yard of the restaurant's owned or leased property so long as there remains no less than forty-two inches (42") of unencumbered sidewalk width remaining, or, alternatively, on a public way or other public property abutting the front, rear, or side yard of the restaurant's owned or leased property, provided that:
- (i) No temporary outdoor restaurant seating shall be permitted, unless the Board of Selectman authorizes the placement of temporary outdoor seating within the public right-of-way, public sidewalks and/or on public property;
 - (ii) Such use is clearly related to the restaurant conducted inside the principal building;
 - (iii) A minimum width of forty-two inches (42") shall be continuously maintained and unobstructed on the sidewalk or entrance into the principal building, or any other designated sidewalks or pedestrian paths, as shown on the plan provided to the Board of Selectmen;
 - (iv) Outdoor seating is prohibited in designated or required landscaped areas, parking lots, or drive aisles;
 - (v) Such use does not obstruct or otherwise interfere with visibility at intersections;
 - (vi) The outdoor seating must be adjacent to the restaurant establishment and in front, to the rear, or to the side of, as the case may be, the front face of the restaurant's owned or leased property;
 - (vii) The Board of Selectmen may impose such conditions on the use of public property as it deems necessary to protect the public interest; and;
 - (viii) At the close of business, the area of outdoor seating must be cleaned, including clearing of all tables and removal of all trash.

Items (a)(i), (a)(iii), (a)(iv) and (b)(ii), (b)(iv), and (b)(vi) shall not apply during special town-wide festivals or events during the year.

Where there is authorization for the placement of seasonal temporary outdoor restaurant seating and where such seating could be interpreted to be an increase in the number of seats serving a restaurant, such seating shall not be counted toward the off-street parking or loading requirements, so long as they remain seasonal and temporary and do not increase capacity by more than thirty percent (30%)."

Article 2: PB Amend Zoning By-Law – Schedule of Uses Regulations

To see if the Town will vote to amend the Needham Zoning By-Law as follows:

1. In Section 3, Use Regulations, Subsection 3.1, Basic Requirements, by adding the following paragraph to the end of the section as follows:

“Notwithstanding the uses set forth in the Schedule of Use Regulations (Section 3.2), in all Industrial, Business, and/or Commercial zoning districts, including Mixed Use-128 the Planning Board may allow by right a use similar in intent and impact to a use authorized by the uses allowed by Section 3.2 as of right or by special permit a use similar in intent and impact to a use authorized by the uses allowed by Section 3.2 by special permit, which in the opinion of the Planning Board constitutes the same general use and is similar in intent and impact as one specifically authorized by the uses allowed by Section 3.2.”

Article 3: PB Amend Zoning By-Law – Neighborhood Business District

To see if the Town will vote to amend the Needham Zoning By-Law as follows:

1. Amend Section 3.2.3, Uses in the Neighborhood Business District, Subsection 3.2.3.1 Permitted Uses, as follows:
 - a. Delete in (j) the words: “provided such structure was in existence prior to December 31, 1992 and was previously used as a single-family detached dwelling”.
 - b. Delete in (k) the words: “provided such structure was in existence prior to December 31, 1992 and was previously used as a two-family detached dwelling” and add the words “provided they comply with the reconstruction provisions of Section 1.4.7.4.”
 - c. Amend (p) to read: “Beauty salon, day spay, barber shop, tailor, dressmaker, shoe repair, photographic processing, photocopying and reduction services but not commercial printing, provided the gross floor area so used does not exceed one thousand five hundred (1,500) square feet per establishment.”
 - d. Add “(v): Professional offices, not listed in (q), provided the gross floor area so used does not exceed one thousand five hundred (1,500) square feet per company.”
 - e. Add “(w): Offices for consumer sales and/or services totaling no more one thousand five hundred (1,500) square feet per company.”
 - f. Add “(x) General office uses, provided the gross floor area so used does not exceed one thousand five hundred (1,500) square feet per company.”
 - g. Add at the end of this section: “As to uses (l)-(x) above, all operations must be conducted entirely within an enclosed building. Storage of equipment and products outdoors during non-operating hours is prohibited. Commercial delivery and/or maintenance trucks must be parked during non-operating hours in a garage or in outdoor area not within the required setback for the principal building and shall be screened from the view of the abutting lots and street(s). If operations of the aforementioned uses are in whole or in part conducted outdoors during operating hours, such uses shall be deemed to be uses permitted by special permit pursuant to Section 3.2.3.2.”
2. Amend Section 3.2.3, Uses in the Neighborhood Business District, Subsection 3.2.3.2, Uses Permitted by Special Permits as follows:
 - a. Amend (c) to read: “Bank, provided the gross floor area so used does not exceed three thousand (3,000) square feet gross floor area per company.”
 - b. Add (k): “Medical, dental or psychiatric office exceeding one thousand (1000) square feet gross floor area per company.”
 - c. Add (l): “Professional offices, not listed in 3.2.3.1 (q), exceeding one thousand five hundred (1,500) square feet gross floor area per company.”
 - d. Add “(m): Offices for consumer sales and/or services exceeding one thousand five hundred (1,500) square feet gross floor area per company.”
 - e. Add (n): “General office uses exceeding one thousand five hundred (1,500) square feet gross floor area per company.”
 - f. Add “(o): Uses (l)-(x) of Section 3.2.3.1 conducting operations in whole or in part outdoors during operating hours.”
 - g. Add at end of this section: “Uses conducted in whole or in part outdoors during operating hours and/or storing equipment and product outdoors during non-operating hours shall be required to provide such screening and landscaping as deemed necessary by the SPGA to shield neighboring residential uses. Except for use (e), commercial delivery and/or maintenance trucks must be parked during non-operating hours in a garage or in outdoor

area not within the required setback for the principal building and shall be screened from the view of the abutting lots and street(s).”

Article 4: PB Amend Zoning By-Law – Technical Amendments for New England Business Center, Highland Commercial-128 and Mixed Use-128

To see if the Town will vote to amend the Needham Zoning By-Law as follows:

1. Amend Section 3.2.4, Uses in the New England Business Center, Subsection 3.2.4.1, Permitted Uses, as follows:
 - a. By adding to (f) at the beginning of the subsection: “Medical laboratory or”
 - b. By adding a new section: “(l) More than one building on a lot.”
 - c. By adding a new section: “(m) More than one use on a lot.”
2. Amend Section 3.2.5, Uses in the Highland Commercial-128 District, Subsection 3.2.5.1, Permitted Uses, as follows:
 - a. By adding to the beginning of the subsection (h): “Medical laboratory or”
 - b. By adding new section: “(j) More than one building on a lot.”
 - c. By adding new section: “(k) More than one use on a lot.”
3. Amend Section 3.2.6, Uses in the Mixed Use-128 District, Subsection 3.2.6.1, Permitted Uses, as follows:
 - a. By adding to the beginning of (j): “Medical laboratory or”
 - b. By adding new section: “(o) More than one building on a lot.”
 - c. By adding new section: “(p) More than one use on a lot.”

Article 5: PB Amend Zoning By-Law – Corrective Zoning Amendments

To see if the Town will vote to amend the Needham Zoning By-Law as follows:

1. Amend Section 4.1.5 Minimum Required Lot Width by replacing “4.5.1” with “4.6.1”.

The former section does not contain the minimum frontage requirements referenced; the latter does. The provision would read as follows: “Building lots in all zoning districts recorded or endorsed after January 9, 1986 shall be required to have a minimum lot width for a distance that extends from the front lot line throughout the building or structure not less than the applicable minimum frontage for the district in which said lot is located, as specified in Sections 4.2.1, 4.3.1, 4.4.1 and 4.6.1; except, however, in the Single Residence A District such minimum required lot width shall be at least 120 feet.”

2. Amend Section 4.2.4 Flexible Development Consistent with the Subdivision Control Law (a) General by inserting the words “Rural Residence Conservation,” after “General Residence,” in the last sentence.

The Rural Residence Conservation districts should have been included in the flexible development provision and was inadvertently omitted.

3. Amend second sentence of footnote * in Section 4.3.1 Table of Regulations (applicable to Apartment Districts) by replacing “4.6.2” with “4.7.2”.

The former section relates to front and side setbacks in Industrial Districts; the latter to height limitation exceptions in, inter alia, Apartment Districts. The footnote would read: “See height limitation exceptions in Section 4.7.2.” Section 4.7.2 is entitled “Height Limitation Exceptions in...Apartment...Districts”.

4. Amend Section 4.3.5 Setback for Other Uses in the Dimensional Regulations for Apartment Districts by replacing “4.6.4” with “4.7.1 and 4.7.3.”

Section 4.6.4 governs height limitations in Industrial Districts and is not applicable to the front, side and rear line setbacks referenced in 4.3.5 as relating to Apartment Districts. Section 4.7.1 provides Special Conditions relating to Specific Front Setbacks and Section 4.7.3 relates to minimum side line setbacks for a dwelling or institutional building within Apartment Districts. Section 4.3.5 would read: “Front, side, and rear line setbacks for any permitted building or structure, other than an apartment house (or a structure accessory thereto), shall be the same as required in Section 4.2.1 and 4.7.1 and 4.7.3.”

5. Amend Section 4.4.2 (b) Maximum Building Bulk with respect to Dimensional Requirements in Commercial Districts by adding clarifying language after “4.4.5”: “, third paragraph, second sentence.”

4.4.2 (b) relates to maximum lot coverage and floor area ratio requirements in Center Business District. It refers back to Table 1 in subsection (a) and then references Section 4.4.5, which, relating as it does to driveway openings, is not apparently applicable. However, buried in the second sentence of the third paragraph is language permitting the Planning Board by special permit to increase the maximum floor area ratio if a shared driveway eliminates the need for an individual driveway in the Center Business District. Clarity would be afforded by amending this provision. Section 4.4.2(b) would thus read in relevant part: "Buildings and structures which are located on property in the Center Business District are not limited to the maximum lot coverage requirements in this Section 4.4.2 as specified in Table 1, but shall have a maximum floor area ratio of 1.0 or the floor area ratio in existence on January 1, 1990, whichever is greater. (See also Section 4.4.5, **third paragraph, second sentence**)"

6. Amend the By-Law by deleting all references in the By-Law to the "Industrial Park" from the captions, as well as from the text and the respective zone requirements.

The Industrial Park district no longer exists so all references to the zone and its specific requirements should be deleted, in particular:

1. Table of Contents: delete "and Industrial Park" from reference to 4.6 (p. 2)
2. Classes of Districts Section 2.1: delete "IND P – Industrial Park" (p.17)
3. Uses in Rural Residence-Conservation...Industrial Park Districts Section 3.2.1
 - Delete " and Industrial Park" from caption of section and insert "and" between "Industrial" and "Industrial-1" (p. 23)
 - Delete "IND P" from first sentence in Section 3.2.1 and insert "and" between "IND" and "IND-1" (p. 23)
 - Delete "IND P" column in use table in Section 3.2.1 (pp. 23-34)
 - Delete footnotes (a) and (b) relating to uses in Industrial Park (pp 34-35)
4. Dimensional Regulations for Industrial and Industrial Park Districts Section 4.6
 - Delete "and Industrial Park" from caption of section (p. 139)
 - Delete "Industrial Park" from row in use table in Section 4.6.1 (p. 139)
 - Delete "or Industrial Park" from the first sentence in Section 4.6.3 (p. 139)
 - Delete "or industrial park" from the first sentence in Section 4.6.5 and insert "or" between "manufacturing" and "industrial" (p. 139)
5. Special Conditions Section 4.7
 - Delete " and Industrial Park" from caption of Section 4.7.2 and insert "and" between "Industrial" and "Industrial-1" (p. 141)
 - Delete "and Industrial Park" from the first sentence in Section 4.7.2 and insert "and" between "Industrial" and "Industrial-1" (p. 141)
 - Delete "or Industrial Park" from the first sentence in Section 4.7.3 and insert "or" between "Business" and "Industrial" (p. 141)
 - Delete "or Industrial Park" from the second sentence in Section 4.7.3 and insert "or" between "Business" and "Industrial" (p. 141)
6. Driveway Openings Section 5.1.3
 - Delete "Industrial Park" from the second sentence of subsection (d) (p. 155)

Delete “or Industrial Park” from first sentence of subsection (j) and insert “or” between “Business” and “Industrial” (p. 156)

Delete “except however, in the Industrial Park District, if more than one lot is held in common ownership and devoted to parking for the same principal use or building, the interior lot lines are excluded from the rear and side setbacks” from third sentence of subsection (j) (p. 156)

7. Accessory Uses Section 6.1.2

Delete “and Industrial Park” from the first sentence in Section 6.1.2 and insert “and” between “Rural Residence--Conservation” and “Institutional” (p. 161)

8. Limited Heliports Section 6.5.1

Delete “and Industrial Park” from the first sentence in Section 6.5.1 (p. 164)

9. Building or Use Permit Section 7.2.5

Delete “Industrial Park District” from the first sentence of this section. (p. 183)

10. Authority and Specific Powers of Design Review Board Section 7.7.2.2

Delete “Industrial Park District” from second paragraph of this section (p. 195)

7. Further Amend Section 4.7.2 Height Limitation Exceptions in Business, Apartment, Industrial, Industrial-1 and Industrial Park Districts by replacing references to “Section 4.4.2 and 4.5.4” in the first paragraph with “Section 4.4.3 and 4.6.4” and replacing the reference to “Section 4.3.2” in the second paragraph with “Section 4.3.1”

This section, which relates to height limitation exceptions in various districts. Section 4.4.2 relates to maximum building bulk requirements, which is not applicable; Section 4.4.3 is the applicable height limitation provision. Section 4.5.4 does not exist; the appropriate reference is Section 4.6.4, the height limitation provision for industrial districts. Similarly, the height limitation provision applicable to Apartment districts is Section 4.3.1 not the referenced 4.3.2. The first sentence of the first paragraph should read in relevant part: “In Business... the limitation of height in feet in Section 4.4.3 and 4.6.4 shall not apply to towers, steeples...” The second paragraph should read in relevant part: In Apartment districts the limitation of height in feet in Section 4.3.1 shall not apply to the structures enumerated herein except...”

8. Amend Section 4.7.5 Reduction in Dimensional Regulations by Special Permit by correcting the reference in the second paragraph from “This Section 4.6.5” to “This Section 4.7.5”.

The reference in the second paragraph incorrectly refers to the section as 4.6.5 rather than 4.7.5. This paragraph should read: “This Section 4.7.5 shall apply only to buildings...”

9. Amend Section 4.10.4 Gould Street-Highland Avenue Buffer in the Dimensional Regulations for Industrial-1 District by replacing “4.6.1(e) and (f)” with “4.7.1 (b) and (c).”

This section refers back to special front building setback lines. Sections 4.6.1 (e) and (f) do not exist. The appropriate references are 4.7.1 (b) and (c). This sentence would read: “The special front building setback lines of 50 feet, as provided for in Subsections **4.7.1 (b) and (c)**, shall be landscaped vegetative buffer area in the Industrial-1 District.”

10. Amend Section 5.1.3 Driveway Openings by deleting Sections “4.5.6 and 4.7.3” and replace them with Sections “4.6.6 and 4.10.3”.

This section addresses driveway opening regulations in Business, Industrial and Industrial-1 Districts. While the first section referenced (4.4.5) does relate to driveway openings in Business Districts, the other two sections are mislabeled. Driveway openings in Industrial Districts are covered by Section 4.6.6 and driveway openings in Industrial-1 District are addressed in Section 4.10.3. The second sentence should read: “See Sections 4.4.5, **4.6.6, and 4.10.3** for Driveway Openings Regulations in Business, Industrial and Industrial-1 Districts.”

11. Amend Section 5.5 Signs by deleting “XIX” and inserting “5”.

The proper reference to the Needham Sign By-Law is no longer Article XIX but Article 5 of the General By-Laws. The sentence should read: “Signs within the Town are regulated and controlled by Article **5** of the Town’s General By-Laws.”

12. Amend Section 7.7.2.2 Authority and Specific Powers of the Design Review Board by inserting in the first sentence of the second paragraph between the words “Industrial District” and “Industrial-1 District” the words “Elder Services Zoning District”.

When this new zoning district was added, review by the Design Review Board through major site plan review for such projects was arguably included, this amendment would make this clear. The first sentence of the second paragraph should read in relevant part: “The Design Review Board shall review permit applications for all new structures and outdoor uses, exterior additions, exterior alterations and exterior changes in all areas zoned as a...Industrial District, **Elder Services Zoning District**, Industrial-1 District...”

13. Further amend Section 7.7.2.2 Authority and Specific Powers of the Design Review Board by deleting “XIX” and inserting “5” in the last sentence of the second paragraph.

The proper reference to the Needham Sign By-Law is no longer Article XIX but

Article 5 of the General By-Laws. The sentence should read: "The Design Review Board shall also review requests for all sign permits, as required under Article 5 of the Needham General By-Laws."

14. Amend Section 7.7.3 Procedure of the Design Review Board by deleting "XIX" and inserting "5" in the first sentence of the first paragraph.

The proper reference to the Needham Sign By-Law is no longer Article XIX but Article 5 of the General By-Laws. The sentence in relevant part should read: "An application for Design Review Board shall be submitted to the Design Review Board...(See ...Article 5 of the General By-Laws for application procedure for all sign permits."

15. Amend Section 7.7.4 Design Criteria of the Design Review Board by deleting "XIX" and inserting "5" in the last sentence of this section.

The proper reference to the Needham Sign By-Law is no longer Article XIX but Article 5 of the General By-Laws. The sentence in relevant part should read: "In addition... the Design Review Board shall review requests for sign permits according to the design guidelines listed in Section 3.5 of Article 5 of the General By-Laws."



PART I ADMINISTRATION OF THE GOVERNMENT
(Chapters 1 through 182)

TITLE VII CITIES, TOWNS AND DISTRICTS

CHAPTER 40A ZONING

Section 5 Adoption or change of zoning ordinances or by-laws; procedure

Section 5. Zoning ordinances or by-laws may be adopted and from time to time changed by amendment, addition or repeal, but only in the manner hereinafter provided. Adoption or change of zoning ordinances or by-laws may be initiated by the submission to the city council or board of selectmen of a proposed zoning ordinance or by-law by a city council, a board of selectmen, a board of appeals, by an individual owning land to be affected by change or adoption, by request of registered voters of a town pursuant to section ten of chapter thirty-nine, by ten registered voters in a city, by a planning board, by a regional planning agency or by other methods provided by municipal charter. The board of selectmen or city council shall within fourteen days of receipt of such zoning ordinance or by-law submit it to the planning board for review.

[Second paragraph effective until June 30, 2009. For text effective June 30, 2009, see below.]

No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning board in a city or town, and the city council or a committee designated or appointed for the purpose by said council has each held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard. Said public hearing shall be held within sixty-five days after the proposed zoning ordinance or by-law is submitted to the planning board by the city council or selectmen or if there is none, within sixty-five days after the proposed zoning ordinance or by-law is submitted to the city council or selectmen. Notice of the time and place of such public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board of each abutting cities and towns. The department of housing and community development, the regional planning agency, the planning boards of all abutting cities and towns and nonresident property owners who may not have received notice by mail as specified in this section may grant a waiver of notice or submit an affidavit of actual notice to the city or town clerk prior to town meeting or city council action on a proposed zoning ordinance, by-law or change thereto. Zoning ordinances or by-laws may provide that a separate, conspicuous statement shall be included with property tax bills sent to nonresident property owners, stating that notice of such hearings under this chapter shall be sent by mail, postage prepaid, to any such owner who files an annual request for such notice with the city or town clerk no later than January first, and pays a reasonable fee established by such ordinance or by-law. In cases involving boundary, density or use changes within a district, notice shall be sent to any such nonresident property owner who has filed such a request with the city or town clerk and whose property lies in the district where the change is sought. No defect in the form of any notice under this chapter shall invalidate any zoning ordinances or by-laws unless such defect is found to be misleading.

[Second paragraph as amended by 2008, 451, Sec. 45 effective June 30, 2009. See 2008, 451, Sec. 187. For text effective until June 30, 2009, see above.]

No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning board in a city or town, and the city council or a committee designated or appointed for the purpose by said council has each held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard. Said public hearing shall be held within sixty-five days after the proposed zoning ordinance or by-law is submitted to the planning board by the city council or selectmen or if there is none, within sixty-five days after the proposed zoning ordinance or by-law is submitted to the city council or selectmen. Notice of the time and place of such public hearing, of the subject matter, sufficient for identification, and of the place where texts and maps thereof may be inspected

shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of said hearing, and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of said hearing. Notice of said hearing shall also be sent by mail, postage prepaid to the department of housing and community development, the regional planning agency, if any, and to the planning board of each abutting city and town. The department of housing and community development, the regional planning agency, the planning boards of all abutting cities and towns and nonresident property owners who may not have received notice by mail as specified in this section may grant a waiver of notice or submit an affidavit of actual notice to the city or town clerk prior to town meeting or city council action on a proposed zoning ordinance, by-law or change thereto. Zoning ordinances or by-laws may provide that a separate, conspicuous statement shall be included with property tax bills sent to nonresident property owners, stating that notice of such hearings under this chapter shall be sent by mail, postage prepaid, to any such owner who files an annual request for such notice with the city or town clerk no later than January first, and pays a reasonable fee established by such ordinance or by-law. In cases involving boundary, density or use changes within a district, notice shall be sent to any such nonresident property owner who has filed such a request with the city or town clerk and whose property lies in the district where the change is sought. No defect in the form of any notice under this chapter shall invalidate any zoning ordinances or by-laws unless such defect is found to be misleading.

Prior to the adoption of any zoning ordinance or by-law or amendment thereto which seeks to further regulate matters established by section forty of chapter one hundred and thirty-one or regulations authorized thereunder relative to agricultural and aquacultural practices, the city or town clerk shall, no later than seven days prior to the city council's or town meeting's public hearing relative to the adoption of said new or amended zoning ordinances or by-laws, give notice of the said proposed zoning ordinances or by-laws to the farmland advisory board established pursuant to section forty of chapter one hundred and thirty-one.

No vote to adopt any such proposed ordinance or by-law or amendment thereto shall be taken until a report with recommendations by a planning board has been submitted to the town meeting or city council, or twenty-one days after said hearing has elapsed without submission of such report. After such notice, hearing and report, or after twenty-one days shall have elapsed after such hearing without submission of such report, a city council or town meeting may adopt, reject, or amend and adopt any such proposed ordinance or by-law. If a city council fails to vote to adopt any proposed ordinance within ninety days after the city council hearing or if a town meeting fails to vote to adopt any proposed by-law within six months after the planning board hearing, no action shall be taken thereon until after a subsequent public hearing is held with notice and report as provided.

No zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting; provided, however, that if in a city or town with a council of fewer than twenty-five members there is filed with the clerk prior to final action by the council a written protest against such change, stating the reasons duly signed by owners of twenty per cent or more of the area of the land proposed to be included in such change or of the area of the land immediately adjacent extending three hundred feet therefrom, no such change of any such ordinance shall be adopted except by a three-fourths vote of all members.

No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

When zoning by-laws or amendments thereto are submitted to the attorney general for approval as required by section thirty-two of chapter forty, he shall also be furnished with a statement which may be prepared by the planning board explaining the by-laws or amendments proposed, which statement may be accompanied by explanatory maps or plans.

The effective date of the adoption or amendment of any zoning ordinance or by-law shall be the date on which such adoption or amendment was voted upon by a city council or town meeting; if in towns, publication in a town bulletin or pamphlet and posting is subsequently made or publication in a newspaper pursuant to section thirty-two of chapter forty. If, in a town, said by-law is subsequently disapproved, in whole or in part, by the attorney general, the previous

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zoning by-law, to the extent that such previous zoning by-law was changed by the disapproved by-law or portion thereof, shall be deemed to have been in effect from the date of such vote. In a municipality which is not required to submit zoning ordinances to the attorney general for approval pursuant to section thirty-two of chapter forty, the effective date of such ordinance or amendment shall be the date passed by the city council and signed by the mayor or, as otherwise provided by ordinance or charter; provided, however, that such ordinance or amendment shall subsequently be forwarded by the city clerk to the office of the attorney general.

A true copy of the zoning ordinance or by-law with any amendments thereto shall be kept on file available for inspection in the office of the clerk of such city or town.

No claim of invalidity of any zoning ordinance or by-law arising out of any possible defect in the procedure of adoption or amendment shall be made in any legal proceedings and no state, regional, county or municipal officer shall refuse, deny or revoke any permit, approval or certificate because of any such claim of invalidity unless legal action is commenced within the time period specified in sections thirty-two and thirty-two A of chapter forty and notice specifying the court, parties, invalidity claimed, and date of filing is filed together with a copy of the petition with the town or city clerk within seven days after commencement of the action.

Board of Selectmen

AGENDA FACT SHEET for 2/15/2011

Agenda Item: **Approve Land Exchange Agreement for Property
Located in Needham, Massachusetts**

Presenter(s): **Kate Fitzpatrick, Town Manager**

1. BRIEF DESCRIPTION OF TOPIC TO BE DISCUSSED:

The Town and the MBTA have reached agreement on the terms of the transfer of the Needham Heights commuter lot and the Upper Hersey commuter lot which will be effective March 1, 2011.

2. VOTE REQUIRED BY BOARD OF SELECTMEN: [YES] NO (circle one)

Suggested Motion: That the Board vote to approve and sign the Land Exchange Agreement for Property Located in Needham, Massachusetts

3. BACK UP INFORMATION ATTACHED:

- a. Land Exchange Agreement for Property Located in Needham, Massachusetts

4. SIGN OFF/APPROVAL REQUIRED:

a.	Town Manager	yes	[no]	NA	_____
b.	Town Counsel	yes	[no]	NA	_____
c.	Finance Director	yes	[no]	NA	_____
d.	DPW _____	yes	[no]	NA	_____

Disposition by BOS

Action taken: _____

Present on future Agenda: _____

Refer to/Inform: _____

Report back to BOS on: _____

Prepared by kpf

LAND EXCHANGE AGREEMENT
FOR PROPERTY LOCATED IN NEEDHAM, MASSACHUSETTS

1. Parties

This **LAND EXCHANGE AGREEMENT** ("**Agreement**") is made as of the ___ day of February 2011, by and between **THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**, a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts with a usual place of business at Ten Park Plaza, Boston, Massachusetts 02116 ("**MBTA**") and **THE TOWN OF NEEDHAM**, a municipal corporation with a principal place of business at 1471 Highland Avenue, Needham MA 02492 ("**TOWN**").

In consideration of the mutual promises set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledge, MBTA agrees to convey to Town and Town agrees to convey to MBTA, the following described premises, and each party agrees to accept the applicable premises from the other party, subject to the terms and conditions hereof.

2. Premises

(a) The premises to be conveyed by MBTA to Town shall consist of a parcel of land comprising approximately 71,293 square feet, together with all improvements thereon and appurtenances thereto, if any, located adjacent to MBTA's "Needham Heights" commuter rail station in Needham, Massachusetts, as approximately shown on the plan attached hereto as **Exhibit A** ("**MBTA Premises**"). For MBTA's title to the MBTA Premises see Order of Taking recorded with the Norfolk County Registry of Deeds at Book 10563, Page 162.

(b) The premises to be conveyed by Town to MBTA shall consist of a parcel of land comprising approximately 58,340 square feet, together with all improvements thereon and appurtenances thereto, if any, located adjacent to MBTA's "Hersey" commuter rail station in Needham, Massachusetts and commonly known as the "Upper Hersey Parking Lot", as approximately shown on the plan attached hereto as **Exhibit A-1** ("**Town Premises**"). For Town's title to the MBTA Premises see deed recorded with the Norfolk County Registry of Deeds at Book 1208, Page 528.

The MBTA Premises and the Town Premises are more particularly described on **Exhibit B** and **Exhibit B-1**, respectively attached hereto.

The MBTA Premises and the Town Premises are collectively referred to herein as the "**Premises**".

3. Quality of Title

The MBTA Premises and the Town Premises each is to be conveyed by a good and sufficient quitclaim deed ("**MBTA Deed**" and "**Town Deed**", respectively) of the applicable party, conveying good and marketable title fee simple title to same, free from all encumbrances, except:

- (a) Provisions of existing building and local zoning laws;
- (b) Existing rights created by instruments of record in party or partition walls;

- (c) Such taxes for the current tax year as are not due and payable on the date of the delivery of such deed, and any liens for municipal betterments assessed after the date of this agreement;
- (d) Easements, restrictions, reservations, and eminent domain takings of record;
- (e) Any encroachments, parties-in-possession, leases, licenses and occupancies
 - (1) that can be seen by inspecting the Premises, or
 - (2) are shown on the plan attached hereto as **Exhibit A** and **Exhibit A-1**, as applicable;
- (f) All Permitted Exceptions under Section 8 of this Agreement;
- (g) With respect to the MBTA Premises, (i) a use restriction for the benefit of the MBTA's abutting property, providing that the MBTA Premises shall be used only for municipal purposes by the Town and (ii) the Parking and Access Easement described in Section 20(c) of this Agreement; and
- (h) A right of first offer to be set forth in the Town Deed, which shall provide that in the event the MBTA decides to offer the Town Premises for sale, the Town shall have a right of first offer to purchase the Town Premises at its then current market value.

The MBTA Deed and the Town Deed are attached hereto as **Exhibit C** and **Exhibit C-1**, respectively and are collectively referred to herein as the "**Deeds**".

4. **Intentionally omitted**

5. **Time of Performance**

(a) The Deeds are to be delivered at the Needham Town Hall, 500 Dedham Avenue, Needham, Massachusetts 02492 on or before March 1, 2011 ("**Closing Date**"), except as otherwise mutually agreed upon. Parties agree to close this transaction by mail by delivering executed closing documents in escrow on or before the Closing Date.

(b) Full and exclusive possession of the Premises, is to be delivered at the time of the Closing, the Premises to be then in the same condition as they now are, reasonable use and wear thereof excepted. In addition, the Premises shall be free and clear of the rights of all others except as expressly set forth in this Agreement.

(c) Each party shall deliver to the other at Closing such evidence as the other party's title insurer may reasonably require as to the authority of the person or persons executing documents on behalf of the conveying party, as well as mechanic's liens and party in possession affidavits and indemnities required by the grantee's title insurer to remove any exceptions to coverage relating to parties in possession and mechanics liens. Each party shall deliver an original closing statement reasonably acceptable to the other listing any prorations in connection with the Closing.

(d) At Closing each party shall pay for the cost of recording any instruments required to clear title to the Premises it is conveying.

6. **Intentionally omitted**

7. **Regulatory and Permitting Approvals**

Each of the MBTA and the Town shall be responsible for all necessary permitting approvals associated with its proposed land use and/or any of its proposed development on the Town Premises or MBTA

Premises, as applicable, at its sole cost and expense. Either party's inability to obtain any permitting approvals necessary for its plans for the use and/or development of the Town Premises or MBTA Premises, as applicable, shall not relieve said party of its obligations under this Agreement.

8. Due Diligence

(a) **Due Diligence.** MBTA and Town each shall have until five (5) days from the full execution and delivery of this Agreement ("**Due Diligence Period**"), to perform, at its sole cost and expense, such physical site inspection of the Town Premises and MBTA Premises, respectively, it may determine in its sole discretion (including environmental due diligence, provided, however, that no subsurface investigations of any kind and for any reason may be conducted by either party), to examine any and all documents, reports and files concerning the Town Premises and MBTA Premises, as applicable, and the legal compliance thereof, to examine such additional documentation, and to make such additional investigations and inspections (subject to the limitations set forth above) including, without limitation, title and survey, all as MBTA or Town, as applicable shall determine in its sole discretion.

(b) **Inspection Obligations.** (i) Each party's performance of any on-site due diligence shall be subject to (1) each party not unreasonably interfering with any work at the MBTA Premises or the Town Premises, as applicable, or with the operation of the MBTA Premises or the Town Premises, as applicable, and the use and occupancy thereof and (2) each party promptly repairing all damage caused by its due diligence activities.

(ii) For each entry onto the MBTA Premises and/or any adjacent MBTA owned and/or operated land, prior to any such entry and the commencement of any due diligence activities the Town and/or each of its consultants and contractors, as applicable, shall execute an MBTA License for Entry in form and substance substantially similar to the MBTA's form of "License for Entry Railroad Properties" (which form can be viewed at the following website: www.transitrealty.com/lic_docs/lic_sample_railroad.pdf)

(c) **Indemnifications.** (i) Town hereby indemnifies the MBTA and agrees to defend the MBTA and save the MBTA harmless from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' expenses and fees), causes of action, suits, claims, demands or judgments of any nature whatsoever including, without limitation, those related to personal injuries or death, that may be imposed upon, incurred by, or asserted against the MBTA arising from the negligence or willful misconduct of the Town, its employees, contractors, sub-contractors or consultants in conducting the due diligence investigation(s) permitted hereunder.

(ii) MBTA hereby indemnifies the Town and agrees to defend the Town and save the Town harmless from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' expenses and fees), causes of action, suits, claims, demands or judgments of any nature whatsoever including, without limitation, those related to personal injuries or death, that may be imposed upon, incurred by, or asserted against the Town arising from the negligence or willful misconduct of the MBTA, its employees, contractors, sub-contractors or consultants in conducting the due diligence investigation(s) permitted hereunder.

(d) **Insurance.** Prior to entry onto the other party's Premises to conduct the due diligence pursuant to this Section 8, each party (or its consultant(s)) shall provide the other party with a certificate

or certificates of insurance covering all days that such consultants and contractors will be on the Premises before Closing, evidencing the insurance of the activities permitted hereunder, and each party's, as applicable, covenant of indemnification hereinabove, with companies that are reasonably acceptable to the other party as stated below, in which the other party is an additional insured as its interests may appear and which provides coverage as follows.

i. **Commercial General Liability Insurance** – Commercial General Liability Insurance insuring the investigating party, the other party and the Premises on which the due diligence will be conducted and all activities allowed hereunder as well as the investigating party's indemnification obligations contained in this Section 13 with minimum liability coverage for personal injury, bodily injury and property damage with limits of not less than One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) in aggregate. Umbrella liability coverage with limits of not less than Five Million Dollars (\$5,000,000.00) covering all work performed must also be provided. Such insurance shall be written on an occurrence basis as opposed to claims made basis. These policies shall name the owner of the applicable Premises as an additional insured.

ii. **Automobile Liability Insurance** – Automobile liability insurance shall be provided with limits of not less than One Million Dollars (\$1,000,000.00) covering all owned, non-owned, hired, rented or leased vehicles of the investigating party and its consultants and contractors that are used in the activities permitted hereunder. The policy shall contain a waiver of subrogation clause in favor of the owner of the applicable Premises.

iii. **Worker's Compensation Insurance** – Worker's Compensation Insurance insuring all persons employed by the investigating party in connection with any work done on or about the Premises on which due diligence is conducted with respect to which claims for death or bodily injury could be asserted against the Premises owner or the applicable Premises with limits of liability of not less than those required by Massachusetts General Laws Chapter 152, as amended. The policy shall contain a waiver of subrogation clause in favor of the non-investigating party. Each of the investigating party's contractors and consultants shall have similar policies covering their employees.

iv. **Railroad Protective Liability Insurance** - While working within fifty (50) feet of the nearest rail of an active Right-of-Way, insuring the MBTA and any railroad company authorized by the MBTA to operate on the Right-of-Way (collectively, the "Railroad Companies") as named insureds with limits of not less than \$2,000,000.00 per occurrence and \$6,000,000.00 in aggregate combined bodily injury property damage. MBCR shall be provided with an original policy of Railroad Protective Liability Insurance and the MBTA and the remaining Railroad Companies shall be provided with certificates of insurance.

(e) **Due Diligence Results/Objections.** If MBTA or Town is unsatisfied with the results of its due diligence on the Town Premises and the MBTA Premises, respectively, for any

reason, or no reason, in its sole discretion, MBTA or Town may terminate this Agreement during or upon the expiration of the Due Diligence Period by written notice to the other party whereupon this Agreement shall terminate with no further obligations by either party; except that any tort liability of a party that arose pursuant to Section 8 hereof shall remain.

Notwithstanding the foregoing, MBTA and Town each shall have the right, during or upon the expiration of the Due Diligence Period, to notify the other party in writing ("**Objection Notice**") of any objections that MBTA or Town, as applicable, may have based on its due diligence including, without limitation, those related to title, survey and environmental matters ("**Objections**"). MBTA and Town each shall have two (2) business days after receipt of the Objection Notice to notify the other party ("**Response Notice**") that MBTA or Town, as applicable, (a) will cure such Objections (or specific Objections as identified by the other party) on or before the Closing (as defined below), and the manner in which such Objections shall be cured (which shall be subject to the other party's reasonable approval), provided that the curing party may extend the Closing for such period as shall be required to effect such cure up to thirty (30) days; or (b) elects not to cause all or any specified Objections to be cured. If MBTA or Town, as applicable, fails to provide a Response Notice within such two (2) business day period, such failure to respond shall be deemed to be an election by the non-responding party to not cause the specified Objections to be cured. Each objecting party shall have two (2) business days after receipt of a Response Notice (or if no Response Notice is given two (2) business days after receipt by the non-responding party of the other party's Objection Notice) in which to notify the other party that (i) the objecting party will proceed with the purchase and take title to the MBTA Premises or the Town Premises, as applicable, subject to such Objections as the other party has not agreed to cure (the foregoing with respect to title being the "**Permitted Exceptions**"), or (ii) the objecting party elects to terminate this Agreement. If this Agreement is terminated pursuant to the foregoing provisions of this Section 8, then neither party shall have any further rights or obligations hereunder (except for any obligations of either party pursuant to the other provisions of this Agreement which are intended to survive such termination and except that any tort liability of a party that arose pursuant hereto shall remain). If this Agreement is not so terminated, then, after the expiration of the Due Diligence Period each party shall have rights to object only to matters arising after the date of its respective due diligence examination during the Due Diligence Period. Notwithstanding the foregoing or any other provision to the contrary, MBTA (with respect to the MBTA Premises) and Town (with respect to the Town Premises), shall be required to remove (x) all liens and encumbrances which can be cured by a monetary payment including, without limitation, mechanics' liens, unless created by or on behalf of the other party (y) any existing mortgages and mortgage related documents and (z) those objections which MBTA or Town, as applicable, has agreed to cure, and all of the foregoing described in clauses (x), (y) and (z) shall not be deemed Permitted Exceptions.

9. **Acceptance of Deed**

MBTA or Town shall have the election, at either the original or any extended time for performance, to accept such title as the other party is able to deliver to the MBTA Premises or the Town Premises, as applicable, in its then condition and to fully perform all of its obligations hereunder. The acceptance of a Deed and possession by a party shall be deemed to be full performance and discharge of the parties obligations with respect to the applicable Premises, except with respect to those terms and conditions of this Agreement which expressly survive the Closing.

10. **No Brokers**

Town hereby represents and warrants that it has not dealt with any broker who is entitled to a commission or fee in connection with the conveyance contemplated hereby, and covenants to pay, hold harmless and indemnify MBTA from and against any and all claims for any such commissions or fees. MBTA hereby represents and warrants that it has not dealt with any broker or other entity who is entitled to a commission or fee in connection with the conveyance contemplated hereby other than TRA, whose fee is the sole responsibility of MBTA, and MBTA covenants to pay, hold harmless and indemnify Town from and against any and all claims for any such commissions or fees. The representations, warranties, and agreements contained in this paragraph shall survive the delivery of the deed and/or any expiration or termination of this Agreement.

11. Condition of the Premises; Indemnification and Release

(a) MBTA hereby expressly disclaims any warranties of any nature, express or implied or otherwise with respect to the MBTA Premises, except as expressly set forth herein, including without limitation, anything related to the presence of "oil", "hazardous materials" or "hazardous wastes" as those terms are defined in Massachusetts General Laws Chapter 21E ("**Chapter 21E**"), as from time to time amended, and the regulations promulgated pursuant thereto, the Massachusetts Contingency Plan, 310 CMR 40.0000 et seq. ("**MCP**"), and as further defined in all other applicable state and Federal laws regarding hazardous materials and environmental regulation (collectively, "**Hazardous Materials**") on, in, at, over, under, from, through or associated with the MBTA Premises. Town hereby acknowledges that MBTA is conveying and Town accepts the MBTA Premises in an "as is" condition, including all debris and personal property thereon, and with "all faults" as of the Closing Date, without any warranty or representation by MBTA, its agents or representatives whatsoever relating to the MBTA Premises. Town further acknowledges and confirms that Town is not relying on any representation or inducement which was or may have been made or implied by MBTA or any other party acting on behalf of MBTA (including, without limitation, TRA) with respect to the MBTA Premises, including, without limitation, the fitness of the MBTA Premises for any proposed use, the suitability of the MBTA Premises for any particular purpose.

(b) Town hereby expressly disclaims any warranties of any nature, express or implied or otherwise with respect to the Town Premises, except as expressly set forth herein, including without limitation, anything related to the presence of Hazardous Materials on, in, at, over, under, from, through or associated with the Town Premises. MBTA hereby acknowledges that Town is conveying and MBTA accepts the Town Premises in an "as is" condition, including all debris and personal property thereon, and with "all faults" as of the Closing Date, without any warranty or representation by Town, its agents or representatives whatsoever relating to the Town Premises. MBTA further acknowledges and confirms that MBTA is not relying on any representation or inducement which was or may have been made or implied by Town or any other party acting on behalf of Town with respect to the Town Premises, including, without limitation, the fitness of the Town Premises for any proposed use, the suitability of the Town Premises for any particular purpose.

(c) Upon and after delivery of the MBTA Deed, and to the extent permitted by law, the Town for itself, its successors and assigns, shall indemnify, defend (at the option of the MBTA) and save the MBTA harmless from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' expenses and fees), causes of action, suits, claims, demands or judgments of any nature whatsoever arising from the gross negligence or willful misconduct by the Town, its employees, agents or contractor's on the MBTA Premises including, without limitation, (i) those related to personal

injuries or death and (ii) those related to the release of Hazardous Materials caused by the Town, its employees, agents or contractors on the MBTA Premises.

(d) In addition, Town, for itself and successors and assigns, releases MBTA from any liability because of the condition of the MBTA Premises and because of any present or future negative impacts and shall agree not itself to sue or commence action, claim, counterclaim or cross-claim, or otherwise seek affirmative relief against MBTA arising out of the condition of the MBTA Premises at Closing including, but not limited to, the presence of Hazardous Materials on, in, at, over, under, from, through or associated with the MBTA Premises and (ii) the fact that the MBTA Premises are subject at all times to noise, fumes, odors, electromagnetic fields, lighting, pollution, and vibrations and other negative conditions associated with the operation of the MBTA's transportation system. The foregoing release shall be binding on the Town's successors and assigns and the Town shall insert language in every, deed, lease or occupancy agreement related to the MBTA Premises pursuant to which all grantees, assignees, tenants and occupants of the MBTA Premises agree to be bound by and subject to the foregoing release. This release does not include any claim arising out of the use by the MBTA of the portions of the MBTA Premises that are subject to the easements set forth in Sub-paragraphs 20(c)(i) and (ii) of this agreement.

(e) Any required response action related to the MBTA Premises required by a governmental authority shall be performed by the Town at Town's sole cost and shall be performed in accordance with Chapter 21E, the MCP, and any other applicable statutes and regulations ("**Applicable Laws**"). The foregoing provisions of indemnity and release shall be incorporated into the MBTA Deed and shall run with the MBTA Premises. Town shall insert language in every lease or occupancy agreement related to the MBTA Premises in which all lessees and occupants also agree to the foregoing Release with respect to the MBTA. This sub-paragraph (e) does not include any claim arising out of the use by the MBTA of the portions of the MBTA Premises that are subject to the easements set forth in Sub-paragraphs 20 (c) (i) and (ii) of this Agreement.

(f) In addition, the MBTA, for itself and successors and assigns, releases the Town from any liability because of the condition of the Town Premises and because of any present or future negative impacts and shall agree not itself to sue or commence action, claim, counterclaim or cross-claim, or otherwise seek affirmative relief against the Town arising out of the condition of the Town Premises at Closing including, but not limited to, the presence of Hazardous Materials on, in, at, over, under, from, through or associated with the Town Premises and including the fact that the Town Premises are subject at all times to noise, fumes, odors, electromagnetic fields, lighting, pollution, and vibrations and other negative conditions associated with the operation of the MBTA's transportation system. The foregoing release shall be binding on the MBTA's successors and assigns and the MBTA shall insert language in every, deed, lease or occupancy agreement related to the Town Premises pursuant to which all grantees, assignees, tenants and occupants of the Town Premises agree to be bound by and subject to the foregoing release.

(g) Any required response action related to the Town Premises required by a governmental authority shall be performed by the MBTA at MBTA's sole cost and shall be performed in accordance with Chapter 21E, the MCP, and any other applicable statutes and regulations ("**Applicable Laws**"). The foregoing provisions of indemnity and release shall be incorporated into the Town Deed and shall run with the Town Premises. MBTA shall insert language in every lease or occupancy agreement related to

the Town Premises in which all lessees and occupants also agree to the foregoing Release with respect to the Town.

12. Intentionally omitted

13. Default; Damages

If either party shall fail to fulfill its agreements herein, and such default continues for thirty (30) days after the defaulting party's receipt of a default notice from the other party (or such longer period as may be reasonably required to cure the default provided the defaulting party is diligently pursuing such cure), the complaining party shall be entitled to all rights and remedies available at law and in equity (including, without limitation, specific performance).

In no event will either party be liable to the other for any consequential or indirect damages of any kind whatsoever, arising from the transactions contemplated under this Agreement.

14. Intentionally omitted

15. Notices

Any notice or other communication in connection with this Agreement shall be deemed given when received or upon attempted delivery if delivery is not accepted. Such notices shall be in writing and shall be deemed to have been properly given when delivered by an overnight mail service that electronically tracks deliveries to the correct addressee or by facsimile to the correct addressee with a "Successful Delivery" receipt. Notices to the MBTA shall be given to the General Manager and Transit and Rail Administrator, MBTA, 10 Park Plaza, Boston, MA 02116. In addition, a duplicate notice from the Town shall be sent in the same manner as the notice to MBTA to MBTA's representative, Transit Realty Associates, LLC, at 77 Franklin Street, Boston, MA 02110. Notice the Town shall be given in the same manner as the notice to the MBTA, given to the Town Manager, 1471 Highland Ave, Needham, MA 02492 and a duplicate notice from MBTA shall be sent in the same manner as the notice to the Town to Town Clerk, 1471 Highland Ave., Needham MA 02492. Either party may change the address(es) at which notices are to be received by notice given as set forth above.

16. Authority of Signatory

Town represents and warrants to MBTA that the individual signing this Agreement on behalf of Town is authorized to execute, acknowledge, and deliver this Agreement on behalf of Town and to thereby bind Town to the same. This representation and warranty shall survive the delivery of the Town Deed.

MBTA represents and warrants to Town that the individual signing this Agreement on behalf of MBTA is authorized to execute, acknowledge, and deliver this Agreement on behalf of MBTA and to thereby bind MBTA to the same. This representation and warranty shall survive the delivery of the MBTA Deed.

17. Severability

If any term of this Agreement or the application thereof to any person or circumstance shall, at any time, or to any extent be deemed invalid or unenforceable, the remainder of this Agreement and the

application of such term to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected.

18. No Waiver

No delay or omission on the part of either party in exercising its rights under this Agreement shall constitute a waiver of such right or any other right under this Agreement. Also, no waiver of any such right on one occasion shall be construed as a waiver of it on any other occasion.

19. Entire Agreement; Counterparts

This Agreement is a Massachusetts contract and constitutes the entire agreement between the parties relating to the subject matter hereof, supersedes all prior oral or written offers, negotiations, agreements, understandings, and courses of dealing between the parties relating to the subject matter hereof and is subject to no understandings, conditions, or representations other than those expressly stated herein. This Agreement may only be modified or amended by a writing, which states that it modifies or amends this Agreement, and which is signed by both parties. This Agreement may be executed in duplicate or in duplicate counterpart originals and facsimiles (each of which shall be deemed an original, and all of which shall constitute one and the same instrument) and is to take effect as a sealed instrument.

The parties acknowledge that this transaction is between public entities and therefore complies with the requirements of M.G.L. Chapter 30B.

20. Operation of MBTA Premises Post-Closing.

The provisions of this Section 20 shall survive the Closing.

- (a) From and after the Closing Date, the MBTA shall, at its sole cost and expense, manage (or cause to be managed by a third party management company selected by MBTA, in its sole discretion) the MBTA's Needham Heights Station, which management shall include, without limitation, the collection of commuter parking fees and the maintenance and repair of the commuter parking lots (including, without limitation, snow and ice removal) at said Station.
- (b) (i) From and after the Closing Date, MBTA and Town shall share in revenues from the Needham Heights parking lot as follows. If the parking occupancy at the Needham Heights lot exceeds eighty-five (85) cars per day, the Town shall receive one hundred percent (100%) of the "net parking revenue" above eighty-five (85) cars per day, until such time that the Parking and Access Easement (defined in (c)(i) below) is relocated to the Relocated Easement Area (defined in (c)(i) below), and thereafter the Town shall no longer be entitled to any parking revenue. The eighty-five cars shall include the cars that are allowed to park in the lot under licenses granted by the MBTA.
 - (ii) The term "the net parking revenue" shall mean revenue earned from the use by the general public of the commuter parking spaces on the Town Parcel and the cars that are allowed to park in the lot under licenses granted by the MBTA., less all costs and expenses, fees and taxes incurred by the MBTA in connection with the operation of the commuter parking lot located thereon by or on behalf of the MBTA including, without limitation, all fees paid to any third

party management company and all parking area, walkways, equipment and fixtures maintenance, repair, replacement costs and expenses, snow and ice removal costs and expenses and utilities costs and expenses. The MBTA shall provide supporting documentation regarding net parking revenue upon written request by the Town.

- (c) (i) The MBTA shall reserve in the MBTA Deed a perpetual exclusive easement over the entire MBTA Premises and appurtenant to the MBTA's adjacent Needham Heights Station parcel for (i) use as commuter parking lot containing 229 parking spaces and (ii) pedestrian access between such parking lot and the Needham Heights Station including, without limitation, the right to pave, stripe, reconfigure, construct, install, maintain, repair and replace, from time to time, the parking area, walkways, lighting fixtures, utilities, and any other ancillary fixtures, systems and equipment within the easement area ("**Parking and Access Easement**"), shown on the plan attached hereto as **Exhibit D ("Easement Area")**. The Town shall cooperate with the MBTA in obtaining and installing any utility service required for the operation of such parking area and pedestrian walkways including, without limitation, granting utility easements in, over and/or under the MBTA Premises, provided that any such utility easements on the MBTA Premises and outside of the "**Relocated Easement Area**", shown on the plan attached hereto as **Exhibit D-1** shall not interfere with the Town's proposed Sr. Center project.

(ii) The MBTA acknowledges that the Town intends to construct a building for use as a Town owned senior center on a portion of the MBTA Premises in a location which will not be determined by the Closing Date. Therefore, the MBTA and the Town agree that the Easement Area will need to be relocated on the MBTA Premises and the number of commuter parking spaces reduced to no less than eighty-five (85) spaces, at the Town's option, sole cost and expense, as is reasonably necessary to accommodate the location of such building outside of the Relocated Easement Area (no further relocation of the Easement Area shall be permitted without the MBTA's prior written consent.) The MBTA agrees that the area designated as "**Relocated Easement Area**" on the plan attached hereto as **Exhibit D-1** is an acceptable area for the relocation of the Easement Area and the location of the eighty-five (85) parking spaces. Any such Easement Area relocation shall be effectuated pursuant to an amendment to the Parking and Access Easement reserved in the MBTA Deed, such amendment solely reflecting the Relocated Easement Area. The MBTA Deed shall provide that the Town shall have the right to use the driveways on the Relocated Easement Area solely for the purpose of ingress and egress to and from, and the use of, the Sr. Center.. The Town shall be solely responsible, at its sole cost and expense, for the preparation of the Relocated Easement Area including, without limitation, (x) striping of the parking spaces and driveways as shown on **Exhibit D-1** hereto, (y) installation of light poles and (z) completion of all other work necessary to deliver the Relocated Easement Area to the MBTA, with all improvements thereto as shown on **Exhibit D-1** (collectively, "**Relocation Work**"). In furtherance of the exclusive Parking and Access Easement, the Town agrees that it shall not construct or locate any improvements, fixtures and/or equipment of any kind whatsoever in, on or under the Relocated Easement Area, except for the Relocation Work, without MBTA's prior written consent, which consent the MBTA may grant or withhold in MBAT's sole discretion. Until such time as the Relocation Work is fully completed the MBTA shall continue to have the right to use all of the parking spaces on the MBTA Premises. Upon full completion of the Relocation Work, the aforementioned amendment to the Parking and Access Easement shall be executed by the Town and the MBTA and promptly recorded with the Norfolk County Registry of Deeds, at the sole cost and expense of the Town. The Town shall install signage at all entrances to the MBTA Premises outside of the Relocated Easement Area

indicating that any parking areas on the MBTA Premises and outside of the Relocated Easement Area shall not be used for commuter parking.

The MBTA may from time to time, in its sole discretion, grant to the Town or third parties licenses to use some or all of the parking spaces on the Easement Area and Relocated Easement Area, pursuant to the MBTA's standard form of License or Use and Occupancy Agreement.

The Town shall **(x)** provide the MBTA's representative, Mark Boyle, Assistant General Manager for Development, at MBTA, 10 Park Plaza, Boston, MA 02116, with at least two (2) business days prior notice of all public design and planning meetings and the MBTA shall have the right to attend all such meetings and to have input in such public design and planning process and **(y)** use reasonable efforts to provide Mr. Boyle with telephonic notice of all other planning and design meetings at 617-222-3255. The Town shall, at its sole cost and expense, provide the MBTA with copies of all preliminary and final site plans with respect to the Town's proposed development of the MBTA Premises.

(iii) Upon and after the delivery of the MBTA Deed, and to the extent permitted by law, the MBTA for itself, its successors and assigns, shall indemnify, defend (at the option of the Town) and save the Town harmless from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' expenses and fees), causes of action, suits, claims, demands or judgments of any nature whatsoever arising from the gross negligence or willful misconduct of the MBTA, its employees, agents or contractors on the Easement Area including, without limitation, **(x)** those related to personal injuries or death and **(y)** those related to the release of Hazardous Materials caused by the MBTA, its employees, agents or contractors on the Easement Area.

(d) (i) From and after the Closing Date, the Town shall not undertake any construction activities on the MBTA Premises, or any portion thereof, without the prior written consent of MBTA, which consent may be withheld solely for the reasons set forth in **(d)(ii)** below. MBTA shall endeavor to respond to a request for such consent no later than sixty (60) days after the Town's request therefor and receipt by the MBTA of all the Town's plans and specifications for the subject project. If MBTA has objections to Town's submission of any project, MBTA shall specify such objections by notice to Town, in reasonable detail, and advise Town of the necessary changes to be made in order to obtain MBTA's consent. MBTA shall have an additional thirty (30) days to review Town's resubmissions. Once MBTA has approved any project, the Town shall not make any material modification thereto without MBTA's prior written consent. Town shall also submit to MBTA, at least five (5) business days prior to submission to any governmental authority, copies of all applications for any permits or approvals necessary for the applicable project. The provisions of this Section 20(d) shall not apply to the construction of the proposed Sr. Center project described in (c)(ii) above provided that during its planning and design process, the Town addresses any reasonable concerns the MBTA may have regarding any adverse affects which the MBTA anticipates that such project may have on the use and operation of the MBTA's Mass Transportation Facilities (defined below) or the MBTA's Mass Transportation Activities (defined below) currently located on or about the MBTA Premises.

(ii) MBTA may only withhold consent to any such proposed project, if the MBTA in its sole, but reasonable discretion, determines that all or any portion thereof (including, without limitation, footprint and/or height of any building or other improvement or installation) will unreasonably interfere with MBTA's Mass Transportation Facilities (defined below) or MBTA's Mass

Transportation Activities (defined below) or endanger public safety at its Needham Heights Station or within the Easement Area.

"MBTA's Mass Transportation Facilities" shall mean the commuter rail line, any current or future bus services, the Needham Heights Station, buildings on any MBTA property owned or operated by the MBTA, all adjacent to the MBTA Premises, and any and all roadways, sidewalks, access/egress ways, easements for air and light, entrances, venting structures, tunnels, surface parking, garages, bus stops, passenger pick-up areas, lighting facilities, drainage areas, landscaping and site signage, any improvements, fixtures, utilities or equipment relating to any of the foregoing and any additions to or alterations of any of the foregoing or, in lieu thereof, any replacement of the foregoing (including, but not limited to, MBTA's Mass Transportation Improvements (defined below)), which are located in, on, under or above any property owned or operated by the MBTA (including the Easement Area) and adjacent to the MBTA Premises.

"MBTA's Mass Transportation Activities" shall mean the installation, construction, reconstruction, use, maintenance, repair, inspection, replacement, relocation and/or removal of the MBTA's Mass Transportation Facilities, including the use thereof by MBTA's agents, servants, employees, contractors, invitees, licensees and by commuters using the commuter rail line, bus services, parking areas, walkways, or any other MBTA-approved activity adjacent to the MBTA Premises.

"MBTA's Mass Transportation Improvements" shall mean any improvements adjacent to the MBTA Premises, which MBTA may make in the future with respect to MBTA's Mass Transportation Facilities.

(e) At the Closing, the Town shall grant to the MBTA an easement over certain land owned by the Town located between the Town Premises and Great Plain Avenue designated as the **"Access Easement"** on the plan attached hereto as **Exhibit E ("Access Easement Area")**. The Town intends to widen the roadway layout of Great Plain Avenue to encompass the Access Easement Area, pursuant to a Town Meeting vote to be held in May 2011. Upon the effective date of the Town's acceptance of the widening of Great Plain Avenue to fully encompass the Access Easement Area and thereby causing the Town Parcel to directly abut Great Plain Avenue, at no cost, expense or liability to the MBTA, the above described easement shall terminate. The Town agrees to grant to the MBTA any necessary permits (including any curb cut permits) allowing for the continuation of the current means of ingress and egress between the Town Parcel and Great Plain Avenue as so widened. In the event that such roadway widening does not occur in July 2011 the Town (i) acknowledges that the MBTA may at any time after July 2011 take the fee in the Access Easement Area by eminent domain and the Town hereby waives its right to object to any such taking and (ii) the Town agrees to not seek, and hereby waives any rights to receive, compensation for any such taking.

(f) The MBTA agrees that if the MBTA determines that a parking structure is required for the parking lot on the Town Premises, then the MBTA agrees to participate in a community planning process with the Town.,

(g) The MBTA Premises shall be conveyed to the Town subject to a restriction limiting use thereof for municipal purposes only.

21. Right of First Offer of Upper Hersey Lot

It is agreed between the parties that the MBTA shall not transfer or convey the Town Premises or any part thereof ("**Offer Premises**") without first submitting to the Town an offer to sell the Offer Premises to the Town for its then fair market value (Market Value).

The MBTA shall provide the Town the name of a qualified real estate appraiser who is a member of the Appraisal Institute and carries the designation of MAI and his/her opinion of the Market Value of the Offer Premises.

Within thirty (30) days the Town will accept in writing the named appraiser and his/her determination of the Market Value of the Offer Premises, or shall propose the name of another real estate appraiser with the MAI designation and his/her opinion of the Market Value of the Offer Premises. The MBTA may accept that appraiser and his/her determination of the Market Value.

If the Town does not accept the determination of the Market Value proposed by the MBTA's appraiser and the MBTA does not accept the determination of Market Value proposed by the Town's appraiser, then if the higher opinion of Market Value is greater than the lower opinion of Market Value by ten percent (10%) or less, the average of the two values shall be deemed the Market Value of the Offer Premises.

If the Town does not accept the determination of the Market Value proposed by the MBTA's appraiser and the MBTA does not accept the determination of Market Value proposed by the Town's appraiser, if the higher opinion of Market Value is greater than the lower opinion of Market Value by more than ten percent (10%), the two designated appraisers shall agree upon and name a third qualified MAI appraiser who shall appraise the Offer Premises or portion thereof and determine the Market Value.

Within thirty days of receiving the Market Value determined by this procedure, the Town shall notify the MBTA whether it is exercising its right to purchase the Offer Premises for the Market Value and shall, within a reasonable time, not to exceed forty-five days thereafter, consummate the purchase.

If the Town does not accept the offer within the time required, or having accepted, does not consummate the purchase as set forth herein, or if the Town expressly rejects the offer, the MBTA shall be free to complete the transfer of the Offer Premises to a third party and the Town shall have no further rights under this Section 21.

The cost of each of the appraisers shall be borne by the party designating him/her and the cost of the third appraiser designated by the other two appraisers shall be divided equally between the Town and the MBTA.

If the MBTA shall make and record with said Norfolk Registry of Deeds an affidavit stating **(a)** that the MBTA has given notice to Town in connection with the MBTA's desire to sell the Offer Premises as required by the provisions hereof and **(b)** that the MBTA has not received written notice of acceptance of the offer given by the Town; or that the Town has failed to complete the purchase in accordance with said provisions, then such affidavit shall be conclusive evidence of compliance with the requirements hereof with respect to the MBTA's intent to sell the Offer Premises. It is further understood and agreed that the obligation to offer the Offer Premises is the obligation only of the MBTA and that no subsequent grantee of the Offer Premises in connection with a transfer by them shall be required to see to the carrying out of the terms of this Section 21.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the said parties hereto set their hands and seals on the day and year written below the party's signature

TOWN OF NEEDHAM

By: _____

Signature

John Bulian
Print Name

Chairman, Board of Selectmen

Selectman

Selectman

Selectman

Selectman

Town Manager

Date of Execution: _____

**MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY**

By: _____

Richard A. Davey
General Manager and Rail & Transit
Administrator
Date of Execution: _____

Approved as to Form:

William A. Mitchell, Jr.
General Counsel
Date of Execution: _____

EXHIBIT A
(MBTA Premises Plan)

EXHIBIT A-1
(Town Premises Plan)

EXHIBIT B
(Order of Taking of MBTA Premises)

EXHIBIT B-1
(Town Premises Legal Description)

EXHIBIT C
(MBTA Deed)

**EXHIBIT C-1
(Town Deed)**

EXHIBIT D
(Easement Area Plan)

EXHIBIT D-1
(Relocated Easement Area Plan)

EXHIBIT E
(Access Easement Area Plan (Town Premises))

Board of Selectmen

AGENDA FACT SHEET for 2/15/2011

Agenda Item: **Approve Use and Occupancy Agreement – MBTA #10243, Railroad Properties, Needham, Massachusetts**

Presenter(s): **Kate Fitzpatrick, Town Manager**

1. BRIEF DESCRIPTION OF TOPIC TO BE DISCUSSED:

The Town and the MBTA have reached agreement on terms that will allow for municipal parking in Needham Center in spaces that had previously been reserved for commuter parking. Our evaluation indicates that at this time, there is sufficient capacity at the Needham Heights, Needham Junction, Upper Hersey and Lower Hersey lots to accommodate the commuter parking need. Use of the Needham Center lot for municipal parking will meet demonstrated need for employee ("permit") and retail ("2 hour") parking in Needham Square. The Use and Occupancy Agreement is renewable annually. In the event that additional commuter parking is necessary in the future, the use of the property can be easily converted. The MBTA will continue to maintain the station in Needham Center as a neighborhood station.

2. VOTE REQUIRED BY BOARD OF SELECTMEN: [YES] NO (circle one)

Suggested Motion: That the Board vote to approve the Town Manager's entering into a Use and Occupancy Agreement for use of parking spaces in Needham Center.

3. BACK UP INFORMATION ATTACHED:

- a. Approve Use and Occupancy Agreement – MBTA #10243, Railroad Properties, Needham, Massachusetts

4. SIGN OFF/APPROVAL REQUIRED:

a.	Town Manager	yes	[no]	NA	_____
b.	Town Counsel	yes	[no]	NA	_____
c.	Finance Director	yes	[no]	NA	_____
d.	DPW _____	yes	[no]	NA	_____

Disposition by BOS

Action taken: _____

Present on future Agenda: _____

Refer to/Inform: _____

Report back to BOS on: _____

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
USE AND OCCUPANCY AGREEMENT –MBTA #10243
RAILROAD PROPERTIES
NEEDHAM, MASSACHUSETTS

1. Use and Occupancy Agreement

The Massachusetts Bay Transportation Authority, a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts, established and existing pursuant to Chapter 161A of the Massachusetts General Laws, with a usual place of business at 10 Park Plaza, Boston, Massachusetts (hereinafter referred to as "MBTA"), hereby grants to the Town of Needham (referred to as "OCCUPANT" or "LICENSEE"), Massachusetts, the right and privilege to use and occupy land near the MBTA Needham Center commuter rail road station in, Needham, Massachusetts as shown on Exhibit A attached hereto, and incorporated herein, (hereinafter referred to as the "Premises") for the purposes described in the Scope of Use and Occupancy below. Such use and occupancy may be conducted only during the Term.

2. General Conditions

- 2.1 Date:** February 1, 2011
- 2.2 OCCUPANT:** Town of Needham
- 2.3 Term:** March 1, 2011 to February 28, 2012; except that the MBTA may terminate this Agreement at any time with thirty (30) days written notice.
- 2.4 Occupancy Fee:** \$1,312.50 monthly payable in advance, without demand.
- 2.5 Administrative Fee:** N/A
- 2.6 Premises:** A certain parcel of land, approximately 10,500 square feet located near the MBTA Needham Center commuter rail station, Needham, Massachusetts and shown in Exhibit A attached hereto.
- 2.7 Scope of Use and Occupancy Agreement:**
To use and occupy the Premises solely for purpose of parking, subject to the remainder of this Agreement. No construction or improvements are permitted hereunder without the express written consent of the MBTA, which may include additional terms and conditions. OCCUPANT shall have the right to permit its employees, contractors and agents to use the Premises as permitted hereunder and acting by and through the OCCUPANT, subject to all of the terms and conditions of this License.

OCCUPANT shall have control of the Premises; except that the MBTA may enter the Premises at any time with forty-eight (48) hours notice to OCCUPANT (except in case of emergency when the MBTA shall give whatever notice is feasible.)

OCCUPANT shall operate and maintain the Premises and its installations thereon in a safe manner and immediately notify the MBTA if any problem occurs which may result in a safety hazard. If any unsafe situation should occur as a result of the OCCUPANT's use of the Premises, OCCUPANT will correct the situation by eliminating any safety hazard immediately or, if the situation cannot be reasonably cured immediately, then in such longer time as is reasonably required, and in all such unsafe situations, MBTA Railroad Operations Safety Procedures shall be followed.

2.8 Notices:

MBTA:

Real Estate Department
Massachusetts Bay Transportation Authority
10 Park Plaza, Room 5720
Boston, Massachusetts 02116
Attn: Assistant General Manager for Development

and

MBTA Railroad Operations Department
45 High Street
Boston, Massachusetts 02110
Attn: Director

and

DESIGNATED REPRESENTATIVE:
Transit Realty Associates, LLC
77 Franklin Street, 9th floor
Boston, Massachusetts 02110
Attn: Executive Director

and,

OCCUPANT:

Town Manager
Town of Needham
Town Hall
Needham, MA

3. Consideration

The rights contained in this Agreement are granted for good and valuable consideration, the sufficiency of which is hereby acknowledged.

4. Terms and Conditions of Agreement

This Agreement is subject to the following terms and conditions:

4.1 Scope of Use and Occupancy

(a) Scope of Use and Occupancy

Subject to the terms and conditions in this Agreement, the OCCUPANT, its agents, employees, contractors, subcontractors and/or representatives are hereby granted

the right to enter upon, use and occupy the Premises for the purposes more fully described in Paragraph 2.7.

(b) Utilities

OCCUPANT acknowledges that there may be surface and subsurface utilities on and adjacent to the Premises and agrees to exercise extreme caution in performance of any activity. OCCUPANT shall comply with Massachusetts General Laws, Chapter 82, Section 40 (said statute also known as the "Dig Safe" law) and the regulations promulgated pursuant thereto. Including, but not limited to, the Code of Massachusetts Regulations, more particularly, 220 CMR 99.00 et seq. Any damage to any utilities on or near the Premises caused by OCCUPANT shall be the sole responsibility of OCCUPANT including but not limited to transit utilities, facilities and appurtenances thereto, caused by OCCUPANT shall be the sole responsibility of OCCUPANT. The MBTA, without being under any obligation to do so and without waiving the OCCUPANT's obligation hereunder, may repair any utilities damaged by the OCCUPANT immediately and without notice in case of emergency. In the event the MBTA exercises such right, the OCCUPANT shall pay to the MBTA immediately upon demand all of the MBTA's reasonable cost of performing such repairs plus a fee equal to ten percent of the MBTA's cost of performing such repairs to reimburse the MBTA for its administrative costs.

(c) Subordination to MBTA's Operating Requirements

The activities permitted hereby shall be subordinate to the requirements of the MBTA in maintaining and operating a transportation system and may be stopped or delayed, at any time, in response to each requirement. The MBTA shall not be responsible for any damages incurred by OCCUPANT as a result of any such stoppage or delay. In such event there shall be an equitable reduction in the Occupancy Fee.

(d) Environmental Cooperation

If, as a result of OCCUPANT's activities permitted hereunder, "oil" or "hazardous materials", as those terms are defined in Massachusetts General Laws Chapter 21E ("Chapter 21E") and the regulations promulgated pursuant thereto, the Massachusetts Contingency Plan, 310 CMR 40.0000 et seq. (the "MCP") (collectively, "Hazardous Materials") are discovered on the Premises and pursuant to the remainder of this Agreement, the OCCUPANT is not responsible for the remediation of the Hazardous Materials that were discovered, then OCCUPANT agrees to cooperate with the MBTA in the determination of the party liable for the remediation of the Premises under applicable Federal and/or state law. Such cooperation may include the temporary adjustment of the rights granted to OCCUPANT hereunder. The MBTA shall not be responsible for any damages incurred by the OCCUPANT as a result of said temporary adjustment. In such event there shall be an equitable reduction in the Occupancy Fee.

(e) Remediation Obligation of the OCCUPANT

Whenever OCCUPANT causes and is liable for remediation costs for Hazardous Materials on the Premises (or on MBTA owned land abutting the Premises) pursuant to this Agreement (including, but not limited to, obligations that stem from the indemnifications herein stated below in Section 4.2) or pursuant to State or Federal law, then upon written demand of the MBTA, OCCUPANT shall conduct,

at OCCUPANT's sole cost and expense (or, at the MBTA's election, reimburse the MBTA for the reasonable cost and expense incurred by the MBTA in connection with the MBTA's conduct of), all response actions required by Chapter 21E and the MCP with respect to the Hazardous Materials (including the hiring of a Licensed Site Professional) discovered on the Premises or on MBTA owned land abutting the Premises. Any such response action, if performed by OCCUPANT, shall be performed in accordance with Chapter 21E, the MCP, any other applicable statutes and regulations, and in accordance with plans and specifications approved by the MBTA, shall be completed in a timely manner to the reasonable satisfaction of the MBTA, and shall allow the MBTA to use the Premises, and/or adjacent or contiguous property, for its present use and for any future transportation use. OCCUPANT shall also be responsible 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.

4.2 Indemnification and Release of MBTA

- (a) OCCUPANT shall indemnify, defend (at the option of the MBTA) and save the MBTA, harmless from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' expenses and fees), causes of action, suits, claims, demands or judgments of any nature whatsoever including, without limitation, those related to Hazardous Materials that may be imposed upon, incurred by, or asserted against the MBTA by reason of any of the following occurrences:
- (1) the activities of the OCCUPANT hereunder or the exercise by the OCCUPANT of any rights or privileges hereby granted; or
 - (2) the presence, discovery or revealing of any pre-existing Hazardous Materials on the Premises (or other property of the MBTA adjacent to the Premises) (i) which is a result of the LICENSEE'S activities hereunder; (ii) where said Hazardous Materials are present because of LICENSEE'S previous occupancies of the Premises, whether those occupancies were unauthorized or permitted pursuant to prior agreements between the parties; or (iii) where those pre-existing Hazardous Materials migrated from land now or previously owned, leased, occupied or operated by the LICENSEE; or
 - (3) the discovery of Hazardous Materials arising from the activities of OCCUPANT during the Term hereof (and all extensions thereof) on the Premises or on land owned by the MBTA adjacent to the Premises; or
 - (4) any use, condition or occupation of the Premises or any part thereof by OCCUPANT; or
 - (5) any failure of OCCUPANT to perform or comply with any of the terms hereof, or of any contracts, agreements or restrictions, statutes, laws, ordinances or regulations affecting the activities or any part thereof.

- (b) OCCUPANT has inspected the surface conditions of the Premises and decided that the surface conditions of the Premises are suitable for the uses OCCUPANT contemplates. OCCUPANT assumes all the risk of entry on to the Premises.
- (c) OCCUPANT hereby releases the MBTA from any responsibility for OCCUPANT's losses or damages related to the condition of the Premises, and OCCUPANT covenants and agrees that it will not assert or bring, nor cause any third-party to assert or bring, any claim, demand, lawsuit or cause of action (whether by way of original claim, cross claim, counterclaim, contribution claim, indemnification claim, third-party claim or fourth-party claim, or any other claim) (hereinafter "Claims") against the MBTA, including, without limitation, claims for response actions, response costs, assessments, containment removal and remedial costs, governmental oversight charges, including any overhead or response action costs incurred or assessed by DEP, fines or penalties, permit and annual compliance fees, reasonable attorney and expert fees, natural resource damages, property damages, including diminution in property value claims, and personal injury damages and damages related to a person's death relating to, or arising from, the OCCUPANT'S use of the Premises.
- (d) In clarification of the above release and covenants of defense and indemnification, and not in limitation of them, OCCUPANT shall indemnify, defend (at the option of the MBTA) and save the MBTA harmless from and against any and all liabilities, losses, damages, costs, expenses (including reasonable attorneys' expenses and fees), causes of action, suits, claims, demands or judgments related to the injury, illness or death of any employee of OCCUPANT or of an employee of OCCUPANT's contractors or consultants; except if the "Claim" arose because of the MBTA's grossly negligent or willful misconduct. It shall not be grossly negligent to allow access to the Premises that are in substantially the condition they were in when OCCUPANT inspected the Premises before accepting this Agreement.

OCCUPANT shall obtain a written release of liability similar to the one in this Section 4.2(d) [and including the language of Section 4.2(c)] in favor of the MBTA from each of OCCUPANT's consultants and contractors before they enter onto the Premises for purposes of construction or repair, if such use is allowed.

- (e) OCCUPANT shall be notified, in writing, by the MBTA within a reasonable time from the MBTA's receipt of the assertion of any claim against the MBTA of the assertion of any claim against it that OCCUPANT has agreed to indemnify above (the "Indemnified Claim").

If the MBTA decides to have OCCUPANT defend the Indemnified Claim or handle the response action, the MBTA shall notify OCCUPANT of that decision in writing and the OCCUPANT shall bear the entire cost thereof and shall have sole control of the defense of any Indemnified Claim and all negotiations for its settlement or compromise provided that the MBTA is fully indemnified by the OCCUPANT and provided further that the settlement or compromise shall not include the admission of guilt (or comparable plea), wrongdoing or negligence or the permitting or

imposition of civil or criminal penalties or indictments, or the entering of consent decrees or orders of any kind by the OCCUPANT on behalf of the MBTA or any other action that would materially prejudice the rights of the MBTA without the MBTA's express written approval. The MBTA shall cooperate with the OCCUPANT in the defense of any Indemnified Claim.

If any response action due to the presence of Hazardous Waste or the threat of release of Hazardous Waste onto the Premises (or other property of the MBTA, which abuts the Premises) is performed by OCCUPANT, the response action shall be performed in accordance Section 4.1 (e) herein.

- (f) OCCUPANT shall provide to the MBTA financial assurance in a form satisfactory to the MBTA guaranteeing OCCUPANT's performance of the obligations set forth in Section 4. of this Agreement.

For purposes of this Section 4, the MBTA shall include the MBTA and its directors, officers, employees, agents, successors and assigns.

The provisions of Sections 4.1 and 4.2 shall survive the termination or expiration of this Agreement.

4.3 Insurance

Prior to entry hereunder, OCCUPANT and its consultants and contractors shall provide the MBTA with a certificate or certificates of insurance and shall, during the term hereof, renew and replace any expired certificate, evidencing the insurance of the activities permitted hereunder, and OCCUPANT's covenant of indemnification hereinabove, with companies that are reasonably acceptable to the MBTA, as stated below, in which OCCUPANT and others hereinafter specified are either additional insureds as their interests may appear or named insureds and which provide minimum liability coverage as follows:

- (a) Commercial General Liability Insurance

Insuring the OCCUPANT, the MBTA, the Premises and all activities allowed hereunder as well as OCCUPANT's indemnification obligations contained in Section 4 with minimum liability coverage for personal injury, bodily injury and property damage with limits not less than One Million Dollars (\$1,000,000.00) per occurrence and Three Million Dollars (\$3,000,000.00) in aggregate. Umbrella liability coverage with limits of not less than Five Million Dollars (\$5,000,000.00) covering all work performed must also be provided. Such insurance shall be written on an occurrence basis (as opposed to a claims made basis). These policies shall name the MBTA as an additional insured.

- (b) Worker's Compensation Insurance

Insuring all persons employed by OCCUPANT in connection with any work done on or about the Premises with respect to which claims for death or bodily injury could be asserted against the MBTA or the Premises with limits of liability of not less than those required by Massachusetts General Laws Chapter 152, as amended. The policy shall contain a clause waiving the right of subrogation in favor of the MBTA. Each of OCCUPANT's subcontractors and consultants shall have similar policies covering their employees.

(c) Railroad Protective Liability Insurance - Intentionally Omitted

(d) Automobile Liability Insurance

Automobile liability insurance with limits of not less than One Million Dollars (\$1,000,000.00) covering all owned, non-owned, hired, rented or leased vehicles of OCCUPANT and its consultants and contractors that are used in the activities permitted hereunder.

The required insurance coverages hereinbefore specified shall be placed with insurance companies licensed by the Massachusetts Division of Insurance to do business in the Commonwealth of Massachusetts and having a Best's rating of B+ or better, shall be taken out before the Contract is commenced and be kept in full force and effect throughout the term of the Contract, shall be primary to and non-contributory to any insurance or self-insurance maintained by the MBTA, and shall require that the MBTA be given at least 30 days advance written notice in the event of any cancellation or materially adverse change in coverage. All such required insurance, with the possible exception of Pollution Liability Insurance, if required, shall be written on an occurrence basis form, as opposed to a claim made basis form. The MBTA shall be named as an additional insured under the Commercial General Liability, Automobile Liability, Umbrella Insurance Policies. The Workers' Compensation and Employers' Liability Insurance Policies shall include a waiver of subrogation in favor of the MBTA which precludes these insurers from being able to make any subrogation claims against the MBTA. All such required insurance shall not contain any exclusions for acts of terrorism, and shall fully cover any acts of terrorism, irrespective of whether such acts of terrorism are caused by domestic or foreign terrorists, and irrespective of whether such acts of terrorism are certified or non-certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act of 2002. All such insurance as is required of the Contractor shall be provided by or on behalf of all subcontractors to cover their operations performed. The Contractor shall be held responsible for any modifications, deviations or omissions in the compliance with these requirements by the subcontractors. At the inception date of the Contract and throughout the term of the Contract, the MBTA shall be provided with certificates of insurance evidencing that such insurance policies are in place and provide coverage as required.

4.4 Compliance with Laws

OCCUPANT shall comply with, and shall cause all activity performed on the Premises to comply with all applicable Federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations and ordinances.

OCCUPANT shall also be responsible for obtaining any and all Federal, state, and/or local permits and/or approvals necessary to carry out the activities permitted hereunder.

4.5 Non-Exclusive Use

The MBTA makes no representations or warranty, express or implied, that the OCCUPANT shall have sole or exclusive use of the Premises under this Agreement. In the event other

leases, licenses or easements have been or are granted, the OCCUPANT shall be responsible for coordinating its work and activities with that of other occupants; except that no license or easement shall substantially negatively impact OCCUPANT'S operations. Notwithstanding the preceding, if the MBTA grants a license or easement to install a utility or telecommunications conduit, OCCUPANT'S operations may be temporarily impacted and OCCUPANT may either terminate this Agreement or negotiate a fair adjustment. The MBTA shall not be liable for delays, obstructions, or like occurrences affecting the OCCUPANT, arising out of the work of the MBTA or other occupants.

OCCUPANT's rights herein are granted subject to easements and rights of record.

4.6 No Warranty

OCCUPANT accepts the Premises "As Is" and the MBTA makes no warranty, express or implied, as to the condition of the Premises.

4.7 Termination

At the termination of this Agreement, OCCUPANT agrees to restore the Premises to the condition it was in at the commencement of the term hereof, and to remove all of OCCUPANT's personal property and debris from the Premises. Should OCCUPANT not perform such restoration at the end of the Term, the MBTA may perform any and all necessary restoration at the sole expense of the OCCUPANT. Any personal property not so removed shall, at the option of the MBTA, either become the property of the MBTA or be removed by the MBTA and disposed of without any liability in the MBTA for such removal and disposition, all at the sole expense of OCCUPANT.

4.8 Assignment

OCCUPANT shall not, without the prior written consent of the MBTA, transfer or assign this Agreement or any part hereof. Such consent may be withheld in the sole discretion of the MBTA.

5. Notices

All notices, demands, requests, consents, approvals and other instruments required or permitted to be given pursuant to the terms hereof (hereinafter "Notice"), shall be in writing and shall be deemed to have been properly given when deposited in registered or certified United States mail, postage prepaid, return receipt requested, addressed, as described in Section 2.8 or when delivered by messenger or overnight mail service to the correct addressee. Notice shall be deemed received when actually received or when the proffered Notice has been refused by the Addressee. The signature of an employee, servant or agent of the Addressee shall be determinative on the issue of actual receipt.

OCCUPANT and the MBTA shall, at any time and from time to time, have the right to specify as their proper addresses for purposes of this Agreement any other address or addresses giving fifteen (15) days' written notice thereof to the other party.

6. Default and Termination

(a) Termination for Non-Payment

In the event that OCCUPANT shall neglect or fail to pay the Agreement Fee, Administrative Fee or any other sum herein specified to be paid upon the due date hereunder, OCCUPANT shall be in default and the MBTA shall have the right at any time thereafter to terminate this Agreement by giving OCCUPANT two (2) weeks written notice of the MBTA's decision

to terminate for non-payment ("Termination Notice"). OCCUPANT shall not be entitled to cure any such default by tendering payment after the expiration of the two (2) week grace period which starts upon OCCUPANT or OCCUPANT's servants, agents or employee's receipt of (or refusal to accept) the MBTA's Termination Notice.

(b) Default of Terms and Conditions

OCCUPANT shall also be in default if OCCUPANT:

- (1) fails to perform or observe any of the other covenants or agreements contained in this instrument and on its part to be performed or observed, or
- (2) makes any assignment for the benefit of creditors or files petition for relief under bankruptcy law, or
- (3) has a bankruptcy petition filed against it that is not dismissed within sixty (60) days, or
- (4) has its estate taken by process of law, proceeding in bankruptcy or insolvency or otherwise,

and if such defaults continue after two (2) weeks' written notice given by the MBTA to OCCUPANT to cure, the MBTA may terminate this Agreement by written notice to Occupant and/or deny access to the Premises and expel OCCUPANT and those claiming through or under OCCUPANT and remove OCCUPANT's effects from the Premises without prejudice to any remedies which might otherwise be available for such breach of covenant, and, upon entry as aforesaid, the rights of OCCUPANT created by this Agreement shall terminate. OCCUPANT agrees to pay any expense including reasonable attorneys' fees incurred by the MBTA in enforcing any of OCCUPANT's obligations hereunder.

In the event this Agreement is terminated pursuant to this Paragraph 6, the MBTA shall retain the Agreement Fee as partial damages, without prejudice to its right to claim additional damages as a result of the breach.

Notwithstanding the preceding, if the default is one that threatens the safety of the public or the ability of the MBTA to operate the railroad, then it shall be considered an Emergency Default and if LICENSEE does not effect an immediate cure, the MBTA may terminate the License upon reasonable notice and use self help at the expense of LICENSEE and LICENSEE shall be responsible for such expenses.

7. Holding Over

If OCCUPANT desires to continue to use and occupy the Premises as defined in the Scope of Use and Occupancy after the end of the Term of this Agreement, the resulting Agreement shall be on a month-to-month basis. Such Agreement may be terminated by either Party at any time by providing the other Party with thirty (30) days prior written notice of termination. During such extended term, OCCUPANT shall be bound by all applicable provisions of this Agreement. During the first year of the extended term, OCCUPANT shall pay an Occupancy Fee based on a monthly fee equal to the annualized Occupancy Fee in Section 2.4 increased by the percentage increase in the Consumer Price Index for the Boston Metropolitan Area ("CPI") during the Term. Each year thereafter the monthly fee will increase from the fee paid in the prior year by the percentage increase in the CPI during said prior year. If the MBTA terminates the Agreement in the middle of

an annual term, OCCUPANT shall be entitled to a refund of a proportionate share of the Occupancy Fee it has already paid for the then month.

8. Work in Harmony

OCCUPANT agrees that in any work performed in or about the Premises, it will employ only labor that can work in harmony with all elements of labor being employed by the MBTA.

9. Promotional Material

OCCUPANT shall not, without the prior written approval of the MBTA, refer to the MBTA in any promotional matter or material, including, but not limited to advertising, letterheads, bills, invoices and brochures.

10. Nondiscrimination

With respect to its exercise of all rights and privileges herein granted, OCCUPANT shall undertake affirmative action as required by Federal and state laws, rules and regulations pertinent to Civil Rights and Equal Opportunity unless otherwise exempted therefrom. OCCUPANT agrees that it shall comply with any and all required affirmative action plans submitted pursuant to the directives of any Federal agency and in accordance with applicable Federal Law and applicable state laws, rules and regulations.

OCCUPANT shall not discriminate against any person, employee or applicant for employment because of race, color, creed, national origin, age, sex, sexual orientation, disability or Vietnam era veteran status in its activities at the Premises, including without limitation, the hiring and discharging of employees, the provision or use of services and the selection of suppliers, contractors, or subcontractors.

OCCUPANT shall use reasonable efforts to contact, encourage and utilize minority and female business enterprises in the procurement of materials and service under this Agreement.

11. Taxes

OCCUPANT shall be solely responsible for the payment of any taxes, levies, betterments or assessments, fees or charges, whether in existence on the date hereof or becoming applicable during the Term, which may be assessed against OCCUPANT or the MBTA which are directly attributable to OCCUPANT'S installations in, or use of, the Premises, or any personal property or fixtures of OCCUPANT located thereon (collectively referred to as "Taxes"). OCCUPANT shall pay all Taxes directly to the taxing authority before delinquency and before any fine, interest, or penalty shall become due or be imposed by operation of law for their nonpayment. Such payments shall constitute an additional Agreement Fee hereunder.

OCCUPANT may contest, in good faith for its own account and at its own expense, the validity or amount of any Taxes, provided OCCUPANT shall indemnify the MBTA against any resulting loss, cost and expense. OCCUPANT shall not permit a lien or encumbrance on the Premises by reason of failure to pay any Taxes.

12. No Third Party Beneficiaries

This Agreement shall not be construed to create any third party beneficiary rights in favor of any other parties or any right or privilege for the benefit of any other parties.

13. Entire Agreement

This Agreement contains the entire agreement of the parties hereto with respect to the subject matter hereof, and no representations, inducements, promises, or agreements, oral or otherwise, between the parties hereto with respect to the subject matter hereof not embodied herein shall be of any force or effect.

14. Governing Law

This Agreement shall be construed and interpreted under and pursuant to the laws of the Commonwealth of Massachusetts, and the Massachusetts and Federal conflict of laws provisions shall not be applied if the result is that other than Massachusetts law shall govern.

15. Successors and Assigns

The provisions of this Agreement shall be binding on and inure to the benefit of the parties hereto and their respective successors and assigns.

16. Limitation On Damages

The MBTA shall not be liable to OCCUPANT for any loss of business or any indirect, incidental, special, consequential or exemplary damages or lost profits unless specified herein.

The OCCUPANT shall not be liable to MBTA for any loss of business or any indirect, incidental, special, consequential or exemplary damages or lost profits unless specified herein.

17. Termination of Prior Agreements

The execution of this Agreement shall terminate any prior agreements that may exist between the parties that pertain to the premises subject to this License.

18. Special Provisions

Special Provisions to this Agreement, if any, are attached as Exhibit D hereto and incorporated herein. In any instances where any Special Provision shall conflict with preceding provisions of the Agreement or Exhibits attached hereto; the Special Provisions shall prevail.

19. No Waiver No failure by Licensor to insist upon strict performance of any term, covenant or condition hereof, or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of any such term, covenant or condition. The acceptance by Licensor of any amount less than the full amount due to Licensor hereunder shall not be deemed a waiver by Licensor of its right to collect the full amount due. Licensor may deposit checks or drafts that state "final payment", "payment in full" or the like without being deemed to have waived its right to receive all amounts due hereunder. Any waiver by Licensor of any term, covenant or condition hereof shall not be effective unless such waiver is in writing.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed this ____ day of _____.

OWNER:
MASSACHUSETTS BAY
TRANSPORTATION AUTHORITY

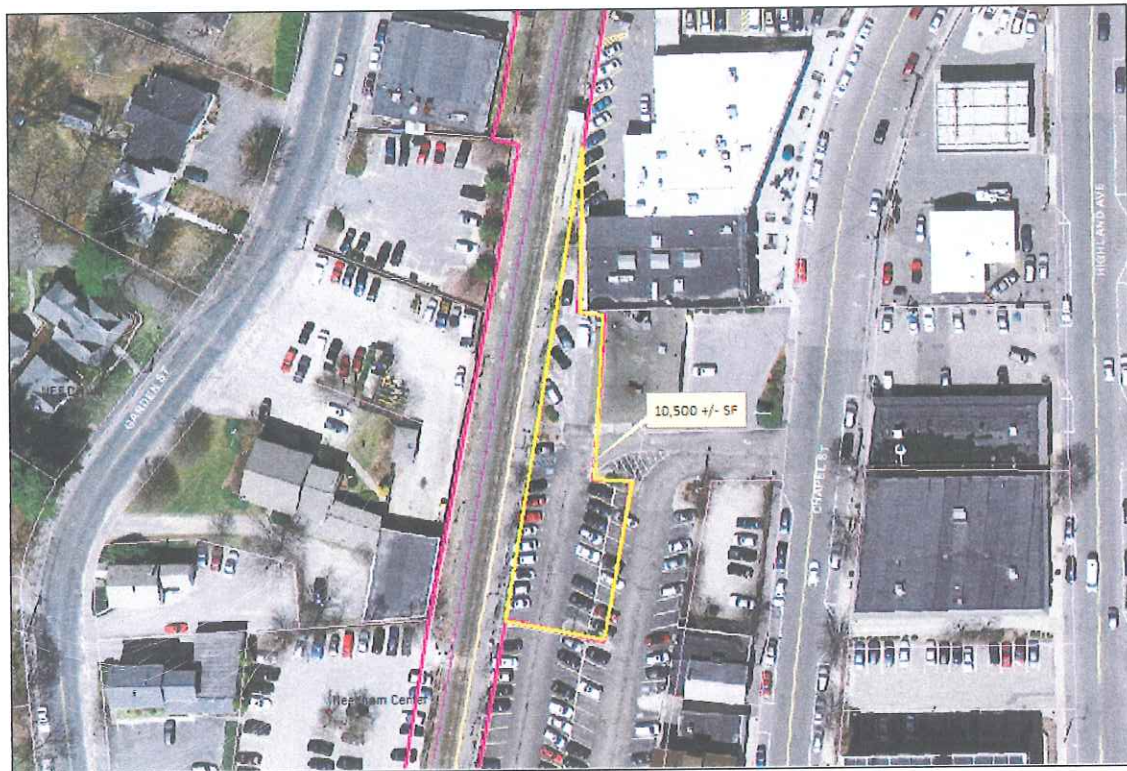
OCCUPANT:

By: _____
Mark E. Boyle
Assistant General Manager for Development

By: _____
Name: _____

Title: _____
(Duly Authorized)

EXHIBIT A
PLAN OF PROPERTY



Needham Center Station Area
Needham, MA

0 25 50 100 150 200
Feet



TRA
Aerial Video, Stillphoto
Georeferenced MapGIS Orthophoto
4/2008 1/4" = 100' Streets 200'
MRTA Parcel Layer
December 6, 2002/RG

EXHIBIT B

SCOPE OF USE AND OCCUPANCY

(1) Use of the Premises.

The Premises shall be used solely for the purposes described in Paragraph 2.7.

OCCUPANT shall have control of the Premises; except that the MBTA may enter the Premises at any time with forty-eight (48) hours notice to OCCUPANT (except in case of emergency when the MBTA shall give whatever notice is feasible.)

OCCUPANT shall operate and maintain the Premises and its installations thereon in a safe manner and immediately notify the MBTA if any problem occurs which may result in a safety hazard. If any unsafe situation should occur as a result of the OCCUPANT's use of the Premises, OCCUPANT will correct the situation by eliminating any safety hazard immediately or, if the situation cannot be reasonably cured immediately, then in such longer time as is reasonably required, and in all such unsafe situations, MBTA Railroad Operations Safety Procedures shall be followed.

(2) Special Requirements for Construction, Repairs and Maintenance of Premises.

In the event that OCCUPANT is entitled to construct anything on the Premises, OCCUPANT shall provide at least ten (10) days prior written notice of its intent to enter the Premises for such purpose to the MBTA'S Railroad Operations Department.

In addition, prior to beginning the construction, installation, repair or maintenance, OCCUPANT shall submit a plan and detailed specifications (including the materials to be used) and the proposed methods of performing the work, or any part thereof (the "Plan") to the MBTA. OCCUPANT shall not begin construction until the Plan has been approved by the MBTA. Such approval may be withheld in the MBTA's sole discretion. The Scope of Use and Occupancy for said construction, repairs, maintenance, operation and/or replacement will be more fully defined in the approved Plan, which approved Plan will automatically be incorporated herein by reference and made part of this Agreement. The OCCUPANT shall also provide the MBTA with a detailed schedule of times when OCCUPANT, its employees, contractors, subcontractors, or agents would like to be on the Premises to undertake the Scope of Use and Occupancy (the "Access Plan"). The MBTA must have full power to make a final determination of when OCCUPANT may be on the Premises as it is necessary to coordinate the work of all those desiring or having the right to access to the Premises.

Unless entry is made pursuant to an Access Plan approved by the MBTA, OCCUPANT agrees to give each time it desires entry, at least seven (7) days' prior written notification to the MBTA (except in cases of emergency when notice shall be given to the MBTA as quickly as possible) of its need to access the Premises for all work to be performed under this Agreement by contacting the MBTA Subway Operations Department, of its desire for access. OCCUPANT understands that the more notice given to the MBTA, the more likely it will be that OCCUPANT can gain access at the times requested. OCCUPANT shall present evidence of the required insurance coverage before each entry. In the case of an emergency, OCCUPANT shall as soon as possible contact the MBTA Railroad Operations Department.

No activities permitted herein may be performed by OCCUPANT except as approved in writing by the MBTA; and no method of repair, maintenance, or construction shall be used by OCCUPANT except with prior written approvals or written approvals received in the field from the MBTA's representatives at the time the work is performed.

If at any time during the work of repairs and maintenance, the MBTA should, in its sole and absolute discretion, deem flagmen, watchmen, communications/signaling personnel, electric traction personnel, inspectors assigned to construction crews, and/or other measures, including but not limited to train re-routing, desirable or necessary to protect its operations, its property or its employees or other persons on or near the Premises, the MBTA shall upon notice to OCCUPANT (where such notice is feasible) have the right to place such personnel, including personnel of the MBTA's agents or to take such measures, at the sole cost and expense of OCCUPANT. Such cost and expense shall include the current wages and fringe benefits due and owing to such personnel in and for the performance of such measures. OCCUPANT hereby covenants and agrees to bear the full cost and expense thereof and to reimburse the MBTA within thirty (30) days of receiving an itemized, written invoice for such reimbursement. The MBTA's failure to furnish such personnel or take such measures shall not relieve OCCUPANT of any obligation or liability it might otherwise have assumed, and shall not give rise to any liability to OCCUPANT on the part of the MBTA. Upon being notified that the personnel or measures referred to in the first sentence of this Paragraph have been deemed desirable or necessary by the MBTA, OCCUPANT shall not commence or continue construction or repair measures, as the case may be, unless and until such personnel or measures are in place.

If OCCUPANT shall deem any requirement for flagging or the like by the MBTA or one of their agents for supervision of the activity hereunder as unreasonable, OCCUPANT shall nevertheless pay for such flagging and the like, but shall take exception in writing thereto as an unreasonable requirement in each instance. The parties agree to review such exceptions at the times of billings for such services and attempt to adjust them as the MBTA may deem appropriate. This reimbursement is in addition to the Agreement Fee and Administrative Fee required hereunder.

OCCUPANT shall comply with the MBTA Special Instructions, April 2003 attached hereto as Exhibit C and made a part of this Use and Occupancy Agreement, all of which documents are incorporated by reference herein and made a part of this Use and Occupancy Agreement.

(3) Other Uses of the Premises.

If other uses are permitted herein, then OCCUPANT shall either (a) follow the requirements in Section (2) above, or (b) meet all requirements of the MBTA to place barriers between the Premises and the Right of Way.