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February 16, 2012

Peter Meade
Director
Boston Redevelopment Authority
1 City Hall Square, 9th floor
Boston, MA 02201

Dear Mr. Meade:

I am writing as part of the ongoing review of the License, Maintenance and Indemnification Agreement (Agreement) between the Boston Red Sox Baseball Club Limited Partnership (Red Sox) and the Boston Redevelopment Authority (BRA).

Under the Agreement, which the Office of the Inspector General (OIG) began reviewing last spring, the BRA leased two separate properties to the Red Sox: a) the air rights necessary to build the Green Monster seats above Lansdowne Street and b) an easement providing the Red Sox exclusive use of Yawkey Way on game days. The 10-year Agreement required that the Red Sox pay the BRA approximately \$165,000-a-year, with annual adjustments to account for changes in the consumer price index.

Last summer your office told the OIG that you planned to renegotiate this valuable license with the Red Sox.

Our review has led us to conclude that the Agreement pertaining to Yawkey Way cannot be renegotiated, extended or renewed under existing state law absent a new taking as explained herein and, further, that the Agreement pertaining to the Green Monster seats must be renegotiated to provide for Fair Market Value payments to the city.

Background

In order to enact the agreement with the Red Sox, the BRA took possession of the Lansdowne Street air rights and Yawkey Way from the city by using its eminent domain power as an urban renewal agency under M.G.L. c.121B. According to property records

of the eminent domain taking, the Lansdowne Street property interest is limited to the air rights and subsurface rights while the city of Boston continues to own the surface rights. The BRA's expressed public purpose for the Lansdowne Street taking was ostensibly "to eliminate 'urban blight'" present in the air and subsurface rights. This was a permanent, perpetual taking from the city by the BRA.

Like the Lansdowne Street taking, when it came to the Yawkey Way easement the BRA stated the public purpose in taking the property was "to protect against or eliminate 'urban blight'."

However, the transaction regarding Yawkey Way was fundamentally different from the Lansdowne Street air rights in important respects. Most notably, the BRA exercised only temporary and intermittent possession of the surface rights of Yawkey Way. These rights expire at the end of the 2013 baseball season and revert to the city. Also, the BRA's easement taking control of Yawkey Way is in effect only on days during which a Red Sox home game is scheduled. Furthermore, the BRA's eminent domain easement is expressly for the "limited purposes" described in the licensing agreement, which are "reasonably related to the game of baseball or other activities that occur in Fenway Park on a game-day basis."

It is a matter of record that the BRA's takings as well as the licensing agreement were undertaken at the request of the Red Sox's owners as a "demonstration project." In the orders of taking, the BRA states it is exercising its power under M.G.L. c.121B §46(f), which allows an urban renewal agency "to develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight."

By statute, a party challenging an urban renewal taking must file a petition in court within 30 days. Only one entity, Pennant Publications, challenged the BRA's actions in court, arguing that the Yawkey Way taking was illegal because the area was not blighted and the taking was for a private benefit, not a public use. Two months after filing suit, Pennant Publications voluntarily dismissed the case. As a result of the dismissal, there was no judicial review of the takings.

New Agreement

As explained above, the BRA's easement on Yawkey Way on game days expires at the end of the 2013 baseball season. If the BRA were to seek to negotiate a new agreement with the Red Sox, it would need to acquire another easement on Yawkey Way starting in 2013. This would constitute a new transaction distinct from the 2003 eminent domain taking.

If the BRA were to seek future rights to Yawkey Way using the methods it employed in 2003, the BRA would have to declare Yawkey Way a blighted area and "detrimental to the safety, health, morals, welfare or sound growth" of the community. The OIG is concerned that such a declaration may expose the BRA to a legal challenge to the

finding that Yawkey Way is a blighted area during Red Sox games, given the capital improvements made to the area during the demonstration period and the record of higher than expected revenues during game days.

The transfer of rights to Yawkey Way from the City Council to the BRA and then, in a further step, to a private business, may potentially be deemed unjustified upon judicial review. In 1969, the Supreme Judicial Court expressed skepticism that a bill permitting eminent domain in order to construct a sports stadium was a legitimate public use. In *Opinions of the Justices*, the SJC opined that the public agency empowered with eminent domain authority must impose “at least the fair market value of the privileges afforded” to the private beneficiaries of the takings (p. 798). In 2000 in the case *City of Springfield et al. v. Dreison Investments Inc.*, a Superior Court case judge prohibited a proposed eminent domain taking in which “the primary beneficiary...was not the public.” (p. 141)

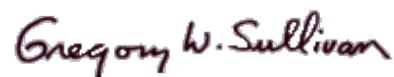
Beyond 2013, the BRA, in the case of Lansdowne Street, and the city, in the case of Yawkey Way, are obligated to ensure each receives fair value from the licensing of these public properties. The city must either follow procurement practices set in M.G.L. c.30B, or seek special legislation in order to convey the rights to Yawkey Way. The BRA has the authority to negotiate with the Red Sox for the air rights license to accommodate the Green Monster seats over Lansdowne Street. The BRA must receive fair market value for those air rights, an amount based on an analysis of the nine seasons of revenue and expense data generated by the “Demonstration Project.” City officials should require the Red Sox to provide that data.

As part of any new agreement, I also urge the BRA to seek compensation for the game day closure of Van Ness Street.

As you are aware, the OIG’s opinion in this matter is not binding or dispositive. Interpretation of the relevant statutes pertaining to these matters is ultimately made by the judiciary.

Kindly let me know if I can be of any assistance as you seek to determine the full value of this important license agreement.

Sincerely,

A handwritten signature in black ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan
Inspector General