August 2, 2018

His Excellency Charles D. Baker
Governor of the Commonwealth
State House
Boston, MA 02133

Re: H. 4868, Sect. 10 (amending H. 4732) and M.G.L. Ch. 40, Sect. 54A

Dear Governor Baker:

I write on behalf of the Real Estate Bar Association for Massachusetts (REBA), an organization representing over 2,500 lawyers practicing in all areas of real estate law. REBA urges your approval of legislation to amend M.G.L. Ch. 40, Sect. 54A, as appearing in the above-captioned bill.

We applaud Rep. Joseph Wagner and the other legislators identified below, without whose advocacy this legislation would not have passed. We also applaud your Department of Transportation for recognizing the importance of these issues to development and financing of properties affected by this statute. REBA has been advocating for revisions in this statute since before 2005.

The legislation seeks to clarify this 1973 statute, which requires written consent by the then Executive Office of Transportation and Construction, after a hearing, as a precondition to the issuance of any municipal building permit for construction of any kind on land formerly used at any time by a railroad corporation as a right of way or on "property appurtenant to" a former railroad right of way. The Department of Transportation (MassDOT) is the agency now charged with implementation of the statute. Many municipal building departments are not aware of this statute. Different administrations at MassDOT have construed its provisions in different ways. REBA members are often required to give opinions to property owners and lenders relative to the applicability of this improvidently drafted statute.

For history, this statute was passed in the wake of the financial collapse of major railroads and railroad service in the northeast in the 1960's. The decade saw many railroads in financial trouble as well as a number of mergers. This culminated in the collapse in 1970 of the newly created Penn Central Railroad giant. Realizing the severity of the situation, the Federal government stepped in and set up the Consolidated Rail Corporation, which comprised the skeletons of several bankrupt Northeastern carriers, to begin operations in 1976. With Federal backing, Conrail began to slowly pull out of the red ink, and by the late 1980s was a profitable railroad after thousands of miles of excess trackage were abandoned or upgraded. Also, Amtrak was created to organize a chaotic system from the remnants of the private freight railroads' passenger operations.

Chapter 40, sec. 54A was one of two statutes, the other one now designated as M.G.L. c. 161C, sec.7, that were intended to preserve rights of way for future transportation needs. Under chapter 161C, sec.7 MassDOT, or its designee, has a right of first refusal if any railroad company wishes to sell, transfer or otherwise dispose of railroad rights-of-way or related facilities to another party. This right of first refusal is clear and easily understood by all real estate conveyancers.

On the other hand, chapter 40, sec. 54A was improvidently drafted. Under its terms it applies to any lands formerly used as a railroad right-of-way, and any property appurtenant thereto, if ever used by any railroad company in the commonwealth. The standard 50-year title examination may not reveal the existence of this restriction that affects the ability of a landowner to use his or her property. Even if the Commonwealth has no desire to utilize the land for transit purposes, that may not be ascertainable. We do not think that the statute was intended to apply to the vast acreage of railroad yards in South Boston, Somerville, West Cambridge, Worcester, Greenfield, to name a few. The customary 50-year title search generally would not identify railroad land deeded out during the Depression or earlier.

The inclusion of "any property appurtenant" to lands used as a right of way is too vague, and may encompass property and facilities not even within, or in proximity to, the right of way. In Woburn there are former woodlots that belonged to the Boston and Lowell Railroad in the days when locomotives burned wood. These lots were sold in the 1860's, but they are still technically subject to the statute. During a 50-year title search, even assuming a recorded plan shows the former right of way, how would the examiner know if other property was appurtenant to a right of way?

The statute would apply each time a property turned over to another potential owner. With the passage of time, the "property appurtenant" provision in most cases has come to serve no useful public purpose. If the Commonwealth declines to consent to the issuance of a building permit, the land owner has a right to be compensated, provided he purchased the land prior to January 1, 1976. If he purchased after that date, he may be out of luck. A constitutional challenge alleging an unlawful taking of property would be likely, although it is not clear that it would be successful. That may be the only recourse for the owner, since the Supreme Judicial Court held that the statute imposes a "restriction on the use of the property, but it does not affect the owner's title to the property. . . . The existence of the statutory restriction, therefore, does not give rise to coverage under [a title insurance] policy." Somerset Savings Bank vs. Chicago Title Insurance Company, 420 Mass. 422 (1995.)

The pending legislation would clarify the statute so that land that was not used as a railroad right of way would be excluded from its terms. The clause that refers to other property "appurtenant thereto" would be eliminated. The bill also clarifies that the statute includes any right of way over which the railroad had an easement to use the land. The bill would retain the required consent by MassDOT to issuance of a building permit on former railroad land and it would give MassDOT discretion to determine when a public hearing is required.

If you or your staff require further information, please contact our legislative counsel, Edward J. Smith, at (978) 590-5308 or at ejs@ejsmithrelaw.com.

Thank you for your consideration of our comments.

Sincerely,

Peter Wittenborg

Cc: Senator Joseph A. Boncore
Senator Eric P. Lesser
Representative William M. Straus
Representative Joseph F. Wagner
Stephanie Pollack, *Secretary of Transportation*
David I. Begelfer, *CEO*, NAIOP Massachusetts