

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT

CIVIL ACTION NO. 22-2403 G

MARY BETH SWEENEY

Plaintiff,

v.

CITY OF BOSTON BOARD OF APPEAL,
CHRISTINE ARAUJO, SHERRY DONG
MARK ERlich, MARK FORTUNE
JEANNE PINADO, ERIC ROBINSON,
and JOSEPH RUGGIERO,
as Members of the City of Boston
Board of Appeal, and
MICHAEL DOHERTY,

Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2022 OCT 20 A 10:17
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

COMPLAINT

1. Plaintiff Mary Beth Sweeney ("Ms. Sweeney" or "Plaintiff") brings this action pursuant to Section 11 of the Boston Zoning Enabling Act, Chapter 665 of the Acts of 1956, as amended (the "Enabling Act") to appeal the decision entered with the Inspection Services Department ("ISD") on September 30, 2022 (the "Decision"),^{1/} of the City of Boston Board of Appeals (the "Board"). The Decision purports to approve an application for zoning relief submitted by Michael Doherty (the "Proponent") in connection with the proposed redevelopment of the premises located at 40-42 Cross Street, Ward 3, Boston, Massachusetts (the "Premises"). The zoning relief granted by the Board would allow the Proponent to construct a five (5) story, one-

^{1/} A true and accurate copy of the Decision is attached hereto at Exhibit A.

hundred and thirty-four (134) room hotel (the “Proposed Project”) that did not follow the proper community process and runs afoul of multiple provisions of the Boston Zoning Code (the “Code”).

2. The Decision stems from an improper process that concluded with the Board granting numerous variances and conditional use permits without making any of the necessary findings required by the Code. During a hearing held via Zoon on August 23, 2022 (the “Hearing”), the Board did not consider whether the Proposed Project met *any* of the requirements to grant a variance or conditional use permit, instead focusing on concerns such as the availability of parking and ease of access from a designated drop-off area to the entrance of the proposed hotel. Further, the Decision simply stated “the Board of Appeal finds that all of the following conditions are met” and recited the standards for granting variances and conditional use permits enumerated in the Code verbatim, without actually making *any* of the required findings, in direct violation of the law and past reprimand from this court.^{2/} The Board seems to believe that the more provisions of the Code a project violates, the less attention it must pay to each individual violation.

3. Against this backdrop, Plaintiff brings this action to challenge the Board’s Decision and alleges that, among other things, the Board failed to make the requisite findings to support the zoning relief needed for the Proposed Project; the Proposed Project does not meet the legal standards for the relief sought by the Proponent; this Decision is arbitrary, capricious, and inconsistent with law; and the Proposed Project would cause harm that is specific to Plaintiff and not to the public generally.

^{2/} See *Van Buren v. S. Boston New Hous., LLC*, No. 87590, 02-5467-A, 2005 Mass. Super. LEXIS 29, at *17-18 (Mass. Super. Ct. Feb. 4, 2005) (Sikora, J.) (“The multiple warnings of the courts through more than 75 years have not substantially affected the quality of factfinding by the Board of Appeal of Boston. This case typifies a tradition of illusory findings wrapped in the general boilerplate of its Enabling Act and Code . . . Decisions of this caliber proceed continuously into the Suffolk Superior Court. The decisions display no deliberation upon the legal merits of a variance application. They show no sign of any contribution from a legal mind. As long as they continue, the tradition of competent judicial review will invalidate them under the governing legal standards.”).

4. For the reasons set forth herein the Decision exceeds the authority of the Board and should be annulled.

PARTIES

5. Plaintiff Mary Beth Sweeney is the owner of the residential property at 26 Stillman Street, Apt. 2-4, Boston, MA (the "Sweeney Property").

6. Defendant City of Boston Board of Appeal is a municipal board of the City of Boston, with a usual place of business at Boston City Hall, One City Square, Room 801, Boston, Massachusetts 02201 and the Board of Appeal maintains an office located at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118. The Board rendered the Decision allowing the Proposed Project.

7. Defendant Christine Araujo is named in her capacity as chairperson and member of the Board, and in that capacity has her usual place of business at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118.

8. Defendant Sherry Dong is named in her capacity as a member of the Board, and in that capacity has her usual place of business at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118.

9. Defendant Mark Erlich is named in his capacity as a member of the Board, and in that capacity has his usual place of business at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118.

10. Defendant Mark Fortune is named in his capacity as a member of the Board, and in that capacity has his usual place of business at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118.

11. Defendant Joseph Ruggiero is named in his capacity as a member of the Board, and in that capacity has his usual place of business at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118.

12. Defendant Eric Robinson is named in his capacity as a member of the Board, and in that capacity has his usual place of business at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118.

13. Defendant Jeanne Pinado is named in her capacity as a member of the Board, and in that capacity has her usual place of business at 1010 Massachusetts Avenue, 5th Floor, Boston, Massachusetts 02118.

14. Defendant Michael Doherty is listed as the Proponent of the Proposed Project.^{3/} Michael Doherty is an architect working for The Architecture Team, the architect for the Proposed Project.^{4/}

JURISDICTION

15. This Court has jurisdiction over this zoning appeal pursuant to Section 11 of the Boston Zoning Enabling Act, Chapter 665 of the Acts of 1956, as amended.

THE ENABLING ACT

16. Section 9 of the Enabling act provides the Board's authority to grant variances from zoning regulations only if certain, narrowly defined requirements are met. Article 7 of the Boston Zoning Code governs variance requirements. The Board must articulate specific findings for each variance requirement in its decision.

^{3/} William Caulder, manager of Cross Street Ventures LLC, the proponent of the Proposed Project during the Boston Redevelopment Authority Article 80 Review Process, introduced himself during the Hearing as the proponent of the Proposed Project. Michael Doherty did not speak, but was present, at the Hearing.

^{4/} To avoid confusion, The Architecture Team is the name of the architecture firm for the Proposed Project.

17. Section 10 of the Enabling Act provides the Board's authority to award conditional use permits. Article 6 of the Boston Zoning Code governs conditional use permits and that the Board may grant a conditional use permit only if it makes a finding that each of the specific conditions for a conditional use permit have been met.

THE BOSTON ZONING CODE

18. The Proposed Project is located within the Hanover Community Commercial zoning subdistrict ("Hanover CC") of the North End Neighborhood District. The Hanover CC is a Community Commercial Neighborhood Business Subdistrict. *See* Code Section 54-11. Article 54 of the Code establishes zoning restrictions for the North End Neighborhood District that apply to the Proposed Project.

19. Pursuant to Section 54-13, the dimensional regulations applicable in Neighborhood Business Subdistricts in the North End Neighborhood District are set forth in Table D of Article 54:

TABLE D - North End Neighborhood District Dimensional Regulations Neighborhood Business Subdistricts

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EXPAND

	Neighborhood Shopping Subdistricts	Community Commercial Subdistricts
Maximum Floor Area Ratio	3.0	3.0
Maximum Building Height ⁽¹⁾	55	55
Minimum Lot Size	none	none
Minimum Lot Area Per Dwelling Unit	none	none
Minimum Usable Open Space (Square Feet per Dwelling Unit) ⁽²⁾	50	50
Minimum Lot Width	none	none
Minimum Lot Frontage	none	none
Minimum Front Yard ⁽³⁾	none ⁽⁴⁾	none ⁽⁴⁾
Minimum Side Yard ⁽⁵⁾	none	none
Minimum Rear Yard ⁽⁶⁾	20	12

20. If a proposed project in a Neighborhood Business Subdistrict in the North End Neighborhood District does not comply with the regulations set forth in Table D of Article 54, it requires a variance.

21. Table D of Article 54 notes that Section 54-18 sets forth additional building height and roof structure restrictions.

22. Pursuant to Section 54-18, if the height of a proposed project will exceed the "height of any building existing [on that premises] as of June 24, 1985" it requires Board approval. The Board must "consider whether such roof structure has the potential for significantly restricting light and/or air flow to adjacent structures and/or significantly restricting views from roofs, windows, doors, or balconies."

23. Pursuant to Section 54-12, the use regulations applicable in Neighborhood Business Subdistricts in the North End Neighborhood District are set forth in Table B of Article 54.

24. If a use in Table B of Article 54 is identified as "C" (conditional), it requires a conditional use permit.

25. If a use in Table B of Article 54 is identified as "F" (forbidden), it requires a variance.

26. Pursuant to Table B of Article 54, hotels and first floor restaurants are conditional uses in a Community Commercial Subdistrict in the North End Neighborhood District.

27. Pursuant to Table B of Article 54, first floor restaurants exceeding twenty-five hundred (2,500) square feet and restaurants located on or above the second story are forbidden uses in a Community Commercial Subdistrict in the North End Neighborhood District.

28. The Proposed Project is located within a Groundwater Conservation Overlay District which requires that the Proposed Project comply with Article 32 of the Code in addition to the standards for a conditional use permit in Section 6-3.

29. Pursuant to Section 32-6, a proposed project in a Groundwater Conservation Overlay District must comply with the following requirements: “(a) a provision that any Proposed Project promote infiltration of rainwater into the ground by capturing within a suitably-designed system a volume of rainfall on the lot equivalent to no less than 1.0 inches across the area of the lot occupied by structures or otherwise impervious surface” and “(b) provision that any Proposed Project result in no negative impact on groundwater levels within the lot in question or adjacent lots, subject to the terms of any (i) dewatering permit or (ii) cooperation agreement entered into by the Proponent and the Boston Redevelopment Authority, to the extent that such agreement provides for groundwater production during construction.”

30. The Proposed Project is located in a Flood Hazard District. Pursuant to Section 25-6, a proposed project in a Flood Hazard District can receive a variance from the provisions of Article 25 if the Board, in addition to the standards for a variance in Section 7-3, finds that the proposed use or structure “(a) will not derogate from the purpose of [Article 25], (b) will comply with the provisions of the underlying subdistrict or subdistricts, (c) will not overload any public water, drainage or sewer system to such an extent that the proposed use or any developed use in the area or in any other area will be unduly subjected to hazards affecting health, safety or the general welfare, and (d) will not be located within a floodway unless it is demonstrated to the satisfaction of the Board of Appeal that there will be no increase in flood levels during the base flood discharge.”

31. Pursuant to Section 25-6, when considering a petition for a variance from the provisions of Article 25, the Board "shall consider all technical evaluations, standards in other sections of the article and: (a) the danger that materials may be swept onto other lands to the injury of others; (b) the danger to life and property due to flooding; (c) the susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner; (d) the importance of the services provided by the proposed facility to the community; (e) the necessity to the facility of a waterfront location, where applicable; (f) the availability of alternative locations for the proposed use which are not subject to flood damage; (g) the compatibility of the proposed use with existing and anticipated development; (h) the relationship of the proposed use to the comprehensive plan and flood plain management program of the area; (i) the safety of access to the property in times of flood or ordinary and emergency vehicles; (j) the expected heights, velocity, duration, rate of rise, and sediment transport of flood waters and the effects of wave action, if applicable, expected at the site; and (k) the costs of providing governmental services during and after flood conditions, including maintenance and repair of public utilities and facilities such as sewer, gas, electrical, and water systems, and streets and bridges."

32. Pursuant to Section 7-3 of the Code, the Board can only approve a variance if it finds that: (a) there are special circumstances or conditions, fully described in the findings, applying to 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; (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; and (d) that, if the variance is for a Development Impact Project, as defined in Section 80B-7, except if such variance is for a deviation from said requirements.”

33. When making the required findings to grant a variance, the Board shall take into account: “(1) the number of persons residing or working upon such land or in such structure; (2) the character and use of adjoining lots in the neighborhood; and (3) traffic conditions in the neighborhood.” *See* Code Section 7-3.

34. Pursuant to Section 6-3 of the Code, the Board can only approve a conditional use permit if it finds that: (a) the site that is an “appropriate location” for such use; (b) that the intended use “will not adversely affect the neighborhood;” (c) that there will be no “serious hazard to vehicles or pedestrians from the use;” (d) that “no nuisance will be created by the use;” (e) that “adequate and appropriate facilities” will be provided for that use; and (f) that, where applicable, the applicant has complied with the “Development Impact Project Exaction requirements” of Section 80B-7.

THE FACTS

35. The Premises located at 40-42 Cross Street^{5/} and currently improved by three one-story structures and a surface level parking lot.

^{5/} The Premises is made up of eleven parcels: 0302460000, 0302460001, 0302459000, 0302458000, 0302461000, 0302462000, 0302463001, 0302464000, 030246001, and 030246002; as well as a private way that benefits Parcels 030246000, 0302464000, 0302464001, 0302464002, and 0302459000. The parcels and private way compromising the Premises were purchased by Cross Street Ventures, in or around the spring of 2022.

36. The Premises currently houses one vacant building, a woodworking shop, and a real estate sales agent office.

37. The Proposed Project^{6/} will demolish the three one-story structures and surface level parking lot and construct a one-hundred and thirty-four (134) room hotel with two ground floor restaurants totaling approximately four-thousand eight-hundred and sixty-four (4,864) square feet and a seasonal rooftop dining area of approximately six-thousand five-hundred and two (6,502) square feet.

38. The Proposed Project requires relief from the following provisions of the Code: (1) a conditional use permit for hotel use; (2) a variance for ground floor restaurant use in excess of twenty-five-hundred (2,500) square feet; (3) a variance for restaurant use above the first floor; (4) a dimensional variance for Floor Area Ratio; (5) a dimensional variance for building height; (6) a dimensional variance for rear yard setback; (7) a height variance and conditional use permit for the roof deck; (8) a variance for Flood Hazard Districts; (9) a conditional use permit for Ground Water Conservation Overlay Districts; (10) approval pursuant to the requirements of the Greenway Overlay District; and (11) approval pursuant to the requirements of the Freedom Trail Neighborhood Design Overlay.

The ISD Refusal Letter

39. On March 11, 2022, William Caulder, Manager of Cross Street Ventures LLC ("Cross Street"), submitted a building permit application on behalf of Cross Street to ISD. A letter accompanying the application acknowledged the application would be rejected because the Proposed Project would require zoning relief.^{7/}

^{6/} A true and accurate copy of the plans for the Proposed Project submitted to the Board on June 30, 2022, are attached hereto at Exhibit B.

^{7/} A true and accurate copy of the letter accompanying the March 11, 2022, letter is attached hereto at Exhibit C.

40. On May 20, 2022, ISD issued a Zoning Code Refusal, stating that the application requires relief from the Board of Appeals because it would be in violation of the Boston Zoning Code.^{8/} The Zoning Code Refusal cited the following violations:

Violation	Violation Description	Violation Comments
Art. 25 Sec. 5	Flood Hazard Districts	
Art.32 Sec. 32-4	Groundwater Conservation Overlay District, Applicability	
Art. 54 Section 12 * **	Use: Forbidden	Restaurant use on ground floor (exceeding 2,500 sqft)
Art. 54 Section 12 * **	Use: Forbidden	Restaurant use on penthouse/ roof floor
Art. 54 Section 12 **	Use: Conditional	Hotel
Article 49A Section 3	GWOD Applicability	
Article 54 Section 13	Dimensional Regulations	Max. floor area allowed: 3 Proposed: 5.21
Article 54 Section 13	Dimensional Regulations	Max. building height allowed: 1 story (15') as per section 54. 18 Proposed: 5+ Penthouse (65')
Article 54 Section 13	Dimensional Regulations	Min. rear yard: 20' Proposed: 0'
Article 54 Section 15	Establishment of Freedom Trail Neighborhood Design Overlay	
Article 54, Section 18	Roof Structure Restrictions	<ul style="list-style-type: none"> - Access to roof deck is not through a hatch or bulkhead. - Roof deck's handrail is not set back 1 foot for each foot of the height of the structure. - Roof structure area exceeds 10% of total's roof area, hence they shall be included while measuring the building height. - The height of any existing building (currently, three, 1-story/ 15' buildings) shall determine the allowed building height on that lot after the buildings are demolished.

^{8/}

A true and accurate copy of the Zoning Code Refusal is attached hereto at Exhibit D.

Notes		Parking spaces and loading areas to be determined by art. 80 LPR.
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41. Following the Zoning Code Refusal, the Proponent appealed the ISD's refusal to the Board (the "Proponent's Appeal").^{9/}

Lack of Community Process

42. Prior to the Hearing, resident groups expressed concern that the Proposed Project had not undergone a proper community process.

43. The Proponent did not present the final version of the Proposed Project to either of the two neighborhood associations in the North End; the North End/Waterfront Residents' Association ("NEWRA") or the North End Waterfront Neighborhood Council ("NEWNC"). The North End/Waterfront Residents' Association wrote in a letter to the Board^{10/} that it was extremely concerned that the Proposed Project had been placed on the agenda for a hearing on August 23, 2022, when there had been no "public abutters' meetings or any appearances by the Developer before either NEWRA or the North End Waterfront Neighborhood Council" to consider the final proposal for the Proposed Project, and the version of the Proposed Project going to the Board "did not undergo any public review at all."

44. The NEWNC noted in a letter to the Board^{11/} that although it allowed the Proponent time to present at two separate meetings, it "made it clear to them that although [the NEWNC was] happy to allow them to present informally, they would need to come before [the NEWNC] for a council vote once the application to [the Board] was pending" but the Proponent made no effort to present the final plans of the Proposed Project to the NEWNC and obtain a vote of the NEWNC.

^{9/} A true and accurate copy of the Proponent's appeal to the Board is attached hereto at Exhibit E.

^{10/} A true and accurate copy of the NEWRA letter is attached hereto at Exhibit F.

^{11/} A true and accurate copy of the NEWNC letter is attached hereto at Exhibit G.

45. Because of this, the Proposed Project that the Board considered did not undergo a proper community process which would allow the neighborhood associations to voice their opposition or support.

The Hearing

46. On August 23, 2022, the Board held the Hearing on the Proponent's Appeal.

47. Seven members of the Board were virtually present: Christine Araujo, Mark Fortune, Mark Erlich, Joseph Ruggiero, Eric Robinson, Sherry Dong, and Jeanne Pinado.

48. The Hearing lasted approximately twenty-nine (29) minutes; a video recording of the Hearing is available at https://www.cityofboston.gov/cable/video_library.asp?id=51081.^{12/} The video recording of the Hearing is expressly incorporated herein by reference.

49. At the outset of the Hearing, Chairwoman Araujo stated that the Board was "running out of time" and the Board would only hear from five abutters in opposition to the Proposed Project and five abutters in support of the Proposed Project. This limitation silenced many of the abutters in opposition to the Proposed Project, and gave the false appearance that there were an equal number of abutters in support and in opposition.

50. There were not, in fact, an equal number of abutters in support and in opposition to the Proposed Project. In addition to both the NEWRA, NEWNC, and the neighborhood organization Friends of Cuttillo Park, the Board received approximately one-hundred and fort-four (144) letters in opposition to the Proposed Project, all of which were signed and/or submitted in August 2022.

51. The Proponent claimed in a submission to the Board it had three-hundred and eighty-five (385) letters in support of the Proposed Project. Of the "letters" submitted in advance

^{12/} The hearing for the Proposed Project begins at 3:01:20.

of the Hearing, approximately three-hundred and sixty (360) were form letters dated March 2021 or earlier and not even addressed to the Board, but to the Senior Project Manager of the Boston Planning and Development Agency. The Proponent submitted letters dated as early as June 2021, over one year before the Hearing.

52. During the public comments, Chairwoman Araujo cut off nearly every abutter in support of the Project during their remarks. After she cut off one abutter, she noted “we are just so far behind schedule.”

53. During the public comments of abutters in opposition to the Proposed Project, persons in support of the Proposed Project were left unmuted and could be heard speaking over the abutters in opposition.

54. After public comments from abutters, the Board allowed the attorney for the Proponent an opportunity to rebut the comments of abutters in opposition to the Proposed Project. The attorney for the Proponent claimed that opposition to the Proposed Project was limited to “one stack of units in 26 Stillman” and that those residents “already have their windows blocked[.]”

55. The claim that opposition was limited to residents of 26 Stillman Street is demonstrably false, as approximately one-hundred (100) of the letters in opposition to the Proposed Project were not from residents of 26 Stillman Street.

56. Additionally, residents of 26 Stillman Street do not currently have their windows blocked as claimed by the attorney for the Proponent. During the Hearing, the Board did not analyze whether any of the Code violations cited by ISD met the requirements for granting a variance or a conditional use permit.

57. Chairwoman Araujo asked the attorney speaking on behalf of the Proposed Project the height of the structures located on the Premises on June 24, 1985, and the height of the

Proposed Project. There was no discussion of whether the Proposed Project met any of the requirements for a height variance.^{13/}

58. The Board did not ask, and the Proponent did not present any evidence on, whether allowing the Proposed Project to exceed the height of the structures existing on the Premises on June 24, 1985, has the potential to significantly restrict light and/or air flow to adjacent structures^{14/} and/or significantly restrict views from roofs, windows, doors, or balconies as required by Section 54-18.

59. The Board did not ask, and the Proponent did not present any evidence on, the roof deck access or handrail setback.

60. The Board did not ask, and the Proponent did not present any evidence on, the Floor Area Ratio and whether the Proposed Project met any of the requirements for a Floor Area Ratio variance.

61. The Board did not ask, and the Proponent did not present any evidence on, the Rear Yard size and whether the Proposed Project met any of the requirements for a minimum Rear Yard size variance.

62. The Board did not ask, and the Proponent did not present any evidence on, the restaurant use on the roof of the Proposed Project and whether the Proposed Project met any of the requirements for a variance to allow a restaurant use on or above the second floor.

63. The Board did not ask, and the Proponent did not present any evidence on, the size of the first floor restaurants and whether the Proposed Project met any of the requirements for a

^{13/} The Board did not allow the Proponent to speak on its contention that the Proposed Project did not require a height variance. Instead, the Board granted the height variance without making any of the necessary findings.

^{14/} Eric Robinson commented on the potential shadows the Proposed Project could cast over Cutillo Park, but not on adjacent structures as required by Section 54-18.

variance to allow a restaurant use exceeding twenty-five-hundred (2,500) square feet on the first floor.

64. Mark Erlich asked the Proponent why a hotel use would be appropriate for the site. The Board did not ask, and the Proponent did not present any evidence on, the remaining requirements for a conditional use permit for a hotel.

65. At the end of the Hearing, Joseph Ruggiero moved to grant the requested relief with BPDA design review, stating that the “uses are appropriate” and “the height is reasonable.” Mr. Ruggiero stated that “it is acceptable to have a restaurant on the ground floor.” He also stated a restaurant on the rooftop was “common in the surrounding areas,” particularly around North Station.^{15/}

66. The explanation that the height is “reasonable” and rooftop restaurants are “common in the surrounding areas” falls drastically short of the findings required to grant a variance.

67. No other members of the Board commented on whether any of the needed variances or conditional use permits met any of the requirements for granting a variance or a conditional use permit.

68. The motion passed with all members of the Board, with the exception of Chairwoman Araujo, voting in favor.

The Board's Decision

69. The Board filed and entered its Decision with ISD on September 30, 2022.

70. The Decision states that it considered the Proponent's appeal from all violations for which it was cited; which required the Proponent to seek (1) a conditional use permit for hotel use;

^{15/} North Station is located in the North Station Economic Development Area and governed by Article 39 of the Code.

(2) a variance for ground floor restaurant use in excess of twenty-five-hundred (2,500) square feet; (3) a variance for restaurant use above the first floor; (4) a dimensional variance for Floor Area Ratio; (5) a dimensional variance for building height; (6) a dimensional variance for rear yard setback; (7) a height variance and conditional use permit for the roof deck; (8) a variance for Flood Hazard Districts; (9) a conditional use permit for Ground Water Conservation Overlay Districts; (10) approval pursuant to the requirements of the Greenway Overlay District; and (11) approval pursuant to the requirements of the Freedom Trail Neighborhood Design Overlay.

71. The Decision completely fails to make any of the findings required for the needed variances.

72. The Decision states: "With respect to the requested use and dimensional variances, the Board of Appeals find that all of the following conditions are met . . ." and goes on to recite the required findings to grant a variance listed in Section 7-3 of the Code almost verbatim. The only change is the plural "variances" rather than the singular "variance" found in the Code.

73. The Board made no findings of fact for any of the needed variances.

74. The Decision completely fails to make any of the findings required for the needed conditional use permits.

75. The Decision states: "With respect to the requested conditional use permits, the Board finds that all of the conditions for granting the requested relief in accordance with Article 6, Section 6-3 of the Code are met, as follows . . ." and goes on to recite the required finding to grant a conditional use permit listed in Section 6-3 of the Code almost verbatim.

76. The Board made no findings of fact for any of the needed conditional use permits.

77. The Decision also recites the standards for approval in a Groundwater Conservation Overlay District and Flood Hazard District verbatim.

78. The Board made no findings of fact for the standards for approval in a Groundwater Conservation Overlay District or Flood Hazard District.

The Decision is Not Sufficient to Grant the Required Variances for the Proposed Project

79. The Board's Decision to grant variances for the Proposed Project is arbitrary and capricious and not based on substantial evidence and exceeds its authority.

80. The Board did not make any of the required findings necessary to grant any of the variances the Proposed Project requires pursuant to Section 7-3 of the Code.

81. Instead, the Board recited the requirements for granting a variance from Section 7-3 of the Code almost verbatim, rendering the Decision void on its face.

82. The Decision does not list any "special circumstances or conditions . . . 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."

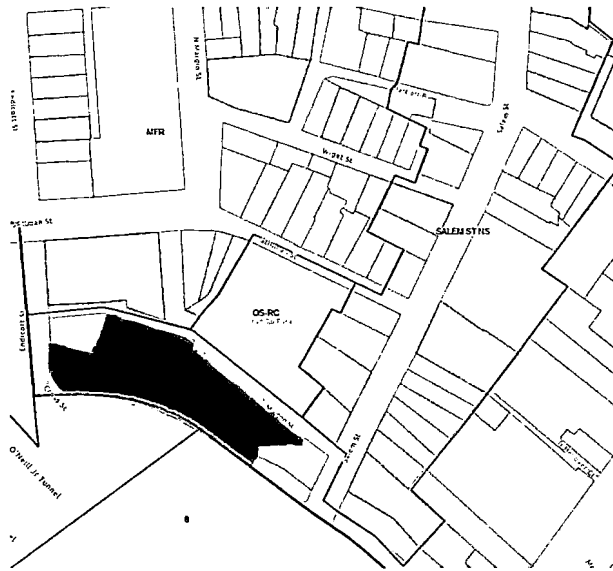
83. The Decision states that the Proponent presented that the Premises is "uniquely narrow and highly constrained by abutting properties, MassDOT and Boston Water and Sewer Commission ("BWSC") infrastructure, Morton Street, and Cross Street Plaza[.]"

84. The Board did not make any findings of its own that the Premises is uniquely narrow.

85. The Board did not find that the MassDOT and Boston Water and Sewer Commission infrastructure was unique to the Premises and not the neighborhood generally.

86. The Board does not make any findings that because of the purported “narrowness” of the Premises and MassDOT and BWSC infrastructure, the application of the provisions of the code would deprive the Proponent of the reasonable use of the Premises.

87. Nor could the Board have made these findings. Narrow lots are not peculiar to the Premises, but common to the neighborhood generally, as shown below:^{16/}



88. Additionally, Cross Street Ventures purchased the eleven parcels that make up the Premises for the purpose of constructing the Proposed Project. Cross Street Ventures willingly chose the selected parcels, and necessarily the shape of the Premises; and it is well-established that self-imposed hardships are not a basis for granting a variance.

89. The Board also could not have found that the application of the Code would deprive the Proponent of the reasonable use of the Premises. In the past the Premises houses commercial storefronts; a reasonable use of the Premises.

90. The Decision does not explain how that “for reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variances

^{16/} The Premises is highlighted for ease of reference.

is necessary for the reasonable use of the land or structure and that the variances as granted by the Board are the minimum variances that will accomplish this purpose[.]”

91. The Decision does not list *any* “practical difficulty or demonstrable and substantial hardship.”

92. The Decision also does not provide any explanation as to why variances for height, rear yard setback, floor area ratio, ground floor dining exceeding twenty-five-hundred (2,500) square feet, and rooftop dining are the *minimum* necessary for the reasonable use of the land.

93. The Decision simply states that the Proponent “contends that the supporting restaurants and rooftop dining are critical amenities for the success of a downtown hotel.”^{17/} But maximizing financial success is not reasonable use of the land.

94. Nor could the Board make these findings. The developer seeks to maximize its return on investment of the Premises, which it purchased for the sole purpose of constructing the Proposed Project. It is well-established that financial hardship or the inability to maximize the theoretical potential of a parcel of land is not a substantial hardship.

95. The Decision does not explain how “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[.]”

96. The Decision does not even state the general purpose and intent of the Code, let alone how the Proposed Project would be in harmony with it.

97. Nor could the Board make this finding. The goals and objectives of Article 54 are set forth in Section 54-1 and provides as follows: “The goals and objectives of this Article and the North End Neighborhood Plan are to manage the future development of the North End for the

^{17/} The necessity of rooftop dining to the success of a downtown hotel is also suspect given the abundance of hotels in the downtown Boston area without rooftop dining.

benefit of the inhabitants of the North End and Boston; to preserve and enhance the North End neighborhood; to conserve the value of land and buildings; to encourage the most appropriate use of land throughout the North End neighborhood; to lessen congestion in the streets; to provide adequate light and air, and to prevent overcrowding of land; to promote appropriate economic development for the benefit of residents; to promote residential development that is affordable to all segments of the community, particularly low and moderate income residents; to discourage displacement of residents; to preserve, enhance, and create open space to be enjoyed by residents; and to promote the public safety, health and welfare of the people of Boston.”

98. The Proposed Project would frustrate nearly all of these goals and subject numerous abutting properties – specifically Plaintiff’s home – to adverse impacts related to light, shadows, airflow, traffic, congestion, overcrowding, and other interests that Article 54 is intended to protect.

99. Because the Board failed to make the required findings necessary to approve variances pursuant to Section 7-3 of the Code at its Hearing or in its Decision and the Board could not have made such required findings given the facts, the Decision must be annulled.

The Board’s Decision to Allow the Proposed Project to Exceed the Height of the Structures Existing on the Premises as of June 24, 1985, Exceeded its Authority

100. The Board’s decision to allow the Proposed Project to exceed the height of the structures existing on the Premises as of June 24, 1985 is arbitrary and capricious and not based on substantial evidence and exceeds its authority.

101. The Decision does not address whether the Proposed Project “has the potential for significantly restricting light and/or air flow to adjacent structures and/or significantly restricting views from roofs, windows, doors, or balconies.”

102. The Decision states that Eric Robinson “remarked that he had reviewed the shadow studies submitted during the BPDA process and that the Proposed Project would have minimal

shadow impact on the surrounding structures and nearby local park.” But Eric Robinson did not comment on the shadow impact to surrounding structures; at the Hearing he stated that he reviewed a shadow analysis as part of the Article 80 process, and that “there is around the park existing six-story buildings actually, so there is minimal impact on the park.” He did not state there would be minimal impact on adjacent structures.

103. The Proposed Project will tower over abutting structures and cast shadows,^{18/} restrict light, restrict air flow, and significantly restrict views from roofs, windows, doors, or balconies.

104. The Proposed Project will also cast shadows over Cutllo Park. As described by the Boston Parks and Recreation Department in a letter to the BPDA on April 19, 2021,^{19/} the Proposed Project “will have adverse impacts on the sun and shadows on Cutllo Park” and “[v]egetation will receive few hours of sunlight which may reduce the viability of new planting[.]”

The Board’s Decision Granting Conditional Use Permits for the Proposed Project Exceeded its Authority

105. The Board’s Decision to grant conditional use permits for the Proposed Project is arbitrary and capricious and not based on substantial evidence and exceeds its authority.

106. The Decision does not adequately explain why “the specific site is an appropriate location for such use[.]”

107. At the Hearing the Board discussed whether a hotel would be appropriate at the site, but the Board’s ultimate findings, if there were any, are not present in the Decision.^{20/}

^{18/} A true and accurate copy of the Proponent’s shadow study from the Supplemental Filing to the BPDA is attached hereto at Exhibit H.

^{19/} A true and accurate copy of the Boston Parks and Recreation Department’s letter is attached hereto at Exhibit I.

^{20/} The Decision notes that Joseph Ruggiero stated the restaurants were appropriate for the area; but the restaurants require variances, not conditional use permits.

108. The Decision does not explain why “the use will not adversely affect the neighborhood.”

109. The Decision lists benefits the Proponent claims the Proposed Project will have, but is completely devoid of any independent findings of the Board or consideration of both potential positive and negative effects of the Proposed Project.

110. The Decision also noted that approval from elected officials and “numerous members of the community further supports the Board’s finding that the requested relief will have no negative impact on the surrounding area[.]” The Decision ignores the large number of North End residents and community groups that vehemently oppose the Proposed Project.

111. Additionally, despite stating the support of certain elected officials and members of the community “further supports the Board’s finding that the requested relief will have no negative impact on the surrounding area,” the Decision does not include the factual basis for that finding.

112. The Proposed Project would in fact have an adverse impact on the neighborhood by, among other things, adding congestion and overcrowding by an estimated daily increase of 3,000 automobile, transit, and pedestrian/bicycle trips, and severely impacting direct abutters of the Proposed Project by cutting off light and airflow to their residences and the public parks around the Proposed Project.

113. The Decision does not adequately address why “there will be no serious hazard to vehicles or pedestrians from the use or what “adequate and appropriate facilities will be provided for the proper operation of the use.”

114. The Decision states that the Proposed Project will not include parking but that the “Applicant presented that it will work with existing garages in the area to meet the limited anticipated parking needs of the hotel[.]” The Decision provides no details on what existing

garages the Applicant contacted, or whether they actually agreed to provide parking to the Proposed Project.

115. The Decision does not explain how a one-hundred and thirty-four (134) room hotel with multiple restaurants would only require “limited” parking.

116. Nor could the Board make this finding. The Proposed Project will require hundreds of employees, attract visitors to the on-site restaurants, and accommodate one-hundred and thirty-four (134) rooms’ worth of hotel patrons. Without providing any parking to accommodate this influx of people that will be traveling to the Proposed Project, the Proposed Project does not provide adequate or appropriate facilities for the proper operation of the Proposed Project.

117. Additionally, the Proposed Project would be located on an already-congested street. The influx of people, many of whom will likely travel to the hotel via ride share services, will make an already poor traffic situation worse, posing a hazard to both vehicles and pedestrians.

118. The Decision does not adequately address why “no nuisance will be created by the use.”

119. Nor could the Board make this finding. The Proposed Project would add three restaurants; including one restaurant on a rooftop deck, a use that is forbidden by the Code. The noise generated by the restaurants, especially the rooftop restaurant, will cause a nuisance to the North End residents that live around the building. North End residents will also suffer excess noise from the congestion around the Proposed Project.

120. The Decision did not make any of the findings of fact required to grant a variance from the requirements of Article 25-6 of the Code, applicable to Flood Hazard Districts.

121. Nor could the Board make the required findings. The Board did not receive information needed to decide if the Proposed Project will derogate from the purpose of Article 25

of the Code, overload any public water, drainage or sewer system, or result in an increase in flood levels during the base flood discharge.

COUNT I: APPEAL PURSUANT TO SECTION 11 OF THE ENABLING ACT

122. Plaintiff incorporates all allegations set forth above as if fully set forth herein.

123. As a direct abutter to the Proposed Project, Mary Beth Sweeney is presumed to be a “person aggrieved” by the Board’s Decision.

124. Mary Beth Sweeney is a “person aggrieved by the Board’s Decision. Ms. Sweeney will suffer specific and unique harms that will not be experienced by the public generally if the Decision is not annulled and the Proposed Project goes forward. As an abutter, those harms include, among other things:

- The Proposed Project, which will be built mere feet from her property will cast shadows over her property and block critical light and air-flow.
- The Proposed Project will cut off the view from Ms. Sweeney’s property of downtown Boston replace it with a solid wall mere feet from her window.
- The Proposed Project will add to the congestion around Ms. Sweeney’s property by injecting one-hundred and thirty-four (134) hotel rooms into an already crowded area.
- The Proposed Project will place a loading dock and garage within feet of Ms. Sweeney’s windows, causing excess noise and smell. Additionally, kitchen vents of the Proposed Project will face the windows of Ms. Sweeney’s apartment, projecting smells from the Proposed Project directly into Ms. Sweeney’s apartment.
- The Proposed Project and its impacts will reduce the market value of Ms. Sweeney’s property.

125. The Proposed Project will cause Ms. Sweeney to suffer infringement of these and other legal rights that the Enabling Act and Boston Zoning Code were intended to protect.

126. The Decision is improper, legally untenable, arbitrary and capricious, not based on substantial evidence, unreasonable and was rendered in excess of the Board's authority in violation of the Boston Zoning Code and applicable law.

127. Among other things: the Proposed Project does not satisfy the requirements for granting variances that are needed for the Proposed Project; the Decision does not set forth sufficient findings for the granting of a variance as required under Section 7-3 of the Code; the Decision purports to approve variances pursuant to Section 7-3 of the Code without sufficient facts or evidence; the Board did not deliberate and/or make the required findings necessary to approve the variances for the Proposed Project pursuant to Section 7-3 of the Code; the Proposed Project does not satisfy the requirements for granting conditional use permits pursuant to Section 6-3 of the Code; the Decision purports to approve conditional use permits pursuant to Section 6-3 of the Code without sufficient facts or evidence; the Board did not deliberate and/or make the required findings necessary to approve conditional use permits pursuant to Section 6-3 of the Code; the Proposed Project does not satisfy the requirements for granting a variance pursuant to Article 25 of the Code; the Decision purports to approve a variance pursuant to Article 25 of the Code without sufficient facts or evidence; the Board did not deliberate and/or make the required findings necessary to approve a variance pursuant to Article 25.

128. Accordingly, the Decision should be annulled.

129. For all the reasons stated herein, the Board acted with gross negligence in issuing the Decision.

RELIEF REQUESTED

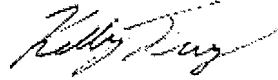
WHEREFORE, the Plaintiff respectfully asks that this Court enter judgment in its favor and:

130. Enter judgment annulling the Decision;
131. Enter such further relief as this Court deems just and proper, including Plaintiff's attorney fees and costs.

Respectfully submitted,

MARY BETH SWEENEY,

By her attorneys,



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Date: October 20, 2022