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PUBLIC PROJECTS AND CITIZEN PARTICIPATION: THE CHALLENGE OF COORDINATING MEANINGFUL PUBLIC INVOLVEMENT OVER TIME

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Abstract: Consensus to proceed with Boston’s Big Dig Project was only reached after the Commonwealth agreed to perform a long list of mitigation measures to satisfy the objectives of numerous interest groups. To ensure that those measures would be implemented and to avoid project-stopping litigation, the Central Artery Environmental Oversight Committee was formed. Its work over the last fourteen years is a unique blend of lawyering and leadership. For the redevelopment of the surface above the downtown portions of the Project, the Mayor’s Central Artery Completion Task Force was created to implement neighborhood task forces to work with park and building designers and to coordinate the neighborhood views with the interests of regional park, transit, tourism, and similar groups. The results of the Task Force’s work over the last six years will soon be seen as the parks and civic structures are built.

Introduction

Given the diversity of Symposium attendees, this Essay will focus on issues relevant to students, who find themselves at the beginning of their legal careers, as well as to seasoned practitioners who, in addition to looking forward, also enjoy the luxury of reflecting on past professional experiences. Some of the audience members have, in fact, over the last twelve or fourteen years, personally worked on issues concerning public open space arising from Boston’s Central Artery/Tunnel Project (Big Dig or the Project).

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I. Supervising Mitigation Measures: The Work of the Environmental Oversight Committee

The first question to be asked about Boston’s Big Dig, which was the same inquiry posed fourteen years ago, is how does one perform open-heart surgery on a patient while the patient is playing tennis? Planners faced this very situation in downtown Boston, and a plethora of real estate and environmental law issues surfaced as a result.¹ Real estate clients who owned neighboring buildings expressed deep concern over access issues and the disappearance of business from downtown Boston during the Project’s construction. There were also those who felt planners were spending money in the wrong way, characterized with the familiar mantra: If you build it, they will come. Of course, there can never enough highways built because increased capacity just induces additional usage. In response, some conveyed the belief that all of this money should be invested in public transportation rather than highways. Still others felt the major issue to be addressed was the fact that the cars on these highways, especially when idling, were producing air pollution. The question then becomes: how do we reduce that air pollution and how fast can we do it? In addition, there were others who advocated for new parks and open space in the downtown area, as well as improved amenities. As a result, and like every political process, heads clashed, nasty words were expressed, and those with the necessary skills resorted to the courts and figured out that it was best to carry a big stick and use it.

At this stage, the underlying question then became how do you get the decisionmakers to listen to your position? A key player in this process was Fred Salvucci,² who utilized his tremendous intellectual powers and great political skills—as well as his position as Secretary of Transportation and Construction—to reach out and broker deals. Eventually he began to build coalitions for the purpose of buying peace with the various interest groups. The settlements were memorialized in certain commitments that would effectively satisfy the needs of each particular interest group.

These totaled approximately 1200 commitments, and they involved many of the issues previously discussed, including clean air, open space, transit, and traffic. For example, one of the commitments

focused on the retention of downtown business accessibility, and as a result, planners agreed to maintain the same number of travel lanes on key roads at all times. Most drivers have at one time or another shared in a moment of great frustration, where on a highway you find yourself sitting in traffic for a long time, and then you finally see the big yellow sign indicating the highway has gone from three lanes to two lanes, and you curse wildly and wonder why the planners do not perform the work at night or create temporary roadway capacity. With Boston’s Big Dig, the overriding concept was that the Project would not force drivers to deal with this typical construction dilemma. Ideally, the highways would have the same number of travel lanes all the time and the construction managers would be given the burden of devising practical solutions. Regardless of whether the managers opted to expand, reduce, or change their work zones, or change their hours, the overriding concern at all times was the notion that the city must live, or to refer back to the earlier analogy, the tennis player must win the match while the endeavor moves forward.

There also existed quite a few issues with respect to traffic, which could be resolved by getting people out of their cars and into public transit. Critics questioned why one of the most densely populated cities in the country was building more highways and why the focus wasn’t on getting people out of their cars and into public transit. In the 1980s, the transit system in Boston was not something to be particularly proud of. People were moving away from public transportation on account of safety concerns, poor reliability, lack of station parking, and geographical impracticality. Out of these concerns arose numerous Big Dig commitments. For instance, planners agreed to develop remote parking lots with increased capacity, including 20,000 parking spaces for park and ride lots serving commuter rail lines. There had to be tremendous improvements to the transit lines themselves. The Blue Line, which runs from Government Center to the airport, and then up to the North Shore, was to be expanded in order to accommodate six-car trains, up from the four-car trains currently in service. In addition, there were commitments to take down and replace the Washington Street and the Arborway surface transit lines, one with an elevated system, the other with surface trolleys.

In addition to these commitments, which had been commemorated in writing, there were other, more simple commitments relating

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to urban aesthetics and architecture. View corridors had to be preserved. For instance, views of the Old North Church from particular locations could not be obstructed. Furthermore, the Project planners had to preserve corridors through the neighborhoods. It was also imperative to maintain the Freedom Trail. The overriding question ultimately became how to ensure implementation of these 1200 measures. As a result of legal efforts, such as the Conservation Law Foundation suit, a number of these commitments were written down into a consent decree, and as part of that decree, the Conservation Law Foundation required a periodic report from the planners to ensure the implementation of those commitments designed to satisfy the needs expressed and advanced by the affected interest groups.

My particular group, the Central Artery Environmental Oversight Committee (Committee), was established to respond to and oversee issues concerning open space, traffic, transit, and air quality. Of the 1200 total commitments that were undertaken, the Committee followed about 700 of them. In following these 700 commitments, the Committee rattled the cage of the Massachusetts Turnpike Authority (Authority) and made clear that its purpose was to ensure the timely implementation of all these commitments. Not only was the Committee going to make sure that the commitments were satisfied, but it also required periodic reports on the commitments. This enabled formal documentation of the commitments’ source materials, or in other words, the documents from which the commitments were first created. Additionally, the Committee would be able to identify the parties responsible for implementation and their contact information, as well as compile all available timelines and schedules for the implementation of the commitments.

In the beginning, the Committee received an annual report detailing progress in each of the four relevant subject areas. As things progressed, it reduced that schedule. The most important benefit to come from the Committee’s involvement was the introduction of self-policing by Project staff, because managers working on particular projects became cognizant of the fact that people were actually going to look at these reports, follow their progress, and find their names attached to them. They realized that their participation in projects that either failed to meet predetermined goals or progressed in opposition to the commitments would no longer go unnoticed. Anonymity had been effectively eliminated.

The Committee was created in 1991 by the Secretary of Transportation and Construction and the Secretary of Environmental Affairs. I was appointed Chair about a year later, in 1992, and I have served in
that role from then to the present. What I wanted to mention and stress, particularly for students in the audience, is that this kind of role is one that really fits the legal profession and the concept of lawyering, because what we have here is a situation rife with conflict. The Committee has been assigned to handle people who are quite angry with each other, and it is our responsibility as lawyers to try to talk with them, so that we can accurately distill the essence of their wants and needs. In other words, our job is to allow them to vent their frustration, and then guide them to prioritize their desires. Then our task shifts to hearing from the other side and seeing how the commitments could be modified, how their implementation could be altered, how time schedules would be delayed, and so on. Eventually, using our lawyering skills and capitalizing on our role as a neutral third-party, we try to formulate common threads or common paths that we then can propose, which will ultimately effectuate a win-win situation. That has been our mission over the last fourteen years, to listen to the interested parties and then attempt to resolve apparent conflicts.

An additional goal of the Committee, which traces its roots back to an instruction contained in the very short document creating the Committee, concerns the adoption of measures to substitute for those commitments that no longer are appropriate. For instance, many of the transit mitigation measures, which pertained to the Massachusetts Bay Transportation Authority (MBTA)—Boston’s subway, commuter rail, and bus line operator—were derived from what was on the drawing board at the beginning of development. While these transit mitigation measures may have been relevant in 1989 or 1990, not all of them retain such relevance a decade and a half later. So our group has been instructed to assist in the formulation of substitutes to replace outmoded or inappropriate measures.

Another function of the Committee has been to meet approximately every six weeks to discuss topics relating to measures taken in furtherance of the commitments. The process for these meetings consists of discussing reports submitted to the Committee by the various people and organizations responsible for implementing the commitments. In addition, the Committee discusses critical reports submitted by interested parties or individuals. Once all relevant topics have been fully analyzed and discussed, the Committee presents the information to the entire community. The Committee is the only organization that deals with all of the mitigation measures across the entire Project, and for this reason numerous government officials, including the individuals working on the Project, as well as those regulating them, participate in the process. This dynamic has fostered the establishment of a real
clearinghouse for ideas and a forum by which people can remain informed as to the progress of the Project. As a result of this system, we are able to move forward by getting people to agree to new paths, new approaches, and new processes. Ultimately, what has resulted has been a very high level of compliance with the commitments.

Most of the measures taken in furtherance of the commitments have been completed or are on schedule. However, a number of glaring omissions do still exist. Some of these omissions deal primarily with transit measures and the fact that Massachusetts blithely committed to make $1 billion worth of transit improvements and then failed to adequately fund them. Long-time residents of Massachusetts no doubt are familiar with the manner by which the MBTA used to receive funds. Formerly, the MBTA would operate for a year and then announce to the legislature its budgetary deficit for the preceding year. The legislature would then fund the deficit. In contrast with the previous system, the MBTA now operates under a forward funding program where, like other rational organizations, it is constrained by a budget, which is roughly limited to income derived from one cent of the sales tax, plus fare collection. The problem is that it does not have adequate funds under the current budget both to operate the existing transit system and to solve the problems the Commonwealth deemed necessary to be solved in order to build the Project.

II. Mediating Among Interested Parties: The Work of the Central Artery Completion Task Force

The second major problem we had with the Big Dig that I would like to address was how to achieve a greenway park design that would reflect both the abutting communities’ needs, as well as the needs of the regional interests, such as park advocates, tourists, and the national park service, all the while staying within applicable budgetary constraints.

Initially, and especially for lawyers, it may be relevant to understand how this entire system was set up. Originally, the Project was governed in part by section 4(f) of the Federal Highway Act, which states that building a highway on public open space should be avoided but, in the event that such construction is necessary, a very high level of mitigation must be performed. Looking to the Big Dig, the area where the highway crosses the Charles River previously had been des-

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ignated as parkland. In light of this designation, the planners assumed a tremendous obligation, which ultimately translated into an $80 million budget (escalated by inflation) to build the final half-mile of the Charles River greenway, which had been left incomplete for about 100 years. The Committee monitors projects such as this. Despite being significantly behind schedule, under-funded due to a lack of control over the design process and because of the presence of contaminated soil on the Cambridge side, there are signs of hope, as the parks projects appear to be progressing. These parks should be completed by the time the Big Dig is completed, or shortly thereafter.

But in the downtown portion of the Project, there were no prior parklands. Here the issue was how to plan for new surface uses—including parks—on the land which would be created above the subsurface roadway.

The federal government has a role in this process as well. Due to the presence of federal funding for the Big Dig, the federal government has produced what is known as a Record of Decision. The Record of Decision is the enforceable document which addresses the action applicable federal agencies will take in reference to the Project. This Record of Decision also contains an appendix called the joint-development appendix, which states that prior to any reuse, any parcel of land used for or purchased by the Project must go through a joint-development process, which involves the state, the city, and the community. As result of leadership by Jay Wickersham, then head of the state environmental review agency, the Mayor’s Central Artery Completion Task Force (Task Force) was designated to serve as the group that would represent the voice of the community relating to greenway parcels arising out of the demolition of the Central Artery.

Most of the parcels there also abut various residential communities. There is the Bulfinch Triangle, created by a great architect, Charles Bulfinch, in the area adjacent to the front of the former Boston Garden (or FleetCenter). There is also the North End, as well as the Wharf District, which includes both commercial and residential abutters. The Leather District and Chinatown are also distinct geographical locations. Chinatown, in fact, is the densest community in all of Massachusetts. Chinatown also happens to be one of the poorest communities in the city. Taking into account all of these distinct and diverse communities, the question became how to integrate the designers, regulators, and builders with all of these dispersed, interested groups. To complicate matters further, there are interest groups beyond the immediate abutters, such as the Sierra Club, the Conservation Law Foundation, the Boston Natural Areas Network, the Boston
Harbor Alliance, the Boston Greenspace Alliance, Walk Boston, and the Island Alliance (an organization associated with the new Boston Harbor Islands national park area), not to mention a whole host of other park and transportation interests, as well as groups with a focus on urban needs.

So how does one get this diverse body of interest groups into the same room and then get them to comment in a rational manner, so that the park and building designs could actually reflect as much as possible of what everybody wants? To start, the Mayor of Boston created the Mayor’s Central Artery Completion Task Force, comprised of all the people interested in the parks and greenway debate. The Task Force was originally chaired by the Mayor’s Chief of Staff, Jim Rooney, but he shortly left this position to take control of the new convention center. At the urging of citizens, the Mayor decided to appoint a citizen member, myself, as Co-Chair of the Task Force. I share this responsibility with Mark Maloney, the Director of the Boston Redevelopment Authority. We have held meetings every two weeks, or more frequently as needed, to allow for discussions pertaining to various open space design issues. These issues range from planning processes to the actual designs, or even the selection of the designers and developers. Most importantly, we provide the community and the larger interest groups with an opportunity to participate in the making of these decisions.

Did the Task Force accomplish everything it had set out to accomplish? Were all of the community interests satisfied? Absolutely not. In the beginning, it was a common misperception that the size of the greenway would be comparable to the prominence of Central Park in New York City. The idea was to provide space for ball fields and playgrounds where children could play, as well as an amphitheatre for dramatic or musical performances, and numerous other facilities associated with a large-scale park. In reality, however, the open space equates to about the size and shape of several blocks of the Commonwealth Avenue Mall for those of you familiar with the Back Bay area. In other words, the open space is a considerably smaller area than had commonly been envisioned. For this reason, the Task Force had to prioritize. It was an essential first step, then, to get people to understand that they would not get everything they wanted. It is

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always hard to get people to understand that they are going to be disappointed. But I believe personally that if you explain to people what’s happening, and they feel that the process by which those decisions will be made is first, rational, and second, provides them an opportunity to be heard, then they will ultimately concur with the conclusions reached. There may still be grumbling, but at least they will feel that they had an opportunity to voice their opinions and test them in a sympathetic marketplace.

The next step, after convening these group meetings with the interested parties, involved the creation of neighborhood task forces. These neighborhood task forces met with the individual park designers on a weekly or monthly basis, and they reported back to the Task Force. The Task Force then made sure that all of the park design standards were uniform, so that we could ensure consistency of the parks from one neighborhood to the next. Ultimately, our goal was to prevent a situation where one neighborhood felt as though it was getting cheated or shortchanged. It was important to ensure equality among the neighborhoods so that, for example, Chinatown residents would not be surprised two years down the line to find out that there was something very luxurious being built in the North End, with no analog existing in their own community. In a particularly important victory for these neighborhood task forces, the Task Force was able to secure a small grant from one of the charities in Boston to help finance translation services, and other assistance, in order that they might be able to participate actively and in an informed manner with the designers. This was especially important in the North End and the Chinatown communities, which did not have the financial resources necessary to provide for such services.

**Conclusion**

Like the Environmental Oversight Committee, the Mayor’s Task Force represents an ongoing process. As a lawyer, my job in both organizations has consisted primarily in communicating with all of the interested parties, and making clear to them that, while they may or may not see all of their desires come to fruition, they do have a voice, and that voice will be heard. Once I have listened to all of the interested parties, my role then shifts to communicating the collective desires to the relevant planners and convincing them that the wishes of the interested parties are valid and should be accorded appropriate evaluation and consideration. Essentially, I am acting as the middle man, and that is what lawyers often do. My hope then, and I shall
close with this thought, is that each and every one of you is able to serve such a satisfying role in your own career.