COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
CASE NO. 2018-P-0318

JOSEPH P. MARCHESE
PLAINTIFF/APPELLANT

V.

BOSTON REDEVELOPMENT AUTHORITY
DEFENDANT/APPELLEE

ON APPEAL FROM A JUDGMENT
OF THE SUFFOLK SUPERIOR COURT

APPELLANT'S BRIEF

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Issues Presented For Review

1. Did the trial court err in ruling that the defendant Boston Redevelopment Authority ("BRA") did not exceed its authority when it took by eminent domain an easement in Yawkey Way and then transferred those easement rights to the Boston Red Sox?

2. Did the trial court err in not allowing Plaintiff to amend his complaint to add claims for damages under the Uniform Procurement Act ("UPA") and Chapter 93A?

Statement Of The Case

This case is a challenge to the BRA's eminent domain taking of certain perpetual easement rights in Yawkey Way, a public street, in the City of Boston, and private transfer of those rights to the Red Sox. The easement rights are for the exclusive use, occupation, and control over a 17,300 square foot area of Yawkey Way on days when there is a Boston Red Sox baseball game or other event at Fenway Park.

On September 28, 2015, Plaintiff moved to amend the complaint, to add, *inter alia*, claims under the UPA and Chapter 93A. The trial court denied Plaintiff's motion to amend in its Memorandum of Decision and Order dated December 14, 2016.

Statement Of Facts Relative To The Issues On Appeal

On September 26, 2013, acting under its authority pursuant to G.L. c. 121B, the BRA adopted a resolution executing an Order of Taking by eminent domain of certain perpetual easement rights in Yawkey Way, a public street, in the City of Boston (the "Yawkey Way Taking"). The easement rights are for the exclusive use, occupation, and control over a 17,300 square foot area of Yawkey Way on days when there is a Boston Red Sox baseball game or other event at Fenway Park (the "Yawkey Way Easement"). The Yawkey Way Taking was made pursuant to an agreement between the BRA and the Boston Red Sox and affiliated entities (the "Red Sox"), under which the BRA transferred the Yawkey Way Easement to the Red Sox, in perpetuity, as long as Fenway Park is used as a venue for Major League Baseball games (the "Red Sox Agreement"). The Red Sox will in turn use the Yawkey Way Easement area for vending, concessions, retail sales, and other revenue-producing activities. The effect of the Yawkey Way Taking and the Red Sox Agreement is to transfer from the City of Boston to the Red Sox the exclusive use of, control over, and benefit from Yawkey Way as a

revenue-producing and valuable real estate asset on Red Sox game days. Decision at 9-15.

Prior to the Yawkey Way Taking, Plaintiff communicated several times, in writing, to both the BRA and the City of Boston his desire to bid on and/or make an offer to purchase the right to occupy and use Yawkey Way for vending activities during Red Sox game days, on terms more favorable than under the existing agreement with the Red Sox. Despite Plaintiff's offers and requests, neither the BRA nor the City of Boston solicited bids for the sale of the easement rights in Yawkey Way. Likewise, neither the BRA nor the City of Boston negotiated with Plaintiff, nor with any party other than the Red Sox, for the sale of those rights in Yawkey Way. Decision at 15-16.

But for the Yawkey Way Taking, any sale by the City of Boston of the perpetual and exclusive right to use, occupy, and control Yawkey Way on Red Sox game days, and thereby exclusively benefit from vending and other revenue-producing activities on Yawkey Way during Red Sox game days, would have been subject to the procurement provisions of the Uniform Procurement Act, G.L. c. 30B, and as such would have been required to be put out to public bid. Decision at 9, 13-15.

ARGUMENT

I. The BRA's Actions Were Outside The Scope Of The "Demonstration Clause" Of Chapter 121B, § 46(f).

G.L. c. 121B, § 46(f) allows urban renewal agencies "to develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight." There are no mechanisms under this "demonstration" clause for public participation and oversight as there are with formal urban renewal plans and projects under G.L. c. 121B, § 48. From that single clause in § 46(f), the BRA here used the demonstration procedure to avoid the cumbersome (from its perspective) urban renewal plan process and public bidding requirements. However, there is nothing in the law to suggest that the § 46(f) procedure exists so that the BRA can simply call any action it takes a "demonstration project" and avoid the inherent limits to its eminent domain authority, the protections afforded the public, and the open bidding requirements of the UPA –- all without providing any evidence, analysis, support, or even any details about what exactly is being demonstrated and how the demonstration furthers the public purpose of curing or preventing urban blight.

Indeed, the only thing that was demonstrated in this case was how to take public property and transfer it to a private owner in a manner that avoids public bidding protections and procedures. And even more egregious, in a way that did not obtain fair value. Decision at 9-11, 13-15. The Legislature could not have intended that such an unchecked and monumental broadening of the powers of the BRA and other urban renewal agencies would be created by one clause in one sentence of any otherwise exhaustive Chapter 121B. Indeed, as the trial court found, the legislative history suggests otherwise. Decision at 25-26.[1]

§ 46(f) was never intended to be a catch-all power, or a substitute for urban renewal plans. The power under the demonstration clause was intended to be limited to actually demonstrating methods for

[1] § 46(f) of Chapter 121B has its origin in the 1955 initial enactment of the urban renewal statute, Chapter 654 of the Acts of 1955. § 46(f) is directly descended from the last sentence of Section 26AAA of that Act. Chapter 654 of the Acts of 1955 originated as House Bill No. 2863. But the original bill had different language in Section 26AAA: "Such authority is further authorized to develop, test, and report methods and techniques, and carry out demonstrations *and other activities* for the prevention and elimination of slums and urban blight." (emphasis added). However, the words "and other activities" were struck from the bill by amendment in the Senate, proposed on July 26 and adopted on August 1, 1955. See Decision at 25, fn. 22.

addressing urban blight that could be broadly used in other instances. An urban renewal agency cannot undertake any and all actions under §46(f) as it sees fit. In this case, there is nothing at all in the record or anywhere else indicating any demonstration by the BRA of general methods of urban renewal cures. To the contrary, as the BRA concedes, this was an entirely specific set of actions, which could only be used on Yawkey Way during games.

II. The Yawkey Way Taking Was Outside The Authority Of The BRA.

Like all urban renewal agencies, the BRA has limited powers of eminent domain, restricted to situations where the power is exercised for the public good of addressing urban blight. Mahajan v. DEP, 464 Mass. 604, 619 (2013) ("Certainly, for the BRA to take land by eminent domain, it must exist in a 'decadent, substandard, or blighted' condition."); Tremont on the Common Condominium Trust v. BRA, 2002 Mass. Super. LEXIS 564, at *47-49. Although the BRA may wish that its eminent domain powers were broader (and at times, as in this case, acts as if they are), there is no question that, like all urban renewal agencies, the

BRA does not enjoy general powers of eminent domain. Id.

Where, as in this case, a party challenges an eminent domain taking as outside the authority of the BRA, a reviewing court must determine whether or not the taking furthers the public purpose of addressing urban blight. See, e.g., Boston Edison Company v. BRA, 374 Mass. 37, 59-60 (1977); Tremont on the Common, 2002 Mass. Super. LEXIS 564, at *49-57. Urban blight is found only where a condition exists that is "detrimental to the safety, health, morals, welfare or sound growth of a community." Tremont on the Common, 2002 Mass. Super. LEXIS 564, at *16. Thus, any eminent domain taking by the BRA or other urban renewal agency not made to address urban blight is outside the limited parameters of its authority and must be annulled. See Newton v. Trustees of State Colleges, 359 Mass. 668 (1971).

Here, there was not finding of current blight on Yawkey Way. Indeed, how could there possibly be, given the substantial increase in property values and revitalization in the area? See Decision at 20-21; 27-28.

Instead, the trial court found that the BRA's actions were tenable as preventing possible urban blight in the future. But the evidence in the record was simply insufficient to warrant that conclusion. There were no studies or professional analyses done or commissioned by the BRA. There was no evidence that blight in the area was threatened, likely, or even remotely foreseeable. There was no evidence in any way suggesting that the current situation on and in the area of Yawkey Way was likely to change at all. Instead, all that there is in the record is the BRA's bare, unilateral "conclusion" that the taking of the easement and transfer of the rights to the Red Sox was necessary because urban blight might, possibly, potentially happen in the area at some unspecified point in the future. But how is this different from any land in the Commonwealth? The trial court's decision sets a very dangerous precedent, allowing urban renewal agencies to unilaterally slap a "could be blighted someday" label on public property, and then transfer it to a private owner without the public bidding protections that would otherwise be required.

III. The Fee Ownership Of Yawkey Way Is Irrelevant.

The Yawkey Way Easement allows whomever owns it to entirely control access to Yawkey Way on Red Sox game days. This is obviously incredibly lucrative, as its real value is the ability to control -- and charge a fee for -- the right to operate vending and concessions on Yawkey Way. But it does not at all follow that because the abutters, including the Red Sox, own the fee in Yawkey Way that they are the only parties who could own the right to control and charge for concession rights on Yawkey Way. See Decision at 29-20. That is, even if it is true that the Red Sox and other abutters would have to agree to any concession management plan, it does not mean the Yawkey Easement rights could not have been put out for public bid. Bidding parties would simply be required to factor into their bid the potential requirement to come to some agreement with the abutting property owners. Indeed, that is exactly what the BRA itself did. The potential requirement to deal with the abutting lot owners is simply one additional factor that a bidder would have to consider in making a bid. In fact here, the Plaintiff offered to pay more for

the Easement rights than the Red Sox had under the initial ten-year plan. Decision at 15-16.

The BRA argued that the Red Sox deal "merged the roadway rights with the fee interest rights, enabling the Red Sox to utilize Yawkey Way for ballpark purposes for a limited period of time on game days." But the BRA did not explain, and the trial court did not find, any reason why the BRA was the only entity that could accomplish that merger. To the contrary, there is no reason why the publicly-owned roadway rights could not have been put out to bid, then conveyed to the winning bidder, who then would have been free to negotiate with the Red Sox and other abutters to the extent necessary, just as the BRA itself did. Indeed, under the UPA The right to bid is itself the opportunity which the UPA is intended to protect. See, e.g., Phipps Prod. Corp. v. MBTA., 387 Mass. 687,691-692 (1982)("statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally). Furthermore, if not for the taking, the Boston City Council would have been charged with deciding how to handle Yawkey Way on game days, and

may have decided on a totally different approach than the BRA did. Indeed, the trial court and the BRA approached this case as if Yawkey Way absolutely has to be closed to the public on game days, with the vending on the street controlled by a single entity. But there is no reason this is the case at all. Just because the Red Sox and BRA prefer it that way does not trump the limits imposed on the BRA's authority.

IV. The Trial Court Erred In Not Allowing Plaintiff To Amend His Complaint To Add Claims For Damages Under The UPA And Chapter 93A.

The right to recover damages under the UPA is well-established. Peabody Const. Co., Inc. v. City of Boston, 28 Mass. App. Ct. 100 (1989). Here, the BRA's unlawful taking of the Yawkey Way Easement deprived Plaintiff the right to bid on the sale of those easement rights. It is undisputed that but for the taking, the easement rights would have been required to be put out to public bid by the Boston City Council, and could not have been sold directly to the Red Sox. (Again, assuming the City Council chose to do so at all). Whether or not Plaintiff would have won the bid is irrelevant; it is the right to bid itself that is protected. Id.

Moreover, here the BRA "inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play." Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 27 (1997) (applying 93A to nonprofit entity). In fact, ensuring "ethical behavior and fair play" is at the core of the UPA, the BRA's violation of which is the crux of Plaintiff's claim. Cataldo Ambulance Service v. City of Chelsea, 426 Mass 383, 389 (1998) ("competitive bidding serves a dual purpose of obtaining the most favorable contract while ensuring fair competition"); Modern Continental Constr. Co. v. Lowell, 391 Mass. 829, 840 (1984) ("the purpose of competitive bidding statutes is not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an open and honest procedure for competition for public contracts"); Phipps Prod. Corp. v. MBTA., 387 Mass. 687,691-692 (1982)("statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally"); Interstate Engr. Corp. v. Fitchburg, 367 Mass 751, 758 (1975) (competitive

bidding statutes "establish[] an honest and open procedure for competition for public contracts and, in so doing, place[] [bidders] on an equal footing in the competition to gain the contract"). The trial court therefore erred in not allowing Plaintiff's 93A claim.

CONCLUSION

The judgment of the trial should be reversed, and judgment should enter annulling the Yawkey Way Taking, and remanding for further proceedings on Plaintiff's proposed damages claims under the UPA and Chapter 93A.

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Dated: July 27, 2018

Part I ADMINISTRATION OF THE GOVERNMENT

Title XVII PUBLIC WELFARE

Chapter 121B HOUSING AND URBAN RENEWAL

Section 46 POWERS OF URBAN RENEWAL AGENCY

Section 46. An urban renewal agency shall have all the powers necessary or convenient to carry out and effectuate the purposes of relevant provisions of the General Laws, and shall have the following powers in addition to those specifically granted in section eleven or elsewhere in this chapter:?

(a) to determine what areas within its jurisdiction constitute decadent, substandard or blighted open areas;

(b) to prepare plans for the clearance, conservation and rehabilitation of decadent, substandard or blighted open areas, including plans for carrying out a program of voluntary repair and rehabilitation of buildings and improvements, plans for the enforcement of laws, codes and regulations relating to the use of land and the use or occupancy of buildings and improvements, plans

for the compulsory repair and rehabilitation of buildings and improvements, and plans for the demolition and removal of buildings and improvements;

(c) to prepare or cause to be prepared urban renewal plans, master or general plans, workable programs for development of the community, general neighborhood renewal plans, community renewal programs and any plans or studies required or assisted under federal law;

(d) to engage in urban renewal projects, and to enforce restrictions and controls contained in any approved urban renewal plan or any covenant or agreement contained in any contract, deed or lease by the urban renewal agency notwithstanding that said agency may no longer have any title to or interest in the property to which such restrictions and controls apply or to any neighboring property;

(e) to conduct investigations, make studies, surveys and plans and disseminate information relative to community development, including desirable patterns for land use and community growth, urban renewal, relocation, and any other matter deemed by it to be material in connection with any of its powers and duties, and to make such studies, plans and information available to the federal government, to agencies or subdivisions of the commonwealth and to interested persons;

(f) to develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight;

(g) to receive gifts, loans, grants, contributions or other financial assistance from the federal government, the commonwealth, the city or town in which it was organized or any other source; and

(h) In any city whose population exceeds one hundred and fifty thousand, to own, construct, finance and maintain intermodal transportation terminals within an urban renewal project area. As used in this clause an "intermodal transportation terminal" shall mean a facility modified as necessary to accommodate several modes of transportation which may include, without limitation, inter-city mass transit service, rail or rubber tire, motor bus transportation, railroad transportation, and airline ticket offices and passenger terminal providing direct transportation to and from airports.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 2013-3768-E

JOSEPH P. MARCHESE

VS.

BOSTON REDEVELOPMENT AUTHORITY

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO FILE FIRST AMENDED COMPLAINT

INTRODUCTION

This is an action for a writ of *certiorari* under G. L. c. 121B, § 47 brought by plaintiff Joseph P. Marchese ("plaintiff") against defendant Boston Redevelopment Authority ("BRA") on account of an eminent domain taking by the BRA. The matter is before the court on the plaintiff's motion to file a first amended complaint, which motion the BRA opposes. After hearing, and for the reasons set forth below, the motion is **DENIED**.

BACKGROUND

This case arises out of the BRA's taking by eminent domain of easement rights in Yawkey Way, a public way adjacent to Fenway Park in the City of Boston ("Taking"), and the BRA's subsequent no-bid sale and transfer of those rights to the Boston Red Sox ("Red Sox Agreement"). In his complaint, the plaintiff alleges that the BRA's Taking and then the Red Sox Agreement violated the Uniform Procurement Act, G. L. c. 30B, because the Taking was not part of an "urban renewal plan," G. L. c. 30B, § 1(b)(25), and, therefore, should have been the subject of public, competitive bidding. (The plaintiff was an interested bidder for the Yawkey Way

easement rights.) The plaintiff further maintains the Taking exceeded the BRA's powers of eminent domain because Yawkey Way is not blighted, as contemplated under G. L. c. 121B, § 46(f). See *Mahajan* v. *Dept. of Environmental Protection*, 464 Mass. 604, 619 (2013).

The instant action has survived the relatively low threshold of Rule 12(b)(6) scrutiny. Accepting all the allegations in the complaint as true, as it must, *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), the court, Ames, J., determined that the plaintiff had standing to seek judicial review of the BRA's Taking and, accordingly, denied the BRA's motion to dismiss. Hence, the plaintiff's claim for *certiorari* review of the BRA's Taking remains viable.

DISCUSSION

The plaintiff now seeks to amend his complaint by adding claims for judicial review of the Red Sox Agreement, for monetary damages, and for violation of G. L. c. 93A.[1] The decision whether to grant a motion to amend is left to the sound discretion of the judge, but leave should be granted unless there are good reasons for denying the motion. *Goulet* v. *Whitin Mach. Works, Inc.*, 399 Mass. 547, 549 (1987). See Mass. R. Civ. P. 15(a). One of those reasons is futility of amendment. *Castellucci* v. *U. S. Fidelity & Guar. Co.*, 372 Mass. 288, 290 (1977). See *Mathis* v. *Mass. Elec. Co.*, 409 Mass. 256, 264 (1991). Such is the case here: all of the plaintiff's proposed amendments would be in vain.

First, the plaintiff's attempt to challenge the Red Sox Agreement is pointless. If the court ultimately determines that the Taking was a proper exercise of the BRA's statutory authority

[1]Contrary to his contention, the plaintiff cannot amend as of right under Mass. R. Civ. P. 15(a) because the BRA already has answered by virtue of its filing the administrative record in court. See G. L. c. 30A, § 14(4); Superior Court Standing Order 1-96(2).

relative to a development project, Section 1(b)(25) of Chapter 30B specifically exempts from public bidding the easement rights in question. G. L. c. 30B, § 1(b)(25). If the court finds that the Taking was improper, then the Taking would be annulled; and the easement rights would revert back to the City of Boston. See *Newton* v. *Trustees of State Colleges*, 359 Mass. 668, 670 (1971); *Wright* v. *Walcott*, 238 Mass. 432, 436 (1921).

Furthermore, the plaintiff cannot recover monetary damages as a result of the Taking.[2] Where the power of eminent domain is exercised, only the *owner* of the property is entitled to the reasonable value of the property taken. *Smith* v. *Commonwealth*, 210 Mass. 259, 261 (1911); *Senn* v. *Western Massachusetts Elec. Co.*, 18 Mass. App. Ct. 992, 994 (1985). The fee simple interests in Yawkey Way are owned by the two abutting landowners (the Red Sox and another); the Taking expressly excluded "any and all right, title and interest or easement, if any, of any abutters in Yawkey Way." Through the Red Sox Agreement, the BRA granted to the Red Sox the right to suspend the City of Boston's right to use Yawkey Way as a roadway, a right that is not marketable to anyone other than the fee owners in the Way. Therefore, the plaintiff's assertion that he suffered monetary damages as a result of the Red Sox Agreement lacks merit, especially in light of his concession that his claim for damages under G. L. c. 121B is "an issue of first impression."

Finally, the BRA, not being engaged in the conduct of any trade or commerce but, rather, in the legislatively-prescribed mandate of land redevelopment, is not subject to the proscriptions

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[2]In citing *Peabody Constr. Co.* v. *Boston*, 28 Mass. App. Ct. 100, 105 (1989), the plaintiff appears to be conflating his present action for a writ of *certiorari* under G. L. c. 121B, § 47, the sole remedy of which is the correction of legal errors, with an action under the public bidding law, G. L. c. 149, § 44E(3), which provides for the recovery of bid preparation costs by a bidder wrongfully deprived of a contract. *Id.*

of G. L. c. 93A. *Lafayette Place Associates* v. *Boston Redevelopment Auth.*, 427 Mass. 509, 535-36 (1998). See *Peabody N. E., Inc.* v. *Marshfield*, 426 Mass. 436, 439-40 (1998). The plaintiff admits that "[n]o appellate level court has established whether or not 93A applies to a municipality or a municipal authority"; the Superior Court decision on which he relies, *Johnson Golf Mft., Inc.* v. *Town of Duxbury*, Middlesex Sup. Ct., 2008-04641, is distinguishable, non-precedential, and on appeal.

ORDER

For all the foregoing reasons, the plaintiff's motion to file a first amended complaint is hereby **DENIED**.

Linda E. Giles,
Justice of the Superior Court

Dated: December 14, 2016

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2013-3768-G

JOSEPH P. MARCHESE

vs.

BOSTON REDEVELOPMENT AUTHORITY

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Joseph Marchese ("Marchese"), brought this *certiorari* action under G. L. c. 121B, § 47 to challenge an eminent domain taking of an easement by the Boston Redevelopment Authority ("BRA"). Presented for decision are cross motions for judgment on the pleadings filed by Marchese and BRA. For the following reasons, Marchese's motion is **DENIED** and the BRA's motion is **ALLOWED**.

BACKGROUND

Historical Framework

Fenway Park, Boston's popular and historic ballpark, has been the home of the Boston Red Sox since 1912. It was built on a parcel of land within Boston proper, which is now abutted by Lansdowne Street to the north, Ipswich Street to the east, Van Ness Street to the south, and Brookline Avenue and Yawkey Way to the west.[1] That parcel of land (and the ballpark itself) are

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[1] Until 1977, what is now Yawkey Way was part of Jersey Street.. Jersey Street was created as a public way on July 15, 1898 under the authority of St. 1891, c. 323, entitled *An Act Relating to the Location, Laying Out and Construction of Highways in the City of Boston.* See *An Act to Extend the Time for Filing Petitions for the Assessment of Damages Accruing from the Laying Out and Construction of Jersey Street in the City of Boston*, 1905 Mass. House Bill 0170; *A Record of the Streets, Alleys, Places, Etc. in the City of Boston*, compiled under the direction of the Street Commissioners and printed by the order of City Council at 1, 261 (1910) (stating that Jersey Street was a public highway "in the opinion of the Street Commissioners"); *Edwards* v. *Bruorton*, 184 Mass. 529, 529-530 (1904). See also *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000) (court may take notice of "matters

now owned by the Olde Town Team Realty Trust ("Olde Town"). Olde Town is a Massachusetts real estate trust and the Boston Red Sox Baseball Club Limited Partnership is Olde Town's sole beneficiary. Today, Fenway Park is not only the oldest Major League Baseball ("MLB") park in continuous use in the United States, but the smallest ballpark still in use.

The location of the Red Sox's ballpark has long been a matter of both public and governmental interest. As early as the 1960s, the legislature began to consider plans for a new, larger stadium in the city of Boston ("Boston" or the "City"), with better access to public transportation and parking facilities. See, e.g., *An Act Creating the Greater Boston Stadium Authority and Authorizing Said Authority to Construct, Operate, and Maintain a Multi-Purpose Stadium and Appurtenant Facilities in or in the Vicinity of Greater Boston*, St. 1962, c. 778. A lack of public transportation and parking options contributed to low attendance figures, and Red Sox officials had expressed their belief that the team needed "a new stadium if it [was] to survive financially." See *Supplementary Report Relative to a Boston Multi-Purpose Sports Facility* at 14-15, Mass. Senate Rep. No. 1125 (1965). This early push to build a new baseball stadium with public funds struck out when, in 1969, the Supreme Judicial Court held that pending legislation to provide public funding to the Massachusetts Turnpike Authority for the purpose of developing a new athletic stadium was unconstitutional because the legislation did not set forth "appropriate standards and principles" to protect the public interest. See *Opinion of the Justices*, 356 Mass. 775, 795 (1969).

That a legal challenge slowed but did not stem the interest in developing a new stadium, with government support. Public efforts to build a new ballpark in Boston experienced a revival

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of public record"); *Commonwealth* v. *Greco*, 76 Mass. App. Ct. 296, 301 (2010) (matters of common knowledge and facts that "are indisputably true" subject to judicial notice).

in the 1990s. See, e.g., *An Act Relative to Development of Convention Facilities in the Commonwealth*, St. 1995, c. 006, § 18(f) (establishing a commission to make recommendations and file proposed legislation to build either a new convention center with a fixed seating component, or a separate facility to host athletic events "including major league baseball") (emphasis added). On August 10, 2000, then Massachusetts Governor Paul Cellucci signed into law *An Act Relative to the Construction and Financing of Infrastructure and Other Improvements in the City of Boston and Around Fenway Park* (the "2000 Act"). See St. 2000, c. 208. The 2000 Act codified legislative findings that Fenway Park was "inadequate for the purposes for which it was designed and a new ballpark is required to attract and retain those athletic events which shall promote the economic health of the commonwealth and encourage further private development, including development of other commercial facilities." *Id.* at § 1(d).

> The 2000 Act declared that "the acquisition and financing by the city of Boston of a suitable site within the city for the new ballpark is in furtherance of a public purpose and shall provide an essential stimulus to the development of the ballpark and the economic health and development of the city and the community adjacent to the ballpark . . . [and] shall promote and enhance public safety and convenience and shall provide an essential stimulus to the construction of the new ballpark and related facilities for economic development by private industry and the economic development of communities adjacent to the ballpark."

Id. at §§ 1(f), (i). The 2000 Act authorized the issuance of $100 million in state bonds to finance infrastructure improvements in the vicinity of the ballpark development area[2] and $140 million

[2] The 2000 Act defined the "ballpark development area" as "the area within the city of Boston bounded and described as follows: beginning at the intersection of the centerline of Brookline avenue and the centerline of Boylston street, thence easterly following the centerline of Boylston street to the intersection with the centerline of Ipswich street, then northerly and easterly along the centerline of Ipswich street to the intersection with the centerline of Landsdowne [sic] street, then westerly along the centerline of Landsdowne [sic] street to the intersection with the centerline of Brookline avenue, then southwesterly along the centerline of Brookline avenue to the point of beginning. St. 2000, c. 208, § 3(a).

in bonds to finance land acquisition, the relocation of residents within the ballpark development area, and environmental cleanup costs.[3] *Id.* at §§ 5(a), 8(a).

There remained tension among the various factions as to how best to achieve the desired outcome of creating an improved and self-sufficient ballpark in the City. The 2000 Act faced opposition from many people who sought, rather than developing a new ballpark, to improve the existing park and suggested that the existing Fenway Park could be redeveloped to allow for increased capacity and amenities. After the 2000 Act was signed into law, the Red Sox's owners struggled to secure the necessary parcels of land and infrastructure support necessary to construct the new ballpark. Meanwhile, in 2002 ownership of the Red Sox changed hands and the franchise was purchased by Fenway Sports Group (formerly known as New England Sports Ventures). Subsequent to that change in ownership, the conversation about what to do about Fenway Park moved in the direction of improving the existing park, not building a new one.

August 2002: Short Term Licensing Agreement

In an effort to improve the park experience for fans, in 2002, the Red Sox's new owners[4] petitioned the City's Public Works Department to issue a permit for the temporary closure of Yawkey Way from Brookline Avenue to Van Ness Street during the 2002 baseball season "for the purpose of utilizing the public way as an extension of the ballpark for Red Sox home games only." See *License, Maintenance and Indemnification Agreement*, AR 1. The City had long closed Yawkey Way to vehicular traffic on Red Sox game days for safety purposes, but that

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[3] The 2000 Act also prohibited the city of Boston from acquiring any land within the proposed ballpark development area before preparing an economic development plan and receiving the approval of the Boston City Council and Mayor. Among other things, the economic development plan was required to encompass an agreement between the city of Boston and the ballpark developer to share a portion of the net income generated from a proposed parking facility and a provision that required the ballpark developer to pay "as consideration for the lease of the ballpark site a sum equal to the total debt service incurred by the city . . . ." See St. 2000, c. 208, §§ 4(d), 6(a).

[4] Unless otherwise indicated, references to the "Red Sox" hereinafter refer to the team's owners.

closure did not allow the Red Sox to exclude persons from the area who were not ticketholders. If approved, the permit would extend the closure to all pedestrians except for ticket holders.

On August 29, 2002, the City, acting by and through its Public Works Commissioner, allowed the petition and entered into a short term licensing agreement ("Short Term Licensing Agreement") with the Red Sox, acting by and through the Red Sox's then president and CEO, Larry Lucchino ("Lucchino"). The Short Term Licensing Agreement granted the Red Sox "exclusive use, occupation, and control" of Yawkey Way from Brookline Avenue to Van Ness Street for up to four hours before, and up to two hours after the start of Red Sox baseball games from September 5, 2002 to the last Red Sox home game of 2002 in exchange for $900 per game.

October 2002: Proposed Interim Improvements

On October 22, 2002, less than two months after the Short Term Licensing Agreement had commenced, the Red Sox sent the BRA an application for small project review under Article 80E of the Boston Zoning Code. The proposal accompanying the application ("proposal") asked the BRA to approve certain interim improvements to Fenway Park and designate the improvements as a "demonstration project" under G. L. c. 121B, § 46(f).

The proposal set forth two categories of improvements. Under the first category, the Red Sox proposed replacing Fenway Park's existing standing room areas with structured seating on top of the "Green Monster" in left field and on the right field roof. The Red Sox needed to acquire the fee simple interest in air and subterranean rights, over and below Lansdowne Street, to install the new seating structure, which would project over Lansdowne Street and require new foundation to be poured underneath the Lansdowne Street sidewalk

The second category of proposed improvements concerned concourse upgrades. The proposal noted that the Fenway Park concourse "has the most limited area for fan amenities,

concessions, restrooms and circulation of any park in Major League Baseball" and that replacing the standing areas within the park with structured seating would further reduce the Red Sox's ability to provide "concessions and necessary fan amenities." The proposal stated that the Red Sox sought to enter into an agreement "that would permit the continued use of Yawkey Way as part of the concourse for home game days on a predictable basis for 2003 and beyond, in the same general manner" as it had been used under the Short Term Licensing Agreement. The proposal indicated that the demonstration project designation would allow the BRA to grant the Red Sox certain property rights that the proposed improvements would encroach upon. The proposal promised that "[i]n order . . . to carry out the streetscape improvements, the Red Sox would make specific repairs to Yawkey Way, including landscaping, lighting and special amenities" such as "a video board and a replica of the Green Monster scoreboard to be placed on the building facades above the adjacent Yawkey Way retail stores."[5] The proposal also stated that the proposed improvements would "provide an immediate upgrade to the fan experience, without a material impact to the surrounding neighborhood and businesses" and were "independent of any future plans" for Fenway Park.

Demonstration Project Implementation

On November 7, 2002, a public meeting was held by the Fenway Planning Task Force.[6] The details of who attended the meeting are not clear, but the record indicates that the majority of attendees approved the Red Sox's proposal to the BRA. On December 5, 2002, the BRA's

[5] The proposal also sought permission to rehabilitate and expand Fenway Park's bleacher and right field concourse areas in order to increase the number of restrooms and concessions stands available to patrons, and allow Aramark, the Red Sox's concessionaire, "to better prepare quality foods."

[6] "The Fenway Planning Task Force (FPTF), appointed by Mayor Thomas Menino, was a group of community, business and institutional representatives that lay down the foundation for issuing new and permanent zoning in the Fenway neighborhood." *Fenway Planning and Rezoning*, Boston Planning & Development Agency, http://www.bostonplans.org/planning/planning-initiatives/fenway-planning-and-rezoning (last visited December 5, 2017).

Board of Directors ("Board") voted to designate the proposed upgrades as a "Demonstration Project Plan" and initiated related eminent domain procedures.[7] In connection with these proceedings, the Board declared:

> (a) That the Massachusetts Legislature in the Acts of 2000, Chapter 208 has found, that '. . . the current open air ballpark [the existing Fenway Park] is inadequate for the purposes for which it was designed . . .";
>
> (b) That in order to protect against urban blight, the undertaking of the [proposal] and assistance in the acquisition and transfer of adjacent areas to the existing Fenway Park are in the best interest of both the [BRA] and the City of Boston, and requires the assistance of the [BRA];
>
> (c) That the [BRA] may take by eminent domain certain rights in and over parts of Lansdowne Street and Yawkey Way for the [Proposal]; and
>
> (d) Based on (a), (b) and (c) above, the [Proposal] constitutes a "Demonstration Project" under General Laws Chapter 121B, Section 46(f), as amended.

The same day, the BRA issued an Order of Taking for the fee simple interest in air and subterranean rights necessary to install the proposed new seating over Lansdowne Street ("Lansdowne Rights").

On January 16, 2003, the Board voted to approve the Demonstration Project pursuant to Article 80, Section 80E of the Boston Zoning Code. The same day, the BRA issued an Order of Taking ("2003 Order of Taking") for a limited easement over the portion of Yawkey Way between Brookline Avenue and Van Ness Street ("Yawkey Way Easement"). The 2003 Order of Taking stated that the BRA was taking the Yawkey Way Easement "to protect against or eliminate 'urban blight' as described in Chapter 121B, Section 46(f)." The 2003 Order of Taking also stated that the BRA was taking the Yawkey Way Easement "subject to the terms and conditions" of a licensing agreement and that the use thereof "shall be limited to the surface use

[7] The improvements are referred to hereinafter, collectively, as the "Demonstration Project."

of the [Yawkey Way Easement] for those days and limited uses on which the Boston Red Sox have games at Fenway Park and subject further to the terms and conditions of the [licensing] Agreement." Unlike the permanent taking pursuant to which the BRA acquired the Lansdowne Rights, the 2003 Order of Taking stated that it was only "temporary in nature" and is "in effect through the last game day in the tenth calendar year from and after" the 2003 Order of Taking was recorded.[8]

After the BRA acquired the Lansdowne Rights it engaged with the Red Sox ownership to further the efforts to upgrade and improve the park and environs instead of building a new stadium in another location. On February 12, 2003, the BRA and the Red Sox executed a License, Maintenance and Indemnification Agreement ("2003 LMI") granting the Red Sox a license to use the Lansdowne Rights and the Yawkey Way Easement on game days, just before and after games for a ten-year period that commenced on February 1, 2003, and would end on the last Red Sox game of the 2013 MLB Season. In consideration for the ten year game-day license, the Red Sox agreed to pay the BRA $165,000 each year, subject to an annual percentage adjustment no greater than 5% of the increase in the Consumer Price Index from the previous license year.[9]

The 2003 LMI stated that the Red Sox's license to use the Yawkey Way Easement encompassed the "right to temporarily close and have exclusive use, occupation, and control of [the Yawkey Way Easement] . . . for the installation of portable fencing, turnstiles and any other structures or equipment associated with the Permitted Activities . . . in connection with the utilization of the area as an extension of the Fenway Park concourse area during all Red Sox

[8] The 2003 Order of Taking was recorded on February 12, 2003. The last Red Sox game day of the tenth calendar year from that date was October 30, 2013.

[9] The 2003 LMI defined the "Consumer Price Index" as "the Consumer Price Index for Urban Wage Earners and Clerical Workers, all items . . . for Boston Massachusetts published by the United States Bureau of Labor Statistics."

home games which require a ticket for admission to Fenway Park." (Emphasis added) The Red Sox were permitted to close the Yawkey Way Easement area "to the public, including pedestrian and vehicular use or other public activities" for four hours prior to the start of each game and the earlier of two hours after each game or midnight. The 2003 LMI also authorized the Red Sox to "use third parties to provide certain operations, services or management" service in connection with their use of the Yawkey Way Easement.

2013 Ratification and Confirmation

The Demonstration Project was not without critics. On February 16, 2012, the Commonwealth's Office of the Inspector General ("OIG")[10] wrote the BRA a letter in connection with its ongoing review of the Demonstration Project and the 2003 LMI in particular. The letter cautioned the BRA that its review had led the OIG "to conclude that the [2003 LMI] pertaining to Yawkey Way cannot be renegotiated, extended or renewed under existing state law absent a new taking" and reminded the BRA of its obligation to ensure that the City received fair market value for the licensing of the Yawkey Way Easement, either by following "procurement practices set in G. L. c. 30B, or seek[ing] special legislation in order to convey the rights to Yawkey Way." The OIG publicized its objections, however, importantly, the OIG's recommendations in this regard were not binding on the BRA. See G. L. c. 12A, §§ 1 et seq.

Toward the end of the 2003 LMI and 2003 Order of Taking, on September 26, 2013, BRA staff distributed copies of a memorandum titled "FENWAY PARK DEMONSTRATION PROJECT PLAN AND ASSOCIATED ACTIONS" ("Memorandum") to the Board and

[10] The OIG is responsible for "prevent[ing] and detect[ing] fraud, waste and abuse in the expenditure of public funds, whether state, federal, or local, or relating to programs and operations involving the procurement of any supplies, services, or construction . . . ." G. L. c. 12A, § 7. The BRA is not bound by the OIG's recommendations. See G. L. c. 12A, § 8.

indicated an intent to seek a vote on the issues therein the same night.[11] The Memorandum proposed that the Board "ratify and confirm the BRA's adoption" of the Demonstration Project pursuant to G. L. c. 121B, § 46(f), and stated, in relevant part that

> Fenway Park, as improved, is now a top tourist attraction in the City of Boston and the Boston Red Sox have set team and major league baseball attendance records throughout the course of the agreement. Moreover, the stabilization of the Red Sox use of historic Fenway Park has played a significant role in the development of the surrounding neighborhood. In the ten years of the agreement, over $2.2 billion of private, non-institutional funds have been invested in residential and commercial development . . . . Visitor spending attributable to events at Fenway Park since 2002 also exceeds $2 billion.
>
> In addition to the spin-off effects in the Fenway Neighborhood and elsewhere in the city, the Boston Red Sox have also paid multiple times more in taxes to the City of Boston and the Commonwealth of Massachusetts since the commencement of the existing agreement. The Red Sox have paid $28 million to the City of Boston in taxes since 2002 and $36 million to the Commonwealth during that time. These figures represent an approximately threefold increase from the preceding ten years.

The Memorandum continued that the Red Sox and BRA sought to "continue the success" attributable to the Demonstration Project and "to take certain measures for the prevention of urban blight." The Memorandum stated that the BRA sought to accomplish two goals: "(1) preserve the economic benefit to the City of Boston that the [Demonstration Project] has produced; and (2) protect the taxpayers by receiving fair compensation for the future use of rights in both Yawkey Way and Lansdowne Street." The Memorandum thus proposed the adoption of a permanent Order of Taking of the Yawkey Way Easement, "on days when there is a licensed event at Fenway Park and only for a period of time before, during and after the event." The Memorandum proposed that the BRA sell the Yawkey Way Easement to the Red Sox "for as long as major league baseball games are played at Fenway Park."[12]

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[11] The Board member who eventually voted against the ratification and confirmation of the Demonstration Project began asking BRA staff for a memorandum on the issue four days earlier, on September 22, 2013.

[12] Therefore, if the Red Sox leave Fenway Park and are not replaced with another MLB team, the Yawkey Way Easement rights revert back to the BRA.

The BRA calculated the value of the Yawkey Way Easement by multiplying $60 per square foot (the annual revenue potential of "quality retail space in the Fenway neighborhood") by 32.87% (the percentage of one year that reflected the 120 days that the Red Sox were estimated to use the Yawkey Way Easement) to determine the annual revenue potential of the Yawkey Way Easement was $19.72 per square foot. The BRA concluded that the annual revenue potential of the Yawkey Way Easement was $341,156 by multiplying the $19.72 price per square foot by the 17,300 square foot area of the Yawkey Way Easement. Based on the seven percent capitalization rate[13] for retail space at that time, the BRA determined that the value of the rights to the Yawkey Way Easement was $4,873,657. The OIG later concluded this price worked out to approximately $4,000 per event day for ten years, and $0 per event thereafter.

At the 5:30 p.m. Board meeting on September 26, 2013, the BRA staff gave a thirty-six minute presentation that summarized the information in the Memorandum, followed by a question and answer session. Following the presentation, the Board voted four to one in favor of ratifying and confirming the Demonstration Project. The BRA's process while unusual did not violate any internal procedures or regulations.[14]

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[13] The Massachusetts Appeals Court has explained the use of capitalization rates in real estate valuation as follows:

> Massachusetts decisional law recognizes both capitalization of income and comparable sales studies as valid methods of real estate valuation. . . .
>
> Capitalization of income measures the value of property on the basis of its income-earning capacity. It typically employs two components: (1) the net income of the property (gross rental income minus operating expenses); and (2) a capitalization rate percentage representing the return necessary to attract investment capital. Division of the net operating income by the capitalization rate yields the proposed value of the property. Specific appraisals or assessments may add refinements to the basic computation.

Black Rock Golf Club, LLC v. Board of Assessors of Hingham, 81 Mass. App. Ct. 408, 410 n.5 (2012) (citation omitted).

[14] Subsequently, the OIG has also recommended that the BRA develop regulations for the approval of demonstration projects.

A permanent Order of Taking ("2013 Order of Taking") for the Yawkey Way Easement issued immediately after the Board's September 26, 2013 vote. Like the 2003 Order of Taking, the 2013 Order of Taking stated that the BRA was taking the Yawkey Way Easement for "the prevention and elimination of 'urban blight' as described in Chapter 121B, Section 46(f)." The 2013 Order of Taking expanded the scope of the Yawkey Way Easement to "those days at which a duly licensed event is to be held at [Fenway Park]" and was not simply limited to home games as the earlier agreement had been

On November 4, 2013, the BRA and the Red Sox executed a "Master Agreement," which built upon and made permanent the terms of the 2003 LMI. The recitals of the Master Agreement assert, in pertinent part, that

> Fenway Park, though still in use, fell into disrepair in the late 20th Century which had a degrading impact on properties located in its immediate proximity and a blighting influence on the surrounding neighborhood. By the year 2000, the roughly triangular area in the Fenway neighborhood . . . was characterized by low densities, underutilized properties, disparate uses and open areas with limited prospect of private investment ("Redevelopment Area").
>
> [A]s part of an economic development plan which included construction of a new Fenway Park, the Massachusetts Legislature found and declared, in Chapter 208 of the Acts of 2000, that the Redevelopment Area (referred to as the ballpark redevelopment area) was an "economic development area" defined to mean a blighted open area or a decadent area as defined in Chapter 121B and authorized the expenditure of up to $240 million in taxpayer money for, among other things land acquisition, infrastructure improvements and a parking facility.

The Master Agreement also stated that the BRA "recognize[d] that it is in the public interest to preserve Fenway Park and to encourage sound development in the areas to induce the [Red Sox] to maintain Fenway Park as a first class destination location and to prevent blighting conditions in the Redevelopment Area if Fenway Park were to fall into disrepair."

The BRA and the Red Sox also executed a Land Disposition Agreement ("LDA") that day. In Section 3.01 of Article III of the LDA, titled "RESTRICTIONS AND CONTROLS

UPON THE PROPERTY," the BRA acknowledged that "the continued authorization to host the type and frequency of Fenway Events is an important element of the Agreement and the [BRA] enters into this Agreement with the expectation that events of this nature and frequency will continue . . . ."

Section 3.02 of the LDA set forth the following terms with respect to the scope of the Yawkey Way Easement:

> The [Red Sox] agree[] that the Grant of Easement from the [BRA] to the [Red Sox] of the Yawkey Rights shall contain convents binding on the [Red Sox], proving that the holder of the Yawkey Rights:
>
> (i) May temporarily close that part of Yawkey Way located within the Yawkey Rights to the general public including pedestrian use, vehicular use and other public activities, during the period of time four (4) hours before the start of a Fenway Event until two (2) hours after the conclusion of the Fenway Event at which time that part of Yawkey Way temporarily closed shall be re-opened and restored to its condition immediately prior to closing.
>
> . . .
>
> (v) Shall be permitted to employ, use and otherwise engage third parties to provide certain operations, services or management in relation to the use, operation and maintenance of the Yawkey Rights.

On December 23, 2013, the BRA recorded a Grant of Easement officially conveying the Yawkey Way Easement to the Red Sox pursuant to the terms set forth in the Master Agreement and LDA.

OIG Review of the 2013 Ratification and Confirmation

After completing its review of the BRA's 2013 vote to ratify the Demonstration Project, on October 26, 2015, the OIG wrote a nineteen-page letter to the BRA sharply criticizing the agreements the BRA entered into with the Red Sox to continue the Demonstration Project.

The OIG criticized the BRA because it only obtained an oral consult on the value of the Yawkey Way Easement and "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 OIG also stated that 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." As a result, the OIG argued that the BRA "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." The OIG believed that "[w]ithout such an analysis, the BRA staff could not know that it was receiving the fair market value for the City's property . . . ," the City's property being the licensure of the limited easement of Yawkey Way on game days.

The OIG stated that it was "unclear whether the BRA ever asked for the net-revenue information in order to properly estimate an income-based price for the transactions," and found "[t]o the contrary . . . the BRA relied on illogical comparisons to retail space figures for a typical Fenway or other Boston neighborhood business." The letter pointed out that there was no restriction in the grant of easement that limits the Red Sox use of Yawkey Way to just 120 days per year, which was the number of days that factored into the calculation of the Yawkey Way Easement's price.

With regard to the circumstances of the Board's vote, the OIG noted that there was nothing apparent from the Board's September 26, 2013 agenda or the Memorandum to suggest there was any evidence as to *how* taking the Yawkey Way Easement would prevent or eliminate blight. Further, there seemed to have been a sense of urgency to the vote that only permitted the Board members hours to review a complicated transaction. In sum, the OIG took issue with the BRA's decision to "ratify" the Demonstration Project, value the Yawkey Way Easement as it

did, and then vote to extend the Master Agreement for as long as the Red Sox play at Fenway. But, in the final analysis, while there maybe criticism of the deal, this Court finds that the BRA acted within its authority to establish and execute Demonstration Projects.

Marchese's Claim vs. BRA

On May 3, 2013, before the BRA voted to confirm and ratify the terms of the Demonstration Project, Marchese contacted the BRA and expressed an interest in acquiring the rights to the Yawkey Way Easement that had been granted to the Red Sox under the 2003 LMI. Marchese proposed to the BRA a ten-year contract for $300,000 per year, of which $1.5 million would be paid upon execution of the agreement. Marchese stated that it was his intention to "lease spaces to vendors promoting the Boston experience . . . ." The Yawkey Way easement has been used for more than just a vendors' showcase. It has also been integrated into the security plan for the park. All bags and purses are searched outside the park on the concourse as part of the security screening for the park. The BRA had not sought any public bids for the Yawkey Way Easement.

On July 17, 2013, Marchese wrote another letter to the BRA asking it to "follow the guidance and suggestions of the Inspector General, and put the [licensure of the Yawkey Way Easement] 'out to bid' in order to allow others to participate in a transparent, fair and competitive bid procedure." Marchese wrote several additional letters. The BRA was not bound by the OIG and decided not to solicit other bids on the Yawkey Way Easement, mindful that the Red Sox, as private land owners, owned the land in fee to the center of Yawkey Way (subject to the easement for the public way on Yawkey Way).[15] The Red Sox, in other words, owned the

[15] See *Boston* v. *A.W. Perry, Inc.*, 304 Mass. 18, 20 (1939) ("It has always been held with respect to land included within the limits of [a] public way to be clear that the public have no other right, but that of passing and repassing; and that the title to the land, and all the profits to be derived from it, consistently with, and subject to, the right of way, remain in the owner of the soil.") (citation omitted).

land immediately abutting the easement. This factor would impact the value of the easement in that access to the easement would almost certainly require the Red Sox consent to access their property.[16] And, the BRA acquired a portion of the public way easement (for a few hours on game days) and did not acquire any rights in the land owned by the Red Sox.

Disappointed, Marchese filed the present action seeking certiorari review of the 2013 Order of Taking under G. L. c. 121B, § 47. Marchese challenged the BRA's taking of the Yawkey Way Easement and he also challenged the deal to transfer easement rights on Yawkey Way (on home game days and event days) to the Red Sox because he claimed it exceeded the scope of the BRA's authority because he claimed that Yawkey Way was not "blighted." Marchese also alleged that the Yawkey Way Easement should have been put out to bid pursuant to G. L. c. 30B. This court previously denied the BRA's motion to dismiss Marchese's complaint, and found, at that preliminary stage of the legal proceedings that Marchese had standing to challenge the 2013 Order of Taking and conveyance of the Yawkey Way Easement to the Red Sox.[17]

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[16] See *Boston*, 304 Mass. at 20 ("[T]he rights of those who have title to the fee subject to [a] public easement are carefully guarded . . . ."); *In re Opinion of the Justices*, 297 Mass. 559, 562 (1937) ("Whatever is done within the limits of the highway by the public or by members of it not justifiable as incidental to travel is a violation of the rights of the abutting owner.").

[17] At that time in the proceedings, it was reasoned that Marchese was a "person aggrieved" because the BRA had deprived Marchese and any other potential bidder of the opportunity to bid on the Yawkey Way Easement by ratifying and confirming the terms of the 2003 LMI. On December 14, 2016, the court (Giles, J.) denied Marchese's motion to file a first amended complaint adding claims for judicial review of the 2013 transactions between the BRA and the Red Sox, monetary damages, and violation of G. L. c. 93A. The court reasoned that Marchese's attempt to challenge the 2013 agreement was "pointless" because if the court ultimately determined that the taking was a proper exercise of the BRA's statutory authority, G. L. c. 30B, § 1(b)(25) specifically exempted the easement rights in question from public bidding. The court added that if it ultimately found the taking was improper, then it would be annulled, and the easement rights would revert back to the City.

DISCUSSION

I. Certiorari Review of the 2013 Taking

A. The BRA's Eminent Domain Power

The BRA's exercise of its eminent domain power "is proper so long as the taking is for a public purpose" and made within the confines of its authority granted under Chapters 121A and 121B of the General Laws. See *Benevolent & Protective Order of Elks, Lodge No. 65* v. *Planning Bd. of Lawrence*, 403 Mass. 531, 536-539 (1988); see also *Mahajan* v. *Department of Envtl. Protect.* 464 Mass. 604, 606 (2013) (BRA is a redevelopment and urban renewal agency under G. L. c. 121B, §§ 4, 9 and acts "as the planning board for the city of Boston" under G. L. c. 121A). The BRA has considerable latitude in articulating a public purpose in support of its exercise of its eminent domain powers.

When considering whether a BRA eminent domain taking was for a proper public purpose, Massachusetts appellate courts generally look to those purposes articulated by the legislature, such as those set forth in the *Legislative Declaration of Necessity of Urban Renewal Projects* under G. L. c. 121B, § 45. See e.g., *Benevolent & Protective Order of Elks, Lodge No. 65*, 403 Mass. at 539-540 (citing G. L. c. 121B, § 45 in support of holding that "[t]aking for redevelopment an area which is a 'blighted open area' . . . is a public purpose"). Eliminating and "preventing recurrence" of "substandard," "decadent" or "blighted open areas" throughout the Commonwealth are among these purposes. See G. L. c. 121B, § 45. According to the legislature, such areas "constitute[] a serious and growing menace, injurious and inimical to the safety, health, morals and welfare of the residents of the commonwealth. . . . [and] an economic and social liability, [that] substantially impairs or arrests the sound growth of cities and towns, and retards the provision of housing accommodation . . . ." *Id.* See *Lowell* v. *Boston*, 322 Mass.

709, 735 (1948) ("The legislative declaration as to the public conditions which led up to the enactment of the statute and the purpose sought to be accomplished are entitled to great weight."); see also *An Act Relative To Urban Redevelopment Corporations, the Housing Authority Law, and the Clearing of Slums and Redevelopment Areas*, St. 1953, c. 0647, § 18. Accordingly, a BRA taking by eminent domain has a proper public purpose if it was to eliminate or prevent the recurrence of "substandard," "decadent" or "blighted open areas" throughout the Commonwealth.[18]

Turning to the BRA's statutory authorization, G. L. c. 121B, § 11(d) permits redevelopment authorities such as the BRA to take by eminent domain "any property, real or personal, or any interest therein, found by it to be necessary or reasonably required" to eliminate or prevent the recurrence of substandard, decadent, or blighted open areas, or to "carry out" any of Chapter 121B's sections, "and to sell, exchange, transfer, lease or assign the same . . . ."

Marchese nonetheless argues that Section 46(f) did not authorize the permanent taking of the Yawkey Way Easement because Section 46(f) does not provide any mechanism for public participation and oversight such as those required before the BRA can commence a formal urban renewal project under G. L. c. 121B, § 48. Marchese thus argues that BRA's interpretation of 46(f) would allow it, and other urban renewal agencies, to "take *any* property in the Commonwealth by eminent domain . . . transfer it to a new owner" and claim that it is a "demonstration" without detailing what is being demonstrated or how it cures or prevents urban blight." See *Plaintiff's Memorandum* at 8 (emphasis in original). This Court rejects that

[18] But see *Opinion of the Justices*, 332 Mass. 769, 783-784 (1955) (bill to acquire land with public funds to prevent blight was not a public purpose where "it seem[ed] plain that the primary design of the bill [was] to provide for the acquisition of the area by the use . . . of substantial sums of public money and later of comparatively small sums, to formulate a plan for development, including the devoting of some portions of the area to truly public uses, and the return of the remainder to private ownership . . . with the expectation that adjacent areas and the city as a whole will benefit through the increase of taxable property and of values").

argument just as Justice Botsford rejected a similar argument in *Tremont* v. *Boston Redevelopment Auth.*, 2002 Mass. Super. LEXIS 564 at *37-*45 (2002). The court finds her analysis persuasive in this case as well:

> Section 11 confers on the BRA the right to take property by eminent domain whenever it determines the taking is necessary to carry out the purpose of any section of the urban renewal statute, c. 121B. Section 46(f) is manifestly a section of c. 121B. It follows, therefore, that if the BRA finds a taking to be necessary "for the prevention and elimination of slums and urban blight" under § 46(f), such a taking has the requisite statutory basis in § 11(d), unless § 46(f) itself limits the BRA's ability to take property by eminent domain to situations where the taking is part of an approved "urban renewal project."
>
> There is no such limitation. Section 46 sets out in eight separate subsections (§ 46(a) through (h)) a set of powers that the section deems additional to those granted in other parts of c. 121B. Included among these are the power "to prepare or cause to be prepared urban renewal plans, . . ." (§ 46(c)), and "to engage in urban renewal projects . . ." (§ 46(d)). Section 46(f), which gives the power "to carry out demonstrations for the prevention and elimination of slums and urban blight," contains no language that ties such demonstrations to urban renewal plans or projects. . . .
>
> Moreover, support for the view that the BRA does have statutory power to take property by eminent domain independent of an urban renewal plan or project comes from G. L.c. 121B, § 45, the section of the statute that declares the purpose of and necessity for urban renewal programs in general. . . .
>
> The necessity in the public interest for the provisions of this chapter relating to urban renewal projects is hereby declared as a matter of legislative determination. This section supplies an unquestionably broad description of purposes for which an urban renewal agency such as the BRA may exercise the power of eminent domain. While it mentions the need for redevelopment of land to be "in accordance with a comprehensive plan," the section nowhere defines that "plan" as being limited to a formal "urban renewal plan" within the meaning of c. 121B, § 1, and more to the point, nowhere restricts an agency's power of eminent domain to taking property in conjunction with an approved "urban renewal plan." . . . Furthermore, the second paragraph of § 45 . . . relating to conservation and rehabilitation of blighted open areas or portions of such area, makes no reference to a "comprehensive plan" at all.

(citation omitted).

For these reasons, the court finds that G. L. c. 121B, § 46(f) empowered the BRA to take the Yawkey Way Easement by eminent domain to carry out a demonstration project because it

was to prevent or eliminate urban blight. There is no definition of urban blight in the statute. The BRA as specialist in the area of urban renewal are given some deference in making that determination and the court ought not substitute its judgement of what is blight or not. See *Boston Edison Co.* v. *Boston Redev. Auth.*, 374 Mass. 37, 70 (1977) (declining to substitute judgment for that of agency charged with making determination). The statute does not require any method for determining or quantifying blight.

What the record makes clear is that since at least the 1960s there was governmental interest, as expressed by the state legislature and governor, to explore opportunities to improve the athletic stadium for the Red Sox, whether by replacement or otherwise. The legislative acts supported the public means by which an athletic stadium would remain in Boston and could therefore help prime the City's economic engine. The legislature saw it as part of a larger plan to renew the Fenway area. Looking at the Fenway area today, it may be difficult to imagine how different that area appeared in the 1960s, 1970s, 1980s, and 1990s and then compare those historical images with how that neighborhood had been transformed by 2013. The BRA is tasked with taking the long view on urban renewal. The sale of the Red Sox in 2002, and the new owners' willingness to renew, restore and improve the existing Fenway Park rather than building a new stadium, (likely in a in a new location) presented this opportunity to the BRA. The BRA's conduct is consistent with longstanding legislative plans and proposals to upgrade the park and its surrounding neighborhood.

In this case, the BRA took the Yawkey Way Easement by eminent domain to carry out a demonstration under G. L. c. 121B, § 46(f), which empowers the BRA to "develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight[.]" See September 26, 2013 Order of Taking, AR 16. As previously

noted, this Court will not substitute its judgment for the specialized knowledge and expertise of the BRA in identifying blight and areas that are to be subject to renewal. There is a legislative record to support the conclusion that the BRA's actions here were to prevent urban blight and continue the renewal and development of a vital economic neighborhood in the City. Therefore, the taking at issue in this case was within the BRA's statutory authority and for a proper public purpose as it was to eliminate or prevent blight as found by the BRA.

B. Scope of Judicial Review

"The decisions made by the BRA under G. L. c. 121B are legislative in nature. . . . [and] involve policy matters concerning the implementation of long-term development of areas of Boston considered to be in need of renewal." *St. Botolph Citizens Comm.* v. *Boston Redev. Auth.*, 429 Mass. 1, 12 (1999). "For this reason, G. L. c. 121B provides no explicit right of appeal in connection with the BRA's management of an urban renewal plan." *Id.* Nonetheless, the Supreme Judicial Court has held that the Superior Court has jurisdiction to review the BRA's determination that a taking satisfied statutory requirements and thus furthered a proper public purpose. See *Benevolent & Protective Order of Elks, Lodge No. 65*, 403 Mass. at 536-537. Such challenge, however, is limited to a narrow scope of review.

Marchese's first challenge is to the September 26, 2013 Order of Taking. Although the taking of the Yawkey Way Easement was conducted under Chapter 121B, Marchese argues that the court should review the taking under the substantial evidence test applicable to BRA proceedings under G. L. c. 121A. See *Boston Edison Co.*,, 374 Mass. at 52 (broader scope of review applies to BRA proceedings under G. L. c. 121A). In *Boston Edison Co.*, the Supreme Judicial Court found that due to "[t]he differences in the nature of the projects and the methods for approval between redevelopment plans under c. 121A and those under c. 121B . . . different

treatment in terms of scope of review is appropriate . . . ." *Id.* The SJC held that a court reviewing proceedings conducted under G. L. c. 121A should apply the substantial evidence test because such proceedings are privately initiated and therefore did not involve a "large amount of participation by public agencies" or "tax benefits" to private entities. *Id.* at 53. In contrast, the court found that proceedings conducted under G. L. c. 121B could be reviewed under the narrower arbitrary and capricious standard of review because such projects generally involve an urban renewal plan that "must be approved by the city council and an independent State agency . . . ."[19] *Id.*

Here, Marchese argues that because the taking of the Yawkey Way Easement was not publicly reviewed or conducted pursuant to a Chapter 121B urban renewal plan it was akin to a proceeding under Chapter 121A and requires a more rigorous review. The court does not agree. Although demonstrations carried out under G. L. c. 121B, § 46(f) are not subject to the public review requirements the SJC discussed in *Boston Edison*, the legislature has repeatedly recognized, since at least the 1960s and culminating with the 2000 Act, that expanding the capacity of Fenway Park should be a priority for the City. Therefore, although the Yawkey Way Easement was not taken pursuant to a formal urban renewal plan, it nonetheless furthered an articulated legislative priority. Compare *Opinion of the Justices*, 356 Mass. at 796 (if stadium subsidized by taxpayers "can be operated . . . so as in effect to subsidize private organizations operated for profit, then the facilities could not be said to exist for a public purpose" despite legislative declarations to the contrary). Moreover, unlike proceedings under G. L c. 121A, the BRA did not take the Yawkey Way Easement its capacity as a "planning board" for the City or

[19] General Laws c. 121B, § 48 provides that "[n]o urban renewal project shall be undertaken until (1) a public hearing relating to the urban renewal plan for such project has been held after due notice before the city council of a city or the municipal officers of a town and (2) the urban renewal plan therefor has been approved by the municipal officers and the department as provided in this section."

confer any tax benefits on private entities in connection with the taking. Compare *Boston Edison Co.*, 374 Mass. at 52. For these reasons, the court will review whether the BRA's determination that the taking of the Yawkey Way Easement was for the elimination and prevention of blight under the arbitrary and capricious standard of review applicable to proceedings under Chapter 121B.

Further, at this stage in the case, the reverse its position and instead concludes as for the BRA taking of the limited game day easement on Yawkey Way,, Marchese lacks legal standing to challenge the BRA's decision to exercise its eminent domain powers to take the easement rights from the City. This is so because: "[a] party has standing when it can allege any injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." *Benevolent & Protective Order of Elks, Lodge No. 65*, 403 Mass. at 542 (quotation omitted). In general, landowners or tenants within a project area are "'within the area of concern' of the statutory requirements which relate to the eligibility of the project area for urban renewal," and thus have standing to challenge a BRA action taken under G. L. c. 121B. *Id.* at 546. Here, however, Marchese is not a landowner or tenant within the demonstration area. Alternatively, standing could be conferred, as the SJC has found when "[a]ny person [is] aggrieved" by a BRA action and they may then seek judicial review. See *Boston Edison Co.*, 374 Mass. at 45. A person is "aggrieved" if the BRA action will cause them to suffer an injury that is "direct, substantial, and ascertainable." *Id.* at 46. In *Boston Edison*, the SJC conferred standing on the plaintiffs where the subject BRA action would result in "the elimination of a group of consumers" from the market available to the plaintiff. *Id.* at 44. Here, Marchese cannot show that consumers on Yawkey Way were a market available specifically to him. He was not in business at that location at the time of the taking and did not lose any existing consumers. He perhaps hoped to develop a new

commercial market with new consumers if he were to be successful but that would also be true to the public at large. Applying the plaintiff's definition of aggrieved in that sense then everyone who is not the Red Sox could be seen as an "aggrieved" person. Surely this proves too much.

Moreover, as explained below, Marchese's ability to access the easement, even if he could be the successful bidder for the easement rights, would also depend on the Red Sox, as the property owner, giving him consent to access their property abutting the easement. Absent evidence that Red Sox would have granted Marchese such approval and because he had no existing market before the BRA taking, his status remained unchanged by the BRA taking. The taking of the easement did not uniquely injure Marchese. Therefore, Marchese cannot show that the BRA's eminent domain taking of the Yawkey Way Easement for the purpose of conveying it to the Red Sox eliminated a group of consumers that had previously been available to him and so he lacks standing as a person "aggrieved" by the BRA taking.

C. Analysis

Arbitrary and Capricious

"A decision is not arbitrary or capricious unless there is no ground which 'reasonable [people] might deem proper' to support it." *Teamsters Joint Council No. 10* v. *Director of the Dept. of Labor & Workforce Develop.*, 447 Mass. 100, 107 (2006), quoting *Cotter* v. *Chelsea*, 329 Mass. 314, 318 (1952). "This standard is highly deferential to an agency and requires according due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." *Ten Local Citizen Group* v. *New England Wind, LLC*, 457 Mass. 222, 228 (2010) (quotation omitted). As the challenging party, Marchese carries the burden of persuasion.

Definition of "Urban Blight"

As an initial matter, the court must define the undefined term "urban blight" as that term is used in G. L. c. 121B, § 46(f). The provision now codified as G. L. c. 121B, § 46(f) (formerly G. L. c. 121, § 26AAA) originated in 1955 when the General Court passed *An Act Relative to Urban Renewal Projects* in the wake of the National Housing Act ("NHA") of 1954,[20] which constituted an expansion of the Federal Government's efforts to aid in the "elimination and prevention of slums," and introduced the concept of urban renewal. St. 1955, c. 654. See Mass. House Rep. 7839, August 2, 1954. Section 314 of the NHA authorized the Federal Housing and Home Finance Administrator "to make grants, subject to such conditions as he shall prescribe, to public bodies, including cities and other political subdivisions to assist them in developing testing and reporting methods and techniques, and *carrying out demonstrations* and other activities for the prevention and the elimination of slums and urban blight."[21] (Emphasis added). At that time, the NHA defined a "blighted area" as "any area where dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these facts, are detrimental to safety, health or morals." *National Housing Act Amendments of 1938*, c. 13, § 3, 52 Stat. 16 (presently codified at 12 U.S.C. § 1713(a)(5)).

Section 46(f) closely tracks the language of Section 314 of the NHA.[22] By enacting section 46(f), the legislature allowed redevelopment authorities such as the BRA to take

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[20] Pub. L. 83-560, 68 Stat. 590 (1954) (codified as amended at 12 U.S.C. §§ 1701 et. seq.).

[21] NHA demonstration grants were designed to "assist communities and other public agencies to develop solutions to the various problems raised by urban-renewal requirements though special studies and experimental activities carried out by non-federal governmental units." Special Commission on Audit of State Needs, *Massachusetts Needs in Urban and Industrial Renewal*, Mass. House Rep. No. 3373 at 96 (1960) (hereinafter, "House Rep. No. 3373").

[22] Marchese correctly points out that unlike the NHA, Section 46(f) does not include the language "and other activities."

advantage of NHA demonstration grants.[23] The legislature did not, however, incorporate the NHA's definition of a "blighted area" into the legislation that is presently codified as Chapter 121B, or otherwise define the term "urban blight." Chapter 121B does, however, define the term "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 . . . through the ordinary operations of private enterprise . . . ." G. L. c. 121B, § 1. Considering the statutory definition of a "blighted open area" in light of the legislative history of Section 46(f), and definition of "blighted area" set forth in the NHA, the term "urban blight" can reasonably be understood to refer to an area that is "detrimental to the safety, health, morals, welfare or sound growth of a community because it is unduly costly to develop . . . through the ordinary operations of private enterprise."[24]

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[23] In 1960, the Special Commission on Audit of State Needs produced a report in connection with executive and legislative requests to undertake an assessment of Massachusetts' urban renewal needs. See *Letter of Transmittal*, House Rep. No. 3373. Although the NHA made demonstration grants available several years before the report was issued, the Commission found that the Commonwealth had largely failed to take advantage of the demonstration grant program and recommended that Massachusetts utilize the program to facilitate "a flow of information and fresh approaches to the solution of urban renewal problems . . . ." House Rep. No. 3373 at 97. Among other things, the Commission recommended the use of demonstration grants to conduct a state-wide housing inventory, review problems of code enforcement related to conservation and rehabilitation programs, investigate the need for legislation authorizing an urban renewal "land bank," and carry out studies regarding difficulties faced by small business dislocated by urban renewal programs. *Id.* at 122-123.

[24] In *Tremont*, Justice Botsford settled on the same definition, albeit by taking a different route, finding that the terms "urban blight," "blighted open area," and "decadent area":

> should be given their common sense meanings, and that they need to be read in conjunction with the related statutory definitions "to produce an internal consistency." . . . The word "blight" is defined to mean in relevant part "something that impairs growth, withers hopes and ambitions, or impedes progress and prosperity." The American Heritage Dictionary of the English Language (3d ed. 1992). In the statutory context in which "urban blight" occurs, and drawing on the two statutorily defined terms cited above [(blighted open area and decadent area)], "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," is caused by one of a number of factors including the physical deterioration of facilities and buildings in the area, and that is not being alleviated or remedied "by the ordinary operations of private enterprise."

2002 Mass. Super. LEXIS 565 at *54-*56 (citation omitted).

Marchese's Petition for Review

As explained, the court's analysis is limited to whether there was "no ground which reasonable people might deem proper to support" the BRA's determination that the taking of the Yawkey Way Easement would eliminate or prevent urban blight, i.e., conditions "detrimental to the safety, health, morals, welfare or sound growth of a community." See G. L. c. 121B, § 1; *Teamsters Joint Council No. 10*, 447 Mass. at 107 (quotation and alteration omitted).

Marchese's principal argument is that "there is no urban blight on Yawkey Way, neither existing nor looming, threatened nor prospective." See *Plaintiff's Mem.* at 4. In support, Marchese points to dicta in the court's decision on the BRA's motion to dismiss, which stated that "no rational review of the facts shows that the parcel comprising the Yawkey Easement, as of September 26, 2013, was detrimental to the community's safety, health, morals, welfare, or growth." See *Memorandum of Decision and Order on Defendant Boston Redevelopment Authority's Motion to Dismiss* at 9 n.8. Marchese's reliance on the court's decision is misplaced.

The dictum cited by Marchese is not binding for purposes of the present analysis, that was at the Motion to Dismiss stage and now the parties have presented a more comprehensive understanding of the applicable statutory scheme for the court to review. Moreover, the court's order on the BRA's motion to dismiss did not reach the merits of Marchese's request for judicial review.[25]

Marchese also relies on the OIG's finding that the BRA did not articulate how taking the Yawkey Way Easement would prevent or eliminate urban blight. However, to some extent, Marchese's and the OIG's emphasis on evidence of "blight or threatened blight" miss the point. The BRA need not limit its consideration to only evidence of impending blight in order to

[25] A judge has the power to reconsider "an issue or a question of fact or law" that has already been decided "until final judgment or decree." *Commonwealth* v. *Charles*, 466 Mass. 63, 83-84 (2013).

determine that certain actions would prevent conditions detrimental to the safety, health, morals, welfare or sound growth of a community from developing. The on-going renewal of a neighborhood may also be a valid consideration.

Here, the BRA had evidence before it that during the ten-year period that the 2003 LMI was in place, over $2.2 billion of private funds had been invested in residential and commercial development in the neighborhood surrounding Yawkey Way. The BRA reasonably concluded that ratifying and confirming the improvements made under the 2003 LMI and 2003 Order of Taking, and thereby conveying the Yawkey Way Easement to the Red Sox indefinitely, the economic benefit that the improvements had already conferred on the surrounding neighborhood would be preserved. See *Boston Edison Co.*, 373 Mass. at 78 ("If there is any room for the exercise of discretion the judgment of the board must prevail.") (quotation omitted). The preservation of these benefits in turn prevented conditions detrimental to the safety, health, morals, welfare or sound growth of a community from developing in the area surrounding Yawkey Way. See G. L. c. 121B, § 45 (declaring that preventing the recurrence of substandard conditions "or their development" is a public purpose).

Despite Marchese's argument to the contrary, this is not a situation where the BRA relied on a determination of blight "made some years earlier" and did not have the benefit of data concerning the present characteristics of the neighborhood before making a determination. See *Boston Edison Co.*, 374 Mass. at 60. Rather, the BRA compared data about the neighborhood before the 2003 Order of Taking to data about the neighborhood ten years later and reasonably concluded that it had done more to improve the condition of the neighborhood than "the ordinary operations of private enterprise" had accomplished before 2003. See *Benevolent & Protective Order of Elks, Lodge No. 65*, 403 Mass. at 542 (eminent domain taking proper in light of

evidence "concerning the history of the project area and its development [which] support[ed] a conclusion that the ordinary operations of private enterprise were not remedying the deteriorated and unused condition of a preponderance of the project area").

The legislature has given the BRA the "power to make necessary findings" in circumstances such as those now under review. See *Boston Edison Co.*, 374 Mass. at 78. The BRA's findings "are not to be retried in our courts." *Id.* (quotation omitted). For the foregoing reasons, Marchese has failed to meet his burden to show that there was "no ground which 'reasonable [people] might deem proper'" to support the BRA's decision that the 2013 Order of Taking would prevent blight. *Teamsters Joint Council No. 10*, 447 Mass. at 107.

II. Uniform Procurement Act

The Uniform Procurement Act ("UPA"), G. L. c. 30B requires "governmental bodies" to solicit bids for "every contract for the procurement of supplies, services or real property and for disposing of supplies or real property . . . ." G. L. c. 30B, § 1. The court, after review of the record on the cross motions for Judgment on the Pleadings, now concludes that the acquisition of the Yawkey Easement is exempt from the requirements of G.L. c. 30B. G.L.c. 30B §1(b)(25).[26] Marchese's contention that the UPA applied to the BRA's conveyance of the Yawkey Way Easement is rejected. It fails to take into account the unique nature of the interest conveyed.

Upon executing the 2013 Order of Taking, the BRA took by eminent domain the exclusive right to use a public easement for a limited and specific times and on specific days.[27]

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[26] The foregoing discussion of the legislative and BRA acts with respect to the development of the park and surrounding neighborhood constitute a valid plan if such a plan could be required for a demonstration project.

[27] Although it does not bear on the issues raised here, the significant body of mostly early twentieth century case law holding that cities cannot interfere with the use of a public easement over a public way without express legislative authorization seems apropos. See e.g., *Boston* v. *A.W. Perry, Inc.*, 304 Mass. 18, 21 (1939) (Legislature "is the supreme authority in regard to public rights in the streets and highway" and can only be regulated by municipalities within the bounds of authority that has been conferred by statute) (citation omitted); *Lexington* v. *Suburban Land Co.*, 235 Mass. 108, (1920) (the right to erect structures such as telephone poles and plant trees along public ways is subject to legislative authorization); *Cape Cod S.S. Co.* v. *Selectmen of Provincetown*, 295 Mass. 65, 67 (1936)

The Red Sox nonetheless retained their fee interest in the land upon which the Yawkey Way Easement sits and their right as an abutter to deny prospective vendors the right to access their property thereby impeding a third party's ability to operate a business on Yawkey Way. See *Loosian* v. *Goudreault*, 335 Mass. 253, 256 (1957), quoting *Opinion of the Justices*, 297 Mass. 559, 564 (1937) ("The rights of those owning land abutting upon [public ways], and having title to the fee in land subject to the easement of public travel acquired by the laying out of highways, are established and are carefully guarded.") ("Whatever cannot be justified as incidental to travel is a violation of the rights of the abutting landowner in the ordinary case where he owns the fee of the public way . . . ."); *Boston* v. *A.W. Perry, Inc.*, 304 Mass. 18, 20 (1939) ("It has always been held with respect to land included within the limits of [a] public way to be clear that the public have no other right, but that of passing and repassing; and that the title to the land, and all the profits to be derived from it, consistently with, and subject to, the right of way, remain in the owner of the soil.") (citation omitted); see generally *McIntyre* v. *Boston Redev. Auth.*, 33 Mass. App. Ct. 901 (1992) (in absence of evidence that fee owner's use of land was inconsistent with right of public construction of pedestrian mall on land fee owner controlled over which there was

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("The town could no more grant the exclusive use of any part of it needed by the public for the purposes of a landing to particular persons or corporations in derogation of the equal rights of the rest of the public than it could grant to individuals the exclusive right to travel over portions of its town ways."); *Cheney* v. *Barker*, 198 Mass. 356, 363 (1908) ("Our roads or public ways are established for the common good and for the use and benefit of all the inhabitants of the Commonwealth . . . . The mere fact that the burden of their construction and maintenance has to a large extent been put upon the cities and towns in which they are situated gives to those cities or towns . . . no peculiar privileges in such ways.") (citation omitted); *Browne* v. *Turner*, 176 Mass. 9, 15 (1900) (city could only set price and duration of lease of public way according to terms prescribed by the legislature); see also *Lowell* v. *Boston*, 322 Mass. 709, 736 (1948) (city maintains public lands as representative of the public, which is in turn represented by the legislature, and therefore could only lease public land "for not more than the maximum term or less than the minimum rental designated by statute"). The SJC recently affirmed the basic principles underlying these cases in *Smith* v. *Westfield*, 478 Mass. 49, 59-60 (2017), holding that where the "general public has obtained an interest in land such as an easement, those rights are "subject to the paramount authority of the General Court which may limit, suspend or terminate the easement."

a public easement was proper). Compare *Boy Scouts of Am., Cape Cod & Islands Council, Inc.* v. *Yarmouth*, 32 Mass. App. Ct. 713, 718 (1992) (where county take land in fee by eminent domain, landowner's ownership interest in underlying property is extinguished and county is vested with complete title). Cf. G. L. c. 140, § 50 (licensing authorities not permitted to grant license to food truck vendors "to use any part of a highway the fee in which is not owned by the town unless the owners of the land abutting on that way part of the way consent in writing to the granting of the license."); *Sullivan* v. *Police Comm'r of Boston*, 304 Mass. 113, 116 (1939) (holding that the legislature could properly find that by reserving a taxi stand on a private way "for the exclusive use of the taxicab owner selected by the proprietor of the abutting premises . . . the public would be well served"); *Lambert* v. *Collins*, 16 L.C.R. 7 at *8 (Mass. Land. Ct. 2008) (municipality owns "roadway layout" and "[i]ts inherent police owners grant it the power to make judgments" related thereto "in the interest of public safety and convenience . . . . It has no obligation to maximize the value of the properties along its roadway s in making those judgments"). Therefore, unlike the typical situation where a governmental body solicits bids to dispose of commercial real estate with fewer (and more typical) restrictions on its alienability, the BRA did not possess, and therefore could not solicit bids for the exclusive right to control/use the Yawkey Way Easement during licensed events at Fenway Park. For these reasons, the court finds that the UPA is inapplicable to the Yawkey Way Easement because it could not be marketed to bidders other than the Red Sox.

ORDER

For the foregoing reasons, Marchese's Motion for Judgment on the Pleadings is **DENIED** and the BRA's Motion for Judgment on the Pleadings ~~is~~ **ALLOWED**.

Rosemary Connolly
Justice of the Superior Court

Dated: December 13, 2017

	Judge: Connolly, Hon. Rosemary	
05/03/2018	JUDGMENT pursuant to MRCP 54(b), the Court ORDERED separate and final Judgment. Therefore, it is ORDERED and ADJUDGED that the Complaint of the Plaintiff(s), Joseph P Marchese be and hereby is dismissed against Defendant(s), Boston Redevelopment Authority without statutory costs. Judgment shall enter for the Defendant, in accordance with the Court's Decision dated December 13, 2017.(filed 5/2/18) as to plff vs deft with prejudice and without costs entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Judge: Connolly, Hon. Rosemary	24
05/03/2018	Disposed for statistical purposes	
05/15/2018	Notice of appeal filed. Notice sent 5/16/18 Applies To: Marchese, Joseph P (Plaintiff)	25

Case Disposition

Disposition	Date	Case Judge
Judgment after Finding on Motion	05/03/2018	

CERTIFICATE OF SERVICE

I, Justin Perrotta, attorney for Appellant, herby certify under the pains and penalties of perjury that I have this day served the attached to counsel of record in this case by first class mail as set forth below.

Denise A. Chicoine
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44 School Street, Suite 800
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Dated: July 27, 2018

/s/ Justin Perrotta

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I herby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Justin Perrotta

Dated: July 27, 2018