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Variances: A Canary in the Coal Mine for Zoning Reform?

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Variances: A Canary in the Coal Mine for Zoning Reform?

John J. Infranca and Ronnie M. Farr*

Abstract

There is perhaps no area of land use law where practice departs more from legal doctrine than the realm of zoning variances. According to the legal doctrine, variances are to be granted sparingly, providing a “safety valve” that alleviates unique hardships encountered by a property owner. In practice, variances are granted at high rates—often around ninety percent of applications are approved—and, in some jurisdictions, in high volumes. In such cases, variances effectively serve as a rezoning, enabling jurisdictions to permit otherwise prohibited uses and allow growth and development to occur without addressing needed zoning reforms. By allowing neighbors the opportunity to weigh in on the smallest of changes, with little attention to the relevant legal doctrine, they also create significant uncertainty, delay, and cost for property owners.

This problem is particularly acute in the City of Boston, where the city grants thousands of variances each year. In this symposium contribution, we share the results of an empirical study of variance decisions in Boston. We compare Boston to three neighboring

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jurisdictions: Cambridge, Brookline, and Somerville. We find that variances in Boston are, consistent with prior studies elsewhere, granted at a very high rate. Looking at the substance of these decisions, we find that little attention is given to the legal requirements for a variance. Instead, decisions are shaped by a desire to help individual applicants, a willingness to permit development consistent with the neighborhood, and the policy preferences of board members.

This study suggests a number of lessons for reformers. Variance decisions shed light on particularly onerous elements of local zoning, revealing targets for reform. The process itself highlights how local residents understand zoning and their expectations regarding their own role in land use decision-making. In jurisdictions that rely heavily on variances to permit new development, reformers will need to grapple with how they might substitute the voice residents currently exercise through the variance process.

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I. INTRODUCTION

There is perhaps no area of land use law (and perhaps law more generally) where practice departs more from the legal doctrine than variances.¹ The doctrine states that variances are to be granted sparingly to address unique hardships encountered by a property owner.² Zoning draws in broad strokes, and in some instances, a particular parcel, due to its unique shape or some distinct and debilitating characteristic, cannot be put to any reasonable use if one applies the district's zoning restrictions as written.³ The variance offers a "safety valve," alleviating the hardship imposed on the property's owner (and perhaps avoiding the need for takings compensation).⁴ This is the theory. In practice, variances are granted at incredibly high rates—often around ninety percent of applications are approved—and, in some jurisdictions, incredibly high volumes.

In such cases, as prior commentators have observed, variances function akin to a rezoning.⁵ They enable jurisdictions to permit otherwise prohibited uses and allow growth and development to occur without addressing needed reforms to the existing zoning. They also provide local residents an opportunity to weigh in on the smallest of changes to their neighbors' property, simultaneously creating significant uncertainty for those neighbors and any prospective developers.

This problem is particularly acute in the City of Boston, where the city grants thousands of variances each year. It has persisted for decades. Writing in 1979, two prominent zoning experts declared that "[i]n Boston, the variance has all but replaced the amendment, which seems to have been relegated to a device used only by neighborhood groups seeking to downzone their

1. See discussion *infra* Parts III, IV.

2. See Osborne M. Reynolds, Jr., *The "Unique Circumstances" Rule in Zoning Variances—An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. LAW. 127, 128 (1999) ("It has frequently been emphasized by courts and commentators that the power to award variances should be exercised sparingly . . .").

3. See, e.g., STEWART STERK, EDUARDO PEÑALVER & SARA BRONIN, *LAND USE REGULATION* 28 (2d ed. 2016).

4. See Jonathan E. Cohen, Comment, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENV'T AFFS. L. REV. 307, 361 (1995) ("Designed to provide a constitutional safety valve in the zoning context, the unnecessary hardship variance has a history of malleable and sometimes corrupt use by local reviewing bodies.").

5. See Ann Martindale, Comment, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 687–88 (1988) ("A ZBA strays onto legislative turf when it grants so many variances in one neighborhood that it causes de facto rezoning . . .").

community.”⁶ Nothing has changed in the years since.

In this symposium contribution, we share the results of an empirical study of variance decisions in Boston.⁷ We also compare our findings in Boston to variance decisions in three neighboring jurisdictions: Cambridge, Brookline, and Somerville.⁸ We find that variances in Boston are, consistent with prior studies elsewhere, granted at a very high rate.⁹ We also find, looking at the substance of these decisions, that little attention is given to the legal requirements for a variance.¹⁰ Instead, decisions are shaped largely by the policy preferences of decision-makers, as well as an apparent inclination to help individual applicants burdened by Boston’s overly restrictive zoning.

From this study, we glean a number of lessons for zoning reformers, arguing that reform efforts should consider the role the variance process plays in a given jurisdiction. Variance decisions can shed light on particularly onerous elements of local zoning, revealing targets for reform.¹¹ The variance process also highlights how local residents understand zoning and their expectations regarding their own role in the land use process.¹² As a prominent Seattle land use lawyer observed in 1979:

The zoning board is, in some respects, ill-conceived in terms of what it has come to be, but it has become a sacred cow. Variances are like magic, and when zoning reform occurred in this town we talked about going to a different kinds of system, . . . and people just could not conceive of not having variances. They couldn’t conceive of it, and they couldn’t conceive of not having a board of adjustment. There

6. CLIFFORD L. WEAVER & RICHARD F. BABCOCK, CITY ZONING: THE ONCE AND FUTURE FRONTIER 161 (Planners Press ed., 1979) (“In Detroit, the applications for rezoning per year are counted in the tens while applications for variances [in Boston] are counted in the hundreds—lots of hundreds.”).

7. *See generally infra* Section IV.A.1 (depicting and describing the quantitative findings of the empirical study).

8. *See generally infra* Section III.B (comparing variance requests in Boston with those in other jurisdictions).

9. *See generally infra* section IV.A (describing the findings indicating the high rate of variances granted in Boston).

10. *See generally infra* Section IV.A.2 (underscoring the rarity of examination of the required elements for grant of a variance, particularly a finding of a unique and substantial hardship).

11. *Infra* Section V.B.

12. *Infra* Section V.B.

was no reason to keep it.¹³

In jurisdictions that rely heavily on variances to permit new development, reformers will likely need to grapple with how they might substitute for the voice residents currently exercise through the variance process.

This Article proceeds in four parts.¹⁴ Part II examines the variance as intended by zoning's early proponents and the legal doctrine that, in theory, governs the grant of variances.¹⁵ Part III considers two recent reports on Boston's Zoning Board of Appeal (ZBA) and variance process before comparing the volume of variances granted in Boston to other cities.¹⁶ Part IV shares the results of our research, details quantitative findings, and assesses the substance of variance decisions in Boston, the neighboring cities of Cambridge and Somerville, and the Town of Brookline.¹⁷ Finally, Part V briefly suggests some implications, both potential reforms to the variance process itself and how this process might inform more significant zoning reforms.¹⁸

II. THE VARIANCE IN THEORY

A. *No One Is Enthusiastic About Variances Except the People*¹⁹

Variances, which permit departures from the uniformity (and predictability) of a zoning ordinance, have raised concerns since the earliest days of zoning. The 1926 Standard State Zoning Enabling Act provided for a "board of adjustment" with the power to make "special exceptions to the terms of the [zoning] ordinance in harmony with its general purpose and intent."²⁰ The board's role would include authorizing

in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special

13. WEAVER & BABCOCK, *supra* note 6, at 163 (alteration in original) (quoting Jerry Hillis, a Seattle land use lawyer).

14. *See infra* notes 25–28 and accompanying text (providing a roadmap for the Article's content).

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

18. *See infra* Part V.

19. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 17 (1966) ("No one is enthusiastic about zoning except the people.").

20. A STANDARD STATE ZONING ENABLING ACT § 7 (U.S. DEP'T COM. 1926).

conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.²¹

As originally understood, such variances were to be granted sparingly, to address unique situations where strict enforcement of the zoning ordinance might raise due process concerns by imposing an “unnecessary hardship”.²²

The Act’s provisions regarding the board of adjustment constituted “the stickiest point” for the committee that drafted it.²³ Shortly after the Act’s passage, one prominent committee member, Lawrence Veiller, expressed concern that zoning boards were already abusing their authority.²⁴ A contemporaneous New York State Court of Appeals decision by Chief Judge Benjamin Cardozo warned that the variance power is “one easily abused.”²⁵ Within a decade of the Supreme Court’s decision upholding zoning in *Village of Euclid v. Ambler Realty Co.*,²⁶ zoning boards of adjustment were facing criticism for destroying the integrity of zoning maps and districts.²⁷ Edward M. Bassett, a prominent early advocate of zoning and lead drafter of New York City’s zoning ordinance, wrote in 1947:

There is a great deal of well-justified criticism all over the country against zoning because boards of appeals make changes in the guise

21. *Id.*

22. Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between*, 39 URB. LAW. 877, 881, 889 (2007).

23. Ruth Knack, Stuart Meck & Israel Stollman, *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 3, 5 (1996).

24. *Id.* at 6.

25. *People ex rel. Fordham Manor Reformed Church v. Walsh*, 155 N.E. 575, 578 (N.Y. 1927); see also Yoram Jerry Cohen, *Area Variance Law in New York: A Uniform Approach*, 7 CARDOZO L. REV. 251, 26768 (1985) (“New York City’s 1916 zoning regulation had allowed the BSA to use its judgment whenever it believed that there was a sufficient showing of practical difficulties or unnecessary hardship. However, it was widely believed that the absence of enumerated criteria was causing an abuse of the variance power.” (footnote omitted)); *Sugar v. N. Balt. Methodist Protestant Church*, 165 A. 703, 706 (Md. 1933) (declaring variance power an unconstitutional delegation of legislative function); *Welton v. Hamilton*, 176 N.E. 333, 335 (Ill. 1931) (“The Legislature must decide what the law shall be, and a law must be complete in all its terms and conditions when it leaves the Legislature.”).

26. 272 U.S. 365 (1926).

27. Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 82–83 (Charles M. Haar & Jerold S. Kayden eds., 1989) (citing SEYMOUR I. TOLL, ZONED AMERICAN 281 (1969)).

of variances. For instance, a board of appeals will authorize a permit for a change of a one-family house in a one-family residence district into a two-family house. Such action is equivalent to making an amendment to the zoning ordinance.²⁸

The broad discretion granted to zoning boards, coupled with the vague criteria that often govern variance applications, exacerbates concerns.²⁹ Critics routinely lament that zoning boards ignore the relevant legal standards,³⁰ particularly the requirement of a substantial hardship that is unique to the applicant.³¹ Others highlight the frequent practice of providing justifications for

28. See Edward M. Bassett, *A Warning as to Unlawful Zoning*, AM. CITY 119 (Jan. 1947). See generally John J. Infranca, *Singling Out Single-Family Zoning*, 111 GEO. L.J. (forthcoming 2023) (manuscript at 27) (discussing the role of Bassett in early development of zoning).

29. Thomas Sattler, Comment, *Variances and Parcel Rezoning: Relief from Restrictive Zoning in Nebraska*, 60 NEB. L. REV. 81, 113 (1981) (referencing “lack of clearly understandable, distinct and consistent standards for cases involving requests for a variance”); Marcia R. Gelpe, Note, *Variance Administration in Indiana—Problems and Remedies*, 48 IND. L.J. 240, 246 (1973) (“In Indiana, the delegating statute is an ineffective control mechanism because the statutory language applicable to most jurisdictions is extremely vague and, even with the judicial interpretations that have been provided, leaves boards with no clear guidelines.” (footnotes omitted)); Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 672–73 (1969) (discussing how vague criteria lead to boards exercising considerable discretion).

30. See, e.g., Cohen, *supra* note 25, at 273 (“[T]he BSA frequently ignores its own guidelines.”); David Newbern, *Zoning Flexibility: Bored of Adjustment?*, 30 ARK. L. REV. 491, 511 (1977) (“The problem with the current law is not the lack of a standard to be applied but lack of willingness or ability to apply such a standard.”); Ronald M. Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 13 (1969) (“A pattern generally prevalent in variance decisions is the distinct absence of specific findings based on legal standards. Instead, boards generally support their variance grants with boilerplate language”); see also JOSEPH SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 478 (Barkow et al. eds., 8th ed. 2022) (“[Z]oning boards often ignore the law and grant variances when there is no showing that the owner has met the standard for undue hardship.”); David H. Cook & Robert D. Trotta, Note, *Syracuse Board of Zoning Appeals—An Appraisal*, 16 SYRACUSE L. REV. 632, 636 (1965) (“In every case where a variance was granted to an applicant, whether he was a business or a nonbusiness user, the board commented on the hardship or practical difficulties question. However, for the most part there was little relationship between the ‘general standards’ applied by the board and the strict standards imposed by case law.”); Thomas B. Donovan, Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101, 107 (1962) (“A study of the . . . variance applications submitted . . . suggests that the zoning ordinance is being administered without regard to statutory requirements.”). See generally David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENV’T L. 279, 297 (2004) (summarizing earlier empirical studies and criticisms).

31. See Reynolds, Jr., *supra* note 2, at 138 (“[B]oards often do not spell out the reasoning behind their decisions and, in particular, don’t indicate what specific hardship justified a variance that is

a decision that derives not from the relevant legal standard but rather policy preferences and other factors that, strictly speaking, are irrelevant.³² Still, other criticisms emphasize a lack of common evidentiary or procedural standards.³³

Two commentators succinctly framed the general problem as, perhaps, inevitable:

The usual three- or four-part formula for assessing the merits of a variance is all but meaningless when applied to most cases that come before a city zoning board. The result is that zoning board members, having no meaningful standard, fall back to acting in light of what they perceive their role to be, that of a board of equity sitting to do rough justice in difficult cases. Frequently, the zoning board sees itself as the protector of citizens against the professionals.³⁴

With its role framed in this way, it is perhaps not surprising that studies of zoning boards of appeal routinely reveal that a high volume and share of variance applications are approved.³⁵ Such patterns would seem in tension

awarded.”); Cohen *supra* note 4, at 361 (“Designed to provide a constitutional safety valve in the zoning context, the unnecessary hardship variance has a history of malleable and sometimes corrupt use by local reviewing bodies.”); Martindale, *supra* note 5, at 670 (“Disrespect for the hardship doctrine is virtually a tradition in Connecticut, as well as nationwide.”); *id.* at 689 (“The failure of zoning boards to correctly apply the hardship doctrine is legendary. Early critics contended that ZBAs granted variances if they concluded that the variance would harm no one.”).

32. Owens, *supra* note 30, at 299 (“In other instances the board engaged in providing lax application of community standards to favored interests on the basis of political, economic, or ideological bases.”); Cohen, *supra* note 4, at 308 (“Local decisionmaking bodies have been found frequently to base decisions to grant or deny variances on inappropriate and substantially irrelevant factors.”).

33. See Reynolds, Jr., *supra* note 2, at 130 (“There are no common evidentiary or procedural standards, and many hearings fail to provide fundamental fairness and due process. The prerequisites for obtaining a variance are often not clearly provided by law and are, in any event, frequently ignored.” (footnote omitted)); Brent Ellis Dickson, Note, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398, 402 (1968) (“Effective judicial review is hindered by the failure of Indiana statutes and cases to require the boards to make written findings of fact.”).

34. WEAVER & BABCOCK, *supra* note 6, at 161; *cf.* Cohen, *supra* note 25, at 272 (“In its defense, the BSA argues that the standards in section 72-21 are overly strict, inflexible, and therefore unworkable. This sometimes leads the BSA to depart from the letter of the law in an attempt to seek equity in the case immediately before it.” (footnote omitted)).

35. See, e.g., Owens, *supra* note 30, at 295–96 (“A persistent cause of concern was the high approval rate for variance petitions. Studies of variance practice in the 1925 to 1940 era indicate well over half of all variance petitions were routinely approved in large metropolitan jurisdictions. Studies of variance practice in the 1945–1960 immediate post-war period of rapid suburbanization and spread

with the traditional and oft-quoted depiction of variances as “safety valves” to be granted “sparingly.”³⁶

Noting that variances are, in theory, to be granted only rarely, a 1972 Massachusetts Department of Community Affairs Report observed that “the discrepancy between theory and practice in the local administrative process is nowhere more apparent than here and has been observed by a number of critics.”³⁷ The report quoted a 1955 treatise, which criticized the tendency of zoning boards “to play the good fellow and substitute for tests specified in the statute and ordinance the following: (1) Will the variance help the applicant, and (2) are the neighbors complaining?”³⁸ It noted that two prior studies of Cambridge and Boston found very high rates of variance requests being granted and that, in Boston, fifty-two percent of all dwelling units constructed

of zoning indicated it was commonplace for 70% or more of variance petitions to be approved. Studies confirmed that variance approval rates in the 70%–80% range continued to be common throughout the 1960–1990 period in a wide variety of settings, including urban, small town, and rural jurisdictions.” (footnotes omitted)); Gelpe, *supra* note 29, at 244 (“Despite the presence of such standards, evidence from Marion County indicates that an excessive number of variances is granted. . . . Since variances are designed to provide relief from zoning ordinances in relatively rare cases, such excessive variances indicate a malfunctioning of the variance granting system.” (footnote omitted)); Dickson, *supra* note 33, at 410 (“Apparently oblivious to the admonition of the Indiana Appellate Court that ‘variances should be granted sparingly,’ the Board granted 86% of the variance requests decided during the study. Published results for the year 1966 disclose that 77% of the 458 use variance petitions were granted. Studies of other boards have indicated similarly high rates of variance grantings.” (footnotes omitted)).

36. Shapiro, *supra* note 30, at 3 (“The variance power, to be consistent with its theoretical objectives and legal limitations, should be exercised sparingly, with particular care to avoid harmful side effects.”); John W. Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280, 281 (1955) (“Probably no other figure of speech has been so overworked as the comparison of the board of appeals to a ‘safety valve,’ designed to prevent some legal explosion.”).

37. COMMONWEALTH OF MASS. DEP’T OF CMTY. AFFS., REPORT OF THE DEPARTMENT OF COMMUNITY AFFAIRS RELATIVE TO PROPOSED CHANGES AND ADDITIONS TO THE ZONING ENABLING ACT, H.R. 167-5009, 1st Sess., at 63 (1972).

38. *Id.* at 64 (quoting FRANK E. HORACK, JR. & VAL NELSON, JR., LAND USE CONTROLS 176 (1955). Horack and Nelson went on: “Thus, losing sight of the long-range objectives of the comprehensive plan and insensitive to the indirect consequences of the grant, the board authorizes the variance in most instances. Inasmuch as the decision of the board of zoning appeals is rarely subjected to judicial review, the administrative standards become controlling.” *Id.* Boston’s ZBA, in a guide for applicants, states that they should include “supporting evidence” when applying for a variance, including “letters or petitions signed by abutters or any other evidence that supports their appeal,” although the legal standard does not require such support. *Zoning Board of Appeal Process, A Guide to the City’s Zoning Board of Appeal Process*, BOS. INSPECTIONAL SERVS., https://www.boston.gov/sites/default/files/file/2021/12/ZBA%20Guide%2012%2018%2021%20English%20final_0.pdf (last visited Sept. 29, 2022).

in the city during the study period involved a variance request.³⁹ Interviews with zoning board members at the time confirmed that “zoning boards in many communities do not adhere to the strict standards for the granting of variances” under Massachusetts’s statutory and case law and perform quasi-legislative rather than quasi-judicial roles.⁴⁰

In sum, critics of zoning boards and their willingness to grant variances raise substantive concerns focused on the lack of adherence to relevant legal standards and procedural concerns, including criticism of a lack of fact-finding and procedural regularity. The high volume of variances granted suggests both a lack of careful consideration of the relevant legal standards and a problematic undermining of the uniformity of zoning through a sort of piecemeal planning and rezoning.⁴¹

Some commentators push back on criticism of variance decisions and their failure to conform to technical legal requirements.⁴² Economist and zoning expert William Fischel, a member of the Hanover, New Hampshire, zoning board for many years, has defended the consideration of local support, opposition, and decisions grounded in familiarity with the particular site in question, even though outcomes may not always be consistent with the law.⁴³ Eric Steele framed zoning ordinances as a procedural mechanism which serves to identify proposed changes that may be problematic and merit community input.⁴⁴ Matters that are routinely granted and generate no community participation represent “false positives,” and too many of these, Steele

39. COMMONWEALTH OF MASS. DEP’T OF CMTY. AFFS., *supra* note 37, at 64 (citing CHARLES M. HAAR, *LAND-USE PLANNING* 296 (1959)) (finding, in a study of the City of Cambridge, that the city granted 48 out of 57 applications for “use variances,” and granted 51 out of 59 applications for “dimensional variances”); *Administrative Discretion in Zoning*, *supra* note 29, at 673 (finding that during a study period, “fifty-two percent of all dwelling units constructed in the city” involved requests for an exercise of variance or special permit granting power, of which 81% were successful).

40. COMMONWEALTH OF MASS. DEP’T OF CMTY. AFFS., *supra* note 37, at 64.

41. Sampson, *supra* note 22, at 903 (“While a high approval rate does not confirm variance abuse on the part of a board, it does raise a suspicion, at least, that not all such variances granted met the applicable approval criteria.”); see also Christopher Rizzo, *Zoning Variances and the New York City Board of Standards and Appeals*, 30 COLUM. J. ENV’T L. 193, 196 (2005) (“[A]n extremely high variance approval rate calls into question the scrutiny that is applied to applications.”).

42. See, e.g., WILLIAM A. FISCHEL, *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION* 39 (2015).

43. *Id.* at 39–41.

44. Eric H. Steele, *Community Participation and the Function of Rules: The Case of Urban Zoning Boards*, 9 LAW & POL’Y 279, 296 (1987); see also Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1067–68 (1990).

suggests, create “pressure to amend the zoning ordinance to eliminate or loosen the criterion.”⁴⁵ Steele’s account provides an intriguing defense of the role of variances, but there is no clear evidence that frequent grants lead to changes to underlying zoning rather than more reliance on variances.

B. The Legal Standard in Massachusetts

The Massachusetts Supreme Judicial Court, in an early zoning decision, declared it

manifest from the tenor of the zoning act as a whole . . . that the power of authorizing variations from the general provisions of the statute is designed to be sparingly exercised. It is only in rare instances and under exceptional circumstances that relaxation of the general restrictions established by the statute ought to be permitted.⁴⁶

Subsequent decisions in the Commonwealth reaffirmed that variances should be granted sparingly.⁴⁷ Before we explore the extent to which this admonition is ignored, it will be helpful to briefly review the law that, in theory, governs variances in Massachusetts.

1. State Law

Massachusetts has two state zoning enabling acts. Chapter 40A, often called the “Zoning Act,” applies to all municipalities outside of Boston.⁴⁸ A separate act, referred to simply as the “Enabling Act,” applies exclusively to the City of Boston.⁴⁹ Chapter 40A and the Enabling Act provide slightly

45. Steele, *supra* note 44, at 296.

46. *Norcross v. Bd. of Appeal of Bldg. Dep’t of Bos.*, 150 N.E. 887, 890 (Mass. 1926).

47. *See, e.g., Sheppard v. Zoning Bd. of Appeal of Bos.*, 963 N.E.2d 748, 752 (Mass. App. Ct. 2012) (“We are mindful that ‘[n]o person has a legal right to a variance and they are to be granted sparingly. . . .’”); *Pendegast v. Bd. of Appeals of Barnstable*, 120 N.E.2d 916, 918 (Mass. 1954) (“It has often been said that variances are to be granted sparingly.”); *Coleman v. Bd. of Appeal of Bldg. Dep’t of Bos.*, 183 N.E. 166, 167 (Mass. 1932) (“[T]he power of authorizing variations from the general provisions of the statute is designed to be sparingly exercised.”); *Prusik v. Bd. of Appeal of Bldg. Dep’t of Bos.*, 160 N.E. 312, 314 (Mass. 1928) (“It is manifest from the general purpose underlying any zoning act . . . that the power to vary the application of the act is to be exercised sparingly.”).

48. MASS. GEN. LAWS ch. 40A (1954).

49. BOS., MASS., ENABLING ACT ch. 665 (1956).

different standards for the grant of a variance.⁵⁰

Under Chapter 40A, a permit granting authority has the power to grant a variance if it:

specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.⁵¹

In Boston, variances are governed by Section 9 of the Enabling Act, which grants the Zoning Board of Appeal power to authorize:

a variance from the terms of such zoning regulation 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.⁵²

Both standards suggest that variances are appropriate only when (1) there is something unique to the parcel or structure at issue, a condition that is not generally prevalent in the zoning district; (2) due to this condition, literal enforcement of the zoning ordinance would impose “substantial hardship,” and

50. *Van Buren v. S. Bos. New Hous., LLC*, No. 02-5467-A, 2005 WL 332815, at *8 (Mass. Super. Ct. Feb. 4, 2005) (“[C]ase law construing and applying Enabling Act Section 9 has equated its general terms with the more specific ones of present G.L. c. 40A, § 10, governing variances in all other municipalities.”).

51. MASS. GEN. LAWS ch. 40A, §10 (1954). This language, enacted in 1975 by 1975 Mass. Acts chapter 808, is narrower than its predecessor, which required, for a variance, a less precise showing of “conditions especially affecting such parcel or such building.” 1954 Mass. Acts. Ch. 368 at 249, <https://archives.lib.state.ma.us/bitstream/handle/2452/52914/1954acts0368.pdf?sequence=3&isAllowed=y>.

52. BOS., MASS., ENABLING ACT ch. 665, § 9 (1956).

(3) a grant of relief would neither cause “substantial detriment to the public good” nor undermine the purpose of the relevant zoning ordinance.⁵³ The Zoning Act specifically references financial hardship; however, Boston’s Enabling Act does not.⁵⁴ Courts have overturned grants of variances in Boston that relied upon financial hardship.⁵⁵

The Zoning Act further specifies that a zoning board must, for purposes of an appeal, establish “a detailed record of its proceedings” that clearly sets forth “the reason for its decision[s] and of its official actions.”⁵⁶ Reviewing courts conduct *de novo* review of zoning decisions; however, a decision is to be disturbed only if “it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.”⁵⁷ Boston’s Enabling Act similarly requires a detailed decision providing reasons for the Board’s decision, the vote of each member, and any conditions or provisos imposed.⁵⁸ The Massachusetts Supreme Judicial Court has declared that a “mere repetition of the statutory words” fails to satisfy the requirement for a detailed record with specific findings and the Board’s reasoning.⁵⁹ Rather, the Board must provide a

53. Compare BOS., MASS., ENABLING ACT ch. 665, § 9 (1956), with MASS. GEN. LAWS ch. 40A, § 10 (1954).

54. Compare BOS., MASS., ENABLING ACT ch. 665, § 9 (1956), with MASS. GEN. LAWS ch. 40A, § 10 (1954).

55. See CYNTHIA M. BARR & JENNIFER SCHULTZ, BOSTON ZONING: A LAWYER’S HANDBOOK § 12.9 (citing cases); see also 39 Joy St. Condo. Ass’n v. Bd. of Appeal of Bos., 688 N.E.2d 1363, 1367 (Mass. 1998) (“[F]inancial hardship to the owner alone is not sufficient to establish ‘substantial hardship’ and thereby justify a variance.” (quoting *McNeely v. Bd. Of Appeal of Bos.*, 261 N.E.2d 336, 342 (Mass. 1970))); *Prusik v. Bd. of Appeal of Bldg. Dep’t of Bos.*, 160 N.E. 312, 314 (Mass. 1928) (“The financial situation or pecuniary hardship of a single owner affords no adequate ground for putting forth this extraordinary power affecting other property owners as well as the public.”).

56. MASS. GEN. LAWS ch. 40A, § 15 (1954).

57. *Roberts v. Sw. Bell Mobile Sys., Inc.*, 709 N.E.2d 798, 804 (Mass. 1999) (quoting *MacGibbon v. Bd. of Appeals of Duxbury*, 255 N.E.2d 347, 350 (Mass. 1970)).

58. BOS., MASS., ENABLING ACT ch. 665, § 8 (1956).

59. *Warren v. Bd. of Appeals of Amherst*, 416 N.E.2d 1382, 1388 (Mass. 1981) (quoting *Brackett v. Bd. of Appeal of the Bldg. Dep’t of Bos.*, 39 N.E.2d 956, 958 (Mass. 1942)); see also *McNeely*, 261 N.E.2d at 342–43 (“We agree . . . that the decision of the board is invalid on its face. The board did not make the explicit findings which are prerequisite to the granting of a variance and which, as we have often said, are not supplied by a bare recital of the statutory conditions essential to the granting of a variance.”); *Wolfson v. Sun Oil Co.*, 256 N.E.2d 308, 310 (Mass. 1970) (“All the board and the judge did by their ‘findings’ was substantially to repeat the language contained in the statute. The specific findings necessary to satisfy the requirements for granting a variance are not met by a ‘mere repetition of the statutory words.’”).

record sufficient to “move an impartial mind” to the conclusion reached.⁶⁰ Moreover, satisfying the statutory requirements—while strictly necessary to obtain a variance⁶¹—does not entitle a party to relief.⁶²

2. Local Variations

In Boston, Article Seven of the Zoning Code further details the Board of Appeal’s power to grant variances.⁶³ The board may only grant a variance when three conditions are satisfied:

(a) That there are special circumstances or conditions, fully described in the findings, applying to the land or structure for which the variance is sought (such as, but not limited to, the exceptional narrowness, shallowness, or shape of the lot, or exceptional topographical conditions thereof) which circumstances or conditions are peculiar to such land or structure but not the neighborhood, and that said circumstances or conditions are such that the application of the provisions of this code would deprive the appellant of the reasonable use of such land or structure;

(b) That, for reasons of practical difficulty and demonstrable and substantial hardship fully described in the findings, the granting of the variance is necessary for the reasonable use of the land or structure and that the variance as granted by the Board is the minimum variance that will accomplish this purpose; [and]

(c) That the granting of the variance will be in harmony with the general purpose and intent of this code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare[.]⁶⁴

60. *Prusik*, 160 N.E. at 314 (“There must be set forth in the record substantial facts which rightly can move an impartial mind, acting judicially, to the definite conclusion reached.”).

61. *See* *Plan. Bd. of Springfield v. Bd. of Appeals of Springfield*, 245 N.E.2d 454, 456 (Mass. 1969) (“[A] decision of the board of appeals granting a variance cannot stand unless the board specifically finds that each statutory requirement has been met.”).

62. *Pendegast v. Bd. of Appeals of Barnstable*, 120 N.E.2d 916, 918 (Mass. 1954).

63. BOS., MASS., ORDINANCES art. 7, § 7-1 (1956).

64. *Id.* § 7-3. An additional condition applies if the variance is for a “Development Impact Project,” which must comply with relevant requirements. *Id.*

The Zoning Code also directs the board to consider additional factors, including the number of people residing or working on the land or in the structure, the character and use of the adjoining lots and neighborhood in general, and neighborhood traffic conditions.⁶⁵ The Zoning Code further specifies, in Section 7-3(a), what constitutes a special circumstance or condition, although it offers enumerated examples rather than an exclusive list.⁶⁶ It calls explicitly for these special circumstances to be “fully described in the findings.”⁶⁷ Boston’s Zoning Code adds language that does not appear in the state law, requiring a finding that these circumstances “deprive the appellant of the reasonable use” of their property.⁶⁸ The next Section reiterates the state law’s requirement of a finding of substantial hardship but adds that the hardship must be “demonstrable” and must be coupled with “practical difficulty.”⁶⁹ It also calls for the variance granted to be the minimum necessary to allow reasonable use.⁷⁰ Finally, Section 7-3(c) largely parallels the language of the last clause of the state law, but it adds a requirement that the variance cause no injury not only to the public welfare or good generally but also to the neighborhood.⁷¹ Read together, these provisions expand the number of factual and legal findings the board must make in granting a variance.⁷² Massachusetts courts reviewing Board of Appeals decisions tend to invoke both the state law and the Boston Zoning Code.⁷³ However, some cases invoke and apply only the language of the city’s zoning code.⁷⁴ The ZBA itself does the same in its decisions.

65. *See id.*

66. *Id.* § 7-3(a).

67. *Id.*

68. *Id.*

69. *Id.* § 7-3(b).

70. *Id.*

71. *Id.* § 7-3(c).

72. *See id.* § 7-3 (requiring that “[t]he Board of Appeal shall grant a variance only if it finds that all of the . . . conditions are met”).

73. *See, e.g.,* 39 Joy St. Condo. Ass’n v. Bd. of Appeal of Bos., 688 N.E.2d 1363, 1366 (Mass. 1998) (“The grant of a variance to Ciancarelli is governed by St.1965, c. 665, § 9, and the Boston Zoning Code.”); McGee v. Bd. of Appeal of Bos., 819 N.E.2d 975, 978 (Mass. App. Ct. 2004) (“To support the grant of the variances Verdi had applied for, the board was required by the Boston act, St.1956, c. 665, § 9, and the code, Section 7–3, to find four conjunctive criteria.”); Topolski v. Bd. of Appeals for the City of Bos., No. 1784CV04135BLS1, 2021 WL 9334590, at *4 (Mass. Super. Ct. June 15, 2021) (“The grant of a variance is governed by St. 1965, c. 665, § 9 and the Code.”).

74. Steamboat Realty, LLC v. Zoning Bd. of Appeal of Bos., 875 N.E.2d 521, 523 n.5 (Mass. App. Ct. 2007); Van Buren v. S. Bos. New Hous., LLC, No. 02-5467-A, 2005 WL 332815, at *5–6 (Mass. Super. Ct. Feb. 4, 2005).

Before a variance application even reaches the ZBA, it goes through a process that is, to a significant degree, not dictated by law.⁷⁵ When the city's Inspectional Services Department (ISD) receives an application, it notifies the Mayor's Office of Neighborhood Services (ONS).⁷⁶ Community liaisons in the ONS "notify the applicant to arrange a meeting with the local neighborhood association (typically a private organization) and also to provide notice to abutters by posting a sign (prepared by ISD) at the project site."⁷⁷ These practices, while not required by law, have become standard policy.⁷⁸ The neighborhood review process is set by the local neighborhood association, which "can drag out the review process and often schedule meetings several months out. Even if not intending to delay, association meeting schedules may be such that review takes several months."⁷⁹ Approval from the neighborhood association is not required for the Board to grant a variance, and as discussed below, the neighborhood association's opinion is often not heeded.⁸⁰ However, the Board does, at its hearings, ask applicants about their engagement with the neighborhood association and their position on the application.⁸¹ Recommendations from the Mayor's Office of Neighborhood Services and the Boston Planning and Development Agency are also provided "orally at or shortly before the zoning hearing."⁸²

The specific legal standards governing variances in the jurisdictions outside Boston will be explored in turn as we discuss our analyses of those jurisdictions.⁸³ One final point regarding local practice is in order, however. Outside of Boston, commentators have noted a blurring of the lines between

75. See Memorandum from Victor N. Baltera & Patrick P. Dinardo to Eugene O'Flaherty & Henry C. Luthin regarding Boston Board of Appeal 15-17 (Jan. 13, 2020) (on file with author) [hereinafter Sullivan & Worcester Memorandum] (discussing how neighborhood review and approval are not required by law).

76. *Id.* at 16.

77. *Id.*

78. *Id.*; see generally BOS. INSPECTIONAL SERVS., *supra* note 38 (outlining steps of the ZBA appeal process).

79. Sullivan & Worcester Memorandum, *supra* note 75, at 16.

80. See *id.* ("Neither of these processes is set forth in the Enabling Act or Zoning Code, but rather have been implemented as policy matters.")

81. See generally BOS. INSPECTIONAL SERVS., *supra* note 38 ("The BPDA and Mayor's Office of Neighborhood Services may also solicit and/or receive input from abutters and community groups and, if appropriate, will arrange meetings between builders and neighborhood groups.")

82. Sullivan & Worcester Memorandum, *supra* note 75, at 9.

83. See *infra* Section IV.B. (comparing the legal standards governing variances in Boston with those of other jurisdictions).

dimensional variances and special permits.⁸⁴ Some jurisdictions provide a mechanism for relief, via a special permit, from dimensional requirements in neighborhoods with a general pattern that developed prior to the existing zoning standards.⁸⁵ Section 6 of the Zoning Act establishes a means for single and two-family residences that do not conform with current zoning to be extended or altered upon a finding that “such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.”⁸⁶ The Massachusetts Supreme Judicial Court has declared homeowners availing themselves of the special permit process under Section 6 need not also obtain a variance pursuant to local law.⁸⁷ Rather, the permitting authority simply must “identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones.”⁸⁸ Only if the proposal would intensify existing nonconformities or create new ones must the question of whether the change is “‘substantially more detrimental’ to the neighborhood” be addressed.⁸⁹ A finding of no substantial detriment precludes the need for a variance to maintain the special protections the state legislature provided to one- and two-family residences.⁹⁰ As noted in Part III, many requests for relief that are addressed as variances in Boston are instead channeled into this and related special permit provisions in other communities.⁹¹

84. MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW 343 (5th ed. 1993).

85. *See Emond v. Bd. of Appeals of Uxbridge*, 541 N.E.2d 380, 381 (Mass. App. Ct. 1989) (discussing a local ordinance in Uxbridge allowing for special permits to provide relief from dimensional requirements in neighborhoods that previously had more lenient frontage and area standards).

86. MASS. GEN. LAWS ch. 40A, § 6 (1954).

87. *Bellalta v. Zoning Bd. of Appeals of Brookline*, 116 N.E.3d 17, 29 (Mass. 2019). The homeowners sought to modify their portion of a two-family home by adding a dormer, which would increase the pre-existing nonconforming floor area ratio, and received approval via a special permit from the Zoning Board of Appeals. *Id.* at 20.

88. *See id.* at 25–26 (quoting *Willard v. Bd. of Appeals of Orleans*, 514 N.E.2d 369, 373 (Mass. App. Ct. 1987)).

89. *Id.* at 23 (quoting MASS. GEN. LAWS ch. 40A, § 6 (1954)).

90. *Id.* at 28 (“Indeed, given the difficulties and expense associated with obtaining a variance, as well as in obtaining a finding of no substantial detriment, construing the statute to mandate both well could render illusory the protections the Legislature intended to provide these homeowners.”).

91. *See infra* Section III.B (drawing distinctions between variance requests in Boston and those in other jurisdictions).

III. THE VARIANCE IN PRACTICE

A. *Recent Studies of Boston's Zoning Board of Appeal*

1. Sullivan and Worcester Memo on ZBA

In just the past few years, two prominent reports have strongly criticized elements of Boston's variance process.⁹² A January 2020 report on the Zoning Board of Appeal followed an external review requested by then-mayor Marty Walsh in response to a high-profile corruption scandal.⁹³ In addition to reviewing internal operations, the review "considered the impact of Boston's stringent zoning regulations on Board workload and public perceptions of the zoning process."⁹⁴ It described the "complexity of the Boston Zoning Code" as "the elephant in the room," as it "result[ed] in relief being needed for a significant number of projects (no matter how small or routine) with corresponding pressure on the Board to ignore variance standards."⁹⁵ The report's review of the practical operation of the variance process revealed:

The vast majority of variance (and other) appeals are allowed, thereby suggesting that the base Code requirements are too strict. Numerous people we spoke with observed that the Code is very restrictive and complex, and that past down-zoning has made many existing properties nonconforming (*i.e.*, the standards do not reflect the neighborhood). Board members stated that they consider the

92. See Sullivan & Worcester Memorandum, *supra* note 75 (analyzing the BDPA practices and procedures for board appeals and providing recommendations for improvement); CITY COUNCILOR AT-LARGE MICHELLE WU, FIXING BOSTON'S BROKEN DEVELOPMENT PROCESS: WHY AND HOW TO ABOLISH THE BPDA (2019) [hereinafter Wu Report] (outlining the history and development of the Boston Planning and Development Agency, and recommending reforms to city planning and development practices).

93. Catherine Carlock, *Boston Law Firm to Review City Board Linked to Bribery Scandal*, BOS. BUS. J. (Sep. 5, 2019), <https://www.bizjournals.com/boston/news/2019/09/05/boston-law-firm-to-review-city-board-linked-to.html>; see also Sullivan & Worcester Memorandum, *supra* note 75, at 1 ("Corporation Counsel defined our goals as seeking ways to increase efficiency, improve public access, and enhance transparency of the Board's processes and procedures."). Then-Mayor Marty Walsh subsequently issued an executive order regarding ethics, transparency, and modernization at the Zoning Board of Appeal. *An Executive Order Relative to the Zoning Board of Appeal*, CITY OF BOS.: OFFICE OF THE MAYOR (Feb. 24, 2020), <https://www.boston.gov/sites/default/files/file/2020/02/Signed%20ZBA%20EO.pdf>.

94. Sullivan & Worcester Memorandum, *supra* note 75, at 2.

95. *Id.* at 5–6.

variance standards in the Code (BZC §7-3) when deciding appeals but are also influenced (regardless of compliance with the standards) by whether there is support from the community, BPDA, and elected officials; whether they feel the proposal is a “good project”; whether it is similar to others that have been allowed in the past; and how it fits in with the fabric of the neighborhood. *In practice, it appears projects which survive public scrutiny are almost always granted variances with little concern to technical legal requirements.*⁹⁶

The report offered the frank conclusion that faithful application of variance standards would likely lead to development “grind[ing] to a halt” in Boston.⁹⁷ Given that the Board hears around forty cases at each meeting and meets about twice a month, “little time is available for consideration of individual cases.”⁹⁸ Nonetheless, the report suggested that “the system seems to work, in the sense that it processes a large volume of cases with projects shaped to respond to community concerns” and few applicants appeal matters to the courts.⁹⁹ But the report recognized that the failure to adequately consider the legal standard governing variances can harm the Board’s public reputation and “impose[] unwarranted costs and delays on applicants.”¹⁰⁰

96. *Id.* at 6 (emphasis added). The report went on to suggest that recurring requests for relief may suggest a need for amendment of the zoning code to permit such developer to occur as-of-right. *Id.*

97. *Id.* at 6; cf. Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 275 (1962) (concluding, after reviewing decisions in Lexington, Kentucky, that “legal norms governing the Board’s actions do not satisfy needs and demands of contemporary society respecting land use”).

98. Sullivan & Worcester Memorandum, *supra* note 72, at 4. While the architect on the Board reviews plans a few days ahead of the hearing, most members receive a packet at the hearing “consisting of the project proposal, list of violations, and applicant identification (but not the plans or arguments supporting zoning relief).” *Id.* at 9; see also Reynolds, Jr., *supra* note 2, at 138 (“Lack of time for consideration of individual cases is, in particular, a burden that has been noted as leading to many of the problems in variance administration.”).

99. Sullivan & Worcester Memorandum, *supra* note 75, at 6. The report contains a footnote stating, without citation, that “[r]ecently an average of 28 cases have been filed each year, compared to over 1,000 annual filings with the Board.” *Id.* at 6 n.7. This is not surprising, given that “[i]f no neighbor objects to a grant of a variance on less than a strict application of the hardship standard, there is little chance the grant of the variance will be challenged in court.” SINGER ET AL., *supra* note 30, at 478.

100. Sullivan & Worcester Memorandum, *supra* note 75, at 6.

2. Wu Report on BPDA

In October 2019, then-City Councilor and current Boston Mayor Michelle Wu published a report titled *Fixing Boston's Broken Development Process: Why and How to Abolish the BPDA*.¹⁰¹ The report's introduction described a development boom "in neighborhoods transformed by an onslaught of zoning variances and special approvals."¹⁰² It deemed the BPDA an "anachronism" that "operates on political relationships and special exceptions in the absence of up-to-date zoning and a citywide master plan."¹⁰³ Wu called for a new Planning Department that, by revising the zoning code and conducting a comprehensive master plan, would "introduce consistency and predictability to the development process."¹⁰⁴

Consistent with the Sullivan & Worcester report, Wu highlighted the uncertainty developers face when pursuing a variance, including "an unpredictable timeline for community engagement."¹⁰⁵ Moreover, she noted, a reliance on special approvals advantages those familiar with ZBA practices or with "personal relationships with its members," fostering "both the perception of and potential for corruption."¹⁰⁶ Consistent with commentary on variances in other jurisdictions, Wu critiqued the city for "setting citywide development

101. Wu Report, *supra* note 92.

102. *Id.* At the time, City Councilor Wu served as Chair of the City Council's Committee on Planning, Development and Transportation. *Id.* (describing herself as Chair of the City Council's Committee on Planning, Development and Transportation). The Boston City Council, however, has no direct control over zoning and does not hear appeals from either the zoning board or planning board. *See id.* at 14 (citing *Planning Boston's Future*, BOS. PLAN. & DEV. AGENCY, <http://www.bostonplans.org/planning/> (last visited Sept. 30, 2022)) ("Thanks to its outdated zoning code, Boston manages development through a hodgepodge of piecemeal measures with the potential for abuse: zoning variances issued by the Zoning Board of Appeals (ZBA) and Planned Development Areas (PDA) approved by the BPDA board."). A number of Wu's criticisms echo those in the legal literature on variances. *See, e.g.*, Reynolds, Jr., *supra* note 2, at 129 ("[T]he criticism is frequently made that variances have, in the practice of many communities, been so widely and liberally granted that the device has become 'one of danger rather than safety.' Specifically, it has been alleged that variances constitute a kind of 'hidden zoning' that makes it difficult for the average citizen to know what uses are allowed in a neighborhood." (footnotes omitted)).

103. Wu Report, *supra* note 92, at 1; *see also id.* at 14 ("Thanks to its outdated zoning code, Boston manages development through a hodgepodge of piecemeal measures with the potential for abuse: zoning variances issued by the Zoning Board of Appeals (ZBA) and Planned Development Areas (PDA) approved by the BPDA board." (citing *Planning Boston's Future*, BOS. PLAN. & DEV. AGENCY, <http://www.bostonplans.org/planning/> (last visited Sept. 30, 2022))).

104. *Id.* at 1.

105. *Id.* at 14.

106. *Id.* at 15.

policy through case-by-case exceptions.”¹⁰⁷

She called instead for more citywide planning and reform of existing zoning to better address community needs and to improve “predictability and consistency.”¹⁰⁸ “[M]eaningful community participation to shape clear rules” should lead, Wu argued, to a streamlining of inspection and permitting for projects that conform with such rules.¹⁰⁹

On one reading, Wu’s report suggests a shift to more as-of-right development.¹¹⁰ It contends, consistent with traditional understandings of the variance process, that “with a more current zoning code reflecting community feedback, variances would be the exception—not the norm.”¹¹¹ However, it leaves uncertain what form community participation will take and when it will occur, as well as how significantly zoning should be loosened so as to allow development without a variance.

B. Comparing Variances in Boston to Other Jurisdictions

To provide a bit more context for the volume of zoning variance requests considered and granted in Boston, we sought information on variances in the twenty largest cities by population in the United States, as well as a few other of the fifty largest cities.¹¹² Only a very small number of these cities had publicly available reports with information on variance applications or denials.¹¹³

107. *Id.*; see also Gelpe, *supra* note 29, at 241 (“Numerous problems have been attributed to an excessive number of variances. Their quantity, it is argued, contributes to the decreased utility of zoning as a positive planning tool, retards later sound development in undeveloped areas, and contributes to urban blight and neighborhood decay.” (footnote omitted)).

108. Wu Report, *supra* note 92, at 25. Boston’s last official citywide master plan was issued in 1965. See 1965/1975 GENERAL PLAN FOR THE CITY OF BOSTON AND THE REGIONAL CORE, BOS. RE-DEVELOPMENT AUTH. (1964), <https://archive.org/details/19651967generalp00bost/page/n3/mode/2u>.

109. Wu Report, *supra* note 92, at 26.

110. See *id.* (“Because the BPDA has not undertaken a comprehensive master planning to inform citywide zoning code updates, it is nearly impossible to propose financially feasible projects that are ‘as of right’ By engaging community in setting regulations for how land should be used, then codifying updated zoning code provisions *before* a developer gets involved, Boston can move to a development review process that is transparent, consistent, and more efficient . . .”).

111. *Id.* at 25.

112. See discussion *infra* Section III.B (comparing variance request approval rates in Boston with those in other jurisdictions).

113. See *infra* notes 116–153 and accompanying text (explaining the public availability of information relating to city-by-city variance request approval rates).

Others provided such information in response to our requests.¹¹⁴ In a few instances, we reviewed available information, including meeting minutes, and calculated these numbers.¹¹⁵

Boston, the twenty-fourth largest city in the United States by population,¹¹⁶ saw 1,096 applications for variances in 2019, of which it granted 948 (many of these applications, as we note in the next Part, include requests for multiple individual variances).¹¹⁷ In 2020, Boston's ZBA received 639 applications, granting 512.¹¹⁸ For comparison, New York City, which has roughly thirteen times the population and over six times the land area¹¹⁹ of Boston, saw 50 variance applications ruled upon (or withdrawn) in fiscal year 2018 (July 1, 2018, to June 30, 2019), of which the city granted 26.¹²⁰ During the following fiscal year, from July 1, 2019, to June 30, 2020, a total of 34 cases were ruled upon (or withdrawn) in New York City, with 19 granted.¹²¹ Los

114. See *infra* notes 116–153 and accompanying text (detailing information relating to variance approvals).

115. See *infra* note 142 (providing authors' calculations based on meeting minutes). Some cities rely more on other forms of relief, including special permits and rezonings, to allow new development. See, e.g., N.Y.C. BD. OF STANDARDS AND APPEALS, NEW YORK CITY ADMINISTRATIVE CODE § 25-208(B) REPORT ON VARIANCES AND SPECIAL PERMITS (2020), https://www1.nyc.gov/assets/bsa/reports/2020_09_01_report_and_varinces_special_permit.pdf (outlining New York City's special permit policies). For purposes of this article we did not look closely at the use of these mechanisms in other cities. See *infra* Section III.B (comparing variance requests in Boston with those in other jurisdictions). In a future paper one of us (Infranca) plans to compare the use of different forms of zoning relief in a range of cities. See generally *Options for Zoning Relief*, FINDLAW (June 20, 2016), <https://www.findlaw.com/realestate/land-use-laws/options-for-zoning-relief.html>.

116. *City and Town Population Totals: 2020–2021*, U.S. CENSUS BUREAU (May 16, 2022), <https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html>. All population rankings in this Section are drawn from the United States Census Bureau, City and Town Population Totals: 2020–2021, Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2021 Population: April 1, 2020 to July 1, 2021 (SUB-IP-EST2021-ANNRNK). See *id.*

117. See *Zoning Board of Appeal Decisions*, CITY OF BOS., <https://www.boston.gov/departments/inspectional-services/zoning-board-appeal-decisions> (Apr. 4, 2016); see also *infra* Part V.

118. See *id.*

119. *Largest Urbanized Areas with Selected Cities and Metro Areas*, U.S. CENSUS BUREAU (Nov. 15, 2012), <https://www.census.gov/dataviz/visualizations/026/508.php> (providing a land area of 303 square miles for the city of New York and 48 square miles for Boston). All land areas for cities discussed in this section are drawn from *United States Census Bureau, Largest Urbanized Areas with Selected Cities and Metro Areas*. See *id.*

120. See N.Y.C. BD. OF STANDARDS AND APPEALS, *supra* note 115, at 3. Twenty applications were withdrawn, three dismissed, and one denied. *Id.*

121. *Id.* at 3–4 (including authors' calculation of applications related to BZ 72-21, the variance provision of the New York City Zoning Resolution). One application was denied and fourteen were withdrawn. *Id.*

Angeles, with nearly six times the population and ten times the land area,¹²² saw a total of 138 variance applications total in 2019 and 2020, approving 109 of these.¹²³

San Antonio, the seventh largest by population,¹²⁴ saw 171 applications for variances or special exceptions in 2019, of which the city granted 129 were granted, and 135 in 2020, of which it granted 90.¹²⁵ San Diego, the eighth largest by population,¹²⁶ saw only 3 variance applications in 2019 and 2 in 2020.¹²⁷ Austin, the eleventh largest city by population,¹²⁸ heard 109 variance requests between July 2019 and June 2020.¹²⁹ A number of cities closer in population to Boston also saw far fewer variance applications.¹³⁰ Charlotte, North Carolina, sixteenth by population,¹³¹ received 99 applications for variances in 2019 and 102 in 2020, granting 65 and 95, respectively.¹³² San

122. See U.S. CENSUS BUREAU, *supra* note 116 (listing New York and Los Angeles's populations); U.S. CENSUS BUREAU, *supra* note 119 (listing New York City and Los Angeles's city area by square mile).

123. See E-mail from Beatrice Pacheco, Rec. Mgmt. Unit, L.A. City Plan., to author (July 22, 2022, 5:59 PM) (on file with author).

124. See U.S. CENSUS BUREAU, *supra* note 116 (ranking San Antonio seventh for population size).

125. See E-mail from Sandra Garza, Dev. Servs., San Antonio, Tex., to Veronica M. Farr (Oct. 20, 2021, 10:41 PM) (on file with authors) (RE: Response to Public Information Request COSA ORR No: W404873-092021). San Antonio did not disaggregate requests for variances from requests for special exception. *Id.* However, a review of a recent agenda reveals that many applications include requests for both forms of relief, and that special exceptions are often granted for matters that in Boston are treated as variances. See *Board of Adjustment Meeting Agenda*, CITY OF SAN ANTONIO (Aug. 1, 2022, 1:00 PM), <https://sanantonio.primegov.com/Portal/Meeting?meetingId=5447&templateName=HTML%20Agenda>.

126. See U.S. CENSUS BUREAU, *supra* note 116 (ranking San Diego eighth for population size).

127. See E-mail from Stacie Maxwell, Legislative Recorder, City of San Diego Dev. Serv. Dep't, to author (Sept. 20, 2021, 2:26 PM) (on file with authors) (providing count of applications by year and links to decisions).

128. U.S. CENSUS BUREAU, *supra* note 116 (ranking San Diego eighth for population size).

129. CITY OF AUSTIN BD. OF ADJUSTMENT, ANNUAL INTERNAL REVIEW 2 (2020), <https://www.austintexas.gov/edims/document.cfm?id=357193>. Of these, 34 were granted, 6 denied and 69 withdrawn or postponed. *Id.* at 3.

130. See *infra* notes 132–137 and accompanying text (discussing other cities with similar populations to that of Boston that had fewer variance applications).

131. See U.S. CENSUS BUREAU, *supra* note 116 (ranking Charlotte sixteenth for population size).

132. *Zoning Board of Adjustment Cases 2011–Present*, CITY OF CHARLOTTE, <https://charlottenc.gov/planning/ZoningAdministration/ZBACases/Pages/Home.aspx> (last visited Sept. 21, 2022) (providing data for 2020); E-mail from Terry Edwards, Zoning Admin. Specialist, City of Charlotte, to author (Oct. 21, 2021, 1:13 PM) (on file with authors) (stating that there were 99 applications in 2019, with 65 variance grants that year, drawn from 67 decisions on the merits, and that the remainder

Francisco, which is seventeenth in population¹³³ and nearly identical in size to Boston,¹³⁴ saw 170 applications in 2019, of which the city approved 101, and 138 in 2020, only approving 74.¹³⁵ Denver, nineteenth in population,¹³⁶ received 129 requests for variances in 2019 and 112 in 2020.¹³⁷

A few large cities do see numbers comparable to Boston. Philadelphia, the sixth most populous city,¹³⁸ saw an average of about 950 annual variance requests between August 2012 and August 2017.¹³⁹ This number was even higher prior to an overhaul to the zoning code in the early 2010s.¹⁴⁰ Chicago, the third largest city by population,¹⁴¹ saw over 301 variance applications and 292 grants in 2019 and 250 applications and 234 grants in 2020.¹⁴² Yet,

of the applications were withdrawn). One 2019 decision, which we consider a grant, approved one variance requested and denied the other. 1658 Sterling Rd., Case No. 2019-068, Charlotte Zoning Bd. of Adjustment (Nov. 13, 2019) (on file with authors). This data includes administrative deviation requests, which Section 4.107 of the Zoning Ordinance authorizes the Zoning Administrator to grant. *See Variance, Appeal, and Administrative Deviations, Application and Procedures Packet*, CHARLOTTE PLAN., DESIGN & DEV. 2 (2021), https://charlottenc.gov/planning/ZoningAdministration/Documents/ZBA_Documents/ZBA_ApplicationPktSp.pdf.

133. *See* U.S. CENSUS BUREAU, *supra* note 116 (ranking San Francisco seventeenth for population size).

134. *See* U.S. CENSUS BUREAU, *supra* note 119 (listing the land areas of Boston as forty-eighth in square miles and San Francisco as forty-seventh in square miles).

135. *See* E-mail from Chan Son, Exec. Sec’y, S.F. Plan. Comm’n, to author (Nov. 1, 2021, 7:51 PM) (on file with authors) (including spreadsheet with variances by filing date).

136. *See* U.S. CENSUS BUREAU, *supra* note 116 (ranking Denver nineteenth for population size).

137. AUSTIN KEITHLER, BD. OF ADJUSTMENT, CITY AND COUNTY OF DENVER, 2021 YEAR END REPORT 5-6 (2021), <https://www.denvergov.org/files/assets/public/board-of-adjustment-zoning/documents/2021-yr-final.pdf> (providing a bar graph with numbers, but not actual count).

138. *See* U.S. CENSUS BUREAU, *supra* note 116 (ranking Philadelphia sixth for population size).

139. *See* PHILA. CITY PLAN. COMM’N, CITY OF PHILADELPHIA ZONING CODE 5 YEAR REPORT, AUGUST 2012–AUGUST 2017, at 5 (2017), https://www.phila.gov/media/20191121115606/Zoning-Code_5Yr_Report.pdf (providing a table with the number and disposition of requests for variances and other forms of zoning relief from 2008 through 2017).

140. *See id.*; *see also* Aaron Moselle & Ryan Briggs, *Council President Darrell Clarke to Introduce Overhaul of Philly Zoning Board*, WHYY (Sept. 15, 2021, 5:55 PM), <https://whyy.org/articles/council-president-darrell-clarke-to-introduce-overhaul-of-philly-zoning-board/>. Philadelphia does not continue to keep annual records of the total number of variance applications, as was confirmed to us via email. *See* E-mail from Paul Chrystie, Deputy Dir. For Comm’n, Dep’t of Plan. And Dev., City of Philadelphia, to author (Oct. 26, 2021, 5:00 PM) (on file with authors) (“Zoning Board of Adjustment records are kept by individual case and not in a collective way that would, for example, allow a sorting that would group appeals by approval or denial.”).

141. *See* U.S. CENSUS BUREAU, *supra* note 116 (ranking Chicago third for populations size).

142. *See Zoning Board of Appeals*, City of Chicago, https://www.chicago.gov/city/en/depts/dcd/supp_info/zoning_board_of_appeals.html (last visited Sept. 23, 2022) (authors’ calculations based on meeting minutes).

these two cities with comparable volumes of variance applications have larger populations and land areas than Boston.¹⁴³ Boston is, in sum, an outlier in the volume of variance applications received and variances granted, although the rate it grants variances is, as discussed in the next Part, consistent with other jurisdictions.¹⁴⁴

IV. OUR FINDINGS

As the numbers in the prior Section reveal, Boston sees and grants a significantly higher volume of variance applications than comparably sized cities.¹⁴⁵ Our research examined the extent to which the variance process in Boston is consistent with prior empirical studies of variances in other jurisdictions and with substantive criticisms.¹⁴⁶ It also sought, in keeping with the theme of this symposium, to explore how a deeper understanding of the role of variances might inform zoning reform efforts.¹⁴⁷

We focused on Boston, which is marked by an incredibly high volume of variances and decisions that seemingly lack any concern with the statutory standard.¹⁴⁸ We also looked at the variance processes in two nearby cities—Cambridge and Somerville—and in the Town of Brookline.¹⁴⁹ Decisions in Cambridge were most similar to those in Boston, with scant consideration of the legal standards.¹⁵⁰ Brookline relied significantly on special permits to address many of the issues for which variances provide relief in Boston.¹⁵¹ Finally, Somerville revealed the strongest fidelity to the statutory requirements, both before and after a recent rewrite of its zoning ordinance.¹⁵²

143. See *supra* notes 116, 119 (providing data on all three cities by population and square mileage).

144. See *supra* Section III.B (comparing variance application statistics in Boston with those in other jurisdictions); *supra* Part IV (discussing the findings of the authors' Boston variance study).

145. See *supra* Section III.B (comparing variance applications in Boston with other jurisdictions).

146. See *infra* Section IV.B (discussing the findings of the Boston study).

147. See *infra* Part V (discussing the implications of the study).

148. See Sullivan & Worcester Memorandum, *supra* note 75, at 6 (“In practice, it appears projects which survive public scrutiny are almost always granted variances with little concern to technical legal requirements.”).

149. See *infra* Sections IV.B–D (discussing the findings of the study).

150. See *infra* Section IV.B (analyzing Cambridge's variance practices).

151. See *infra* Section IV.C (analyzing Brookline's variance practices).

152. See *infra* Section IV.D (analyzing Somerville's variance practices).

A. Boston's Voluminous Variances

At the time our research began, the City of Boston did not make the text of variance decisions publicly available. We received, via a document request, files from the Boston Zoning Board of Appeals with all decisions related to hearings held on three dates in April 2019 (April 9, April 25, and April 30)—a total of 104 decisions.¹⁵³ We also examined decisions in 2021, by which time the decisions were publicly available on the ZBA's website.¹⁵⁴ We reviewed 100 decisions filed on three dates in June of 2021 (June 2, June 11, and June 22).¹⁵⁵ Twenty-seven of all decisions reviewed did not involve a variance request but instead sought other forms of relief, including conditional use permits and extensions of nonconforming uses. The remaining 177 applications included requests for more than 691 distinct variances (we coded denied applications as a single-variance request, but for granted variances, we counted each individual request separately).¹⁵⁶ A total of 544 distinct variances were granted.¹⁵⁷

The mayor appoints the members of Boston's ZBA to serve three-year terms.¹⁵⁸ The ZBA includes seven members and seven alternative members and meets twice each month.¹⁵⁹ In addition, a subcommittee of the ZBA, which meets monthly, consists of three board members and makes recommendations regarding cases involving one- and two-family residential projects and

153. Of these, 50 related to a hearing held on April 9, 2019, 13 related to April 25, 2019, and 41 related to April 30, 2019. The data provided in this discussion, when not cited, can be found in a spreadsheet on file with *Pepperdine Law Review*. The decisions in these cases were issued in May, June, July and August 2019.

154. *Zoning Board of Appeal Decisions*, CITY OF BOS. (Apr. 16, 2021), <https://www.boston.gov/departments/inspectional-services/zoning-board-appeal-decisions>. The ZBA also now has an appeals tracker, which, as of January 1, 2019, maps the location of relief and allows users to determine their status. See *Appeal Tracker*, ZBA, https://experience.arcgis.com/experience/c019ba9a25cb4f33bb6cdd2f69b543d4/page/page_0/ (last visited Sept. 24, 2022).

155. We chose June of 2021 as a rough proxy for applications that would have been heard in April of that year. This set included 49 decisions issued on June 2, 2021, 26 issued on June 11, 2021, and 25 issued on June 22, 2021.

156. These requests were roughly evenly split, with 337 variance requests identified in the applications reviewed in 2019 and 354 in 2021.

157. These were again roughly evenly split, with 269 variances granted in 2019 and 275 in 2021.

158. BOS. INSPECTIONAL SERVS., *supra* note 38, at 4.

159. *Id.* As of the time of writing there were twelve members of the Board, eleven of whom were holdovers whose three-year term had ended. *Zoning Board of Appeal*, CITY OF BOS. (Sept. 22, 2022), <https://www.boston.gov/departments/inspectional-services/zoning-board-appeal>.

small businesses of less than 35,000 square feet.¹⁶⁰ The subcommittee is intended to expedite the process for such matters and free up time at the full board meetings for discussion of larger projects.¹⁶¹

1. Basic Quantitative Findings

Of the 177 decisions that involved requests for variances, 154 were decided on the merits while the remaining 23 were dismissed without prejudice. Of these 154 decisions, the relief requested was granted in 137 cases for an approval rate of 89%, consistent with the high approval rates found in prior empirical studies.¹⁶² The decisions granting requested variances were unanimous in all but two cases. The decisions either granted or denied all specific variances requested in an application.

Opposition to a variance request seemed to have little effect on the outcome. We identified 39 cases in which any individual opposition was mentioned in the decision; in 34 of these, the requested relief was granted. Relief was granted in 11 of the 12 cases where we identified only opposition, and no support, from neighbors. City councilor opposition was identified in 7 cases, yet all 7 of the applications were granted unanimously.¹⁶³ In 3 of these decisions, there was opposition from the city councilor, along with significant neighbor opposition.¹⁶⁴ However, in all 7 decisions, the Mayor's Office of

160. BOS. INSPECTIONAL SERVS., *supra* note 38, at 4.

161. *Id.*

162. *See supra* note 35 and accompanying text. We did not consider the economic value of projects, which a prior study did analyze. *See Administrative Discretion in Zoning, supra* note 29, at 675 (“The dollar value of a proposed project also appears influential in expediting an appeal. In Boston, the board granted eighty-eight percent of requested variances for buildings with an estimated cost of over \$10,000, as compared with seventy-four percent of those for buildings costing less than \$10,000.”).

163. 14 Meehan St., Case No. BOA1051313, Bos. Zoning Bd. of Appeal (June 22, 2021); 271 W. Fifth St., Case No. BOA891497, Bos. Zoning Bd. of Appeal (July 12, 2019); 2 Snelling Place, Case No. BOA918229, Bos. Zoning Bd. of Appeal (June 28, 2019); 72 Dresser St., Case No. BOA878714, Bos. Zoning Bd. of Appeal (June 14, 2019); 18A Rockville Park, Case No. BOA889398, Bos. Zoning Bd. of Appeal (June 14, 2019); 50 Moseley St., Case No. BOA906174, Bos. Zoning Bd. of Appeal (May 10, 2019); 95–97 W. Walnut Park, Case No. BOA844016, Bos. Zoning Bd. of Appeal (May 10, 2019).

164. 14 Meehan St., Case No. BOA1051313, Bos. Zoning Bd. of Appeal (June 22, 2021) (granting relief after noting opposition from the neighborhood association and a city councilor, but support from Office of Neighborhood Services); 18A Rockville Park, Case No. BOA889398, Bos. Zoning Bd. of Appeal (June 14, 2019) (“At the subsequent Zoning Board of Appeal hearing on April 30, 2019, a representative from the Mayor's Office of Neighborhood Services stood in support of the project.

Neighborhood Services supported the variance request.¹⁶⁵

Relying solely on references in the decisions to additional units added, we counted 949 additional housing units related to these 204 decisions.¹⁶⁶ However, when discounting projects with 20 units or more, a rough proxy for the 20,000 square feet of development that requires the Boston Planning and Development Agency's (BPDA) small project review, the count of added units drops to 170.¹⁶⁷ This suggests that, over the two months of applications studied, approximately 170 units of additional housing were produced largely in reliance upon the variance process, which would be around 1,020 residential units in a year.

As the following table depicting code provisions for which we found more than 25 variance applications reveals, most requests related to relief from dimensional regulations:

While there was some opposition voiced at the hearing, by a representative from the office of City Councilor Janey and multiple abutters, the Board ultimately determined that the support for the proposal outweighed the opposition presented. This showing of approval from the community further supports the Board's finding that the requested relief will have no negative impact on the surrounding area and is in harmony with the general purpose and intent of the Code."); 72 Dresser St., Case No. BOA878714, Bos. Zoning Bd. of Appeal (June 14, 2019) ("At the subsequent Zoning Board of Appeal hearing on April 30, 2019, a representative from the Mayor's Office of Neighborhood Services stood in support of the project. Although there was opposition voiced at the hearing, by City Councilors Flynn, Flaherty, Essaibi-George and an abutter, the Board found the support and validity of the project outweighed the opposition. This showing of approval from the community further supports the Board's finding that the requested relief will have no negative impact on the surrounding area and is in harmony with the general purpose and intent of the Code."). The 72 Dresser Street project required six variances and would add eight additional units. *Id.*

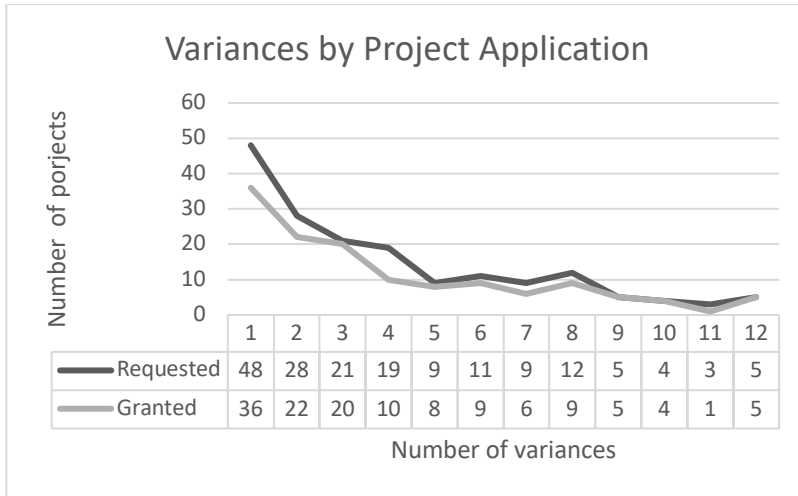
165. See *supra* notes 163–164 (citing the variance request decisions).

166. We identified 728 units related to 2019 decisions and 221 units related to 2021 decisions.

167. See *Small Project Review*, BOS. PLAN. & DEV. AGENCY, <http://www.bostonplans.org/projects/development-review/small-projects> (last visited Sept. 30, 2022); *Large Project Review*, BOS. PLAN. & DEV. AGENCY, <http://www.bostonplans.org/projects/development-review/large-projects> (last visited Sept. 24, 2022). If you eliminate those with fifty or more units, a rough proxy for the 50,000 square feet of development that requires the more intense large project review, the count of new residential units is 214. *Id.*

Provision	Description	Number requested	Wards
53-9	Dimensional regulations in residential subdistricts; East Boston Neighborhood District	126	1
65-9	Dimensional regulations in residential subdistricts; Dorchester Neighborhood District	55	7, 13, 15, 16, 17
56-8	Dimensional regulations in residential subdistricts; West Roxbury Neighborhood District	31	20
50-29	Dimensional regulations in residential subdistricts; Roxbury Neighborhood District	31	12, 13, 14
69-9	Dimensional regulations in residential subdistricts; Hyde Park Neighborhood District	27	18, 15

More than half of the applications reviewed, a total of 97, were for 3 or fewer variances, as shown in the next chart. Twelve projects requested 10 or more variances.



The largest number of applications for variances, 31, related to properties in Ward 1 (East Boston), a neighborhood that has seen significant new development in recent years. Ward 5 (the Back Bay) saw the next largest number of applications with 15.

2. The Substance of Decisions

The Board’s decisions are written by an assistant corporation counsel assigned to serve as its Executive Secretary, who relies in many cases on proposed decisions written and submitted by the applicant.¹⁶⁸ Few, if any, of the 177 variance decisions reviewed discussed the uniqueness or substantiality of the hardship faced by the applicant.¹⁶⁹ Instead, they offered substantially

168. See BOS. INSPECTIONAL SERVS., *supra* note 38, At 11 (“If an applicant is represented by counsel, the attorney will provide a first draft of the decision for the Executive Secretary to review for accuracy before presenting to the ZBA for signature. If the applicant is not represented by counsel, the Executive Secretary will draft the decision to present to the ZBA.”); *Zoning Board of Appeal Tracker*, ANALYZE BOS., <https://data.boston.gov/dataset/zoning-board-of-appeal-tracker> (last visited Oct. 2, 2022) (“The ZBA Executive Secretary finalizes the Board’s decision in writing or the appellant’s attorney submits a finalized decision for ISD Legal Team review.”).

169. *But see* 1078–1082 Dorchester Ave., Case No. BOA825727, Bos. Zoning Bd. of Appeal (June 14, 2019) (stating, without more, in grant of variance from parking requirements, that “[o]wing to the size and location of the property, it was explained that no off-street parking could be provided, but

identical boilerplate language in the form of conclusory statements of the statutory requirements before noting, without any specific findings of fact, that the applicant satisfied the requirements.¹⁷⁰ This has long been Board practice, despite multiple criticisms by courts over the years.¹⁷¹ One Superior Court judge offered a particularly thoughtful critique in 2005:

In this case, the Board drafted the following clause: “The Board of Appeals finds that all of the following conditions are met.” It then inserted verbatim the language of subsections (a), (b), and (c) of Section 7-3 quoted above.

Two of those subsections explicitly, and the third one implicitly, command “fully described . . . findings” of fact in support of a variance. The Board’s decision contains *no* findings of fact. Even as the

that the property is located a very short distance from the MBTA’s Savin Hill rapid transit station”). A few decisions made a passing attempt at identifying evidence of a unique hardship. *See id.*

170. In most instances, the board simply ends its decision by stating that “the Board of Appeal finds that all of the following conditions are met” and then states a paraphrase of the relevant ordinance, with the phrase “fully described in the findings” inserted into each clause. Of course, the reasons are not described partially, let alone fully, in any such findings. In some cases, a separate sentence in the “findings,” such as they are, provides a conclusory statement along the lines of “[r]equiring strict compliance with the Code for the above referenced violations, would present a substantial hardship to the petitioner.” *See* 237 Leyden St., Case No. BOA903636, Bos. Zoning Bd. of Appeal (June 14, 2019); *see also* 181 Bennington St., Case No. BOA906217, Bos. Zoning Bd. of Appeal (June 14, 2019) (same language); 91 Trenton St., Case No. BOA910090, Bos. Zoning Bd. of Appeal (June 14, 2019) (same language). But no description is given of the nature or substantiality of this hardship. In cases where variances were denied the relevant boilerplate stated something along these lines:

The Board is of the opinion that the Appellant did not advance sufficient reasons to satisfy the Board that all the conditions under which the Board may grant a Variance as specified in Article 7, Section 7-3 of the Zoning Code have been met, nor to cause the Board to come to a conclusion that this is a specific case where a literal enforcement of the Act involves a substantial hardship upon the Appellant as well as upon the premises, nor where the described relief may be granted without substantial detriment to the public good and without substantially derogating from the intent and purpose of the Zoning Act.

55 Easton St., Case No. BOA896850, Bos. Zoning Bd. of Appeal (June 14, 2019). Given the discretionary nature of variances, such conclusory statements are, it might be argued, more acceptable in cases of denials. *Cf.* Repts, *supra* note 36, at 283 (“Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.”).

171. *Van Buren v. S. Bos. New Hous., LLC*, No. 02-5467-A, 2005 WL 332815, at *6 (Mass. Super. Ct. Feb. 4, 2005) (criticizing the board decision’s lack of findings of fact).

Board was invoking these Code provisions, it was violating them.¹⁷²

The court went on, “The command for specific findings . . . is not a technicality. It promotes the rationality and integrity of decisions, and enables informed judicial review of their merits.”¹⁷³ It then wasted no words in criticizing the Board of Appeals’ behavior and emphasizing its negative consequences:

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. It presents a decision without reasons or a decision based upon the wrong reasons in place of one “of rational causes and motives.” 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. The result will continue to be the waste of the public and private resources of the applicant builders and developers, the opposing neighbors and landowners, the Board itself, the City law department called upon to defend such decisions under judicial review, and the Superior and appellate courts. The hope for a remedy is that the Board will receive or use the services of knowledgeable City attorneys *at the stage of original variance decision*. That reform, at the least, would cure the chronic ill of blatantly inadequate factfinding. Perhaps the Board and the City government could deploy their legal resources to accomplish that improvement.¹⁷⁴

172. *Id.* (holding granted variance requests as void for the Board’s failure to furnish findings as required by zoning law). In *Van Buren*, the board granted the variance because it would create affordable home ownership in South Boston, but the court held that policy preferences alone do not meet the legal standard required to grant a variance. *See id.*

173. *Id.* at *7.

174. *Id.* The Housing Court issued a similar, but more concise, rebuke in annulling and remanding a variance grant: “The ZBA, while finding the existence of special circumstances, fails . . . to identify which circumstances exist and makes no reference to any information provided to it or upon which it

Our findings are consistent with the court’s description of the Board’s practices.¹⁷⁵ In what follows, we highlight a few recurring patterns in the decisions we reviewed.¹⁷⁶

It appears from our review that the primary factor shaping the Board’s decision is whether the requested relief would allow for something consistent with or similar in size and density to surrounding buildings¹⁷⁷ and will not adversely affect neighbors.¹⁷⁸ Consider, for example, a 2021 decision involving a request for permission to change a two-family residence into a six-unit residential building, in part by constructing a rear addition to the existing structure.¹⁷⁹ The project required eight variances, yet the board provided no discussion of any unique conditions or any practical difficulty or substantial hardship, despite including its standard boilerplate that it found such conditions satisfied based on reasons “fully described in the findings.”¹⁸⁰ The Board declared the grant of relief would allow for reasonable use of the property, assuming *sub silentio* that a two-family dwelling was somehow unreasonable, and declared, without analysis, the project appropriate and “in harmony with the general purposes and intent of this Code,” despite the fact that the Code prohibited the project in question.¹⁸¹

relies to conclude that special circumstances are established.” *Goureev v. Zoning Bd. of Appeal*, Hous. Court Dep’t, City of Bos. Div., No. 16H84CV000137 (Nov. 2, 2016) (noting that lack of findings precluded court from determining legal validity of decision).

175. See *Van Buren*, No. 02-5467-A at *7 (criticizing the factfinding of the Boston Zoning Board of Appeal); *infra* notes 177–226 and accompanying text (discussing patterns exemplified by several board decisions from 2019 to 2021).

176. See *infra* notes 177–226 and accompanying text.

177. 24 Norwood St., Case No. BOA896383, Bos. Zoning Bd. of Appeal (June 14, 2019) (granting a use variance, in addition to multiple area variances, to permit a multifamily dwelling and finding that while floor area ratio (FAR) exceeded what zoning permitted, it was “not inconsistent with other building densities in the neighborhood”); see also 837 Saratoga St., Case No. BOA1029221, Bos. Zoning Bd. of Appeal (June 22, 2021); 65 Gove St., Case No. BOA1035808, Bos. Zoning Bd. of Appeal (June 22, 2021); 47 Condor St., Case No. BOA1110007, Bos. Zoning Bd. of Appeal (June 2, 2021); 50 Moseley St., Case No. BOA906174, Bos. Zoning Bd. of Appeal (May 10, 2019); 140 Harrishof St., Case No. BOA909985, Bos. Zoning Bd. of Appeal (June 14, 2019); cf. 68–70 Phillips St., Case No. BOA909779, Bos. Zoning Bd. of Appeal (June 14, 2019) (finding expanded roof decks similar to those of other residential units in the immediate area).a

178. 140 Harrishof St., Case No. BOA909985, Bos. Zoning Bd. of Appeal (June 14, 2019) (“This project is an appropriate use of the lot and will not adversely affect the community or create any detriment for abutting residents.”); 2 Mount Vernon St., Case No. BOA1130851, Bos. Zoning Bd. of Appeal (June 2, 2021) (same language).

179. 23 Arcadia St., Case No. BOA1160268, Bos. Zoning Bd. of Appeal (June 11, 2021).

180. *Id.* at 3.

181. *Id.* at 2.

While the Board at times references “unique” conditions, its analysis is scant and devoid of comparison to neighboring properties.¹⁸² In one example, a 102-unit residential building was proposed for the site of an older industrial building, requiring variances for FAR, height, and front-yard setbacks.¹⁸³ Given its scale, this project also required review under the BPDA’s “Large Project Review” process.¹⁸⁴ The decision noted that the appellant claimed “the land and existing conditions at the Site are *unique*.”¹⁸⁵ This claimed uniqueness involved variations in grade, the lot having street frontage on two sides, and it being in close proximity to recreational areas and a commuter station.¹⁸⁶ But no comparisons were made to nearby sites to show why these factors rendered the site unique, nor was it explained why refurbishing the property to allow a new, permitted use would create a substantial hardship or, as claimed, deprive the appellant of reasonable use of the land.¹⁸⁷ Rather, arguments were awkwardly attired in the language of a variance that better suggested grounds for a rezoning.¹⁸⁸

While uniqueness and hardship receive scant attention from the ZBA, an argument can be made that some consideration is given to the public good, albeit not in the narrow context called for by the relevant legal standard.¹⁸⁹ Decisions frequently emphasize the extent to which granting relief will further a particular policy goal, such as providing needed housing,¹⁹⁰ “family friendly

182. *See, e.g.*, 44–46 Soldiers Field Place, Case No. BOA1163038, Bos. Zoning Bd. of Appeal (June 11, 2021) (“[T]he site consists of certain *unique* characteristics and conditions which support the grant of the requested Variances . . .”).

183. *Id.*

184. *Id.* (“With a building scale in excess of 50,000 square-feet at this location, the Proposed Project is also subject to Large Project Review by the Boston Planning and Development Agency . . .”).

185. *Id.* at 3 (emphasis in original).

186. *Id.*

187. *See id.* at 8.

188. *See id.* (“The building and lot configuration on this unique Site is inconsistent with modern-day planning standards and prevailing land use patterns in this neighborhood.”); *see also id.* at 10 (“[T]he grant of relief will allow for the reasonable use of the Site for a purpose substantially more in keeping with the nature of the surrounding community, existing and emerging, than to continue as an outdated and non-conforming commercial structure and a vacant lot in a transitional mixed-use neighborhood.”).

189. *See infra* notes 190–193 and accompanying text (highlighting common policy goals mentioned in board decisions).

190. *See, e.g.*, 140 Harrishof St., Case No. BOA909985, Bos. Zoning Bd. of Appeal (June 14, 2019) (noting that the provision of one additional unit will provide much-needed housing in an area facing shortage); 211 E. Eagle St., Case No. BOA1071307, Bos. Zoning Bd. Of Appeal (June 22, 2021)

housing units,”¹⁹¹ or “quality market rate housing.”¹⁹² The discussions on these points read less like administrative determinations of whether the property owner, facing a unique and substantial hardship, merits narrow relief from the applicable zoning, and more like the basis for a rezoning that implements a desired policy preference.¹⁹³

Due to the supermajority of votes required for a variance to be granted, in certain cases, the policy preferences of a minority of members of the Board dictate the outcome.¹⁹⁴ As a few reports in the press and from community groups have highlighted, in the past year, the ZBA has routinely rejected requests for relief from projects with no parking.¹⁹⁵ In one case, the Board voted

(noting that the provision of six additional units, which required nine variances, will provide much-needed housing in an area facing shortage); 151 Spencer St., Case No. BOA1038331, Bos. Zoning Bd. of Appeal (June 11, 2021) (noting that granting the variance will help to fill critical needed for housing). *151 Spencer Street* involved requests for ten variances to erect a new four-story multifamily residential building with nineteen affordable rental units. 151 Spencer St., Case No. BOA1038331, Bos. Zoning Bd. of Appeal (June 11, 2021) (listing the ten variances and the purpose of the appeal). The decision offered no substantive discussion of the variance criteria, instead emphasizing significant support from the community, the need for housing in the area, and the opportunity to revitalize a city-owned parcel. *Id.* (“The requested relief will revitalize City-owned land that is in despair, by constructing new, multi-family residential housing, the residents of which will bring vibrancy and increased demand for commercial services to the area while also generating property tax revenue for the City.”).

191. 9 Eden St., Case No. BOA1152882, Bos. Zoning Bd. of Appeal (June 11, 2021).

192. 76 Montmorenci Ave., Case No. BOA11167099, Bos. Zoning Bd. of Appeal (June 22, 2021) (adding one additional unit); 546 Saratoga St., Case No. BOA1128259, Bos. Zoning Bd. of Appeal (June 11, 2021); (razing existing building and constructing four units); 121 Havre St., Case No. BOA1141109, Bos. Zoning Bd. of Appeal (June 2, 2021) (adding two units).

193. *See, e.g.*, 151 Spencer St., Case No. BOA1038331, Bos. Zoning Bd. of Appeal (June 11, 2021) (referring positively to the development group’s mission to build a better, stronger community by creating safe, sustainable, and affordable housing and commercial spaces).

194. *See* MASS. GEN. LAWS ch. 40A, § 15 (1954) (“The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a board of five members, shall be necessary . . . to effect any variance in the application of any ordinance or by-law.”); Simon Rios, *To Solve State’s Housing Inventory ‘Crisis,’ Advocates Say Liberalize Zoning*, WBUR (Aug. 30, 2018), <https://www.wbur.org/news/2018/08/30/housing-crunch-zoning-reform> (“The supermajority zoning rule gives more say to those who want to keep things the same . . .”).

195. *See* Adam Gaffin, *Board Rejects Apartment Building Near Ashmont T Station for Lack of Parking, Being Too Big for Its Lot, Too Tall for the Neighborhood*, UNIVERSAL HUB (Apr. 5, 2022, 11:41 AM), <https://www.universalhub.com/2022/board-rejects-apartment-building-near-ashmont-t> (discussing denial of relief to construct a twenty-six unit apartment building); *see also* *4198 Washington Street Mixed Use and Affordable Housing Project Rejected by Zoning Board of Appeal Due to Lack of Parking*, WALKUP ROSLINDALE (Nov. 16, 2021), <https://walkuproslindale.org/weblog/2021/11/16/4198-washington-street-mixed-use-and-affordable-housing-project-rejected-by-zoning-board-of-appeal/> (criticizing ZBA rejection of projects that included affordable units, but lacked parking, in an area near public transit).

3–2 in support of a project, but it failed to receive the required number of votes under state law.¹⁹⁶ The Board Chairwoman voted against three such projects in her own neighborhood,¹⁹⁷ declaring in the hearing for one project—which would have provided more affordable units than required—her belief that “parking should be maximized as much as possible” in the area.¹⁹⁸ This occurred even as Boston has taken steps to constrain parking requirements, most notably by eliminating such requirements for entirely affordable developments.¹⁹⁹

In other decisions, the Board places considerable weight on references to “reasonableness” in the variance standard, albeit in interesting ways, finding a proposal will provide for reasonable use of the property by, *inter alia*, allowing applicants to “renovate a dwelling and build a roof deck”²⁰⁰ or “add[] a second story addition and renovat[e]”²⁰¹ or “[increase] the occupancy” by turning a three-family residence into a four-family one.²⁰² These

196. See Gaffin, *supra* note 195 (“The board voted 3-2 to support Mark Kennedy’s plans to replace his current commercial painting building with an apartment building with no parking spaces . . .”).

197. See *id.*; see also Adam Gaffin, *Another Apartment Building Rejected on Washington Street in Roslindale*, UNIVERSAL HUB (March 8, 2022, 12:37 PM), <https://www.universalhub.com/2022/another-apartment-building-rejected-washington>.

198. Adam Gaffin, *In Roslindale Square Battle Between Parking and Affordable Housing, Parking Wins*, UNIVERSAL HUB (Nov. 16, 2021, 1:19 PM), <https://www.universalhub.com/2021/roslindale-square-battle-between-parking-and>. While the Board voices such statements of policy preference in the hearings, the decisions in such cases merely state that the applicant did not satisfy the conditions required for grant of a variance. See, e.g., 4160–4164 Washington St., Case No. BOA1163272, Bos. Zoning Bd. of Appeal (July 13, 2021) (describing how the Board voted 4–2 in favor of granting relief but failed to reach the required number of votes to grant relief).

199. *Mayor Wu Eliminates Parking Minimums for Affordable Housing Developments*, BOS. PLAN. & DEV. AGENCY (Dec. 22, 2021), <https://www.bostonplans.org/news-calendar/news-updates/2021/12/22/mayor-wu-eliminates-parking-minimums-for-affordabl>; see also *An Order Regarding a Text Amendment to the Boston Zoning Code with Respect to Parking Minimums for Affordable Housing*, CITY OF BOS. (May 19, 2021), <https://www.boston.gov/sites/default/files/file/2021/09/Docket%20%230685.pdf> (providing the text of a City Council petition to amend the Boston Zoning Code).

200. 43 Union Park, Case No. BOA1102146, Bos. Zoning Bd. of Appeal (June 22, 2021).

201. 3 Westford St., Case No. BOA1085225, Bos. Zoning Bd. of Appeal (June 22, 2021) (allowing renovation of single-family home to add second story, garage, and office space).

202. 2 Putnam St., Case No. BOA1133492, Bos. Zoning Bd. of Appeal (June 22, 2021) (allowing change from three-family to four-family residence); see also 23 Mather St., Case No. BOA1156325, Bos. Zoning Bd. of Appeal (June 2, 2021) (allowing reasonable use of property via variance from rear yard requirement for garage and storage shed); 94 Cass St., Case No. BOA1156154, Bos. Zoning Bd. of Appeal (June 2, 2021) (allowing reasonable use of property, a single-family residence, through extension of living space into attic); 6 Paisley Park, Case No. BOA902477, Bos. Zoning Bd. of Appeal (June 11, 2019) (finding that a variance “will allow the Appellant to have reasonable use of the

determinations presume that a residence lacking a roof deck or a property limited to a three-family home is somehow an unreasonable restriction.²⁰³ Reasonableness, by this reading, lacks any relation to substantial hardship.²⁰⁴

Instead, reasonableness is often invoked when granting minor relief to allow expansion of an existing structure in a manner consistent with neighboring properties.²⁰⁵ Commentators have noted in other jurisdictions the willingness of zoning boards to grant these sorts of relatively minor variances—for extensions and improvements—to homeowners despite the absence of a showing of hardship.²⁰⁶ In one decision, the Board declared a variance would allow the “reasonable use” of property by providing residents “with some much-needed extra living space.”²⁰⁷ The requested relief was deemed “appropriate for this location” as the addition would “greatly benefit[] the neighborhood because usable living space is very limited in this section of Boston and this proposal will create additional living space in a manner that is consistent with existing surrounding uses and structural designs.”²⁰⁸ This suggests the Board’s decision rested on its own determination that the existing zoning

premises by changing the occupancy from a single-family to a two-family dwelling and making the necessary improvements to add the second dwelling unit”).

203. See *supra* notes 200–202 and accompanying text (illustrating references to reasonableness in Board decisions).

204. See *supra* note 202 (providing multiple zoning decisions showing reasonableness lacking any relation to substantial hardship); Reynolds, *supra* note 2, at 138 (“[B]oards often do not spell out the reasoning behind their decisions and, in particular, don’t indicate what specific hardship justified a variance that is awarded.”); Cohen, *supra* note 4, at 361 (“Designed to provide a constitutional safety valve in the zoning context, the unnecessary hardship variance has a history of malleable and sometimes corrupt use by local reviewing bodies.”).

205. 2 Snelling Place, Case No. BOA918229, Bos. Zoning Bd. of Appeal (June 25, 2019). Relief—in the form of three variances (to exceed allowable floor area ratio, include a rear setback, and alter roofline)—was requested “to allow the Appellant to have reasonable use of the property, while constructing a one-story addition and decks to the building and extending living space into the basement.” *Id.*

206. Martindale, *supra* note 5, at 691 (“Connecticut zoning boards of appeals are most likely to blind themselves to the hardship doctrine for a category of variances that are rarely litigated: area variances for new swimming pools, garages, porches, or family rooms added to existing homes. Such ‘homeowner’ variances are by far the most common type of variance applications, and are almost invariably granted. Yet almost *all* should be defeated if appealed because the presence of a house on the lot means there is already a reasonable use of the land and therefore no hardship exists.” (footnotes omitted)).

207. 2 Snelling Place, Case No. BOA918229, Bos. Zoning Bd. of Appeal (June 25, 2019). The decision does implicitly (but briefly) reference legal criteria, noting “the unusually small size of the lot,” which, according to the Board, rendered the proposal “the most reasonable and efficient way to provide future residents with needed living space without adversely affecting the neighborhood.” *Id.*

208. See *id.* (noting surrounding multi-family residential buildings of comparable size and height).

restricts an intensity of development that is acceptable and characteristic of the neighborhood—a determination that sounds more akin to a rezoning.²⁰⁹ Interestingly, while the appellant made design changes in response to community feedback, the local city councilor, an abutter present at the meeting, a local residents’ association, and a direct abutter via letter opposed the variances.²¹⁰ However, the Mayor’s Office of Neighborhood Services and several community members, via letter, expressed support, leading the Board to conclude with its standard boilerplate reasoning: “the Board determined the showing of approval from the community supports the Board’s finding that the requested relief will have no negative impact on the surrounding area, and is in harmony with the general purpose and intent of the Code.”²¹¹ The decision in this and similar cases suggests that—rather than require individual property owners to seek a variance in cases where there is no indication their property is unique or their hardship substantial—Boston would benefit from rezoning such areas to permit such development as-of-right, providing greater predictability for property owners and reducing the costs and time required for basic changes that conform to the neighborhood and serve an acknowledged need.²¹²

Other cases emphasize the degree to which a variance will improve an applicant’s living environment, such as by allowing additional open space in the form of a roof deck and dormer.²¹³ One decision noted that the applicant had stated a second-floor addition of three bedrooms and a bathroom “will allow them to add much needed additional living space to accommodate a growing family.”²¹⁴ While the precise relevance of this second-floor addition

209. *See id.* (explaining that the Board’s findings were partially based on the character of the adjoining lots and the community in general). *See generally* Sattler, *supra* note 29, at 113 (referring a “lack of clearly understandable, distinct and consistent standards for cases involving requests for a variance”).

210. 2 Snelling Place, Case No. BOA918229, Bos. Zoning Bd. of Appeal (June 25, 2019)

211. *Id.* at 4.

212. *See* Wu Report, *supra* note 92, at 26 (proposing to dispense with certain zoning laws in Boston in order to ensure that city planning and development is more efficient and transparent).

213. 4 Melrose St., Case No. BOA903623, Bos. Zoning Bd. of Appeal (May 3, 2019). It could be argued that the decision’s discussion on this point, which emphasizes the proposal being “modest in scope and consistent with the character of abutting buildings and of the surrounding neighborhood,” is of relevance to the third prong of the variance inquiry. *Id.* However, the substantial hardship imposed by living without a roof deck and the uniqueness of that plight are, one can surmise, assumed.

214. 64 Radcliff Rd., Case No. BOA925117, Bos. Zoning Bd. of Appeal (May 3, 2019); *see also* 12 Scribner Rd., Case No. BOA927697, Bos. Zoning Bd. of Appeal (May 3, 2019) (noting the

to the Board's decision to grant six dimensional variances was left unsaid, this type of discussion would seem to run afoul of the principle that variances are granted based on the conditions and circumstances of the *property* and not the applicant.²¹⁵ The Board at times also emphasizes characteristics of the developer when granting a variance, observing in one case that the appellant "has a long history and proven track record of building better and stronger communities in the Dorchester area, with 40 years of experience of creating housing that is safe, sustainable, and affordable."²¹⁶

Although seemingly exceptions to the norm, a few decisions document some sort of unique condition or substantial hardship.²¹⁷ In a request for a variance to construct a new single-family home, the Board noted:

[T]he Appellant submits that the Property is uncharacteristically and exceptionally narrow, which presents a substantial hardship on the Appellant's ability to utilize their property for its highest and best use and supports the grant of the requested Variance, as the minimum relief necessary for the reasonable use of the Property.²¹⁸

While this language identifies something unique about the property, it confuses the substantial hardship inquiry, suggesting that a denial of the ability to develop property to its "highest and best use" is a substantial hardship, and that any development less than that would be unreasonable.²¹⁹ However, it may be conceded, given the proposal is for a single-family home, that without a variance, no form of residence could be built on the property, which *would* suggest a substantial hardship.²²⁰ Moreover, the decision subsequently emphasizes that the variance will enable the development of a unique lot in a

applicant's contention that a second-floor addition of three bedrooms and a bathroom to an existing bungalow will provide "much needed additional living space to accommodate a growing family").

215. *See* 12 Scribner Rd., Case No. BOA927697, Bos. Zoning Bd. of Appeal (May 3, 2019) (highlighting that the conditions relate to the land itself and must be met for the Board to grant a variance).

216. 25 New England Ave., Case No. BOA1038330, Bos. Zoning Bd. of Appeal (June 11, 2021); *see also* 1 Rockwood Terrace, Case No. BOA927192, Bos. Zoning Bd. of Appeal (June 14, 2019) (granting appellant developer a variance for reasonable use of the property).

217. *See, e.g.*, 1 Rockwood Terrace, Case No. BOA927192, Bos. Zoning Bd. of Appeal (June 14, 2019) (determining that a unique condition existed since the property was "uncharacteristically and exceptionally narrow").

218. 1 Rockwood Terrace, Case No. BOA927192, Bos. Zoning Bd. of Appeal (June 14, 2019).

219. *Id.* (discussing the substantial hardship on the appellant's property).

220. *See id.* (discussing a proposal to construct a single-family dwelling on the appellant's property).

manner that conforms to those around it, suggesting the proper role of a variance in confronting the unique conditions of a particular parcel.²²¹

In other cases, while the analysis leaves something to be desired, the facts suggest a basis for granting a variance.²²² One example is a case involving an attempted conversion of office space to dwelling units, which required a variance for excessive floor area ratio.²²³ This was an existing condition of the property, which was located in a residential district and functioned as a non-conforming office use.²²⁴ The property was also in a historic district, and relevant regulations prohibited a reduction in the building's massing.²²⁵ As such, the Board concluded a denial of zoning relief would deprive the appellant of "reasonable use of the pre-zoning code structure."²²⁶ We were not able to determine in our analysis which decisions were initially drafted by the applicant or their counsel and what effect this had on the decisions' attentiveness to the legal standards.²²⁷

In addition to Boston, we also looked at zoning decisions in three nearby jurisdictions: Cambridge, Brookline, and Somerville.²²⁸ Each of these communities has a slightly different approach to variances and similar requests for zoning relief, particularly from dimensional regulations.²²⁹ While these jurisdictions, particularly Cambridge, reflect some of the same problems found in

221. 1 Rockwood Terrace, Case No. BOA927192, Bos. Zoning Bd. of Appeal (June 14, 2019). This same project also faced significant opposition, even following "a robust community process." *Id.* While the Mayor's Office of Neighborhood Services and one community member, via a letter, supported it, three city councilors, a local neighborhood association, and attorneys for multiple abutters spoke in opposition, joined in their efforts by multiple letters in opposition. *Id.* Nonetheless, "considering all the testimony the Board determined the benefits of the project further supports the Board's finding that the requested relief will have no negative impact on the surrounding area and is in harmony with the general purpose and intent of the Code." *Id.*

222. *See, e.g.*, 33 Mount Vernon St., Case No. BOA921129, Bos. Zoning Bd. of Appeal (April 9, 2019) (discussing the facts of this case that suggest a variance could be appropriate, such as the prohibitive FAR limit).

223. *Id.*

224. *Id.* (referring to the nonconforming condition of the property).

225. *Id.* (describing the historical protections applied to buildings in the area).

226. *Id.* The Board also invoked broad goals and objectives of the zoning code: "Among the goals and objectives of Article 1 are to encourage the most appropriate use of land throughout the City; to conserve the value of land and buildings; to lessen congestion in the streets; and to preserve and increase the amenities of the City." *Id.*

227. *See id.*

228. *See* discussion *infra* Sections IV.B–D (discussing zoning decisions in Cambridge, Brookline, and Somerville respectively).

229. *See* discussion *infra* Sections IV.B–D (discussing different approaches to variances and similar requests for zoning relief between Cambridge, Brookline, and Somerville).

Boston, they also offer models for improvement to the variance process and zoning more generally, particularly in Somerville.²³⁰

B. Cambridge Offers Slightly Better Analyses

We obtained, via request, all decisions by the Cambridge Zoning Board of Appeals related to four meetings: two in April 2019 and two in April 2021.²³¹ Cambridge's Open Data Portal includes a spreadsheet that provides a significant amount of information on individual variance requests but not the actual decisions.²³² Our analysis of this material found 1,059 applications for relief from October 2013 through November 2020 (the last month for which an entry appears), with the following dispositions:²³³

Form of Relief	Approved	Denied	Under Review	Withdrawn	Total
Special Permit	301	7		36	344
Variance	406	19	2	83	510
Variance/ Special Permit	174	7	2	22	205
Total	881	33	4	141	1059

This represents an approval rate of applications solely for variances of 96% during this period.²³⁴ In addition to this data, Cambridge publicly posts the meeting agendas for the ZBA, which include all materials related to each

230. See discussion *infra* Sections IV.B–D (discussing similarities and differences to the Boston variance and zoning processes).

231. *Board of Zoning Appeal Requests*, CAMBRIDGE OPEN DATA, <https://data.cambridgema.gov/Inspectional-Services/Board-of-Zoning-Appeal-Requests/urfm-usws/data> (last visited Oct. 8, 2022) (providing access to calendar with links to agenda and case files for each application). This amounted to 30 decisions total: 7 decisions from April 11, 2019; 7 from April 25, 2019; 8 from April 8, 2021; and 8 from April 22, 2021. *Id.*

232. *Id.* (providing data on available records from October 2013 through November 2020).

233. *See id.*

234. *See id.*

application for relief²³⁵ and the meeting minutes.²³⁶

The Cambridge Board of Zoning Appeal consists of five members and up to seven associate members, and requires a quorum of five; however, a meeting may proceed with only four members if the petitioner agrees.²³⁷ Following the submission of an application for a variance, the Board holds a public hearing at which it first hears all evidence in support of the petitioner's case, including recommendations from the Planning Board or other city agencies.²³⁸ Opponents may then voice their opposition, and the petitioner has an opportunity to rebut the opposition and field questions from the Board.²³⁹ The Board records the opinions of those at the meeting in favor of or against the petition.²⁴⁰ It deliberates following the hearing and issues a written decision.²⁴¹ The city's Zoning Ordinance outlines the requirements for a grant of an area or use variance, which include a substantial hardship unique to the land or structure and a showing that granting relief would not be substantially detrimental to the public good or the ordinance's intent and purpose.²⁴²

Variance decisions in Cambridge frequently involve requests for minor dimensional relief relating to homeowners seeking to modify an existing non-conforming structure.²⁴³ While the Board does not provide the most extensive legal analyses, it tends to identify some facts indicating hardship and uniqueness and provides a more sustained explanation than Boston's ZBA regarding

235. *Board of Zoning Appeal Agenda*, CAMBRIDGE INSPECTIONAL SERVS. DEP'T, <https://www.cambridgema.gov/inspection/Calendar/View?guid=57d5e894-279d-47cf-8b2d-b5cefe9a079&start=20220630T183000&end=20220630T233000> (last visited Oct. 8, 2022) (providing access to calendar with links to agenda and case files for each application).

236. *BZA Meeting Minutes Archive*, CAMBRIDGE INSPECTIONAL SERVS. DEP'T, <https://www.cambridgema.gov/inspection/Zoning/boardofzoningappeal/bzameetingminutes> (last visited Oct. 8, 2022).

237. *See* CITY OF CAMBRIDGE BOARD OF ZONING APPEAL, RULES OF PRACTICE AND PROCEDURE 3–4 (2012), <https://www.cambridgema.gov/-/media/Files/inspectionalservicesdepartment/BZA/bza-rulesofpracticeandprocedure.pdf>. When a petitioner consents to a four-member meeting, the four members must vote unanimously to grant a petition. *Id.*

238. *See id.* at 5–6.

239. *See id.*

240. *See id.*

241. *See id.* at 7.

242. CAMBRIDGE, MASS., ZONING ORDINANCE §§ 10.31–32 (2021).

243. *See, e.g.*, 22 Athens St., Case No. BZA-017088-2019, Cambridge Bd. of Zoning Appeal (May 31, 2019) (involving a single-family residence); *see also* 45 Francis Ave., Case No. BZA-017084-2019, Cambridge Bd. of Zoning Appeal (May 29, 2019) (involving a nonconforming structure on Harvard Divinity School campus).

its application of the legal standard to a particular case.²⁴⁴ In one case, the Board emphasized that the existing “house was oddly laid out” and “that it sat on a small corner lot,” rendering relief necessary for minor modifications to renovate and continue the structure’s existing use.²⁴⁵ It then made, following a motion by the Chair, the following findings:

[A] literal enforcement of the provisions of the Ordinance would involve a substantial hardship . . . the hardship related to *the need to improve the property in order to make it habitable* . . . the hardship was substantial and *related to the structure itself* . . . the hardship *owed to the size of the lot* and the nonconforming structure, where any modification would require zoning relief . . . the Board find that relief could be granted without substantial detriment to the public good or nullifying or substantially derogating from the intent and purpose of the Ordinance . . . the Board find that the proposed *work would improve the housing stock of the City by renovating the house, which was in a strategic location in the Harvard Square area.*²⁴⁶

The language in italics was unique to the case at hand, while that not in italics is replicated in most decisions granting a variance.²⁴⁷

The Cambridge Board’s decisions frequently emphasize the hardships

244. *Compare* 45 Francis Ave., Case No. BZA-017084-2019, Cambridge Bd. of Zoning Appeal (May 29, 2019) (explaining the grant of the variance based on the hardship posed by a nonconforming century-old school building and the need to maintain a “contemporary educational environment”), with 6 Paisley Park, Case No. BOA-902477, Boston Bd. of Zoning Appeal (June 11, 2019) (granting the variance based on a lack of local opposition without applying any concrete facts to the uniqueness or hardship standards).

245. 22 Athens St., Case No. BZA-017088-2019, Cambridge Bd. of Zoning Appeal (May 31, 2019).

246. *Id.* (emphasis added).

247. 45 Francis Ave., Case No. BZA-017084-2019, Cambridge Bd. of Zoning Appeal (May 29, 2019) (modifying quoted language in case involving the expansion of a structure on the Harvard Divinity School campus). As one example, in the 45 Francis Avenue case the Board added this language:

[T]he Board find that the hardship related to the Divinity School campus and the subject structure existing for many years and presumably being around for many more years, and that in order to maintain a contemporary educational environment, a project of the proposed sort was necessary; that the Board find that the hardship owed to the nonconforming structure, where any modification would require zoning relief . . . that the Board find that the proposed project would allow the Divinity School to thrive as it worked toward its next century of existence; and that the Board find that the proposed project was a necessary step in the progress of the school and the maintaining of an adequate environment for the course offerings.

Id.

encountered by property owners due to the uniqueness of the structure existing on the property rather than the property itself,²⁴⁸ but this is in keeping with the language of the relevant state law—which calls in part for a finding of circumstances “especially affecting” the building or structure and leading, if the zoning ordinance is literally enforced, to substantial hardship.²⁴⁹ In one case, the Board found “the hardship related to the older structure needing some modification in order to convert it to the sort of housing contemplated by the petitioner, which would be true for anyone wishing to develop the property,” but it was also due to the lot’s shape.²⁵⁰ In another case, a variance was necessary to address newly-discovered “structural problems with the foundation,” which the Board linked to “soil conditions,” which the state variance standard explicitly references.²⁵¹ In still another, a variance was granted from height restrictions “to correct for low ceiling heights” in the course of renovating an older structure in poor condition.²⁵² Finally, the renovation of a fifty-year-old building required three variances in order to “upgrade to modern standards” of fire safety and energy efficiency due to “the shape of the building and its location on the lot.”²⁵³

The Cambridge Board, at times, like its counterpart in Boston, explicitly considers the personal interests of an applicant rather than something related to the property or structure itself.²⁵⁴ The Board granted a variance for a second-story addition to a small and legal nonconforming house, noting “the undersized lot and the position of the house,” but also finding modest relief sought “would allow the family that owned the house to have the room required to remain there.”²⁵⁵ In some cases which may have involved sympathetic private parties, the Board concluded that a hardship existed on rather

248. *See, e.g., id.* (emphasizing the hardship endured by the school).

249. MASS. GEN. LAWS ch. 40A, §10 (1954); *see also supra* note 51 and accompanying text.

250. 74 Oxford St., Case No. BZA-017090-2019, Cambridge Bd. of Zoning Appeal (May 29, 2019) (granting variances for addition to and renovation of an existing five-unit nonconforming residential building).

251. 68 Sparks St., Case No. BZA-017072-2019, Cambridge Bd. of Zoning Appeal (May 21, 2019).

252. 115 Spring St., Case No. BZA-017093-2019, Cambridge Bd. of Zoning Appeal (May 31, 2019).

253. 808–812 Memorial Drive, Case No. BZA-017091-2019, Cambridge Bd. of Zoning Appeal (May 31, 2019).

254. *See, e.g.,* 66 Clifton St., Case No. BZA-109178, Cambridge Bd. Of Zoning Appeal (June 1, 2021) (considering the personal interests of a family).

255. *Id.*

tenuous grounds.²⁵⁶ It granted a variance to a homeowner who wished to convert a single-family home into a two-family home so as to age in place while renting out one unit.²⁵⁷ The structure in question was a three-floor duplex, which was previously converted into a single-family structure.²⁵⁸ The variance would allow a change back to the original two-family use.²⁵⁹ The board found that enforcement of the ordinance would impose a substantial hardship by “preclud[ing] her from having a rental apartment in the building” and emphasized that the full building was too large for the petitioner’s needs and “required a lot of upkeep and expense, where the addition of a unit would be enormously helpful in allaying those expenses.”²⁶⁰ The Board’s determination relied on the needs and situation of the petitioner, with little unique about the structure and no indication of why continued use as a single-family home would impose a substantial hardship given, one presumes, that the property could be sold and used in that manner, as it had been for some number of prior years.²⁶¹ In another decision from the same month, in which the Board granted a variance and special permit for a thirty-six-square-foot addition, the findings included “that the hardship ran with the property and *was not peculiar to the current occupants of the property*,” but also—somewhat in tension—that it “was related to the need to use the basement space for residential purposes and would allow the current owner to stay in place and allow for family members to move in.”²⁶²

Cambridge’s ZBA appears to provide slightly more careful factual and legal analyses in its decisions than does Boston.²⁶³ Policy considerations are still explicitly invoked in support of decisions, for example, in the case mentioned allowing a conversion of a one-family residence to a two-family

256. See, e.g., 343½ Broadway, Case No. BZA-109493, Cambridge Bd. of Zoning Appeal (July 14, 2021) (granting a variance and finding that the original building was too large for the petitioner’s needs).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 2.

261. *Id.* The Board also invokes additional policy considerations, including “that granting relief would assist in allowing people to remain in their homes, in providing housing for people of all income levels, and assisting people as they change in life to accommodate their aging in place by allowing them to stay in their property.” *Id.*

262. 23 Bigelow St., Case No. BZA-111104, Cambridge Bd. of Zoning Appeal (June 1, 2021) (emphasis added).

263. See discussion *supra* Section IV.A (discussing Boston’s variance decisions).

residence so as to enable an existing resident to age in place.²⁶⁴ Indeed, the Board only rejected two variance applications among the decisions we reviewed.²⁶⁵ It denied a variance to allow dormers exceeding the existing guidelines, even when the homeowner contended it was necessary “in order to accommodate a growing family,” and the only input from neighbors was three letters of support.²⁶⁶ It emphasized that it took the dormer guidelines “very seriously.”²⁶⁷ In a separate decision, the Board rejected a homeowner’s application for variances to replace an old garage with a two-story accessory apartment, again despite neighbor support.²⁶⁸ It voted 3–2 to deny relief, finding “that what was proposed was not a restoration of an accessory structure, but the creation of a new residential structure” and that the statutory requirement of hardship was not satisfied.²⁶⁹ While only so much can be gleaned from this small sample, the second case, which rejected an application to raze an existing structure and construct a new residence in the same place, suggests an unwillingness to permit the rather drastic changes Boston frequently permits through variances—changes better treated through a rezoning.²⁷⁰

In sum, while Cambridge’s ZBA grants variances at a very high rate, the scope of those variances is significantly more limited than in Boston.²⁷¹ While not models of rigorous legal analysis, the Cambridge Board’s decisions did make some attempt to establish the grounds for granting the relief requested in a given case.²⁷²

264. 343½ Broadway, Case No. BZA-109493, Cambridge Bd. of Zoning Appeal (July 14, 2021).

265. 5 Kelly Rd., Case No. BZA-109443, Cambridge Bd. of Zoning Appeal (June 1, 2021) (rejecting variance application); 8 Sacramento St., Case No. BZA-106563, Cambridge Bd. of Zoning Appeal (June 1, 2021) (rejecting variance application).

266. 5 Kelly Rd., Case No. BZA-109443, Cambridge Bd. of Zoning Appeal (June 1, 2021).

267. *Id.* (rejecting proposed dormer that would extend twenty feet where guidelines limited a dormer to fifteen feet).

268. 8 Sacramento St., Case No. BZA-106563, Cambridge Bd. of Zoning Appeal (June 1, 2021).

269. *Id.*

270. *See id.* (stating that the requested construction would “exceed the allowable height for accessory structures”).

271. *See supra* text accompanying note 263 (examining the depth of the factual analysis of Cambridge’s Board as compared to Boston’s Board in variance decisions).

272. *See, e.g., supra* notes 243–253 and accompanying text (discussing examples of factual applications underpinning the board’s variance decisions).

C. Brookline and the Use of Special Permits

Brookline makes Zoning Board of Appeals decisions available on its website, with individual files for each decision identified by case number and address.²⁷³ As of this writing there were 918 decisions posted dating back to 2006, for an average of roughly 54 annually.²⁷⁴ We reviewed 5 decisions related to hearings held in April 2019 and 7 related to hearings in April 2021.²⁷⁵

The Brookline Zoning Board of Appeals has the power to hear and decide applications for special permits, variances, and to build low- or moderate-income housing.²⁷⁶ It hears appeals from decisions and enforcement actions of the building commissioner or building inspector.²⁷⁷ Brookline's separate Planning Board, which is responsible for planning and rezonings, also reviews applications for administrative relief and provides recommendations to the ZBA.²⁷⁸

A significant share of Brookline ZBA decisions involve special permits for a dimensional waiver or to modify an existing nonconformity.²⁷⁹ While Brookline allows for use variances, minor dimensional changes to existing structures, which in other jurisdictions might be allowed via an area variance, are granted through special permits.²⁸⁰ Section 5.43 of the Zoning By-Law

273. *Zoning Board of Appeals Decisions*, BROOKLINE MASS., <https://www.brooklinema.gov/Archive.aspx?AMID=76> (last visited Oct. 8, 2022).

274. *See id.*

275. *See infra* notes 283–291 and accompanying text (discussing the Brookline variance decisions).

276. TOWN OF BROOKLINE BD. OF APPEALS, RULES AND REGULATIONS AND GENERAL INFORMATION 1 (2019), <https://www.brooklinema.gov/ArchiveCenter/ViewFile/Item/1872>.

277. *See id.* at 2.

278. *See FAQs*, BROOKLINE MASS., <https://www.brooklinema.gov/Faq.aspx?QID=464> (last visited Sept. 24, 2022) (explaining functional differences between the Planning Board and Board of Appeals). The Planning Board must make a recommendation and propose conditions on applications to the Board of Appeals within twenty days of receiving an application for a special permit, variance, time extension, or modification request. *See* TOWN OF BROOKLINE PLAN. BD., RULES AND REGULATIONS AND GENERAL INFORMATION 1 (2013), <https://www.brooklinema.gov/DocumentCenter/View/168/Planning-Board-Rules-and-Regulations>.

279. *See, e.g.*, 114 Clyde St., Case No. 2019-0059, Town of Brookline Bd. of Appeals (Oct. 28, 2019) (indicating that the relief requested could be granted via special permit if there is an existing structure on the lot). Section 8.02 of the Zoning By-law provides for a change to a nonconforming use to be allowed via a special permit and Article IX of the By-law details the requirements for such a permit. BROOKLINE, MASS., ZONING BY-LAW art. VIII, § 8.02, art. IX (2018). This process is consistent with MASS. GEN. LAWS ch. 40A, § 6 (1954), which provides protections for one-family and two-family nonconforming structures. *See supra* notes 86–90 (discussing state provision).

280. *See, e.g.*, 114 Clyde St., Case No. 2019-0059, Town of Brookline Bd. of Appeals (Oct. 28,

allows for the waiver of yard and setback requirements via special permit if the applicant provides a counterbalancing amenity, granting the ZBA flexibility in conditioning such relief.²⁸¹ In addition, section 5.05 allows for a waiver of any dimensional requirement other than minimum lot size in the case of certain conversions, including from a one-family to a two-family dwelling.²⁸² The special-permit process was invoked in decisions we reviewed involving conversion of a one-family to two-family dwelling²⁸³ and a two-family to three-family dwelling via an addition.²⁸⁴ In granting special permits, the ZBA provided detailed fact-finding in its decisions and recounted the specific comments of both board members and members of the public who spoke during the hearing.²⁸⁵ In one decision providing relief for an addition to a single-

2019) (noting that the relief sought could be granted via special permit if there is an existing structure on the lot). In one 2019 Brookline ZBA decision, the board chair, an attorney, noted that the relief being requested, which could be granted via special permit when there is an existing structure on the lot, would require a variance were it a “virgin lot.” *Id.* The chair opined that “conditions for a variance haven’t been met.” *Id.*

281. BROOKLINE, MASS., ZONING BY-LAW art. V, § 5.43 (2018) (“Under a special permit after a hearing the Board of Appeals may permit, in lieu of the requirements for yards or setbacks specified in this By-law, the substitution of such other dimensional requirements as shall assure the same standard of amenity to nearby properties as would have been provided by compliance with the regulations of the By-law, as measured by off-setting a reduction in the depth or area of a required yard or setback by an increase in the depth or area of another yard or setback or by the provision or preservation of a condition or a facility not otherwise required that will counterbalance such a reduction; provided, however, that under this section the Board of Appeals shall not reduce the depth of a required front yard below 15 feet in M Districts.”); *see also id.* § 9.05 (outlining conditions that must be satisfied for a special permit to be approved).

282. BROOKLINE, MASS., ZONING BY-LAW art. V, § 5.05 (2018) (“In the case of the conversion of a single-family detached dwelling to a two-family dwelling in an SC or T District, or the conversion of a dwelling to create additional dwelling units in an F or M District, the structure shall conform to all dimensional requirements specified in §5.01. However, the Board of Appeals by special permit may waive any of said dimensional requirements except minimum lot size, provided that no previously existing nonconformity to such requirements is increased and provided that all other requirements of this By-law for such conversions are met.”).

283. 35 Eliot Crescent, Case No. 2019-0068, Town of Brookline Bd. of Appeals (Feb. 24, 2020).

284. 98 Chestnut St., Case No. 2019-0026, Town of Brookline Bd. of Appeals (June 25, 2019).

285. *See, e.g.*, 22 Carlton St., Case No. 2019-0011, Town of Brookline Bd. of Appeals (July 12, 2019) (granting a special permit for a large accessory structure—a four car garage—on an oversized lot); 603, 605, 619 Boylston St., Case No. 2019-0017, Town of Brookline Bd. of Appeals (May 16, 2019) (granting a special permit for a cluster subdivision); 15 Cumberland Ave., Case No. 2019-0020, Town of Brookline Bd. of Appeals (April 29, 2019) (granting a special permit for an extension to a single-family home); 3 Greenway Ct., Case No. 2019-0012, Town of Brookline Bd. of Appeals (May 29, 2019) (granting a special permit for the conversion of a six-unit building into a seven-unit building); 127–131 Harvard St., Case No. 2019-0016, Town of Brookline Bd. of Appeals (May 16, 2019) (granting a modification of a special permit).

family home, the ZBA did not provide a significant analysis of the question, under Section 6 of the Zoning Act, of whether relief would be substantially more detrimental to the neighborhood, merely relying on a single letter of support.²⁸⁶

Brookline's Zoning By-Law provides for use variances in Section 9.09.²⁸⁷ When granting such a variance, the ZBA similarly provided detailed analyses of the relevant factors.²⁸⁸ In a case involving a variance from the required minimum number of parking spaces, the decision documented the proponent's attorney's arguments, which highlighted how the lot's narrowness, combined with a "significant drop in elevation," was unique to the district and made it difficult to provide a fourth parking space.²⁸⁹ Then, citing relevant case law regarding "hardship," the proponent argued that the denial of a variance would prevent the development of a two-family home—an allowable use in the district.²⁹⁰ Finally, the unique narrowness of and elevation change within the parcel justified granting relief to allow a use that would be consistent with that of surrounding properties and, therefore, would not derogate from the relevant zoning.²⁹¹

Overall, Brookline's ZBA hears far fewer decisions than Boston's ZBA and provides more careful discussions of the relevant factual findings and legal analysis in its decisions.²⁹²

286. 119 Payson Rd., Case No. 2019-0021, Town of Brookline Bd. of Appeals (July 12, 2019) (noting that the attorney for the applicant cited a lack of opposition and a single letter of support from an abutter as evidence of no substantial detriment); *see also supra* note 86 and accompanying text (discussing MASS. GEN. LAWS ch. 40A, § 6 (1954)).

287. BROOKLINE, MASS., ZONING BY-LAW art. V, § 9.09 (2018) (providing for grant of use variance).

288. *See infra* notes 289–291 and accompanying text.

289. 35 Eliot Crescent, Case No. 2019-0068, Town of Brookline Bd. of Appeals (Feb. 24, 2020). The rather detailed analysis further notes that the lot's size was reduced by the 1917 exercise of eminent domain, which reduced the amount of usable open space. *Id.*

290. *Id.*

291. *Id.* In fact, the petitioner provided a chart with the number of units on each lot and number of parking spaces, which revealed that half of lots on the road failed to comply with parking requirements. *Id.* In total, three full pages of the decision discussed the legal and factual basis for granting the variance. *Id.*

292. *Compare supra* text accompanying note 222 (discussing the Boston Board's shallow analysis), *with supra* text accompanying note 285 (analyzing the Brookline Board's consideration of specific facts and live testimony).

D. Somerville and the Benefits of Zoning Reform

The City of Somerville makes all decisions of its Zoning Board of Appeals, as well as materials submitted by applicants for relief and related staff memoranda, available on its municipal website.²⁹³ We reviewed all cases that had a first hearing during either April or June of 2019 and 2021—a total of 47 cases.²⁹⁴ The vast majority of these cases involved special permits.²⁹⁵ Only 5 involved variances, each of which is discussed below.²⁹⁶

Somerville completely rewrote its zoning code in 2019 following SomerVision, a seven-year planning process.²⁹⁷ When the process began, the development of only 23 lots in the city conformed with the existing zoning.²⁹⁸ Somerville’s reform effort, according to the city’s planning director, started by looking at projects that had made it through the existing zoning process and then “re-wrote the code to make those projects allowable without needing

293. *Zoning Board of Appeals*, CITY OF SOMERVILLE, <https://www.somervillema.gov/departments/zoning-board-appeals> (last visited Oct. 8, 2022). Decisions can be searched for by street address and by case number. *Id.* Decisions are available from hearings going back to May 2011. *Id.*

294. *See* Somerville ZBA Decisions Coded (spreadsheet on file with authors).

295. *See id.* (noting that twenty-seven out of forty-seven decisions involved special permits).

296. *See* 43 Victoria St., Case No. ZBA 2019-20, Somerville Zoning Bd. of Appeals (Apr. 17, 2019); 620 Broadway, Case No. P&Z#21-140, Somerville Zoning Bd. of Appeals (Dec. 15, 2021); 225 Powder House Boulevard, Case No. CZC21-000032, Somerville Zoning Bd. of Appeals (Apr. 28, 2021); and 27 Loring St., Case No. P&Z 21-004, Somerville Zoning Bd. of Appeals (June 8, 2021). ZBA 2018-21-E1-2/19 (101 South Street/2 Earle Street) involved the reapproval of a previously granted variance. 101 S. St. & 2 Earle St., Case No. ZBA 1018-21-E1-2/19, Somerville Zoning Bd. of Appeals (Apr. 3, 2019). No decision was issued regarding P&Z 21-004 (27 Loring Street). 27 Loring St., Case No. P&Z 21-004, Somerville Zoning Bd. of Appeals (June 8, 2021). However, the staff memo recommended denial of the request of two hardship variances to add a half story to a “Cottage building type.” *See* Memorandum from the Somerville Plan. & Zoning Staff to Zoning Bd. of Appeals Regarding 27 Loring Street, P&Z 21-004 (June 8, 2021), <https://www.somervillema.gov/sites/default/files/Loring%20St%2027%20-%20Staff%20Memo.pdf>. The staff memo discussed specific characteristics of the parcel and the existing cottage structure before concluding that no special circumstances existed. *Id.* The memo provided a more perfunctory and conclusory discussion of the effect a variance grant would have on the public good and the intent and purpose of the zoning district, merely restating the intent and purpose without any analysis. *Id.* As for the second criteria—substantial hardship—the memo observed that “Planning & Zoning Staff is generally unable to provide analysis or recommendations concerning the existence of actual hardship, financial or otherwise, in relation to the Applicant for the second review criteria.” *Id.*

297. *See* CITY OF SOMERVILLE, MASS., STRATEGIC PLAN. & COMTY DEV., SOMERVILLE ZONING ORDINANCE 376 (2021), <http://3pb8cv933tuz26rfz3u13x17-wpengine.netdna-ssl.com/wp-content/uploads/sites/2/2022/01/2021-21-31-Somerville-Zoning-Ordinance.pdf>.

298. Mike Ross, *On Housing, Wu Should Look to Somerville*, COMMONWEALTH (Jan. 8, 2022), <https://commonwealthmagazine.org/opinion/on-housing-wu-should-look-to-somerville/>.

to obtain variances or other zoning relief.”²⁹⁹

The reforms, many of which relate to the subjects of variance requests in Boston, included allowing specific “building components” (for example, dormers and rear decks) to be attached to a principal building by right;³⁰⁰ creating an Affordable Housing Overlay District permitting buildings with entirely affordable dwelling units with increased density, higher building heights, and looser dimensional standards;³⁰¹ loosening minimum motor vehicle parking spot requirements in transit areas;³⁰² and easing mixed-use and high-density development.³⁰³ Generally speaking, the Somerville zoning amendments have been well received, with some arguing Boston should consider adopting some of Somerville’s new measures.³⁰⁴

Prior to the public hearing on an application for relief, the Director of Planning and Zoning turns over a staff report to the Board.³⁰⁵ This includes a summary of the project, an identification of the requested permits, a zoning compliance review, and an account of any neighborhood or design review meetings.³⁰⁶ Following the public hearing, the Board issues a written decision that must include a detailed record of the proceedings, the vote of each board member, and the reason for the Board’s decision.³⁰⁷

Somerville’s Zoning Ordinance establishes the following criteria for the review of applications for a “Hardship Variance”:

299. *Id.*

300. *See* CITY OF SOMERVILLE, MASS., *supra* note 298, at 99 (indicating which building elements owners may attach to a residential building by right or by special permit, as well as those not permitted).

301. *See id.* at 387 (discussing relaxed standards for affordable housing units in overlay districts to incentive development); *id.* at 94 (noting that apartment buildings with more than four units are subject to this requirement).

302. *See id.* at 482 (requiring permanent bicycle parking spots within 200 feet of the principal entrance of building intended to serve); *id.* at 485 (outlining the process for filing notice that a dwelling is ineligible to provide parking spots near transit areas).

303. *See id.* at 375–83 (laying out requirements for mixed-use residential and commercial developments within the Assembly Square special district).

304. *See* Ross, *supra* note 298 (stating that Somerville went beyond typical zoning measures by basing zoning code on existing buildings that received variances through the old system, by removing parking minimums, and by prioritizing sustainability, pedestrian streets, lab space, and an art overlay district).

305. *See* CITY OF SOMERVILLE, MASS., *supra* note 297, at 539–40 (2021).

306. *See id.*

307. *See id.*

- i. The Zoning Board of Appeals may only grant a Hardship Variance upon finding all of the following:
 - a). Special circumstances exist relating to the soil conditions, shape, or topography of a parcel of land or the unusual character of an existing structure but not affecting generally the zoning district in which the land or structure is located;
 - b). Literal enforcement of the provision of this Ordinance for the district where the subject land or structure is located would involve substantial hardship, financial or otherwise, to the petitioner or appellant due to said special circumstances; and
 - c). Desirable relief could be granted without causing substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of a specific district in this Ordinance or the Ordinance in general.³⁰⁸

The city provides residents an online portal through which they can electronically submit an application for a Hardship Variance.³⁰⁹ While applicants must also upload documentation that fully describes the requested relief, the portal has fields that, following a summary of each of the three criteria, ask the applicant to briefly describe, in turn, “the special circumstances existing on this site,” “your hardship,” and “the relief requested,” emphasizing the importance of these statutory requirements.³¹⁰

The new ordinance’s language regarding variances differs from that found in the city’s prior zoning ordinance, with the key distinction being the removal of a separate requirement that the variance granted be the minimal necessary to grant “reasonable relief” and allow “reasonable use.”³¹¹ A

308. *Id.* at 544.

309. *Application for Hardship Variance*, CITY OF SOMERVILLE PLAN. & ZONING, <https://app.smart-sheet.com/b/form/608fc6af2c294b808a35c2895d0b6702> (last visited Oct. 8, 2022).

310. *Id.* The Town of Brookline provides in its application for a special permit or variance specific fields requesting the applicant to explain how they will meet the conditions for a special permit or for a variance and, with regards to a variance, summarizes the statutory requirements. See *Applying for Special Permit/Variances*, BROOKLINE MASS., <https://www.brooklinema.gov/DocumentCenter/View/11079/EXHIBIT-A-Special-PermitVariance-Application> (last visited Oct. 8, 2022) (providing the Town of Brookline Board of Appeals Application for Special Permits and/or Variances).

311. SOMERVILLE, MASS., ZONING ORDINANCE art. V, § 5.5.3 (2019). At the time Somerville’s

Somerville variance decision issued just prior to the change in language reveals a seeming model of consistency with the relevant legal requirements and the traditional purposes of a variance.³¹²

At 43 Victoria Street, the applicants sought a variance in April 2019 related to fence height.³¹³ The fence, which was already in place at the time of the application for relief, was eight feet tall, exceeding the maximum of six feet.³¹⁴ The ZBA's decision stated each of the three findings required for the grant of a variance under Section 5.5.3 of the Somerville Zoning Ordinance in place at the time.³¹⁵ Under each excerpt of the relevant language, it summarized the applicant's arguments before providing its own analysis of the criteria as applied to the applicant's case.³¹⁶ A two-foot difference in elevation between the applicant's property and a neighboring parcel, which was marked by a two-foot-high retaining wall, created the need for a fence to be installed below the retaining wall (in order for the fence to be physically stable).³¹⁷ The applicant received permission to place their fence on their neighbor's

zoning ordinance provided different language regarding variances, with the substantive differences italicized:

5.5.3. Authorization and Conditions for Variances. A variance from the requirements of this Ordinance may be authorized by the Board of Appeals only for reasons of *practical difficulty* and substantial hardship, and only where the Board finds that all of the following conditions apply:

- (a) There are special circumstances relating to soil conditions, shape or topography of land or structures which especially affect such land or structures but not affecting generally the zoning district in which it is located, causing a substantial hardship, financial or otherwise.
- (b) *The specific variance as may be granted by the Board is the minimum variance that will grant reasonable relief to the owner, and is necessary for a reasonable use of the building or land.*
- (c) The granting of the variance will be in harmony with the general purpose and intent of this Ordinance and *will not be injurious to the neighborhood* or otherwise detrimental to the public welfare. *In addition to considering the character and use of the nearby buildings, the Board, in making its findings, shall take into account the number of persons residing or working in such buildings or upon such land, and the present and probable future traffic conditions.*

Id.

312. 43 Victoria St., Case No. ZBA 2017-90, Somerville Zoning Bd. of Appeal (Apr. 17, 2019) (considering the "spirit of the Ordinance").

313. *Id.*

314. *Id.* at 2.

315. *See id.* ("In order to grant a variance the Board must make certain findings and determinations as outlined in §5.5.3 of the SZO.")

316. *See id.*

317. *Id.* (explaining the need to install a fence below the retaining wall due to the lot's unique topography).

property.³¹⁸ As such, the fence, while rising eight feet in height from its base on the lower part of the retaining wall, rose only six feet above the applicant's lot.³¹⁹ The ZBA decision went on to carefully consider the next two factors: whether the variance was the minimum necessary, and whether the grant of variance would be in harmony with the ordinance's intent and purpose and not cause injury to the neighborhood.³²⁰

In another 2019 decision, the ZBA reapproved a previously granted variance that allowed for a reduction in the amount of parking provided, as well as exceeding the maximum building height and floor area ratio.³²¹ Since no changes were made to the request in the year since it was originally granted, the ZBA approved the variance request again, attaching its original decision.³²² That decision cited the applicant's description of conditions—the soil had more contamination than “typical of historic fill in the Somerville area,” which created a substantial hardship.³²³ These conditions created significant costs beyond “routine foundation excavation costs.”³²⁴ In addition, the planning staff noted that the building at issue was part of a larger development, which at full-build would provide “ample parking,” justifying flexibility in this first phase of development.³²⁵ The opinion offered no close analysis of whether the variance was the minimum necessary to allow “reasonable use of the building or land,” instead reemphasizing how additional parking would be phased in over the course of development in the area.³²⁶ As for whether the variance was in harmony with the “general purpose and intent” of the zoning ordinance, the ZBA emphasized the city's broader goals regarding transit-oriented development in the area and that the variance would enable this development.³²⁷

In April 2021, the Somerville ZBA approved two hardship variances under the new standard for the construction of a fence on a triangular corner

318. *Id.* (“[T]he board believes the condition is met.”).

319. *Id.* (noting the fence achieved the same visual effect as fences in full compliance).

320. *Id.* (analyzing the practical impacts of the proposed variance).

321. 2 Earle St., Case No. ZBA 2018-21-E1-2/19, Somerville Zoning Bd. of Appeals (Apr. 3, 2019). The applicant had received a variance for parking relief one year earlier, but state law prohibits extending the expiration date of a variance. *Id.*

322. *Id.*

323. *Id.* at 3.

324. *Id.*

325. *Id.*

326. *Id.* at 4.

327. *Id.* at 4.

lot.³²⁸ The lot's shape resulted in most of the lot being within the frontage area, where a fence would be limited to four feet in height and fifty percent opacity.³²⁹ The staff memo highlighted the parcel's uniqueness:

The Ordinance anticipates streets intersecting at approximately right angles, and most residential streets in the City follow this pattern; it is unusual to have a lot in the Neighborhood Residence district where the streets intersect at an acute angle and create a lot where approximately two-thirds of the perimeter is composed of front lot lines. Due to the shape of the lot and the placement of the principal structure, the frontage area includes the majority of the lot area not covered by the principal building.³³⁰

The ZBA found that such a fence would impose a substantial hardship, denying the property owner's privacy and protection from litter and trespassers.³³¹ It permitted the installation of a six-foot tall fence of more than fifty percent opacity, finding no substantial detriment and noting specifically that the "proposed fence will not reduce visibility for vehicles approaching the intersection."³³²

Finally, in a more recent decision, the applicant sought a variance from the minimum number of stories in a commercial district so as to construct a one-story building in a district with a minimum of three stories.³³³ While the Board's decision is less extensive than that in other cases, it noted the abnormal shape and condition of the parcel, a triangular lot with a significant change

328. 255 Powder House Boulevard, Case No. CZC21-000032, Somerville Zoning Bd. of Appeals (April. 28, 2021).

329. *Id.*

330. Memorandum from the Somerville Plan. & Zoning Staff to Zoning Bd. of Appeals Regarding 255 Powder House Boulevard, CZC21-000032 (April. 14, 2021), <https://s3.amazonaws.com/somervillema.gov.if-us-east-1/s3fs-public/Powder%20House%2020255%20Staff%20Memo.pdf>. The staff did not analyze the existence of hardship, but did note that it did not believe grant of a variance would be detrimental to the public welfare or the intent and purpose of the zoning district. *Id.*

331. 255 Powder House Boulevard, Case No. CZC21-000032, Somerville Zoning Bd. of Appeals (April. 28, 2021).

332. *Id.*

333. 620 Broadway, Case No. P&Z#21-140, Somerville Zoning Bd. of Appeals (Dec. 15, 2021). While the Board's decision is brief, the Somerville website makes available a staff memorandum that included a ten-page memorandum in support of the variance request by the applicant's attorney. See Memorandum from the Somerville Plan., Pres. & Zoning Staff to Zoning Bd. of Appeals Regarding 620 Broadway, P&Z 21-140 (Dec. 13, 2021), [https://s3.amazonaws.com/somervillema.gov.if-us-east-1/s3fs-public/Broadway%20620%20Staff%20Memo%20\(Updated\)%20with%20Narrative.pdf](https://s3.amazonaws.com/somervillema.gov.if-us-east-1/s3fs-public/Broadway%20620%20Staff%20Memo%20(Updated)%20with%20Narrative.pdf).

in grade, and contaminated soil.³³⁴ These conditions imposed a substantial hardship, as the soil was not suitable for support of a building of the minimum required height.³³⁵ As to the final prong, the Board gave a rather perfunctory statement that a one-story building would provide no substantial detriment to the public good.³³⁶

Somerville's process of reviewing variance decisions reveals the potential for zoning reform to reduce the need for overreliance on variances and other forms of administrative relief and the related pressure on ZBAs to ignore the relevant legal criteria.³³⁷ Moreover, the online portal through which applicants begin the process of requesting variances compels applicants, from the start, to identify facts supporting their request for relief that are grounded in the statutory requirements.³³⁸

While it should be acknowledged that jurisdictions such as Brookline and Somerville, which produce more reasoned decision-making in variance cases, are smaller than Boston and see fewer requests for relief, arguably providing more time for careful consideration of each case, it remains the case that Boston is an outlier even among comparably sized and significantly larger cities.³³⁹

334. 620 Broadway, Case No. P&Z#21-140, Somerville Zoning Bd. Of Appeals (Dec. 15, 2021) (noting the parcel's condition).

335. *Id.* ("The Board finds that literal enforcement of the Ordinance would involve substantial hardship to the petitioners due to the deed restriction on future uses from the previous contaminated use.")

336. *See id.* ("The Board finds that approving a one-story building on this property will not cause a substantial detriment to the public good.")

337. *See* CITY OF SOMERVILLE, INFORMATION FOR PLANNING BOARD AND ZONING BOARD OF APPEALS APPROVAL 1-2 (2017), <https://s3.amazonaws.com/somervillema.gov/inf-us-east-1/s3fs-public/application-for-pb-and-zba-approval-guide.pdf> (outlining the special permit and variance procedure).

338. *See* CITY OF SOMERVILLE PLAN. & ZONING, *supra* note 309 (providing the application for a variance request).

339. *See, e.g.,* Owens, *supra* note 30, at 315 ("Cities with smaller populations consistently reported greater adherence to legal standards, less likelihood for favoritism or sympathy for petitioners or opponents affecting variance decisions, and less influence of neighbors and attorneys on variance decisions."). A survey of zoning administrators throughout North Carolina found similar results. *Id.*

V. A FEW IMPLICATIONS

It is problematic to have a legal standard, especially one that has implications for the property rights of individuals seeking variances and their neighbors, that is ignored by the entity responsible for implementing it.³⁴⁰ One response to this problem would be to revise the legal standard to better accord with what occurs in practice.³⁴¹ A better alternative, however, is to consider the causes of this inconsistency and reform the broader system to avoid the apparent need for such departures from the legal doctrine. In this Part we briefly suggest what both approaches might look like.³⁴²

A. *Revise the Legal Standard for Variances*

One way to improve the variance review process in Boston is to change the legal standard for area variances to one that is consistent with the type of inquiry the ZBA conducts. It would then be beneficial for the ZBA to actually apply this new test in its decisions. New York State provides a model for such an approach. Acknowledging the lack of clarity in the “practical difficulties” test for area variances, the legislature replaced it “with a consistent test that weigh[s] benefit to the applicant against detriment to the community, in addition to other enumerated factors.”³⁴³

The New York Town and Village statutes—which apply to all jurisdictions except New York City—empower local zoning boards of appeal to grant

340. See Sampson, *supra* note 22, at 920 (“[A] system that *forces* (or too easily *allows*) the decision-maker to ignore or give ‘lip service’ to its governing principles in order to reach that perceived proper result is a system that should raise serious questions, from both a legal perspective and a functional or policy perspective.”).

341. See *id.* at 924 (noting that “a long history of questionable decisions” requires “an array of possible measures to address and counteract the problem”).

342. See discussion *infra* Sections V.A, V.B (presenting two approaches to fixing the disconnect between variance legal standards and their implementation).

343. *Id.*; see also *Kali Bari Temple v. Bd. of Adjustment of Readington*, 638 A.2d 839 (N.J. Super. Ct. App. Div. 1994) (discussing, in relation to area variance, balancing of applicant’s need for variance against impact on surrounding uses). For a discussion on the challenges courts face in determining whether “practical difficulties” exist, see JULIAN CONRAD JUERGENSMEYER ET AL., *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 170 (4th ed. 2018) (“The elements of a separate ‘practical difficulties’ test are not well defined. . . . [T]he test is to be less rigorous than the unnecessary hardship standard. Courts usually toss several factors together in a balancing test between the property owner and the community.”).

use or area variances.³⁴⁴ The standard for a use variance requires establishing a unique hardship that prevents the property owner from obtaining a reasonable return.³⁴⁵ In contrast, requests for an area variance are reviewed under a more open-ended, multi-factor balancing test, which asks:

(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.³⁴⁶

Such a test explicitly focuses the ZBA's attention on the types of issues that shape many of the decisions in Boston.³⁴⁷ It suggests a balancing of the benefits to be accorded to the applicant against any potential negative consequences for

344. N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2022); N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 2022). The text of the two statutes is identical. *See* TOWN § 267-b(2)(b); VILLAGE § 7-712-b(2)(b).

345. TOWN § 267-b(2)(b); VILLAGE § 7-712-b(2)(b). The statutes require showing:

(1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

TOWN § 267-b(2)(b); VILLAGE § 7-712-b(2)(b). A board also must grant the minimum variance necessary to address the hardship “and at the same time preserve and protect the character of the neighborhood and the health, safety, and welfare of the community.” TOWN § 267-b(2)(c); VILLAGE § 7-712-b(2)(c).

346. TOWN § 267-b(3)(b); VILLAGE § 7-712-b(3)(b). As for a use variance, a board may only grant the minimum variance necessary. TOWN § 267-b(3)(c) (2022); VILLAGE § 7-712-b(3)(c). New York City, in contrast, requires for all variances a more traditional showing of a unique hardship that prevents an owner from obtaining a reasonable return. N.Y.C., N.Y., Zoning Resolution § 72-21 (2011).

347. *See* TOWN § 267-b(2)(b); VILLAGE § 7-712-b(2)(b); *see also supra* Section IV.A.1 (examining several of the factors considered in Boston variance decisions).

neighboring properties.³⁴⁸ It also makes clear to applicants and to neighboring property owners the scope of discretion the Zoning Board is granted and exercises. In places like Boston, where a large number of variances are granted with scant attention to the existing legal standard, this approach might remedy inconsistencies between legal doctrine and practice. But it is not clear that such an open-ended test would improve predictability or consistency. It also should be noted that this test is targeted, by its very terms, at addressing more minor requests for relief.³⁴⁹

B. Implications for Zoning Reform Efforts

A better approach would recognize how overreliance on the variance process reveals deeper problems with a jurisdiction's existing zoning. Such problems call for more substantial reforms not simply to the variance process or the legal doctrine governing variances, but to the overall zoning regime within a jurisdiction.

Our study suggests a few implications for such reform efforts. First, variance requests can serve to highlight particular ways in which zoning restricts new development that appears to be largely consistent with existing development and acceptable to the community.³⁵⁰ Such instances should lead to a rezoning of a particular area or a revision to particular zoning text, as was done in Somerville.³⁵¹ As Boston and other cities consider zoning reform, they would benefit from reviewing areas and particular provisions linked to a high volume of variance applications and grants.

Second, overreliance on variances can lead to a general distrust of zoning officials and a sense among residents that decision-makers are indulging individual developers by loosening restrictions at the cost of communities.³⁵² Lost in such a perception is any sense of how existing zoning stifles needed development, as well as how it creates costs and uncertainty not only for developers

348. See, e.g., *Kali Bari Temple*, 683 A.2d at 842 (“A board must first identify the public interest at stake in the proposed use, then identify any determinantal effect which would ensue were the variance to be granted.”).

349. See VILLAGE § 7-712-b(2)(b) (specifying that whether the variance is “substantial” alters the likelihood of relief being granted).

350. Cf. Owens, *supra* note 30, at 317 (“[T]here is a continuing need to make modest adjustments to the detailed application of the regulatory scheme when a zoning ordinance imposes significant burdens on an individual and relief can be fashioned without harm . . .”).

351. See generally *supra* Section IV.D (discussing Somerville's rezoning approach).

352. Cf. *id.* (warning that the failure of boards of appeals to follow the law by amending it leads to negative consequences, causing “well-justified criticism all over the country”).

but also for individual homeowners looking to make relatively minor changes. Reformers should be sensitive to this dynamic and emphasize how zoning reform that constrains the role of discretion can level the playing field for new entrants and foster greater predictability for all parties.

Finally, zoning reformers would benefit from attentiveness to the interests that variances serve, particularly the demand for participation in land use decisions among local residents.³⁵³ There are reasons to question whether residents should have any such rights,³⁵⁴ whether participatory mechanisms are adequately representative,³⁵⁵ and whether assertions of local control merely serve to exclude outsiders.³⁵⁶ Nonetheless, existing expectations are likely to constrain reform efforts unless some attempt is made to substitute them in the course of more comprehensive planning and rezoning efforts.³⁵⁷ A review of variance decisions might help reformers highlight the key concerns of residents and to shape reforms—and some form of participatory process—in a manner responsive to these concerns.³⁵⁸ At the same time, it is worth emphasizing that variance hearings are often sparsely attended, so to the extent that a jurisdiction allows significant changes to occur through a variance process rather than a more substantial rezoning effort, it may undercut an opportunity for greater public participation and deliberation.³⁵⁹

One further point is worth mentioning. Boston may be exceptional in one important respect. Another significant distinction between Chapter 40A and

353. See generally Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083 (2021) (analyzing the need for reform in the public participation process).

354. See generally John J. Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271 (2020) (discussing merits of demands for local control of land use in different communities).

355. See KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 109 (2020) (finding, based on an empirical study of planning and zoning board meetings in metropolitan Boston, that participants are not representative of the general population).

356. See Lemar, *supra* note 353, at 1086 (“[L]ocal control, community empowerment, and public participation are among the building blocks of residential segregation.”).

357. See *id.* at 1140 (“Public participation requirements are appropriate at the planning stage . . .”).

358. See *id.* (“At the planning stage, information received from the public can be both vetted and supplemented as part of a more wide-ranging rulemaking process.”).

359. See Bassett, *supra* note 28, at 119. Edward Bassett made this point in 1947 in the course of criticizing variance processes: “The public hearing on a variance is generally sparsely attended. On the other hand, since a change in the actual words of the ordinance calls out whole neighborhoods, dangerous changes in the ordinance will not slip through so easily as if made as variances by a board of appeals.” *Id.*

Boston's Enabling Act relates to the delegation of power to pass and amend zoning ordinances.³⁶⁰ As is typical of most American jurisdictions, Chapter 40A grants this power to the local legislative body.³⁶¹ In contrast, that power is granted in Boston to an unelected zoning commission, with members appointed by the mayor.³⁶² In the absence of local elected officials (the members of the Boston City Council) having a direct voice in zoning decisions, the variance process may be seen as a substitute mechanism for local voice.

VI. CONCLUSION

Variations are intended to be exceptions granted sparingly and not a routine component of the development process. An overreliance on variations creates costly delays, significant uncertainty, and distrust. It also highlights the need for zoning reform. Advocates of such reform would benefit from attending to the role variations currently play in their community and how careful study of the variance process might reveal important insights into the substance and process of reform.

360. Compare BOSTON, MASS., ENABLING ACT ch. 665, §§ 1–2 (1956), <http://www.boston-plans.org/getattachment/f44de6aa-8b2b-4cae-b110-0dd502ebc2bd> (delegating the power to pass and amend zoning ordinances to local legislators), with MASS. GEN. LAWS ch. 40A, § 5 (1954) (delegating the power to pass and amend zoning ordinances to a zoning commission).

361. MASS. GEN. LAWS ch. 40A, § 5 (1954); see also STEWART STERK, EDUARDO PEÑALVER & SARA BRONIN, LAND USE REGULATION 33–34 (3d ed. 2020). Unlike the variance and special permit, which are traditionally forms of administrative relief granted by a zoning board of appeals, rezonings are typically the domain of the local jurisdiction's legislative body. *Id.*

362. BOSTON, MASS., ENABLING ACT ch. 665, §§ 1–2 (1956), <http://www.bostonplans.org/getattachment/f44de6aa-8b2b-4cae-b110-0dd502ebc2bd>.