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Mr. Peter Catalano
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Gentlemen:

You have asked me to describe the legal standards by which to judge any public assistance which might be accorded to the development of a new Red Sox Stadium.

I. Eminent domain may not be exercised nor may public money be spent on a stadium for the Red Sox unless doing so advances a "Public Purpose" as defined by the courts. Allydon Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 297 (1939). We are, thus, immediately confronted by the question: Would a new Fenway Park serve a sufficient public purpose so as to survive legal challenge? The answer is found in Opinions of the Justices, 356 Mass. 775, 795 (1969). There the House of Representatives asked the Supreme Judicial Court if a bill authorizing the Massachusetts Turnpike Authority to construct a stadium in the City of Boston would be constitutional. The bill would have empowered the Turnpike to take land by eminent domain, borrow money for the cost of the facility and enjoy an exemption from real estate taxation.

Section 1 of House Bill No. 5486 contained the following declaration of public purpose:



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[T]here exists in the commonwealth an acute...need for a large multi-purpose stadium, open and available to...citizens...in large number, for the purpose of providing...facilities for public activities...such as political and patriotic rallies, public exercises conventions and meetings of public officials, organizations protective of rights of working men and women, and...groups dedicated to civic and social betterment...forums for educational addresses...conventions of educators and student organizations...concerts, theatrical exhibitions and other cultural...and recreational activities, including shows, expositions and professional and amateur athletic events; the existence of a suitable gathering place for large numbers of persons will contribute substantially to the public interest; there presently exists no stadium or equivalent facility in the commonwealth capable of satisfying the above needs; the public facilities...authorized...under this act will promote the economic development of the commonwealth and enhance the prosperity, health, culture and welfare of its inhabitants; the purposes for which such facilities and projects shall be provided are...declared to be public purposes. (at pp. 779-780)

But the Court said (at page 796):

Enterprises like the stadium complex and the arena necessarily contemplate a substantial use of the facilities by nonpublic persons and entities and contracts between such persons and entities and the public agency operating the facilities. Some of these persons and entities will be operating for profit and using the facilities in their operation. If the stadium complex and arena under the proposed legislation can be operated, and if they should in fact 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 the type of legislative declarations, already quoted...

As to public subsidies, the Court said that the legislation contained no clearly expressed requirement that, in making arrangements with persons and entities operating for profit, the Authority shall impose on them charges representing at least the fair market value of the privileges afforded and at least comparable to those which would be charged by a prudent and diligent private owner of the same facility. (at p. 798)

The Court concluded:

In the absence of adequate statutory guidance and standards on the matters mentioned above, and of clear provision for reasonable review of compliance with appropriate standards, we are unable to advise that the stadium complex...will be for a public purpose. (at p. 799)



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The principles enunciated in that case have in no way been softened in the last 30 years. Indeed, they were vehemently reiterated in February of this year by Superior Court Judge Constance Sweeney, who declared invalid the use of eminent domain to construct a minor league baseball stadium in Springfield. City of Springfield v. Dreison Investments, Inc., Superior Court of Hampden County, Civil Action No. 99-1218, February 25, 2000 (the Springfield Case). (All page references are to Judge Sweeney's decision.) The City had taken private property by eminent domain in order to lease it to a minor league team. (p. 2) The City proposed to borrow funds for "for the construction of municipal outdoor recreational and athletic facilities." (p. 8) A not-for-profit corporation (SBC) would finance and build the stadium and purchase a baseball team. (p. 20) The estimated budget for the entire undertaking was more than \$21 million. (p. 22) The City would lease the land to the corporation for a maximum term of fifty years. Whenever the lease ended, the stadium would belong to the City. (p. 35) The corporation would not pay any rent, but would make yearly payments in lieu of taxes of \$100,000, if the corporation had the funds. The corporation would collect any fees for third party use of the stadium. (p. 36) The City was entitled to use the stadium, but the corporation's use of it would supersede the City's. (p. 37) If the City's land taking costs exceeded \$6 million, the corporation would make up the difference, if it could afford to do so. (p. 38) The eminent domain takings caused removal of a number of businesses, some to other communities, loss of jobs and tax revenue. (p. 54)

After an exhaustive 25-page analysis of the law of public purpose here and elsewhere, Judge Sweeney recounted that the Supreme Judicial Court in Opinions of the Justices recognized that where it is contemplated that a stadium will be used primarily or substantially by a privately owned professional athletic team, statutory controls must be in place before public funds can be used to acquire or build such a stadium. That is exactly the type of stadium at issue here. The principal immediate reason for the proposed stadium in this case is to allow a private not-



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for-corporation to own and operate a professional baseball team. As reflected in the history leading up to the takings in this case, including the proposed lease terms and the design of the proposed stadium, the ultimate goal is to secure at least a class AA affiliation. The arrangement between the City and SBC does not prohibit SBC from assigning the lease to persons or entities operating a team for profit. Under the lease terms as currently proposed, such profit-making enterprises would not owe the City a dime in rent for the duration of the lease. That type of potential private windfall is precisely what concerned the justices. (p. 798)

In addition to owning the team, SBC or its assignee can assess fees for civic uses of the stadium by anyone other than the City itself. All civic functions must give way to the professional baseball team's use of the stadium. Other than knowing the length of the baseball season, there is nothing in place or proposed that defines the extent of that use. The justices stated that statutory standards must be designed to protect whatever public interest there may be in having the facilities available to a diversity of users on a fair basis, and not, for example, placed so exclusively at the disposal of one or more particular users that an equitable amount of use by others will be unduly restricted. (p. 71)

For those and other reasons Judge Sweeney invalidated the takings. (p. 85)

II. So many different ways have been suggested for financing a new Fenway Park that it is not useful to measure each one of them against the law established by these cases. But the major principles can be stated briefly and emphatically:

1. If the new Red Sox Stadium is to receive public assistance through eminent domain, subsidy or tax exemption, the Stadium must be available for public functions and not automatically give way to Red Sox use. The Red Sox may not be willing to have school or neighborhood baseball, lacrosse or football teams play on their turf. They may object to political rallies, theatrical performances, exhibitions, rock concerts or conventions. The legislation will have to specify how the priorities of use are to be implemented.

2. If public funds are expended for the stadium--I leave aside parking or infrastructure improvements--the Commonwealth or the City would have to impose "charges representing at least the fair market value of the privileges afforded and at least



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comparable to those which would be charged by a prudent and diligent private owner.”
 (Opinions of the Justices at p. 798) Such a calculation of fair return would have to take into account the loss of tax revenue if the Stadium were to be exempt from real estate taxes.

3. At least in some instances elsewhere, the construction of a new stadium has greatly increased the revenue and the value of the teams which occupy them. The Supreme Judicial Court said that if the stadium “should be operated, so as in effect to subsidize private organizations operated for profit, then [it] could not be said to exist for a public purpose.” (Opinions of the Justices at p. 796)

III. You have also inquired what authority the Boston City Council may have over these matters. City Council approval, by a two-thirds vote at two separate meetings two weeks apart, is required to borrow funds for any purpose. (St. 1909, c. 486, §2, as amended). With regard to eminent domain, City Council approval is not required, whether a taking is done by the Public Facilities Commission (St. 1966, c. 642, §12), the Boston Redevelopment Authority (BRA) (G.L. c. 121B, §45) or the Economic Development and Industrial Commission (EDIC) (St. 1971, c. 1097, §204(k))

However, takings by Public Facilities cannot be made until the City Council has approved the loans to pay for them. (St. 1966, c. 642, §12) Takings by the BRA are in general only permissible in furtherance of an urban redevelopment or renewal plan, which must be approved by the City Council. (G.L. C. 121B, §48) Similarly, takings by EDIC must be in furtherance of an economic development plan which must be approved by the City Council. (St. 1971, c. 1097, §§1 and 2)

City Council approval must also be obtained for the disposal of the city land--streets, schools, parks, etc. Language in St. 1966, c. 642, §12, suggesting otherwise has been deemed not to override requirements for City Council approval by a two-thirds vote appearing in St. 1909, c. 486, §2.



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IV. Analogies have been drawn to the public assistance provided by legislation (Chapter 16 of the Acts of 1999) to assist the development of a new stadium for the New England Patriots in Foxborough and Chapter 15 of the Acts of 1993 providing for construction of the North Station Transportation Center and the new Boston Garden--now the Fleet Center. Since neither scheme was ever tested in court, they provide no legal precedent that they serve a public purpose.

Yours very truly,

Herbert P. Gleason

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