

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY, ss.

SUPERIOR COURT

CIVIL ACTION

NO. 22-2768B

JOYCE MICHAELIDIS, AS TRUSTEE OF )  
THE OF 3 DANA AVENUE REALTY TRUST, )

Plaintiff, )

v. )

THE CITY OF BOSTON ZONING BOARD OF )  
APPEAL, MR. MARK ERLICH, )  
CHAIRPERSON, et. al., )

and )

HHC ONE ARNOLD LLC, )

Defendants. )

**COMPLAINT PURSUANT TO BOSTON ZONING ENABLING ACT**  
**CHAPTER 665 of the ACTS of 1956**

**INTRODUCTION**

1. This is an appeal pursuant to the City of Boston Zoning Enabling Act, Chapter 665 of the Acts of 1956, as amended (the "Act"), from decisions of the Zoning Board of Appeal, City of Boston (the "Board"), concerning HHC ONE ARNOLD LLC's (the "Defendant") multifamily residential project proposed at 7 Dana Avenue in Boston's Hyde Park ("the Project").

2. Plaintiff is an immediate abutter, owning property at 3 Dana Avenue directly bordering 7 Dana Avenue.

3. On August 5, 2022, Defendant filed an appeal with the Board, seeking variances from the City of Boston Zoning Code, as the Boston Inspectional Services Department Plans Examiner had determined that the Project had multiple violations of the City's Zoning Code.

4. On October 4, 2022 the Board held a hearing on Defendant's Appeal.

5. Plaintiff, other residents, and representatives of the Hyde Park Neighborhood Association submitted written comments and additionally appeared and testified at the hearing, requesting that

the appeal be denied, as the Defendant had not presented the evidence required for the Board to make supported findings for grant of requested variances.

6. At the close of the hearing, the Board decided to grant the requested variances by a vote of 5 in favor and 1 opposed.

7. On November 15, 2022, the Board issued its decision granting Defendant's appeal; the decision was entered in the Inspectional Services Department on November 18, 2022. Appended hereto at Exhibit A is a certified copy of the decision.

8. The November 15, 2022 written decision confirms the 5 to 1 final vote, but also states, in likely inadvertent error, that the Board voted unanimously to grant the requested variances.

9. Plaintiff now brings this action challenging the Board's decision, as Plaintiff will suffer harm in their private property interests, which are protected by the Boston Zoning Code, should the Project be constructed in violation of provisions of the Code, and as approved by the Board.

### **THE PARTIES**

10. Plaintiff is an individual and Co-Trustee of the 3 Dana Avenue Realty Trust, owner of the 3 Dana Avenue property in Hyde Park. Plaintiff's daughter is a member of the Hyde Park Neighborhood Association and both she and plaintiff have participated in public review of the 7 Dana Avenue project, providing evidence in written and spoken form to the Board and requesting that Defendant's Appeal be denied.

11. Defendant HHC ONE ARNOLD LLC is a foreign Limited Liability Corporation organized under the laws of Delaware, with a principal place of business located at 27 Congress St. Salem, MA 01970, and which makes annual filings with the Commonwealth of Massachusetts Secretary of State.

12. Defendant Zoning Board of Appeal through its members/alternate members Chair Mark Ehrlich, Mark Fortune, Sherry Dong, Eric Robinson, Joseph Ruggiero, and Hansy Better Barraza, is the duly-constituted board established pursuant to the Act to hear appeals from orders or decisions of any administrative official of the City of Boston Building Commissioner in regard to matters regulated by the Act. The Board has a business address of 1010 Massachusetts Avenue, 4th Floor, Boston, MA, 02118.

### **RELATED CASE**

13. As of the date of this filing, a related case is pending in the Land Court Department, Michaelidis et al v. One Arnold LLC, No. 22 MISC 000261 (the "Related Case").

14. Plaintiff certifies that the Board of Appeal was advised in writing of this Related Case and further certifies that no cause of action in the pending Land Court case is raised in this Complaint.

## JURISDICTION

15. The Court has jurisdiction to hear this matter pursuant to Section 8 and Section 11 of the Act, as this Complaint is filed with the Court within 20 calendar days of the November 18, 2022 entry of the Board's decisions in the office of the Commissioner of the Inspectional Services Department.

## THE 7 DANA AVENUE PROJECT

16. Defendant applied to the City of Boston through its Inspectional Services Department and Planning and Development Agency, seeking to build a 27 unit rental housing project on a 13,633 sq ft property, owned by Defendant, at 7 Dana Avenue in Hyde Park, City of Boston.

17. 7 Dana Avenue is a 13,633 square foot parcel, level and rectangular in shape, with a size and ordinary topographical character similar to other properties on Dana Avenue and the surrounding planning Subdistrict and without any circumstances or conditions particular to the site and not to the neighborhood at large.

18. A residential building currently occupies the 7 Dana Avenue site.

19. Development in the Hyde Park area of Boston is governed by Article 69 - Hyde Park Neighborhood Plan of the City's Zoning Code.

20. 7 Dana Avenue is within a Hyde Park Neighborhood Shopping (NS) Subdistrict. Any development on the 7 Dana property is subject to NS Subdistrict provisions of the Hyde Park Neighborhood Plan.

21. **The proposed site is located in an overlay design district**, and the overall Neighborhood Shopping Subdistrict designation is further divided into NS-1 and NS-2 areas, each with certain different requirements and allowances.

22. 7 Dana Avenue is within an NS-2 Subdistrict, as is Plaintiff's 3 Dana Avenue property.

23. The Hyde Park Neighborhood Plan states that the purpose of a Neighborhood Shopping designation is to encourage the development of neighborhood businesses that provide essential goods and services to, as well as jobs and entrepreneurial opportunities for, the Hyde Park community.

24. Defendant seeks to construct a four (4) story rental building at the property, consisting of 27 residential apartments and 27 off-street parking spaces.

25. Multi-family housing is an allowed use in a Hyde Park NS-2 Subdistrict.

26. On the first floor of structures within an NS-2 Subdistrict, the Hyde Park neighborhood plan allows without condition specified local retail and community serving uses, such as bakeries

or garden supplies, so that the street-level uses are consistent with the business development purposes of the NS-2 Subdistrict.

27. Certain other first floor uses are conditional with the Hyde Park NS-2 Subdistrict; these include for example a hotel or car rental agency office.

28. At the same time, the Hyde Park NS-2 Subdistrict zoning prohibits certain street-level, first floor uses. These prohibited uses include a parking garage or housing units.

29. The 7 Dana Avenue project - while located in a Neighborhood Shopping Subdistrict - does not include any actual allowed or conditional Neighborhood Shopping uses on the first floor of the proposed building.

30. Consequently, the Project is not consistent with the stated purpose of the Hyde Park Plan - Article 69, as it does not encourage the development of neighborhood businesses that provide essential goods and services to, as well as jobs and entrepreneurial opportunities for, the Hyde Park community.

31. According to determinations of the City's Inspectional Services Department Plans Examiner, the proposed development triggered two violations of the Boston Zoning Code.

32. The first violation was to Zoning Code Article 69 Sec. 29, Off-Street Parking/Loading, described as: "Exterior loading bay design, maneuvering areas per Hudson maneuverability letter 3.21.22 and per stamped Architectural plans provided 3.28.22"

33. The second violation was to Zoning Code Article 69 Sec. 29.5, Off-Street Parking/Design, described as: "Access/maneuvering to required parking spaces >1 via one access bay per Patel/McKinnon opinion/design letter dated 3.8.22 and stamped architectural plans identifying proposed "two story" parking (1st flr/Basement) 3.28.22"

34. From the start of the project review process, Plaintiff and the Hyde Park Neighborhood Association, together with other abutters and residents, all expressed serious objection to the City's interpretation of provisions for this development proposed in a Hyde Park Neighborhood Shopping Subdistrict.

35. These concerns were expressed by Plaintiff, the Hyde Park Neighborhood Association, and others in writing and at public meetings held for the project.

36. Specifically, Plaintiff, the Association, and others drew attention to the plain language of the Hyde Park Neighborhood Plan and its business development purposes, the unambiguous prohibition of locating a parking garage on the first floor of any structure within an NS Subdistrict, and the adverse impacts and harm to Plaintiff of removing existing mature shade trees as part of the proposed project.

37. The 7 Dana Avenue project includes a parking garage on the first floor, in violation of the Hyde Park Neighborhood Plan.

38. The project also includes parking on a second partially below-ground level.
39. The City's Plans Examiner and Zoning Board of Appeal did not include the 7 Dana Ave first floor parking as a code violation requiring zoning relief.
40. Plans submitted to the Board and which served as the basis for the granted variances show that the project will require removal of mature **trees including along the property line that separates the 3 Dana Ave property from the 7 Dana Ave property, notwithstanding the fact they benefit the 3 Dana Avenue property. Certain of these trees are within a narrow boundary area which the Plaintiff claims via adverse possession in the Related Action.**
41. These mature trees provide shade and cooling, retain stormwater and soil, and provide privacy to Plaintiff's home and property. Removal of these trees will result in immediate and lasting harm to Plaintiff.
42. On September 21, 2022 the City of Boston released its "Urban Forest Plan".
43. The Urban Forest Plan listed the benefits of urban trees, which include shade and cooling, stormwater retention, carbon sequestration, natural habitat, and privacy benefits.
44. Under the 7 Dana Avenue plan improperly granted variances by the Board, these multiple benefits of urban trees will be lost to the detriment of Plaintiff.
45. Purposes of the Hyde Park Neighborhood Plan include protection of the environment, improvement of quality of life, and promotion of public safety, health, and welfare.
46. The City's Urban Forest Plan was prepared and adopted for similar purposes, including to inform Board review of projects such as 7 Dana Avenue, where removal of mature urban trees are a component of the plan presented for Board consideration.
47. As Board duties in appeal review include protection of the environment, improvement of quality of life, and promotion of public safety, health, and welfare, the Board must evaluate and make findings with respect to removal of these mature urban trees when deciding whether or not to grant zoning relief, making required findings all based in substantial evidence
48. Removal of mature urban trees will be generally injurious to the neighborhood and detrimental to the public welfare, and additionally impose unique, undue, and unnecessary injury to Plaintiff as the immediate neighbor at 3 Dana Avenue, by reducing shade, stormwater retention and carbon sequestration while increasing heat and diminishing privacy, all contrary to the express purposes of the Code.
49. Plaintiff now brings this action challenging the Board grant of variances for the 7 Dana Avenue project in order to protect personal, private property interests recognized by the Article 69 of the City of Boston Zoning Code and as the proposed project and the Board's approvals was in violation of Zoning Code.

50. Plaintiff has credible concern regarding harm from removal of the trees in the narrow boundary area that is the subject of the Related Action.

51. In particular, Defendant has failed to plant and maintain any landscaping on the adjacent 11 Dana Avenue multi-unit property recently constructed by Defendant, despite Defendant assurances to Plaintiff, other residents, and the City that they would provide extensive new landscaping around their new building.

52. Defendant's 11 Dana Avenue property is now essentially without any landscaping, and Plaintiff has reasonable concern that the same neglect will occur at 7 Dana Avenue, causing harm to Plaintiff's property owing to significantly reduced shade, cooling, and rainwater retention, with increased glare, heat, and damaging stormwater runoff.

53. **The Board, in its decision, concludes that the 7 Dana Avenue Property is “peculiarly different from the other properties in the neighborhood in that the Property cannot be used in similar fashion to other properties without variances being granted” but fails to describe or explain such “peculiar differences”, and as such the decision fails to articulate the findings necessary to justify the variances granted.**

54. **The decision paves the way for a project of immense size, scale and density that includes a cement lot and lacks green landscaping, trees and vegetation that is common to the neighborhood.**

55. **The decision paves the way for a project that will add significantly to the already congested traffic problems, increase noise and overburden much needed on-street parking.**

56. **These impacts will adversely affect the Plaintiff in the use and enjoyment of her property, as well as having similar adverse impacts on other residents in this neighborhood.**

#### COUNT I - APPEAL FROM BOARD'S DECISION

Chapter 665 of the Acts of 1956

Article 69 - Hyde Park Neighborhood Plan

57. The Board decision does not offer any evidence that the 7 Dana Avenue land has special circumstances or conditions, such as narrowness, shallowness, or lot shape, or any other exceptional topographical conditions, which are particular to the site but not the neighborhood.

58. In fact, the City's own property records show that the 7 Dana Avenue land and structure is nearly identical in its conditions with other abutting properties, including Plaintiff's property at 3 Dana Avenue.

59. Nor does the Board decision provide any evidence that application of all provisions of the Code - that is to say an "as of right project" - would deprive Defendant of reasonable use of the 7 Dana Avenue property.

60. The Board's decision granting the requested variances was thus not consistent with an essential requirement of the City of Boston Zoning Code.

#### COUNT II - APPEAL FROM BOARD'S DECISION

Chapter 665 of the Acts of 1956

Article 69 - Hyde Park Neighborhood Plan

61. The Board decision does not include any evidence that any practical difficulty exists, or that there is any demonstrable and substantial hardship concerning the site, which difficulties and hardships prevent Defendant from making reasonable use of the 7 Dana Avenue property without grant of zoning variances.

62. Further, the Board decision does not make any showing that the variances granted are the minimum necessary to allow Defendant reasonable use of the property at 7 Dana Avenue.

63. As a result, the Board's grant of the variances sought by Defendant failed to comply with an essential, separate requirement of the Zoning Code and must be set aside.

#### COUNT III - APPEAL FROM BOARD'S DECISION

Chapter 665 of the Acts of 1956

Article 69 - Hyde Park Neighborhood Plan

64. Despite the clear business development purposes of the Neighborhood Shopping (NS) Subdistrict designation, and the NS Subdistrict unambiguous limitations of first floor, street front uses to certain purposes that further business development, the Zoning Board of Appeal granted variances to a project which included no allowed, or conditional, business uses on the structure's first floor.

65. Thus, the Board's approval was not in harmony with the general purpose and intent of the Code, and thus injurious to the neighborhood generally and particularly to Plaintiff as an immediate abutter, and must be set aside on that basis.

#### COUNT IV - APPEAL FROM BOARD'S DECISION

Chapter 665 of the Acts of 1956

Article 69 - Hyde Park Neighborhood Plan

66. Table B of Article 69 states that in a Neighborhood Shopping Subdistrict, a parking garage is an allowed use, but only: "Provided that such parking is located: (1) underground, or (2) above the ground floor in a structure in which the ground floor is occupied by retail, hotel, service or office uses; otherwise Forbidden." Fn. 27

67. Contrary to the clear requirements of Table B limiting parking to underground locations and above the ground floor, the Zoning Board allowed a parking garage on the first floor of 7 Dana Avenue and did not find such first floor parking as a violation of the Code.

COUNT V - APPEAL FROM BOARD'S DECISION

Chapter 665 of the Acts of 1956

Article 69 - Hyde Park Neighborhood Plan

68. The Board improperly and without any factual basis granted variances for a plan which results in removal of mature shade trees, in violation of Article 69 provisions concerning protection and improvement of the environment and of public health, welfare, and quality of life generally, to the harm and detriment of Plaintiff.

69. As set forth above, an actual controversy exists between the Parties concerning the Decision.

70. Plaintiff has a beneficial interest in Zoning Board of Appeal compliance with all Zoning Code provisions for projects at and near their property and has reasonable expectation that the Board will properly enforce all provisions of the Code.

71. The harms which will be directly caused by development of the 7 Dana Avenue site under the terms approved by the Board of Appeal will individually and cumulatively adversely and substantially affect Plaintiff interests, and which interests are protected under the City of Boston Zoning Code.

72. Plaintiff has no other remedy or route of appeal other than by this action.

73. A copy of the Board's Decision dated November 15, 2022 and entered on November 18, 2022 is attached to this Complaint at Exhibit A.

WHEREFORE, Plaintiff respectfully requests that this court:

- i. Enter judgment in favor of Plaintiff on Counts I-V of this Complaint; and
- ii. Find that granting zoning relief for 7 Dana Avenue was beyond the Board's authority, contrary to provisions of the zoning code, other applicable zoning requirements, and that therefore the Board's decisions should be annulled; and
- iii. Remand this matter to the Zoning Board of Appeal for further consideration consistent with this judgment; and
- iv. Award attorneys' fees, if any, and court costs to Plaintiff; and
- v. Enter such further and other relief as the Court deems equitable and just.



Respectfully submitted,

The Plaintiff,

JOYCE MICHAELIDIS, AS TRUSTEE OF  
THE OF 3 DANA AVENUE REALTY TRUST,

By her Attorney,

SHEEHAN PHINNEY BASS & GREEN, PA



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Damon M. Seligson (BBO #632763)

28 State Street, Floor 22

Boston, MA 02109

(617) 897-5600

[dseligson@sheehan.com](mailto:dseligson@sheehan.com)

Date: December 7, 2022