

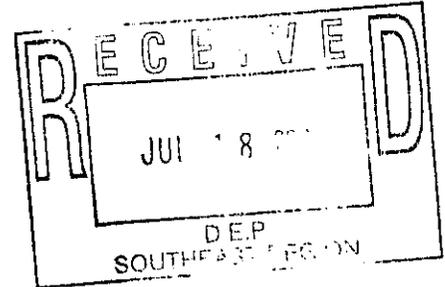


**KOPELMAN AND PAIGE, P.C.**  
*The Leader in Municipal Law*

101 Arch Street  
Boston, MA 02110  
T: 617.556.0007  
F: 617.654.1735  
www.k-plaw.com

July 17, 2008

**Mark R. Reich**  
mreich@k-plaw.com



Mr. Gerard M. R. Martin  
Chief  
Site Management & Enforcement Section  
Department of Environmental Protection  
20 Riverside Drive  
Lakeville, MA 02347

Re: Notice of Noncompliance – RTN 4-3024519  
(Town of Holbrook)

Dear Mr. Martin:

I am in receipt of the Notice of Noncompliance dated May 5, 2008 directed to the Town of Holbrook regarding the property located at 3 Phillips Road in the Town. Town has acquired title to the property located at 3 Philips Road (the “Property”) through the tax taking process. The Property was previously owned by Holbrook Chemical Corporation, which apparently abandoned the Property. A portion of the Property is currently occupied by Falvey Steel Castings, Inc. Nangle Consulting Associates, Inc., acting on behalf of Falvey, undertook an environmental assessment of the property, including sampling from test borings and monitoring wells. This sampling indicated certain exceedances, resulting in a reporting to the Massachusetts Department of Environmental Protection (the “DEP”). It is my understanding that Falvey has been deemed a Potentially Responsible Party (“PRP”) by the DEP.

The Notice of Noncompliance states that DEP records indicate that the Town is a PRP for the release at the Property. Please note that, as discussed above, the Town holds title to the Property through the tax title process and therefore may benefit from the statutory exemption from liability for municipalities which acquire property due to non-payment of taxes. Therefore, given the manner by which the Town acquired the Property and the manner in which the Town is managing the property, the issuance of a Notice of Noncompliance to the Town is not appropriate.

As you are aware, G.L. c. 21E, § 5 provides that owners and operators of sites can be held liable for releases or threats of release of oil and/or hazardous materials from or at those sites. The terms “owner” and “operator” are defined in G.L. c. 21E, § 2, which section also includes exemptions from the definition. Of particular interest in this regard are the provisions of G.L. c. 21E, § 2(d) which provide as follows:

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(d) A city or town shall not be deemed an owner or operator if all of the following requirements are met:

(1) The city or town has purchased or taken the site for nonpayment of taxes under section forty-three or fifty-three or chapter sixty, respectively or has acquired an interest in the site by fee, easement, lease, license or otherwise, from the Massachusetts Bay Transportation Authority for purposes of the installation, operation, maintenance and use of a rail-trail, defined as a property converted from former use as a railroad right-of-way to a revitalized use as a publicly owned, improved and maintained corridor for bicycle, pedestrian, and other non-motorized public transportation, recreation and associated purposes.

(2) No act of the city or town, or of its employees or agents, causes or contributes to the release or threat of release or causes the release or threat of release to become worse than it otherwise would have been.

(3) After acquiring title to or commencing control or management of the site or vessel, the city or town satisfies all of the following conditions:

(A) the city or town notifies the department immediately upon obtaining knowledge of a release or threat of release for which notification is required pursuant to, and in compliance with, section seven or regulations promulgated pursuant thereto;

(B) the city or town provides reasonable access to the site or vessel to employees, agents, and contractors of the department to conduct response actions, and to other persons intending to conduct necessary response actions;

(C) the city or town undertakes reasonable steps to (i) prevent the exposure of persons to oil or hazardous materials by fencing, paving, installing geo-textile membrane, or otherwise suitably preventing access to the site or vessel or to the oil or hazardous materials present at the site (ii) contain the further release or threat of release of oil or hazardous materials from a structure or container;

(D) if there is significant evidence of an imminent hazard to public health, safety, welfare, or the environment from oil or hazardous materials at or from the site or vessel, the city or town takes action to control the potential for health damage, human exposure, safety hazards, and environmental harm through appropriate short term measures;

(E) if the city or town elects to voluntarily undertake a response action or portion of a response action at a site or vessel, the city or town conducts such response action in compliance with the requirements of this chapter and the Massachusetts contingency plan; and

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(F) the city or town acts diligently to sell or otherwise divest itself of ownership or possession of the site or vessel or, in the case of a site acquired from the Massachusetts Bay Transportation Authority for purposes of the installation, operation, maintenance and use of a rail-trail, the city or town acts diligently to develop the rail-trail for its intended purpose.

Whether the city or town is acting or has acted diligently to sell or otherwise divest itself of ownership or possession of the site or vessel shall be determined by considering the same criteria applicable to secured lenders set forth in subclause (iii) of subparagraph (F) of clause (5) of paragraph (c). Whether the city or town is acting or has acted diligently to develop the rail-trail for its intended purpose shall be determined by considering all pertinent circumstances of municipal financing, bidding, and construction of the rail-trail project, and of the availability of and rules governing the applicable state or federal funding program therefor, in light of the discovery of the release or threat of release of oil or hazardous materials at issue.

A city or town which takes any action referred to in clause (3) shall not be deemed an owner or operator solely because said city or town took such action.

A city or town which meets all of the requirements set forth in the provisions of this paragraph shall be excluded from the definition of owner or operator only with respect to releases and threats of release that first begin to occur before the city or town acquires ownership or possession. Notwithstanding any other provision of this definition, a city or town shall be deemed an owner or operator with respect to any release or threat of release that first begins to occur at or from the site or vessel during the time that the city or town has ownership or possession of it for any purpose.

In my opinion, this statutory exemption is available to the Town with regard to its interest in the Property. The Property is currently held by the Town as a result of a Judgment in Tax Lien Case entered by the Land Court as a result of the default of the former property owner in the underlying tax lien conversion action. Thus, the Town has "taken the site for nonpayment of taxes" as contemplated by G.L. c. 21E, § 2(d) as cited above. Therefore, the Town has met the first threshold for applicability of the exemption from liability. The Town has taken no action at the Property which would cause or contribute to a release of oil or hazardous material or to make worse the existing release, satisfying the second requirement for the exemption. Thus, the Town is entitled to an exemption from liability pursuant to the provisions of G.L. c. 21E, § 2(d) provided that it takes the steps required by the statute to maintain that entitlement.

The provisions of G.L. c. 21E, § 2(d)(3) outline requirements which must be met for the Town to retain the exemption from liability with regard to property obtained for non-payment of taxes. The Town is required to notify the DEP immediately upon obtaining knowledge of a release

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or threat of release for which notification is required. DEP received notice that a release occurred at the site, resulting in the naming of Falvey as a responsible party. Therefore, the notice requirement has been satisfied

The Town is obligated to take reasonable steps to prevent exposure of persons to the hazardous materials at the property, including the erecting of fences or installation of paving or membranes, and to contain further releases. The location of the Property limits access, and there has been no improper access to the Property. There is no evidence to suggest that any persons have been exposed to hazardous materials at the Property.

A major component of the Town's exemption from liability is the obligation to "diligently to sell or otherwise divest itself of ownership or possession of the site." This provision of the statute does not require the Town to sell the Property outright, but plainly allows the Town to otherwise divest itself of ownership or possession. It is a well-settled principle of statutory construction that words that appear unambiguous must be given their plain and usual meaning. Garrison v. Merced, 33 Mass. App. Ct. 116, 118 (1992). The statute unambiguously allows the Town to sell or otherwise divest itself of ownership or possession of the Property and maintain its liability exemption. To read the statute otherwise so as to restrict its applicability only to efforts to sell contaminated tax title parcels would violate the principles of statutory construction and render a portion of the statute meaningless. See, e.g. Adamowicz v. Town of Ipswich, 395 Mass. 757, 761 (1985) ("Nor do we interpret a statute so as to render it or any portion of it meaningless."). Had the intent of the statute been to require sale of such contaminated parcels, the additional language with respect to divestiture of possession would not have been included.

The Town of Holbrook is diligently seeking to divest itself of possession of the Property through a long term lease to an entity which will undertake the remediation of the Property and make productive use of the property during the period of the lease. Through the lease, the Town will retain a level of control as to the future permanent disposition of this property while ensuring that public health and safety are protected in a manner consistent with the intentions of the statutory exemption provided under the provisions of G.L. c. 21E, § 2(d)(3). The Town has obtained an appraisal of the Property which demonstrates that, based upon the significant presence of contamination, the Property is valued at one dollar. This appraisal included the understanding that any subsequent user of the Property may become an operator and would certainly, under any agreement with the Town, become responsible for the remediation of the Property. This appraisal was reviewed and accepted by the Office of the Inspector General in determining that the value of the Property did not meet the threshold for undertaking abiding process for its disposition by the Town.

Based upon the clear language of the statute, the Town may not be deemed an owner or operator of the property and is not subject to liability for its remediation. The Town has diligently

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undertaken the process of negotiating a lease with a party that will return the Property to active and productive use while also undertaking the remediation of the Property in accordance with the requirements of the Massachusetts Contingency Plan. Thus, the Town has taken all of the statutory steps required to maintain its exemption from liability for the remediation of the Property. The Town is therefore not a responsible party and so should not be subject to a Notice of Noncompliance.

Please contact me if you have any further questions regarding this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mark R. Reich", written in a cursive style.

Mark R. Reich

MRR/dbl

cc: Board of Selectmen

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