

# SENATE . . . . . No. 970

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## The Commonwealth of Massachusetts

PRESENTED BY:

***Michael F. Rush***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to promote worksite safety and restoration of local roads.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Michael F. Rush</i>	<i>Norfolk and Suffolk</i>
<i>Mayor Thomas M. Menino</i>	<i>Boston City Hall One City Hall Square Boston, MA 02201</i>
<i>Carlo Basile</i>	<i>1st Suffolk</i>
<i>Christopher G. Fallon</i>	<i>33rd Middlesex</i>
<i>Thomas J. Calter</i>	<i>12th Plymouth</i>
<i>Russell E. Holmes</i>	<i>6th Suffolk</i>

# SENATE . . . . . No. 970

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By Mr. Rush, a petition (accompanied by bill, Senate, No. 970) of Michael F. Rush, Mayor Thomas M. Menino, Carlo Basile, Christopher G. Fallon and other members of the General Court for legislation to promote worksite safety and restoration of local roads. Municipalities and Regional Government.

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## The Commonwealth of Massachusetts

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In the Year Two Thousand Thirteen  
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An Act to promote worksite safety and restoration of local roads.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Chapter 40 of the General Laws, as appearing in the 2010 Official Edition,  
2 is hereby amended by inserting after section 21D the following section:-

3           Section 21D1/2. (a) When any city or town, or board, commission, or officer thereof  
4 having control of the public ways, adopts ordinances, bylaws, rules, or regulations establishing  
5 safety standards or standards for the proper restoration of public ways to be followed by persons  
6 permitted to open or dig up a public way, such city or town may by ordinance or by-law not  
7 inconsistent with this section provide for the non-criminal disposition of violations of any such  
8 ordinance, by-law, rule, or regulation. A city or town may fix fines as penalties for violations of  
9 such ordinances, bylaws, rules or regulations. Such fines may not exceed three-hundred dollars  
10 for the first five documented violations by any person or entity in a calendar year, may not  
11 exceed five-hundred dollars for the sixth- through- tenth documented violations by any person or  
12 entity in a calendar year, and may not exceed one-thousand dollars for the eleventh or any  
13 subsequent documented violation by any person or entity in a calendar year. For purposes of this  
14 paragraph, each day that a violation of a local ordinance, bylaw, rule or regulation persists can  
15 constitute a separate violation.

16           Any such ordinance or by-law may provide that the non-criminal enforcement and  
17 disposition of any violation of an ordinance, by-law, rule or regulation establishing safety  
18 standards or standards for the proper restoration of public ways to be followed by persons  
19 permitted to open or dig up a public way shall be pursuant to section 21D of chapter 40 of the  
20 General Laws. Alternatively, an ordinance or by-law may provide for the administrative

21 disposition of non-criminal violations of ordinances, by-laws, rules or regulations establishing  
22 safety standards or standards for the proper restoration of public ways pursuant to subsections (b)  
23 through (k).

24 (b) The body, board, commission, or officer having responsibility for the maintenance  
25 and construction of public ways in a municipality shall appoint a hearing officer. The hearing  
26 officer shall hear appeals of violation notices issued within the municipality for violations of any  
27 ordinance, bylaw, rule, or regulation establishing safety standards or standards for the proper  
28 restoration of public ways to be followed by persons permitted to open or dig up a public way.  
29 The hearing officer may be a member or employee of the body, board, commission, or officer  
30 having control of the maintenance and construction of public ways, and the hearing officer's  
31 other duties may include participation in the formation of safety standards or standards for the  
32 proper restoration of public ways to be followed by persons permitted to open or dig up a public  
33 way. However, the hearing officer shall not be involved in the issuance of individual permits to  
34 open or dig up the public way, or the inspection of compliance with safety or restoration  
35 standards imposed on persons permitted to open or dig up the public way. Under no  
36 circumstances shall the hearing officer participate in any way in the decision to issue a notice of  
37 violation that will be subject to a hearing under this section.

38 (c) Every officer and inspector empowered to enforce violations of ordinances, bylaws,  
39 rules, or regulations establishing safety standards or standards for the proper restoration of public  
40 ways to be followed by persons permitted to open or dig up a public way who takes notice of a  
41 violation of such, shall provide the offender with a notice forthwith, which shall be in the form of  
42 a written notice of violation, to appear before the hearing officer or the hearing officer's designee  
43 during regular office hours, not later than 21 days after the date of such violation. All notices of  
44 violation shall be prepared in triplicate or by the use of an automated ticketing device and shall  
45 be pre-numbered.

46 (d) The notice of violation shall be presented to the person in charge of any permitted  
47 worksite, if present, and shall contain, but shall not be limited, to: the date, time and place of the  
48 violation, the specific violation charged, the name and badge number of the officer or inspector  
49 and his division, a schedule of payment for established fines and instructions for return of the  
50 notice of violation. If there is no representative or employee of the permit holder present at the  
51 site when the officer or inspector takes notice of the violation, he shall deliver the notice of  
52 violation to the body, board, commission, or officer having responsibility for the maintenance  
53 and construction of public ways within the time specified in subsection (e), who shall, not later  
54 than the end of the next business day after receipt of the notice, mail the notice of violation to the  
55 person or entity permitted to work at the site where the violation was discovered.

56 (e) Within 3 business days after completion of each shift, the officer or inspector shall  
57 give to the body, board, commission, or officer having responsibility for the maintenance and  
58 construction of public ways those copies of each notice of a violation issued during such shift.

59 The body, board, commission, or officer having responsibility for the maintenance and  
60 construction of public ways shall retain and preserve 1 copy and shall, not later than the end of  
61 the next business day after receipt of the notice, deliver another copy to the hearing officer  
62 before whom the offender has been notified to appear, unless the ticket was produced by an  
63 automated ticketing device, in which case no duplicate copies need be retained. The municipal  
64 hearing officer shall maintain a docket of all such notices to appear. Within 5 business days of  
65 receiving the notice of violation, the body, board, commission, or officer having responsibility  
66 for the maintenance and construction of public ways in a municipality shall determine whether  
67 the violation is subject to an escalated fine as a subsequent documented violation under the city  
68 or town ordinance or bylaw as authorized by subsection (a) of this section. If so, within 6  
69 business days of receiving the notice, it shall deliver an amended copy of the notice reflecting the  
70 increased fine to the hearing officer and shall mail the amended notice reflecting the increased  
71 fine to the person or entity permitted to work at the site where the violation was discovered. For  
72 purposes of making this determination, a documented violation shall include all noticed  
73 violations, whether or not under appeal, that have not been dismissed by the hearing officer or a  
74 court. In the event that a notice of violation that is treated as a documented violation that  
75 increases a subsequent fine actually paid by any person is subsequently dismissed by a hearing  
76 officer or court, that person shall be entitled to a refund from the city or town, which he is  
77 entitled, but not required to receive in the form of a deduction from the fee to be paid for any  
78 subsequent permit to open or dig up a public way.

79 (f) The municipality shall, by ordinance or by-law, establish a schedule of fines for  
80 violations of ordinances, bylaws, rules, or regulations establishing safety standards or standards  
81 for the proper restoration of public ways to be followed by persons permitted to open or dig up a  
82 public way, subject to the limitations imposed in subsection (a).

83 (g) Where a notice of violation is issued for a violation of an ordinance, bylaw, rule, or  
84 regulation establishing safety standards or standards for the proper restoration of public ways to  
85 be followed by persons permitted to open or dig up a public way, the alleged violator, within 21  
86 days, shall return the notice of violation by mail, personally or by an authorized person, to the  
87 hearing officer and shall either: (1) pay in full the scheduled fine by check, postal note, money  
88 order or other legal tender; or (2) request a hearing before the hearing officer. Each violation  
89 issued shall contain a statement explaining the procedure to adjudicate the violation by mail. Any  
90 amounts paid shall be payable to the municipality. If a fine remains unpaid for 21 days and no  
91 hearing has been requested, a letter shall be sent to the person or entity permitted to work at the  
92 site where the violation was discovered, with a processing fee of not more than \$10, notifying  
93 him that the fine shall be paid within 30 days after receipt of that notice unless within 14 days of  
94 receiving that notice the person or entity permitted to work at the site where the violation was  
95 discovered requests a hearing before the hearing officer and swears in writing under the pains  
96 and penalties of perjury that the person or entity did not receive the notice of violation.  
97 Thereafter, any fine which remains unpaid may be added to the fee that may be charged by the

city or town for any permit to open or dig up a public way that the person or entity applies for on or after the expiration of the 30 day period.

(h) Any person notified to appear before the hearing officer, as provided herein may, without waiving the right to a hearing provided by this chapter and without waiving judicial review as provided in subsection (j), challenge the validity of the violation notice and receive a review and disposition of the violation from the hearing officer by mail. The alleged violator may, upon receipt of the notice to appear, send a signed statement of objections to the violation notice as well as signed statements from witnesses, police officers, government officials and other relevant parties. Photographs, diagrams, maps and other documents may also be sent with the statements. Any statements or materials sent to the municipal hearing officer for review shall have attached; the person's name and complete address as well as the notice of violation number and the date of the violation. The hearing officer shall, within 21 days after receipt of such material, review the material and dismiss or uphold the violation and notify the alleged violator by mail of the disposition of the hearing. Such review and disposition conducted by mail shall be informal, the rules of evidence shall not apply and the decision of the hearing officer shall be final, subject to any hearing provisions allowing for judicial review. If the outcome of the hearing is against the alleged violator, the hearing officer shall explain the reasons for the outcome on the notice. If the outcome of the hearing is against the alleged violator, and he does not appeal to a court pursuant to subsection (j), the person or entity that received the violation must pay the fine within 21 days of being given notice of the decision. Thereafter, unless an appeal is filed pursuant to subsection (j), any fine which remains unpaid may be added to the fee that may be charged by the city or town for any permit to open or dig up a public way that the person or entity applies for on or after the expiration of the 21 day period.

(i) If the alleged violator requests a hearing before the municipal hearing officer in a timely manner, the hearing officer shall schedule a hearing not later than 45 days after receiving the hearing request. The hearing officer shall duly notify the alleged violator of the date, time and location of the hearing. When a hearing notice is sent, the alleged violator shall be given an opportunity to request a rescheduled hearing date. If a person fails to appear at the scheduled hearing without good cause, the appeal shall be dismissed and the violator shall waive any further right of appeal. The hearing officer shall receive annual training in the conduct of administrative hearings. The hearing and disposition shall be informal and shall follow the rules set forth in chapter 30A. Rules for judicial proceedings shall not apply. In conducting the hearing, the hearing officer shall determine whether the violation occurred and whether it was committed by the person or entity notified to appear. If the outcome of the hearing is against the alleged violator, and he does not appeal to a court pursuant to subsection (j), the person or entity that received the violation must pay the fine within 21 days of being given notice of the decision. Thereafter, unless an appeal is filed, any fine which remains unpaid may be added to the fee that may be charged by the city or town for any permit to open or dig up a public way that the person or entity applies for on or after the expiration of the 21 day period.

(j) A person aggrieved by a decision of the hearing officer may appeal to the district court for the jurisdiction where the alleged offense occurred, or the Boston Municipal Court for offenses alleged to have occurred in Boston, on a form provided by the municipality, and shall be entitled to a de novo hearing before a clerk magistrate of the court. The court shall consider such appeals under a civil standard. The aggrieved person shall file the appeal within 10 days after receiving notice of the decision from the hearing officer who conducted the hearing. If the outcome of the court proceeding is against the alleged violator, the person or entity that received the violation must pay the fine within 21 days of being given notice of the decision. Thereafter, any fine which remains unpaid may be added to the fee that may be charged by the city or town for any permit to open or dig up a public way that the person or entity applies for on or after the expiration of the 21 day period.

(k) All fines, penalties or assessments in actions under this section shall be paid to the general fund of the municipality.

SECTION 2. Section 70 of Chapter 164 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by striking out the last sentence and inserting in place thereof the following sentence:-

A gas company will be subject to any local ordinances, bylaws, or regulations concerning the digging up, opening, and repair of streets, lanes and highways except to the extent that any such local ordinance, bylaw, or regulation requires the party opening the street, lane or highway to repair it to any standard better than as good repair as it was in when opened.

SECTION 3. Section 76 of Chapter 164 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by inserting, after the last sentence, the following paragraph:-

The department's power of general supervision shall not preempt or replace local laws or regulations concerning local traffic and site safety measures and standards for proper restoration of a roadway owned by a municipality to be followed by persons permitted to open or dig up a public way, provided that such local rules: (i) are established by local ordinances, bylaws, rules, or regulations and imposed as a condition of all permits to dig up or open public ways in said municipality; (ii) apply to all persons receiving a permit to open or dig up public ways, including any contractor working for the municipality.