Shirley Kressel
27 Hereford Street
Boston, MA 02115

May 16, 2013

Re: H. 826, An Act Protecting Sunlight in Certain Public Parks

Senator Marc Pacheco
Senate Chair, Joint Committee on the Environment, Natural Resources & Agriculture
State House, Room 312B
Boston, MA 02133
Marc.Pacheco@masenate.gov

Representative Anne Gobi
House Chair, Joint Committee on the Environment, Natural Resources & Agriculture
State House, Room 473F
Boston, MA 02133
Anne.Gobi@mahouse.gov

Dear Co-Chairs Pacheco and Gobi:

I am a landscape architect and urban designer. I have been an advocate for smart growth and lawful development in Boston for twenty years. I testified in support at your hearing on this bill, discussing the positive impact of such legislation on the city as a whole, including quality of life, real estate values and economic development.

I am writing to clarify the dispute between the supporters of the bill, who seek state regulatory protection for the parks involved, and the opponents, who claim that the parks are already protected by the City's public review of proposed projects.

The issue is not merely that there is unreliable adherence to the city's Zoning Code in the project review process, but that the permitting process has been formally disconnected from the Zoning Code. An explanation of Boston's development permitting process reveals why state support is needed to protect these parks from sunlight deprivation, just as Article 97 of the state constitution is necessary to protect public space from changes of use.

Boston's Zoning Code, although legally voted by the Boston Zoning Commission, is written by the Boston Redevelopment Authority (BRA), which became Boston's Planning Board by state legislation in 1960. The Code sets height, massing and other regulations for development in each of the city's many zoning districts; there is no general plan for the city as a whole. The zoning process is lengthy and involves extensive public participation.

However, when a project is proposed, the Zoning Code is sidelined, and the permitting is done through a project-by-project review process conducted by the BRA, based on individual project impact studies provided by the developer. There are several avenues for project review:

Article 80* of the Boston Zoning Code prescribes review of four types of development. Large Project Review applies to projects of at least 50,000 sf. Small Project Review requires design review of projects of at least 20,000 sf or at least 15 dwelling units. Planned Development Area (PDA) designation is available for projects of at least one acre in size. Institutional Master Plan (IMP) designation is given to development by educational and medical institutions.

Developers of Large and Small Projects must go before the Zoning Board of Appeal (ZBA) for variances to deviate from zoning; in this process, community members can testify, but of course, the recommendations of the Mayor's Office and the BRA weigh heavily in ZBA decisions. Although legal recourse is available to parties

aggrieved by variances that do not meet the legal criteria, challenges are rare and even more rarely successful, due to lack of financial resources or inability to obtain standing to sue.

In a PDA or IMP, development is exempted from existing zoning and the design of the approved development becomes the new zoning. For these self-zoning projects, there is no legal recourse through the ZBA process. Since the BRA is the Planning Board, legal challenge to these zoning amendments is virtually impossible. Eligibility for PDAs is often added at the end of the long community zoning process; and code prohibition on PDAs is routinely lifted when a developer applies for PDA designation. The BRA guides developers to apply for a PDA designation in order to deviate from zoning without legal exposure.

Two other permitting mechanisms used to exempt projects from zoning are urban renewal designations. Projects whose sites are declared "blighted" under MGL Ch. 121A are exempted from zoning (and property taxes); the absolute discretion of blight declaration by the BRA has been upheld in court. A "U-District" designation exempts from zoning projects in urban renewal areas to which the BRA has contributed a piece of land, however small.

Finally, there is the Interim Planning Overlay District (IPOD); while a re-zoning process is being conducted in a district, proposed projects are reviewed independent of the existing zoning. Sections of downtown have been IPODs for decades while many projects have been approved.

Public review processes are specified for each of these permitting mechanisms. These generally include developer filings of project design and impact reports, public meetings, and public comment periods. Often, the Mayor appoints a civic advisory group, which discusses the design and negotiates impact mitigations, usually payments for community amenities. He chooses the community residents who will represent the neighborhoods, and also includes in these groups development and other business interests. In this process, the district's publicly created Zoning Code is not a factor. Should citizens raise a zoning issue, they are advised that the zoning code is merely a "guideline," a "starting point." In fact, the term "dynamic zoning" was recently invented to justify the suspension of the Zoning Code in the entire Longwood Medical Center.

In the end, after all the advisory group or community-wide meetings and comment letters, the BRA, in consultation with the Mayor, makes the decision. The primary use of the public review process is to legitimize pre-ordained approvals, and to negotiate the community benefits that the developer promises in return. Many residents view the permitting as a "done deal" from which they are trying to extract maximal benefits (including good relations with the BRA and the Mayor).

It is important to note that the Boston City Council has no voice in city planning or development regulation, nor in the massive tax exemptions granted under Ch. 121A.

In a Back Bay Sun story* on the Liberty Mutual tower project in Back Bay, which got a PDA to build at triple the zoning limit by counting existing building space they remodeled and which was predicted to cast some excess shadow on both Copley Square and the Boston Common, then-Representative Martha Walz was quoted, "The BRA waives zoning code routinely."

Perhaps the best explanation of Boston's regulatory process came from a City permitting official to a citizen questioning the workings of the system: "The BRA makes all illegal things, legal." Clothed in the powers of both planning board and urban renewal agency, the BRA is virtually immune from legal recourse; the BRA calls itself "bullet-proof."

The reality of Boston's project review process is that the community is given little real power to stand against the powerful forces of development.

The BRA and private real estate interests have painted a grim future of economic stagnation in Boston should the bill pass. This extreme position misrepresents the nature and impact of the legislation. We should remember that House Bill 826 has a very limited scope. The bill does not halt development anywhere. It simply calls for compliance with local zoning where violations would cast excess shadows on these six parks, and only during the prime sunlit hours, from an hour after sunrise to an hour before sunset.

As the bill's opponents pointed out, Boston's development has blossomed over the past two decades, with little or no impact on these parks. That could continue under this legislation; one estimate is that over 3 million gross square feet of developable space would be possible in the Copley Square area alone under the proposed bill.

If developers were not contemplating extra-zoning towers that would shadow the affected public parks, they would not fear this legislation. If such towers are indeed planned, the necessity of this legislation is proven, because the community voice cannot prevail in Boston's site-specific zoning system where short-term political and economic pressures can easily overpower long-term environmental considerations. Recently approved in is a 600-foot tower at Copley Place that would cast shadows into Copley Square, one of the parks the bill seeks to protect.

The state is always involved in municipal development, through MEPA reviews, state-authorized tax breaks, Article 97 of the state constitution, historic commission activities, enabling laws for city zoning regulations and for empowerment of redevelopment agencies, and many other oversight functions. It is entirely legitimate for the state to exercise its protective and regulatory oversight powers to protect major public natural and historic resources such as the six parks named in H.826. The precedent for this was confirmed by the 1990 legislation protecting the Boston Common and Public Garden from proposed over-development, which has received universal acclaim -- even by the BRA.

There is no reason not to extend state protection to these six parks, and, in view of the existing project permitting process – and the success of the Common and Garden legislation, every reason to do so.

Sincerely,

Shirley Kressel

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*http://www.bostonredevelopmentauthority.org/pdf/documents/A%20Citizens%20Guide%20to%20Article%2080.pdf

*http://backbaysun.com/2011/07/12/rep-walz-makes-a-case-for-height-restrictions/