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CASE STUDY OF A TAKING UNDONE

PETER P. FENTON*

INTRODUCTION

This Article consists of a case study illustrating how an eminent domain taking of real estate came undone. This issue arose in the context of an attempt by a municipal administration to erect a new civic stadium with private financing in the city of Springfield, Massachusetts. To appreciate the intricacies of the case, this Introduction provides the factual and legal background which gave rise to the controversy.

Based upon his belief that downtown revitalization would improve the overall quality of life for Springfield residents, Michael J. Albano, Mayor of Springfield, made downtown revitalization a key goal of his administration. An important part of his revitalization plan involved bringing professional minor league baseball[1] back to

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* City Solicitor, City of Springfield Law Department. Western New England College School of Law (J.D. 1980). Although this case study was prepared under the direction and supervision of the City Solicitor, the final work product reflects a joint effort by the Law Department lawyers who worked on the case, including: Harry P. Carroll, Deputy City Solicitor; Patricia T. Martinelli, Chief of Litigation; Kathleen T. Breck, Associate City Solicitor; and Edward M. Pikula, Assistant City Solicitor. Each attorney contributed materials to the various areas according to their individual involvement and efforts during the course of the litigation.

1. Sports and recreation have a unique significance for Springfield, which is the birthplace of basketball. Mayor Albano believes that a new civic stadium in Springfield would promote the city's general welfare by improving the quality of life for city residents and bolstering the city's image as an entertainment and tourist center. Minor league baseball is a form of affordable entertainment. Families can attend games for less than the cost of going to the movies. Adding baseball to Springfield's mix of attractions would improve the quality of life in the city by bringing the community together through a common interest in rooting for the home team. Minor league baseball is an activity that is popular among people of all ages and socioeconomic groups. Diverse fans would enhance the image of downtown Springfield, strengthen the community, and help promote the city's livability. The new stadium would not be used exclusively for a professional baseball team. Besides only playing a limited number of games a year, the team would have many out of town games when the stadium could be used for other public purposes. A civic stadium could be used by young athletes attending Springfield public schools to hold important baseball or softball games. Such a stadium could also be used to host state semi-finals and final championship games. It would also be available to area schools, colleges and universities so they could make use of a new state-of-the-art sports facility for sporting and civic events. Besides baseball, other family-ori-

Springfield.[2] To accomplish that objective, it was necessary to erect a civic stadium. This could only be achieved through the cooperative efforts of the public and private sectors. The Mayor's plan called for the city to acquire an appropriate site for the stadium, and for the private sector—operating through a not-for-profit corporation—to acquire a baseball team and finance the construction of the new civic stadium. Once constructed and paid for, the new civic stadium was to be owned by the city. Prior to that time, a ground lease between the city and the not-for-profit corporation would permit the city to use the new stadium, without rent, for civic and public events. A site for the new civic stadium was carefully selected to increase social and economic activity in the downtown area, particularly during the crucial evening and weekend hours.[3]

On September 22, 1999, the City Council voted for orders of taking ("Taking Orders") relative to the site for a new civic stadium ("Site").[4] These Taking Orders were then approved by the mayor. They were recorded in the Hampden County Registry of Deeds and the Hampden Registry District of the Land Court on September 23, 1999. On September 29, 1999, Deputy City Solicitor Harry P. Carroll was asked at a city council subcommittee meeting about the legal ramifications of a vote by citizens to overturn the Taking Or-

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ented programs, social and civic events could be held in the new civic stadium. A stadium would bring intangible benefits to the city as well. It would make people optimistic about the downtown's future. It would provide activities for the entertainment, enjoyment, and pleasure of the citizens. It would be an additional place for public gatherings. Having minor league baseball in the city would cause Springfield's name to be repeated throughout the Northeast in the sports pages and electronic media, enhancing the city's image. *See* discussion *infra* Part IV.A.

2. It was determined that the best place for a new civic stadium would be in downtown Springfield, where it would complement other projects such as the new Basketball Hall of Fame and the Convention Center, and further Springfield's joint public/private goal of improving its downtown as a sports and entertainment destination.

3. Mayor Albano believes that a new civic stadium would bring more people downtown. It would provide a needed opportunity for an affordable family outing, generate civic pride, cause greater utilization of the city's existing business base, and further the city's efforts to become a major attraction for visitors and businesses. Sports, entertainment, and special events have an economic spin-off effect that would strengthen city businesses, particularly those located in the downtown area. The baseball team was expected to have an operating budget of more than two million dollars, much of which would be spent locally. During the baseball season, visiting teams would travel to Springfield and remain here for two to four days at a time, and fans attending the games would engage in spending. The construction of a new civic stadium was expected to create scores of construction jobs over an eighteen-month time frame, in addition to fifteen full-time jobs and perhaps as many as one hundred part-time jobs during the baseball season.

4. *See* MASS. GEN. LAWS ch. 43, § 30 (1998) (requiring a city council to make an appropriation by a two-thirds vote).

ders. Carroll responded that "[c]hallenging an eminent domain proceeding by referendum might be unconstitutional."[5] In view of the significance of this complex legal question and the concerns it generated from all levels of city government, Springfield City Solicitor Peter P. Fenton directed the city's legal review board to immediately research the relevant law and draft a report.

On October 8, 1999, Attorney Frank P. Fitzgerald wrote to Mayor Albano demanding payment on behalf of his client, Dreison Investments, Inc., one of the landowners whose property had been taken for a portion of the civic stadium. Late in the afternoon of October 12, 1999, 454 binding referendum petitions ("Referendum Petitions") to the City Council were filed with the City Clerk's office protesting against the Taking Orders. The Referendum Petitions were transmitted to the election office by the City Clerk for certification of signatures on October 13, 1999.

On October 14, 1999, the city's legal review board completed its work. City Solicitor Fenton publicly issued a report to resolve the legal question of whether an eminent domain taking by the city was subject to a local referendum petition. The report concluded that a referendum, if applied to the city's eminent domain taking of the Site, would violate the United States Constitution as well as the Massachusetts Constitution.[6]

The Springfield Board of Election Commissioners' staff reviewed the Referendum Petitions. After five days of examination, it was determined that 11,020 registered city voters had signed the Referendum Petitions. In accordance with state law, the election commission certified to the City Clerk, William Metzger, that the Referendum Petitions had 11,020 valid signatures.[7]

On October 22, 1999, Solicitor Fenton received a copy of a letter from Attorney John S. Leonard on behalf of his client, Northgate Center LLC, another of the landowners whose property had been taken for a portion of the Site. Attorney Leonard's letter alleged that his "clients' constitutional rights were violated by the city's purported taking of the Northgate Plaza."[8] Citing the local

5. City of Springfield Law Department, Report of the City Solicitor: Eminent Domain Referendum 2 (Oct. 14, 1999) [hereinafter Eminent Domain Referendum] (on file with the author).

6. *See id.* at 58; *see also* MASS. GEN. LAWS ch. 43, § 30 (1998).

7. Thus, the statutory threshold of 12% of registered voters was met. *See* MASS. GEN. LAWS ch. 43, § 37 (1998) (requiring 12% of registered voters for a Referendum Petition).

8. Letter from John S. Leonard, attorney for Northgate Center LLC, to Peter P.

referendum law, Attorney Leonard contended that the Taking Orders had "been suspended from taking effect" and demanded that the city "forthwith cease and desist from taking any action whatsoever in furtherance of" the Taking Orders.[9]

The Taking Orders awarded a total $3,925,500.00 for that taking. The notices of taking to the former owners of the property informed them that they could pick up their checks for payment at the city treasurer's office "on or after November 1, 1999."[10] City Solicitor Fenton informed Matthew E. Donnellan, the Collector/Treasurer of Springfield, of Attorney Fitzgerald's demand for payment on behalf of his client.[11] State law obligated the city treasurer "within fifteen days after demand" to immediately make proper payment available to the persons entitled thereto.[12] This amounted to a payment of $1,637,500.00, which was due October 25, 1999. City Treasurer Donnellan was also notified that a Referendum Petition had been filed protesting the City Council's vote and the city's eminent domain taking of the property. These circumstances left Donnellan in a quandary. He wanted to fulfill his legal obligation to make payment for the property taken by the city, but he did not want to jeopardize the public interest by paying $1,637,500.00 for property subject to a political process (i.e., a local referendum seeking to void the land taking for which payment was due). City Solicitor Fenton directed the Springfield Law Department to take immediate action to settle the legal issues and terminate the uncertainty and controversy.

On October 25, 1999, the city of Springfield, its mayor, and treasurer (collectively called "City") petitioned a single Justice of the Massachusetts Supreme Judicial Court ("SJC") for a declaration of their rights with respect to a taking of private property by eminent domain for a new municipal stadium ("Petition"). The Petition also sought temporary equitable relief to preserve the City's financial and legal interests until such time as the case was decided. The Petition asked the court to resolve a conflict between the local referendum and eminent domain laws—a conflict with constitutional significance that goes to the root of the government's power

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Fenton, City Solicitor, City of Springfield Law Department (Oct. 21, 1999) (on file with author).

9. *Id.*

10. Notice of Taking (Sept. 22, 1999) (on file with author).

11. The Collector/Treasurer of Springfield is required to issue all checks payable by the City.

12. MASS. GEN. LAWS ch. 79, § 7B (1998).

of eminent domain and the individual's right to private property. A hearing in the Massachusetts Supreme Judicial Court was scheduled. The parties, however, would not agree to the facts underlying the Petition and the Justice transferred the Petition to the Hampden County Superior Court for disposition.

Associate Superior Court Justice, Constance M. Sweeney consolidated the Petition with several other cases.[13] Judge Sweeney recognized that a decisive issue had been raised in one of the newly consolidated actions—whether there was a "valid purpose" for the eminent domain takings. Judge Sweeney ruled that a trial would be held on this issue before dealing with the constitutional issues. Following the trial, Judge Sweeney ruled that there was not a legitimate public purpose for the eminent domain takings and held them invalid.[14] Consequently, the statutory and constitutional issues originally raised by the City in its Petition remain undecided.

Part I of this Article discusses the unresolved statutory issues arising from an attempt to overturn an eminent domain taking by means of a referendum petition. The unresolved state constitutional issues are discussed in Part II, while Part III outlines the federal constitutional issues involved. Part IV of this Article discusses the municipality's position concerning the decisive public purpose issue and the court's resolution of this dispute. This Article outlines the relevant law regarding these unresolved issues and concludes that an eminent domain taking is not subject to the referendum process.

I. Local Referendum Law as Applied to Eminent Domain Taking

State statutes make it unlikely that a referendum designed to overturn a taking by eminent domain would be legally valid. The primary reason is that an order taking property by eminent domain is not a "measure" within the meaning of that statutory term. Pursuant to Massachusetts State Law[15] and the charter of the city of Springfield ("Charter"), the city council, at the request of any department, and with the approval of the mayor, may take property by eminent domain. On the evening of September 22, 1999, the City Council voted to approve four separate orders. The first order

13. *See* City of Springfield v. Dreison Invs., Inc., Nos. 19991318, 991230, 000014, 2000 WL 782971 (Mass. Super. Ct. Feb. 25, 2000).

14. *See id.* at *1; *see also infra* Part IV.B.

15. Mass. Gen. Laws ch. 79, ch. 43 § 30.

accepted two grants associated with a baseball stadium in Springfield. One of the grants accepted was a Community Development Action Grant ("CDAG II"). That order stated that the "City Council of the City of Springfield, with the approval of the mayor, hereby accepts the CDAG II grant and authorizes the grant funds to be expended for the purposes outlined in the grant, *including site acquisition* . . . ."[16] Three other votes taken that evening ordered that the City take certain parcels of land by eminent domain. The mayor approved each order on September 22, 1999. Orders taking the parcels were recorded in the Hampden County Registry of Deeds on September 23, 1999.

Section 42 of the City Charter, which parallels section 42 of chapter 43 of the Massachusetts General Laws allows for a referendum petition challenging "final passage of any *measure*, except a revenue loan order, by the city council."[17] Thus, if each order of taking qualifies as "final passage of a measure," each is subject to a referendum vote. The analysis under the Charter therefore revolves around the issue of whether or not the orders of taking are "measures." If they are, they are subject to referendum; if they are not, then a referendum vote may not be held.

"Measure" is defined in section 37 of the Charter as "an ordinance, resolution, order or vote passed by a city council or a school committee . . . ."[18] In construing the term "measure," the courts have "considered instructive the distinction between legislative and executive acts, reasoning that only the former constitute 'measure[s]' subject to referendum petition."[19] Thus, if the orders of taking are legislative acts, they may qualify as "measures" subject to referendum; if they are deemed executive or administrative acts, no referendum vote may be had.[20]

In determining whether particular action taken by a city coun-

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16. Order for Eminent Domain Taking (Sept. 22, 1999) (recorded at Hampden County Registry of Deeds) (emphasis added) [hereinafter Order of Taking].

17. Revenue loan order is not specifically defined. *See* MASS. GEN. LAWS ch. 43, § 23 (1935) (amended 1935) (referencing revenue loan order but since repealed); MASS. GEN. LAWS ch. 44, § 5A (1967) (repealed 1969) (same). It appears from the context of those two Acts that it pertains to an order of the council to borrow money against anticipated revenue. *See* Act of Mar. 12, 1935, ch. 68, 1935 Mass. Acts 93 (excluding revenue loan orders by cities from certain provisions of their charters and their subjection to referendum); *see also* Act of Mar. 22, 1967, ch. 73, 1967 Mass. Acts 34 (providing for borrowing by cities, towns, and districts in anticipation of revenue).

18. *See* MASS. GEN. LAWS ch. 43, § 37 (1998) (defining "measure").

19. Andrade v. City Council, 547 N.E.2d 927, 929 (Mass. 1989).

20. *See* Jordan v. City Clerk, 436 N.E.2d 446, 447 (Mass. App. Ct. 1982); Murphy v. City of Cambridge, 173 N.E.2d 616, 617 (Mass. 1961).

cil is legislative or executive, the courts have noted that the "crucial test is 'whether the proposition is one to make new law or to execute law already in existence.'"[21] Applying this test and defining what is a legislative act has proven difficult. "The line between executive and legislative actions is sometimes difficult to delineate and in some instances may be completely obliterated."[22]

In *Dooling v. City Council*,[23] the court described a legislative act as "the laying down of a rule, a principle or a law by which the conduct of a public officer may be guided."[24] *Dooling*, while not addressing the issue of eminent domain, commented:

> It is an act of legislation to authorize the construction of a public building, to set a boundary to its cost and to provide money to pay for it. But it is an executive act to select a contractor, to agree with him as to the thing to be done, the precise price, the terms of payment, and the numerous other conditions incident to a building contract.[25]

Another factor in favor of finding legislative action is if the vote amount[s] to a "sweeping determination of municipal policy."[26]

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21. Moore v. Sch. Comm., 378 N.E.2d 47, 49 (Mass. 1978) (quoting 5 E. McQuillan, Municipal Corporations § 16.55 (3d rev. ed. 1969)); *see also Andrade*, 547 N.E.2d at 929.

22. *Moore*, 378 N.E.2d at 50.

23. 136 N.E. 616 (Mass. 1922).

24. *Id.* at 617.

25. *Id.*

26. Gorman v. City of Peabody, 45 N.E.2d 939, 942 (Mass. 1942) (voting to increase salaries of all public school teachers is legislative); *cf.* Fantini v. Sch. Comm., 285 N.E.2d 433, 435 (Mass. 1972) ("[W]e seriously doubt the applicability of initiative or referendum procedures to acts of a school committee with respect to the appointment or removal of particular individuals."). For a review of Massachusetts cases in which the legislative/executive test was used to determine whether an action taken was a "measure" and therefore subject to referendum, see *Moore*, 378 N.E.2d at 50 (voting of school committee to close two public schools involved policy determination common to legislative action); *Fantini*, 285 N.E.2d at 435 (voting by school committee not to reappoint superintendent is not legislative); *Gorman*, 45 N.E.2d at 942 (voting to increase salaries of all public school teachers is legislative); *Dooling*, 136 N.E. at 617 (passing order by city council authorizing and directing the mayor to execute three contracts was not legislative and therefore not subject to referendum); Jordan v. City Clerk, 436 N.E.2d 446, 447 (Mass. App. Ct. 1982) (voting of city council granting special permit is an executive function and not subject to referendum petition). *But see Andrade*, 547 N.E.2d at 930 (voting by city council determining the percentages of the local tax levy to be borne by various classes of real and personal property was an executive rather than legislative function and therefore not subject to referendum); LaBranche v. A.J. Lane & Co., 537 N.E.2d 119, 122 (Mass. 1989) (concluding that referendum process available to challenge an amendment to city's zoning ordinance); Gould v. City Council, 465 N.E.2d 258, 260 (Mass. 1984) (stating that where city council had general power to authorize lease of city-owned property, vote of city council authorizing the mayor to

In *Andrade v. City Council*,[27] the court concluded that the setting of the tax factor by the city council was an executive act. In reaching this decision, the court considered:

> [P]rudential concerns of efficient government warrant placing certain limitations on the definition of "measure." "In ascertaining the intent of the Legislature with respect to the scope and nature of the referendum powers that it has conferred, *it is appropriate and important to consider what the consequences of applying [them] to a particular act of legislation would be,* and, if it is found that the exercise of those powers tends to destroy the efficacy of other governmental mandates, the court ought not to place such an interpretation upon the grant of the referendum powers as to bring about any such result."[28]

The above-cited proposition is important because it emphasizes the consequences of a particular act of legislation in determining whether that act is subject to referendum. This relaxes the legislative/executive test almost to the point of suggesting the following: regardless of whether an act is more legislative than executive, if the consequence of allowing a referendum vote on such act is the destruction of the efficiency of certain governmental mandates, then the act should not be subject to referendum.

There is no Massachusetts case law directly determining the question of whether, for purposes of the referendum statute, a taking of property by a city council is a legislative act. However, case law on the legislature's power of eminent domain is informative. In *City of Boston v. Talbot*,[29] the court stated:

> The question whether the use for which land is taken under the right of eminent domain is a public use is a judicial question, and the determination of the Legislature upon it may be revised by the court. But if the use for which the taking is made is public, *the question whether the taking of a particular piece of real estate is necessary or expedient is a legislative question*, upon which the decision of the Legislature, as a tribunal of fact, is conclusive.[30]

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enter into a long-term lease was carrying out a legislative function and therefore referable).

27. 547 N.E.2d at 927.

28. *Id.* at 930-31 (emphasis added) (alteration in original) (quoting Gilet v. City Clerk, 27 N.E.2d 748, 750 (Mass. 1940)).

29. 91 N.E. 1014 (Mass. 1910).

30. *Id.* at 1016 (emphasis added) (citations omitted); *see also* Opinion of the Justices, 313 N.E.2d 561, 569 (Mass. 1974) ("The power of eminent domain is a legislative power . . . . '[It] is said that the legislature is the sole judge as to the expediency of . . . exercising the right of eminent domain . . . either for the benefit of the inhabitants of

Although the above-quoted cases were not referendum cases, their language cannot be ignored. Cases from other jurisdictions support the position that selection of a site for public use is an executive or administrative act and is not a legislative one. In *City of Idaho Springs v. Blackwell*,[31] the Supreme Court of Colorado addressed the issue of whether a city council vote to purchase a certain parcel of land for a new city hall was a legislative or administrative vote. Noting that the power of referendum is not unlimited and does not grant the right to petition for an election on administrative matters, the court stated that the "central inquiry is whether the proposed legislation announces new public policy or is simply the implementation of a previously declared policy."[32] To resolve this issue, the court used two tests: first, whether the action related to subjects permanent or general in character (legislative), as opposed to temporary in operation (executive); and second, whether the action was necessary to carry out existing legislative policies and purposes (executive or administrative) or whether it was a declaration of public policy (legislative).[33] The court determined that the legislative action was the policy decision to build a new city hall, which was encompassed in an earlier vote to impose a sales tax for that purpose. "The choice of location and structure for the new city hall is an act 'necessary to carry out' the existing legislative policy to build a new city hall" and therefore an administrative or executive act not subject to referendum.[34]

In Nebraska, in *State ex. rel. Ballantyne v. Leeman*,[35] the court addressed the issue of whether the site selection for a municipal auditorium by the city council was subject to referendum. The court set forth the general rule that "the right to a referendum . . . is ordinarily confined to those acts of the council which are in the exercise of its legislative power and does not extend to administrative or executive acts, even though such acts are exercised by resolution or ordinance."[36] The reason for withholding a referendum in cases of administrative decisions is that to allow a referendum to annul or delay executive or administrative conduct would destroy

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the state or of any particular portion thereof.'" (quoting Dingley v. City of Boston, 100 Mass. 544, 558 (1868)).

31. 731 P.2d 1250 (Colo. 1987).

32. *Id.* at 1254.

33. *Id.*

34. *Id.* at 1255.

35. 32 N.W.2d 918 (Neb. 1948).

36. *Id.* at 923.

the efficient administration of government. "An initiative generally is administrative if it is merely . . . fact finding [to] effectuate policy declared by the legislature."[37]

The *Ballantyne* court held:

> [I]t was an act of legislation to direct and authorize the construction of a public building, to fix the cost, and provide bonds to pay for it, *but that it is an executive and administrative duty to select the site, buy same,* select plans and let a contract, provide precise cost of various items, terms of payment, and numerous other conditions incident to building a large municipal auditorium. Not one of the many executive and administrative acts necessary to complete such project is referable to a vote of the people as a legislative act.[38]

The Arizona Supreme Court has considered the differences between legislative acts and administrative acts in determining whether an act is subject to referendum.[39] The court determined whether a city council resolution approving a road improvement project by widening specific roads, and taking land in connection therewith, was subject to referendum. Prior to the resolution, the electorate of the city had approved a $30 million bond issue for the public purpose of improving city streets. The bond proposal did not mention particular streets. The court concluded that the issuance of bonds was a "legislative act."[40] The resolution of identifying particular streets and taking land for widening them was an administrative act: carrying out the public purpose established in the "bond election" and therefore not subject to referendum.[41] That the bond proposal did not identify particular roads to be improved gave the "[c]ity much more leeway in deciding when and where to administer the bond funds."[42] While this lack of specificity may well have been a valid reason to oppose the bond proposal, it did not change the council's action in widening particular streets from administrative to legislative.[43]

In *Monahan v. Funk*,[44] the Oregon Supreme Court stated that:

> Acts which are to be deemed as acts of administration and

37. 42 AM. JUR. 2D *Initiative and Referendum* § 8 (2000).
38. *Ballantyne*, 32 N.W.2d at 923 (emphasis added).
39. Wennerstrom v. City of Mesa, 821 P.2d 146, 149-50 (Ariz. 1991) (en banc).
40. *Id.* at 155.
41. *Id.* at 153.
42. *Id.*
43. *Id.*
44. 3 P.2d 778 (Or. 1931).

> classed among those governmental powers properly assigned to the executive department are those which are necessary to be done to carry out legislative policies and purposes already declared, either by the legislative municipal body, or such as devolved upon it by the organic law of its existence. The form of the act is not determinative; that is, an ordinance may be legislative in character or it may be administrative.
>
> The crucial test for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence.[45]

The court held that where a previous ordinance had authorized the City to sell bonds for the purpose of acquiring property for a new crematory, a subsequent ordinance purchasing a particular piece of property for this use was an administrative act carrying out the previously adopted policy.[46]

There is adverse, but distinguishable, case law. In *Paget v. Logan*,[47] the court held that the act of the legislative body in selecting a site is a legislative act where a specific state *statute* (a) authorizes counties or cities to acquire, construct, and operate a multipurpose stadium, (b) provides that the ultimate act of site selection belongs to the "governing body," and (c) requires the *right of eminent domain to be exercised by the "legislative body."*[48] In allowing an initiative to go forward, the majority opinion also relied on the fact that no irrevocable commitments had been made.[49] A strong dissent stated:

> I find the law clear in its adherence to the rule that the powers of the initiative and referendum are applicable only to acts which are legislative in character. For good and valid reasons, the initiative and referendum processes are not available to executive or administrative acts. And the decision on the site selection for the multipurpose stadium was an administrative decision which could not be decided by the popular vote of the people.[50]

The dissent further observed that "[t]he legislative decision was made when the people . . . earlier decided by popular vote to

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45. *Id.* at 779-80 (citations omitted).

46. *Id.* at 780.

47. 474 P.2d 247 (Wash. 1970) (en banc).

48. *Id.* at 250-51.

49. *Id.* at 252. The Supreme Court of Washington departed from this reasoning in later cases. *See* Bidwell v. City of Bellevue, 827 P.2d 339, 341-42 (Wash. Ct. App. 1992) (citing cases where the Supreme Court of Washington had departed from this rational as determinative).

50. *Paget*, 474 P.2d at 253 (McGovern, J., dissenting).

erect a multipurpose stadium and approved the issuance of general obligation bonds to finance the construction. *The building site was merely an implementing decision*."[51] The dissent went on to cite with approval the California case of *Simpson v. Hite*,[52] wherein the California Supreme Court held that the selection of a site for certain municipal and court buildings was administrative and therefore not subject to initiative vote. Thus, the court stated:

> If the selection of sites of courts buildings were subject to referendum, the electors could nullify every determination of the board of supervisors to erect buildings for the courts and thereby nullify the legislative policy and prevent execution of the duty imposed upon the board of supervisors. Furthermore, a small group, or various small groups, of electors, by repeated initiative proposals for a change of site, could interfere with the supervisors' attempts to furnish quarters for the courts at any time, even when the period for referendum had passed.[53]

A review of the case law cited above reveals that courts are likely to find the action legislative where it involves a determination of municipal policy. With respect to the City of Springfield, the orders of taking were not "legislative." Thus, the orders were not "measures" subject to referendum because they were simply the execution of the policy set forth in the order appropriating money for the acquisition of a site for a baseball stadium. The appropriation would be subject to referendum as a legislative action, but the takings would not.[54] The "legislative" action here was the acceptance and appropriation of grant money "for the purposes outlined in the grant, including site acquisition, relocation expenses, and costs of demolition and development of land in connection with the new baseball stadium."[55] The orders of taking represented the execution of that policy and were executive or administrative actions. The Referendum Petition did not seek a vote on the acceptance of the grant or appropriation of the grant money for purposes of ac-

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51. *Id.* at 254 (emphasis added).
52. 222 P.2d 225 (Cal. 1950).
53. *Id.* at 230.
54. *See* Jordan v. City Clerk, 436 N.E.2d 446, 447 (Mass. App. Ct. 1982) ("On June 19, 1980, the city council resolved that the city would incur debt for the purpose of acquiring land for a state-sponsored skating rink. While this legislative action could have been made the subject of a referendum petition no such challenge was initiated."); *see also* Dooling v. City Council, 136 N.E. 616, 617 (Mass. 1922) (noting that "[i]t is an act of legislation to authorize the construction of a public building, to set a boundary to its cost and to provide money to pay for it").
55. Order of Taking, *supra* note 16.

quiring a site for the baseball stadium. It only sought review of the orders of taking for the particular sites involved. The petitioners apparently did not object to the appropriation of money for the acquisition of a site for the baseball stadium. They objected to the actual site chosen. The necessity and expediency of appropriating money for this project is a legislative act subject to referendum, however, the administrative act of selecting the site is not.

A second point in support of labeling the takings "executive" or "administrative" acts is that property can only be taken at the request of any department *and with the mayor's approval*.[56] There is no provision within the eminent domain statute for an override of a mayoral veto. This factor lends more support and credence to the position that the orders of taking were executive or administrative acts.

A third point relates to the efficiency considerations voiced in *Andrade v. City Council*.[57] "Initiative and referendum may apply only to legislation; administrative acts generally are exempted from initiative and referendum. The reason for withholding referendum to annul or delay executive or administrative conduct would destroy the efficient administration of government."[58] If each order of taking were subject to a referendum vote, then vast road widening projects, for example, would potentially be subject to hundreds of referendum votes and result in considerable delay. Similarly, in the present situation, if a referendum vote were held and were successful, each successive site selected for the baseball stadium would potentially be subject to another referendum vote.

Notwithstanding the three points above, the language in *Dingley v. City of Boston*[59] and *City of Boston v. Talbot*[60] clearly states that eminent domain is a legislative power. If true, exercise of such power would seem to be a legislative act. In analyzing the legislative/executive issue in the context of the referendum provisions, the

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56. MASS. GEN. LAWS ch. 43, § 30 (2000). The City has a Plan A form of government. *Id.* §§ 46-55; Kaczmarski v. Mayor of Springfield, 193 N.E.2d 574, 575 (Mass. 1963). Under Plan A, the mayor is the chief executive and "every order, ordinance, resolution, and vote passed by the city council, and relating to the affairs of the city, must be presented to the mayor for his approval." DOUGLAS A. RANDALL & DOUGLAS E. FRANKLIN, MASSACHUSETTS PRACTICE: MUNICIPAL LAW AND PRACTICE § 109 (4th ed. 1993) (describing the Plan A form of government). In general, a two-thirds vote of the council is required to override a veto by the mayor.

57. 547 N.E.2d 927 (Mass. 1989).

58. 42 AM. JUR. 2D *Initiative and Referendum* § 8 (2000).

59. 100 Mass. 544, 558 (1868).

60. 91 N.E. 1014, 1016 (Mass. 1910).

analysis must be that the legislative power of eminent domain is the general power to authorize and appropriate money for an eminent domain taking. The mechanics of picking a particular site for a given project are an administrative or executive function, even though the order of taking must be voted on by the city council and approved by the mayor. Further evidence of this is the requirement in chapter 43, section 30 of the Massachusetts General Laws that the taking be "at the request of any department," since presumably the department involved would have unique knowledge regarding an appropriate site for a particular public project.[61]

II. Massachusetts Constitution As Applied to Local Referendum on Eminent Domain Takings

In order to determine whether the local referendum law[62] is constitutional as applied to an eminent domain taking, two provisions of the Massachusetts Constitution must be considered: part 1, article 10 and amended article 48.

A. *Article 10*

Part 1, article 10 of the Massachusetts Constitution ("Article 10") addresses the power to take property by eminent domain, stating in pertinent part:

> Each individual of the society has a right to be protected by it in the enjoyment of his . . . property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: *but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.* In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. *And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.*[63]

The phrase "representative body of the people" has been interpreted to mean the state legislature.[64] Article 10 gives the Legisla-

61. MASS. GEN. LAWS ch. 43, § 30 (2000).
62. *Id.* § 42.
63. MASS. CONST. art. 10, pt. 1 (emphasis added).
64. Opinion of the Justices, 313 N.E.2d 561, 569 (Mass. 1974).

ture alone the ability to decide whether to exercise the power of eminent domain in a particular instance.[65] The Massachusetts Constitution contains no express grant of eminent domain power to the people themselves and it should not be construed to confer that power implicitly because statutes delegating eminent domain power are "in derogation of the rights of individual ownership in property and must be construed with reasonable strictness . . . ."[66]

Under Article 10, only the "representative body of the people" may take private property without the owner's consent.[67] The representative body of the people of Springfield is the city council.[68] The City's Taking Law[69] expressly requires that the exercise of eminent domain power be through the city council, at the request of any department, and with the approval of the mayor under chapter 79. Because the Referendum Petitions in the instant case seek to override the city council's decision to take the Site, application of the local referendum law[70] would violate Article 10 of the Massa-

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65. *Id.*; Dingley v. City of Boston, 100 Mass. 544, 558 (1868) ("[T]he legislature is the *sole judge* as to the expediency of . . . exercising the right of eminent domain . . . either for the benefit of the inhabitants of the state or of any particular portion thereof.") (emphasis added); *see also* Hellen v. City of Medford, 73 N.E. 1070, 1072 (Mass. 1905) (confirming right of the Legislature "to decide absolutely and finally upon the necessity of the taking").

66. Burnham v. Mayor & Aldermen, 35 N.E.2d 242, 243 (Mass. 1941).

67. MASS. CONST. art. 10, pt. 1.

68. *See* MASS. GEN. LAWS ch. 43, § 50 (2000) ("The legislative powers of the city shall be vested in a city council . . . .").

69. *Id.* § 30 ("At the request of any department, and with the approval of the mayor and city council under Plan A . . . the city council may, in the name of the city, purchase, or take by eminent domain, under chapter seventy-nine, any land within its limits for any municipal purpose . . . .").

70. *Id.* § 42 (2000).

> If, within twenty days after the final passage of any measure, . . . a petition signed by registered voters of the city, . . . protesting against such measure or any part thereof taking effect, is filed with the city clerk, the same shall thereupon and thereby be suspended from taking effect; and the city council . . . shall immediately reconsider such measure or part thereof; and if such measure or part thereof is not entirely rescinded within twenty days after the date of the certificate of the registrars, the city clerk shall submit the same, by the method herein provided, to a vote of the registered voters of the city, . . . and such measure or part thereof shall forthwith become null and void unless a majority of the registered voters voting on the same at such election vote in favor thereof.
>
> The petition described in this section shall be termed a referendum petition and section thirty-eight shall apply to the procedure in respect thereto, except that the words "measure or part thereof protested against" shall for this purpose be understood to replace "measure" in said section wherever it may occur, and "referendum" shall be understood to replace the word "initiative" in said section.

chusetts Constitution, which vests exclusive authority to decide whether or not to take private property in the "representative body of the people."[71] That authority cannot be overridden by referendum.

B. *Article 48*

The Massachusetts Constitution does not grant the referendum power at the local level. Article 48 of the Amendments to the Massachusetts Constitution ("Article 48") does, however, expressly recognize that although the legislative power is vested in the General Court:

> *[P]eople reserve to themselves* the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and *the popular referendum*, which is the power of a specified number of voters to submit laws, *enacted by the general court,* to the people for their ratification or rejection.[72]

In Article 48, the people expressly reserved to themselves the power to ratify or reject laws enacted by the Legislature. The purpose of the referendum provisions in the Massachusetts Constitution is to enable the people to pass upon action taken by the Legislature.[73] "A fundamental principle of our system of government is that power to make laws for the general welfare is vested in the General Court, except as affected by article 48 of the Amendments to the Constitution. That power cannot be surrendered or delegated."[74]

The referendum power reserved by the people is not unlimited. The Massachusetts Constitution specifically excludes certain subjects from the statewide initiative and referendum provisions of Article 48:

> *No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use;* the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable

Id.

71. MASS. CONST. art. 10, pt. 1.
72. MASS. CONST. amend. art. 48, pt. 1 (emphasis added).
73. Mass. Atty. Gen. Op. (Apr. 14, 1966).
74. Opinion of the Justices, 191 N.E. 33, 35 (Mass. 1934).

> search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.[75]

Article 48 contains "mandatory" provisions with which the General Court and the people must comply.[76] Under these constitutional exclusions, any proposition that is inconsistent with the "right to receive compensation for private property appropriated to public use" cannot be the subject of a referendum petition. This exclusion clearly applies to eminent domain takings because "[t]he duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain."[77]

Article 48 pertains to laws made by the General Court; it does not permit the people to have a referendum upon purely local matters. That power only exists by statute—specifically, the local referendum law. "A statutory initiative or referendum may be subject to the same state and federal constitutional limitations as are the state legislature and the statutes which it enacts."[78] Although the local referendum law does not contain an express exclusion for constitutionally protected rights, Article 48 expressly prohibits a statewide referendum on any proposition inconsistent with the right to receive compensation for an eminent domain taking. The local referendum law should be harmonized with the exclusionary provisions in Article 48.

The local referendum law thus cannot be used to override the City's taking of the Site. Article 10 requires that type of decision to be made by the "representative body of the people," which is the city council.[79] In addition, applying the local referendum law to the

75. MASS. CONST. amend. art. 48, pt. 2, § 2 (emphasis added). Another section of Article 48 also provides limitations on referendum petitions: "No law that relates to religion, . . . or to . . . judges; or . . . courts; or the operation of . . . a particular town, city or other political division . . . ; or that appropriates money for the current or ordinary expenses of the commonwealth . . . shall be the subject of a referendum petition." MASS. CONST. amend. art. 48, pt. 3, § 2.

76. Opinion of the Justices, 34 N.E.2d 527, 539 (Mass. 1941) ("The provisions of said article 48 touching the description are mandatory and not simply directory. They are highly important. There must be compliance with them.").

77. Bromfield v. Treasurer & Receiver-Gen., 459 N.E.2d 445, 448 (Mass. 1982) (quoting Haverhill Bridge Proprietors v. County Comm'rs, 103 Mass. 120, 124 (1869)); *see also* Att'y Gen. v. Boston & A.R. Co., 35 N.E.2d 252, 257 (Mass. 1893) ("The power to take and the obligation to indemnify for the taking are inseparable." (quoting Drury v. Midland R.R., 127 Mass. 571, 576 (1879))).

78. 42 AM. JUR. 2D *Initiative and Referendum* § 2 (2000).

79. MASS. CONST. art. 10.

City's taking of the Site would violate the spirit of Article 48's exclusionary provisions that expressly prohibit a referendum upon propositions that are inconsistent with the "right to receive compensation for private property appropriated to public use."[80]

III. Federal Constitution as Applied to Local Referendum on Eminent Domain Takings

The United States Constitution establishes delicate balance between the natural right of private property and the inherent governmental power of eminent domain. Application of the local referendum law to challenge the City's eminent domain taking of the Site would interfere with this carefully crafted balance by violating the Fifth and Fourteenth Amendments.

The constitutional provision known as the Takings Clause of the Fifth Amendment[81] guarantees that private property will not be taken for a public use without just compensation. The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[82] The Fifth Amendment Takings Clause applies to the states through the Fourteenth Amendment.

The first section of the Fourteenth Amendment to the United States Constitution contains a "guaranty of due process of law."[83] The Due Process Clause of the Fourteenth Amendment is one of the most important provisions in the Constitution.[84] It makes the protections in the Bill of Rights binding on both the states and the federal government. The constitutional guarantee of due process of law prohibits the government from arbitrarily or unfairly depriving individuals of basic constitutional rights. The United States Su-

80. MASS. CONST. amend. art. 48, pt. 2, § 2.

81. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

82. Armstrong v. United States, 364 U.S. 40, 49 (1960).

83. U.S. CONST. amend. XIV, § 1.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. (emphasis added).

84. The right to due process of law "has been described as the very essence of a scheme of ordered justice." 16B AM. JUR. 2D *Constitutional Law* § 895 (1998) (footnotes omitted).

preme Court[85] has pointed out that "the core" of the due process concept is "protection against arbitrary action."[86]

The Takings Clause in the United States Constitution does not provide any right to a referendum. The Takings Clause recognizes the inherent governmental power of eminent domain and permanently binds the exercise of that power to the individual's right to receive compensation when the government takes his property. A legal analysis of the Due Process and Takings Clause illustrates that these provisions prohibit a referendum on the eminent domain taking of the Site.

The Takings Clause inextricably intertwines the power to take property with the duty to pay for it. The Supreme Court has recognized the unbreakable bond as inviolate:

> [I]t was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature "can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state constitution."[87]

After a taking has occurred, the permissible areas of challenge are confined to the purpose of the taking and compliance with the appropriate statutory process.[88] In this particular instance, the moment the Taking Orders for the Site were recorded in the Registry

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85. "[T]he Fifth Amendment . . . declares that no person shall 'be deprived of life, liberty, or property without due process of law.' The Fourteenth Amendment declares that no state shall 'deprive any person of life, liberty, or property without due process of law,' and is a limitation only upon . . . the state." *Id.* § 890 (citation omitted).

86. County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (citations omitted); *see also* 1A NICHOLS ON EMINENT DOMAIN § 4.01 (rev. 3d ed. 2000) (observing that "[t]he constitutional protections of due process as they relate to eminent domain serve as the basis for the requirements that must be fulfilled in eminent domain proceedings").

87. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 238 (1897) (citations omitted).

88. Massachusetts cases recognize two situations in which the validity of an eminent domain taking is subject to legal challenge: "[T]he taking was for an invalid purpose, i.e., not a public one, or . . . the taking authority had failed to comply with the procedural requirements of [chapter 79 of the Massachusetts General Laws]." Cumberland Farms, Inc. v. Montague Econ. Dev. & Indus. Corp., 650 N.E.2d 811, 814 (Mass. App. Ct. 1995) (citations omitted); *see also* MASS. GEN. LAWS ch. 79, § 10 (2000) ("When the real estate of any person has been taken for the public use . . . , but such taking, entry or damage was not effected by or in accordance with a formal vote or

of Deeds, title to the Site vested in the City and the former owners of the Site obtained the vested right to just compensation.[89] The government's power to take private property and the individual's right to receive compensation are inseparable, and are not subject to local referendum. Every act of the government or the people is subordinate to the Constitution, in which the framers carefully balanced the inherent governmental power of eminent domain with the natural right of private property. This unbreakable bond cannot be changed by local referendum.

For the cities and towns of the Commonwealth to exist as viable governmental entities, they must possess the necessary power to fulfill their responsibilities. For the security of the people, these powers must be kept within safe and well-defined limits. The United States Supreme Court has pointed out that these limits are mandated by the Due Process Clause because:

> [A] legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.[90]

Due process issues are analyzed in terms of both procedural due process and substantive due process. Procedural due process requires that state procedures that deprive an individual of life, liberty, or property must be "adequate in light of the affected interest. Substantive due process, however, imposes limits on what a state may do regardless of what procedural protection is provided."[91]

Procedurally, the Fourteenth Amendment's guarantee of due process in an eminent domain taking of private property has been codified by the legislature in chapter 79 and in the City's Taking Law.[92] Applying the local referendum law to the City's eminent

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order . . . duly authorized by law . . . the damages therefor may be recovered under this chapter . . . .").

89. MASS. GEN. LAWS ch. 79, § 3 (2000).

90. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 236-37.

91. Fournier v. Reardon, 160 F.3d 754, 757 (1st Cir. 1998) (citations omitted).

92. The Supreme Judicial Court, in discussing due process, has observed that the protection afforded property interests by both article 10 of the Massachusetts Declara-

domain taking of the Site raises serious procedural due process concerns.

The former owners of the Site had a legally vested interest to receive just compensation for what was taken from them. A vested interest in money is a recognized property right.[93] The referendum petitions, by initially suspending and, if approved by the voters, invalidating the City's taking of the Site, would deprive these individuals of substantial monetary compensation to which they were entitled.

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."[94]

The local referendum law does not provide for notice and an opportunity to be heard before a measure is suspended from taking effect, reconsidered, and entirely rescinded by the city council, or before it is nullified and voided by an election. Application of the local referendum law to the City's eminent domain taking of the Site would deprive the former owners of the Site of their vested property interest in the substantial compensation awarded them by the City. Thus, a referendum on the eminent domain taking of the Site does not provide sufficient procedural due process to the former owners.

Application of the local referendum law to the City's eminent domain taking of the Site also violates substantive due process. Although there is no generally accepted or universally applicable definition of substantive due process, the meaning of that concept and its practical import are thoroughly established in our law. The United States Supreme Court has recognized the complexities encountered in attempting to define the limits of substantive due

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tion of Rights and the Fourteenth Amendment to the United States Constitution "is subject to the same analysis." Accordingly, "we shall make no specific distinctions for the purposes of our opinion." Opinion of the Justices, 563 N.E.2d 203, 205-06 (Mass. 1990) (citations omitted).

93. *See* Hellen v. City of Medford, 73 N.E. 1070, 1072 (Mass. 1905) ("[T]he petitioners were entitled, under the Constitution and the statutes then in existence, to have their damages paid in money. This was a vested right.").

94. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (citations omitted).

process.[95]

Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests" including "the specific freedoms protected by the Bill of Rights . . . ."[96] The practical significance of this concept is that the fundamental rights and interests to which the concept attaches receive an elevated form of legal protection, making them nearly invulnerable to governmental infringement. A useful methodology to analyze substantive due process issues is the two-pronged test utilized by the Supreme Court in *Washington v. Glucksberg*:[97]

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. As we stated recently . . . the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[98]

A local referendum on the City's eminent domain taking is inconsistent with the constitutional requirement of substantive due process of law. This question of first impression is analyzed in two different ways: first, by applying the two-pronged test used by the Court in *Glucksberg*; and second, by applying the traditional legal tool which serves as the basis for our common law—finding an applicable analogy.

The first prong of the *Glucksberg* substantive due process test requires that an appropriate historical analysis be performed. In this case examining the history, legal traditions, and practices of the City's taking law, chapter 79, and the local referendum.

95. Moore v. City of E. Cleveland, 431 U.S. 494, 501-02 (1977) ("'Due process has not been reduced to any formula; its content cannot be determined by reference to any code.'") (citations omitted).

96. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted).

97. 521 U.S. 702 (1997).

98. *Id.* at 720-21 (citations omitted).

Eminent domain is an essential, inherent, and unalienable aspect of governmental authority. More than a hundred years ago, the Supreme Court observed that "[i]n every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse."[99]

The State's inherent power to take property by eminent domain is a power that "cannot be contracted or bartered away . . . [for it] 'must continue unimpaired in the State.'"[100] A leading treatise on the law of eminent domain states:

> [The] power of eminent domain does not require recognition by constitutional provision, but exists in absolute and unlimited form. Because of the concept of the power as an inherent attribute of sovereignty, positive assertion of limitations upon the power is required. This requirement is met by the provisions found in most of the state constitutions relating to the taking of property by eminent domain. Such constitutional provisions neither directly nor impliedly grant the power of eminent domain, but are simply limitations upon a power already in existence which would otherwise be unlimited.[101]

Among our natural rights as individuals is the right to property. In America, an important feature of this natural right is the requirement of just compensation when the government takes our property. This has been explicitly recognized by the United States Supreme Court:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty," Mr. Broom, in his work on Constitutional Law, says, "is that of enjoying private property without un-

99. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 240 (1897).

100. Town of Chelmsford v. DiBiase, 345 N.E.2d 373, 375-76 (Mass. 1976); *see also* Burnes v. Metro. Dist. Comm'n, 92 N.E.2d 381, 383 (Mass. 1950); Weeks v. Grace, 80 N.E.2d 220, 221 (Mass. 1907); Eastern R.R. v. Boston & Maine R.R., 111 Mass. 125, 130-31 (1872).

101. 1 JULIUS L. SACKMAN ET AL., NICHOLS, EMINENT DOMAIN § 1.3, at 1-91 to 1-92 (rev. 3d ed. 2001); *see also id.* § 1.4 ("It is now well settled that the provisions of the state constitutions are limitations upon an otherwise absolute legislative power and not grants of authority to the legislature."); *id.* § 1.42, at 1-132 ("What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest.") (emphasis added).

due interference or molestation." The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."[102]

The City of Springfield has a "Plan A" form of government.[103] Chapter 43, section 30 of the Massachusetts General Laws expressly authorizes cities with a "Plan A" form of government to take property by eminent domain. The Supreme Judicial Court of Massachusetts ("SJC") has pointed out that all cities with standard charters are controlled by section 30:

> But it is an express requirement of c. 43, § 30, that any purchase or taking of land by the city be "at the request of any department." We must read the statute as requiring the request of a department as a condition precedent to any purchase or taking of land. The reason for the requirement may have been that the Legislature thought it would be safer if the necessity for a particular purchase or taking and the adaptability of the land to the proposed use should first become apparent to some department in the course of the performance of its duties, and if the department should first decide to make a request. Whatever the reason was, the Legislature saw fit to make the requirement, and it cannot be ignored.
>
> The whole purpose of c. 43, § 30, was to place limitations upon the purchase or taking of land in order to prevent hasty or ill advised action by city councils. The word "department" in this section plainly refers to an executive or administrative department of the city government . . . . It does not refer to the city council itself, even though that body may sometimes in common speech be called the legislative department of the city to distinguish it from the administrative departments. It was not intended that the city council should request itself to make a purchase or taking.[104]

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102. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 235-36 (citations omitted); *see also* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a 'personal' right . . . . That rights in property are basic civil rights has long been recognized.").

103. MASS. GEN. LAWS ch. 43, § 30 (2000); *see also* sources cited *supra* note 56.

104. Shea v. Inspector of Bldgs., 83 N.E.2d 457, 460-61 (Mass. 1949) (citations omitted).

Chapter 79 of the Massachusetts General Laws contains "provisions relative to the taking of property by eminent domain and the award and recovery of damages for property taken."[105] The SJC recognized that the "taking of land from a private owner against his will for a public use under eminent domain is an exercise of one of the highest powers of government. Statutes authorizing the exercise of this right must be strictly complied with."[106]

The local referendum law establishes a procedure for direct, democratic decision-making. Although the general concept of the referendum in Massachusetts may date back to Plymouth Colony,[107] the right of referendum at the local level was apparently nonexistent under state statute until it was adopted in 1915.[108] The Massachusetts Constitution was amended on November 5, 1918, to provide for an initiative and referendum regarding laws passed by the General Court. Debates concerning the creation of initiatives and referendums took place in July 1917 in the Committee on Initiative and Referendum and provide insight into the general legal traditions that may have given rise to the local referendum law. Throughout these debates, many of the representatives made remarks concerning the purpose and the goals of the resolution proposing to amend the Massachusetts Constitution. For example, Mr. Joseph Walker of Brookline remarked that "the initiative and referendum simply gives a method of appeal from the decision of the Legislature to the people."[109] Mr. Walker further stated that "the

105. *Id.* at 458; *see also* Inhabitants of Watertown v. Dana, 150 N.E. 860, 862 (Mass. 1926) ("The adoption . . . by the general court of G. L. c. 79 . . . may be presumed . . . to provide a uniform system of procedure, so that everybody concerned will know how to take land by eminent domain . . . . Exceptions cannot easily be read into such a statute with such a history.").

106. Lajoie v. City of Lowell, 100 N.E. 1070, 1071 (Mass. 1913); *see also* Spare v. City of Springfield, 120 N.E. 854, 855 (Mass. 1918) (stating that the "taking of property by eminent domain is an act strictissimi juris and is valid only when the statutory requirements are performed with exactness"); Lancy v. City of Boston, 70 N.E. 88, 89 (Mass. 1904) ("The general rule of law is that where the Legislature authorizes the taking of land for a public use, and the taking is in accordance with the statute, and a plain and adequate remedy is provided for compensation, the remedy provided by statute is exclusive."); Mugar v. Mass. Bay Transp. Auth., 552 N.E.2d 121, 123-24 (Mass. App. Ct. 1990) ("The taking of private property for a public purpose by eminent domain is an inherent attribute of sovereign power. Judicial review is limited to the questions whether a taking was made for a legitimate public purpose, and whether the deprived landowner received just compensation . . . .") (citations omitted).

107. Statement of Robert Luce of Waltham, *in* 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION, 1917-1918, at 118 (1918) [hereinafter DEBATES].

108. *See* Act of May 20, 1915, ch. 267, pt. 1, § 42, 1915 Mass. Acts 302.

109. DEBATES, *supra* note 107, at 25.

initiative and referendum . . . will be a step forward, a long step and an effective step, on the part of those who stand for a fairer and a squarer deal."[110] Dissenters on the Committee on Initiative and Referendum were concerned that the very idea of a check on the legislature would disrupt, if in fact not destroy, the United States Constitution and the Constitution of Massachusetts. The dissenting members wrote that in their view, the referendum and initiative would be subversive to the cornerstones of the United States Constitution including representative government division of public powers, guarantee of personal immunities, and judicial protection of constitutional guarantees.[111]

For purposes of the historical analysis required by the first prong of the *Glucksberg* test, it is significant that the provisions regarding initiative and referendum in the Massachusetts Constitution contain express exclusions.[112] The debates concerning these exclusions from the initiative and referendum are informative. For example, Mr. Merriam remarked:

> [E]ven a sovereign Nation is limited in the exercise of its power; . . . we all have natural rights which even a sovereign Nation in its sovereignty must recognize. It is stated in the Constitution that these rights are "natural," that they are "essential," that they are "unalienable." Now if that is so there must be a corresponding obligation upon the State to recognize them, otherwise they cannot be "rights." . . . The protection over property, that it cannot be taken "except by due process of law," is an article in the Federal Constitution. That phrase in those words is not found in the Massachusetts Constitution. That principle still would prevail as the law of the land beyond the power of any initiative petition to reach it, by virtue of the Federal Constitution.[113]

The second prong of the *Glucksberg* test consists of a "careful description" of the fundamental and other interests revealed in the first prong of the test.[114] These interests are then weighed to determine whether substantive due process attaches to them. If it does, they are entitled to receive the elevated legal protection afforded

110. *Id.* at 49.

111. *Id.* at 14.

112. *See* MASS. CONST. amend. art. 48, pt. 2; *see also supra* note 75 and accompanying text.

113. DEBATES, *supra* note 107, at 1000-01.

114. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

by the Due Process Clause.[115]

For purposes of this Article, the central question under the second prong of the *Glucksberg* test is whether the local referendum law, as applied to the City's eminent domain taking, violates the Constitution's substantive due process protection afforded by vested private property rights. The historical analysis previously conducted with respect to natural rights, "eminent domain power,"[116] and the local referendum law reveals the existence of two fundamental interests, and a third important, but not fundamental interest, which must be clearly identified in order to resolve this central question.

The first fundamental interest is the government's power of eminent domain. This governmental power is deeply rooted in this nation's history and legal traditions, and applies to the City's eminent domain taking of the Site. The second fundamental interest is the individual's right to enjoy private property without undue interference or molestation. This right of private property is founded in natural equity. It is a principle of universal law and it is also deeply rooted in this nation's history and legal traditions. A third interest is the people's statutory power to nullify or void the final passage of any measure unless a majority of the registered voters vote in favor thereof. This power was established in the local referendum law and, unlike the interests previously discussed, is not deeply rooted in this nation's history or legal traditions. Although important, the people's statutory power to nullify or void the final passage of a local measure is not a fundamental interest protected or guaranteed by the Constitution.

The local referendum law is a state statutory commitment to direct democracy that ensures the people a voice in certain types of decisions made by city government. The *Glucksberg* analysis set forth above, combined with the traditional analysis discussed below, demonstrate that a local referendum on the City's eminent domain taking would be inconsistent with our nation's history and legal traditions as they pertain to the governmental power of eminent domain and the natural right of private property.

The government's power of eminent domain is inherent and unalienable. The exercise of this power by the City is constitutional

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115. *Id.* at 720-21.

116. *See id.* (referring to the separate historical analysis set forth in the first *Glucksberg* prong and applying it to "eminent domain power" with respect to government power, the City's Taking Law and chapter 79 of the Massachusetts General Laws).

unless used for an illegitimate purpose or in an irrational manner. In balancing the government's power of eminent domain with the individual's right to property, our Constitution established an unbreakable bond between taking and compensation. For a long time it has been considered unlawful for the government to take private property without providing just compensation.[117]

The Fifth Amendment and the Fourteenth Amendment prevent the Massachusetts Legislature, the City Council, and all other persons from depriving property owners of their vested rights in private property.[118] There is no right to a local referendum on an eminent domain taking granted in the Constitution or the Bill of Rights. It is not one of the activities and decisions that the Supreme Court has recognized "as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."[119] The judgment of history has confirmed the wisdom of the Bill of Rights and the Fourteenth Amendment. Among other things, these great works of American genius guarantee fairness in our laws, liberty in our lives, and security in our private property. These guarantees cannot be nullified by a local referendum. The Constitution prohibits any state from making or enforcing any law which deprives any person of life, liberty, or property without due process of law. The Due Process and Takings Clauses of the Fifth and Fourteenth Amendments thus prohibit state laws that deprive the people of their legally protected property interests.

In addition to the *Glucksberg* analysis described above, applying an appropriate legal analogy to the facts presented indicates that application of the referendum to eminent domain takings would infringe on substantive due process rights. When the City recorded the Taking Orders for the Site in the Hampden County Registry of Deeds, title vested in the City and gave rise to the City's obligation to pay for the property.[120] The legal effect of this vesting

117. *See, e.g.,* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 717 (1999) ("When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well.").

118. *See* discussion *supra* notes 81-88 and accompanying text.

119. *Glucksberg*, 521 U.S. at 727.

120. *See* MASS. GEN. LAWS ch. 79, § 3 (2000) ("Upon the recording of an order of taking under this section, title to the fee of the property taken . . . shall vest in the [entity] on behalf of which the taking was made; and the right to damages for such taking shall thereupon vest in the persons entitled thereto . . . ."); *see also* Grove Hall

of title in the City by eminent domain can be understood in relation to the law of vested rights:

> A right which has become vested is not dependent upon the common law or the statute under which it was acquired for its assertion. It has an independent existence. Consequently, the repeal of the statute or the abrogation of the common law from which it originated does not erase a vested right, but it remains enforceable without regard to the repeal.
>
> In order to become vested, the right must be a . . . property right, or a right arising from a transaction in the nature of a contract which has become perfected to the degree that it is not dependent on the continued existence of the statute.[121]

An order of taking "in writing, duly recorded, in conformity with the statute, is to be *treated as if it were a statute*."[122] Treating the recorded Taking Orders for the Site as a statute raises the "presumption against the retroactive application of new laws," which

> is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." This doctrine finds expression in several provisions of our Constitution. The specific prohibition on ex post facto laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.[123]

Sav. Bank v. Town of Dedham, 187 N.E. 182, 183 (Mass. 1933) ("[U]pon the record of a taking under eminent domain title shall vest in the body politic or corporate on behalf of which the taking is made and the right to damages shall vest in the persons entitled thereto."); Radway v. Selectmen of Dennis, 165 N.E. 410, 411 (Mass. 1929) ("The requirement that the copy of the taking be recorded is not a mere direction, it is the vital act upon which depends the transfer of title from the landowner to the municipality. It is the operative alienation of the land . . . [and] fixes the rights of the parties.").

121. 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 23.34 (5th ed. 1992); *see also* Hellen v. City of Medford, 73 N.E. 1070, 1072 (Mass. 1905) ("[T]he petitioners were entitled, under the Constitution and the statutes then in existence, to have their damages paid in money. This was a vested right.").

122. City of Boston v. Talbot, 91 N.E. 1014, 1016 (Mass. 1910) (emphasis added).

123. Lynce v. Mathis, 519 U.S. 433, 439-40 (1997) (citations and footnotes omitted); *see also* Hughes Aircraft Co. v. United States, 520 U.S. 939, 946 (1997) ("[T]here is a 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence.' The 'principle that the legal effect of conduct should ordinarily be assessed

Retroactive legislation is legally inappropriate for many reasons:

> Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences. Thus *The Federalist* stressed the desirability of protecting the people from the "fluctuating policy" of the legislature. Closely allied to this factor is man's desire for stability with respect to past transactions. . . . A substantial basis for the policies underlying the hostility to retroactive legislation is evidenced by those opinions of the Supreme Court which have held statutes violative of the due-process clause on the basis of their retrospective operation.[124]

The effective date of the taking of the Site was September 23, 1999, the date the Taking Orders were recorded in the Hampden County Registry of Deeds. These recorded Taking Orders had the effect of a statute. At that time, a vested property interest in the amounts awarded by the city council in the Taking Orders accrued to the former owners of the Site. In a 1905 case holding unconstitutional a special act abandoning land previously taken by eminent domain, the SJC stated:

> At the time [the special act] was enacted, the fee having passed to the respondent, the petitioners were entitled, under the Constitution and the statutes then in existence, to have their damages paid in money. This was a vested right. . . . The statute . . . did not undertake to define the nature of the thing originally taken, but to change the right to damages. Before the passage of the statute the petitioners were entitled to have their damages assessed and paid in money. This was a substantive right. After the statute they were deprived of this right, and were obliged to

under the law that existed when the conduct took place has timeless and universal appeal.'") (citations omitted).

124. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692-93 (1960); *see also* E. Enters. v. Apfel, 524 U.S. 498, 547 (1998) ("[F]or centuries our law has harbored a singular distrust of retroactive statutes.") (Kennedy, J., concurring and dissenting) (citations omitted); *Hughes Aircraft Co.*, 520 U.S. at 947 ("'[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'") (citations omitted); Landgraf v. USI Film Prod., 511 U.S. 244, 269-71 (1994) ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.") (footnote omitted).

> take land instead of money. This was a change not only in the remedy, but in the thing that the petitioners were entitled to have. It is of no consequence whether the substantive right vests by virtue of a provision in the Constitution or in a statute, provided it is vested. The remedy may be changed, but the right to money cannot be changed. As to that, no matter how the remedy be changed, the result reached must be, in substance, the same . . . . We are of opinion, therefore, that the statute is unconstitutional as applicable to this case.[125]

A referendum seeking to invalidate an eminent domain taking after title has vested in the City and after the individual's right to damages has accrued would unconstitutionally infringe upon rights enshrined in the Fifth and Fourteenth Amendments. A retroactive law purporting to change the legal consequences of a closed transaction, such as a referendum seeking to undo a taking, would destroy the reasonable certainty and security that are the very objects of property ownership. In enacting the local referendum law, the legislature could not have intended such a result.

IV. The Public Purpose Requirement

The power of eminent domain is an attribute inherent in sovereignty; however, its exercise is constitutionally limited by two interrelated requirements: (1) the taking must serve a public purpose or use[126] and (2) just compensation must be paid to the owner for the property.[127] This trial involved the first requirement for a valid governmental taking of private property by eminent domain—a public purpose. The controlling issue was whether the public interest was the dominant reason for the taking.

The concept of public purpose changes with the requirements of society and there is no exact legal formula to determine whether a taking is for a public purpose. The City's position was that the public would actually use and receive benefits from the taking and that no private interests would benefit, other than incidentally; therefore, the public purpose requirement was met. The Superior Court, in ruling that the public purpose was not clear and that the City acted in bad faith, invalidated and set aside the takings.[128]

125. Hellen v. City of Medford, 73 N.E. 1070, 1072 (Mass. 1905).

126. Burnes v. Metro. Dist. Comm'n, 92 N.E.2d 381, 383 (Mass. 1950).

127. U.S. Const. amend. V, amend. XIV; Mass. Const. art. 10, pt. 1.

128. City of Springfield v. Dreison Invs., Inc., 2000 WL 782971, at *50 (Mass. Super. Ct. 2000).

A. *City of Springfield's Position*

Determination of public purpose is primarily a legislative function. While subject to judicial review, the legislative determination is to be given substantial weight. The United States Supreme Court has discussed the scope of judicial review of such a determination of public purpose under the Fifth Amendment:

> The "public use" requirement is thus coterminous with the scope of a sovereign's police powers. . . . There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But . . . it is "an extremely narrow" one. . . . [D]eference to the legislature's "public use" determination is required "until it is shown to involve an impossibility." . . . *In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."* . . . [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.[129]

The Court further observed:

> [T]he fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. *Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.*[130]

A court's role in reviewing the public purpose is extremely narrow. As pointed out by the Supreme Court, "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of taking—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal

129. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) (emphasis added) (citations omitted).

130. *Id.* at 244 (emphasis added) (footnote and citation omitted).

courts."[131] When a taking occurs for a public purpose, the issue of whether the taking of land is necessary or expedient is a legislative question, and the determination of the legislature, as a tribunal of fact, is conclusive.[132] Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared conclusively. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs.[133]

Massachusetts cases are in accord. In 1899, the SJC discussed the scope of review and the line between public and private purposes:

> From the nature of the case, there can be no precise line. The power requires a degree of elasticity, to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the court.[134]

The City's taking of the Site "is entitled to the benefit of a presumption that the taking was for a public purpose."[135] Neither the entire community, nor any significant portion of it, is required to directly benefit from or participate in the proposed improvement.[136] The City's argument was that the court should not substitute its judgment for the city council's as to what constitutes a municipal purpose. To do so would raise the constitutional question of whether the judiciary is exercising legislative and executive authority prohibited under the separation of powers doctrine.[137]

The SJC has described a public use as "one the enjoyment and advantage of which are open to the public on equal terms. [Even if] only a relatively small portion of the inhabitants may participate in

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131. *Id.* at 242-43.

132. City of Boston v. Talbot, 91 N.E. 1014, 1016 (Mass. 1910).

133. Berman v. Parker, 348 U.S. 26, 32 (1954) (citation omitted).

134. Att'y Gen. v. Williams, 55 N.E. 77, 78 (Mass. 1899) (citation omitted). In *Williams*, the SJC said that "while the growing tendency towards an enlargement of the field of public expenditures should be jealously watched and carefully held in check, a determination of this kind, once made by the legislature, cannot be lightly set aside." *Id.*; *see also* Blakeley v. Gorin, 313 N.E.2d 903, 909 (Mass. 1974) (stating that the role of judiciary in reviewing public purpose is "extremely narrow").

135. Caleb Pierce, Inc. v. Commonwealth, 237 N.E.2d 63, 65 (Mass. 1968).

136. Opinion of the Justices, 8 N.E.2d 753, 756 (Mass. 1937).

137. MASS. CONST. art. 30, pt. 1.

the benefits, . . . the use or service must . . . [affect] them as a community and not merely as individuals."[138] Public purpose sufficient to support a governmental taking of private property by eminent domain is an elastic concept that is "being enlarged and extended with the progress of the people in education and refinement."[139] Over seventy-five years after *Williams* was decided, the SJC, in a case involving zoning power, wrote:

> We live in a changing world where the law must respond to the demands of a modern society . . . . "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." What was deemed unreasonable in the past may now be reasonable due to changing community values. Among these changes is the growing notion that towns and cities can and should be aesthetically pleasing; that a visually satisfying environment tends to contribute to the well-being of its inhabitants.[140] Recognizing the value of a beautiful city, the United States Supreme Court . . . adopted the view that the general welfare embraces aesthetic considerations. "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[141]

The Supreme Court has recognized the expansive nature of public purpose. "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment."[142] The New Jersey Supreme Court embraced this approach, stating "[t]he concept of public purpose is a broad one . . . . To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society."[143] Likewise in *Barnes v. City of New Haven*,[144] the Connecticut Supreme Court noted:

> A public use defies absolute definition, for it changes with vary-

138. *Opinion of the Justices*, 8 N.E.2d at 756.

139. *Williams*, 55 N.E. at 78.

140. John Donnelly & Sons, Inc. v. Outdoor Adver. Bd., 339 N.E.2d 709, 717 (Mass. 1975) (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926)).

141. *Id.* at 717 (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)).

142. Rindge Co. v. County of L.A., 262 U.S. 700, 707 (1923).

143. Roe v. Kervick, 199 A.2d 834, 842 (N.J. 1964).

144. 98 A.2d 523 (Conn. 1953).

> ing conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation. Courts as a rule, instead of attempting judicially to define a public purpose as distinguished from a private purpose, have left each case to be determined on its own peculiar circumstances. Promotion of the public safety and general welfare constitutes a recognized public purpose. "If the expenditure of public funds will promote the welfare of the community, it is for a public purpose." The modern trend of authority is to expand and liberally construe the meaning of "public purpose." The test of public use is not how the use is furnished but rather the right of the public to receive and enjoy its benefit.[145]

There is no universal test for distinguishing between public and private purposes.

> Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. Frequently an object presents a double aspect in that it may in some respects result in conferring a benefit upon the public and in other respects it may result in conferring a benefit upon or in paying money to private individuals. In such instances the cases tend to distinguish between those results which are primary and those which are secondary or incidental and to classify the object according to its primary consequences and effects. At any rate it is plain that an expenditure is not necessarily barred because individuals as such may profit, nor is it necessarily valid because of incidental benefit to the public.[146]

Across the nation courts have faced the issue of public purpose in the context of eminent domain takings for multipurpose stadiums and concluded that stadiums meet the public purpose requirement, despite the fact that a professional team might derive some profit from use of the stadium.[147] In *New Jersey Sports & Exposition Au-*

145. *Id.* at 527-28 (citations omitted).

146. Allydonn Realty Corp. v. Holyoke Hous. Auth., 23 N.E.2d 665, 667 (Mass. 1939).

147. *See* Ginsberg v. County of Denver, 436 P.2d 685, 692 (Colo. 1968) (approving stadium to be leased to owner of professional football team and minor league baseball club); Alan v. County of Wayne, 200 N.W.2d 628, 699 (Mich. 1972) (holding that bonding by county for the purpose of financing construction of a multi-million-dollar stadium to be used by a professional baseball team was valid, construction of the stadium did involve a public purpose); Lifteau v. Metro. Sports Facilities Comm'n, 270 N.W.2d 749, 754-55 (Minn. 1978) (finding that construction of publicly owned stadium

thority v. McCrane,[148] the court noted that "we are all in agreement with the trial court and the numerous authorities cited by it, that it is well within the discretion of the Legislature to find that the sports and exposition complex . . . is a public project and serves a public purpose."[149]

In Massachusetts, an advisory *Opinion of the Justices*[150] to the Legislature recognized that a multipurpose stadium may be for a public purpose. The Justices wrote:

> We are of opinion [sic] that a large multi-purpose stadium or an arena for public activities and events, conventions, professional and amateur athletic events, and other large gatherings may be for a public purpose if the expenditure of public funds, the extension of public privileges, powers, and exemptions, and the use, rental, and operation of the projects are adequately governed by appropriate standards and principles set out in the legislation. *The Legislature may reasonably determine that there are economic, civic, and social advantages to Boston, to eastern Massachusetts, and to the Commonwealth as a whole, from providing in the largest city in the State a stadium and an arena large enough to attract conventions and similar gatherings and to provide for audiences sufficient to support enterprises of interest to large numbers*

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for use by professional baseball and football teams had a public purpose); N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 545 (N.J. 1972) (upholding act creating special public entity with eminent domain powers to build a sports complex noting that proper public purposes include anything designed to promote the education or recreation of the people); Bazell v. City of Cincinnati, 233 N.E.2d 864, 870 (Ohio 1968) (allowing city to make expenditures in connection with the construction of a stadium to be leased to a major league baseball team); Meyer v. City of Cleveland, 171 N.E. 606, 608 (Ohio Ct. App. 1930) (approving city plans to acquire and maintain a multipurpose stadium to be financed by an issuance of municipal bonds, for future use of the stadium by a professional baseball team); Martin v. City of Philadelphia, 215 A.2d 894, 899 (Pa. 1966) (empowering City to secure a loan in the amount of $25 million to build a sports stadium and finding that possible use of the stadium by professional athletic teams did not convert the project into a private enterprise so as to render the loan invalid under the "public purpose" requirement); Citizens for More Important Things v. King County, 932 P.2d 135, 137 (Wash. 1997) (holding that funding by county to pay pre-construction costs of a baseball stadium, prior to the team's agreement to play in stadium, was for "public purpose"); Libertarian Party v. State, 546 N.W.2d 424, 434 (Wis. 1996) (upholding public purpose even though the Milwaukee Brewers baseball team would benefit from baseball park to be built).

148. 292 A.2d 545 (N.J. 1972).

149. *Id.* at 552.

150. 250 N.E.2d 547 (Mass. 1969). Advisory SJC opinions are individuals' opinions, not the court's. "They are not judicial decisions and are not binding upon the court as precedents. If the same question arises later . . . , the duty of the court is to consider it anew, without being affected by the advisory opinion." Bowe v. Sec'y of the Commonwealth, 69 N.E.2d 115, 126 n.2 (Mass. 1946).

> *of people, and suitable to provide recreation and instruction to citizens and others.*[151]

The SJC acknowledged that while a multipurpose stadium may not be a "traditional" public purpose, such an enterprise "may be found to be for public objectives"[152] given adequate standards protecting the public interest.

A review of Massachusetts case law reveals that the City has broad authority to take private property for a public purpose. The power to take private property for public use may "be exercised by the Legislature itself or it may be delegated by statute to the cities and towns."[153] The legislative authority of the City to take land by eminent domain is set forth in chapter 79 of the Massachusetts General Laws; in chapter 43, section 30 of the Massachusetts General Laws; and in the City Charter.[154] Section 30 provides in pertinent part that "[a]t the request of any department, and with the approval of the mayor and city council under Plan A . . . , the city council may, in the name of the city, . . . take by eminent domain, under chapter 79, any land within its limits *for any municipal purpose* . . . .[155] This charter provision has been interpreted to give the City "broad power to take land within its limits for any municipal purpose."[156] The Orders of Taking in the case at bar recite that they are made pursuant to chapter 43, section 30 and chapter 79.

Other cases have addressed the extent of a city's authority under general eminent domain statutes. In *North Ward Co. v. Board of Street Commissioners*,[157] the court discussed the scope of Boston's authority to take property pursuant to a statute very similar to chapter 43, section 30 of the Massachusetts General Laws.[158] In *North Ward*, Boston took property by eminent domain for the purpose of providing a location for the disposal of garbage and refuse. At issue, in part, was Boston's power to take property for this purpose without explicit legislative authority. Boston had taken the property pursuant to chapter 486, section 31 of the 1909 Acts and Resolves of Massachusetts,[159] which provided that "[a]t the request

151. *Opinion of the Justices*, 250 N.E.2d at 558 (emphasis added).
152. *Id.* at 559.
153. Burnham v. Mayor of Beverly, 35 N.E.2d 242, 243 (Mass. 1941).
154. MASS. GEN. LAWS ch. 43, §§ 46-55 (2000) (Plan A Charter).
155. *Id.* § 30 (emphasis added).
156. Poremba v. City of Springfield, 238 N.E.2d 43, 47 n.4 (Mass. 1968) (citation omitted).
157. 104 N.E. 965 (Mass. 1914).
158. MASS. GEN. LAWS ch. 43, § 30 (2000).
159. Act of June 11, 1909, ch. 486, § 31, 1909 Mass. Acts 523.

of any department, and with the approval of the mayor the board of street commissioners, in the name of the city, may take in fee for any municipal purpose any land within the limits of the city, not already appropriated to public use."[160]

In analyzing whether this statute provided Boston with "authority to take land for the erection thereon of a plant for the disposal of city refuse or garbage," the court opined that the intention of the statute was to give Boston the right to take land "for any municipal purpose" and "to enlarge the power of taking by eminent domain so as to make it include every municipal purpose . . . ."[161] Noting that the "collection and disposal of garbage and refuse constitute a legitimate municipal purpose," the court held that Boston had the authority to take the property and that no further express authority was needed.[162]

Similarly, in *Burnham v. Mayor of Beverly*,[163] the court examined a municipality's power[164] to take property by eminent domain for a municipal airport.[165] The *Burnham* court held that such power was not expressly provided in the statutes authorizing the expenditure of municipal funds for airports, nor in the statute regulating the airports' maintenance and supervision. Chapter 40, section 14 of the Massachusetts General Laws[166] supplied such power by authorizing Beverly to take property "for any municipal purpose for which the purchase or taking of land . . . is not otherwise authorized or directed by statute."[167]

The broad power of cities to take property by eminent domain was reaffirmed in *Roberts v. City of Worcester*,[168] holding that Worcester could take property that was part of an Urban Renewal Area and had previously been taken by the Worcester Redevelopment Authority.[169] The court, without much discussion, held that the defendants had the right to exercise the power of eminent domain. The court cited cases standing for the principle that the eminent domain power is inherent in the sovereign and cannot be

160. *Id.*

161. *North Ward*, 104 N.E. at 966.

162. *Id.*

163. *Burnham*, 35 N.E.2d 242 (Mass. 1941).

164. MASS. GEN. LAWS ch. 40, § 14 (2000); *see also* Shea v. Inspector of Bldgs., 83 N.E.2d 457, 458-60 (Mass. 1949).

165. *Burnham*, 35 N.E.2d at 244-45.

166. MASS. GEN. LAWS ch. 40, § 14 (2000).

167. *Burnham*, 35 N.E.2d at 245.

168. 625 N.E.2d 1365 (Mass. 1994).

169. *Id.* at 1367.

divested.[170]

Prior to the specific taking at issue in Springfield, the public purpose was recognized legislatively by the September 22, 1999, vote of the City Council to accept $4,000,000 in grant awards and to authorize the expenditure of such grant funds "for the purposes outlined in the grant, including site acquisition, relocation expenses, and costs of demolition and development of land in connection with the new baseball stadium."[171] Further, the Taking Orders reference the appropriation, stating that the taking was "for municipal purposes (an appropriation of money having been made for said purposes)."[172]

The absence of any detailed legislative recognition of the public purpose to be served has been held not to affect the validity of the taking. In *Caleb Pierce, Inc. v. Commonwealth*,[173] the plaintiff brought suit to recover land which had been taken for a state police substation by the Commissioner of Public Safety ("Commissioner"). The statute enabling the Commissioner's action[174] authorized the Commissioner to either acquire the Site by purchase or to take the land by eminent domain.[175] While the Act described the locus with particularity, it did "not specify any purpose for the taking; nor [did] it prescribe any use to which the locus must be put. It authorized the Commissioner 'to make such improvements on said land as he deems desirable' and to 'expend such sums as may be appropriated therefor.'"[176] The order of taking stated that the purpose was for "maintaining a State Police sub-station."[177] The plaintiff contended that both the Act and the order of taking were invalid: the Act, because it did not mention the public purpose for which the land was being taken, and the order of taking, because it failed to allege a public purpose. In response to the plaintiff's argument that the Act was invalid, the court stated:

> This argument is premised upon the assumption that the public purpose must be set forth in the enabling act. We disagree. The Legislature clearly intended to authorize the taking of the locus.

170. *Id.* at 1366.

171. Springfield City Council vote dated September 22, 1999.

172. Notice of Taking, *supra* note 10.

173. 237 N.E.2d 63 (Mass. 1968).

174. Act of June 7, 1957, ch. 419, 1957 Mass. Acts 297 (authorizing Commissioner of Public Safety to acquire land in Yarmouth).

175. MASS. GEN. LAWS ch. 79 (2000).

176. *Caleb Pierce*, 237 N.E.2d at 64.

177. *Id.*

> Chapter 419 describes the locus in some detail. The act is entitled to the benefit of a presumption that the taking was for a public purpose and was necessary. Accordingly, it is not void on its face.[178]

The court held that the order of taking was not invalid for failure to allege a public purpose, stating "[t]he order states that the land was taken for the purpose of 'maintaining a State Police substation.' This is sufficient to withstand the demandant's challenge that the order is void on its face."[179] Even when the taking order simply states that land is taken "for a municipal purpose," the taking is not rendered invalid.[180]

A municipal taking by eminent domain is not invalidated in the absence of prior enacted special legislation or a local ordinance setting forth the details of use, operation, and rental of the civic stadium.[181] A review of Massachusetts case law indicates that the absence of either a special act or local ordinance setting forth the details of use, operation, and rental of a project does not invalidate the taking. The validity of the taking is an issue separate from the use, operation, and rental of condemned property.

In *Sellors v. Town of Concord*,[182] Concord took property by eminent domain for the municipal purposes of building a police and fire station and a public meeting hall. At the time of the taking, a zoning restriction prohibited the uses for which the town took the property. The plaintiff contended that "in the absence of authority to construct the proposed municipal buildings at the time of the takings the town had no right to take the land."[183] The plaintiff also argued that due to the zoning restriction, which might never be removed, the taking was not for a public use. The court held the taking valid, noting that the taking was for a public purpose and that the zoning restriction could either be eliminated with the permis-

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178. *Id.* at 65.

179. *Id.*

180. Byfield v. City of Newton, 141 N.E. 658, 663 (Mass. 1923); *see also* Bouchard v. City of Haverhill, 171 N.E.2d 848, 849 (Mass. 1961) (failing to recite the specific purpose in order of taking does not render the vote void; amendment could be made).

181. Opinion of the Justices, 350 N.E.2d 547 (Mass. 1969) (discussing public purpose with regard to proposed legislation involving a stadium to be constructed and operated by the Massachusetts Turnpike Authority, which did not consider the issue of whether such legislation must precede the exercise of eminent domain power by a *municipality* in furtherance of a given project).

182. 107 N.E.2d 784 (Mass. 1952).

183. *Id.* at 785.

sion of the board of appeals or amended.[184] Since the town's good faith was not at issue, the court assumed that the proposed uses were not pretenses and that the town officials would "diligently proceed to do whatever is necessary to effectuate the objects for which the land was taken."[185] With regard to the uncertainty of the project at the time of the taking, the court stated:

> That a possibility exists that the land may not be devoted to the proposed uses cannot be denied. But in the absence of evidence that the town cannot reasonably expect to achieve its public purposes, we cannot deny its right to take land by eminent domain. Obviously in the carrying out of the projects contemplated by the town many steps must be taken, and they cannot all be taken at once. It would be unreasonable to hold that the town could not exercise the power of eminent domain until all steps necessary to the carrying out of the projects had been taken.[186]

The decision in *Ballantine v. Town of Falmouth*[187] further indicates that a lack of legislation detailing the use, operation, and rental of property prior to the taking does not invalidate the taking. In *Ballantine,* the town voted to appropriate funds to take private property for public parking and to authorize the board of selectmen to negotiate and enter into a lease for a private entity to operate the parking facility.[188] The taking was pursuant to chapter 40, section 14 of the Massachusetts General Laws.[189] There were no detailed statutory provisions for lease of the property. The court of appeals held that the taking was valid and the SJC affirmed.[190]

The SJC has raised concerns that the public purpose of a civic stadium requires that "the use, rental, and operation of the project" are adequately governed by appropriate standards and principles set out in the legislation.[191] In the present case, the City proposed to retain ownership of the land as well as ultimate control over its use through the terms of the ground lease. The ground lease would had to have been approved by the city council.[192] Once approved,

184. *Id.*

185. *Id.*

186. *Id.* at 786.

187. 294 N.E.2d 524 (Mass. App. Ct. 1973), *aff'd in part, rev'd in part,* 298 N.E.2d 695 (Mass. 1973).

188. *Id.* at 527.

189. MASS. GEN. LAWS ch. 40, § 14 (2000).

190. *Ballantine*, 298 N.E.2d at 700.

191. Opinion of the Justices, 250 N.E.2d 547, 558 (Mass. 1969).

192. MASS. GEN. LAWS ch. 40, § 3 (2000); *see also* Gould v. City Council, 465 N.E.2d 258, 260 (Mass. 1984) (noting that city council approval of the lease, or city

that lease would become the "legislation" for "use, rental and operation" of the civic stadium.

To the extent that the details of stadium availability for civic uses other than professional baseball were an issue, the City argued that the ground lease provisions could provide adequate standards and controls to satisfy the concerns expressed in *Opinion of the Justices*.[193] Furthermore, in light of its status as a municipal corporation with home rule authority, the City stands in a distinctly different position than the Massachusetts Turnpike Authority in *Opinion of the Justices*.[194]

Home rule is a legal concept guaranteeing local autonomy in local matters. A leading authority on municipal law observes that home rule has evolved in response to legislative interference in local affairs and was designed to free municipalities from legislative rule.

> The purpose was to give local communities full power in matters of local concern, which were to be regarded as exclusive matters of local self-government or home rule. With the growing size of municipalities and the increased scope of state legislation there were at least two other reasons for providing the creation of local governmental units to handle local problems: (1) to relieve the legislature from the burden of dealing with local affairs . . . , and (2) the realization that local problems required more attention and comprehensive knowledge than the state could exercise.[195]

In Massachusetts, home rule is constitutionally established and statutorily governed. The constitutional basis for home rule is the "Home Rule Amendment,"[196] while the statutory basis is the "Home Rule Procedures Act."[197] The right of local self-government or "home rule" is a significant legal milestone in the history of the commonwealth. Before home rule was established in 1966:

> [T]he regulation of the affairs of the cities and towns of the Commonwealth was vested primarily in the General Court. In order for a municipality to react to the needs of its citizens, it would have to seek specific enabling legislation from the legislature.

council approval of special legislation to facilitate the lease, would likely be subject to local referendum).

193. 250 N.E. at 558.

194. *See id.*

195. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.40, at 51 (3d ed. rev. 1999).

196. MASS. CONST. amend. art. 2, §§ 1-9; MASS. GEN. LAWS ch. 43B, § 7 (2000).

197. MASS. GEN. LAWS ch. 43B, §§ 1-20 (2000).

> The increasing demands upon local government, together with the time-consuming method of reacting to these demands, led to the passage of Article 89 of the Amendments to the Constitution, which established the basic right of municipalities to self-government. The Home Rule Procedures Act (HRPA), in turn, was passed to detail the procedures under which the municipalities could effect this constitutional grant of home rule. . . .[198]

Fifteen years later, another commentator noted:

> The Home Rule Amendment . . . ("HRA") . . . fundamentally altered the structure of government in Massachusetts. Prior to its enactment, Massachusetts' municipalities were considered hierarchical subordinates to the state legislature that could only enact local legislation after receiving an affirmative grant of power. In contrast, the HRA allows municipalities to act *until* the General Court specifically prohibits or confines their lawmaking.[199]

Home rule authorization for the City's taking of the Site was not necessary since a state statute[200] expressly conferred eminent domain taking power upon the City. Whenever orders "are necessary . . . [actions] may be taken by ordinance . . . resolution, order or vote . . . . Any requirement that an ordinance . . . be entitled as such, or that it contain the word "ordained," "enacted" or words of similar import shall not affect the validity of any action . . . to be taken by ordinance . . . ."[201] According to the court in *Oleksak v. City of Westfield*,[202] "[a]n ordinance is a legislative enactment of a city effective only within its own boundaries, and no return to any State authority is required after its enactment."[203] In an earlier case, the court noted that "[t]here may be occasions where a Legislature uses the word 'ordinance' as referring to any legislative action of a city council as opposed to action purely executive."[204] Massachusetts law defines an ordinance as "a vote or order of the city council entitled 'ordinance' and designed for the permanent regulation of any matter within the jurisdiction of the city council as

198. John W. Lemega, *State and Municipal Government: Home Rule*, 14 ANN. SURV. MASS. L. 264, 264 (1967).

199. Joanna Blum Jerison, *Home Rule in Massachusetts,* 67 MASS. L. REV. 51, 51-52 (1982)(footnotes omitted).

200. MASS. GEN. LAWS ch. 43, § 30 (2000).

201. MASS. GEN. LAWS ch. 43B, § 13 (2000).

202. 172 N.E.2d 85 (Mass. 1961).

203. *Id.* at 87.

204. Brucato v. City of Lawrence, 156 N.E.2d 676, 681 (Mass. 1959) (citation omitted).

laid down in this chapter."[205]

The City's vote to take the Site by eminent domain is to be treated as a type of local legislation. "The act . . . in the form of a taking in writing, duly recorded, in conformity with the statute, is to be treated as if it were a statute."[206] This type of local legislation is within the constitutional right of local self-government.[207] It must therefore be upheld because it is not "inconsistent" with state laws or the Constitution.[208] The court in *Connors v. City of Boston*[209] further noted that:

> Massachusetts has the "strongest type of home rule," and municipal action is presumed to be valid. The analysis whether local action is inconsistent with a State statute is analogous to the analysis whether Federal law preempts State action; the touchstone of the analysis is whether the State Legislature intended to preempt the city's authority to act.[210]

In the case at bar there is no "express legislative intent to forbid" the City's eminent domain taking of the Site.[211] Since the City's eminent domain taking power is expressly authorized by state statute, it does not "frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject."[212] As well, no factual or legal basis exists to "infer that the Legislature intended to preempt the field" of eminent domain to the exclusion of local government.[213] There is no conflict between the City's taking of the Site and the statutory power of eminent domain. The Massachusetts Legislature has neither preempted nor prohibited the City's legislative determination as to the public purpose of the proposed civic stadium. Consequently, the City's taking of the Site should be upheld as a valid exercise of the right of self-government in local matters.

The evidence presented at trial indicated that subsequent to

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205. MASS. GEN. LAWS ch. 43, § 1 (2000).

206. City of Boston v. Talbot, 91 N.E. 1014, 1016 (Mass. 1910).

207. "It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters . . . . " MASS. CONST. amend. art. 2, § 1.

208. Connors v. City of Boston, 714 N.E.2d 335, 337 (Mass. 1999).

209. *Id.*

210. *Id.* (citations omitted).

211. *Id.* (quoting Boston Gas Co. v. Somerville, 652 N.E.2d 132, 133 (Mass. 1995)).

212. *Id.* at 338.

213. *Id.*

relocation, demolition, and site preparation, the City planned to enter into a ground lease for the property with a non-profit entity—the Springfield Baseball Corporation ("SBC"), which owned a baseball franchise.[214] At the trial, the defendants claimed that the uncertainty of the arrangement negated the public purpose because it was possible that final lease terms might never be negotiated. In addressing the same issue, the court in *Court Street Parking Co. v. City of Boston*[215] held:

> The possibility that some lot or lots will continue indefinitely without the construction of a building thereon could have been provided against either by requiring that the city itself build after a period of attempted leasing or, as the plaintiffs have suggested, by authorizing a taking only after a lease to construct had been secured. *But it is not necessary so to limit and hamper the city in its acquisition and development of property for a public purpose.*
>
> We hold that such aspects of private advantage as the statutory plan presents are reasonably incidental to carrying out a public purpose in a way which is within the discretion of the Legislature to choose.[216]

Similarly, the SJC in *Ballantine v. Town of Falmouth*[217] reversed the appeals court holding disapproving of a plan to lease land taken for "municipal purposes" to a third party. The appeals court had held that although a taking of property was valid, the town had "no authority to lease property which it had just acquired by eminent domain for parking purposes because land so acquired for off street parking facilities had to be 'held, used and operated by the town itself.'"[218] The SJC reversed, holding instead that while it agreed that the taking was valid standing alone, the town had the power to lease the property despite the uncertainty as to whether or not a lease could ever be negotiated and the uncertainty over the

214. Unless an exemption was obtained, award of the ground lease would be subject to the requirements of the Uniform Procurement Act. *See* MASS. GEN. LAWS ch. 30B (2000). Such exemption was obtained with regard to earlier proposal at the Chicopee River Technology Park where the city owned land. *See* Act of June 23, 1995, ch. 43, 1995 Mass. Acts 606 ("An Act exempting the leasing of certain land in the city of Springfield from certain bidding laws"); Act of June 23, 1995, ch. 44, 1995 Mass. Acts 607 ("An Act authorizing the city of Springfield to lease certain property").

215. 143 N.E.2d 683 (Mass. 1957).

216. *Id.* at 688 (emphasis added).

217. 298 N.E.2d 695 (Mass. 1973).

218. *Id.* at 697 (quoting Ballantine v. Town of Falmouth, 294 N.E.2d 524 (Mass. App. Ct. 1973)).

substance of its final terms.[219] The court found that the public purpose for the taking could be carried out whether the town or a private lessee operated the parking lot and that the public purpose is not invalidated because some private benefit may ensue.[220]

The "town has authority to lease the premises for use by someone else upon condition satisfactory to the selectmen, provided that the premises will be used for a purpose for which the town took them."[221] The court concluded that a lease arrangement by which a private individual may operate a premises acquired for municipal parking purposes is embraced within the language of the statutes.[222] These statutes authorize a town to make such orders as it may deem necessary or expedient for disposal or use of its corporate property and to make contracts for exercise of its corporate powers.[223]

"We believe that the power of a town to authorize its selectmen to enter into an arrangement by which others may operate premises acquired for municipal parking purposes is 'conferred by statute or necessarily implied' from the statutory powers expressly granted to towns."[224]

At trial, the City argued that the facts regarding the civic stadium were substantially similar to *Ballantine*[225] and *Court Street Parking*.[226] The City Council's vote to take the Site was not contingent upon the negotiation of any lease, nor had a final lease been negotiated. Furthermore, the City would continue to own the land for the purpose for which it was taken. It intended to lease the land to a non-profit entity which would construct and operate a civic stadium. Presumably, such lease would have been negotiated on terms satisfactory to the mayor and the City Council.[227] That the lease

219. The court upheld the taking, noting that "[t]he authorization to take the premises was not contingent upon the negotiation of a lease with the Authority or anyone else." *Id.* at 699. Significant in the court's conclusion was the fact that "the premises will in all events be owned by the town and used for the public purpose for which the premises were acquired." *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See* MASS. GEN. LAWS ch. 40, § 3 (2000) ("A town . . . may make such orders as it may deem necessary or expedient for the disposal or use of its corporate property."); *Id.* § 4 (2000) (permitting a town to "make contracts for the exercise of its corporate powers").

224. *Ballantine*, 298 N.E.2d at 700 (quoting Atherton v. Selectman of Bourne, 149 N.E.2d 232, 235 (Mass. 1958)).

225. *Id.*

226. 143 N.E.2d 683 (Mass. 1957).

227. When and if a lease is negotiated, and assuming it is for a period of more than three years, it will be subject to approval by the city council. *See* MASS. GEN.

had not yet been negotiated should not invalidate the taking. As in *Ballantine* and *Court Street Parking*, the City would own the land at all times and use of the premises would have been restricted to the public purpose for which the premises were acquired.[228]

The proposed leasing of the land for the new civic stadium project was evidence of an arrangement that would further the public purpose. The draft ground lease required the lessee to construct the civic stadium at "its sole cost," and lessor was prohibited from using the premises for "any other purpose."[229] The evidence was undisputed that the Site was taken for a civic stadium and was intended by city officials to be used as such.

The public purpose would also be furthered under the proposed term in which the City would have the right to use the stadium rent-free for athletic events and other civic purposes subject to the lessee's prior right to use the stadium. The baseball team would play forty to fifty games per year in the stadium. As such, the stadium would be available on numerous other dates for other civic purposes including non-professional sports events, such as college, high school, and amateur baseball or softball games, concerts, and educational and recreational events. Any concerns that "the use, rental, and operation of the project" be adequately governed by appropriate standards and principles could have been addressed in a final ground lease. If satisfactory lease terms could not have been negotiated, as in *Ballantine* and *Court Street Parking*, the City would have retained ultimate control of the land.

To the extent that the details of stadium availability to non-professional baseball and other civic uses were an issue, ground lease provisions could have provided adequate standards and controls to satisfy the concerns expressed in *Opinion of the Justices*.[230] Unlike the Turnpike Authority in that opinion, the City was experienced in the operation and leasing of similar facilities, such as the Springfield Civic Center and Symphony Hall. Also, the City has a

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Laws ch. 40, § 3 (2000); *see also* Act of June 23, 1995, ch. 43, 1995 Mass. Acts 606 (exempting the leasing of certain land in the City of Springfield from some bidding laws); Act of June 23, 1995, ch. 44, 1995 Mass. Acts 607 (authorizing the City of Springfield to lease certain property).

228. *See* McLean v. City of Boston, 97 N.E.2d 542, 544 (Mass. 1951) (noting that an arrangement to take land by eminent domain with intent to turn the property over to a private party does not destroy the public purpose of the taking if it is "in furtherance of a public purpose").

229. Draft of Ground Lease between City of Springfield and Lessee (on file with author).

230. 250 N.E.2d 547, 558-61 (Mass. 1969).

legislative branch of government in its city council which is empowered to control budget expenses and make land use decisions.

Under the draft ground lease, the City would not have been responsible for the debt incurred in the actual construction cost of the stadium, estimated in the range of $15,000,000. The lessee would have been responsible for all expenses related to development, construction, and operation of the stadium, including utilities, insurance, maintenance, repairs, and replacements. At the termination of the lease, however, title to the stadium would have vested in the City.

Another factor distinguishing the proposed civic stadium from the arrangement considered in the *Opinion of the Justices*[231] is the non-profit status of the proposed tenant. As the evidence indicated, the City contemplated executing a ground lease with the non-profit SBC. This non-profit entity would construct a civic stadium for use by professional baseball and other civic purposes. SBC's status as a non-profit corporation qualified it for a tax exemption as a public charity pursuant to section 501(c)(3) of the Internal Revenue Code.[232] This status would facilitate private financing through tax-exempt bonds as well as private donations.

Such status is significant in light of the SJC recognition in *Helmes v. Commonwealth*[233] that the public expenditure of $6,000,000 to repair the battleship U.S.S. Massachusetts, paid to a charitable corporation, was not in violation of the "anti-aid" amendment.[234] As noted by the court, the public funds did not benefit the private corporation beyond enabling it to carry out its essential purpose.[235]

SBC's articles of organization and by-laws set forth its purposes as including (a) lessening the burdens on the City in its efforts to rehabilitate the downtown area; (b) promoting redevelopment of and stopping community deterioration in downtown Springfield; (c) supporting tourism and economic development; (d) establishing baseball and softball for inner-city public school students in the Springfield area by providing organizational support for this purpose; (e) expanding employment opportunities and increasing the general level of personal income in downtown Springfield; and (f)

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231. *Id.*

232. I.R.C. § 501(c)(3) (2000).

233. 550 N.E.2d 872 (Mass. 1990).

234. *Id.* at 874. *See generally* MASS. CONST. art. 18, *amended by* MASS. CONST. amends. 46, 103.

235. *Helmes*, 550 N.E.2d at 874.

promoting the common good and general welfare of the City and its residents.

As in *Helmes*, the purposes of the corporation limit the expenditure of the public funds to the designated uses which lead to a determination by the Internal Revenue Service that the entity was a "public charity."[236] Furthermore, like *Helmes,* the articles of organization provide that upon dissolution of the corporation, the assets of the corporation must be distributed to another charitable corporation or to the City of Springfield.[237]

Also, similar to *Helmes,* no private person would be likely to benefit specially from the expenditure. Under the by-laws of the SBC, the board of directors would serve without compensation. The board's composition was subject to restrictions aimed at insuring that control of the board would continue with civic-minded community leaders and be operated for the benefit of the community.

Unlike the proposal in *Opinion of the Justices*,[238] where the Turnpike Authority was planning to lease the stadium to a for-profit professional athletic team, the non-profit SBC was the owner of a Northern League baseball franchise[239] intending to play in the stadium. By acting in furtherance of the corporation's purpose set forth in its articles of organization and by-laws, there was no private inurement or benefit that would result from the corporation's activities except for the incidental benefits resulting from the economic development, that would be created. The financing for the new civic stadium project was a creative collaboration between the public and private sectors and would have resulted in a new state-of-the-art civic stadium being constructed with only a fraction of its total cost being paid by the taxpayers.

SBC obtained commitments of approximately $15,000,000 to finance construction of the new civic stadium. Questions were raised by the defendants over the uncertainty of whether those private financing commitments would be available. In a case where similar public-private cooperation involving a taking in Boston was being challenged, the court said:

> It cannot be known in advance when private capital for this pur-

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236. *Id.* at 873.

237. *Id.* at 875.

238. 563 N.E.2d 203 (Mass. 1990).

239. Mr. Graney testified that the Northern League is an independent baseball league, which means that it is not affiliated with Major League Baseball or its teams.

> pose will surely be available . . . . The possibility that some lot or lots will continue indefinitely without the construction of a building thereon could have been provided against either by requiring that the city itself build after a period of attempted leasing or, as the plaintiffs have suggested, by authorizing a taking only after a lease to construct had been secured. But it is not necessary so to limit and hamper the city in its acquisition and development of property for a public purpose.[240]

The same reasoning is applicable to the present case. The questions raised as to the private financing do not affect the public purpose here.

The public sector's total financial participation in the new civic stadium was to be $6,000,000. One-third of this public money was going to be derived from a $2,000,000 general obligation bond approved and appropriated by the City Council in May 1995. The remaining two-thirds of the public money was to come from a $2,000,000 Public Works Economic Development Grant ("PWED")[241] grant and a $2,000,000 Community Development Action Grant ("CDAG").[242]

The City applied for a PWED grant from the Commonwealth's Executive Office of Transportation and Construction ("EOTC"). On September 10, 1999, a PWED grant in the amount of $2,000,000 was awarded to the City of Springfield by the EOTC for the civic stadium project. The statutory source for the PWED grant derives from chapter 732 of the Acts of 1981, entitled "An Act Providing for a Transportation Development and Improvement Program for the Commonwealth."[243] Specifically, section 17(c) of the Act provides that the purpose of the funds are for "any public works facilities deemed necessary for economic development by the secretary of transportation upon petition of an appropriate local executive government body."[244]

Title 701, section 5.04 of the Massachusetts Code states:

> Eligible projects shall include but will not necessarily be limited to projects for the design, construction and/or reconstruction of existing and/or newly located public access roads, streets and bridges, curbing sidewalks, lighting systems, traffic control and

240. Court St. Parking Co. v. City of Boston, 143 N.E.2d 683, 688 (Mass. 1957).

241. MASS. REGS. CODE tit. 701, §§ 5.00-5.10 (1993).

242. MASS. GEN. LAWS ch. 121B, § 57A (2000) (providing statutory authority for the CDAG grant); *see also id.* § 1 (definitions).

243. Act of Dec. 24, 1981, ch. 732, § 17C, 1981 Mass Acts 1131.

244. *Id.*

> service facilities drainage systems and culverts associated with a municipal economic development effort which seeks to or will:
> (a) retain establish, expand or otherwise revitalize industrial or commercial plants or facilities;
> (b) create or retain long-term employment opportunities;
> (c) have a positive impact on the local tax base;
> (d) leverage high ration private investment, and;
> (e) strengthen the partnership between public and private sectors.[245]

As previously noted, the Secretary approved the civic stadium as eligible.

The City applied for a CDAG from the Commonwealth's Department of Housing and Community Development ("DHCD") and received an award letter. On September 20, 1999, DHCD notified the City that it was "preparing a contract" for a "$2 million grant" regarding "the Marox site of 2.44 acres" which "is decadent and eligible for funding for site acquisition, and/or clearance, and/or preparation."[246] Under section 57A of the Massachusetts General Laws,

> [a]ny eligible city or town, acting by and through its municipal officers or by and through any agency designated by such municipal officers to act on their behalf, including but not limited to its urban renewal agency, may apply to the department for a grant in a specific amount to fund a specified community development project. Said grants shall be in addition to the assistance otherwise made available under this chapter and to other forms of local, state and federal assistance.[247]

Criteria for approval of the grants requires a finding by DHCD that "[t]he project will be of public benefit, in the public interest and for a public purpose, consistent with the sound needs of the community as a whole, and any benefit to private entities or individuals will be indirect and incidental and not the purpose of the project."[248]

The public benefits flowing from the new civic stadium project also support a finding of public purpose. In this case, the public purpose for the City's eminent domain taking of the Site—a new civic stadium—promotes the general welfare of the City's inhabi-

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245. MASS. REGS. CODE tit. 701, § 5.04 (1993).
246. MASS. GEN. LAWS ch. 121B, § 57A (2000); *see also id.* § 1 (definitions).
247. MASS. GEN. LAWS ch. 121B, § 57A(a) (2000).
248. *Id.* § 57A(b)(2).

tants by providing civic, recreational, and economic benefits. The civic stadium project received significant financial support from the commonwealth,[249] which provided two-thirds of the project's total public funding. The Commonwealth's financial support for the civic stadium is a tangible form of state recognition of the project's public purpose.

The City Planning Department conducted an examination of potential downtown locations for the new minor league baseball stadium. One of the locations identified as a potential site for the new stadium was the Chicopee River Business Park. Although the Chicopee River location was attractive from the standpoint of "land acquisition cost, parking and accessibility," it did not provide many "economic spin-offs" because:

> It is not likely that downtown business, even the hotels, would realize an increase in business as a result of professional baseball. Rather, economic spin-offs for Springfield are limited to supplier relationships and employment.
>
> With this in mind, it is appropriate to look at downtown sites. Indeed the success of downtown ballparks in Cleveland, Buffalo and Harrisburg, requires a further study of Springfield's downtown. Two sites, Main-Congress and Carew-Bond-Patton, come to mind . . . .[250]

After describing the properties contained in the Main-Congress site, the Planning Department pointed out that the Site offered "a blend of downtown/urban opportunities" and "a wide latitude of spin-off attractions."[251] Mayor Albano related how the location for the new civic stadium was an important part of his administration's downtown revitalization strategy and would have a significant impact on the quality of life in the region:

> Sports and recreation have a unique significance for Springfield

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249. The Commonwealth's financial support for the City's civic stadium project followed a grant application process during which state officials carefully scrutinized the project. They questioned the City on a number of matters. The City promptly responded with answers to the Commonwealth's questions. This occurred before the state funds (PWED and CDAG) were awarded to the City. Springfield v. Dreison Invs., Inc., Civ. A, No. 99-1318, 2000 WL 782971, at *25 (Mass. Super. Feb. 25, 2000).

250. Minor League Baseball Stadium, Potential Downtown Location, Springfield Planning Department 001676 (June 1996). The Planning Department found that Interstate 291 "is a physical barrier separating the site from the downtown area. This may hurt the potential for spin-off development." In addition, the Planning Department estimated the development costs of the Carew-Bond-Patton site to be higher than the development costs of the Main-Congress site. *Dreison Invs.*, 2000 WL 782971, at *7-8.

251. Springfield Planning Department, *supra* note 250.

> which is the birthplace of basketball. A new civic stadium in Springfield will promote the City's general welfare by improving the quality of life for City residents while bolstering the City's image as an entertainment and tourist center. These things will make a significant and positive contribution to the continuing vitality of Springfield.[252]

In support of a public purpose, the City argued that the location for the new civic stadium was an important part of a downtown revitalization strategy. The new civic stadium would complement other projects, such as the new Basketball Hall of Fame and the Convention Center. Siting the new civic stadium where proposed would further Springfield's goal of improving its downtown as a sports and entertainment destination by bolstering the City's image as a tourist center. The civic stadium site was carefully selected to increase social and economic activity in the downtown area during crucial evening and weekend hours.

Adding baseball to the City's mix of attractions would improve the quality of life in Springfield and bring the community together. In a concurring opinion, Judge Musmanno of the Supreme Court of Pennsylvania eloquently identified the benefits of a baseball stadium:

> We are not dealing with the horse and buggy age, but with the atomic age. But, more than that, we are dealing with a modern development in an age which properly regards as essentials for all the people services which heretofore were enjoyed only by the wealthy and the affluent. There is need today to provide the public with facilities for recreation, sports and enjoyment of outdoor athletic competition. Even passive participation as an onlooker in competitive sports stimulates a desire for physical exercise. In any event it takes the spectator into the open air and provides him with exuberant escape from the cares of the day and arms him with recharged energy to meet responsibilities as a citizen. All this helps to build up a healthy community. . . .
>
> The objective of a community is not merely to *survive*, but to progress, to go forward into an ever-increasing enjoyment of the blessings conferred by the rich resources of this nation under the benefaction of the Supreme Being for the benefit of all the people of that community.
>
> If a well governed city were to confine its governmental

252. Aff. of Mayor Michael J. Albano 2, at ¶ 4 (on file with City's Comprehensive Statement of Springfield v. Dreison Invs., Civ. A, No. 99-1318, Hampden County Super. Ct.).

> functions merely to the task of assuring survival, if it were to do nothing but provide "basic services" for an animal survival, it would be a city without parks, swimming pools, zoo, baseball diamonds, football gridirons and playgrounds for children. Such a city would be a dreary city indeed. As man cannot live by bread alone, a city cannot endure on cement, asphalt and sewer pipes alone. A city must have a municipal spirit beyond its physical properties, it must be alive with an esprit de corps, its personality must be such that visitors—both business and tourist—are attracted to the city, pleased by it and wish to return to it. That personality must be one to which the population contributes by mass participation in activities identified with that city.
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> Hardly anything in America symbolizes a large city more than its . . . baseball team. To take the . . . baseball team out . . . would be to deprive . . . people of the opportunity for a spontaneous outburst of civic pride, for which there is no substitute . . . .
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> . . . Not to have the gladsome and thrilling Opening Day of the Baseball Season each spring, not to watch the tension-charged race of the home team against the teams from afar . . . would be tragedy indeed . . . .[253]

A new civic stadium would also bring intangible benefits to the City. For example, it would enhance the image of downtown, strengthen the community, and help promote the City's livability. It would make people optimistic about downtown's future, as well as provide an additional place for public gatherings. Having minor league baseball in the City would cause Springfield's name to be repeated throughout the Northeast in the sports pages and electronic media. A stadium would bring more people downtown. It would provide a needed opportunity for an affordable family outing, generate civic pride, cause greater utilization of the City's existing business base, and further the City's efforts to become a major attraction for visitors and businesses. These civic benefits, which would be derived from the taking of the Site, supported upholding the taking as in the public's interest. "The concept of the public welfare is . . . spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[254]

The City also argued, in support of a public purpose, that rec-

253. Conrad v. City of Pittsburgh, 218 A.2d 906, 913-14 (Pa. 1966) (Musmanno, J., concurring).

254. Berman v. Parker, 348 U.S. 26, 33 (1954) (citation omitted).

reation itself is a public purpose and includes spectator sports. In discussing the meaning of recreation with in the context of the Massachusetts General Laws,[255] the Massachusetts Court of Appeals stated:

> "Recreation" in its most natural signification means "refreshment of strength and spirits after work; . . . a means of refreshment or diversion." This would include not only the active pursuits (playing baseball and the like) to which the plaintiffs would apparently confine its meaning but also passive pursuits, such as *watching* baseball, strolling in the park to see animals, flowers, the landscape architecture, or other sights, picnicking, and so forth . . . .[256]

Recreation has traditionally been recognized by the courts across the United States as a public purpose. In 1923, the U.S. Supreme Court specifically stated that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, *recreation* and enjoyment."[257]

In Massachusetts, activities which promote recreation of the public constitute a public purpose. For example, the SJC, referring to a statute authorizing the raising of money by taxation for the erection of a memorial hall, stated:

> [A] statute . . . may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates, or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments designed merely to promote the general welfare, either by providing for fresh air or *recreation*, or by educating the public taste, or by inspiring sentiments of patriotism, or of respect for

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255. *See* MASS. GEN. LAWS ch. 21, § 17C (2000).

256. Catanzarite v. City of Springfield, 592 N.E.2d 752, 752-53 (Mass. App. Ct. 1992). A number of state statutes recognize recreation as a legitimate public purpose. *See* MASS. GEN. LAWS ch. 44, § 7(25) (2000) (authorizing the City to incur debt for "the construction of municipal outdoor recreational and athletic facilities, including the acquisition and development of land and the construction and reconstruction of facilities"); MASS. GEN. LAWS ch. 45, § 14 (2000) (recognizing recreation as a suitable public purpose for which cities may acquire land and buildings by eminent domain for purposes of a public playground or recreation center); Act of June 3, 1968, ch. 377, 1968 Mass. Acts 225 (creating the Springfield Civic Center Commission and declaring that the establishment of structures to "accommodate large public and private gatherings, banquets, trade shows, the performing arts, concerts, sports events and cultural events" is "proper public or municipal purpose").

257. Rindge Co. v. County of L.A., 262 U.S. 700, 707 (1923) (emphasis added).

> the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests on sound principles.[258]

This principle is firmly established in other jurisdictions as well.[259]

Upholding the constitutionality of a statute authorizing Boston to borrow money outside its debt limit for constructing a municipal auditorium, the SJC stated:

> [T]he construction of a municipal auditorium for public exercises and hearings, political rallies and other meetings in the exercise of the constitutional right of assembly, and exhibitions incidental to municipal functions such as exhibits of the work of public school pupils and fire prevention and civil defense displays . . . would be a public purpose and if the statute limited the city to the construction of such a hall it would be constitutional. We think that the additional references to "an exhibition hall" or to "conventions and other shows and gatherings" do not derogate from construing the statute to be constitutional.[260]

Public parks, public beaches, municipal civic centers, and municipal auditoriums are all forms of recreation for which courts have found a valid public purpose to exist. In Massachusetts, no cases decide the issue of the public purpose nature of a stadium. There is, however, an advisory *Opinion of the Justices* discussing the proposed legislation that authorized the Massachusetts Turnpike Authority to construct a stadium in which the SJC states:

> [A] large *multi-purpose stadium* or an arena for public activities and events, conventions, professional and amateur athletic events, and other large gatherings *may be for a public purpose*. . . . The Legislature may reasonably determine that there

258. Kingman v. City of Brockton, 26 N.E. 998, 998 (Mass. 1891) (emphasis added).

259. *See* City of Oakland v. Oakland Raiders, 646 P.2d 835, 841 (Cal. 1982) ("'Activities which promote recreation of the public constitute a public purpose.'") (quoting Alameda County v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 85 (Ct. App. 1964)); Ginsberg v. City of Denver, 436 P.2d 685, 688 (Colo. 1968) (en banc) (providing that a sports stadium is for the recreation of the public and is for a public purpose); State v. Osceola County, 752 So. 2d 530, 538 (Fla. 1999) (per curiam) ("We have on numerous cases approved as a public purpose the development of recreational facilities."); Martin v. City of Philadelphia, 215 A.2d 894, 896 (Pa. 1966) ("A sports stadium is for the recreation of the public and is hence for a public purpose."); Mount Spokane Skiing Corp. v. Spokane County, 936 P.2d 1148, 1153 (Wash. Ct. App. 1997) ("Public recreational facilities constitute a public purpose and function.").

260. City of Boston v. Merch. Nat'l Bank of Boston, 154 N.E.2d 702, 705 (Mass. 1958).

> are *economic, civic, and social advantages . . . from providing . . . a stadium* and an arena large enough to attract conventions and similar gatherings and to provide for audiences sufficient to support enterprises of interest to large numbers of people, and suitable to provide recreation and instruction to citizens and others.[261]

In its opinion, the SJC did not directly address the issue of recreation but merely looked at the proposed statute.

As previously noted, other jurisdictions have held that the construction, operation, taking, or management of a stadium facility would create a valid public purpose on the basis that such activity constitutes public recreation, therefore, expanding the eminent domain remedy permitting property to be taken for recreational purposes. The California Supreme Court has upheld the principle that anything calculated to promote the education or recreation of the people is a proper public purpose.[262] New Jersey courts also support this principle. A New Jersey court upheld an act creating a special public entity to build a sports complex, through eminent domain if necessary.[263] The court observed that "the view that the construction and maintenance of stadiums and related facilities constitutes a public purpose has received virtually universal approval in most jurisdictions."[264] The Pennsylvania Supreme Court, in sustaining an ordinance that authorized a loan to construct a sports stadium, declared that "[a] sports stadium is for the recreation of the public and is hence for a public purpose; for public projects are not confined to providing only the bare bones of municipal life . . . ."[265]

The City of Springfield argued the new civic stadium satisfied the public purpose requirement not only because of the recreational baseball use, but noted that the stadium could be used for other public purposes, because it would not be used exclusively for professional baseball. Besides only playing a limited number of games a year, the team would have many out-of-town games when the stadium could be used for other public purposes. The stadium could be used by young athletes attending the Springfield public schools to hold important baseball or softball games as well as host

261. Opinion of the Justices, 250 N.E.2d 547, 558 (Mass. 1969) (emphasis added).

262. *Oakland Raiders*, 646 P.2d at 842.

263. N.J. Sports & Exposition Auth. v. McCrane 292 A.2d 580, 635-30 (N.J. Super. Ct. Law Div. 1971).

264. *Id.* at 598.

265. Martin v. City of Philadelphia, 215 A.2d 894, 896 (Pa. 1966).

state semi-finals and final championship games. Area schools, colleges, and universities could make use of a new state-of-the-art sports facility for sporting and civic events. In addition, other family-oriented programs, social, and civic events could be held in the new civic stadium. A new civic stadium would provide activities for the entertainment, enjoyment, and pleasure of Springfield citizens, and would serve a paramount public purpose by promoting tourism while providing a new forum for educational, recreational, and entertainment activities.

There are several types of economic benefits to the public from a new civic stadium on the Site. These economic benefits include jobs, taxes, and urban revitalization. The SJC held that "[r]educing unemployment and stimulating the economy are public purposes."[266] "'The reduction of unemployment and alleviation of economic distress,' as well as the [s]timulation of investment and job opportunity . . . are proper public purposes."[267] "[F]oster[ing] the expansion of the economy and the reduction of unemployment by providing a role for state and local government in the stimulation of industrial development" has been deemed a valid public purpose by the SJC.[268]

B. *Court's Resolution*

The consolidated cases[269] were tried before Constance M. Sweeney, Justice of the Superior Court, over several days in January 2000. After the trial, Judge Sweeney issued a memorandum of decision filed February 25, 2000,[270] finding that the takings were not a valid exercise of the general eminent domain powers of the City and were not primarily made for a public purpose.[271] The court invalidated and set aside the takings, pursuant to Judge Sweeney's issuance of a declaratory judgment and order for entry of judgment.[272] The City's claim to enjoin further statutorily required proceedings on the referendum petitions were rendered moot because the land takings were invalid.[273]

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266. Opinion of the Justices, 369 N.E.2d 447, 449 (Mass. 1977).

267. Opinion of the Justices, 335 N.E.2d 362, 365 (Mass. 1975) (alteration in original) (citations omitted).

268. Opinion of the Justices, 366 N.E.2d 1230, 1232 (Mass. 1977).

269. *See supra* note 13 and accompanying text.

270. City of Springfield v. Dreison Invs., Inc., Nos. 1999138, 991230, 000014, 2000 WL 782971, at *1 (Mass. Super. Ct. Feb. 25, 2000).

271. *Id.*

272. *Id.*

273. *Id.* at *50.

The court's decision relies on two narrow and fact-specific grounds. First, the decision holds that "when a city exercises its power of eminent domain for the primary purpose of granting a leasehold estate to a private entity so that the entity can build a stadium for its baseball team, the public purpose is not clear."[274] The court held that, under those circumstances, additional legislation governing the relationship of the governmental entity and the lessee is necessary "in order to define the public purpose."[275]

In support of its position, the court cited to and quoted the *Opinion of the Justices*:

> The provision of such facilities . . . is not as clearly and directly a public purpose as supplying housing, slum clearance, mass transportation, highways and vehicular tunnels, educational facilities and other necessities. As to such essential enterprises, the public objectives are well understood. The appropriate and usual methods of achieving them also, on the whole, are well established. In such cases, somewhat general standards of public convenience and necessity and principles of prudent, frugal government administration, necessarily to be implied from the essential projects themselves, may adequately guide the expenditure of public funds, even where there may be involved arrangements with private persons or entities operating for profit.[276]

Judge Sweeney noted that the arrangement between the City and SBC did not prohibit SBC from assigning its lease to an entity operating a team for profit.[277] As under the proposed lease terms such a profit-making enterprise would not owe any funds to the City, the court expressed concern with the potential private windfall that would ensue.[278] The court also noted that in addition to owning the team, SBC or its assignee could assess fees for civic uses of the stadium by entities other than the City.[279] Since the professional baseball team's use of the stadium took priority over all civic functions, the court expressed concern over the absence of any standards defining the extent of such use.[280] Judge Sweeney opined:

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274. *Id.* at *45.

275. *Id.*

276. 250 N.E.2d 547, 558 (Mass. 1969).

277. *Dreison Invs.*, 2000 WL 782971, at *41.

278. *Id.* (citing *Opinion of the Justices*, 250 N.E.2d at 559-60, which noted same concern).

279. *Id.* at *42.

280. *Id.*

> Before six million dollars of public money can be spent to acquire land for the principal and immediate purpose of benefitting a not-for-profit corporation, and potentially to benefit a profit-making enterprise, legislative standards and principles must be in place "to protect all aspects of the public interest and . . . to guard against improper diversion of public funds and privileges for the benefit of private persons and entities.[281]

As Springfield faced one roadblock after another in its attempts to secure a franchise, the pursuit "for a professional baseball team took on a life of its own."[282] The court concluded that by the time of the taking the City had departed "from its basic obligation to protect the public interest and guard against improper diversion of public funds and privileges for the benefit of private persons and entities."[283] The court found that, at the time of the takings, the public was not the "primary beneficiary of the City's contribution."[284] The proposed ground lease terms primarily benefited SBC, not the City.[285]

As a second ground for invalidating the takings, the court found that the takings had to be set aside "even if legislation establishing standards for the City's proposed participation in the stadium project were not required."[286] According to the court, the evidence clearly and convincingly established that the City acted in bad faith when it exercised the power of eminent domain to acquire title to the land parcels.[287] Judge Sweeney's determination that the City acted in bad faith in taking the land parcels is grounded mainly "on the actions and representations of the mayor in the events giving rise to the takings."[288] As property cannot be taken without the mayor's approval,[289] his intent is of import. The court found that facts demonstrate that "until sometime in 1997, city officials were primarily motivated by the public interest in their efforts to attract professional baseball to Springfield."[290] Judge Sweeney made fac-

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281. *Id.*
282. *Id.*
283. *Id.* at *47.
284. *Id.*
285. *See id.* at *49.
286. *Id.* at *45.
287. *Id.*
288. *Id.* at *46 ("The actions, words and knowledge of the mayor, acting within his authority, are attributable to the City.") (citing Pheasant Ridge Assocs., Ltd. v. Burlington, 506 N.E.2d 1152, 1156 (Mass. 1987)).
289. *Id.* (citing MASS. GEN. LAWS ch. 43, § 30 (2000)).
290. *Id.*

tual findings that the project initially sought to serve many tangible and intangible public purposes, i.e., providing family-oriented activities, increasing business for the hotel, restaurant, and café trades, providing increased opportunities for employment, revitalizing the central business district, and increasing public spirit and pride.[291]

There is no specific instant that indicates the City's departure from its responsibility to safeguard the public interest and prevent the improper use of public moneys and privileges for the benefit of individuals and entities.[292] The court declared that it was a gradual process evidenced by the mayor's disregard for separate interests in the stadium project.[293] Judge Sweeney noted that the City did not seriously endeavor to separate the City and SBC's shared objective of local professional baseball from their distinct financial interests in the project.[294] The court also found that bad faith was established because the mayor and his agents, in applying for the CDAG and PWED grants, knowingly made material misrepresentations to the Commonwealth for the purpose of securing four million dollars in state funding for the stadium site.[295]

For the above reasons, the court found the takings invalid as a matter of law, rendering moot the city's petition to prevent the referendum process.[296] The court set aside the takings in accordance with the court's Declaration of the Rights of the Parties and Order for Entry of Judgment.[297] In this Declaration, the court permanently enjoined the City "from asserting any further claim to title in the properties" and enjoined the City "from taking any further action with respect to the referendum petitions."[298] The court further ordered that the City "take all reasonable and necessary action to restore clear title to the properties," and held that the owners of the property had a right to proceed against the City with claims for monetary damages, if any, caused by the cloud on its title by reason of the invalid taking order.[299]

Although the City strongly objected to the factual findings as well as legal reasoning of the decision, no appeal was taken as the parties reached a negotiated settlement of all claims in the case by

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291. *Id.* at *47.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at *48.
296. *Id.* at *50.
297. *Id.*
298. *Id.* at *2.
299. *Id.*

means of the City reconveying title to the land to the former owners and the SBC paying monetary consideration in exchange for a release of all claims for damages against it and the City.

CONCLUSION

It does not appear under Massachusetts law that the state referendum statute applies to an eminent domain taking. Even if it were to apply, the provisions of the state and federal constitutions prohibit a referendum from undoing a taking by eminent domain. The court did not reach these issues in this case because the judge determined the underlying takings did not meet the public purpose requirement. All takings must be made for a public purpose to be legal. It remains to be seen whether in future cases, an eminent domain taking may validly be the subject of a local referendum.