

# The Boston PILOT Task Force One Year Later: Proposed Change and Its Aftermath

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“Many colleges recognize that they have a stake in sustaining their municipalities, which is why they make the [PILOT] agreements in the first place. ‘My primary goal in life is to make Boston University a better institution, but it can only be a better institution if the city thrives.’”<sup>1</sup>

“Boston has concocted an Orwellian program that uses euphemisms—such as ‘PILOTs’ instead of ‘property taxes’ and ‘voluntary’ instead of ‘coerced’—apparently attempting to hide what is really happening to evade what the law prohibits.”<sup>2</sup>

## INTRODUCTION

**T**his Article updates my earlier article, *The Boston City PILOT Task Force: An Emerging Best Practice?*<sup>3</sup> That article examined the work of the Boston PILOT Task Force that was established to review the Boston payment in lieu of taxes (PILOT) program.

Under a PILOT program, a nonprofit organization that is otherwise

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<sup>1</sup> Kevin Kiley, *A Pseudo-Taxing Debate*, INSIDE HIGHER EDUC., Apr. 26, 2011, [http://www.insidehighered.com/news/2011/04/26/cities\\_seek\\_more\\_voluntary\\_payments\\_from\\_colleges\\_as\\_local\\_budgets\\_tighten](http://www.insidehighered.com/news/2011/04/26/cities_seek_more_voluntary_payments_from_colleges_as_local_budgets_tighten) (quoting Robert J. Brown, President of Boston University). President Brown was a member of the Boston’s PILOT Task Force.

<sup>2</sup> Tim Delaney, *Boston’s Coercive PILOTs Experiment Program Should Crash*, HUFFINGTON POST, Apr. 28, 2011), [http://www.huffingtonpost.com/tim-delaney/bostons-coercive-pilots-e\\_b\\_854531.html](http://www.huffingtonpost.com/tim-delaney/bostons-coercive-pilots-e_b_854531.html). Mr. Delaney is President and CEO of National Council of Nonprofits.

<sup>3</sup> See generally Eric A. Lustig, *The Boston City PILOT Task Force*, 44 NEW ENG. L. REV. 601 (2010).

exempt from property taxation agrees to voluntarily make payments to a municipality.<sup>4</sup> The municipality generally seeks payment as compensation for foregone tax revenue on tax-exempt property as well as for the basic cost of public services such as police, fire, and snow removal.<sup>5</sup>

Although Boston's PILOT program was a longstanding, established program that was generally considered to be one of the most effective programs in the country,<sup>6</sup> two concerns emerged and led to the formation of the Task Force. The first related to the adequacy of the overall contributions made through PILOTs by Boston's nonprofits.<sup>7</sup> The second concern involved the fairness of contributions by nonprofits relative to one another.<sup>8</sup>

My first article was published as part of a symposium<sup>9</sup> and the publication date fell just as the Task Force issued its executive summary but before the final report was released. This Article picks up from that point and will address two specific developments. First, the PILOT Task Force issued its final report in December 2010.<sup>10</sup> Second, the Lincoln Institute of Land Policy published a comprehensive report in the fall of 2010.<sup>11</sup>

### **I. Boston PILOT Task Force Final Report and Implementation by the Boston Assessing Department**

In December 2010, the Boston PILOT Task Force issued its final report. The final report set forth recommendations that were essentially the same as those included in the previously released executive summary.<sup>12</sup>

The task force recommended that the PILOT program remain a voluntary one. They considered seeking a legislative change to require PILOT payments but thought the opposition to such an attempt would

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<sup>4</sup> See DAPHNE A. KENYON & ADAM H. LANGLEY, PAYMENTS IN LIEU OF TAXES: BALANCING MUNICIPAL AND NONPROFIT INTERESTS 6 (2010), available at [https://www.lincolnst.edu/pubs/dl/1853\\_1174\\_PILOTs%20PFR%20final.pdf](https://www.lincolnst.edu/pubs/dl/1853_1174_PILOTs%20PFR%20final.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> Lustig, *supra* note 3, at 601.

<sup>7</sup> *Id.* at 602.

<sup>8</sup> *Id.*

<sup>9</sup> Eric A. Lustig, *Foreword: Tax Exempt Organizations and the State: New Conditions on Exempt Status*, 44 NEW ENG. L. REV. xi (2010).

<sup>10</sup> MAYOR'S PILOT TASK FORCE, FINAL REPORT AND RECOMMENDATIONS (2010), available at [http://www.cityofboston.gov/Images\\_Documents/PILOT\\_%20Task%20Force%20Final%20Report\\_WEB%20\\_tcm3-21904.pdf](http://www.cityofboston.gov/Images_Documents/PILOT_%20Task%20Force%20Final%20Report_WEB%20_tcm3-21904.pdf) [*hereinafter* FINAL REPORT].

<sup>11</sup> KENYON & LANGLEY, *supra* note 4, at 2.

<sup>12</sup> Compare FINAL REPORT, *supra* note 10, at 10, with MAYOR'S PILOT TASK FORCE, EXECUTIVE SUMMARY (2010), available at [http://www.cityofboston.gov/Images\\_Documents/PILOT\\_Interim%20Report\\_tcm3-8009.pdf](http://www.cityofboston.gov/Images_Documents/PILOT_Interim%20Report_tcm3-8009.pdf).

undercut the “spirit of partnership between the City and its [exempt] institutions” arising from a broad, uniform voluntary program.<sup>13</sup>

The Task Force also recommended that the PILOT program be extended to all tax-exempt organizations.<sup>14</sup> This recommendation contained two important components. The first important component was to expand the scope of the focus from the medical and higher-education institutions initially studied to secondary schools, cultural institutions, and other “significant” nonprofits.<sup>15</sup> The second important component was to recognize an exception for “smaller non-profits, which may lack the resources to *fully engage* in the PILOT process. *Normally*, a threshold of \$15 million in assessed value would meet this goal.”<sup>16</sup>

The Task Force decided that the voluntary PILOT payments be determined on the value of the institution’s real estate. In order to reflect the tax-exempt status the requested PILOT payment should be discounted to 25% of the tax that would be paid if the property were fully taxable. This 25% figure represents the portion of the City of Boston’s budget devoted to essential services such as police, fire, and snow removal.<sup>17</sup> Finally, in determining the PILOT payment, the effect of the exemption for smaller non-profits is that the first \$15 million of assessed value is exempted from the computation.<sup>18</sup>

The Task Force recognized the importance of community benefits provided by tax-exempt institutions to the city and that asking for an increased payment from institutions might cause a decrease in community service. Accordingly the Task Force recommended a community service credit against the PILOT payment. The credit is to be generally limited to 50% of the “full” PILOT payment.<sup>19</sup> The Task Force further provided that this 50% cap may be exceeded “where the City and an institution identify *exceptional or extraordinary* opportunities to provide services.”<sup>20</sup>

The Task Force recognized that the PILOTs based on these recommendations would be well below the PILOT payments currently paid by Boston’s tax-exempt organizations. Accordingly, the Task Force recommended a phase-in period of “not less than 5 years.”<sup>21</sup>

The Task Force recommended allowing a credit for any real-estate taxes paid on real estate owned by tax-exempt organizations if the property

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<sup>13</sup> FINAL REPORT, *supra* note 10, at 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> FINAL REPORT, *supra* note 10, at 12.

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Id.*

would otherwise be qualified for exemption based on use.<sup>22</sup> This might occur, for example, if a tax-exempt organization were to acquire a property that was on the tax roll and the organization would agree to leave the property on the tax roll even though the property's use now qualifies it for exemption.

The Boston Assessing Department has begun implementing the Task Force's recommendations. The department sent a letter to the 40 nonprofit organizations<sup>23</sup> that have exempt property with an assessed value of more than \$15 million. The letter advises the organization of the recommendation of the Task Force and reinforces that "[t]he new [PILOT] guidelines were recommended as a way to enhance the partnership between the City and its nonprofit institutions in a manner that is both fair and consistent."<sup>24</sup> The letter then sets out the proposed PILOTs by real-estate parcel and by the total PILOT expected to be owed.<sup>25</sup> The assessing department invites the exempt organizations to set up a meeting to discuss the requested PILOT payment. These meetings are ongoing as of the publication of this Article.<sup>26</sup>

The assessing department then plans to send a formal notice for PILOTs due semi-annually.<sup>27</sup> The first notice will be sent October 1, 2011,

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<sup>22</sup> *Id.*

<sup>23</sup> Michael Rezendes, *City Sends "Tax Bills" to Major Nonprofit: Aims to Triple Voluntary Payments Within 5 Years*, BOS. GLOBE, April 24, 2011, at 1; E-mail from Ronald W. Rakow, Chief Fin. Officer and Comm'r of Assessing, City of Boston Assessing Dep't, to Eric A. Lustig, Professor of Law, New England Law | Boston (June 17, 2011, 09:43 EST). The institutions are as follows: medical institutions: Beth Israel Deaconess, Boston Medical Center, Children's Hospital, Dana Farber, Franciscan Hospital, Harvard Vanguard, Massachusetts Eye and Ear Infirmary, New England Baptist Hospital, Partners HealthCare (Massachusetts General Hospital, Brigham and Women's Hospital, Faulkner Hospital, Massachusetts Biomedical Research Corp., Spaulding Rehabilitation, and Financial Research Corporation), Shriners Hospital, and Tufts Medical Center; educational institutions: Berklee School of Music, Boston Architectural College, Boston College, Boston College High School, Boston Conservatory, Boston University, Emerson College, Emmanuel College, Fisher College, Harvard University, Massachusetts College of Pharmacy, New England Conservatory, Northeastern University, Roxbury Latin School, Showa Institute, Simmons College, Suffolk University, and Tufts University; and cultural institutions: Boston Symphony, Children's Museum, Hebrew Rehabilitation Center, Institute of Contemporary Art/Boston, Museum of Fine Arts, Museum of Science, New England Aquarium, and WGBH. *Id.*

<sup>24</sup> Letter from Ronald W. Rakow, Deputy Chief Fin. Officer and Comm'r of Assessing, City of Boston Assessing Dep't, to nonprofit institution (on file with author) (describing new City of Boston PILOT program guidelines).

<sup>25</sup> *Id.*

<sup>26</sup> Telephone Interview with Ronald W. Rakow, City of Boston Deputy Chief Fin. Officer and Comm'r of Assessing (June 15, 2011).

<sup>27</sup> *Id.*

for payments due on November 1, 2011.<sup>28</sup> Although no formal system has been established to report payments, Boston's Commissioner of Assessing Ronald Rakow anticipates that payment information will be periodically disclosed on the assessing department's website.<sup>29</sup> Presumably, the posting will disclose the PILOT paid versus the amount requested.

## II. Lincoln Institute of Land Policy Report

While the Boston Task Force report focuses only on the City of Boston, the Lincoln Institute of Land Policy Report<sup>30</sup> provides a longitudinal study of the subject and helps to put the Boston experience and the Task Force recommendations into a broader context. Moreover, this study pulls together national data, which had not been done previously in a comprehensive and systematic way.<sup>31</sup>

The authors of the Lincoln Institute Report found a trend of growth and expansion in PILOT programs since the early 1990s.<sup>32</sup> Kenyon and Langley report that PILOT programs have existed in 117 communities in "at least 18 states since 2000."<sup>33</sup> The Boston PILOT experience figured prominently in their study, as the city was used as a case study.<sup>34</sup>

Kenyon and Langley concluded that PILOT programs have some serious problems and are not always appropriate as to some communities and some exempt organizations.<sup>35</sup> To the extent that PILOT programs are appropriate and used, Kenyon and Langley used Boston as one of the models and put forth a number of recommendations for communities considering PILOTs (or already using them). The two key features of the Boston program are the stakeholder support generated by the Task Force process and the systematic program reflected in the Task Force's recommendations.<sup>36</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> KENYON & LANGLEY, *supra* note 4.

<sup>31</sup> *Id.* at 7, 20-21.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 43.

<sup>34</sup> *Id.* at 21-23.

<sup>35</sup> Kenyon and Langley note that the voluntary nature of PILOTs has sometimes led to a general "ad hoc" application with a lack of transparency. Moreover, contributions sometimes depend on the aggressiveness of the municipal officials rather than being connected to the level of municipal services provided. *Id.* at 44. Given the success and long standing nature of the Boston program, I am assuming that PILOTs are appropriate for Boston and its tax-exempt organizations. Consideration of alternate programs is beyond the scope of this Article.

<sup>36</sup> See KENYON & LANGLEY, *supra* note 4, at 45.

### III. PILOTs in Boston and Beyond: One More Year of Progress and Some Remaining Questions

One question about the effect of the Boston Task Force's recommendations was quickly answered. The report was not going to be shelved and left for a later date (or perhaps permanently mothballed). The assessing department seamlessly implemented all of the recommendations. Responses to the Boston changes have ranged from strong support<sup>37</sup> to strident opposition;<sup>38</sup> however, a more guarded response may also be seen.<sup>39</sup>

Although it is still too early to fully gauge the ultimate success of the Task Force and its recommendations, it does seem appropriate to make some early observations. First by including representatives from a range of tax-exempt institutions, the Task Force's recommendations may be more readily acceptable to the broader tax-exempt community. In addition, the process used by the Task Force that allowed for input by interested parties also gave them some ownership in the final product.

Some critical questions remain as to whether this project will ultimately be effective. The new PILOT program remains voluntary so there is no legal mechanism to force participation. Thus, participation must result either through political will or a sense of responsibility on behalf of the institutions. Indeed, many of the 40 institutions contacted by the assessing department are already contributing under the preexisting PILOT program. So with one exception,<sup>40</sup> those institutions are being asked to simply contribute more. Of course, how much more will depend on the difference between their original PILOT payment and the amount set forth under the new program guidelines. Presumably, these institutions have already yielded to political will or a sense of responsibility, or some combination of the two.

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<sup>37</sup> See *supra* note 1 and accompanying text. Another nonprofit head stated: "If you're asking me if I'm excited about paying taxes, the answer is no . . . . But I think we recognize that municipal budgets, including the city of Boston's, are under an enormous amount of strain, and we think we have to be good citizens. Rezendes, *supra* note 23 (quoting Eric Buehrens, interim President and CEO of Beth Israel Deaconess Hospital).

<sup>38</sup> Delaney, *supra* note 2; Taylor Arming, *Tax-exempt Only in Name*, PIONEER INSTITUTE BLOG (Apr. 26, 2011), [http://www.pioneerinstitute.org/blog/better\\_government/tax-exempt-only-in-name/](http://www.pioneerinstitute.org/blog/better_government/tax-exempt-only-in-name/) ("These [PILOT] 'requests' are a bit like Don Corleone making someone an offer he can't refuse.").

<sup>39</sup> One prominent representative of the exempt-organization industry stated: "We have some boards of trustees that are asking, 'What are the implications? Does this exist elsewhere in the country? Are there precedents we need to be considering? Are we headed down a slippery slope?'" Rezendez, *supra* note 23 (quoting Richard J. Doherty, President of the Association of Independent Colleges and Universities in Massachusetts).

<sup>40</sup> The Boston Symphony Orchestra will actually see its PILOT contribution go down under the new program. E-mail from Ronald W. Rakow to Eric A. Lustig, *supra* note 23.

Nineteen<sup>41</sup> of the 40 listed institutions, however, had not been under a PILOT agreement under the preexisting program and may need to be cajoled. One of the key features of the process used by the Task Force was transparency. This transparency was manifested by the open public meetings, public hearing, and publication of data and interim reports on the web. Periodic publication of payments made pursuant to PILOT programs should add to the pressure on nonparticipating institutions.<sup>42</sup>

One key unknown is how the recommended guidelines will work in the meetings between the exempt institutions and the assessing department. The recommendations are structured as guidelines and are replete with qualifications such as “generally” and “usually.” This structure allows for flexibility and creativity, which seems appropriate and necessary given the voluntary nature of the programs. Yet allowing for such flexibility and creativity can possibly undercut at least one of the stated goals, uniformity, if significant deviations from the guidelines occur.

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<sup>41</sup> Franciscan Hospital, Massachusetts Eye and Ear Infirmary, New England Baptist Hospital, Shriners Hospital, Boston Architectural College, Boston College High School, Boston Conservatory, Emmanuel College, Fisher College, New England Conservatory, Roxbury Latin School, Wheelock College, Winsor School, Children’s Museum, Hebrew Rehabilitation Center, Institute of Contemporary Art/Boston, Museum of Science, New England Aquarium, WGBH. *Id.*

<sup>42</sup> “I’d hate to feel like I was the only guy paying my taxes.” Rezendes, *supra* note 23 (quoting Eric Buehrens, interim President and CEO of Beth Israel Deaconess Hospital).