

# Alliance of Boston Neighborhoods

White Paper #3  
Boston Zoning Board of Appeal:  
Variance Process Reform  
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Prepared by the delegates to the Alliance

Aberdeen & Reservoir Civic Association  
Bay Village Neighborhood Association  
Chester Square Neighborhood Association  
Community Alliance of Mission Hill  
Ellis Neighborhood Association  
Heath Street Neighbors  
Jamaica Plain Neighborhood Council  
Jones Hill Association/Upham's Corner  
Neighborhood Association of the Back Bay  
Pilot Block Neighborhood Association  
Roxbury Neighborhood Council  
St. Botolph Citizen's Committee  
Worcester Square Area Neighborhood Association

Allston Civic Association  
Campaign to Protect Chinatown  
Claremont Neighborhood Association  
Eight Streets Neighborhood Association  
Fenway Civic Association  
Hyde Park Neighborhood Association  
Jeffries Pt. Harborside Neighborhood Association  
Leather District Neighborhood Association  
North End/Waterfront Residents Association  
Prudential Center Residents Association  
Seaport Alliance for a Neighborhood Design  
Union Park Neighborhood Association

Alliance of Boston Neighborhoods 566 Columbus Avenue  
Boston, MA, 02118 617-437-0110 [www.abnboston.org](http://www.abnboston.org)

*The Alliance of Boston Neighborhoods (ABN) is an open-membership organization consisting of neighborhood associations operating in the city of Boston. Alliance delegates meet monthly to exchange information about issues affecting all neighborhoods in Boston. We develop and disseminate educational materials and position statements to neighborhood delegates, project review agencies, and the general public. ABN encourages citizen engagement in the public process, and is particularly interested in neighborhood and city-wide planning issues.*

Our members are concerned that Boston's planning and zoning ordinances are often undermined by the current process for review of variance applications. We offer the following report and findings:

- The process is unpredictable. The Zoning Board of Appeal (ZBA) does not usually follow the hardship standards for granting variances, set forth in Article 7 of the City's zoning code. Rather, variances are issued according to board members' personal judgments of the merits of the proposed project.
- Variances, which should be exceptions to the law granted only under extraordinary circumstances, are leniently granted. In effect, the ZBA performs "spot zoning" when variances are granted without regard to the hardship standards.
- Such variance decisions undermine city planning and zoning in general, and specifically the rights of other affected property owners.
- It is difficult for community residents to participate in the process. The rules are not administered consistently, procedures are not clearly defined and hearings are held during business hours.
- The appearance and testimony of elected officials or their representatives distracts attention from the legal standards as the basis of decisions.
- Barriers to judicial review of ZBA decisions make legal challenges difficult. This insulates the ZBA from accountability and results in a sense of disempowerment on the part of the public.

This paper reviews the appeal process, and proposes recommendations to make the variance process more understandable, predictable and fairer for all concerned.

## **Legal Requirements**

The Zoning Board of Appeal derives its authority from the Boston Zoning Enabling Act as set forth in Chapter 665 of the Massachusetts Acts of 1956. This document outlines specific circumstances under which variances are granted, and sets out criteria that must be met in order to obtain a variance. The Alliance believes that the process of granting variances has strayed from the intent of the laws cited below:

- Section 9 of the Enabling Act authorizes the Board of Appeal to grant variances for a parcel or building:  
*...where, owing to conditions especially affecting such parcel or such building, but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of such zoning regulation would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of such zoning regulation, but not otherwise.*  
(Boston Zoning: A Lawyer's Handbook by Cynthia M. Barr)
- Boston's zoning code supplements the variance provisions of the Enabling Act, principally in Article 7

(Variances). Section 7.3 sets forth the conditions required for a variance.

*The Board of Appeal shall grant a variance only if it finds that all of the following conditions are met:*

*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;*

*c) That the granting of the variance will be in harmony with the general purpose and intent of this code (Boston's 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, the applicant shall have complied with the Development Impact Project Exaction Requirements set forth in Section 80B-7.3, except if such variance is for a deviation from said requirements.*

- Article 7-4 of the Code allows the Board to attach other conditions necessary as protections. Six examples of such protections are listed in the Code.

### **Appeal Process Issues - Application:**

Currently, variance application forms do not require evidence with respect to the four standards for granting a variance specified in the zoning code (see above).

Applicants are asked to fill out a form answering the following questions:

*a) Describe in detail the reasons for this appeal. The response may be simply a description of the construction desired, e.g., "This appeal seeks to erect a two-family house."*

*b) State reasons for this proposal. The response may describe the applicant's need, e.g., "It will contribute to the overall upgrade of the neighborhood," or "This lot is currently vacant," or "This will provide more living space for my family."*

*c) Provide reasons why board should grant relief. The response may be, "Housing supply is short," or "I have lived here all my life, and I would like my children to live near me."*

None of these questions require the applicant to provide the Board with the necessary information to determine the merits of the case. The application form should be changed to request the evidentiary require-

ments regarding the four standards of Article 7, and should explain to prospective applicants that economic hardship does not qualify, nor does “self-induced hardship,” e.g., purchasing property and then attempting to override zoning restrictions to increase its value.

### **Hearings:**

- Notice: Who receives notice and who may testify at a hearing is not clearly stipulated, nor is it made known to the general public how they can obtain notification.
- Hours: Hearings are conducted during work hours, making it difficult for the public to attend.
- Testimony: Those appearing at hearings to testify are often deprived of their right to speak by Board members’ decisions to stop testimony when they feel they have heard enough. Further, while petitioners can rebut testimony, there is no opportunity to rebut or cross-examine applicants.

### **Political Influence:**

City Councilors or their representatives routinely testify at ZBA hearings as advocates for applicants or for opponents. However, they seldom testify in reference to the four controlling criteria.

The BRA, as the City’s Planning Board, makes formal recommendations to the Zoning Board of Appeal, frequently in a conflict of interest on development issues.

The Mayor’s office often sends representatives to express the Mayor’s position on appeals. Since the Mayor appoints the ZBA board (as well as BRA’s director and most of the board), the appeals process is likely to be responsive to mayoral interests. Such interventions from the Council and the Mayor politicize the process, interfering with judgments that should be based on the four legal criteria.

### **Deferrals:**

Hearing deferrals are often granted without justification, and without advance notice to interested parties, who may have taken time from work or family to attend and/or testify. Cases are usually deferred at the request of the applicant, who may prefer to postpone the hearing if many opponents appear at the hearing. Applicants may reschedule, once or multiple times, to discourage opponents who cannot keep attending.

Opponents are rarely considered as having “standing” to request a deferral, thereby favoring the applicant.

### **Decisions:**

Variances are usually issued without written findings regarding compliance with all the required criteria, particularly the “hardship” clause. They are decided according to Board member’s judgment of the applicant’s stated needs, impression of local impacts, and the level of support or opposition. The result is that decisions frequently constitute “spot zoning,” i.e., zoning limited to individual parcels. Spot zoning is not legal; it undermines the purpose and process of community planning and regulatory controls, which are established with significant public participation. It is also unfair to property owners and occupants who depend on zoning for protection of their financial investments and quality of life.

Without consistent application of the Zoning Code by legal standards, the Board offends the fairness due to those citizens who observe the code’s limits on their property. It undermines the “reciprocity of advantage”

which legitimizes the government's controls over use of private property as a regulation benefiting all the public rather than a "taking." In this circumstance, an applicant who is denied what is approved for another may decide to sue, charging an uncompensated taking of the value of his/her property.

Presently, the prevailing party is required to write the formal decision for the Board. The Board provides instructions, which coach the prevailing party in language that will be acceptable. However, only one of the nine suggested explanatory examples of variance justifications provided by the instructions is in any way related to the four variance criteria mentioned above.

Although the Law Department reviews drafts of decisions, it does not specifically require documentation that the four standards have been met.

### **Challenges to appeals decisions:**

According to the Code, an "interested party" may challenge a decision of the Board in court. However, procedures for challenge and the matter of who has standing as an "interested party" are not clearly established in Article 7, and courts have been limiting the "standing" of those who may challenge.

Challenges to Boston's ZBA decisions are costly and difficult. Filing a challenge may require the posting of a bond, a discretionary barrier that discourages legal challenge.

In sum: The City of Boston does not administer zoning appeals for variances as required by the City's Zoning Code. The zoning appeal process disregards the legal standards governing the granting of zoning relief. Zoning variances allow individuals exemption from laws all others must observe and therefore they should be granted only in extraordinary circumstances according to legal standards provided by State and City laws and regulations.

### **ABN Recommendations:**

The zoning code should be recognized as an implementation mechanism for community-based planning and as a legal framework for protection of property rights. Unsubstantiated decisions harm abutters and deprive the community of predictability in property development and due process in the application of the law. The Alliance recommends a review and revision of the variance appeal process, to assure that the intent of the Code is upheld, and to make the appeal process predictable and orderly for both applicants and abutters, and for the Board of Appeal as well. The following modifications are recommended to make the appeal process fair and responsive to all concerned.

### **Applications:**

The variance appeal application form should be changed. Applicants should be required to respond directly to each of the four variance criteria in the Code. No other information should be solicited or considered. Disclosure regarding all financially interested parties should be required. The names and addresses, and nature of the interest of such parties should be included on the form.

Deferral rights of all parties should be stated clearly in the application materials.

Recourse to ZBA decisions should be explained in the application materials, so that applicants understand how their decision might be challenged and so that both applicants and challengers understand the tests their cases would have to meet in court.

**Hearings:**

The ZBA should set criteria for, and exercise due diligence in, identifying and distributing appropriate notice within the legally specified time period before the hearing. However, parties other than those identified by the ZBA must be allowed to assert their right to testify.

The Board should hear testimony only with respect to the standards of Article 7-3. The Board needs to base its decisions only on written and oral testimony and other evidence that applies to these standards. Evidence regarding each of the four criteria should be systematically elicited and considered for each application. No evidence on irrelevant issues, such as economics, family issues, and purported city needs (e.g., housing supply) should be entertained.

Both written and oral testimony should be sworn, the notice of each hearing should contain a statement that any testimony, written or verbal, is submitted under the penalties of perjury.

Deferrals must be granted only on specific conditions, which should be clarified in the Code and specified with the application instructions. Deferred hearings must be scheduled with the same notice requirements as original hearings. All parties should have equal opportunity to request a deferral.

Hearings should be scheduled after workday hours, in order to provide maximum opportunity for public participation.

**Decisions:**

The Board should reject any variance application that does not comply with all of the standards set in Article 7-3.

The Law Department should require that decisions include detailed findings addressing the legal standards.

The vote record of each ZBA Board member should be recorded with the decision and include comments of those dissenting.

ZBA staff should write the decisions. Application and decision forms should be redesigned to make this a simple administrative task.

A home rule petition should be presented to the legislature enlarging “standing” for challengers of ZBA decisions, recognizing that variances may have impacts well beyond the physical abutters and immediate neighbors

## **Implementation of Recommendations**

To achieve the implementation of the recommendations, we suggest the following:

### **1. City Council hearing:**

The City Council's Committee on Government Operations should hold a public hearing on the issue of the ZBA's responsibilities and current methods of practice. Testimony should be requested from BRA Chief Planner Rebecca Barnes, Linda Haar, BRA Chief of Staff and Director of Planning and Development; and Rick Shaklik, BRA Deputy Zoning Director, as well as from the members and staff of the ISD and ZBA.

### **2. Planning Office review:**

The BRA's Zoning Director and the Director of the Inspectional Services Department should undertake a comprehensive examination of the Boston Zoning Code appeal process, to note the current patterns of decisions. This examination should include:

- A review of the Commonwealth's zoning enabling legislation in general and the special act that relates to the Boston Zoning Board of Appeal.
- A review of variance decisions for the last year. The review should document the proportion of decisions that have granted variances, and of those, the number of decisions which did not substantiate compliance with the four legal criteria. The review should also document the number of decisions that allowed "use variances" (for example, a three-family home in a two-family district, a commercial development in a residential zone), and "dimensional variances," (for example, a change in height or setback). The review should also document reasons for variances granted, noting "self-induced hardship," and economic benefits to applicants. Such a review may point out changes needed in the zoning code itself.

### **3. Zoning Board process modifications:**

ZBA policy and procedural modifications should be issued by the Inspectional Services Department to the Board of Appeal and the public. Board members and staff should also be advised on compliance. These legal criteria should be printed and made available to the public at every hearing.

An annual ZBA training session should be held for Board members to discuss the appeals process, and exchange ideas on best practices in handling applications.

### **Conclusion:**

The Alliance of Boston Neighborhoods believes that if these reforms are implemented, the expressed goals and objectives of neighborhood planning and zoning will be preserved, the ZBA hearing caseload will fall as fewer applicants will submit appeals, and the number of decisions legally challenged will be minimized, as more decisions will be based upon legally appropriate criteria. The process will be clearer and fairer to applicants, abutters, and the community at large.