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October 26, 2015

BY HAND DELIVERY

Mr. Brian Golden
Director
Boston Redevelopment Authority
1 City Hall Square, 9th floor
Boston, MA 02201

Re: 2013 Property Transactions Between the Boston Redevelopment Authority and the Boston Red Sox

Dear Director Golden:

The Office of the Inspector General (“OIG”) has completed its review of the 2013 property transactions between the Boston Redevelopment Authority (“BRA”) and the Boston Red Sox (“Red Sox”). These transactions involved: (1) the BRA’s taking from the City of Boston (the “City”) of an easement over Yawkey Way, a street next to Fenway Park, and the transfer of the rights in that easement to the Red Sox; (2) the BRA’s transfer to the Red Sox of air and subterranean rights on Lansdowne Street, a separate street next to Fenway Park; and (3) the BRA’s payment to a Red Sox affiliate for taking a portion of a parking lot on Van Ness Street in the Fenway neighborhood.

The review found that the BRA did not exercise the due diligence it owes to the City and the taxpayers. It failed to ensure that the sale price it negotiated was in the taxpayers’ best interest. Furthermore, its process for reviewing and approving the transactions was flawed, not supported by evidence and lacked transparency. Specifically, the OIG found that:

1. The BRA followed inadequate rules and procedures for the taking of rights pursuant to demonstration project plans in Yawkey Way and the parking lot on Van Ness Street.
2. The BRA’s 2012 and 2013 findings of urban blight, which were necessary to accomplish the takings, were not supported by evidence.
3. The BRA did not commission written, industry-standard appraisal reports, which would have provided the BRA with an accurate and reliable analysis of the values of the properties.
4. The BRA failed to pursue a revenue-based sale price for Yawkey Way and Lansdowne Street, instead adopting illogical and questionable valuation methodologies.

5. As a result of the BRA's flawed process, the sales price of the 2013 transactions was seemingly insufficient.
6. The BRA did not formally seek any public review or approval of the 2013 transactions.
7. The BRA staff gave the BRA Board insufficient information and only six hours to review the proposed transactions, and the BRA Board may not have met its duty to exercise informed judgment.

The OIG recommends that the BRA implement policies and procedures for using demonstration project plans, declaring blight, taking property rights and transferring property rights to private parties. These policies and procedures should include a requirement that the BRA obtain written, industry-standard appraisals that focus on bringing the highest revenue to the taxpayers, and a requirement that these appraisals be provided to the BRA Board for its review and critical analysis prior to any vote. The BRA should further adopt internal policies that provide for public hearings and comment periods, to ensure an open and transparent process. Creating and following such policies and procedures will ensure that the BRA seeks and receives the highest benefit on behalf of the City and the taxpayers.

Background

In the late 1990s, the former Red Sox owners, led by John Harrington, proposed closing the Red Sox's home stadium, Fenway Park, and building a new stadium. This proposal gained a significant amount of support, including from the Massachusetts Legislature, which in 2000 passed an Act that found the Fenway Park existing at that time to be "inadequate for the purposes for which it was designed."¹ The Act further found that the acquisition and financing by the City of a suitable site for a new ballpark would be "in furtherance of a public purpose" and would "provide an essential stimulus to . . . the economic health and development of the city and the community adjacent to the ballpark."² Specifically, the Legislature found that the "ballpark development area"³ was an "economic development area" within the meaning of Chapter 1097 of the Acts of 1971,⁴ defined within that chapter as "any blighted open area or any decadent area."⁵

Soon thereafter, in 2002, an ownership group led by John Henry, Tom Werner and Larry Lucchino purchased the Red Sox and stated that they wanted to try to preserve and improve upon the existing Fenway Park rather than build a new stadium. Included in the proposed improvements was a plan to build approximately 300 seats above the left field wall (the "Green

¹ See 2000 Mass. Acts. c. 208, § 1(d) ("Chapter 208" or "2000 Act") (repealed in relevant part by Section 79 of Chapter 123 of the Acts of 2006).

² *Id.* § 1(f).

³ The "ballpark development area" was an area bounded by the intersections of Brookline Avenue and Boylston Street, Boylston Street and Ipswich Street, Ipswich Street and Lansdowne Street, and Lansdowne Street and Brookline Avenue. *Id.* § 3(a).

⁴ *Id.* § 4(a).

⁵ 1971 Mass. Acts. c. 1097, § 1(e).

Monster”), later termed the “Monster Seats.” They also sought to expand the stadium’s concourse area by obtaining exclusive control of Yawkey Way, the street on the southwest side of Fenway Park, for the purpose of both restricting the general public from the area on game days and exclusively controlling the sale of concessions.⁶

On December 5, 2002, the BRA adopted an application submitted by the Red Sox for a demonstration project plan (the “Plan” or the “2003 Demonstration Project Plan”)⁷ pursuant to M.G.L. c. 121B, § 46(f). In the Plan, the Red Sox proposed to continue to close Yawkey Way on game days and to build the Monster Seats over a portion of Lansdowne Street. The BRA’s enabling statute, Chapter 121B, permits the BRA to use a “demonstration project” “to develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight.”⁸ The statute contains no formal process for approving a demonstration project. Furthermore, the BRA has no internal rules or policies governing demonstration project plans.

However, in order for the BRA to use a demonstration project plan for its 2003 transactions with the Red Sox, it needed to make a finding that the project would be designed to prevent or eliminate “urban blight.”⁹ In seeking approval for the 2003 Demonstration Project Plan, the BRA relied on the legislative findings from Chapter 208 that the current ballpark was “inadequate” and that to protect against urban blight, a demonstration project should be adopted.¹⁰

Further, in order to effectuate the 2003 Demonstration Project Plan, the BRA needed to exercise its powers of eminent domain, which is proper only when done for a “public purpose.”¹¹ The BRA’s enabling statute allows for the BRA to acquire property for “the purpose of

⁶ As a public safety matter, the City had long closed Yawkey Way to vehicular traffic on game days, but prior to 2002, the City had permitted independent vendors to sell concessions there. In 2002, the City and the Red Sox reached an agreement, for the last 12 home games of that season, in which the Red Sox would pay the City \$900 per game to restrict access to Yawkey Way to ticketholders and the exclusive right to sell concessions on Yawkey Way.

⁷ It was called the 2003 Demonstration Project Plan because the plan was scheduled to take effect during the Red Sox’s 2003 baseball season.

⁸ M.G.L. c. 121B, § 46(f).

⁹ Chapter 121B does not define the term “urban blight.” However, the word “blight” is defined to mean “something that impairs growth, withers hopes and ambitions, or impedes progress and prosperity.” *Tremont v. Boston Redevelopment Auth.*, No. 01-2705, 2002 Mass. Super. LEXIS 564, at *16 (Mass. Super. Sept. 23, 2002) (internal citations omitted). And the statute does define “blighted open area” as “a predominantly open area which is detrimental to the safety, health, morals, welfare or sound growth of a community because it is unduly costly to develop it soundly through the ordinary operations of private enterprise . . .” M.G.L. c. 121B, § 1. Thus, “‘urban blight’ reasonably can be understood to refer generally to a condition in a portion of the city that is detrimental to the safety, health, morals, welfare or sound growth of a community.” *Tremont*, 2002 Mass. Super. LEXIS 564, at *16.

¹⁰ Memorandum from James Tierney, Chief of Staff and Special Counsel to the Dir., Boston Redevelopment Auth., to the Boston Redevelopment Auth. and Peter Meade, Dir., Sept. 26, 2013 (“9/26/2013 Board Memo”). This document as well as all other documents cited in this letter are in the public domain.

¹¹ See *Benevolent and Protective Order of the Elks, Lodge No. 65 v. Planning Bd. of Lawrence*, 403 Mass. 531, 539 (1988).

eliminating decadent, substandard or blighted open conditions thereon and preventing recurrence of such conditions in the area,” and deems that a “public use[] and purpose[].”¹²

In 2003, the City owned the fee simple in Lansdowne Street and a surface easement over Yawkey Way.¹³ Pursuant to the 2003 Demonstration Project Plan, the BRA made a temporary, ten-year taking from the City, by eminent domain, of the surface easement on Yawkey Way. The BRA also permanently took from the City, by eminent domain, the air and subterranean rights on Lansdowne Street in order to allow the Red Sox to build the Monster Seats. The BRA then entered into a ten-year License, Maintenance and Indemnification Agreement with the Red Sox. That agreement both allowed the Red Sox to occupy the part of Yawkey Way adjacent to Fenway Park on game days and granted the Red Sox the air and subterranean rights on Lansdowne Street in exchange for payments starting at \$165,000 per year and increasing based on the Consumer Price Index for ten years. The Red Sox paid the BRA approximately \$2 million over the life of the lease, or approximately \$2,240 per game.

The Red Sox’s renovation of Fenway Park was highly successful. Both the sale of the new Monster Seats and the expansion of the stadium’s concourse through the Red Sox’s exclusive control of Yawkey Way generated substantial revenues for the Red Sox. The Monster Seats generated an estimated \$4,600,000 in gross revenue for the Red Sox in 2012.¹⁴ Moreover, the Red Sox later asserted to the BRA that the sale of concessions on Yawkey Way resulted in gross revenues of approximately \$2 million annually in 2010, 2011 and 2012. By 2012, the combined gross revenue from the Monster Seats and the Yawkey Way concessions corresponded to approximately \$73,700 per game.

In addition, between 2003 and 2012 the area surrounding Fenway Park flourished. During that period, private investors contributed approximately \$2 billion into private developments, including for luxury housing, retail space and offices on Boylston Street and elsewhere in the Fenway neighborhood. And in 2006, the Commonwealth appropriated over \$50 million for infrastructure improvements in the Fenway area.¹⁵ The Fenway area became a new destination spot.

With that backdrop, in 2012, the ten-year agreement between the BRA and the Red Sox for the air and subterranean rights on Lansdowne Street and the surface easement on Yawkey

¹² M.G.L. c. 121B, § 45.

¹³ The City’s surface easement allows the public a right-of-way for travel. The surface easement that the BRA granted to the Red Sox in 2003 allowed it to close Yawkey Way for limited periods of time on game days. The easement did not give the Red Sox any additional air or subterranean rights on Yawkey Way. The City of Boston retained its own surface easement over Yawkey Way at other times.

¹⁴ This estimate assumes that the Red Sox sold all 312 Green Monster tickets for \$165 each, the price as of 2012, on 90 game days a year – the number of seats and game days the BRA’s appraiser used in her calculations. The estimate is also based on all 312 Monster Seats because, although the Red Sox owned a portion of the area where the seats are located, structurally, the team could not have built any of the seats without the property rights from the BRA. This estimated revenue does not include the additional revenue from concessions generated by the Monster Seats.

¹⁵ See Sections 2A and 2B of Chapter 123 of the Acts of 2006.

Way was set to expire and the two parties began to negotiate a new deal. In 2012, the BRA publicly took the position that when the ten-year lease with the Red Sox expired, the BRA would negotiate a more favorable deal for the taxpayers that would take into account the revenue generated from these transferred rights.

Despite its publicly stated intention of negotiating a revenue-based deal, the BRA abandoned that approach. Instead, it agreed to permanently transfer to the Red Sox a surface easement on Yawkey Way and the air and subterranean rights on Lansdowne Street for a set price unrelated to revenues.

a. Determining the value of the transferred rights

Licensed appraisers are often used to determine the value of property rights. The Uniform Standards of Professional Appraisal Practice (“USPAP”), promulgated by The Appraisal Foundation, set out voluntary industry standards for licensed appraisers of property rights. The state regulations governing appraisers (264 CMR 1.00 *et. seq*) adopted USPAP’s standards and definitions. Under USPAP, every appraiser must follow a specific analytic process and adhere to strict record keeping rules. USPAP’s reporting requirements vary, depending on the appraisal’s use. USPAP requires a licensed appraiser to issue a written Appraisal Report whenever the intended users include parties other than the client. When the client is the only intended user a less-detailed Restricted Appraisal Report or oral appraisal is allowed.¹⁶

USPAP recognizes three primary valuation methods:

1. The *sales comparison approach* measures value based on recent sales of comparable properties. In this method, the appraiser uses comparable sales to develop a per-square-foot value for the property in question. This method is most accurate when there are multiple comparable sales to examine. It is often used to value single-family homes, condominiums and developable vacant lots.
2. The *income capitalization approach* measures value based on the income-producing capacity of a property. In this method, the appraiser divides the actual (or estimated) net revenue of the property by a capitalization rate to develop a sale value. This method is often employed to value properties that have consistent annual revenue streams. It is most accurate when the appraiser knows the property’s actual annual net revenue.

¹⁶ Until December 31, 2013, USPAP defined three different report types: Self-Contained Appraisal Report, Summary Appraisal Report and Restricted Use Appraisal Report. The standards that went into effect on January 1, 2014 eliminated the little-used Self-Contained Appraisal Report and dubbed the Summary Appraisal Report simply an Appraisal Report. Similarly, the term Restricted Use Appraisal Report was replaced with the term Restricted Appraisal Report. The substance of the standards associated with a Summary Appraisal Report and an Appraisal Report are identical.

3. The *cost approach* measures value based on how much it would cost to recreate the property. This method is the least common.

A written, USPAP-compliant Appraisal Report includes the appraiser's opinion about the highest and best use of the property and an explanation of how the appraiser arrived at that opinion. It also includes an explanation of his choice of value methodologies, discusses how the values converge or diverge and, if the methodologies produced different values, explains why one approach is more valid than the other. A written, USPAP-compliant Appraisal Report concludes with an estimated value, which is sometimes expressed as a range of values. It also identifies the client, other intended users of the appraisal and the intended use of the appraisal. It identifies both the real estate being appraised and restrictions on the interest being appraised.¹⁷ It also specifies the effective date of the appraisal and the date of the report. The appraiser must also certify that it is accurate.

b. The taking and transfer of rights on Yawkey Way

As a preliminary matter, in order to accomplish the 2013 transfer of rights on Yawkey Way, the BRA again needed to take the surface easement from the City, by eminent domain, as the original taking had only been for ten years. In order to do so, in 2013 the BRA asked its Board to ratify and confirm the adoption of the original 2003 Demonstration Project Plan. Under its enabling statute, the BRA can only take property to prevent blight. Therefore, implicit in this approach was the BRA's continued reliance on a theory that the 2013 taking was necessary and for a public purpose in order to eliminate or prevent the recurrence of blight in the ballpark area.

In its effort to understand the value of the rights to the surface easement on Yawkey Way, the BRA commissioned a licensed appraiser to orally consult on its value.¹⁸ Generally, the BRA did not hire independent appraisers, but relied on its staff, who were considered to be aware of what City property was worth. In valuing Yawkey Way, the appraiser provided spreadsheets reflecting different valuation methods, including: (1) a sales comparison approach that examined recent sales of real estate in the neighborhood; (2) a sales comparison approach that compared the price the Massachusetts Department of Transportation ("MassDOT") paid to the Red Sox for a travel easement over a nearby parking lot; and (3) an income approach based on the rental rates for retail stores in the Fenway and other Boston neighborhoods.

The appraiser did not include a value based on Yawkey Way concession revenues, in part because the Red Sox only provided limited gross revenue information to the BRA. The Red Sox took the position that the team was not earning enough from the concessions to share revenue with the BRA since it was already providing a percentage of its concession revenues to its concessionaire, Aramark, and to Major League Baseball. Thus, despite its intentions for a

¹⁷ For instance, a written Appraisal Report for Yawkey Way would have specified that the appraiser was developing an opinion of value for the surface easement rather than the underlying fee.

¹⁸ The BRA Director asked the appraiser to memorialize her oral valuation in a written document only after the OIG reached out to the BRA with its concerns in September 2013.

revenue-based deal, the BRA ultimately negotiated the 2013 transfer of the surface rights on Yawkey Way to the Red Sox based on an income approach that relied on rental rates for retail stores in the Fenway and other Boston neighborhoods.

Instead of entering into another temporary lease with the Red Sox for the surface easement on Yawkey Way, the BRA sold the Red Sox the rights permanently. The parties settled on a price of \$4,873,657 for the right to occupy Yawkey Way on game days and during other events at Fenway for as long as Major League Baseball is played at the park. Based on past years, the parties estimated that the Red Sox would use Yawkey Way for up to 120 days per year. The price was reached by assuming a rent of \$60 per square foot for retail sales space in the Fenway and other Boston neighborhoods and applying that valuation to the 17,300-square-foot Yawkey Way easement. The parties then discounted the calculation based on the theory that the easement would only be used 120 days, or 32.87%, of the year. This decreased the retail comparison number to \$19.72 per square foot. This resulted in an annual revenue finding of \$341,156, capitalized at 7% annually, resulting in a sale price of \$4,873,657. The payments were structured to be made in ten equal annual installments, interest free. Ultimately, the price of the Yawkey Way easement was approximately \$4,000 per event day for ten years and \$0 per event day thereafter.

c. The transfer of rights on Lansdowne Street

With respect to the air and subterranean rights on Lansdowne Street, the original taking of such rights in 2002 was permanent, so in 2013, the BRA needed only to negotiate the value of such rights to the Red Sox. Again, the BRA chose to permanently convey these rights to the Red Sox for as long as Major League Baseball is played at Fenway Park.

Again, the BRA obtained an oral appraisal of value of the property rights the Red Sox utilized to build the Monster Seats.¹⁹ Here, too, the appraiser provided spreadsheets to the BRA supporting different valuation methodologies, including one that relied on the actual gross revenues from the Monster Seats. This method resulted in a \$3.1 million to \$7.7 million valuation opinion based on the \$165 ticket price of each of the 312 Green Monster Seats.²⁰ The appraiser's other spreadsheets reflected the following valuation methods: (1) a sales comparison approach that valued the development rights at up to \$7.8 million, or between \$65 and \$85 per Floor Area Ratio²¹ square foot; (2) an income approach that treated the Monster Seats as retail space in use 90 days a year which yielded a value of between \$3.6 million and \$5.6 million; and

¹⁹ Again, the appraiser's oral valuation was memorialized in a written document only after the OIG reached out to the BRA with its concerns in September 2013.

²⁰ In 2013, Monster Seats sold for \$165 each. In 2014, the Red Sox adopted a dynamic pricing system for the Monster Seats that based the price on the demand for tickets. During the 2015 baseball season, Green Monster tickets sold for between \$100 and \$450 each.

²¹ Floor Area Ratio ("FAR") is used as a measure of the density of a building. The maximum FAR is usually determined by local zoning codes. The higher the allowable FAR, the higher the value of the lot. In this calculation the appraiser assumed that the BRA would sell the entire 26,111-square-foot area it took from the City and that the maximum FAR would be 3.5. In other words, the appraiser assumed the owners would be able to construct a building 3.5 times the size of the developable lot.

(3) a sales comparison approach that valued the Lansdowne rights at \$2.5 million based on the \$381.21 per square foot price MassDOT paid the Red Sox for an easement across a nearby parking lot.²²

The valuation method that the BRA ultimately relied on was, again, not the intended one of actual revenues, but rather a version of its appraiser's sales comparison approach, which considered the development value of the air and subterranean rights in the Fenway neighborhood. The BRA agreed that the value was \$80 per FAR square foot of development rights and calculated the price using a FAR of 4.0. The BRA agreed to sell only those air rights that the Monster Seats occupy and to keep the remaining air rights it took from the City in 2003. This reduced the square footage of the transaction to 7,708.5 (or approximately one-third of the original taking) and therefore reduced the sale price. Specifically, using the \$80 per square foot of FAR valuation and the reduced square footage resulted in a sale price of \$2,466,720. The payments were structured to be made in ten equal annual installments, interest-free. Ultimately, the price of the Lansdowne Street air and subterranean rights was approximately \$2,000 per event day for ten years and \$0 per event day thereafter.

d. The payment of damages for taking 70 Van Ness Street

A third piece of the 2013 deal between the BRA and the Red Sox concerned a separate transaction related to the creation of a new street named "Richard B. Ross Way." The purpose for creating this new street was, according to the BRA, an effort to mitigate the effects of a project by a private developer to create two residential and retail buildings in the Fenway neighborhood.²³ The proposed street went through one-fifth of the western edge of a parking lot at 70 Van Ness Street that was owned by an affiliate of the Red Sox, New England Sports Ventures ("NESV"). In 2010, NESV had acquired the fee simple in the entire 34,858-square-foot parking lot at 70 Van Ness as part of a land swap. The deed states that NESV paid \$2,316,600, or \$66 per square foot, for the parking lot.

To effectuate the taking of the land from NESV for the creation of the new street, in 2012, the BRA adopted another demonstration project plan. In seeking the approval for such a demonstration project plan from its Board, the BRA cited to Chapter 208 of the Acts of 2000 – which had been repealed six years prior – as support that the area in which the new buildings were to be built was subject to the Legislature's "blight finding."²⁴ In support of its proposed

²² The appraiser's initial calculation valued the 26,116-square-foot parcel on Lansdowne at \$10 million, but she discounted that number twice: once because she assumed the seats are used less than a third of the year, and a second time because air rights are less valuable than land rights. The appraiser's final value estimate using this method was \$2.5 million.

²³ Memorandum from Brenda McKenzie, Dir. of Econ. Dev., Boston Redevelopment Auth., et al., to the Boston Redevelopment Auth. and Peter Meade, Dir., Oct. 18, 2012 ("10/18/2012 Board Memo").

²⁴ The 10/18/2012 Board Memo seeking approval for the taking of the portion of the parking lot at 70 Van Ness Street outlined the history of the 2000 Act, which found the ballpark area to be blighted, and the subsequent demonstration projects that were undertaken to prevent the recurrence of blight and to allow for private redevelopment, resulting in Fenway's "desired redevelopment and renewal ... rather than its once planned abandonment." *Id.*

eminent domain taking, the BRA relied on the following: “the demonstration project for the proposed new street which authorizes the taking of an easement interest in the land required is a necessary component of this ongoing effort to prevent the recurrence of blight.”²⁵

The BRA took an easement over 6,570 square feet (or one-fifth) of the parking lot from NESV in 2012, but did not compensate it at the time. Instead, the parties negotiated the compensation for the taking of that land as part of the negotiations with the Red Sox for the rights in Yawkey Way and Lansdowne Street. The BRA sought the advice of the same licensed appraiser as it did for the Yawkey Way and Lansdowne Street rights. This time, she looked at the revenue potential of the parking lot.

At first, in October 2012, the BRA appraiser estimated the value of 70 Van Ness at between \$1.4 million and \$2.3 million, based on an estimate that NESV would lose 33 spaces at a per-space revenue of \$2,500 to \$3,500 a year. Later, the BRA appraiser raised her estimate using a per-space revenue figure of \$3,000 to \$4,000 a year, resulting in a market value of between \$1.7 million and \$2.6 million. She finally settled on a value estimate of \$2.6 million. The BRA ultimately paid more than its appraiser’s highest estimate and relied on an appraiser hired by the Red Sox to establish the value of 70 Van Ness at \$2.67 million, which became the final price.

e. Board approval

On September 20, 2013, the BRA announced that it would seek the Board’s approval of the agreement reached with the Red Sox with respect to the rights in Yawkey Way, Lansdowne Street and 70 Van Ness at a regularly scheduled board meeting on September 26, 2013. In its press release, the BRA claimed that the new agreement “builds on the successful experiment begun in 2002 to determine if the Red Sox use of Yawkey Way on game days, and the construction of new seating above the famed Green Monster in the left field, would be economically beneficial to the City of Boston and help the Red Sox remain in historic Fenway Park.”²⁶

The BRA staff provided the Board a seven-page memorandum (the “9/26/13 Board Memo”) late on the morning of the Board meeting and indicated its intention to seek a vote that night.²⁷ The memorandum asked the Board to “ratify and confirm” the 2003 Demonstration Project Plan to allow for a taking of the surface rights on a portion of Yawkey Way and to authorize the BRA Director to execute any and all documents “the Director deems necessary and appropriate in connection with the Demonstration Project Plan for the Fenway Park

²⁵ *Id.*

²⁶ Press Release, *BRA and Boston Red Sox Reach Agreement for Yawkey Way*, September 20, 2013, available at www.bostonredevelopmentauthority.org/news-calendar/news-updates/2013/09/20/bra-and-boston-red-sox-reach-agreement-for-yawkey.

²⁷ The lone board member who voted against the plan began asking for a board memo regarding the Red Sox transactions four days before the vote, on September 22, 2013, and continued to request it until he received it late in the morning on the day of the vote, September 26, 2013.

improvements.” At the meeting, BRA staff also gave the Board a proposed Order of Taking and a PowerPoint presentation, which summarized the information in the memorandum.²⁸

Absent from the 9/26/13 Board Memo, the BRA’s presentation and the Order of Taking was any evidence that the taking of Yawkey Way would prevent or eliminate blight, which should have been required for any finding that the taking was necessary and appropriate under a continuation of the 2003 Demonstration Project Plan.²⁹ To the contrary, the 9/26/13 Board Memo highlighted the successful economic impact of the BRA’s 2003 transfer of rights in Yawkey Way and Lansdowne Street to the Red Sox and only cited to the 2000 Act by way of historical reference. The 9/26/13 Board Memo primarily relied on an argument that the 2013 agreement would accomplish the following two goals: “(1) preserve the economic benefit to the City of Boston that the existing agreement has produced; and (2) protect the taxpayers by receiving fair compensation for the future use of rights.”³⁰ Only the Order of Taking, which was signed and dated on the night of the Board meeting, addressed “blight,” stating that the 2013 Yawkey Way taking was “necessary for the prevention and elimination of urban blight, as described in Chapter 121B, Section 46(f)” Despite that conclusory statement, the BRA never presented any evidence to its Board that the taking was needed to prevent “urban blight.”

Also missing from the 9/26/13 Board Memo and the BRA’s presentation was a full explanation of how the BRA arrived at the agreed-to sale price. The BRA failed to use the concession revenue figures for Yawkey Way; instead, the memorandum indicated that the \$4,873,657 sale price for the surface rights, as determined from retail rental rates in the neighborhood, “represents the fair market value of a property interest for which there is no true comparable property anywhere.”³¹ Further, despite the existence of revenue figures for the Monster Seat tickets, the BRA indicated to the Board in the 9/26/13 Board Memo that “[t]he sale of the Lansdowne Street air rights and subterranean rights should be based on the development value of those rights since the Red Sox have essentially developed those rights and seek to continue the utilization of this area for the same limited purpose.”³² And, in its explanation of the compensation price for taking a portion of Van Ness, the BRA indicated that “[a]n appraisal conducted by an appraiser utilized by both the BRA and Boston Red Sox has established the value of the easement interest at \$2,667,000.”³³ Although the appraiser mentioned in the memorandum had worked for the BRA in the past, in 2013 the appraiser was working solely for the Red Sox. To state he had been “utilized by both the BRA and the Boston Red Sox” implies that both entities had hired him to appraise 70 Van Ness, which was untrue.

Also on the agenda for the 5:30 p.m. September 26th Board meeting were sixteen other items, including the demonstration project related to the former Filene’s Building in Downtown

²⁸ An order of taking is the official document that authorizes a public entity (in this case, the BRA) to take property rights by eminent domain. See M.G.L. c. 79, § 1.

²⁹ M.G.L. c. 121B, § 46(f).

³⁰ 9/26/2013 Board Memo.

³¹ *Id.*

³² *Id.*

³³ *Id.*

Crossing where the Millennium Tower was developed. As of 11:00 a.m. on the morning of the meeting, the Board had not received all of the memoranda describing the projects on the agenda. The missing memoranda included the one for the transactions with the Red Sox.

Having only learned of the proposed deal days prior, on the day of the vote, September 26, 2013, the OIG sent a letter to the Chairman of the BRA Board urging the Board to delay its vote on the Red Sox transactions until after the Board and the public had had a chance to fully review and comment on the proposed sales. Despite that appeal, after a thirty-six minute presentation and a Board question-and-answer session, the Board voted 4-to-1 to authorize then-Director Peter Meade to execute agreements with the Red Sox and its affiliate to consummate the proposed transactions.³⁴

The agreements governing the transactions between the BRA and Red Sox were still in draft form on September 26, 2013. Throughout the fall of 2013, the BRA continued to work with the Red Sox to finalize the terms of the transactions. The parties began signing agreements related to the transactions on November 4, 2013, and ultimately concluded the deal on December 23, 2013, approximately three months after the BRA sought the Board's approval. The BRA never presented the concluded agreement to the Board.

Findings

A. The BRA followed inadequate rules and procedures for the Yawkey Way and Van Ness takings.

As noted above, the BRA effectuated the 2013 taking from the City, by eminent domain, of the surface rights on Yawkey Way by use of a demonstration project plan. It also took a portion of 70 Van Ness Street from NESV by use of a separate demonstration project plan.

Under the BRA's statute, there are no rules or policies governing the BRA when it uses a demonstration project plan. By contrast, the BRA cannot conduct urban renewal plans until: (1) a public hearing relating to the urban renewal plan has been held, with notice of the hearing made to the city council; and (2) the urban renewal plan has been approved by the municipal officers and the Massachusetts Department of Housing and Community Development.³⁵ Further, if the renewal plan involves a taking, the BRA must also provide notice of the taking and the public hearing to the land owner of record.³⁶

Similarly, Chapter 208, which the Legislature enacted specifically to address the development of the Fenway area in 2000, and which the BRA relied upon, in part, when it asked its Board to adopt the demonstration project plans, would have required the BRA to comply with

³⁴ The one Board member who voted against authorization commented that he wanted more time to review the numbers associated with the property transfers.

³⁵ M.G.L. c. 121B, § 48. Chapter 121B defines city "municipal officers" as "the city council with the approval of the mayor." *Id.* § 1.

³⁶ *Id.* § 47.

certain rules and requirements. These included the creation of an economic development plan and filings with and approvals by the secretary of administration and finance, the house and senate committees on ways and means, the collector-treasurer of the City, the City Council and the mayor of Boston.³⁷

Here, because the BRA conducted the 2013 property transactions pursuant to a demonstration project plan, it was able to proceed with a multi-million dollar deal without formally seeking any comment or consent beyond that of its own Board. And with no policies or procedures in place requiring external consultation, particularly an avenue by which the public could provide its comments and concerns, the BRA could exert its eminent domain powers with little to no oversight. This lack of public participation not only deprived the citizens and officers of Boston of a voice, but it also deprived the BRA's Board from using valuable public input to better inform its vote on permanent transactions that could only be entered into if they fulfilled a public purpose.

B. The BRA's 2013 finding of urban blight was not supported by evidence.

As noted above, Chapter 121B permits the BRA to use a demonstration project plan solely "for the prevention and elimination of slums and urban blight." While this statute does not define "urban blight," courts have found the term to "refer generally to a condition in a portion of the city that is detrimental to the safety, health, morals, welfare or sound growth of a community."³⁸

By using a demonstration project plan to take the surface rights on Yawkey Way and the parking lot on Van Ness Street, the BRA was relying on a theory that its actions were needed in order to prevent the "recurrence of blight." However, the BRA presented its Board with no evidence or analysis to support a theory that the takings were necessary to prevent blight and the Board did not ask for such evidence or analysis.

Such an omission is particularly concerning given the fact that any "prevention and elimination" of blight determination in the Fenway area in 2012 or 2013 would have been difficult to support with adequate evidence. By that time, the Commonwealth had appropriated over \$50 million for infrastructure improvements and private developers had invested billions of dollars in the area, including for luxury housing, retail and office construction.³⁹ By 2012, the

³⁷ See 2000 Mass. Acts. c. 208, §§ 4(d), 10(a), 10(b); 1971 Mass. Acts. c. 1097, § 6. Chapter 208 of the Acts of 2000 provided that the ballpark site project would be an "economic development project," as defined by Chapter 1097 of the Acts of 1971, and that the Economic Development and Industrial Corporation of Boston ("EDIC"), an entity which merged operationally with the BRA in 1993 and leads Boston's economic development activities, was to undertake, or contract with the BRA for the BRA to undertake, the ballpark site project. See 2000 Mass. Acts. c. 208, § 4(a). This undertaking by either the EDIC or BRA was to be "in accordance with the development act," specifically Chapter 1097 of the Acts of 1971. *Id.* Chapter 1097 establishes the powers and duties of the EDIC, and parallels Chapter 121B, which governs the authority of the BRA.

³⁸ *Tremont*, 2002 Mass. Super. LEXIS 564, at *16. See also *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence*, 403 Mass. 531, 540 (1988).

³⁹ See Sections 2A and 2B of Chapter 123 of the Acts of 2006.

Fenway neighborhood was so revitalized and economically strong that the recurrence of blight seemed highly unlikely. If the area was at risk of becoming blighted, the BRA should have presented objective evidence of that risk, instead of expecting the Board to vote to authorize the takings based on the BRA's conclusory assurances.

In addition, taking by eminent domain is only appropriate if it serves a "public purpose."⁴⁰ The BRA's enabling statute creates such a public purpose where the BRA acquires property for "the purpose of eliminating decadent, substandard or blighted open conditions thereon and preventing recurrence of such conditions in the area."⁴¹ If the BRA's blight determination was flawed, as noted above, there would not be a valid "public purpose" for taking the two parcels of land by eminent domain in 2012 and 2013.

C. The BRA did not commission written Appraisal Reports that met industry standards.

Rather than commission a written, USPAP-compliant Appraisal Report before negotiating the 2013 property transfers, the BRA engaged the services of a licensed appraiser to provide oral appraisals. The documents the appraiser provided to the BRA staff included none of the contextual information that would have been included in a written, USPAP-compliant Appraisal Report. Instead, she provided a series of spreadsheets that used a variety of methodologies to support a variety of values and information about area sales that she saw as comparable to the various property rights she was valuing. As a result of the BRA's failure to commission a written, USPAP-compliant Appraisal Report, it proceeded without the appraiser's certified opinion about the highest and best use of the property, an explanation of how the appraiser arrived at that opinion, an explanation of the choice of valuation methodologies and why the chosen valuation method was better than other approaches.⁴²

A written, USPAP-compliant Appraisal Report would have provided the BRA staff with a reliable analysis of the value of Yawkey Way, Lansdowne and 70 Van Ness. Without such an analysis, the BRA staff could not know that it was receiving the fair market value for the City's property, or that it was paying a fair price for 70 Van Ness.

Had the BRA staff given the Board members a written, USPAP-compliant Appraisal Report, the Board would have better understood the methodology used to arrive at the sale price, as well as the other methods the appraiser had considered and rejected. For example, neither the air and subterranean rights on Lansdowne Street, nor the surface easement on Yawkey Way, were valued using actual revenue figures, which likely would have resulted in higher and more accurate value estimates. A written, USPAP-compliant Appraisal Report would have given the

⁴⁰ See *Benevolent*, 403 Mass. at 539.

⁴¹ M.G.L. c. 121B, § 45.

⁴² One statute governing the BRA's exercise of its eminent domain power states that "[a]n award of damages ... shall not be made until at least one appraisal has been made ... on behalf of the taking authority and filed therewith ..." M.G.L. c. 79, § 7A. The fact that the statute requires the appraisal to be "filed" with the taking authority demonstrates the Legislature's intent that a taking authority obtain a written appraisal prior to exercising its eminent domain power, unless all persons entitled to damages waive the requirement in writing. See *id.*

BRA Board the context to evaluate the sale prices and determine whether they were in the best interest of the taxpayers of the City. Likewise, written appraisals would have created a record for public citizens and officials to review.

D. The terms of the 2013 transactions did not serve the taxpayers' best interests.

The evidence indicates that the terms of the 2013 transactions did not serve the taxpayers' best interests. For instance, the price that the BRA agreed to receive from the Red Sox for the rights in Yawkey Way and Lansdowne Street appears to be insufficient. Similarly, the price that the BRA agreed to pay NESV as damages for taking property on Van Ness Street appears to be inflated.⁴³ By agreeing to the permanent disposition of the Yawkey Way and Lansdowne Street rights, moreover, the BRA foreclosed future administrations from revisiting the terms of the deals.

With respect to the Yawkey Way and Lansdowne Street interests, the BRA knew of the unique value of the rights it was conveying and even publicly committed to entering into a revenue-based transaction prior to negotiations. However, the BRA failed to pursue terms based on actual revenues from the concession sales on Yawkey Way or the ticket sales from the Monster Seats. In fact, it is unclear whether the BRA ever asked for the net-revenue information in order to properly estimate an income-based price for the transactions.

To the contrary, with regard to Yawkey Way, the BRA relied on illogical comparisons to retail space figures for a typical Fenway or other Boston neighborhood business. Unlike a typical retail space, Yawkey Way is densely packed with ticketholders for hours on game days. Once ticketholders enter through the gates, moreover, they cannot re-enter after leaving; if they want to buy anything – food, drinks, shirts, souvenirs – they have to buy from the Red Sox. Even the BRA staff, in the 9/26/13 Board Memo, stated that there is “no true comparable property [to Yawkey Way] anywhere;” yet in arriving at what it claimed was the “fair market value” of Yawkey Way, it compared the street to the rate per square foot of retail rental listings in the Fenway and other Boston neighborhoods.

Moreover, in arriving at its final sale price for Yawkey Way, the BRA discounted the price per square foot from \$60 per square foot to \$19.72 per square foot on the grounds that the Red Sox could only close Yawkey Way 120 days a year. However, the BRA never added a restriction in the grant of easement to the Red Sox to limit its use of Yawkey Way to only 120 days.

With regard to the Lansdowne Street rights, the BRA retreated from pursuing a revenue-based deal and instead based the price on the potential development value of the property. The BRA agreed to apply an \$80 per Floor Area Ratio square-foot price. Moreover, the BRA agreed

⁴³ The BRA appeared to approach the negotiations as a partner with the Red Sox, not as a public agency seeking to negotiate the best outcome for the City. The BRA seemingly had significant leverage in the negotiations, considering the fact that Red Sox could not obtain the rights to Yawkey Way or the Monster Seats without reaching an agreement with the BRA.

to sell only those air rights that the Red Sox used to build the Monster Seats (7,708.5 square feet) rather than the entire section of air rights the BRA took from the City in 2002 (26,116 square feet) for the Red Sox. Had the BRA sold the Red Sox the entire portion of air rights that the BRA took on behalf of the Red Sox and used the same methodology to value the air rights, the price would have been \$8,357,120.

In the end, the total price of \$7,340,377 the Red Sox paid for the Yawkey Way and Lansdowne Street rights was the equivalent of approximately \$6,000 per event day – about the cost of 36 Monster Seat tickets in 2013 – and only for ten years. Had the BRA simply extended the ten-year lease that preceded the 2013 transactions, it would have actually generated more revenue in the long run.⁴⁴

The BRA also agreed to allow the Red Sox to pay for the properties over ten years with no interest. While the BRA also pays no interest on the amount owed for its taking of Van Ness, the BRA would have made additional revenue by charging the Red Sox interest and agreeing to pay interest on Van Ness because the Red Sox owes more to the BRA than the BRA owes to the Red Sox.

Even more striking is the fact that the transfer of the rights in Yawkey Way and Lansdowne Street was permanent. The BRA could have structured another ten-year lease based on a portion of revenue from the sale of concessions on Yawkey Way and tickets to the Monster Seats. After ten years, it could have used the revenue figures earned over that ten-year lease to determine a fair sale price.

Finally, the amount the BRA agreed to compensate NESV for a portion of the parking lot at 70 Van Ness appears to be inflated. Based on the available evidence, the BRA agreed to pay more for an easement over one-fifth of the parking lot in 2013 than NESV paid for the entire parking lot in 2010. As noted above, NESV acquired the entire 34,858-square-foot parking lot at 70 Van Ness in 2010 for \$2,316,600. The BRA agreed to pay \$2,670,000 for a 6,570-square-foot easement in 2013. Because the 2010 deal was part of a land swap, it is likely that the cash value paid for the parking lot does not reflect the property's true value. To ascertain the true value of the property, the OIG requested information related to the 2010 transaction, but the court denied the OIG's motion to obtain the records.

Even if the evidence unavailable to the OIG would have indicated that the value of the property was higher than the 2010 purchase price, the price for 70 Van Ness still appears inflated. In contrast to the Yawkey Way and Lansdowne transactions, the BRA's appraiser used revenue figures to value 70 Van Ness. The appraiser's Van Ness valuation opinions appear to

⁴⁴ Under the original ten-year lease, payments from the Red Sox to the BRA started at \$165,000 annually and were indexed to inflation, which averaged 2.49% over the life of the lease and brought the ten-year lease payment to approximately \$2 million. If the BRA and the Red Sox had signed a new lease extending the original terms – instead of agreeing to an outright sale – the Red Sox's cumulative payments to the BRA under a new lease would have reached \$7,445,124.99 in 2039, exceeding the total sale price in the 26th year of a new lease.

have increased over time, going from a range of between \$1.4 million and \$2.3 million to a range of between \$1.7 million and \$2.6 million. The appraiser finally settled on a value estimate and oral opinion of \$2.6 million, the highest of either range. Ultimately, the BRA agreed to pay NESV the full amount estimated by the Red Sox's appraiser – \$2,667,000 – which was more than the BRA's highest valuation and almost double its lowest appraisal.

E. The BRA staff gave the Board insufficient information and inadequate time to consider the transactions and the BRA Board may not have met its duty to exercise informed judgment.

Members of the BRA Board are public officers.⁴⁵ Under its enabling statute, the Board's purpose is to "manage, control and govern" the BRA.⁴⁶ The mayor or city council may remove the BRA's Board members for inefficiency, neglect of duty or misconduct.⁴⁷ Further, as public officers, the BRA Board members act as "trustee[s] for the citizens and the [City]" and thus owe the normal duties of a trustee.⁴⁸ In sum, both the BRA Board members and its Executive Director owe certain duties to the public and the City.⁴⁹

As set forth above, the BRA staff failed to provide, and the BRA Board failed to require, certain critical information necessary to the Board's vote on the 2013 transactions. For instance, as noted above, the BRA failed to provide evidence or an analysis to support its conclusion that the Yawkey Way and Van Ness takings were necessary to prevent blight and thus were done for a public purpose.

The BRA also failed to provide its Board with written, USPAP-compliant Appraisal Reports, which the Board could have critiqued and used to reject the proposed sales price to the extent the price was not negotiated to achieve the maximum benefit to the taxpayers. Even more troubling was that the BRA presented the sale price to its Board without giving its members the benefit of understanding the various other possible methods that would have led to higher values for the Yawkey Way and Lansdowne Street rights and a lower purchase price for Van Ness. The BRA assured the Board that its goal was to protect the taxpayers by receiving "fair compensation." Specifically, the BRA told its Board that the Yawkey Way valuation

⁴⁵ See *Bunte v. Mayor of Boston*, 361 Mass. 71, 75 (1972). The Executive Director is an *ex officio* member of the BRA. M.G.L. c. 121B, § 7.

⁴⁶ *Id.* § 5.

⁴⁷ *Id.* § 6.

⁴⁸ *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987).

⁴⁹ Arguably, the BRA Board owed statutory fiduciary duties to the BRA at the time of its vote in 2013, under M.G.L. c. 121B, § 13. Under Section 13, the BRA is liable in contract or in tort in the same manner as a private corporation. The BRA Board members and its officers are liable for torts committed or directly authorized by them. Because public officials owe fiduciary duties under the common law, and the breach of one's fiduciary duty is a tort, it follows that the Board members and officers owed fiduciary duties to the BRA. See *Ray-Tek Services, Inc. v. Parker*, 64 Mass. App. Ct. 165, 177 (2005). See also *Silvano*, 812 F.2d at 759; M.G.L. c. 121B, § 13. Regardless of the legal status of the Board's duty at the time of the vote, it is clear that each Board member is now a fiduciary of the BRA. M.G.L. c. 121B, § 5 (as amended by Section 2 of Chapter 235 of the Acts of 2014, effective November 4, 2014).

represented “fair market value of a property interest for which there is no true comparable property anywhere” despite the fact that a concessions revenue-based approach would likely have yielded a higher and more accurate value. Similarly, the BRA told its Board that the Lansdowne Street valuation “should be based on the development value of those rights,”⁵⁰ despite the fact that a Monster Seats revenue-based valuation would likely have yielded a higher and more accurate value.

Furthermore, with respect to Van Ness, in its Board Memo, the BRA said that “an appraisal conducted by an appraiser utilized by both the BRA and the Boston Red Sox has established the value of the easement interest at \$2,667,000.” In fact, the only appraiser who established the value at \$2.67 million was the one hired and paid by the Red Sox. The BRA’s appraiser had valued the property – at the very highest – at \$2.6 million.

Further, the Board had little time to review and digest these complex, multi-million dollar land transactions. The BRA sought the Board’s vote on the same day it provided the Board with a PowerPoint presentation and a seven-page memorandum outlining the transactions. And there were sixteen other items on the Board’s agenda that night. Even when the OIG sought a delay of the vote, neither the BRA nor the Board was willing to do so. There was no need, however, for such a rush. The agreements governing the transactions between the BRA and Red Sox were still in draft form on September 26, 2013, the day of the Board vote, and they were not all finalized until December 23, 2013.⁵¹

The BRA provided its Board with insufficient and partly misleading information. The BRA Board also failed to assure that it was sufficiently informed before voting on these transactions. As a result, the BRA Board may have failed to meet its duty to the public and the City.

Conclusions and Recommendations

Following its review of the 2013 property transactions between the BRA and the Red Sox, the OIG has determined that the BRA did not exercise the due diligence it owes to the City and the taxpayers. It failed to ensure that the sale prices it negotiated were in the taxpayers’ best interest. Furthermore, its process for reviewing and approving the transactions was flawed, not supported by evidence and lacked transparency.

The BRA has significant discretion to shape the development of Boston’s neighborhoods. With discretion comes responsibility. Through the BRA’s use of demonstration project plans, taking City property should be transparent and driven by policy and procedure. Based on its review, the OIG recommends that the BRA adopt clear written policies and procedures governing future demonstration project plans. These standards should provide a specific

⁵⁰ 9/26/2013 Board Memo.

⁵¹ Notably, although the terms of the Red Sox deal could have substantially changed between September 26th and December 23rd, the Board never requested an additional meeting to determine any changes before the agreement was signed. Further, the BRA staff did not present the Board with the completed agreements.

framework for declaring blight, taking property rights, transferring property rights to private parties and conducting demonstration projects generally to ensure that these actions are performed properly, with a public purpose and supported by adequate evidence. The OIG suggests that the following be included in these written standards:

1. The BRA should adopt a precise definition of a “demonstration project plan,” as well as clearly distinguish when the BRA should conduct a demonstration project plan. Further, the BRA should set dollar thresholds for demonstration projects, which would indicate when the BRA should apply additional policies and procedures to a particular project.
2. The BRA should require at least one written, USPAP-compliant Appraisal Report for each acquisition or disposition of property rights in order to assure that the information relied upon by the staff is reliable and supported by legitimate, documented information. The BRA should provide Appraisal Reports to the Board.
3. When seeking to conduct an eminent domain taking pursuant to a demonstration project plan above a certain dollar threshold, the BRA should adopt the requirements for property acquisitions applicable to urban renewal plans, as established by M.G.L. c. 121B, § 47, including (1) that the BRA seek consent for the taking from the Department of Housing and Community Development and municipal officers; and (2) that the BRA conduct a public hearing, providing notice of the hearing to the land owners and the public. These measures will provide the public an opportunity to review and comment on the projects.
4. The BRA should establish a procedure for reviewing and approving demonstration project plans that allows for public participation and better informs the BRA Board members. For projects above a certain dollar threshold, this process would require the first Board meeting addressing a proposed project to include a presentation of the project to the Board. After this initial Board meeting, the BRA would then set a period for public comment, after which the Board would reconvene to hold a public hearing, review the comments and vote on the proposed project. These measures will create a more informed Board, which can thus better meet its duty to the public.
5. The BRA staff should present the Board with adequate, objective evidence of “urban blight” so the Board can make an informed decision of whether a proposed demonstration project plan serves a public purpose.
6. If the contract terms vary materially from the terms the Board reviewed before the original Board vote, the BRA should notify the Board that the terms materially changed and the Board should hold an additional meeting to vote on those terms.

Mr. Brian Golden, Director
Boston Redevelopment Authority
October 26, 2015
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If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Glenn A. Cunha".

Glenn A. Cunha
Inspector General