

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
CIVIL ACTION NO.

22-1632B

BREYAR CORP., BARBARA A. DECK as  
Trustee of the GLENVILLE AVENUE  
REALTY TRUST, NOOR MOON BALBAKY,  
and MASS GREENWOODS, LLC,  
Plaintiffs,

v.

OPCO ALLSTON, LLC; and  
CHRISTINE ARAUJO, MARK FORTUNE,  
MARK EHRlich, JOSEPH RUGGIERO,  
TYRONE KINDELL JR., KOSTA LIGRIS,  
and ERIC ROBINSON, as they are Members of  
the CITY OF BOSTON BOARD OF APPEAL,  
Defendants.

SUFFOLK SUPERIOR COURT  
CIVIL CLERK'S OFFICE  
2022 JUL 19 P 1:01  
MICHAEL JOSEPH DONOVAN  
CLERK / MAGISTRATE

**COMPLAINT**

**Introduction**

1. This is an appeal pursuant to the Boston Zoning Enabling Act, St. 1956, c. 665, § 11, as most recently amended by St. 1994, c. 461, from a decision by the City of Boston Board of Appeal granting a variance and a conditional use permit under the Boston Zoning Code to the defendant OPCO Allston, LLC, for its proposed operation of a retail cannabis establishment at 140-144 Harvard Avenue, Allston, Massachusetts. The Board's Decision was entered in the Boston Inspectional Services Department on July 1, 2022. A certified copy of the Decision is attached to this Complaint as Exhibit A (the "Decision").

**Parties**

2. Plaintiff Breyar Corp. is a Massachusetts corporation that owns and operates a retail furniture store known as Basics Carpet & Furniture, located at 151 Harvard Avenue, Allston, Massachusetts, which is its principal place of business. In this Complaint, Plaintiff

Breyar Corp. will be referred to as “Basics Carpet & Furniture,” and 151 Harvard Avenue will be referred to as the “Basics Carpet & Furniture Property.”

3. Plaintiff Barbara A. Deck is an individual who resides at 9 Hobart Road, Newton Massachusetts, and is a trustee of the Glenville Avenue Realty Trust, which is the owner of 124 Glenville Avenue, Allston, Massachusetts (the “Balbaky Property”).

4. Plaintiff Noor Moon Balbaky is an individual who resides at 124 Glenville Avenue, Allston, Massachusetts (again, the “Balbaky Property”).

5. Plaintiff Mass Greenwoods LLC (“Greenwoods”) is a Massachusetts limited liability company with a principal office at 31 Greenwood Street, Dorchester, Massachusetts. Greenwoods’ principal place of business is at 116-126 Harvard Avenue, Allston, Massachusetts (the “Greenwoods Property”). In this Complaint, the Basics Carpet & Furniture Property, the Balbaky Property and the Greenwoods Property will be referred to as the “Plaintiffs’ Properties.”

6. Defendant OPCO Allston, LLC (“OPCO”), is a Massachusetts limited liability company with a principal office at 44 School Street, Suite 505, Boston, Massachusetts.

7. Defendants Christine Araujo, Mark Fortune, Mark Erlich, Joseph Ruggiero, Tyrone Kindell Jr., Kosta Ligris, and Eric Robinson are individuals who are named in their capacities as members of the City of Boston Board of Appeal (the “Board”). The Board’s address is 1010 Massachusetts Avenue, Boston, Massachusetts.

### **The OPCO Proposal and Its Impacts**

8. Defendant OPCO seeks to operate a retail cannabis establishment at 140-144 Harvard Avenue, Allston, Massachusetts (the “OPCO Property”), which would operate seven days a week, from 9:00 am until 9:00 pm (the “OPCO Proposal”).

9. OPCO’s retail cannabis establishment will sell Cookies brand cannabis products, and Dr. Greenthumb’s brand cannabis products. The Cookies and Dr. Greenthumb’s brands are

very popular and have a very loyal following. Cookies is a \$1 billion company, with approximately 50 retail locations, that was founded by Berner, a well-known recording artist. Dr. Greenthumb's also has numerous retail locations, and was founded by B-Real, another well-known recording artist. According to OPCO, Cookies has an "international footprint," and "is the number one selling cannabis brand in the nation." According to OPCO, Dr. Greenthumb's and Cookies have more than 300,000 "unique monthly customers across all stores." According to OPCO, Dr. Greenthumb's cannabis products are a "proprietary blend" that are "very well regarded and very well sought after, and would only be available at this location in this area." On information and belief, OPCO's customers will drive from various parts of Boston and other municipalities to purchase the Cookies and Dr. Greenthumb's products.

10. On information and belief, Dr. Greenthumb's has an agreement with Driven Deliveries, Inc., in which Driven Deliveries provides on-demand deliveries of cannabis products from Dr. Greenthumb's retail cannabis establishments.

11. OPCO's proposed retail cannabis establishment will, in the vicinity of the OPCO Property and the Plaintiffs' Properties: (a) materially increase and exacerbate motor-vehicle traffic and congestion, where there is already significant motor-vehicle traffic and congestion; (b) materially increase the demand for public parking spaces, where such parking spaces are already in high demand and short-supply; and (c) create and exacerbate hazards to vehicles and pedestrians.

12. Under the OPCO Proposal, a loading dock in the rear of the OPCO Property will be relied upon for deliveries, and a small parking area in the rear of the OPCO Property will be relied upon for some of OPCO's staff parking. Vehicular access to the rear of the OPCO Property is by a narrow, winding, alleyway with poor sightlines and requires vehicles to drive over a heavily utilized public sidewalk.

**The Required Zoning Relief for the OPCO Proposal**

13. The applicable use regulations in Article 51 of the Boston Zoning Code provide that a cannabis establishment may operate with a conditional use permit, “provided that any cannabis establishment shall be sited at least one-half mile or 2,640 feet from another existing cannabis establishment.” If the proposed cannabis establishment will violate this siting restriction – commonly referred to as the cannabis establishment buffer zone – then in addition to the conditional use permit, the proposed establishment also requires a variance.

14. Months before OPCO appeared before the Board seeking approval of the OPCO Proposal, the Board approved plaintiff Greenwoods’ retail cannabis establishment at the Greenwoods Property.

15. The OPCO Property is located approximately 250 feet, or less, from the Greenwoods Property.

16. Under Article 51 of the Boston Zoning Code, the OPCO Proposal requires (a) a variance, because it would be located within 2,640 feet of the Greenwoods retail cannabis establishment at the Greenwoods Property; and (b) a conditional use permit.

**The Variance Granted by the Board Must Be Annulled**

17. In its Decision, the Board granted OPCO a variance from its violation of the required 2,640-foot cannabis establishment buffer zone in Article 51 (the “Variance”).

18. The OPCO Proposal does not satisfy the standards or requirements for a variance under the Boston Zoning Code.

19. There are no special circumstances or conditions that are peculiar to the OPCO Property – but not the neighborhood – which are such that applying the Code’s 2,640 foot cannabis buffer zone would deprive OPCO of the reasonable use of the Property.

20. The OPCO Property is not exceptionally narrow.

21. The OPCO Property is not exceptionally shallow.

22. The shape of the OPCO Property is not exceptional.

23. The topography of the OPCO Property is not exceptional.

24. The OPCO Property is typical for the neighborhood.

25. There are other reasonable uses of the OPCO Property that are allowed by right, without the need for a variance.

26. There are other reasonable uses of the OPCO Property that are allowed with a conditional use permit, without the need for a variance.

27. There are no reasons of practical difficulty, nor any demonstrable or substantial hardship, that make the granting of the Variance necessary for the reasonable use of the OPCO Property.

28. A literal enforcement of the provisions of the Boston Zoning Code would not involve substantial hardship to OPCO.

29. The Variance granted by the Board is not the minimum variance that would accomplish the purpose of enabling the reasonable use of the OPCO Property.

30. The Decision, the Variance, and the OPCO Proposal are not in harmony with the general purpose and intent of the Boston Zoning Code.

31. The Decision, the Variance, and the OPCO Proposal will be injurious to the neighborhood, and otherwise detrimental to the public welfare.

**The Conditional Use Permit Granted by the Board Must Be Annulled**

32. In its Decision, the Board granted OPCO a conditional use permit for the OPCO Proposal pursuant to Article 51 of the Boston Zoning Code (the "Conditional Use Permit").

33. The OPCO Proposal does not satisfy the standards or requirements for a conditional use permit under Article 6 of the Boston Zoning Code.

34. The OPCO Property is not an appropriate location for the proposed retail cannabis establishment.

35. The OPCO Proposal will adversely affect the neighborhood.

36. The OPCO Proposal will create and exacerbate serious hazards to vehicles and pedestrians.

37. The OPCO Proposal will create a nuisance.

38. Adequate and appropriate facilities will not be provided for the proper operation of OPCO's proposed retail cannabis establishment at the OPCO Property.

#### **Procedural Defects and Irregularities**

39. At the Board's hearing concerning the OPCO Proposal, the Board did not provide adequate opportunity for opponents of the Proposal to be heard and to present their arguments.

40. On information and belief, OPCO – either directly, or through its agents, representatives or other third parties – paid or offered to pay one or more members of the public to make comments in support of the OPCO Proposal during the permitting and approval process for the OPCO Proposal.

#### **The Plaintiffs Have Standing**

41. Plaintiff Basics Carpet & Furniture operates a store that is directly across the street from the OPCO Property. The distance between the OPCO Property and the Basics Carpet & Furniture Property is approximately 70 feet. Plaintiff Basics Carpet & Furniture is an abutter of the OPCO Property, or an abutter to an abutter of the OPCO Property, within 300 feet. Plaintiff Basics Carpet & Furniture is a party in interest with a presumption of standing.

42. Basics Carpet & Furniture has operated its store (at the Basics Carpet & Furniture Property) for decades, has a lease with many years remaining, and intends to continue operating its store (at the Basics Carpet & Furniture Property) for many years into the future.

43. The Greenwoods Property – the location of plaintiff Greenwoods’ retail cannabis establishment – is on the same block as the OPCO Property, approximately 250 feet or less from the OPCO Property.

44. Greenwoods has a lease for the Greenwoods Property with many years remaining, and intends to operate its retail establishment many years into the future.

45. The OPCO Proposal – and the Decision, Variance and Conditional Use Permit that purportedly authorize the OPCO Proposal – will have a significant adverse impact on Plaintiffs Basics Carpet & Furniture and Greenwoods, and their property interests by, among other things: significantly increasing traffic and congestion, and creating and exacerbating parking problems and safety hazards in the vicinity of their businesses, and for their staff and customers, and harming the values of their long-term leasehold interests.

46. Plaintiff Barbara A. Deck, as Trustee of the Glenville Avenue Realty Trust, owns the fee interest in the Balbaky Property. A major purpose of the 2,640-foot cannabis buffer zone requirement is to prevent the creation of so-called “green zones” – a concentrated area of cannabis establishments, that will harm property values in the neighborhood. The OPCO Proposal will establish a green zone in the neighborhood, harming the value of the Balbaky Property.

47. Plaintiff Noor Moon Balbaky relies on the public, on-street parking spaces on Glenville Avenue – in the vicinity of the Balbaky Property, where she lives – to park her car. The Balbaky Property has no off-street parking. The on-street parking spaces on Glenville Avenue are in high demand. The OPCO Proposal will increase the use of, and demand for, the public parking spaces on Glenville Avenue, which is less than 250 feet from the OPCO Property. The OPCO Proposal will materially decrease the availability of public parking spaces on Glenville Avenue for Plaintiff Noor Moon Balbaky.

48. The Plaintiffs and their property interests will be directly harmed by the OPCO Proposal, and by the Decision, Variance, and Conditional Use Permit that purportedly authorize the OPCO Proposal.

49. The Plaintiffs are persons aggrieved by the Decision, the Variance, the Conditional Use Permit, and the OPCO Proposal, and have standing to bring and maintain this zoning appeal.

**COUNT I**  
**(Appeal Pursuant to St. 1956, c. 665, § 11)**

50. The Plaintiffs repeat and incorporate by reference as though fully set forth herein the allegations in paragraphs 1-49.

51. The Board's Decision granting the Variance and the Conditional Use Permit is legally insufficient, is based on legally and factually untenable grounds, lacks the required findings, makes only a bare recital or mere recitation of the Boston Zoning Code's standards and requirements, is arbitrary and capricious, exceeds the Board's authority, and must be annulled.

**REQUESTS FOR RELIEF**

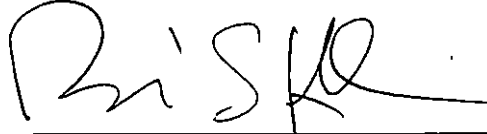
WHEREFORE, the Plaintiffs respectfully request that this Court:

1. enter judgment for the Plaintiffs;
2. annul the Decision of the Board;
3. award the Plaintiffs their reasonable costs; and
4. order such other and further relief as the Court deems appropriate.



MASS GREENWOODS, LLC,  
BARBARA A. DECK as Trustee of the  
GLENVILLE AVENUE REALTY TRUST,  
NOOR MOON BALBAKY, and  
BREYAR CORP.,

By their attorney,



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Brian S. Kaplan (BBO #639922)  
bkaplan@kaplanlaw-llc.com  
KAPLAN LAW LLC  
123 South Street, Second Floor  
Boston, MA 02111  
(617) 558-5582 (phone)  
(617) 558-0250 (fax)

Dated: July 19, 2022

# EXHIBIT A



City of Boston  
Board of Appeal

**NOTICE OF DECISION**  
**CASE NO. BOA1281800**  
**PERMIT # ALT1257418**  
**APPEAL SUSTAINED**  
**WITH PROVISOS**

In reference to appeal of

OPOCO Allston, LLC

Concerning premises

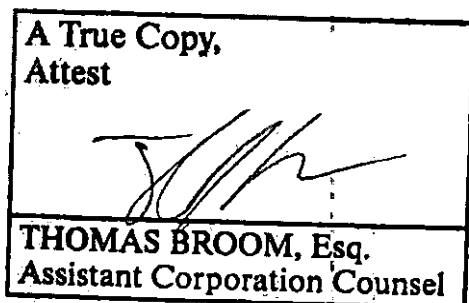
140-144 Harvard Avenue, Ward 21

to vary the application of the Zoning Act, Ch. 665, Acts of 1956, as amended, in this specific case, I beg to advise that the petition has been granted.

Decision has been filed in the office of the Commissioner of the Inspectional Services Department, 1010 Massachusetts Avenue, Fourth Floor, Boston, MA 02118, and is open for public inspection.

Date of entry of this decision in the Inspectional Services Department was July 01, 2022.

Please be advised, due to the ongoing COVID-19 public health emergency, this decision of the Board has been reviewed and signed electronically by the signing Board Members. The addition of the certification of the Executive Secretary to the signature page attests that each Board Member who has signed this decision electronically has had an opportunity to review the written decision and has given his or her express written permission to the Executive Secretary to sign this decision electronically.



FOR THE BOARD OF APPEAL

/s/Thomas J. Broom

Thomas J. Broom

Principal Administrative Assistant



DECISION OF THE BOARD ON THE APPEAL OF

June 7, 2022  
DATE

OPOCO Allston, LLC

to vary the terms of the Boston Zoning Code, under Statute 1956, Chapter 665, as amended, Section 8,  
at premises: 140-144 Harvard Avenue, Ward – 21

For the terms of the Boston Zoning Code (see Acts of 1956, c. 665) in the following respect: **Variance, Conditional Use Permit, and/or other relief as appropriate**

<u>Violation</u>	<u>Violation Description</u>	<u>Violation Comments</u>
Article 51 Section 16	Use Regulations	Use: Cannabis Retail Store: Conditional
Article 51 Section 16	Use Regulations	Cannabis Establishment Location shall be sited at least one-half mile or 2,640 feet from another existing Cannabis Establishment

Purpose: Change of Occupancy to a Cannabis Establishment.

In his formal appeal, the Appellant states briefly in writing the grounds of and the reasons for his appeal from the refusal of the Building Commissioner, as set forth in papers on file numbered BOA-1281800 and made a part of this record.

In conformity with the law, the Board mailed reasonable notice of the public hearing to the petitioner and to the owners of all property deemed by the Board to be affected thereby, as they appeared on the then most recent local tax lists, which notice of public hearing was duly advertised in a daily newspaper published in the City of Boston, namely:


THE BOSTON HERALD on Tuesday, May 17, 2022

The Board took a view of the petitioner's land, examined its location, layout and other characteristics. The Boston Planning & Development Agency was sent notice of the appeal by the Building Department and the legal required period of time was allotted to enable the BPDA to render a recommendation to the Board, as prescribed in the Code.

After hearing all the facts and evidence presented at the public hearing held on Tuesday, June 7, 2022 in accordance with notice and advertisement forementioned, the Board finds as follows:

The Appellant appeals to be relieved of complying with the aforementioned section of the Boston Zoning Code, all as per Application for Permit#ALT-1257418 and October 8, 2021 plans submitted to the Board at its hearing and how on file in the Building Department.

A True Copy,  
Attest



THOMAS BROOM, Esq.  
Assistant Corporation Counsel



DECISION OF THE BOARD ON THE APPEAL OF

140-144 Harvard Avenue, Ward 21  
BOA-1281800  
Date of Hearing: June 7, 2022  
Permit # ALT-1257418  
Page # 2

In this appeal, the Petitioner seeks a Conditional Use Permit pursuant to the Boston Zoning Code within the Allston/Brighton Neighborhood Zoning District and the CC-1 Subdistrict relating to use under Article 6, § 6-3, and a Variance pursuant to Article 7, § 7-3 on account of its operations within one-half mile of an existing Cannabis Establishment, to operate an adult use Cannabis Establishment at the building located at 140-144 Harvard Ave, Boston, MA (Ward 21) ("the Property").

**BACKGROUND**

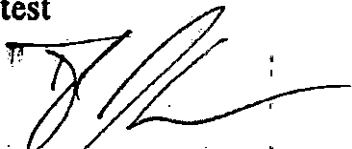
The Petitioner received a zoning code refusal from Plans Examiner Thomas J. White on or about April 27, 2022, on behalf of the Commissioner of Inspectional Services. It appealed said refusal and was given a public hearing date of June 7, 2022.

At the public hearing the Petitioner presented facts and materials, as to how it satisfied the criteria for a conditional use permit, as set forth in the Boston Zoning Code and public testimony was taken. The Mayor's Office of Neighborhood Services (ONS) testified to the community process conducted by the applicant. Letters of support were supplied by the applicant, the office of the District City Councilor and At-Large Councilor Flaherty was in non-opposition, State Representatives Moran and Honan testified in support at the hearing. There were also letters and testimony in opposition. The state required and properly noticed Community Outreach Meeting was also held.

**DOCUMENTS FILED WITH THE CITY AND/OR THE BOARD**

The Petitioner filed the following documents:

- Appeal and Filing Fee;
- Plans and survey;
- A Host Community Agreement executed by the Petitioner and the City of Boston; and
- Correspondence of the Boston Cannabis Board demonstrating its vote of support.

A True Copy,  
Attest  
  
THOMAS BROOM, Esq.  
Assistant Corporation Counsel



DECISION OF THE BOARD ON THE APPEAL OF

140-144 Harvard Avenue, Ward 21  
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**FINDINGS**

Based on the evidence before it, and pursuant to Article 6, § 6-3, the Board makes the following findings:

**a) The specific site is an appropriate location for such use;**

The Cannabis Establishment is a contemplated use in this Zoning District. The location of the Cannabis Establishment is an appropriate location. The Petitioner presented that the Cannabis Establishment is centrally located and easily accessible via public or private means of transportation.

**b) The use will not adversely affect the neighborhood;**

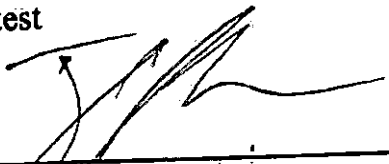
The Cannabis Establishment will not adversely affect the neighborhood, or alter the essential character of the neighborhood, or produce an undesirable change in the character of the neighborhood. The Petitioner submitted that, pursuant to state and local regulations, the Cannabis Establishment is specifically designed to minimize and mitigate any impact on the neighborhood. It will be equipped with state-of-the-art security features including video surveillance and private security.

**c) There will be no serious hazard to vehicles or pedestrians from the use;**

The Petitioner submitted that the Cannabis Establishment will not disturb the existing right of way, pedestrian access, and will not cause a serious hazard to vehicle or pedestrian traffic.

**d) No nuisance will be created by the use; and**

The Petitioner submitted that the Cannabis Establishment will not produce any unusual noise or odors, fumes or waste nor will it cause any serious hazard to pedestrians or create a nuisance. The Petitioner is and will continue to be subject to rigorous requirements set for by the CCC to ensure the proper operation of the Cannabis Establishment.

A True Copy,  
Attest  
  
THOMAS BROOM, Esq.  
Assistant Corporation Counsel



DECISION OF THE BOARD ON THE APPEAL OF

140-144 Harvard Avenue, Ward 21  
BOA-1281800  
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**e) Adequate and appropriate facilities will be provided for the proper operation of the use.**

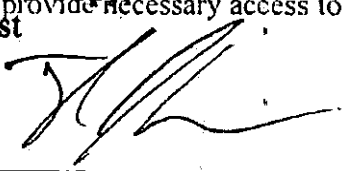
The Petitioner presented that the Cannabis Establishment will be fitted with high-end equipment, providing adequate and appropriate facilities to enhance its operation. The Petitioner further states that it has designed the Cannabis Establishment in a manner that will be in keeping with the neighborhood, while preserving its ability to provide vital services. The Cannabis Establishment will benefit the City and promote the health and welfare of its residents by providing quality service to its customers, and will operate in a professional manner.

Furthermore, based on the evidence before it, and pursuant to Article 7, § 7-3, the Board makes the following findings:

- (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 purposes and intent of this Code and will not be injurious to the neighborhood or otherwise detrimental to the public welfare

Based on the foregoing Findings, the Board finds that the requested relief may be granted in harmony with the general purpose and intent of the Code and will not be injurious to the neighborhood or otherwise detrimental to the public welfare. The Cannabis Establishment will provide necessary access to customers. It will serve as a benefit to the City by fulfilling the state

A True Copy  
Attest



**THOMAS BROOM, Esq.**  
Assistant Corporation Counsel



City of Boston  
Board of Appeal

DECISION OF THE BOARD ON THE APPEAL OF

140-144 Harvard Avenue, Ward 21  
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mandate that Cannabis Establishments need to be allowed to open and operate, while ensuring the safety of the public.

**CONCLUSION**

Based on the evidence, the Board finds that all conditions required for the granting of a Conditional Use Permit under Article 6 § 6-3 and a Variance under Article 7 § 7-3 of the Zoning Code have been met.

A True Copy,  
Attest

A handwritten signature in black ink, appearing to read "T. Broom", written over a horizontal line.

THOMAS BROOM, Esq.  
Assistant Corporation Counsel





DECISION OF THE BOARD ON THE APPEAL OF

140-144 Harvard Avenue, Ward 21  
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Therefore, acting under its discretionary power, the Board (the members and substitute member(s) sitting on this appeal) voted to grant the requested Variances and Conditional Use permits as described above, annuls the refusal of the Building Commissioner and orders him to grant a permit in accordance with this decision, with the following proviso, which, if not complied with, shall render this decision null and void.

APPROVED AS TO FORM:

Assistant Corporation Counsel

PROVISO(S): The relief granted by this decision is for this applicant only.

Signed: \_\_\_\_\_ June 28, 2022

With my affixed signature I, the Executive Secretary of the Board of Appeal, hereby certify that the signatories of this decision have given their express permission for electronic signature:

Thomas J. Broom, Esq.  
Executive Secretary  
Board of Appeal

- /s/ Christine Araujo  
Christine Araujo- Chair (Voted In Favor)
- /s/ Mark Fortune  
Mark Fortune – Secretary (Voted In Favor)
- /s/ Mark Erlich  
Mark Erlich (Voted In Favor)
- /s/ Jeanne Pinado  
Jeanne Pinado (Alternate) (Voted In Favor)
- /s/ Kosta Ligris  
Kosta Ligris (Voted In Opposition)
- /s/ Eric Robinson  
Eric Robinson (Voted In Favor)
- /s/ Sherry Dong  
Sherry Dong (Voted In Favor)

A True Copy,  
Attest

THOMAS BROOM, Esq.  
Assistant Corporation Counsel