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November 27, 1978

The Honorable City Council
City Hall
Cambridge, Massachusetts

RE: Red Line Extension

Dear Councillors:

Mr. Russell B. Higley, City Solicitor, has informally advised you that "based upon the present documentation, there is little likelihood of success" in court on three of the several claims raised in the complaint filed by the Red Line Alert challenging the Red Line Extension as it is presently being constructed. As an attorney working in the field of environmental law, with experience in the application of the National Environmental Policy Act (NEPA) to major projects, I am not nearly as conservative in my assessment of the chances of success, on these issues and on other claims not reviewed by Mr. Higley.

I offer the following observations for your consideration. Of course I respect Mr. Higley and I enjoy working with him to press our concerns and our questions with the MBTA and UMTA in Washington. But I was so surprised by his emphatic pessimism "out of the blue", coupled with his written advice on a question not asked by the City Council that I wanted to share with you the results of our detailed research. Also, I know Mr. Higley will take these thoughts in the spirit they are offered: additional input for consideration as our efforts continue.

1. Mr. Higley's opinion is qualified, resting only upon "present documentation". The plaintiffs are perfecting their claims, and will add whatever affidavits and documentation are necessary to substantiate their request for a preliminary or permanent injunction against all or individual components of the Red Line Extension. We look forward to working with the City of Cambridge toward this end.
2. The fact that the U.S. District Court denied the plaintiffs' request for a temporary restraining order to stop all construction-related activities is no indication of the plaintiffs' likelihood of success at a full court hearing on a preliminary or permanent injunction. The plaintiffs filed their motion for a temporary restraining order in the morning of October 25, 1978, after learning a short time previously that the MBTA intended to award the construction contract for the tunnel between Harvard Square and Porter Square on that date. A major purpose of the request for a temporary restraining order was to prevent the awarding

and signing of that contract. A court hearing on the plaintiffs' request was held about four hours after the complaint and affidavits were filed and two hours after the MBTA had already awarded the contract. The presiding judge, the Hon. A. David Mazzone, acknowledged in court that he had not had time to even read all of the complaint and affidavits, because of the unusual "emergency" nature of the relief requested. The judge indicated also that he thought the concerns of the City of Cambridge had been addressed sufficiently and in good faith by the MBTA.

At a hearing on a preliminary or permanent injunction, the plaintiffs' claims will be substantiated fully, and the court will have adequate time to research the issues raised. If the City of Cambridge joins the suit, it will be clear to the court that the City's concerns have not been addressed sufficiently and in good faith by the MBTA. The likelihood of success on the merits will be increased greatly.

3. Mr. Higley's analysis is restricted to only three of the many issues raised in the complaint: the change of Alewife from a way station to the project terminus; the change of construction method for the Harvard Square-Porter Square segment from a shallow-bore tunnel using a tunnel boring machine to a deep-bore tunnel with blasting; and the change in use of Russell Field from minor use for six to nine months to that of a major construction staging area for at least five years.

These are indeed major concerns, but Mr. Higley did not address the other issues raised, all of which are well-founded and supportable under NEPA, the Department of Transportation Act and the Urban Mass Transportation Act:

A) The need for a supplemental Environmental Impact Statement (EIS) analyzing the many substantial changes in the scope and nature of the impacts originally described in the EIS. Many of these significant impacts have not been considered at all, or were superficially dismissed in the EIS, including disruption of traffic; impacts on residences and businesses; impacts of truck traffic on Massachusetts Avenue hauling excavated material, resulting in approximately one truck every four minutes, 16 hours per day, 6 days per week for about two years; and the use of a site on the corner of Massachusetts Avenue and Garfield Street as a major construction staging area, instead of only the location of a vent shaft. (Complaint, Count I);

B) The need for a supplemental EIS considering the cumulative impact of the construction of the Alewife Garage/Terminus and the Massachusetts Department of Public Works roadway improvement projects in the Metropolitan District Commission's Alewife Reservation and Little River area. NEPA and the regulations of the United States Department of Transportation (U.S. DOT) require a unified, comprehensive environmental impact analysis totally lacking in this EIS (Complaint, Count II);

C) The need for a supplemental EIS analyzing the impacts of depositing excavated material at the City dump, as well as possible damage to the area economy and environment that will be caused by trucks and other

construction-related traffic on Massachusetts Avenue and adjacent streets. Again, these impacts were completely ignored in the EIS, in violation of the most basic principles of NEPA (Complaint, Count III).

4. As for the three issues that Mr. Higley does analyze, I believe that his conclusions are incorrect:

A) Alewife Terminus

Mr. Higley states that the impacts of an Alewife terminus are addressed on the following pages of the EIS: Chapter II, pp. 44-49; Chapter VI, pp. 26-31; and Chapter IX, pp. 28-45. The actual discussion of the Alewife terminus is not that extensive. Even where the possibility of an Alewife terminus is mentioned, it is dismissed in the EIS itself, and there certainly is no comprehensive analysis of its impacts, as required by NEPA. The treatment of the Alewife terminus in the EIS amounts to nothing more than a superficial discussion of a rejected alternative.

Chapter II, pp. 44-49, of the EIS presents nothing more than ridership and parking demand estimates for several alternative terminals, including Alewife. In no way is this an environmental impact analysis. Chapter VI, pp. 26-28, adds some data on daily inbound boardings and feeder bus requirements for alternative termini, including Alewife, concluding only that "an Alewife terminal would double the number of buses required to meet peak-hour demands." Chapter VI, pp. 29-31, contains a limited discussion of park-and-ride excess demands and diversions, suggesting only that an Alewife terminus would result in enormous congestion, with approximately 2,000 vehicles at the station during peak hours.

The Alewife terminus is considered for the last time in Chapter IX of the EIS, at pp. 31-34. Based upon all data presented earlier, the Alewife terminus option is judged to be not acceptable because it "would result in the most serious congestion problem of any of the options discussed in the chapter" (EIS IX-32).

Nowhere in the EIS is there any discussion of the impact of an Alewife terminus on air pollution, or the sensitive wetland and open space areas of the Alewife Brook Reservation. Indeed, the U.S. Environmental Protection Agency (EPA) therefore classified the draft EIS as "incomplete" until these impacts, as well as others discussed above, were addressed (EIS XII-2,3). Against the advice of EPA, they were not addressed in the final EIS.

B) Method of Construction

Mr. Higley states that the deep-bore alignment was "recommended in the EIS as shown on figure 11-1B of Chapter II and described on page 2 of Chapter IV". He also states that the choice of tunneling methods was "addressed and left open on page 6 of Chapter IV".

Actually, the EIS excerpt cited by Mr. Higley makes it clear that all the EIS is really saying is that tunnel-boring machines or "conventional methods" would be used to tunnel the one-quarter mile from Garfield Street to below Porter Square. Nowhere in the EIS is it contemplated that there would be blasting or even tunneling through rock for the entire length of the segment from Harvard Square to Porter Square. Nowhere is it explained what "conventional methods" means, so it cannot be said that there was full disclosure of possible construction methods. Also, at page II-91 of the EIS, a tunnel through rock is rejected; "A tunnel completely within the rock was not considered feasible after the initial borings showed bedrock to be as much as 80 feet deep".

At the very least, NEPA requires a full disclosure and good-faith analysis of the major impacts of the Red Line Extension. There is no doubt under law that there must be a discussion of the project alignment and methods of construction. There has been no such discussion in this EIS.

C) Russell Field

Mr. Higley cites page 145 of Chapter II of the EIS, which addresses the possibility of the MBTA using Russell Field as a staging area if an agreement could be reached with the City of Cambridge. Even if the City and the MBTA reach a final agreement on the use of Russell Field, that is not enough to satisfy the strict requirements of NEPA, the Department of Transportation Act and the Urban Mass Transportation Act. The EIS violates all three of these laws.

The EIS contemplates using about one-fifth of Russell Field for a period of six to nine months (EIS II-143). The citation used by Mr. Higley is to a single sentence in the EIS saying that all of Russell Field might be used if it could be filled. That possibility is dismissed, because it would be illegal to so fill a floodplain area. The alternative of using all of Russell Field therefore was rejected, although the matter was kept open in case some agreement with the City could be reached.

Now, by agreement with the City, the MBTA proposes to use all of Russell Field for a major construction staging area for at least five years. The EIS never considered the impacts of this significant change in use. At most, the EIS contemplates that at some point in the future the use of Russell Field might change. That is what happened, and it is precisely this kind of change that warrants a supplemental EIS under established NEPA principles. Even if this arrangement is agreeable to, or benefits, the City of Cambridge, there is no doubt that the impact of the loss of Russell Field as a recreational facility must be assessed by the project sponsors. The agreement between the City and the MBTA does not suspend NEPA requirements and the City has not by agreement with the MBTA given away its rights to get the study it is

entitled to.

The use of Russell Field in a manner totally inconsistent with the use described in the EIS also violates Section 4(f) of the Department of Transportation Act (49 U.S.C. Section 1653(f)) and Section 1610 of the Urban Mass Transportation Act (49 U.S.C. Section 1610). Both statutes require that the U.S. Secretary of Transportation make written findings that no feasible and prudent alternative exists to the proposed use of the park or recreational land, and that all planning has been done to minimize the impacts of intended use. Without these specific findings, the MBTA cannot use Russell Field as it now proposes. There have been no written determinations by the U.S. Secretary of Transportation for the proposed use of Russell Field. The federal statutes are strictly enforced by the courts and they are being violated in this case.

In conclusion, I suggest that the fundamental limitation in Mr. Higley's analysis is that mere mention of any activity in an EIS does not satisfy the rigorous consideration of impacts required by the federal statutes. In many cases, significant impacts were not mentioned at all in this EIS. Required written findings were not made. The fact is ignored that this is now a different project from what was originally proposed, studied and justified. For these reasons, there is a strong likelihood of success in court on the issues raised by the plaintiffs.

We appreciate the chance to continue working with the City on this and we know our research will be taken as a helpful supplement to the work Mr. Higley has already done.

Sincerely,



Gregor I. McGregor

GIMcG/abm

cc: Russell Higley, Esq.

cc: All members, City Council

10.

S-504

Comm. from Gregor I. McGregor, Esq. re:
complaint filed by the Red Line Alert
challenging the Red Line Extension.

In City Council,
December 4, 1978

12/4/78
Placed on File