The South End News

Guest Opinion by Shirley Kressel
October 20, 2005

For those who don't understand why the Boston Redevelopment Authority (BRA) cannot legitimately function as both a planning and regulatory agency and also a development-promotion agency, the Gaiety Theatre story provides a very clear illustration.

In July, I wrote about the demolition of the zoning-protected Gaiety Theatre by the developer who owned it and the problem of legal "standing" that kept community people from bringing legal challenge (see "Guest Opinion," July 21.)

In April I filed a Freedom of Information Act (FOIA) request asking the BRA for any documents related to the Gaiety Theatre. The FOIA produced new documentary evidence showing that the BRA knew that the developer's strategy to get around zoning regulations in order to win a demolition permit of the Gaiety Theatre was unlawful. And yet the BRA nevertheless assisted the developer in pursuing that strategy. The documents clearly show how the BRA's conflict of interest as both an advocate for development and a City regulatory agency, can — and in this case, did —result in development activities that breach zoning ordinances. *

As you may recall, the BRA, through the Zoning Commission (which the BRA staffs and advises), gave the proposed project a Planned Development Area (PDA) zoning designation which was, numerous plaintiffs alleged, invalid for two reasons: First: The development site was under the one-acre minimum for a PDA. Second: The project was premised on the demolition of a theatre, which is prohibited in the Cultural District. The Gaiety's legal use and occupancy **permit was for a** "Theatre," according to the Inspectional Services Department's official land-use zoning, and it was this use categorization that protected it. As a theatre, it couldn't lawfully be demolished through a conventional ISD permit.

Demolition could be permitted only if the Zoning Board of Appeal decided, after a hearing to consider community recommendations, that a change-of-use permit wouldn't harm the historic cultural character of the district. Once the use was changed and the Theatre was no longer officially a Theatre, the developer could apply for a demolition permit. But, per the District's code, such a ZBA-allowed demolition would have required either a full replacement theatre or a costly "substantial rehabilitation" of another theatre.

ZBA approval for demolition was highly unlikely if the community were heard. Both the **Asian-American** and African-American communities had waited decades to have the Gaiety restored as a multi-cultural performance center, as the official Midtown Cultural District Plan recommended. And even if it were given, ZBA approval would have required replacement or other expensive mitigation.

To get around this problem, the proposed PDA project plan included a statement that the Zoning Commission's approval of the PDA would **validate the developer's claim** that the Gaiety was not a Theatre, basically because it had stood long unused. In fact, the BRA itself had written both the City's Midtown Cultural District Plan — which specified the Gaiety by name as " Vacant theatre worthy of preservation" — and the District zoning codifying that Plan to save exactly such unused theatres for future generations.

The FOIA request yielded two BRA mark-ups of the draft PDA Plan related to the change of use designation of the Gaiety Theatre required for demolition. In one section, the BRA's legal department crossed out the statement that the Gaiety is not a Theatre, noting in brackets: "This is a zoning opinion matter, not a development plan issue. The zoning commission is not a factfinder, moreover, and has no way of verifying or weighing the assertions made here."

The next draft of the PDA Plan titled "Change of Use or Occupancy of Theater" asserted: "This Development Plan seeks confirmation that the former Gaiety Theatre, which is located on a portion of the Project Site and has been vacant and unoccupied for about 20 years, lacks the facilities and equipment required for such events and is accordingly not subject to this requirement." The BRA's legal department had circled the section and noted in capital letters and underlined twice, "No." *

In other words, the PDA could not lawfully be used to eliminate the zoning protections for the Theatre. This set up a classic confrontation between the laws of the City, which barred the demolition of the Gaiety without extensive public process and ultimately **replacement of the theatre**, and the desire of a developer to be free of this legal burden. With the BRA as arbiter, the developer, as usual, won.

In the end, the BRA issued a "Certificate of Consistency" declaring the demolition "consistent" with the PDA project plan, which, despite the BRA lawyers' objections, pronounced the Theatre to be *not* a Theatre. Pursuant to this Certificate, the Inspectional Services Department, knowing full well it was allowing the destruction of a building it classified as a theatre, issued a demolition permit on the BRA's authorization, standard procedure for PDAs.

The urgent need to repeal the stealth 1960 legislative hand-over of Boston's City planning and regulation to an agency created to advocate for development is vividly and tragically illuminated by glorious theatre lights now extinguished forever.

The common-sense point, understood by every other city in the United States, is that planning and regulation cannot be done by an agency whose mission is primarily the promotion of development. No other city entrusts its planning and zoning to an urban renewal authority. Boston should re-create a real planning/regulatory office within the City government, accountable to the citizens and working unconflicted, for our long-term social, economic and environmental needs.

Shirley Kressel is a landscape architect and urban designer and one of the founders of the Alliance of Boston Neighborhoods. She can be reached at shirley.kressel@verizon.net.

Wiest, Donald

From: Lawlor, Matthew J. [MLawlor@GOULSTONSTORRS.com]
Sent: Wednesday, September 03, 2003 9:28 PM
To: 'donald.wiest.bra@cl.boston.ma.us'
Cc: Kiefer, Matthew J.; 'rcole@gct.com'
Subject: Kensington -- Revised PDA Development Plan

Result of comparison Doc Num 1...

<<Result of comparison Doc Num 1137691v18 to Doc Num 1137691v18_.doc>>

Don:

Attached hereto please find a blackline version showing changes from the prior version on which you commented. On balance, I think that we incorporated most of your comments, either verbatim or at least in concept. A few notes to help in your review and to highlight open issues that will require further discussion:

1. In addition to the changes we made in response to your comments, we have also modified the PDA Development Plan to reflect a variety of other separate matters, including the new unit count (up from 336 to 351), new parking space count (up from 240 to 246) and additional language regarding certain required findings pursuant to Section 3-1A.a of the Code.

2. In Section 3, we did not indicate that the Cooperation Agreement's effectiveness is dependent on approval of the Project because that is not what that agreement provides, although it is of course highly unlikely that Kensington would pursue its rights under the Cooperation Agreement absent approval of the Project.

3. In Section 6(b), our discussion of FAR is now somewhat different from what was initially drafted and from your suggested edits. We believe that the new version meets your concerns and our ours equally, but we should go walk through it to make sure.

4. In Section 6(d), we did not incorporate your comment verbatim, but think that as revised this section should be acceptable. Let us know.

5. In Section 6(l), the problem we are encountering is that the DPIR/FPIR wind analysis showed that there would be a worsening of wind impacts at a very limited number of locations (I believe we are talking about 1 or 2 locations) and accordingly relief is required from the Article 38 wind provisions at Section 38-16.2. This section can either be left as we have revised it or we will need to call out specific instances of noncompliance in order to obtain the necessary relief.

6. In Section 9(c), we believe that deletion of this entire section would be very problematic for the Project. As you know, opponents of the Project have specifically referred to the referenced provision of Article 38 and accused Kensington of violating it by changing the theater's use without providing the required mitigation. Leaving the PDA Development Plan silent on this issue would practically invite a legal challenge. We also don't see how the interpretation required in this section differs in any meaningful way from Section 9(b).

7. We are not sure why you want to delete all of Section 14. This is a fairly standard section in all PDA Development Plans.

8. The rationale behind our revisions to Exhibit E (Allowed Uses) is that certain of the uses we want to protect going forward (i.e., townhouses, restaurants for off-premises consumption and health clubs) are not allowed as-of-right under Article 38 and so it is not sufficient just to point at the allowed uses under Article 38 and be done.

I will plan on calling you tomorrow afternoon to discuss the above issues and any other further comments you may have on the document. Thanks as always for your helpful advice on how to make the Project and its documentation better and more effective.

Best regards,
Matt

9. **Proposed Uses**: The Project may be used for residential, accessory off-street parking and loading and lower-floor commercial uses listed in Exhibit E, attached hereto. ~~<The>~~ **Article 38 provides that the** Project is ~~<also>~~ subject to the following use restrictions:

a. Ground Level and Cultural Uses: Pursuant to Section 38-18.1 of the Code, uses with street frontage located on the ground level or entered by stairs from a sidewalk entry (excluding lobby entrances, which may occupy a maximum of 40 feet of street frontage) are limited to the Ground Level and Cultural Uses listed in Appendix B to Article 38.

~~<The Proponent intends to seek tenants of the Project's ground floor retail space for the uses listed in Exhibit E attached hereto.~~

~~>~~

b. Neighborhood Business Opportunities: Section 38-18.3 affords certain neighborhood ~~<business>~~ **businesses** opportunities in any Proposed Project in the Midtown Cultural District that will contain 50,000 or more square feet of space available for lease. ~~<This Development Plan seeks confirmation that "space available for lease" is not applicable to residential space.>~~ As proposed, the Project design ~~<calls for approximately>~~ **will include a total of** 9,000 square feet of space to be leased ~~<to>~~ **for** non-residential uses. **The requirements of Section 38-18.3 are therefore inapplicable.**

c. Change of Use or Occupancy of Theater: Section 38-21.2 contains certain requirements applicable to any Proposed Project seeking to change the use or occupancy of a Theater. Article 38 defines "Theater" to include only those structures that are "equipped for the production and presentation of performing and visual arts events." This Development Plan seeks confirmation that the former Gaiety Theater, which is located on a portion of the Project Site and has been vacant and unoccupied for about 20 years, lacks the facilities and equipment required for such events and is accordingly not subject to this requirement.

Once the BRA Director certifies that the actual uses of the Project are consistent with this Development Plan, then such uses shall be deemed to be in compliance with this Development Plan to the extent **that** such uses are addressed in this Development Plan.

10. **Proposed Traffic Circulation**: The Project will have a single driveway on LaGrange Street, which will lead to an underground parking garage and a loading area. The Project driveway is located as far as possible from Washington Street in order to minimize disruption to traffic operations at the intersection of LaGrange Street with Washington Street. In addition, the Project proposes to improve LaGrange Street along its entire length and widen the street to allow for two-way traffic operations from Washington Street to the Project driveway. Traffic impacts of the proposed Project design and uses have been analyzed in the course of Large Project Review for the Project. Mitigation measures to address any such traffic impacts will be the subject of a Transportation Access Plan Agreement between the Proponent and BTD.

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11. **Proposed Parking and Loading Facilities**: ~~Approximately~~ 240 off-street parking spaces will be provided in a four-level below-grade parking garage to be developed on the Project Site as part of the Project. The parking ratio for the Project is accordingly 0.71 spaces per residential unit, which slightly exceeds the minimum required by Section 38-14.3. If demand so warrants, the number of spaces may be increased, subject to BTD approval, to a maximum of 334 by the use of mechanical stackers. All of these spaces will be accessory to