BOSTON REDEVELOPMENT AUTHORITY

IN THE MATTER OF:

FRIENDS OF
POST OFFICE SQUARE, INC.

M E M O R A N D U M

This memorandum is submitted by the First Franklin Parking Corp. ("First Franklin"), the lessee of the Post Office Square Garage, to address certain legal issues apparent on the face of the application of the Friends of Post Office Square, Inc. ("Applicant") for approval of a redevelopment project at the site of the existing Post Office Square Garage pursuant to G.L. c. 121A and Chapter 652 of the Acts of 1960. Because the hearings are not complete, this memorandum does not attempt to address the factual issues raised by the application such as whether this is a "decadent area", "sub-standard area" or "blighted open area" as defined is Section 1 of Chapter 121A. First Franklin submits that the defects in the application, in and of themselves, warrant a denial of the request for approval and consent by the Boston Redevelopment Authority for the intended project.

I. The Boston Redevelopment Authority Lacks Jurisdiction and Authority to Authorize the Proposed Taking Under Chapter 121A of the General Laws.

In 1946, the General Court expressly directed the City of Boston, acting by its Real Property Board ("Board"),[1] to proceed forthwith to establish public off-street parking facilities as the Board may deem necessary to insure in the public interest the free circulation of traffic in and through the City. Chapter 434 of the Acts of 1943. The Board was granted broad powers to be execised with the approval of the mayor in the name and on behalf of the City. The statute was later amended to provide for the determination by the Commissioner of Traffic and Parking ("Commissioner") as to the necessity of public off-street parking facilities. The acquisition of property for the purposes enumerated in this grant requires the approval of the Commissioner and the Boston Redevelopment Authority ("B.R.A.").[2]

In its original form, the legislature contemplated the construction of public parking garages through the use of public funds. However, it became evident that public funds

1 In 1946 the Board was known as the Board of Real Estate Commissioners.

2 The Boston Redevelopment Authority succeeded to the powers of the Planning Board pursuant to Chapter 652 of the Acts of 1960.

were not being expended in such a manner to alleviate the congestion from parked motor vehicles in the City so the Legislature determined that it was necessary to involve the private sector in the construction and operation of public parking garages. By Chapter 612 of the Acts of 1948, the Legislature amended Chapter 474 to give the Board the power to lease to any person property acquired for the purposes of Chapter 474 for a period of up to 40 years, provided the lessee constructs such parking facilities as the Board and the Commissioner shall deem necessary. It was under this amended statute that the First Franklin Parking Corp. leased the premises from the Real Property Board and constructed the Post Office Square Garage.

The statutory scheme envisioned by the Legislature was designed to increase the amount of space in the City available for off-street parking of automobiles and, with the 1948 amendment, was designed to promote the construction of parking facilities without the use of public funds. In return for the construction of a parking facility, the lessee would receive a lease of the premises for up to 40 years.

> "The land taken will stand permanently devoted to the public purpose of an adjunct to, and facilitating, the use of public ways and not subject in such use to the decision of an owner to change the use. It will so stand as a part of a statutory plan to provide enough such areas to relieve a pressing public need. Its ownership

> will have changed as a part of a plan designed to use public authority to marshal private capital to meet the public need." Court Street Parking Co. v. City of Boston, 336 Mass. 224 (1957).

The City, in exercising its authority under Chapter 474, is acting as a representative of the general public, which in turn is represented by the General Court, yet the implementation of the legislative plan has been delegated to the City. In the case of Lowell v. Boston, 322 Mass. 709 (1948), the Supreme Judicial Court, in considering a similar statute authorizing the City to lease a garage under the Boston Common, made the following observation:

> "The garage is an incident in a legislative plan designed to abate a public nuisance arising from serious traffic congestion due to the greatly increased use of motor vehicles and their parking in the public ways of the City. The garage is a method employed to accomplish the primary purpose of the statute." Id. at 737.

In the case of Tate v. City of Malden, 334 Mass. 507 (1956), the City of Malden, acting under a special enabling statute (Chapter 600 of the Acts of 1964) took a private parking facility for the purpose of public parking. The Court stated:

> "The provision of off-street parking spaces is a public purpose for which land may be taken under the statute. Such provision is an essential concomitant of the provision of highways for the use of automobiles. The parking lot is a necessary public utility in a society which has so evolved that its functioning is dependant upon the daily movement of much of the

> population of motor vehicles. Legislative findings on the question of what is a public use are significant.
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> In serving this public purpose the Legislature and the aldermen acting under the delegated power might lawfully plan for the long future and fix into the plan as parking areas lots deemed appropriate therefor, taking them at such time as appeared appropriate, whether or not then devoted to like use by private owners.

The Legislature envisioned a long term solution to alleviate a perceived public nuisance and enacted, by enabling legislation, procedures for the acquisition and construction of parking garages. The present proposal ignores this legislative scheme in the interests of personal gain and in derogation of interests protected by the statute.

In the present case, the Board leased the subject parcel to First Franklin, which, in accordance with the terms of the statute and the lease, constructed a parking facility. The 1953 lease of the Post Office Square parcel between the City, acting through the Board, and First Franklin specifically states that the City is acting under Chapter 474 and identifies the subject parcel as described on a plan of land "for off-street parking facilities under authority of the Legislature, Chapter 474 of 1946 and Chapter 79 of the General Laws." There can be no question that this parcel is being held by the City under the authority of Chapter 474 and therefore is governed by the terms and conditions of that grant of authority.

Chapter 474 has several specific limitations on the acquisition, use and disposition of property set aside "for the purposes of this Chapter:"

1) The Board, in the name and on behalf of the City, may exercise the powers of eminent domain to accomplish the purposes of the Chapter, "except the power to operate the parking facility established or acquired under this chapter."

2) The Board has the power to lease the property provided it is used for parking of motor vehicles, but for no other purpose.

3) The Board has the power to sell at public auction, to the highest bidder, any property, real or personal, acquired or used for the purposes of this chapter, whether or not improved, which the Board, with the approval of the B.R.A. and the Commissioner, shall have determined to be no longer required for such purposes.

4) Once a lease is granted, the Board, and hence the City, shall not modify or cancell the lease other than for breach of any covenant or condition thereof.

These provisions demonstrate a Legislative intent that the property, once dedicated to a parking garage and leased to a developer/operator, was to remain dedicated to that purpose through the life of the lease (in the abscence of a breach of the terms of the lease), which was contemplated to extend for up to 40 years. If the property is no longer useful as a garage, then the Board, with the approval of the B.R.A. and the Commissioner, is required to sell the property by auction to the highest bidder. As long as it remains under the control of the City pursuant the Chapter 474, it must be administered under the terms of that statute.

It may be argued that the powers enumerated in the statute are not exclusive of any other powers the Board may deem

necessary and convenient to the accomplishment of the purposes of the Act. However, the tenor of the statute indicates a specific legislative intent to designate and define the scope of the City's authority to take property by eminent domain for public parking. This application is a direct challenge to the Legislature's specific and limited grant of eminent domain authority and would circumvent the provisions of Chapter 474. If in fact the purpose of the new proposal is to establish off-street parking facilities, the City is authorized to take the property provided it complies with the requirements of Chapter 474 and lease the premises under the terms of the statute. This would obviously be legally impossible since the premises is already leased to First Franklin under the terms of the statute.

The proponents of the new proposal would presumably argue that the redevelopment corporation's power of eminent domain, devolved from the state, is superior to the authority granted by Chapter 474. However, the power of eminent domain for the purposes of establishing parking garages is also devolved from the state through an explicit legislative scheme whereby the Legislature delegated its power of eminent domain to the City for a specific public purpose -- the same purpose espoused by the applicant. The City acts as an agent of the state for a specific purpose; the redevelopment corporation, if at all, acts as an agent of the state generally. It must therefore give way to the preexisting, substantial and specific

declaration of legislative intent and the delegation of powers to the City.

II. The Proposal Does Not Comply With the Requirements of Chapter 121A of the General Laws.

Section 10 of Chapter 121A prescribes an excise tax to be paid in lieu of taxes by a redevelopment corporation organized under Chapter 121A. The tax shall be equal to the sum of:

a) 5% of its gross income, and

b) An amount equal to $10 per thousand of the fair cash value of all real and tangible personal property of the corporation.

For purposes of the excise, the fair cash value of the property subject to tax is determined "as of January first in the year in which the excise becomes payable."

In calculating the excise tax, the two significant variables are "gross income" and "fair cash value." Under paragraph seven of § 10, the assessors, at the request of the B.R.A., shall determine the fair cash value of the property, which will thereafter be controlling for the life of the project. In paragraph five of the "Proposed 6A Contract," the Applicant is requesting that the fair cash value be determined, but not to exceed a value which would result in an excise of $350,000, i.e., a fair cash value of $35,000,000, assuming no gross income.

If the fair cash value is so determined, the only variable is the "gross income" of the 121A corporation. The ninth paragraph of § 10 defines "gross income" as follows:

> "For the purposes of this section, 'gross income' shall mean payments actually made by persons for the right to reside in or occupy any portion or all of the project and shall not be deemed to include any payments made by any governmental unit to or on behalf of such corporation or to or on behalf of any tenant of such corporation which are in addition to such payments actually made by such tenant."

The proposal now before the B.R.A. seeks to circumvent this definition through the use of a lease to an unidentified limited partnership and deprive the state of the excise tax mandated by Chapter 121A. The use of a parking space is a payment "actually made by persons for the right to . . . occupy any portion . . . of the project". The projected "total revenue" from the leasing of parking spaces is in excess of $6 million a year -- an amount which reflects the true gross income of the project as envisioned by the Legislature. Interposing a limited partnership between the driver/tenant and the redevelopment corporation is a subterfuge, to which the B.R.A. will be a party by approving this application.

In Appendix 17 of the proposal, the applicant summarizes the basic provisions of the ground lease between the redevelopment corporation and the limited partnership with the caveat that "the precise terms of the lease may vary from the foregoing." The rent to be paid by the limited partnership to the redevelopment corporation can be summarized as follows:

Rent on Proposed Ground Lease from 121A Corporation to Limited Partnership

Rent shall be the Sum of:

A. Annual Base Rent (ABR) i.e. $265,000

B. Percentage Rent (PR)

Percentage Rent may be expresses as follows:

PR = AP (TR - D - ABR - ADS)

Definitions:

AP = 0 during construction phase
100% in Year 1
75% in Year 2
50% in Year 3 and thereafter

TR (Total Revenue) = all income of Tenant

ADS (Approved Debt Service) = priciple and interest on secured debt i.e. bonds

D (Deductions) = salaries and benefits
marketing expenses
operating and maintenance costs
reserve for uncollectible a/c's
consultant fees
taxes
amortization of pre-opening expenses

As should be abundantly clear, the rent received by the redevelopment corporation is substantially less than the net income of the limited partnership after payment of principal and interest on the debt.[3] Beginning in the third year, the

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[3] The project, but for a $2,000,000 investment by the limited partners, will presumably be financed through the issuance of industrial revenue bonds. If the development costs range between $38.8 million and $43 million, the amount of the bonded debt should exceed $40 million.

payments will be 50% of the net income after debt service plus the base rent of $265,000 (which is deducted in calculating net income).

Although projections of potential gross and net income of the limited partnership have been provided, a projection of rent to be paid to the redevelopment corporation and the excise to be paid to the Commonwealth has not been provided. Before these further projections can be calculated, one must determine the amount of the bonds or other financing instrument to be issued by the partnership, the interest rate, the method of repayment and the life of the financing.

In justification for this arrangement, knowing it violates the provisions of Chapter 121A, § 10, the applicant states that it is within the Authority's "descretion to permit . . . acting under Mass. G.L.c. 121A § 11, first paragraph." That statement is misleading. Section 11 merely enables the redevelopment corporation to lease the premises; it does not authorize a sweetheart deal between the redevelopment corporation and a tax shelter limited partnership.

The proposed limited partnership will hold all the non-voting stack of the redevelopment corporation in return for a cash contribution of at least $2 million. The voting stock will be held by Friends of Post Office Square, Inc., which will receive the stock in return for services. Any transaction

between a corporation and its 90% owner is hardly arms-length; moreover, we do not know the identity of the general partner or the limited partners of the limited partnership and therefore can not determine if the principals of the holder of all the voting stock of the redevelopment corporation will also be principals in the limited partnership.

By generally permitting the leasing of property, the Legislature could not have intended to permit a circumvention of the excise tax provisions through the use of related and interlocking corporations and partnerships. It is too obvious for this Authority and for the Commonwealth of Massachusetts Department of Revenue to permit.

III. The B.R.A., acting on behalf of and as an agent for the City of Boston, will violate the express language of the Lease if it grants approval to the Applicant.

In 1953, the City, acting through its Board of Real Estate Commissioners under the authority of Chapter 474 of the Acts of 1946, entered into a lease with First Franklin for the use, construction and operation of a parking garage a Post Office Square. In that Lease, the City agreed as follows:

> "The Lessor covenants with the Lessee that the Lessee on paying the rent hereby reserved and performing and observing the covenants and conditions herein on the part of the Lessee contained shall and may peaceably and quietly have, hold and enjoy the demised premises for the term aforesaid without any interruption by the Lessor or any person rightfully claiming under Lessor."

The B.R.A., having assumed the authority formerly held by the City Planning Board, is an instrumentality of the City of

Boston, even though its approval authority over 121A projects is derived from a Special Statute. Chapter 652 of the Acts of 1960. Under Chapter 474 of the Acts of 1946, as amended, the B.R.A. is given approval authority over the acquisition and sale of premises to be used for public off-street parking. In the context of these two enabling statutes and the present application, the B.R.A. is "claiming under" the Lessor. Any action by the B.R.A. which interrupts, as its approval would, the continued use of the premises as contemplated by the Lease is a violation of an express covenant of the Lease.

Under the present proposal, the redevelopment corporation would take land now owned by the City and being used for the identical public purpose of public off-street parking. In exercising its authority under Chapter 474, the City was acting in its capacity as representative of the people, as a body politic, exercising powers derived from the General Court. It is not exercising its authority under its general powers as a municipal corporation to lease to private parties for private use property not dedicated to public use. The parking garage is already dedicated to public use.

Prior to the execution of this Lease, the Legislature, acting through the City to whom the power of eminent domain had been delegated, decided to dedicate the subject premises to a public purpose as an off-street parking facility. In accordance with the terms of Chapter 474, the City entered into

a lease with the First Franklin Parking Corp. for the maximum period permitted by the statute. To permit the City to now disregard its covenants and agreements under that Lease, violate the prohibition in the statute against termination except for breach of contract and approve a taking for the same purposes would nullify the intent of the Legislature and be in breach of the Lease.

The Applicant will cite certain cases standing for the proposition that the City may abrogate its contracts in the exercise of the sovereign right of eminent domain. On close inspection, those cases are inapplicable to the present set of facts and are readily distinquishable. Because the the City executed this Lease in its capacity as representative of the public generally and not in its corporate or proprietary function, as was the stituation in the cases cited by the Applicant, they should be disregarded in favor of the express language of the Lease and Chapter 474.

In the case of Brimmer v. Boston, 102 Mass. 19 (1869), the plaintiffs had entered into an indenture with the City of Boston whereby the plaintiff constructed a new dock and retained certain portions of the new dock for their exclusive use. The remained was open to public use. The City, exercising its sovereign powers of eminent domain, took a portion of the plaintiffs' private property for the purpose of constructing a dike or street. The Supreme Judicial Court, in subjecting the exclusive private right of the plaintiffs to

the City's predominent sovereign power of eminent domain, held that the plaintiffs' interest was liable to be taken and appropriated for public use regardless of whether they had entered into a covenant of quiet enjoyment. The Court found that the corporate statis of the City must yield to its representative status as a body politic. Since the indenture had been agreed to by the City in its capacity as a municipal corporation, the private interests granted by that indenture could be taken by the City.

In direct contrast, the covenant of quiet enjoyment in this Lease was entered into by the City of Boston in its capacity as a sovereign authority, deriving this authority from the State pursuant to Chapter 474. The garage is leased and operated for the purposes of Chapter 474, which are to provide off-street parking for the public. It is a public use and not a private use as in the Brimmer case.

This same distinction applies to the case of Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115 (1900). The Supreme Judicial Court distinquished between the Boston Terminal Co., a public authority, acting in its corporate capacity as landlord and the Boston Terminal Co. acting in its capacity as representative of the "public power distinct". It held that the defendant had the authority, without breaching the lease to the plaintiffs, to take the premises. But in the present case, the City executed the Lease in its capacity as

representative of the "public power distinct" for an express public purpose and not in its proprietary capacity.

A covenant of quiet enjoyment, whether implied by law or an express covenant of the lease, is not limited to a promise by the landlord that the tenant's possession will not be interrupted due to defects in the landlord's title. The tenant shall not be deprived of his possessory right in the demised primises and shall not be disturbed in his use by the acts or failure to act of the landlord or persons claiming under him. Blackett v. Olanoff, 371 Mass. 714 (1977). Such illegal conduct includes authorizing another person to interfer with the tenant's right to quiet enjoyment, Case v. Minot, 158 Mass. 577 (1893). Nor can the interests of the tenant be interrupted by the transfer or assignment of the landlord's interest. Albiani v. Evening Traveler Co., 220 Mass. 20, 27 (1914).

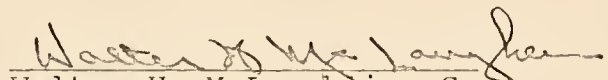
To approve the application and deprive First Franklin of its leasehold is in direct violation of the express terms of the Lease and contrary to the legislative scheme which envisioned a lease term of up to 40 years without the power to cancel except for breach of the terms and conditions of the Lease. As the cases in the first section of this memorandum clearly state, Chapter 474 was a envisioned by the Legislature as a long-term solution, and it enacted protections in the statue so that persons entering into leases with the City and constructing garages at their own risk and expense could rest

assured that the lease would not be cancelled and their interests given to others for the same purposes. It is a long-standing plan which this Authority should respect.

Respectfully submitted,

First Franklin Parking Corp.

By its attorneys,



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