

To: Eugene O'Flaherty, City of Boston Corporation Counsel  
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From: Victor N. Baltera  
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RE: Boston Board of Appeal

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### **Introduction**

We understand that the Mayor's Office directed Corporation Counsel to solicit and oversee our review of the practices and procedures of the Boston Board of Appeal, including its interaction with the City's Inspectional Services Department ("ISD") and the Boston Planning and Development Agency ("BPDA"), in order to provide recommendations, if any, for improvement of the Board's practices. Corporation Counsel defined our goals as seeking ways to increase efficiency, improve public access, and enhance transparency of the Board's processes and procedures. This memorandum describes how we proceeded to analyze the Board's practices, and presents our conclusions and recommendations. In conducting our review, we interviewed in-person or by phone the following individuals:

1. Dion Irish, Commissioner of ISD;
2. Kim Thai, ISD Assistant Commissioner of Plans and Zoning and Director of Policy;
3. Ed Coburn, ISD Assistant Commissioner, Legal Division;
4. Jill Cox, ISD Assistant Commissioner for Building and Structures;
5. All eight current Board of Appeal members and alternates;
6. Kevin O'Connor, Executive Secretary for the Board and Assistant Corporation Counsel;
7. Matthew Fitzgerald, a former Executive Secretary;
8. Jeff Hampton, BPDA Deputy Director of Zoning;
9. Joyce Linehan, Chief of Policy and Planning in the Office of the Mayor, responsible for nominations to the Board;

10. Patrick Brophy, Chief of Operations in the Office of the Mayor, responsible for ISD;

11. Jerome Smith, Chief of Civic Engagement and Director of Neighborhood Services and Ed McGuire, his chief of staff;

12. Representatives of three neighborhood associations who frequently participate in the zoning process. In addition, two of the Board members we spoke with were formerly active in neighborhood associations;

13. Councilor Lydia Edwards;

14. Several practitioners who frequently appear before the Board;

15. Various citizens who contacted us with comments; and

16. Administrative staff at ISD.

We solicited comments concerning the zoning process from three trade organizations: NAIOP, the Real Estate Bar Association, and CREW, and we reviewed Councilor Edwards's proposal for amending Section 8 of the Enabling Act regarding, among other things, the composition of the Board. Finally, we reviewed Councilor Wu's recent report on the BPDA.

As a result of our investigation, we identified a number of categories for potential improvement in the Board's operations as described below. These range from physical and technological changes to increased training, staffing and similar matters. We also considered the impact of Boston's stringent zoning regulations on Board workload and public perceptions of the zoning process. Our recommendations are summarized in Appendix A hereto.

### **Overview and Background of Boston Board of Appeal**

The Boston Board of Appeal was established under section 8 of chapter 665 of Massachusetts Acts of 1956, as amended (the "Enabling Act"). The Board's procedures are not subject to General Laws chapter 40A, which regulates zoning in the rest of Massachusetts. The Enabling Act authorizes the Board to decide appeals from decisions of the Building Commissioner including the refusal to issue a building permit. Enb. Act §8, par. 7. Under Section 9 of the Act, the Board may grant variances from zoning regulations with respect to a particular parcel of land or an existing building subject to strict standards.<sup>1</sup> Similar (although not

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<sup>1</sup> Section 9 authorizes variances only: "where, owing to conditions especially affecting such parcel or such building, but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of such zoning regulation would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of such zoning regulation, but not otherwise."

identical) variance standards are included in Section 7-3 of the Boston Zoning Code.<sup>2</sup> Section 10 of the Enabling Act provides that zoning regulations may include special exceptions which may be allowed by the Board of Appeal subject to conditions and safeguards. Pursuant to this authority, the Zoning Code establishes various conditional uses. Article 6 of the Zoning Code authorizes the Board to grant conditional use permits, prerequisites for which are included in Section 6-3 and 6-3A (for off-street parking in a restricted parking district). The standards for conditional use permits are more flexible than those for variances.<sup>3</sup> The Zoning Code also authorizes the Board to grant exceptions in planned development areas, urban renewal areas, and certain other districts subject to standards set forth in Section 6A-3.

The Board is one of several entities that address zoning matters in the City. The BPDA, which effectively acts as the City's planning agency, plays a significant role. Among many other tasks, the BPDA reviews projects under Article 80 of the Zoning Code, both small project review and large project review. Small project review (generally for projects above 20,000 square feet or 15 housing units and below 50,000 square feet) involves project design, including vehicular and pedestrian access, building and parking/loading locations, landscaping, screening, roof shapes and structures, signs, and other design features. BZC §80E-3.

Large project review (threshold varies based on location and type of project but generally new construction above 50,000 square feet (above 10,000 square feet in the Harborpark) entails a more robust analysis of matters such as transportation, environmental protection, urban design, historic resources, infrastructure, site plan, and, where applicable, tidelands. BZC §80B-3. As part of large project review, the BPDA seeks mitigation, but it does not grant variances or other relief from zoning requirements. However, the BPDA does provide recommendations to the Board of Appeal concerning appeals for conditional use permits and variances. BZC §§6-2 and 7-2. (The BPDA has a principal role in planned development areas and institutional master plans, which processes also involve approval from the Boston Zoning Commission but not the

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<sup>2</sup> Before granting a variance, the Board must find: "(a) that there are special circumstances or conditions, fully described in the findings, applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure; (b) that, for reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose; [and] (c) that the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare." An additional finding is required if the variance is for a Development Impact Project.

<sup>3</sup> The findings required for most conditional use permits are: "(a) the specific site is an appropriate location for such use or, in the case of a substitute nonconforming use under Section 9-2, such substitute nonconforming use will not be more objectionable nor more detrimental to the neighborhood than the nonconforming use for which it is being substituted; (b) the use will not adversely affect the neighborhood; (c) there will be no serious hazard to vehicles or pedestrians from the use; (d) no nuisance will be created by the use; [and] (e) adequate and appropriate facilities will be provided for the proper operation of the use." Additional requirements apply for certain uses and locations.

Board of Appeal (other than the rare situation where an applicant seeks an exception under Article 6A in a planned development area)).

In many ways, the BPDA is analogous to the planning board in a Chapter 40A community. It comments on site design and project impacts. For its part, the Boston Board of Appeal is comparable to both a Chapter 40A permit granting authority which grants variances (typically a board of appeals in Chapter 40A communities) and a special permit granting authority (typically, either a board of appeals or planning board or both in Chapter 40A communities).

Projects begin their journey to the Board of Appeal when an applicant files for a building permit with the ISD. Plan examiners at ISD review the proposal for zoning violations and, in the absence of zoning compliance, will issue a refusal letter. The applicant may file an appeal of the refusal and thereby request zoning relief (variance or conditional use permit) from the Board. ISD notifies the Mayor's Office of Neighborhood Services ("ONS") and the BPDA of new appeals. ONS directs the applicant to meet with abutters and to reach out to the local neighborhood association to arrange review by that body. ONS informs the Board of the position of the Mayor's Office, which includes a consideration of the community review. Public testimony is taken at the Board's hearings from both supporters and opponents as well as elected officials. Limited documentation is provided to the Board members, principally including the agenda and a list of the violations for which relief is requested. The Board does not get a copy of the applicant's appeal (either before or at the hearing) or any written description of the applicant's argument as to why relief should be granted. Statements are taken orally, but given the size of the Board's docket, hearings on any individual matter are generally brief, although some controversial matters can take longer. Unless a matter is deferred for additional community input or negotiation, the Board generally will vote at the hearing. Board members rarely discuss the matters among themselves at the hearing, although members will pose questions to the applicant. The vast majority of variance requests are allowed.

### **Board Workload**

The Board meets twice each month on Tuesday mornings, and generally has a very full docket (approximately 40 new cases each hearing date, lasting between 4 and 6 hours).<sup>4</sup> As a result, little time is available for consideration of individual cases (although many cases are routine and unopposed so do not have a large time demand; however, this can vary from week to week). In general, the length of the hearings depends on how many controversial matters have been scheduled. The Board also has instituted a monthly Thursday evening subcommittee process at which three Board members (the chair, secretary, and architect member) hear small owner-occupied requests and some small business requests. It is unclear what the specific criteria for qualifying for the subcommittee meeting are.<sup>5</sup> The subcommittee reports its

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<sup>4</sup> In 2018, there were 1,337 appeals filed with the Board.

<sup>5</sup> We received conflicting statements as to whether the process applies only to owner-occupied properties.

recommendation at the next regular Board meeting, and the full Board typically votes to adopt all of the subcommittee recommendations in one motion. Efforts should be made to expand the subcommittee process, if possible, to both alleviate the full board's workload and to provide a more convenient forum for small, routine projects. Consideration should be given as to what other projects may be appropriate for this process.

We considered whether the number of Board members should be increased with the Board then divided into randomly assigned panels for hearings. As a result, any individual member would have a reduced workload. Random assignment could also deter attempts at influencing Board members *ex parte* (although we were provided no information that such contacts occurred). However, this proposal seems administratively cumbersome and could lead to inconsistent results. In general, the number of Board members and alternates was considered adequate by various interviewees, provided that all Board positions were actually filled.

Board members noted that it would help them to receive BPDA recommendations for all cases and to get them in advance of Board hearing.

We believe the Board could make inroads into its caseload by adding an additional meeting perhaps one additional Tuesday per quarter. Some members of the public commented that daytime meetings are difficult on neighbors and homeowner applicants, particularly when there is no specific time assigned to a case. People may need to give up a half-day or more of work or other obligation to attend the zoning board meeting. The Enabling Act currently has a process for requiring evening meetings if requested by the Mayor or any City Councilor and by 50 residents of the neighborhood in which the project is located. Enb. Act §8, par. 8. On the other hand, Board members noted that an evening meeting following a day of work would be burdensome for the members. We concluded that with a more active Executive Secretary actively managing the agenda of each meeting, adding one meeting per quarter will help alleviate the burden of each individual meeting, but only if ISD gets additional administrative staffing to assist with the additional notices that would require. More effectively shepherding appropriate matters to the subcommittee meeting on Thursday evenings will help as well.

In addition to its primary role in resolving zoning appeals, the Board has authority to decide appeals of Building Code matters. Enb. Act §8, par. 7. Although most people who seek Building Code relief file with the State Board of Building Regulations and Standards, some file with the Boston Board of Appeal, particularly when the project needs zoning relief as well. With the possible exception of the architect and building trades representative, Board members typically have no technical expertise in the Building Code or in evaluating alternative compliance methods. We recommend removing Building Code jurisdiction from the Board to reduce workload and to place these technical, safety-related matters with the experts on the state level. Even if there are not many Building Code matters brought to the Board, it would improve the Board's workload to remove Building Code issues from its purview. This recommendation would require a change to the Enabling Act.

In evaluating both Board workload and public perceptions of the Board, the elephant in the room is the complexity of the Boston Zoning Code, which results in relief being needed for a

significant number of projects (no matter how small or routine) with corresponding pressure on the Board to ignore variance standards. Consideration should be given as to whether the Zoning Code regulates too many matters and whether the Code can be amended to allow more as-of-right uses and set dimensional requirements more in line with existing neighborhood conditions. While such an evaluation is beyond the scope of the assignment, it is clear that the Board of Appeal workload is primarily due to requests for variances. The vast majority of variance (and other) appeals are allowed, thereby suggesting that the base Code requirements are too strict. Numerous people we spoke with observed that the Code is very restrictive and complex, and that past down-zoning has made many existing properties nonconforming (*i.e.*, the standards do not reflect the neighborhood). Board members stated that they consider the variance standards in the Code (BZC §7-3) when deciding appeals but are also influenced (regardless of compliance with the standards) by whether there is support from the community, BPDA, and elected officials; whether they feel the proposal is a “good project”; whether it is similar to others that have been allowed in the past; and how it fits in with the fabric of the neighborhood. In practice, it appears projects which survive public scrutiny are almost always granted variances with little concern to technical legal requirements. While it is not uncommon throughout the Commonwealth for zoning boards sometimes to ignore the strict variance standards in the statute (chapter 40A outside of Boston and the Enabling Act within), it may be preferable to determine whether certain recurring proposals (particularly smaller homeowner matters), should be allowed as-of-right through amending the Zoning Code. The contrary argument is that allowing matters as-of-right, whether use or dimensional, cuts neighbors out of the development and home-improvement process. In many cases, neighbors (we were told) believe that they have the right to control (or at least have some influence over) all degrees of development, and the existing stringency of the Zoning Code may reflect this.

It appears that development would grind to a halt if the Board were to faithfully apply the variance standards.<sup>6</sup> Indeed, the system seems to work, in the sense that it processes a large volume of cases with projects shaped to respond to community concerns. Apparently, few matters are appealed to court,<sup>7</sup> which may reflect the success of the consensus-building process or may indicate that prospective plaintiffs have settled their claims in advance of an appeal or otherwise do not want to take on the expense of litigation. However, giving short shrift to the legal requirements for variances can contribute to a negative public perception of the Board while creating a system that imposes unwarranted costs and delay on applicants. On appeal, courts have harshly criticized the Board’s handling of variances. *See e.g., Van Buren v. South Boston Housing LLC*, Ruling and Order for Judgment, Suffolk Superior C.A. No. 02-5467A (Jan. 31, 2005) (Sikora, J); *see also, Prusik v. Board of Appeal*, 262 Mass. 451, 457-58 (1928) (“There would be little left of a zoning law. . . if a decision like that made by the respondent

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<sup>6</sup> Other than projects in Planned Development Areas or Institutional Master Plan areas, which projects do not require variances. They do undergo extensive review by the BPDA and approval by the Zoning Commission.

<sup>7</sup> Recently an average of 28 cases have been filed each year, compared to over 1,000 annual filings with the Board.

board [granting a variance] should be permitted to stand.”); *Sheppard v. Zoning Board of Appeal of Boston*, 81 Mass. App. 394, 398 (2012) (variances “to be granted sparingly”).

One possible solution to retaining community input in conjunction with less restrictive zoning, would be to expand BPDA<sup>8</sup> design review authority below the Article 80 small project review threshold (comparable to site plan review in Chapter 40A communities). Thus, dimensional controls could be relaxed in the Code but review over impacts retained with the goal of mitigating and shaping a project without prohibiting it. This would ensure review by BPDA design professionals with public input in an appropriate legal framework that did not create pressure to disregard strict variance standards. This approach also would be consistent with the standard Board proviso requiring BPDA design review. Board control over uses could be retained through requirements for conditional use permits for potentially troublesome uses. In any event, the City should determine if its dimensional standards make sense in light of the projects being proposed and allowed routinely through variance.

We heard from several people that the conditional use permit requirement for development in a groundwater conservation overlay district (“GCOD”) (BZC §32-3.3) is unnecessary and an added burden on the Board’s workload. Article 32 of the Zoning Code requires that projects exceeding certain criteria in the GCOD must provide certification from an engineer confirming compliance with the Code’s groundwater standards. As a matter of practice, where groundwater recharge is needed to meet the standards, plans must be submitted to the Boston Water and Sewer Commission (“BWSC”) for its approval. Upon receipt of the required documentation, the Board of Appeal routinely rubber stamps the request for a conditional use permit. While the requirement for compliance with the standards and approval of BWSC should be retained in the Code, this does not need to be done through the conditional use permit process, but rather could be a precondition to getting a building permit.<sup>9</sup> Note, however, that this change would remove projects from coverage under the Inclusionary Development Policy, if the only zoning relief needed were the GCOD conditional use permit. We also understand that, in the Chinatown neighborhood, GCODs are seen as a valuable tool to control development as a GCOD may provide the only trigger for community input on many projects. This may reflect the community’s desire for input on projects that are allowed as-of-right. Of course, GCOD should not serve as a way to derail a project for non-GCOD matters which are otherwise allowed by zoning.

### **Disclosure by Applicants**

Currently, a proponent of a project requiring zoning relief and involving 100,000 or more square feet must file (with the Executive Secretary who then circulates to Board members) a

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<sup>8</sup> Contrary to recent suggestions, we believe the BPDA plays a valuable role in the planning and zoning processes and should be retained.

<sup>9</sup> Eliminating the conditional use permit, however, would also remove the Board’s existing authority to modify the requirement in certain circumstances. See BZC §32-6(a).

disclosure statement identifying all persons who have a beneficial interest in the project as well as architects, surveyors, consultants, real estate brokers, and lawyers who are providing services (above \$50,000 in value) with respect to an application for zoning relief. BZC §80B-7. The purpose is said to be two-fold: (i) to improve land use decisions and foster public understanding and trust in zoning approval processes, and (ii) to help officials identify and avoid conflicts of interest. No similar disclosure is required for projects below the 100,000 square foot threshold. Thus, for smaller projects, Board members are not able to easily determine potential conflicts. Although disclosure of financial interests for individual homeowner projects appears unnecessary and burdensome, projects below the current threshold could benefit from some form of disclosure of beneficial interests. Perhaps the floor could be changed to the small project review threshold (generally, 20,000 square feet of floor area or 15 dwelling units) or lower threshold as may be appropriate. Disclosure places a burden on applicants; however, the benefit of avoiding conflicts and last-minute recusals outweighs that concern.

### **Physical Enhancements to the Meeting Room**

The Board holds its hearings in a large conference room on the eighth floor of Boston City Hall. The Board sits on a dais at the front of the room which raises it above the general public and can be intimidating to people unfamiliar with the process. The dais is not handicapped accessible. We understand the Mayor's Office has plans to remove this dais, and we endorse that. The room's acoustics are poor making it difficult for members of the public to hear the discussion and, in some cases, making it difficult for Board members to hear an applicant if she is not right next to the microphone. Moreover, the hallway leading to the room acts as a noisy gathering place for people awaiting hearings on later cases. The conference room wall along the hallway is a large glass window. Hallway noise can disrupt Board hearings and is especially bad when the door to the room opens, which happens frequently. A seemingly simple issue, it is nonetheless an important one: an inaudible discussion can lead to a possible open meetings law violation because attendees cannot hear the proceedings. *See, e.g.*, Attorney General, Open Meeting Law Determination, [www.mass.gov/ago/openmeeting](http://www.mass.gov/ago/openmeeting) (OML 2017-40) (March 15, 2017)

We understand that the Mayor's Office has already retained an acoustical engineer to recommend steps to improve sound quality within the room. This work should be continued and accelerated. Perhaps changes can be made to the glass wall to reduce noise. Further, we recommend that that portion of the hallway immediately adjacent to the door to the hearing room not be used as a waiting or assembly area. Acoustical panels might be added in the hallway, and signs should be posted noting that people are not to wait or talk loudly in the area immediately outside the room. A new area for people awaiting later cases could be created further down the hallway from the hearing room. By moving the public down the hall away from the room, people will still have prompt access to the hearing room but will take the conversation and accompanying noise out of the immediate vicinity of the room. Eventually, the City may also want to consider holding the Board hearings in a different room in City Hall if there is a large enough space available with an adequately-sized, but separate waiting area for people to gather



prior to or during meetings. Meetings should be encouraged but not right outside the door to the hearing room.

### **Technology Enhancements**

The Board of Appeal and ISD have minimal technological support, and they rely on an inadequate system first implemented in or about 2006 (called "Hansen"). BPDA planners do not have access to Hansen. Plans are generally filed in paper copy rather than electronically. Once filed, they are not scanned so that hard copies must be provided to BPDA and to ONS.<sup>10</sup> Similarly, members of the public who want to see plans (or the rest of the file) must come to ISD to review a paper copy. This situation is challenging for ISD where the storage space is overflowing with plans for matters at various stages of approval. Comments on pending matters sent via email are printed out by ISD staff and included in the paper files. Paper documents are more easily lost than electronic files and cause delays in processing. Digitization would result in a more efficient process. Care should be taken, however, in adopting technology. Upgrades should be planned carefully to assure that all users can readily access data. Several people noted that the existing Hansen system actually made matters worse due to the difficulty of inputting data; it also does not function as designed and often creates additional work for the administrative staff. Hansen is not connected to a printer at the zoning office and does not automatically populate standard fields (such as case number), leaving that work to be done by hand. Moreover, ISD does not have dedicated IT support, which can delay the correction of problems that arise with the system.

Board members (other than the architect who comes to ISD to review plans several days ahead of the hearing) do not get access to the plans in advance nor do they have access to electronic versions of the files. Rather, they receive packets for each matter consisting of the project proposal, list of violations, and applicant identification (but not the plans or arguments supporting zoning relief) at the hearing. Recommendations from ONS and BPDA are not available electronically and indeed occur only orally at or shortly before the zoning hearing.

The absence of electronic filing makes it difficult to search for related cases. Thus, when an application is filed, the Board has no ready way to determine if the property involved has previously been before the Board, and if so, what the issues and outcome were.

We recommend that information technology improvements be adopted as soon as possible, including the filing and circulation of applications and plans electronically; the ability for the public to view and file applications and decisions remotely rather than having to come into ISD or City Hall; and providing tablets for Board members to use for public business and at hearings. The hearing room should be equipped with a large video screen so that plans and renderings can be displayed and easily viewed by both the Board and the public. Ideally, IT

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<sup>10</sup> There is an option to file electronic plans, but these then need to be printed to provide paper copies for ISD and BPDA.

upgrades should include features that allow searching of applications by property address and/or by requested relief.

People entitled to notice of hearing should have the ability to request email notice, and communication with applicants should be by email, if they consent to that method.

Besides making things easier for Board members, electronic recordkeeping would promote public access and allow the public to more easily learn of proposals made in particular neighborhoods, as well as the eventual decisions rendered. Similarly, posting the written decisions on the Board's website would improve public access. We understand that the Mayor's Office plans to issue an RFP soon for IT proposals to remedy the deficiencies we have noted, and we heartily endorse that development.

### **Training**

Currently, new Board members are provided with standard ethics (G.L. chapter 268A) and open meeting law training. They are also provided with a copy of the Massachusetts Continuing Legal Education book: *Boston Zoning: A Lawyer's Handbook*. The Executive Secretary of the Board gives them a quick overview of Board procedures. The training is described by members as very basic. Given that the Zoning Code is complex and frequently updated, we recommend more substantial on-board training for new appointees, both in terms of the Board's processes and the details and standards of the Zoning Code (at least on those provisions which Board members are most likely to confront). It also would be useful to provide Board members with copies of judicial decisions in cases that have been appealed. This could educate the Board on legal analysis and zoning issues that the courts see as significant. In addition, we recommend more robust ethics training than the state's on-line test,<sup>11</sup> which should include periodic (perhaps annual or semiannual) refreshers for all Board members in ethics, as well as on the Zoning Code and principles of zoning law. Opportunities for new members to discuss completed appeals with veterans could also be worthwhile. Given that several members of the current board are new, we recommend that the Mayor use his executive authority to issue an order requiring the development and implementation of such a training program as soon as possible.

### **Staffing for the Board and the Role of the Executive Secretary**

ISD currently has three administrative personnel devoted to zoning matters and 11 plan examiners (one of whom does not deal with zoning) plus one vacant plan examiner spot. The administrative staff at ISD is being overwhelmed by the volume of business and is plainly understaffed. Delays are inevitable. We believe two additional ISD administrative staff members could alleviate the overload and assist with the archiving of completed files. In addition, the Board's Executive Secretary has no paralegal support. The current Executive Secretary is an Assistant Corporation Counsel assigned to ISD. Approximately 80 percent of his

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<sup>11</sup>The state's online ethics training program must be completed every two years.

time is devoted to the Board of Appeal with the balance addressing other ISD work. He is responsible for taking and sometimes typing minutes of Board meetings, as well as reviewing proposed decisions submitted by applicants. In the absence of a proposed draft from the applicant, he is responsible for preparing the decision itself. We understand Board members do not typically ask the Executive Secretary for zoning law advice during hearings, but might ask questions relating to ISD. (If legal questions arise, they are referred to the City Law Department.)

We recommend the role of the Executive Secretary be expanded to full time and better defined. For example, the Executive Secretary could determine which appeals are appropriate for the expedited subcommittee process (described below) or handled in the Board final arbiter review.<sup>12</sup> Further, the Secretary could screen the agenda to make sure it is balanced and does not contain too many lengthy matters. The Secretary could also review past applications for the same property to advise the Board of historical issues at the site. Likewise, the Secretary could screen requests for extensions. With additional support in the form of a paralegal, the Secretary could focus on more substantive tasks rather than the ministerial tasks. This paralegal could help generate the initial minutes, drafts of routine decisions and help respond to public records requests now being handled by the clerks.

ISD's operations could be made more efficient by consolidating zoning clerical staff on the same floor as legal and file storage. Further, since clerical staff is responsible for hand-carrying various files to, and attending Board hearings, including setting the room up and closing up at the end of the day, arrangements should be made to make it easier for them to travel between ISD and City Hall.

ISD may benefit from an additional plan examiner (although technology enhancements may make that unnecessary).

### **Need for Written Protocols and Policies**

Several Board members noted that there are no written policies governing Board practice or describing how the Board handles particular types of cases. Apparently, there have been such policies at some point in the past.<sup>13</sup> The members consistently felt having policies would give guidance for dealing with similar matters, thereby promoting consistency. Policies could also be posted to help educate the public regarding the role of the Board of Appeal. Examples of possible topics for policies include requirements for takeout and parking and standards for roof structures in different neighborhoods. Procedural matters could also be addressed. Thus,

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<sup>12</sup> This is currently done by the clerical staff (for the subcommittee process) and the plan examiners (for final arbiter).

<sup>13</sup> We were provided copies of old ISD documents setting out procedures (pre-Hansen) for processing incoming appeals, arranging for legal notices, setting up the hearing room, and similar matters. These do not appear to have been updated for current practice. The Board also has a set of standard findings for different types of appeals and outcomes together with instructions for applicants who are preparing draft decisions.

policies could describe which matters are appropriate for the Thursday subcommittee hearings (on smaller, homeowner projects), provide instructions for applicants as to what materials (such as photos and renderings of the proposed project) to file and bring to hearings, and explain the use of the board "final arbiter" procedure (which currently has no basis in the Code or in any written guidance). Another matter that could be appropriate for a policy is the Board's practice on granting extensions for expiring zoning relief. Under the Zoning Code, variances and conditional use permits lapse and become "null and void" unless used within two years after the Board's decision is filed at ISD. See BZC §§ 6-1 and 7-1. Reportedly, there have been instances where requests for extensions were made after the two-year period had passed. The Board seems not to have a standard practice as to when an extension request must be filed and acted upon. It makes sense to implement a policy both to guide applicants and to assure the public that only extensions requested before the relief becomes void are allowed. These matters could all be included in the training process as well, and overseen by the Executive Secretary.

Developing policies will be worthwhile. It would appear to be appropriate for the Board with input and direction from its Executive Secretary, assistance from ISD zoning staff, and perhaps the Law Department as well, to prepare guidance for matters it considers to pose the same recurring issues. The public would benefit from knowing what to expect from the moment an application is submitted.

Finally, several Board members mentioned annoyance at receiving service at home of complaints appealing their decisions. Perhaps the City could adopt and publicize on the Board's website a policy to accept service at the Corporation Counsel's office.

### **Composition and Tenure of the Board**

Under Section 8 of the Enabling Act, Board members are appointed by the Mayor subject to confirmation by the City Council. The Board is supposed to be comprised of seven members and seven alternates (at present, there are a total of eight members and alternates, two of whom are holdovers.) Appointees are chosen from nominees of various organizations or interest groups specified in the Enabling Act. These include the Greater Boston Real Estate Board; the Boston Society of Architects; combined nominations of the Master Builders Association, Building Trades Employers Association, Associated General Contractors of Massachusetts, and the Contractors Association of Boston, Inc.; the Building Trades Council of Greater Boston; at-large appointment by the Mayor; and residential neighborhood organizations. The Enabling Act approach emphasizes expertise by identifying specific organizations apparently expected to have members knowledgeable about building and zoning matters. The appointment of Board members nominated by specific organizations is consistent with at least some other Boston boards and commissions.<sup>14</sup> There are also state-level boards whose members are chosen to

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<sup>14</sup>E.g. The Boston Zoning Commission, Conservation Commission, and Arts Commission and the Back Bay Architectural District Commission all are comprised of members nominated by specific organizations.

reflect certain constituencies.<sup>15</sup> A different model is followed by chapter 40A communities where appointments are at-large with no positions reserved specifically for nominees of any organization (presumably a Town could have a policy or by-law calling for certain expertise).<sup>16</sup> In those communities, expertise to guide the board is often provided by professional staff or consultants. The Boston approach can be beneficial to evaluation of technical matters but also removes the process from citizen decision-making (however, the addition of the neighborhood representatives in the early 1990s may have addressed that concern).

A 2008 study<sup>17</sup> of the composition of land-use boards for major cities nationwide found that boards were largely assembled from the “professional” classes with interests in real estate development. This conclusion was consistent with a 1937 study that found an underrepresentation of “blue collar interests.” The authors of the later study saw little change from the 1937 results and argued that bodies more representative of “ordinary citizens” could lead to greater community acceptance of results. It appears, however, that Boston’s Board of Appeal does reflect a variety of interests through the inclusion of members nominated by the trades as well as the neighborhood representatives. Moreover, the Mayor’s at-large appointment allows flexibility to fill in the gaps as a particular administration may see fit.

Most comments we received on this topic supported the continued reliance on expert nominees emphasizing, in particular, the critical importance of having an architect on the Board to interpret plans and understand design issues. Some people also supported the position for a real estate expert who can understand what a completed project will look like and how it could affect neighbors, and we agree with that view. Some people questioned the need for labor appointed members as to whether they add any special perspective. However, we believe these members can bring a valuable, practical understanding of construction and design issues.

Councilor Edwards recently introduced a proposal to revamp the Board composition. Her plan would eliminate all current positions and it would replace them with members with expertise in affordable housing, civil rights and fair housing, environmental protection and climate change, urban planning and neighborhood design, and zoning and the general laws as well as designate spots for home owners and renters rather than have specific organizations submit nominations. It appears many of these proposed positions would not be focused on zoning and the considerations that go into granting of variances (which is the bulk of the Board’s work). Rather, they seem more directed towards planning matters which are the purview of the BPDA and in many cases already considered by that agency, at least with respect to larger projects. In some cases, they seem designed to bring a certain perspective rather than expertise.

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<sup>15</sup> E.g. Massachusetts Board of Higher Education; Gun Control Advisory Board; Board of Registration of Hazardous Waste Site Cleanup Professionals.

<sup>16</sup> In many, if not most communities, the planning board is elected. We are not aware whether any zoning boards of appeals are elected.

<sup>17</sup> J. Anderson, *et al*, *A Study of American Zoning Composition and Public Attitudes Toward Zoning Issues*. 40 Urb. Law 689 (2008).

As noted, comments we received suggest it would be a serious mistake to remove the architect position. To the extent other issues, such as housing or environmental impacts, are relevant to a zoning appeal, City staff could be made available at Board meetings in the same manner that the Boston Transportation Department representative currently is. If, however, it is deemed important to have new interests represented on the Board, a model having all seats appointed at-large by the Mayor could maintain maximum flexibility to adjust criteria as circumstances and the needs of the City change.

Board members serve three-year terms with no restriction on reappointment. We believe consideration should be given as to whether term limits (either as a policy matter or an amendment to the Enabling Act) might provide the Board with a continuing source of new perspectives and fresh outlooks. We recognize that it may take a year or two for a new member to come up to speed and feel comfortable. Moreover, long-serving members are a source of institutional knowledge (and mentoring for new members), which could be lost through term limits. Nonetheless, the benefits of refreshing the membership may support term limits in some form. We suggest further study of this question.

The length of time it takes to appoint new members is excessive. Recent appointments have taken over a year from initial expression of interest to confirmation by the City Council. Delays reportedly can occur during background checks, review by the law department, City Council review, and even at the City Clerk. There also seems to be difficulty in getting the specified number of nominees from the nominating organizations. More concerted efforts should be made to anticipate vacancies (which would be helped by term limits), engage nominating organizations early, and expedite review by the Mayor's office.

A recent amendment to the Enabling Act presumably has helped address the problem of slow response from nominating organizations. 2018 Acts Ch. 373, §6 (eff. Jan. 7, 2019). The amendment provides that upon a vacancy occurring on the Board, the Mayor shall send written notice to the nominating entity by certified or registered mail. If the entity does not recommend nominees within 90 days of the notice, the Mayor may appoint someone at the Mayor's discretion.

### **Councilor Edwards's Proposal on Conflicts of Interest**

Councilor Edwards' recent proposal to amend the Enabling Act also seeks to address, among other things, potential conflicts of interest among Board members. This would be accomplished by barring people involved in the business of real estate construction, development, purchase or sale within Boston from serving on the Board and giving the City the ability to impose a five-year ban on such activities following termination of Board service. It is unclear whether the proposed ban is meant to include architects and other service providers who work on development projects. As discussed in the section of this memorandum entitled "Composition and Tenure of the Board", we believe it would be a mistake to exclude people with expertise in real estate from the Board.

With respect to conflicts of interest, Board members are currently subject to the state ethics statute, G.L. chapter 268A, which has robust provisions to prevent both actual conflicts and the appearance of conflicts. Moreover, the Enabling Act expands this protection by providing that no member of the Board shall participate in hearing or deciding any appeal involving property in which the member has held an ownership interest or received compensation for services rendered within two years of the date the appeal was filed (or any appeal involving property in the same geographic zoning district and seeking relief from the same provisions of the Code as any other appeal pending before the board in which the member has a financial or legal interest).

The question becomes whether to also prohibit a member's business involvement with properties that have received zoning relief. There seems to be no actual conflict under current law from a member's subsequent involvement with a property which had come before the Board during the member's tenure. Nevertheless, it appears inappropriate for a member to have business dealings concerning a property which receives zoning relief that the member voted on. The public may perceive that the member's vote was made to curry favor with the landowner in hopes of a future relationship.

Thus, it could enhance public confidence to prohibit a Board member from having any subsequent business involvement with a property for which the member voted on zoning relief, and to extend the prohibition for a short period of time after termination of service. Perhaps a one-year post-service "cooling off" period would be sufficient to remove concerns that the Board member's vote was intended as a way to seek future benefit. Although the situations are not precisely analogous, this time frame is comparable to the one-year post-employment ban under the state ethics statute applicable to former municipal employees appearing before a municipal agency in particular matters that were under their authority during the two years before leaving municipal employment. G.L. c. 268A, § 18(b). We note that the state ethics statute would already bar situations where the member had an arrangement with the zoning applicant or property prior to the Board vote.

### **Timeline and the Need for Deadlines**

Neither the Enabling Act nor the Zoning Code sets forth deadlines for Board action following the filing of an appeal.<sup>18</sup> ISD has 30 days to review a building permit application and issue a refusal letter, 780 CMR 105.3.1, and the applicant has 45 days to appeal that refusal to the Board. Enb. Act §8, par. 7. However, once the appeal has been filed, it can, and in some cases does, go into a black hole.<sup>19</sup> The wildcard in scheduling is the neighborhood/community association review process. The Board of Appeal will not schedule its hearing until notified by

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<sup>18</sup> The Board must provide at least 20 days public notice of the hearing and once the hearing has been held, must file its written decision ("detailed record of all its proceedings") within 90 days. Enb. Act §8. However, there is no deadline for holding the hearings.

<sup>19</sup> In contrast, the Zoning Code imposes deadlines for BPDA Article 80 review.

ONS that the community process has been completed. This practice has the potential to impose significant delays through simple inaction.

Upon receipt of an appeal, ISD notifies ONS. ONS community liaisons, who are assigned to various areas of the City, notify the applicant to arrange a meeting with the local neighborhood association (typically a private organization) and also to provide notice to abutters by posting a sign (prepared by ISD) at the project site. Neither of these processes is set forth in the Enabling Act or Zoning Code, but rather have been implemented as policy matters. Generally, only one abutters' meeting is held. However, the neighborhood review process is left to the association. People who run these associations have many other functions and interests besides development, and the procedures and development expertise of the different groups varies across the City.<sup>20</sup> Membership requirements and eligibility for voting are left to each association. Neighbors often are not focused on zoning issues but rather have concerns related to personalities or other extraneous matters. If so inclined, associations can drag out the review process and often schedule meetings several months out. Even if not intending to delay, association meeting schedules may be such that review takes several months. The issue can become particularly troublesome in the summer when many associations do not meet. More delays can occur when projects are located within the sphere of influence of multiple associations. We have heard of some matters taking nine months or more, though that timeline is not the norm.

We recommend establishing a firm time line for a Board decision following filing of an appeal. Thus, if the Board did not act timely, then unless the applicant agrees to an extension, the appeal would be constructively granted. This approach would be consistent with practice under Chapter 40A in the rest of the Commonwealth. It would require a change at least to the Zoning Code to impose timelines and perhaps to the Enabling Act. Alternatively, if a neighborhood group had not met and issued its recommendation by a certain date, then the Association would be deemed in favor of the project or to have no comments. Of course, such a policy could not preclude neighborhood residents from speaking at the hearing. Another, less draconian, alternative could simply be to have the Executive Secretary set a firm hearing date when the appeal is filed, which we understand had been the practice in the past. If the community process is not complete by the hearing, the Board could consider which party was responsible for the delay (and whether that was relevant) when reaching its decision. As an additional benefit, setting a firm hearing date would help BPDA in planning its schedule by letting it know when its recommendation will be needed.

Note that, in Chapter 40A communities (which typically have much lighter dockets than Boston), the zoning or planning board (and sometimes both) typically engages in extensive evaluation of projects, reviewing design and community input at the public hearings they conduct. These city and town boards frequently continue hearings for applicants to respond to board, consultant, and community questions and will require plan revisions as part of the hearing

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<sup>20</sup> Some groups appear well run and knowledgeable with an understanding of the zoning process. Others reportedly are less so.



process. Nevertheless, they operate under strict deadlines that can be extended only with applicant consent. See G.L. c. 40A, §9 (special permit), §15 (variances and appeals). In contrast, Boston conducts the community review process upfront (under the auspices of ONS and BPDA) without involving the Board of Appeal, and that process has no deadline. The Board appears to act as a final stop to determine if the review process has been done, and to weigh any competing or remaining disagreements.

### **Conduct of Hearings**

In light of its heavy docket at each meeting (comprising approximately 40 new matters), the Board tries to limit redundant comments. Often the chair will direct that only four supporters and four opponents may speak and then invites anyone else to sign a sheet indicating support or opposition to a project. The Board also will urge people to only provide new information and not duplicate prior speakers' comments. For the most part, interviewees approved of the process and felt it a necessary way to control the docket. There were reports, however, that some members of the public are upset by the restrictions (especially when their position loses), and this contributes to a negative impression of the Board. While this is a useful device to keep the heavy docket moving, it may implicate due process concerns by preventing testimony at a public hearing, and should be used sparingly.

### **Public Education**

The complexity of both the Boston Zoning Code and the City's zoning practices makes it difficult for laymen to understand the process. The absence of written rules and policies and the creation of arcane procedures like "final arbiter" put a premium on knowing zoning "lore." This can lead to a perception that the process is mysterious and arbitrary.

We recommend that written information be provided on the City website and made available to community groups describing the focus of Board of Appeal proceedings so that extraneous, non-zoning matters do not get aired or, if they do, that the public can understand that such matters will not be considered in reaching the zoning recommendation. Moreover, it could be useful to offer leaders of community groups training on zoning concepts. In the same vein, we understand that upon conclusion of testimony, Board members vote without any discussion among themselves about their view of the appeal. We think engaging in discussion in complex or controversial cases could serve two important functions. First, it would allow members to hear the reasoning of colleagues in reaching their own votes thereby providing a more considered decision. Second, it would allow the public to understand the reasons for the decision. We believe this would help remove the mystery surrounding Board action and reduce the mistrust many seem to have in the system.

## **APPENDIX A**

### **Recommendations List (Draft)**

#### **A. Board Hearings and Workload**

1. Add one additional meeting each quarter to reduce delays and reduce work load at individual sessions.
2. Remove jurisdiction for building code matters (would require Enabling Act amendment).
3. Explore ways to relax dimensional and density controls in Zoning Code to reflect existing neighborhood conditions and allow more as-of-right projects.
4. Remove requirement for a conditional use permit for GCOD projects and replace solely with an administrative process.
5. Improve timing of BPDA recommendations so they are available in advance of hearing.
6. Consider the due process implications of limiting number of speakers at the public hearings. Adjust the practice accordingly, to be used sparingly.

#### **B. Disclosure and Conflicts**

7. Establish a lower threshold for disclosure of beneficial interests for projects before the Board (excluding individual homeowner projects).
8. Consider implementing limitation on member's ability during service, and on a former member's ability following service, to have business dealings concerning a property on which the person had voted.

#### **C. Physical Enhancements to the Meeting Room**

9. Remove the non-handicapped accessible dais from the hearing room.
10. Continue work with acoustical engineer to improve sound quality in the hearing room. Change glass wall to reduce noise.
11. Establish new waiting area further down hallway away from hearing room.
12. Consider holding hearings in a different room if one is available.

#### **D. Technology Enhancements**

13. Digitize the filing process at ISD with upgrades that allow ready access to all users (board members, ISD staff, ONS, BPDA, and the public) and allow searching of applications by property address and requested relief.

14. Circulate plans electronically to BPDA and ONS.

15. Provide dedicated IT support for ISD.

16. If applicants consent, communicate with them by email.

17. Allow persons entitled to notice of hearing to request email notice.

18. Provide access to electronic copies of plans and zoning files to Board members in advance of hearings.

19. Email applicants' appeal petition (including argument in favor of zoning relief) to Board members in advance of hearing.

20. Provide tablets to board members to use for public business and at hearings.

21. Equip hearing room with video screen to be viewed by Board and public.

22. Post written decisions on Board's website within seven days.

#### **E. Training**

23. Provide enhanced on-board training for new appointees to include Board processes, Zoning Code, and principles of zoning law.

24. Provide more robust ethics training beyond the standard state online test.

25. Implement periodic, refresher training for all Board members concerning ethics, Zoning Code, and principles of zoning law.

26. Provide Board members with copies of judicial decisions in matters that have been appealed.

27. Encourage opportunities for new members to discuss completed appeals with senior members.

28. Require development and implementation of a training program as soon as possible.

#### **F. Staffing for the Board and the Role of the Executive Secretary**

29. Expand Executive Secretary position to full time and better define the role. Include responsibilities, e.g., to determine which appeals are appropriate for subcommittee,

screen the agenda to make sure it is balanced, screen requests for extension and requests for Board final arbiter; review past applications for property coming before Board to identify historical issues.

- 30. Provide two additional ISD administrative staff for zoning.
- 31. Provide a paralegal to assist the Executive Secretary.
- 32. Explore whether an additional plan examiner is needed, subject to technology enhancements.
- 33. Locate clerical ISD zoning staff with legal and zoning files storage.

#### **G. Written Protocols and Policies**

- 34. Update or develop written policies governing Board procedures and requirements for routine or recurring matters.
- 35. Clarify requirements to qualify for subcommittee review and expand its use to other projects, if possible, and more effectively screen eligible matters out of the regular process.

#### **H. Composition and Tenure of the Board**

- 36. Improve efforts to anticipate vacancies and take steps to expedite the nomination and approval process.

#### **I. Miscellaneous Recommendations**

- 37. Establish a time line for a Board decision following filing of an appeal.
- 38. Establish process whereby appeal would be constructively granted upon expiration of the time line (would require amendment to Enabling Act) or impose a time line for neighborhood association recommendation.
- 39. Provide written information on City website and directly to community group describing Board of Appeal process and matters that may be considered by the Board.
- 40. Offer leaders of community groups training on zoning concepts.
- 41. Encourage Board members to engage in discussion among themselves at the public hearings in complex or controversial cases prior to vote.
- 42. Adopt and publicize on Board's website a policy to accept service of process of judicial appeals at Corporation Counsel's office.