September 23, 2002

Demonstration Project

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 01-2705

TREMONT ON THE COMMON CONDOMINIUM TRUST

vs.

BOSTON REDEVELOPMENT AUTHORITY;
THEATER MANAGEMENT GROUP, INC.,
Defendant-Intervener

MEMORANDUM OF DECISION AND ORDER ON
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The plaintiff Tremont on the Common Condominium Trust (TOC) brings this action to challenge the validity of actions taken by the defendant Boston Redevelopment Authority (BRA) in connection with the Boston Opera House renovation project (sometimes referred to hereafter as "Opera House project") in downtown Boston. The defendant-intervener Theater Management Group, Inc., now known as SFX-Theater Management Group, Inc.(TMG), is the prospective developer of the Opera House project.[1]

TOC's amended complaint raises seven claims. Several of these challenge the validity of the BRA's eminent domain taking of a portion of Mason Street, a public way that lies behind the Tremont on the Common condominium building. These claims include: (1) the taking was for an improper private purpose and not a valid public one (Count One); (2) the BRA exceeded its statutory authority in effecting the taking pursuant to G. L. c. 121B, §§ 11 and 46(f)(Count Two); (3) the BRA failed to give the statutorily required notice of its intent to take property and of the taking itself, in violation of G. L. c. 79, §§ 5C and 7C, respectively (Counts Three and Four).

[1] The BRA and TMG are sometimes referred to collectively hereafter as "the defendants."

TOC also challenges by way of certiorari review of the BRA's designation and approval of the Opera House renovation project as a demonstration project under G. L. c. 121B, § 46(f) (Count V).[2]

The BRA and TMG have moved for summary judgment on all five of these counts; TOC opposes the motion, arguing in part, pursuant to Mass. R. Civ. P. 56(f), that any ruling should be deferred until it has an opportunity to conduct additional discovery. For the reasons discussed below, the motions for partial summary judgment will be allowed.

Background

Procedural history: TOC filed its complaint on June 15, 2001. Taking the position that the gist of the complaint was a challenge to the BRA's designation of the Opera House project as a demonstration project pursuant to G. L. c. 121B, § 46(f), the BRA filed the administrative record of its "proceedings" relating to the Opera House project as part of its answer, but also answered the numbered paragraphs of TOC's amended complaint. TMG was permitted to intervene as a defendant, and also answered the amended complaint. Upon the motion of the defendants, the court consolidated with this case TOC's separate action against the Public Improvement Commission of the City of Boston (the PIC), in which TOC challenges the validity of the PIC's decision to close a portion of Mason Street in Boston in connection with the Opera

[2] The amended complaint contains two additional counts for damages relating to the taking of a portion of Mason Street, if that taking were to be found valid; TOC claims it owns a portion of the part of Mason Street that has been taken. These claims, set out in Counts Six and Seven, are not at issue at this time, since neither the BRA nor TMG has moved for summary judgment on them. They are not further discussed.

House project.[3]

After some skirmishes about whether the BRA properly could treat this case as one seeking judicial review of an administrative proceeding that would be governed by the Superior Court Standing Order 1-96, as amended – with the result that a motion for judgment on the pleadings could be filed[4] – there was an agreement that the BRA and TMG would seek a resolution of the first five counts of TOC's amended complaint by summary judgment, based on the administrative record the BRA had filed, and with TOC free to argue pursuant to Mass. R. Civ. P. 56(f), that it needed discovery before a ruling on the summary judgment motions. Following argument on the motions for summary judgment and opposition, I permitted TOC to conduct limited discovery in relation to Count I of its amended complaint. At the conclusion of that discovery, all parties filed additional memoranda and the TOC filed additional supporting materials.

The summary judgment record: TOC is a condominium trust that brings this action on behalf of the record unit owners of the condominium building and real property located at 151 Tremont Street in Boston. There are apparently 376 condominium units in the TOC condominium building, and approximately 700 people presently reside there. The building is 27stories high and was constructed in 1964; it was converted to condominium ownership in

---

[3] The case is captioned, *Tremont on the Common Condominium Trust v. Public Improvement Commission,* C.A. No. 01-2706 (Suffolk Superior Court). While the PIC case is certainly related to TOC's case against the BRA and TMG, the parties have agreed to proceed solely with the case against the BRA and TMG first. Accordingly, this memorandum of decision does not concern TOC's claims against the PIC.

[4] See, e.g., *Chandler v. County Comm'rs of Nantucket County,* 437 Mass. 430, 434 (2002).

1982. The building fronts on Tremont Street, and abuts Mason Street at the back. Mason Street historically has been a public way that is east of and parallel to Tremont Street – between Washington and Tremont – and runs from Avery Street on the south to West Street on the north. The TOC condominium building itself was constructed as a rental apartment building part of an urban renewal project initiated by the BRA in the early 1960's. Part of the BRA's 1962 urban renewal plan states that loading access for the TOC building is to be from Mason Street, and no loading will be permitted from Tremont Street.

The BRA is a redevelopment authority that serves as the urban renewal agency for the city of Boston (the city) pursuant to G. L. c. 121B, § 9, as well as the planning board for the city under St. 1960, c. 652. TMG is a facility management company specializing in the operation of 1000 to 4000 seat multipurpose theaters in the United States and Canada. It is the proposed developer of the Opera House project. TMG currently manages theater facilities in San Antonio, New Orleans, Washington, D.C., Louisville, and Baltimore. TMG is a wholly owned subsidiary of SFX Entertainment, Inc., whose parent company is Clear Channel Entertainment.

The Boston Opera House is located at 539 Washington Street in Boston, in the center of the block that runs from Avery Street to West Street. The rear of the building abuts Mason Street; the backs of the Opera House and the TOC condominium building are directly across Mason Street from each other. The Opera House was constructed between 1925 and 1928, opening in November 1928 as the B.F. Keith Memorial Theatre.[5] It was designed by Thomas White Lamb, described in the record as the premier theater architect of the early Twentieth

[5] The Opera House stands on the site of an earlier theater, the (second) Boston Theater, constructed in the Nineteenth Century with a seating capacity of 3,200.

Century, and it remains the only Boston theater which has retained the original Lamb-deigned interior and exterior. It opened as the official memorial to Benjamin Franklin Keith, known as the father of vaudeville. A 1979 report on Boston's theater district that is included in the BRA's administrative record states that the French Baroque interior was called at the time of the theater's opening "a dazzling architectural dream in ivory and gold with marble columns, walnut paneling and a single balcony plan." In 1965, the theater's name was changed by its then-owners, the Sack Theaters, to the Savoy Theatre. In approximately 1978, the Opera Company of Boston purchased the theater and renamed it the Boston Opera House. Title to the theater was transferred to Opera House, Inc., a non-profit corporation affiliated with the Opera Company of Boston that was organized in 1980 for the primary purpose of owning the property.

The Opera House is one of three theaters on the same block of Washington Street; the other two theaters are the Modern (built in 1913), to the north of the Opera House, and the Paramount (built in 1932) to the south. The three theaters historically have formed a central part of the "Washington Street theater district." The Opera House was listed in 1979 in the National Register of Historic Places, and in the 1990's was designated as a Boston landmark by the Boston Landmarks Commission.[6]

The administrative record reveals that for many years before TMG proposed to develop the Opera House, the area surround the Opera House and the Opera House itself had been a point of focus for the city and the BRA. In May 1979, the city and the BRA published a "preliminary report" entitled "Boston's Theatre District: A Program for Revitalization," which describes itself

[6] The Paramount Theater, which is described in the record as Boston's first example of an art deco theater, has also been designated by the Boston Landmarks Commission as a landmark.

as the summation of a six–month planning effort for the area, following the publication of the "Lower Washington Street Area Study" in 1978.[7] The 1979 report describes the theater district as extending from the Back Bay to the Washington Street retail district, with a center at the junction of Boylston and Washington Streets (approximately two blocks from the Opera House). It further describes "the decay of the area" caused in part by "the association of the Combat Zone with the District." (Administrative Record [A.R.], vol. 6, p. 1742 *et seq.*), and includes a preliminary analysis of a market survey of the district funded by the Ford Foundation and the city's Office of Cultural Affairs that stresses the area's physical decline and the negative impact caused by the view of the public that the area was in decline and unsafe. (*Id.*, pp. 1767-1768.) The report notes that the Opera House, then known as the Savoy Theatre, had recently been bought by the Opera Company of Boston, and states: "if the Savoy is to continue as the home of the Boston Opera Company, however, it is essential that its stagehouse also be rebuilt and expanded. Studies have been completed by the BRA to determine the feasibility of discontinuing Mason Street at the rear of the Savoy which is critical to any expansion and it is hoped that construction of an expanded stage will commence next year." (*Id.*, p. 1751.) Included as well in the report is mention of a possible development plan that would feature the three theaters on the "Savoy block" of Washington Street as anchors for a block that included in abutting properties small theater spaces, rehearsal rooms and theater-related workshops and studio spaces. The report mentions that "[i]t is a fact of life that development or rehabilitation of a downtown area in Boston is dependent on some sort of subsidy[,]" (*id.*, p. 1772.), and also acknowledges the acute

---

[7] The Lower Washington Street study does not appear to be part of the administrative record.

economic problem of theater properties because of the need to derive their revenues from "volatile" show business. (*Id.*, p. 1776.) It further describes the ongoing efforts to prepare grant applications for the Washington Street area and notes that the "existing, predominantly empty, yet handsome buildings in the Savoy block are the first priority." (*Id.*, p. 1773.)

The city and the BRA continued to devote attention to the Washington Street theater district in the 1980's. In early 1989, the city through the BRA and the office of arts and humanities, published the Midtown Cultural District Plan for the area stretching from the edge of the Boston Common to Downtown Crossing, the Theater District, the Combat Zone and Park Square. (The development of such a plan for this district was required under the city's 1987 Downtown Interim Zoning Plan.) The plan notes: "Despite Midtown's central location, many areas in the district are underutilized, uninviting, and often dangerous. In addition, half of the district's historic theaters are vacant . . . .Many of the problems facing Midtown are the result of the economic decline of Boston that began during the Great Depression. . . .Since the 1960's, the city and the private sector have tried many times to revitalize the area. While some of these efforts produced sporadic successes, each has failed to generate a critical level of investment necessary to spur revitalization of the area as a whole." (A.R., vol. 7, pp. 2082-2083.) The plan proposed creating a revised cultural district with new as well as rehabilitated space for performing arts and exhibitions, and where the arts and theaters are visible and affordable, and present a vibrant community open 18 hours a day, 7 days a week. With respect to the Opera House, the plan states that the city was then seeking a large grant of funds from the state to renovate the Opera House, in part to provide first-class performance space, and in part to provide an anchor for the Cultural District's facilities along lower Washington Street. (A. R. vol. 7, p.

2126; see A.R. vol. 6, pp. 1985-1995.)

In January 1989, the board of the BRA voted to approve the Midtown Cultural District Plan for this area. The board also voted to petition the Boston Zoning Commission to adopt a new zoning code section, designated as Article 38, for the Midtown Cultural District that would follow the zoning change recommendations in the Midtown Cultural District Plan. (A.R., vol. 6, p. 1998-2000.) The zoning commission approved the petition, and Article 38 was adopted. (See *id.*, pp. 2003 *et seq.*)

In August of 1989, the same year as the Midtown Cultural District Plan was adopted, the BRA commissioned a study of the feasibility and cost of renovating the Boston Opera House. The resulting report was prepared by a private consulting group with assistance from the BRA staff, the city's Office of Arts and Humanities, a private theater consulting firm and a private construction firm. The report describes the building as being in "relatively good shape" but with a roof near the end of its useful life, local areas of disrepair in the interior, problematic plumbing and fire protection systems, and needing a heating system. (A.R. vol.6, pp. 1804-1805.) It further comments that "one of the underlying premises of the study, shared by a broad spectrum of city officials and members of the arts community, are two: [(1)] the current stage of the Opera House is too small for the long term health and prosperity of the house; a substantial stage addition is therefore essential. Because the current stage area borders directly on the street behind the building (Mason Street), a useful stage house addition cannot be accomplished without the closing of Mason Street[;] [(2)] the magnificent decor of the Opera House public spaces precludes any substantial change to these areas; any major change in layout or other significant renovation (aside from restoration of existing surfaces) should therefore be limited to

backstage or non-public areas." (*Id.*, p.1804.) The study includes an analysis of three different "renovation scenarios" -- "full restoration," "cosmetic restoration and code upgrade," and simply "code upgrade." All three of these proposals calls for an expansion and addition to the Opera House stage house and closing of Mason Street. "Obviously this premise has a significant impact on the overall renovation cost, but it is our opinion that it would be ill-advised to spend considerable sums of money necessary for a major building refurbishment without significantly improving the key performance area of the house, and thereby expand the range potential of users, and thus, revenue." (*Id.*, p. 1806.) The study states that the cost of the proposed "full renovation" would be approximately $22 million.

The Opera Company of Boston used the Opera House for performances in the 1980's, but neither the Opera Company nor its affiliated Boston Opera House, Inc. was able to raise sufficient funds needed to renovate the building and to continue to use it. As a result, the Opera House has been vacant since 1990. The fates of the Paramount and Modern Theaters were no better by that time.

On March 29, 1996, the city, the Boston Preservation Alliance and the National Trust for Historic Preservation organized the "Boston Historic Theater Charrette," a one-day workshop program that was billed as "an important initiative to save and revitalize a historic core of our community composed by the Modern, Paramount and Opera House theaters on Washington Street . . . ." (A.R. vol. 6, p. 1890.) The charrette materials state that it was created "in direct response" to the fact that the three theaters had recently been listed on the National Trust for Historic Preservation's "Eleven Most Endangered Historic Places." (*Id.*) The charrette's goal was "to organize development proposals and implementation strategies to preserve and revitalize

abutters. Included in the letters are a great number from residents of TOC, most of them opposed to the proposed Opera House project, in large part because of the proposal to close a portion of Mason Street and to extend the Opera House to a point where it would abut directly TOC's building. One of the major criticisms was that the closing of Mason Street would prevent or substantially interfere with TOC's ability to use its building's loading docks; another was that the closing of Mason Street would create significant safety problems because fire and emergency vehicles would not be able to pass through.[9]

On December 14, 1999, TMG submitted its Draft Project Impact Report (DPIR) to the BRA, again as required by Article 80 of the Boston Zoning Code for large scale projects.[10] The DPIR describes the extensive planning process TMG had engage in, and its meetings with representatives of public agencies (e.g., the BRA, the Boston Transportation Department, Boston Fire and Police Departments), as well as community groups. It also describes in detail TMG's proposal to restore to its original design and condition the exterior facade of the Opera House as well as the interior, to provide new plumbing, electrical, heating, air conditioning systems, handicapped access and additional fire escape routes as well as a new roof. The backstage space would also be substantially improved. The Opera House seating would be decreased, from 2685

---

[9] One of the letters in the record, from the chairperson of the board of trustees of TOC, criticizes the closing of Mason Street and other aspects of the proposed Opera House project, but also states as follows: "During the past twenty years, no one in downtown Boston has been more adversely impacted by the rundown condition of the Opera House than the residents of TOC. The deplorable condition of its physical plant has led to the gathering of a number of people who engage in public drinking, vandalism and other crimes against person and property." (A.R., vol. 3, p. 501.)

[10] Article 80 review provisions for large projects apply to the Opera House project because it would have a total development of something over 100,000 square feet, which is the threshold for triggering large project review.

to 1500 seats. At the rear of the building a new addition would provide for a larger stage and two fully-enclosed loading docks that would be located on a portion of Mason Street. However, in response to the public comments TMG and the BRA received from abutting property owners, including TOC, the DPIR proposed reducing the area of Mason Street to be taken for this addition from 6070 to 3970 square feet. As a result of the reduction, Mason Street would remain open at all points, although its width in the area behind the Opera House would be reduced to ten feet. This is a sufficient width for fire and other emergency vehicles to pass as well as most trucks. TMG's proposal would leave Mason Street as a one-way northbound way (its current direction), but change the configuration of the southern portion of the street below the proposed Opera House expansion to have two lanes so that trucks and other vehicles making deliveries could enter Mason Street from Avery Street, turn around and leave Mason Street the same way. Under the modified plan, TOC would continue to have access to its loading docks on Mason Street.

In the DPIR, TMG explains its position that the stage of the Opera House must be expanded to 45 feet deep and 90 feet wide in order to accommodate large, Broadway-type (musical) shows that TMG believes are necessary to offer, among other types of programs, to justify the initial cost of development and renovation of the Opera House, and to make the theater profitable as it moves forward. TMG further states that in order successfully to develop the Opera House project, it might seek status as a Chapter 121A entity.

The BRA published notice of its receipt of the DPIR on December 15, 1999, and conducted another community meeting on January 19, 2000, to receive further public comments on the project. Representatives of TOC attended that meeting.

On March 24, 2000, TMG submitted an application to the BRA requesting it to approve and adopt a"demonstration project" pursuant to G. L. c. 121B, § 46(f), for the proposed Opera House project, that would involve the BRA acquiring title to "the portion of the Project [i.e., the Opera House project] necessary to effectuate the Project and convey such portion to [TMG], or its nominee, for the undertaking of the Opera House Renovation Project that includes the complete restoration of the Boston Opera House." (A.R., Vol. 1, p. 30.) The application noted that the Opera House had suffered extensive water damage because of the deteriorating condition of the roof, and that unless major repairs were made soon, "there is a danger that with the continued weakening of the membrane the entire interior of the Opera House will be exposed to the elements and the possibility of the restoration of a landmark interior will be lost forever." (*Id.*)[11]

The board of the BRA considered the application to designate the Opera House project as a demonstration project at its regular meeting on March 30, 2000. Public notice of this meeting was given, but the board's agenda, and in particular the fact that consideration of TMG's application was on it, were not part of the public notice. As a general matter, the BRA does not include the agendas of its meetings in the public notices of meetings that are published.

---

[11] This description of the Opera House building is consistent with the description in an appraisal dated June 18, 1999, that TOC included in the summary judgment record. The appraisal states a value of the building as $5.1 million, but notes that inspection reveals the exterior building has suffered from water, infiltration and moisture, that the roof has been leaking with resulting damage to plaster motifs in the interior and a weakening of the vaulted ceilings, and that evidence of continuing damage was observed throughout the building during the inspection. The record contains a number of references from a variety of sources to the ongoing deterioration of the building and the imminent danger to the building posed by the damaged roof. The perilous condition of the Opera House building does not appear to be something that TOC disputes.

The BRA board considered and approved at the meeting a memorandum concerning the Opera House project that was presented by the BRA staff. The memorandum explains the application, describes the proposed project in some detail, and states that the demonstration project designation is necessary to permit and authorize the BRA to acquire title to certain portions of the Project area and then to convey title to TMG or its designee: "But for the [BRA] functioning as intermediary title holder and redeveloper, the Opera House Renovation Project can not be implemented and a historic and cultural asset of the City will be forever lost, serious damaging the [BRA's] efforts to cause the revitalization of the Midtown Cultural District in accordance with the [BRA's] Midtown Cultural District Plan." (A.R., Vol. 1, p. 9.)[12] The memorandum further summarizes the history of the Opera House project and TMG's involvement, the community and pubic agency input into the review of the project, and the financial and other benefits to the city that could be expected to accrue from the project. After discussion, the BRA board voted to designate the project as a demonstration project under G. L. c. 121B, § 46(f). In particular, the board voted:

> That the [BRA] in connection with the properties commonly known as the Boston Opera House and numbered 539 Washington Street and a portion of Mason Street in the Midtown Cultural District of Boston (collectively, the "Project"), hereby finds and declares as follows:
>
> (a) In order to prevent and/or eliminate urban blight, it is in the public interest of

---

[12] The memorandum also points out that the Midtown Cultural District has been "the focus of a variety of public and private development projects, all of which were undertaken with the [BRA's] approval and assistance." (A.R., Vol. 1, p. 9.) These projects include the Millennium Place project, involving two 35-story towers and supporting buildings that include retail, hotel, residential and entertainment uses; the Lafayette Corporate Center, the Tremont Towers Condominiums at 165 Tremont Street, the Liberty Tree Building at the corner of Washington and Boylston Streets, and the Richardson Office Building at the corner of Washington and LaGrange Streets.

> both the [BRA] and the City of Boston to assist [TMG], or its nominee, in the acquisition of the Project, in whole or in part, for the preservation of the Boston Opera House;
>
> (b) The development of the Project by TMG, or its nominee, cannot be achieved without the assistance of the Authority; and
>
> (c) Based [o]n (a) and (b) above, the Project constitutes a "demonstration project" under G. L. c. 121B, § 46(f), as amended.

The BRA board further voted:

> That the [BRA], in connection with the properties commonly known as the Boston Opera House . . . and a portion of Mason Street in the Midtown Cultural District of Boston (collectively, the "Project Area"), hereby adopts the following "Demonstration Project Plan" in connection with the Project: (a) the [BRA] may obtain title to portions of the Project Area, respectively from TMG and the City of Boston necessary to effectuate the Project, by negotiation or through eminent domain takings under G. L. c. 79, as amended and applicable; and (b) the [BRA] may convey portions of the Project Area acquired by [*sic.;* should probably read "to"] TMG, or its assignee or nominee. The Director is hereby authorized, on behalf of the [BRA] to execute such instruments or agreements with TMG, or its nominee, the City of Boston and other entities as may be necessary to effectuate the foregoing Demonstration Project Plan pursuant to G. L. c. 121B, § 46(f), as amended, and the [BRA's] role in the Project, including the planned re-conveyance of the Project. The terms and conditions of all instruments and agreements shall be at the sole discretion of the Director.

(A.R., Vol. 1, pp. 25-26.)

In the months following these votes, the BRA took the following steps (among others) relating to the Opera House project: (1) in May of 2000, the BRA board voted to approve the issuance of a Preliminary Adequacy Determination concerning the Opera House project, waiving further review under Article 80 -- a procedural course of action specifically authorized by Article 80 as part of the large project review; on August 10, 2000, at a public meeting, the board voted to authorize the issuance of a notice of intent to take a certain portion of Mason Street in connection

with the project;[13] and (3) on October 12, 2000, at a regularly scheduled public meeting, the BRA board voted to adopt a resolution for an Order of Taking a portion of Mason Street. With respect to the last, work done between May and October by TMG in response to comments of the BRA as well as abutters, including TOC representatives, had resulted in, among other changes, (a) relocation of the proposed Opera House loading docks so that less of Mason Street would be required to be taken; and (b) an increase in the overall width of Mason Street, and specifically a larger passage between the Opera House and TOC's building. The area of Mason Street that was ordered to be taken was 2614 square feet, rather than 3970 square feet.

The order of taking issued by the BRA on October 12, 2000, was registered in the Suffolk County Registry of Deeds on November 8, 2000. On March 28, 2001, the BRA, upon vote of its board, filed a petition with the PIC to discontinue use as a public way of the portion of Mason Street that the BRA had taken. The PIC voted to approve the BRA's petition on April 19, 2001.

As stated previously, in or around 1980, Opera House, Inc. became the record owner of the Opera House. Opera House, Inc. gave TMG an option to purchase the Opera House on December 18, 1996, which was later amended to extend to December 18, 1999. The summary judgment record indicates that in June 1998, Sarah Caldwell, a trustee of Opera House, Inc. and of the Opera Company of Boston, Inc., assigned to TMG three substantial mortgages and related promissory notes she held from one or both corporations -- the total value of the instruments was

---

[13] Counsel for TOC submitted a letter into the record of the BRA board's August 10, 2000, meeting in which he said that representatives of TOC, the BRA and TMG had been meeting regarding the Opera House project, that progress has been made, but there is as of yet no agreement although more meetings are scheduled The letter reflects an awareness on counsel's part of the proposal for the BRA to vote that day to approve a notice of intent to take a portion of Mason Street.

$7,432,655. There was an agreement entered at that time between TMG and Opera House, Inc., providing that, following TMG's taking title to the Opera House upon foreclosure on the mortgages, it would assume responsibility for paying all outstanding debt associated with the Opera House and would also make the Opera House available for a period of time each year for a number of years for performances of operas at no or reduced ticket cost. It appears TMG was scheduled to foreclose in June 1999, but the foreclosure was derailed by the filing of an involuntary bankruptcy petition by a creditor of the Opera House, Inc. It further appears that ownership of the Opera House remains with Opera House, Inc. at the present time,[14] but TMG remains able to acquire title by foreclosing on the mortgages that it holds.

TMG is responsible for paying off all back taxes, assessments and any other debts; the certificate of municipal liens for the property as of January 31, 2002, indicates that a total of $1,635,649.42 of taxes and assessments are due.[15] For purposes of summary judgment, the defendants have agreed that TMG intends to seek the forgiveness and abatement from the city for all back taxes and assessments, and would seek abatement of all taxes that might be assessed against the Opera House property while renovation work was being done. However, TMG will be fully liable for property taxes assessed against the Opera House property once the renovations are complete.

---

[14] TOC has submitted a document indicating that the Boston Water and Sewer Commission took the Opera House in 1998 for nonpayment of water and sewer charges, but this taking in any event is subject to the right of redemption on the part of Opera House, Inc.

[15] The record contains a copy of an affidavit of Sarah Caldwell that was filed in June 1999 in the involuntary bankruptcy proceeding mentioned in the text. Ms. Caldwell's affidavit states that at that time, the total of mortgage notes and liens on the Opera House building came to $12,046,291. The relationship of this number to the municipal lien certificate and other figures in the record is not clear.

At issue in this case is the BRA's designation of the Opera House project as a demonstration project under G. L. c. 121B, § 46(f), independent of any urban renewal plan, and its taking of property pursuant to that demonstration project. There are four other examples of projects that the BRA has designated a demonstration project unconnected to an urban renewal plan and exercised eminent domain powers as part of that demonstration project: Two Financial Center, Palmer Street/Dudley Square, Stanwood Street, and Grove Hall Retail Center Project.[16]

Discussion

The first two counts of the amended complaint challenge the BRA's taking of a portion of Mason Street on constitutional and statutory grounds, respectively: that there was no public purpose for the taking (Count I), and the taking was *ultra vires* (Count II). Since there would be no reason to consider the public purpose issue unless the BRA had the requisite statutory authority to effect the taking, I consider the latter question first.

There is a threshold issue to consider, however. The defendants claim that they are entitled to summary judgment on Counts I and II because TOC's claims are untimely. In the defendants' view, the only vehicle available to TOC to challenge the taking was by means of an action in the nature of certiorari under G. L. c. 249, § 4. Since that statute has a sixty day limitations period and since TOC did not file its complaint until more than year after the BRA approved the TMG demonstration project plan and seven months after the BRA's order of taking was recorded in the registry of deeds, TOC is simply too late.

At least with respect to TOC's claim of invalidity because there was no public purpose

---

[16] To the extent relevant to the discussion of TOC's claims, other information contained in the summary judgment record will be mentioned below.

for the taking, the defendants' argument fails. A property owner – which the defendants assume TOC is for purposes of summary judgment – may bring a challenge to the validity of an eminent domain taking within three years of the taking. G. L. c. 79, §§ 16, 18. See *Cumberland Farms, Inc. v. Montague Economic Development Corp.*, 38 Mass. App. Ct. 615, 616 and n. 1 (1995). TOC was clearly within the three year limit of the taking when it filed its complaint on June 15, 2001.

It is a more difficult question whether TOC's *ultra vires* claim is timely. The claim challenges the BRA's exercise of authority under G. L. c. 121B, §§ 11 and 46(f). Judicial review of the BRA's actions in its capacity as an urban renewal agency is not generally available. See *St. Botolph Citizens Committee, Inc., v. Boston Redevelopment Auth.*, 429 Mass. 1, 10-11 (1999). Under c. 121B, § 47, an aggrieved person may obtain judicial review of an eminent domain taking by an urban renewal agency, see, e.g, *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence,* 403 Mass. 531, 537 n. 9 (1988) (*Elks Lodge)*, but the statute expressly limits the judicial review to an action in the nature of certiorari that must be brought within 30 days after the challenged taking. For reasons discussed below, I conclude that § 47 does not apply to this case. Nevertheless, in light of the facts that (1) the BRA's eminent domain taking is at the heart of TOC's complaint, and in those circumstances, the Supreme Judicial Court has permitted a party whose property is taken to obtain judicial review even absent an express right of appeal in the statute, see *id.* at 536-537; see also *St. Botolph Citizens Committee, Inc., v. Boston Redevelopment Auth., supra,* 429 Mass at 12. ; and (2) the *ultra vires* challenge is arguably a form of challenge to the validity of the taking permitted by G. L. c. 79, §§ 16, 18, I

address the merits of TOC's *ultra vires* claim.[17]

I. Count Two: Taking in Excess of Authority

The BRA's order of taking states that the property is taken "in pursuance of [the BRA's] powers as set forth in Chapter 121B, Section 46(f) . . ." and is "being taken . . . to eliminate 'urban blight', as described in Chapter 121B, Section 46(f)."[18]

TOC argues that the BRA has no authority to take property under G. L. c. 121B, § 46(f) (§ 46(f)), for a "demonstration project plan" at least in a situation where the demonstration project is not connected to an "urban renewal plan" or "urban renewal project" as those terms are defined in G. L. c. 121B, § 1. In TOC's view, insofar as the BRA is exercising its powers as an urban renewal agency under 121B, its authority to take property by eminent domain is confined

---

[17] The recent decision of the Supreme Judicial Court in *Chandler v. County Comm'rs of Nantucket County, supra,* 437 Mass. 430 (2002), referenced by TOC, may suggest that the defendants are correct, and that TOC was required to raise its *ultra vires* claim solely by way of certiorari within 60 days of the BRA's challenged proceedings: the plaintiffs in *Chandler*, all landowners whose property was taken by the defendant commissioners under G. L. c. 82 (see *id.* at 431), challenged the statutory authority of the commissioners to do so by an action in the nature of certiorari under G. L. c. 249, § 4, and not under G. L. c. 79, §§ 16, 18. See *id.* at 434. See also *Raso v. Lago,* 958 F. Supp. 686, 695-696 (D. Mass. 1997), *affirmed,* 135 F.3d. 11, *cert. denied,* 525 U.S. 811 (1998). For the reasons stated in the text, however, I will address the merits of the claim.

[18] General Laws c. 121B, § 46(f) reads as follows:

> Section 46. An urban renewal agency shall have all the powers necessary or convenient to carry out and effectuate the purposes of relevant provisions of the General Laws, and shall have the following powers in addition to those specifically granted in section eleven or elsewhere in this chapter: –
>
> . . . .
>
> (f) to develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight;

to cases where the BRA has adopted an urban renewal plan that is then approved by the city council and mayor of Boston as well as certain State and Federal agencies. See G. L. c. 121B, §§ 47, 48. Its argument appears to be that the BRA in fact may only take property by eminent domain under one of those two sections, or in any event, any taking the BRA seeks to justify under § 46(f) must be in connection with a demonstration project that is part of an urban renewal plan or urban renewal project approved under one of those sections.

As the defendants point out, G. L. c. 121B, § 11, grants the BRA a very broad, general authority to take property by eminent domain:

> Each operating agency [[19]] . . . shall have the powers necessary or convenient to carry out and effectuate the purposes of relevant provisions of the General Laws and shall have the following powers in addition to those specifically granted in this chapter: –
> . . .
> (d) to take by eminent domain under chapter [79] or chapter [80A], . . . any property, real or personal, or any interest therein, **found by it to be necessary or reasonably required to carry out the purposes of this chapter, or any of its sections, and to sell, exchange, transfer, lease or assign the same** . . . .

(Emphasis supplied.) The meaning of this language is clear, and therefore should be construed in accordance with that meaning. *E.g., Bronstein v. Prudential Ins. Co. of America,* 390 Mass. 701, 704 (1985). Section 11 confers on the BRA the right to take property by eminent domain whenever it determines the taking is necessary to carry out the purpose of any section of the urban renewal statute, c. 121B. Section 46(f) is manifestly a section of c. 121B. It follows, therefore, that if the BRA finds a taking to be necessary "for the prevention and elimination of slums and urban blight" under § 46(f), such a taking has the requisite statutory basis in § 11(d),

---

[19] The term "operating agency" is defined to mean "a housing authority or redevelopment authority." G. L. c. 121B, § 1.

unless § 46(f) itself limits the BRA's ability to take property by eminent domain to situations where the taking is part of an approved "urban renewal project."

There is no such limitation. Section 46 sets out in eight separate subsections (§ 46(a) through (h)) a set of powers that the section deems additional to those granted in other parts of c. 121B. Included among these are the power "to prepare or cause to be prepared urban renewal plans, . . ." (§ 46(c)), and "to engage in urban renewal projects . . ." (§ 46(d)). Section 46(f), which gives the power "to carry out demonstrations for the prevention and elimination of slums and urban blight," contains no language that ties such demonstrations to urban renewal plans or projects. Contrast § 46(h), which grants the power "to own, construct, finance and maintain intermodal transportation terminals **within an urban renewal project area"** (emphasis supplied). If the legislature had intended to tie "demonstrations" to ones that formed components of an urban renewal plan, project or project area, it would have so stated. See, e.g., *Negron v. Gordon,* 373 Mass. 199, 203 (1977).

Moreover, support for the view that the BRA does have statutory power to take property by eminent domain independent of an urban renewal plan or project comes from G. L. c. 121B, § 45, the section of the statute that declares the purpose of and necessity for urban renewal programs in general. General Laws c. 121B, § 45, provides in part:

> It is hereby declared . . . that because of the economic and social interdependence of different communities and of different areas within single communities, the redevelopment of land in decadent, substandard and blighted open areas in accordance with a comprehensive plan to promote the sound growth of the community is necessary in order to achieve permanent and comprehensive elimination of existing slums and substandard conditions and to prevent the recurrence of such slums or conditions . . . ; . . . that the acquisition of property for the purpose of eliminating decadent, substandard or blighted open conditions thereon and preventing recurrence of such conditions in the area, the removal of

> structures and improvement of sites, the disposition of the property for redevelopment incidental to the foregoing, the exercise of powers by urban renewal agencies and any assistance which may be given by cities and towns or any other public bodies in connection therewith are public uses and purposes for which public money may be expended and the power of eminent domain exercised; and that the acquisition, planning, clearance, conservation, rehabilitation or rebuilding of such decadent, substandard and blighted open areas for residential, governmental, recreational, educational, hospital, business, commercial, industrial or other purposes, . . . are public uses and benefits for which private property may be acquired by eminent domain . . . .
>
> It is further declared that while certain of such decadent, substandard and blighted open areas, or portions thereof, may require acquisition and clearance because the state of deterioration may make impracticable the reclamation of such areas or portions by conservation and rehabilitation, other of such areas, or portions thereof, are in such condition that they may be conserved and rehabilitated in such a manner that the conditions and evils enumerated above may be alleviated or eliminated; and that all powers relating to conservation and rehabilitation conferred by this chapter are for public uses and purposes for which public money may be expended and said powers exercised.
>
> The necessity in the public interest for the provisions of this chapter relating to urban renewal projects is hereby declared as a matter of legislative determination.

This section supplies an unquestionably broad description of purposes for which an urban renewal agency such as the BRA may exercise the power of eminent domain. While it mentions the need for redevelopment of land to be "in accordance with a comprehensive plan," the section nowhere defines that "plan" as being limited to a formal "urban renewal plan" within the meaning of c. 121B, § 1, and more to the point, nowhere restricts an agency's power of eminent domain to taking property in conjunction with an approved "urban renewal plan." Compare *Chandler v. County Comm'rs of Nantucket County, supra,* 437 Mass. at 435-438. Furthermore, the second paragraph of § 45 quoted above, relating to conservation and rehabilitation of blighted open areas or portions of such area, makes no reference to a "comprehensive plan" at all.

It is true that decisions of the Supreme Judicial Court have described the BRA's powers under G. L. c. 121B as involving projects that are "publicly initiated and planned, and implemented in conformance with an urban renewal plan." *St. Botolph Citizens Committee, Inc., supra,* 429 Mass. at 11. See *Boston Edison Co. v. Boston Redevelopment Auth.,* 374 Mass. 37, 52-53 (1977). See also *Elks Lodge, supra,* 403 Mass. at 534-535, 538. However, in two of these cases, *St. Botolph* and *Elks Lodge,* the actual projects under review by the court were in fact "urban renewal project[s]," as defined in G. L. c. 121B, § 1, that the urban renewal agency was undertaking pursuant to an "urban renewal plan," as also defined in that section, and thus the court's description of c. 121B powers must be read in that context.[20] In short, in none of these cases was the court undertaking to provide a comprehensive statement about the limits of the BRA's powers as an urban redevelopment agency under c. 121B in general, or about the limitations of its power to take property by eminent domain under that chapter.

In sum, the defendants are correct that G. L. c. 121B furnishes the BRA with the requisite statutory power to take property by eminent domain in furtherance of a demonstration project under § 46(f) to prevent and eliminate slums and urban blight, independent of an "urban renewal plan" or "urban renewal project."[21] The defendants are entitled to summary judgment on Count Two of the amended complaint.

---

[20] In the third case, *Boston Edison Co. v. Boston Redevelopment Auth.,* 374 Mass. 37 (1977), the court was reviewing a development project that was governed by G. L. c. 121A, and was describing, for comparison purposes, redevelopment projects under c. 121B "in general." *Id.* at 52.

[21] The issue here is whether the necessary statutory authority exists for this taking. Whether the BRA possessed an adequate factual basis to support the BRA's determination to take the property for this purpose is a separate question. It is addressed below.

II. Count One: Improper Taking

TOC claims in Count One that the BRA's taking of a portion of Mason Street is invalid because it was not predominantly for a public purpose. The primary purpose, TOC states, was to benefit TMG, essentially giving TMG the means – through the acquisition and then transfer of the Mason Street parcel as well as through tax benefits – to reap a windfall from the Opera House project.

"Exercising the power of eminent domain is improper unless the taking is for a public purpose." *Elks Lodge, supra,* 403 Mass. at 539. Logically, therefore, it makes sense to start with the question whether a taking of private property to eliminate and prevent slums and urban blight qualifies as a public purpose. The answer is yes. Under c. 121B, § 45,[22] both (1) the acquisition of property for the purpose of eliminating decadent, substandard or blighted open conditions thereon and preventing recurrence of such conditions in the area, and (2) site improvement and the disposition of property for redevelopment incidental to the foregoing, are among the public purposes and uses for which the power of eminent domain may be exercised. The same holds true of the conservation and rehabilitation of decadent, substandard and blighted open areas, "or portions of them," described in the second paragraph of § 45. Carrying out a demonstration project to prevent and eliminate slums and urban blight, and exercising the power of eminent domain in furtherance of that project, fit squarely within the scope of these legislatively determined public purposes. TOC does not appear to contend otherwise.

The next question is whether the summary judgment record as it currently stands supports the validity, as a matter of law, of the BRA's finding that in order to prevent and eliminate urban

---

[22] The pertinent portions of § 45 are quoted in the text above at pp. 23-24.

blight, it was necessary to assist TMG in the acquisition of the project in whole or in part for the preservation of the Opera House – which would include assisting by acquiring the challenged portion of Mason Street. The parties disagree about whether the BRA's determination must be supported by substantial evidence, or whether I simply review the finding to determine whether it was arbitrary and capricious.[23] I decline to join this debate: even if the test were one of substantial evidence[24], the BRA has met it.

The materials in the BRA's administrative record reveal that for more than 20 years before it voted to approve the demonstration project plan and the taking of the Mason Street parcel, the BRA and the city had demonstrated a concern about the "decay[ing]"[25] status of lower Washington Street in Boston, and a very specific concern about the deterioration of the Washington Street theaters, including, above all, the Opera House. The Opera House itself was

---

[23] The defendants argue that if any judicial review at all is available of the BRA's determination, it is governed by the arbitrary and capricious standard applies, see, e.g., *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence,* 403 Mass. 531, 537-538 (1988); *Boston Edison Co. v. Boston Redevelopment Auth., supra,* 374 Mass. at 52-53; and in any event the court's role is even more limited than usual because determining whether property fits within a blighted area is for the Authority alone to decide, citing *Moskow v. Boston Redevelopment Auth.,*349 Mass. 553, 561 (1965), *cert. denied,* 382 U.S. 988 (1966). TOC contends that none of these cases governs here because there was no publicly reviewed and approved urban renewal plan or urban renewal project involved, and the deferential standard applies only when such a plan or project is in issue. There is some merit to TOC's position, but I do not need to resolve the question.

[24] "The substantial evidence test is commonly understood to require that agency findings must rest upon 'such evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . Review under the standard entails scrutiny of the whole record to determine whether substantial evidence exists." *Boston Edison Co. v. Boston Redevelopment Auth., supra,* 374 Mass. at 54(citations omitted).

[25] See "Boston's Theatre District: A Program for Revitalization" (May 1979) (A.R. vol. 6, p. 1747; see also Midtown Cultural District Plan (February 1989)(A.R. vol. 7, pp. 2082-2083, 2117-2118.)

the focus of a series of special reports prepared by the BRA, by other city agencies, and by private groups. The first of these reports in the record is dated 1979, followed by the Midtown Cultural District Plan in February 1989, and the petition for a special zoning chapter to implement that district plan, a report prepared by private consultants for the BRA about the feasibility and costs of renovating the Opera House in August 1989, and the Boston Historic Theater Charrette in March 1996. The 1989 report noted the Opera House building, while in relatively good shape, was suffering the effects of old age and lack of maintenance, including a roof near the end of its days. By the 1996 Boston Historic Theater Charrette, the Opera House (along with the other two theaters on the same block) had been listed on the National Trust for Historic Preservation's Eleven Most Endangered Historic Places in America List. By the time the BRA voted to designate the Opera House project as a demonstration project, an architect who has opposed the project noted that delay could result in the roof falling in (A.R. vol. 6, p. 1633), and the record reflects that engineers at that point gave the roof about one more year. Roof failure due to water infiltration is the most common reason for the loss of older theaters in the United States, and the Opera House roof's leaking has damaged plaster motifs and weakened the vaulted ceiling. (A.R. vol. 2, p. 212.) According to contractors and an ornamental plastering company, if deterioration continued at the rate it was progressing in March of 2000, there would be nothing left to restore in twelve to eighteen months. What all the documentation shows is that the BRA and the city had consistently viewed the area as one that holds, in the theaters, critical elements of the city's cultural and historical identity, but also as one that has proved resistant to many different efforts to rehabilitate and revitalize over the years.

The documents in the administrative record mentioned here also paint a compelling

picture about the need to move quickly with respect to the Opera House because of the growing threat caused by age and the elements to the physical integrity of the building and its many unique (in Boston) internal design features. No one, including TOC, disagrees with the proposition that the preservation and restoration of the Opera House qualifies as a public purpose that the BRA is entitled to pursue. Nor is there any dispute that the Opera House, vacant since approximately 1990, is currently in a state of very dangerous disrepair. The DPIR submitted by TMG during the Article 80 review of the Opera House project – a review that TOC affirmatively does not challenge – describes the physical condition in stark terms.

Finally, one finds in the administrative record a consistent thread of concern about the small stage and back stage of the Opera House and the implications of these size constraints for the success of any efforts to restore and revitalize the Opera House as a viable performance space. The 1979 report on Boston's theater district states that expansion of the stagehouse is essential, and that the BRA was then studying the feasibility of discontinuing Mason Street at the rear of the theater to enable this critical expansion to occur. (A.R. vol. 6, p. 1751.) The 1989 consultant's renovation feasibility study, reflecting the views of "a broad spectrum of city officials and members of the arts community," echoes the refrain: the stage is too small, a stage addition is essential, and because Mason Street is directly behind the building, no expansion of the stage can occur without closing Mason Street. (*Id.*, p. 1801.) Again in 1996, a performing arts facility needs assessment conducted by consultants for the city in connection with the Boston Historic Theater Charrette focused on stage size and technical needs of theaters as problems requiring solution if a viable future for the three Boston historic theaters were to be found. (*Id.*, p.1889.) All of these studies and other documents predated any involvement of TMG in the

Opera House project. In combination, they provide substantial evidence to support the determination of the BRA that the proposed demonstration project for the Opera House would require the taking of a portion of Mason Street to permit the proposed expansion of the back stage area for the theater, which the BRA accepts as a necessity if the Opera House project is to have a chance to succeed in its goal of reestablishing a functioning, successful performance venue.[26]

Although § 46(f) authorizes "demonstrations for the prevention and elimination of . . . urban blight," c.121B does not define the term "urban blight."[27] Chapter 121B does, however, define the terms "blighted open area"[28] and "decadent area"[29] in § 1. I agree with the defendants

---

[26] TOC stresses there is information in the record indicating that very few of the theaters in New York City – the original home of the "Broadway-type" shows TMG wishes to attract to the Opera House – have stage dimensions as large as TMG says it needs. This fact is beside the point. the BRA is not required to reject TMG's analysis because there is some evidence that might at first glance lead to a different conclusion, particularly in light of the history of observations in the record that a stage house expansion was necessary. Furthermore, nothing in the record reveals how big the stages and stage houses are at the theaters in New York that housed shows like "Lion King," and other large scale musical productions that appear to be the ones to which TMG, and TOC, refer.

[27] Obviously, § 46(f) also authorizes demonstrations to prevent or eliminate "slums." Since the BRA voted to approve the Opera House demonstration project to prevent or eliminate only "urban blight," I focus solely on this term.

[28] A "blighted open area" is defined in c. 121B, § 1, to include "a predominantly open area which is detrimental to the safety, health, morals, welfare or sound growth of a community because it is unduly costly to develop it through the ordinary operations of private enterprise . . . by reason of the need for . . . unduly expensive measures incident to building around or over rights-of-way through the area, . . . or by reason of . . . deterioration of site improvements or facilities, division of the area by rights-of-way, diversity of ownership of plots, . . . or because there has been a substantial change in business or economic conditions or practices, or an abandonment or cessation of a previous use or of work on improvements begun but not feasible to complete without the aids provided by this chapter, or by reason of any combination of the foregoing or other condition; or a predominantly open area which by reason of any condition or combination of conditions which are not being remedied by the ordinary operations of private

that these terms should be given their common sense meanings, and that they need to be read in conjunction with the related statutory definitions "to produce an internal consistency." *Teletsky v. Wight,* 395 Mass. 868, 873 (1985).[30] The word "blight" is defined to mean in relevant part "something that impairs growth, withers hopes and ambitions, or impedes progress and prosperity." The American Heritage Dictionary of the English Language (3d ed. 1992). In the statutory context in which "urban blight" occurs, and drawing on the two statutorily defined terms cited above, "urban blight" reasonably can be understood to refer generally to a condition in a portion of the city that is "detrimental to the safety, health, morals, welfare or sound growth of a community," is caused by one of a number of factors including the physical deterioration of facilities and buildings in the area, and is that is not being alleviated or remedied "by the ordinary operations of private enterprise."[31] There is clearly substantial evidence in this record to support the BRA's view that the Opera House renovation project qualified as contributing to the elimination of "urban blight." Cf. *Shriners' Hosp. for Crippled Children v. Boston*

---

growth of the community in which it is situated."

[29] The term "decadent area" is defined in G. L. c. 121B, § 1, in part to mean: "an area which is detrimental to safety, health, morals, welfare or sound growth of a community because of the existence of buildings which are out of repair, physically deteriorated, . . . or obsolete, or in need of major maintenance or repair, . . . or because of excessive land coverage or because of diversity of ownership, irregular lot sizes or obsolete street patterns make it improbable that the area will be redeveloped by the ordinary operations of private enterprise, or by reason of any combination of the foregoing conditions."

[30] Further, "[a]s to interpretation of statutes governing [an] agency, [courts] defer to the agency's interpretation and application of the statute within which it operates." *Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of the Div. of Employment & Training,* 54 Mass. App. Ct. 405, 408 (2002).

[31] These quoted phrases appear in the definitions of both "blighted open area" and "decadent area."

Redevelopment Auth., 4 Mass. App. Ct. 551, 555-559 (1976).[32]

In its application for a demonstration project, TMG commits itself to fund, undertake and complete a complete renovation, restoration and refurbishment of the Opera House at substantial private cost (approximately $26 million). The demonstration project plan, as approved by the BRA authorizes the BRA to assist the Opera House project by acquiring the portion of Mason Street that the BRA has deemed necessary for the success of this project. TOC is correct that the Opera House project contemplates TMG, rather than the BRA, as the major initiating force, and in that sense the project resembles one approved under G. L. c. 121A. However, the BRA provides the assistance of effectuating the taking of the necessary portion of Mason Street, a step that could not happen as quickly or directly, if at all, under c. 121A. See G. L. c. 121A, § 6.[33] The history of failed efforts to revitalize the Opera House (and the other theaters) up to the time of TMG's application demonstrates that the BRA's taking was permissibly deemed by it to be a necessary component of any development designed to succeed.

TOC also contends that despite the evidence presented by the defendants concerning the

---

[32] TOC complains that the lower Washington Street area has experienced a great deal of development in the last few years, all of which undercuts the BRA's determination of an area characterized by "urban blight." The fact of new development does not mean, however, that the entire area's redevelopment is complete, and of course none of the new development has touched the Opera House itself. It also bears pointing out again that all the new development projects were themselves completed with BRA assistance. See note 12 above.

[33] Presumably what makes this a "demonstration project" is that it demonstrates a combination of private initiative with the focused use of public authority (i.e., the BRA's exercise of its eminent domain power) in order to achieve the goal of the restoration of the Opera House. One of the other § 46(f) demonstration projects approved by the BRA, the Palmer Street/Dudley Square project, at least as described by TOC in its supplemental memorandum, also involved the approval of a demonstration project to permit the BRA to exercise its eminent domain power to take property by eminent domain directly as a means to act quickly on a project where speed was necessary.

purpose for the Mason Street taking, the taking was in bad faith because in fact it was made to accomplish a private purpose of enriching TOC. It is certainly the case that an eminent domain taking made solely to benefit a private person or interest is subject to challenge on this ground. See *Pheasant Ridge Assoc. Ltd. Partnership v. Burlington,* 399 Mass. 771, 775-776 (1987), and cases cited; *HTA Limited Partnership v. Massachusetts Turnpike Auth.*, 51 Mass. App. Ct. 449, 454-455 (2001). The undisputed facts in this summary judgment record, however, defeat TOC's argument.

Courts have identified primarily two factors that may indicate a taking was made in bad faith – to benefit private parties or for some other illegitimate purpose: (1) the agency taking the property did not follow its usual practices in doing so, and (2) the agency or public body on whose behalf the taking was made had never considered using the property for the purpose stated in the taking. See *HTA Limited Partnership*, 51 Mass. App. Ct. at 456, citing *Pheasant Ridge Assocs. Ltd. Partnership v. Burlington, supra,* 399 Mass. at 778; and *Elks Lodge, supra,* 403 Mass. at 552-553.

With respect to the first factor, at the outset, TOC claimed that the BRA had never taken private property in conjunction with a "demonstration" project under § 46(f), or at least had never done so with the intent of then transferring title to that property to another private party. The record after the discovery I earlier permitted shows that there have been four other occasions where the BRA has followed just this path. TOC now argues that all four of these examples are distinguishable from this case, and in any event four examples out of the many urban renewal takings that the BRA has made demonstrates that this was not a usual practice. The argument deserves rejection. As the BRA states, it is not surprising that the various demonstration projects

involving takings are different from one another, since the point of a demonstration project is to try out a plan or approach that presumably is new or different from the usual manner in which the BRA operates.

More significantly, the fact that the BRA has included a taking of private property in only four other projects involving a designation of a demonstration plan under § 46(f) does not create a dispute of material fact about whether the BRA did not "deal with the acquisition [of a portion of Mason Street] in accord with its usual practices." *Pheasant Ridge Assocs.*, 399 Mass. at 778. The BRA has broad discretion under G. L. c. 121B and c. 121A to deal with projects and programs of urban redevelopment. That it chooses in some cases to proceed under one available and permissible statutory provision while in a greater number of cases it acts under another provision, without more, seems immaterial to the question whether it has acted in bad faith. The point of focus in considering whether a public agency has failed to follow "usual practices" is not the particular statutory authority under which the agency chooses to act under in making the taking, but the practices or procedures it follows in deciding to make the taking. Thus in the *Pheasant Ridge* case, the court stressed that unlike other takings, in this instance the town did not consult with any other town agencies with responsibilities for activities in the area where the land was to be taken, never informed the town's finance committee of the purpose of the taking, and indeed "developed" the purpose for the taking within minutes of the town meeting where the vote to take the property was presented. *Pheasant Ridge Assocs.*, 399 Mass. at 778. Here, in contrast, the record demonstrates that the BRA's consideration of the Opera House project has followed all the usual steps, including a review of the project's zoning application under Article 38 of the Boston Zoning Code that applies to the Midtown Cultural District; and a thorough review by the

BRA and other city agencies as part of the Article 80 large project review process that itself encompassed extensive and continuing consultations with municipal officials on concerns about fire safety, vehicular use of Mason Street, location of underground utilities, and continuing consultations with abutters such as TOC and other residential buildings and lawyers representing such abutters, as well as formal action by the BRA board at regularly scheduled and noticed public meetings after the customary presentation of materials and recommendations from the BRA's staff.

TOC asserts that (1) the BRA's hasty consideration of TMG's application for approval of a demonstration project under § 46(f) – the application was filed on March 24, 2000, and the BRA board approved the application at its meeting on March 30, 2000; and (2) the conduct of the BRA staff in allegedly adopting "lock, stock and barrel" (plaintiff's Rule 9A response, p. 19) TMG's language describing the demonstration project plan and presenting it to the BRA board for its rubber stamp approval, suggest if not indicate a failure to follow usual (and appropriate) procedures. The depositions of the two BRA staff members that TOC took pursuant to its request for discovery, however, reveal that in fact the idea of presenting the Opera House project as a demonstration project under § 46(f) rather than an urban renewal project under c. 121B, §§ 47-48, or a development project under c. 121A – came from the BRA, and did so at some point in 1999 in connection with TMG's filing of the PNF.[34] They also reveal that the BRA staff members made a number of changes to the proposed memorandum submitted by the defendants

[34] According to James McGee, a staff member of the BRA, the reason for proposing the demonstration project was that the BRA contemplated the project would involve taking a portion of Mason Street, and was not willing to purchase the entire Opera House and associated property as well as some or all of Mason Street and then transfer the entire project to TMG. (McGee deposition, pp. 48-49, 53-54.)

before the memorandum went to the BRA board, and that other developers submit draft memoranda to be reviewed and used by the BRA staff in preparing a submission for the board about a particular project. This is not the stuff of "unusual practices."

As for the second factor – the agency's lack of interest in the area where the taking is to occur, or failure to have considered the site before for the purpose given for the taking – the record here contains abundant evidence of the opposite. The BRA and the city have had a longstanding interest in the revitalization of the lower Washington Street area in general and the Opera House in particular for many years, and at least since 1979, the BRA is on record as recognizing that to make any rehabilitation of the Opera House succeed, expansion and a concomitant taking of property in Mason Street would be necessary. See *Elks Lodge, supra,* 403 Mass. at 552. See also *Chelmsford v. DiBiase,* 370 Mass. 90, 93 (1976).

There is no dispute by TOC that a taking may be valid even if a private developer receives benefits from the taking, so long as the predominant purpose of the taking is a public one. See, e.g., *Elks Lodge,* 403 Mass. at 551; *Papadinis v. Somerville,* 331 Mass. 627, 632 (1954). TOC appears to extract from this general rule a corollary to the effect that it is necessary to measure, perhaps quantitatively, the public good to be derived from the taking against the benefits that the private developer will receive. This is not correct. No quantitative weighing of public versus private benefit is called for, and in any event, could not be accomplished. In this case, the record establishes that the BRA's taking of a portion of Mason Street in connection with the Opera House project was for a public purpose, and there has been nothing presented to raise an issue of material fact about the *bona fides* of that taking. It is true that TMG will receive benefits from this project, including title to the portion of Mason Street that the BRA has taken,

and the forgiveness of unpaid taxes on the Opera House property. But it is also true that TMG, through this project, is committing itself to restore, refurbish and improve the Opera House and to bring back to life a treasured artistic and cultural asset of the city. The benefits that will accrue to TMG have been shown as a matter of law to be simply incidental to the primary public purpose. Moreover, as was true in the *Elks* case, "there is nothing in the record . . . to show that the local authorities had any motive other than the performance of their public duty." *Elks Lodge, supra,* 403 Mass. at 553. The defendants are entitled to summary judgment on Count One of the amended complaint.[35]

III. Counts Three and Four: Improper Taking: Failure to Give Notice

In Count Three of the amended complaint, TOC alleges that the BRA failed to give notice to TOC by certified or registered mail or otherwise, of its intend to take the portion of Mason Street, that this failure to provide notice violates G. L. c. 79, § 5C, and renders the taking invalid. Count Four sets out a related claim. There, TOC alleges that at the time it recorded the taking, the BRA failed to give notice to TOC that its property was being taken and that it was entitled to an award of damages, as required by G. L. c. 79, § 7C, and accordingly the taking is invalid.

A. Claim under G. L. c. 79, § 5C.

General Laws c. 79, § 5C provides in relevant part:

> No property shall be taken without the consent of the owner thereof . . . unless notice of intent to take such property is given to the owner of such property at least thirty days prior to the date of the actual taking. . . .

While the section requires notice to property owners, it does not specify what type of

---

[35] It should be clear from this discussion that I conclude the plaintiff has no basis on which to seek yet additional discovery with respect to Count One before summary judgment is granted. See *South Shore etc. v. E. A. Miller,*

notice, and also does not provide that an absence of notice invalidates a taking. TOC has not cited a case, and none was found, holding that a failure to give notice to a property owner in advance of an eminent domain taking invalidates it. Moreover, as the defendants point out, the record contains a great deal of evidence indicating that representatives of TOC had plenty of notice that the BRA intended to take a portion of Mason Street. The record contains a letter from an attorney with the firm representing TOC that was apparently faxed to the BRA on the date (August 10, 2000) the board voted to give notice of intent to take a portion of Mason Street, and the letter reflects knowledge that this vote was scheduled to be held that day. (A.R., vol. 1, pp. 56, 59.) Beyond this letter, it is clear that before and after August 10, representatives of TOC were meeting with representatives of the BRA and TMG to discuss ways to reduce the portion of Mason Street that would be taken, to deal with access to TOC's loading docks on Mason Street, and other related topics. (See, e.g., A.R. vol. 6, pp. 1716-1728, 1667.) No reasonable inference from the record can be drawn other than TOC had actual prior notice of the intent of the BRA to take a portion of Mason Street. Summary judgment will be granted to the defendants on Count Three.

B. Claim under G. L. c. 79, § 7C.

Section 7C of c. 79 reads as follows:

> Immediately after the right to damages becomes vested, the board of officers who have made a taking under this chapter shall give notice thereof to every person, including every mortgagee of record, whose property has been taken or who is otherwise entitled to damages on account of such taking. Such notice shall be in writing and shall describe in general terms the purpose and extent of the taking, and shall state the amount of damages, if any, awarded for such taking and the time and place at which he may obtain payment hereof, or, if no damages have been awarded, the time within which he may petition for an award of the same, and the time within which he may petition the superior court to determine

> his damages under section fourteen. Such notice may be served by personal service, or by leaving an attested copy thereof at the last and usual place of abode of the person to be notified if he is a resident of the commonwealth, by any person authorized to serve civil process or notice may be given to persons within or without the commonwealth, by registered mail or other suitable means. Failure to give notice shall not affect the time within which a petition for damages may be filed except as provided in section sixteen.

There is no dispute that the BRA did not provide written notice in the form set out in this section to TOC, presumably because the BRA did not, and (except for purposes of this summary judgment motion) does not agree that TOC owns any portion of Mason Street. In any event, I assume at this juncture that the statutory notice to TOC was required. Nonetheless, as the defendants argue, failure to provide such notice does not constitute grounds to invalidate the taking. See, e.g., *Grove Hall Sav. Bank v. Dedham*, 284 Mass. 92, 94 (1933); *Merrymount Co. v. Metropolitan District Comm'n,* 272 Mass. 457, 464-465 (1930). See also *Kahler v. Marshfield,* 347 Mass. 514, 517 (1964).

TOC contends that these cases deal with a predecessor statute to § 7C, G. L. c. 79, § 8 (repealed by St. 1964, c. 579, § 4), which expressly provided that failure to provide notice would not affect the validity of the proceedings, a clause not included in § 7C itself. The absence of this express language is not dispositive. What the cited cases make implicitly if not expressly clear is that the purpose of the statutory notice is to ensure that property owners learn of a taking so that they may exercise their right to compensation for the value of the property so taken within the statutory time allotted. See generally *Appleton v. Newton,* 178 Mass. 276, 282 (1901)(considering and affirming the constitutionality of an eminent domain statute that contained no provision for written or individualized notice to property owners). This same purpose is reflected in the last sentence of § 7C quoted above. In this case, TOC obviously has

received timely notice of the taking for these purposes, as its amended complaint contains two counts seeking damages on account of the taking. (Amended complaint, Counts Six and Seven.) As a matter of law, TOC cannot prevail on its claim that the taking of a portion of Mason Street is invalid for lack of notice under G. L. c. 79, § 7C.[36]

Count Five: Claim for Certiorari Review.

In Count Five, TOC alleges that the BRA's designation of the Opera House project, including a portion of Mason Street, as a demonstration project under G. L. c. 121B, § 46(f), was an abuse of discretion, arbitrary and capricious, and based on errors of law. TOC appropriately brings this claim under the certiorari statute, G. L. c. 249, § 4. Cf. *Boston Edison Co. v. Boston Redevelopment Auth., supra,* 374 Mass. at 59 n. 15. I agree with the defendants that this claim is not timely.

General Laws c. 249, § 4, provides that actions in the nature certiorari "to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal," are to be "commenced within sixty days next after the proceeding complained of." The "proceeding complained of" here is the determination by the BRA to approve TMG's application for a demonstration project. The BRA voted to do so on March 30, 2000. TOC did not file its complaint until June 15, 2001, almost fifteen months later. Even if one assumes that the "proceeding complained of" did not actually complete itself until the BRA voted to issue the notice of taking of the portion of Mason Street on October 12, 2000, or even until the notice of taking was recorded on November 8, 2000, still TOC's complaint is

---

[36] I also agree with the defendants that the record reflects TOC is not reasonably likely to be able to prove it did not receive actual notice of the taking, and actual notice is sufficient. See *Cann v. Commonwealth,* 353 Mass. 71, 76-77 (1967).

too late by many months. See *Cumberland Farms, Inc. v. Montague Economic Development & Industrial Corp., supra,* 38 Mass. App. Ct. 615.[37] See also *Raso v. Lago,* 958 F. Supp. 686, 695-696 (D. Mass. 1997), *affirmed,* 135 F.3d. 11, *cert. denied,* 525 U.S. 811 (1998). See generally, e.g., *Committee for Public Counsel Services v. Lookner,* 47 Mass. App. Ct. 833, 835 (1996); *Rosenfeld v. Board of Health of Chilmark,* 27 Mass. App. Ct. 621, 626 (1989).

TOC responds that in fact the time for bringing this claim for certiorari review has not run because the taking itself should have taken place under G. L. c. 121B, § 47, and did not. Section 47 applies to eminent domain takings that an urban renewal agency may make while it is preparing an urban renewal plan. In this case, the BRA was not preparing an urban renewal plan relating to the Opera House project, and for reasons discussed above, was not obligated to. Thus, the BRA did not, and was not required to, effect the taking of the Mason Street parcel under c. 121B, § 47; it was free to proceed under § 46(f). TOC has not met the sixty-day limitation period applicable to its claims. The defendants are entitled to summary judgment on Count Five.

---

[37] This was a case challenging a plan for an economic development project established under a related statute, G. L. c. 121C. The court states: "A person whose land has been taken by eminent domain does, indeed, have three years from the time that the right to damages has vested to contest the lawfulness of a taking under G. L. c. 79 . . . . The avenues of challenge may not, however, include attacks on the underlying planning process that may have led to the authorization of the taking and the order of taking. If that process is to be contested as so flawed as to be unlawful, the challenge must be made within the time limitations applicable to review in the nature of certiorari." *Cumberland Farms, Inc. v. Montague Economic Development & Industrial Corp.,* 38 Mass. App. Ct. 615, 616 (1995).

ORDER

For the foregoing reasons, the motions for partial summary judgment of the defendant Boston Redevelopment Authority and the defendant-intervener Theater Management Group, Inc. are **allowed.** Counsel for the parties are to contact the clerk of this session to schedule a status conference.

Margot Botsford
Justice of the Superior Court

Dated: September 23, 2002