

South End News

July 21, 2005

Guest Opinion by Shirley Kressel

Destruction of Gaiety Theatre was a crime; if the City won't enforce its laws, citizens need the right to do so

If you saw someone assaulted on the street, or a burglar breaking into a building, you'd call the police. They'd rush out and stop the crime, and thank you for helping to enforce the laws written to protect us all.

But what if you called and the police answered: "What's it to you?! Don't call unless it's skin off your nose!"

That's pretty much how the zoning laws governing development work.

We have volumes of zoning code written to protect the public welfare; theoretically, violations can be appealed. But who is allowed to appeal these violations?

Often, it turns out, no one.

The concept of "standing" — the right to bring legal challenge — is the key to the courthouse door. But only individuals or corporations whose property interests are directly harmed, and who suffer unique injury not shared by the community are granted standing to sue if the first line of defense, the City enforcement agencies, don't bar a zoning violation.

Standing, in past practice, was "liberally construed" to admit people into the halls of justice to argue their cases. Nearby property owners were presumed to have standing. But in recent years, the standing gateway has narrowed to the point where even immediate abutters are often denied the right to demand enforcement of zoning codes next door.

Zoning was created to protect the public welfare and safety. The government's right to tell people what they can and can't do with their private property is based on the concept of mutuality of burdens and benefits: everyone obeys a set of constraints to benefit from community-wide protections. But while the legitimacy of zoning lies in its mandate for broad community welfare, only the narrowest individual property interests are actually protected. Ironically, the more broadly significant the zoning goal, and the more people potentially harmed by a violation, the fewer can actually sue. There is no access to law enforcement simply on the basis of public welfare — the very *raison d'être* of all planning and zoning. We must ask: Is an adjoining property interest the only social good to be protected by the vast legal machinery of municipal zoning?

The Gaiety Theatre in the Midtown Cultural District illustrates the problem. The zoning for the District, written in 1989 to protect the dwindling theatre district, expressly forbids demolition of any theatre except by an elaborate Zoning Board of Appeal determination process, specifically requiring community recommendations, that the loss of the theatre would not hurt the historic character of the theatre district; such a decision would also have required a replacement theatre to be built or another defunct theatre to be restored. According to its mission statement, the zoning article is to benefit "the city's nonprofit arts community" and "all residents and visitors." Yet the city's building commissioner,

the Inspectional Services Department (ISD), gave the owner a permit for the Gaiety's demolition. How did this happen?

This permitting was engineered by the Boston Redevelopment Authority through a Zoning Commission code amendment granting the Theatre's owner a "Planned Development Area" (PDA) zoning designation. This designation approved a residential tower the owner proposed, which would replace the Theatre -- ignoring the violation of the code's prohibition of demolition without the Board of Appeal determination. Astoundingly, ISD, whose job is to review all project proposals and deny building permits if a code violation is found, does not perform this job on PDAs -- ISD does not even read PDA plans! So, in PDAs, whatever the BRA and the developer negotiate remains immune from code enforcement. ISD accepts the PDA as superceding all zoning regulations — including, most important in this case, the one requiring a Board of Appeal decision on theatres. ISD even ignored a general code provision specifically forbidding the preemption by PDAs of Board of Appeal powers -- powers which were expressly prescribed for this particular decision in this District's zoning article.

However, since this particular owner didn't even have an acre of land as required to create a PDA, an abutter who was located within the designated PDA area sued against the PDA designation. He got standing on his PDA case, which also included the unlawful demolition. But he was denied standing when he sought an injunction on the Theatre's demolition until the PDA suit was heard. Why? Because he could not prove that his own property would suffer by the Theatre's destruction.

It didn't matter that the demolition permit authorized by the very PDA he had standing to challenge would become invalid if that PDA was ruled invalid. Nor did it matter that he would lose the zoning-protected theatre as an element of his case claiming the PDA violated zoning. Nor that the owner had the theatre for 18 years and could easily sit on it for a few months more until the case was decided. Nor that the Gaiety Theatre was specifically named in the District's official City Plan (in which the owner is credited as a participant) as "worthy of preservation" and slated for restoration as an Asian performing arts center. Nor that the zoning law was written to protect all of us from the loss of theatres in the endangered theatre district.

What mattered to the judges was whether his property would be harmed if the Gaiety was torn down.

Standing in the PDA suit was denied to City Councilors (despite the developer's inclusion of public streets in his project "site" to make up an "acre"), neighborhood organizations whose recommendations would have been required for a Board of Appeal determination, theatre preservation advocates, and individuals participating in the review process whose legal rights had been violated by the defective approval process. Standing was denied even to other property-owning abutters whose light, privacy and views would be diminished by the proposed tower. Amazingly, none of these were granted the right to challenge the zoning decision, nor to ask for a demolition injunction.

Remarkably, even their standing to file an administrative appeal against the ISD permit at the Boston Zoning Board of Appeal was denied. The zoning code implements district planning in which the whole community participated and which together make up the all-important "general plan for the city as a whole," with which all zoning and zoning amendments must be consistent. Shouldn't any resident or taxpayer be allowed to demand at least a City Board of Appeal review of a permit issued in violation of this code? **Apparently not.**

In the end, the Gaiety Theatre, an elegant music hall with acoustics rivaling those of Jordan and Symphony Halls, standing virtually intact for a hundred years, was destroyed simply because, once the City agencies abdicated their responsibility, no one was granted the right to enforce the laws that protected it.

States differ in their treatment of standing, as do cities, some of which do not require standing to file for administrative review by their Board of Appeal. And some of the most liberal interpretations of standing have been made by the U.S. Supreme Court. Some law school student or legal advocacy group should document these differences and study the impacts. Has more liberal standing, for example, really led to more frivolous cases, as the development interests claim?

Bar associations and civil rights advocates should take note of the impact of current practices, and encourage reform that opens the courtroom door to citizens who could help enforce the laws that protect us all.

At least we should change the law to allow any city resident and/or taxpayer to bring an administrative appeal against a permit issued in violation of the zoning code. The factual evidence would be brought forth, bringing to bear the pressure of public accountability and possibly assisting later legal use by parties with standing in the courts.

An ordinance enforceable by no one fails in its fundamental purpose of protecting the public welfare. If the effect of current law is that no one has standing except to protect the narrowest individual property interests, then the law itself must be reconsidered.

What good are rights without recourse?

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