August 3, 2022
To Bryan Glascock
From Mike Mickelson, Charlestown resident and member of Impact Advisory Group for 425 Medford St.
Re Proposed Zoning Amendments

I strongly support the proposed zoning amendments:
“Proposed Zoning Amendments of Floor Area and Other Definitions
http://www.bostonplans.org/news-calendar/calendar/2022/07/20/floor-area-and-other-definitions-zoning-amendment

At the July 20 virtual meeting, you walked us through the proposed amendments. I understand now that Boston’s Zoning Code has been gradually revised by efforts focusing on location, reflecting Boston’s diverse neighborhoods. As a result, there are sections of “old code” and sections of “new code.” In part, the proposed amendments merely update old code. The proposed amendments make only two meaningful changes: one for substance, and one for clarity.

The zoning amendments copy the definitions of “FAR,” “Filled Tidelands,” and “Flowed Tidelands” from the “new code” of Section 2A-1 to the “old code” of Section 2-1, where they were missing.

The amendments add wording to the definitions of “Floor Area, Gross” and “Floor Area Ratio” in the new code, and copy those to the old code.

The new wording for Gross Floor Area changes its meaning in that it will now include the area of above-grade parking.

The new wording for Floor Area Ratio clarifies but does not change its meaning. It clarifies by borrowing wording from the important existing definition of “Lot Area” found later in the Code. The improved wording helps the reader understand that tidal waters are, and have always been, excluded from the calculation of Floor Area Ratio.

At the meeting, two developers were worried that the tidal clarification in the proposed amendments would reduce the Gross Floor Area that they could build as-of-right on their waterfront parcels. That is not true. The proposed amendments will save developers the time and of effort of preparing a defective plan and the embarrassment of unintentionally misrepresenting the facts to the public.

Thank you again for proposing the constructive and helpful zoning amendments.

DETAIL. By way of detail, I would like to suggest that you consider whether to similarly clarify Section 15-1.   Also, if the two developers are still opposed, you may wish to remind them the tidal exclusion is also mentioned in the definition of “Lot Area” in the appendix to Article 42A, and thus Article 42B.

Mike Mickelson

To: Bryan Glascock
From: Anne Doherty, Charlestown resident
Date: August 3, 2022
RE: Proposed Zoning Amendments

I count myself among the many Charlestown residents who are deeply concerned about the size and scale of the Medford Street proposed development and I am in strong support of the "Proposed Zoning Amendments of Floor Area and Other Definitions noted here:

http://www.bostonplans.org/news-calendar/calendar/2022/07/20/floor-area-and-other-definitions-zoning-amendment

I am grateful for the efforts of my fellow residents who serve as members of the Impact Advisory Group for 425 Medford St. in Charlestown to ensure the fine print is reviewed so that any change for overzealous interpretation by developer is nipped in the bud..

I understand that the zoning amendments copy the definitions of "FAR," "Filled Tidelands," and "Flowed Tidelands" from the "new code" of Section 2A-1 to the "old code" of Section 2-1, where they were missing.

The amendments add wording to the definitions of "Floor Area, Gross" and "Floor Area Ratio" in the new code, and copy those to the old code.

Gross Floor Area

Far from an edit for clarity, this new wording for Gross Floor Area changes its meaning in that it will now include the area of above-grade parking.

Floor Area Ratio

The new wording for Floor Area Ratio clarifies but does not change its meaning. It clarifies by borrowing wording from the important existing definition of "Lot Area" found later in the Code. The improved wording helps the reader understand that tidal waters are, and have always been, excluded from the calculation of Floor Area Ratio.

Please listen to the residents of this community. We are watching this development carefully.

Thank you for your work to make clear what these terms mean so that everyone clearly understands what can and cannot be done with this parcel and other similar ones.

Sincerely yours,
Anne Doherty

August 4, 2022

Arthur Jemison, Director
Boston Planning and Development Agency
Boston, MA 02201

Re: NAIOP Comments on Proposed Zoning Amendments of Floor Area Ratio (FAR) and Other Definitions in Article 2 and Article 2A

Dear Director Jemison,

NAIOP Massachusetts, The Commercial Real Estate Development Association, appreciates for the opportunity to offer comment in response to the proposed zoning amendments to Articles 2 and 2A (the Articles). It was made clear at the Public Meeting on July 20 that there is ample confusion among members of the regulated community and the public on the intent and the impact of the proposed amendments, and as such **NAIOP urges the Boston Planning and Development Agency to extend the formal comment period beyond August 5 to ensure feedback can be appropriately responded to, and, where appropriate, incorporated.**

NAIOP also appreciates the willingness of BPDA staff to meet with members of the public and regulated community on this issue as announced at the July 20 meeting, and as such **formally requests a meeting with the appropriate staff to further discuss the concerns outlined below.**

Overall, NAIOP is unclear as to the precise issue that the proposed changes are designed to address. NAIOP strongly believes that amendments to the Articles should be narrowly tailored to the specific purpose they are trying to achieve to alleviate potential ripple effects throughout the zoning code. Concerns related to the scope and potential impacts of the proposed language include:

I. As drafted, the proposed amendments establish a sub-definition of "lot-area-solely-for-purposes-of-calculating-FAR" that differs from the existing definitions of "Lot" and "Lot Area", which terms are found throughout the Zoning Code in various contexts. **NAIOP requests clarification from the BPDA as to how the differing definitions will be applied.**

II. NAIOP believes the proposed language is overbroad in excluding from "lot area" any area supported by piles. For many waterfront properties, a significant portion of the buildable lot is pile supported. For certain water-dependent end-of-pier uses (such as marinas), the entire lot may be pile supported.

    i. For such properties, the amendments as drafted would reduce FAR to zero and take away all development rights.

    ii. For impacted properties that previously included pile-supported area as part of lot area to meet FAR requirements, the proposed amendments would create a pre-existing non-conforming use status, requiring those properties to seek a variance for any modifications to their existing structures.

iii. NAIOP strongly believes that public policy should be promoting water-dependent uses; however, as proposed these amendments would discourage such uses by making them harder to permit, develop, and renovate.

iv. To alleviate this concern, **NAIOP recommends incorporating Chapter 91's "project shoreline" language into the language defining the boundary of what is to be excluded from lot area for purposes of FAR.**

III. NAIOP's members are deeply concerned the proposed language, if enacted, would discourage climate resiliency measures, which by their very nature are likely to be constructed along the edges of piers and wharves. **NAIOP believes that the area in which climate resiliency measures are to be constructed must be included within lot area.**

NAIOP Massachusetts represents the interests of companies involved with the development, ownership, management, and financing of commercial properties. NAIOP has over 1,700 members who are involved with office, research & development, lab, industrial, mixed use, multifamily, retail and institutional space.

Thank you for your consideration of our comments. We look forward to meeting with the BPDA staff to ensure the regulated community's feedback is incorporated into these discussions. We will be in touch to schedule a meeting and please contact me if you have any questions or if additional information is needed.

Sincerely,

Tamara C. Small
Chief Executive Officer
NAIOP Massachusetts, The Commercial Real Estate Development Association

CC:
Devin Quirk, Deputy Chief for Development and Transformation, BPDA
Michael Christopher, Director of Development Review, BPDA
Richard McGuinness, Deputy Director for Climate Change and Environmental Planning, BPDA
Bryan Glascock, Deputy Director for Regulatory Planning and Zoning, BPDA
Mark McGonagle, Community Engagement Manager, BPDA

August 5, 2022
To Bryan Glascock
From Judith McDonough
Proposed Zoning Amendments

To Whom It May Concern:

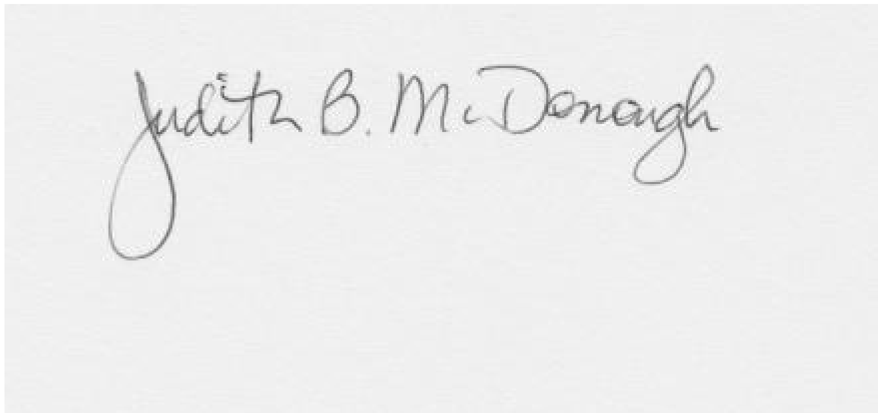
As a long-term Charlestown resident and observer of Boston development projects, I whole-heartedly support the proposed amendments so carefully examined by members of the Impact Advisory Group for 425 Medford St. in Charlestown.

It is so discouraging that developers, especially when property has been owned for decades, seek to advance excessive proposals which decidedly impact a small neighborhood. It is encouraging that dedicated Charlestown residents voluntarily
examine the "fine print" and bring to the sunshine discrepancies in owner/developers' prejudiced interpretations.

Amending the Boston Zoning Code and bringing such portions up to date and in synch should prevent future misinterpretation.

I urge support of the Amendments as outlined in the BPDA documents at the July 20, 2022 virtual meeting.

Thank you for your consideration.



Judith McDonough

THE FLATLEY COMPANY

45 Braintree Hill Office Park, Suite 300, Braintree, MA ◆ 02184-8754 ◆ (781) 848-2000

By email: BPDArpz@boston.gov
Bryan.glascock@boston.gov

September 14, 2022

Boston Planning and Development Agency
One City Hall Square
Boston, MA 02201
Attn: Bryan Glascock, Deputy Director for Regulatory Planning and Zoning

Re: Proposed Zoning Amendments of Floor Area/Other Definitions – Watersheet

Dear Mr. Glascock,

The Flatley Company respectfully submits the following comments on the Proposed Zoning Amendments of Floor Area and Other Definitions, revised draft for discussion at public meeting on September 14, 2022 ("Amendments"). Contrary to BPDA's suggestion, the proposed Amendments provide a substantial change to – not a clarification of – the way the Code directs that FAR be calculated for land that is partially under water. As shared during the public meeting in July, we have serious concerns regarding the legality of these changes as well as the potential impact they would have on the implementation of desperately-needed resiliency measures at the Charlestown parcel and throughout Boston.

The Proposed Amendment Would Dramatically Change the Code's FAR Calculation

The current version of the Boston Zoning Code ("Code") clearly provides that Floor Area Ratio ("FAR") includes land under water in the denominator. There are four reasons for this:

First, while the Code specifically defines the term "Lot Area" to exclude areas under water, the definition of "Floor Area Ratio" does not use the term "Lot Area" in identifying what to include in the denominator. Instead, the term "total area of the lot" is used. If the Boston Zoning Commission had wanted the denominator to exclude areas under water, it would have used the defined term "Lot Area." *See, e.g., Perry v. Zoning Board of Appeals of Hull*, 100 Mass. App. Ct. 19, 22-23 (2021) (where the legislature employs specific language in one paragraph but not another, the excluded language should not be implied).

Second, the Code provides that the FAR denominator shall consist of the "total area of the lot" (Emphasis added.) Therefore, even if "area of the lot" were synonymous with "Lot Area" (it is not), "total area of the lot" would have to have a more expansive meaning than both terms. *See Hutchinson v. Planning Bd. of Hingham*, 23 Mass. App. Ct. 416, 421 n.5 (1987) (noting the

cardinal rule of construction that regulations should be interpreted in a way that words are not made superfluous). As the plain meaning of "total" is "comprising or constituting a whole: ENTIRE,"[1] "total area of the lot" necessarily means the entirety of the lot, which, applying the definition of "Lot" set forth in the Code, specifically includes any and all portions that are under water.

Third, the Code specifically identifies the areas that should be excluded from the denominator of the Floor Area Ratio (*i.e.*, portions of a lot that are required by another structure or use for Code compliance and certain parts transferred subsequent to the Code's effective date), but, land under water is not listed in these exclusions. If the Boston Zoning Commission intended to exclude land under water from the denominator, it would have included such land in the list of exclusions, especially considering that it chose not to use the term "Lot Area."

Fourth, if the Boston Zoning Commission had intended for the terms "total area of the lot," "area of the lot" and "Lot Area" to all have the same meaning – which is effectively what the BPDA contends – the Boston Zoning Commission would not have specifically identified, as an area to be excluded from the FAR denominator, land that is needed to satisfy Code compliance for another building or use, because such land is already excluded from the term "Lot Area." As noted above, it is a cardinal rule of statutory construction that regulations should be interpreted in a way that avoids making words superfluous. Flatley's interpretation honors this rule, but construing "total are of the lot," "area of the lot," and "Lot Area" to all have the same meaning would violate it, by making the exception for land needed to satisfy another building or use entirely superfluous. *See Hutchinson*, 23 Mass. App. Ct. at 421 n.5.

Indeed, the proposed revisions appear to be specifically designed to address three of these four points, which appears to be an implied admission that Flatley's interpretation is the correct one, and that the revisions are needed to support the BPDA's desired interpretation and alter how FAR has been calculated under the Code for many decades. For all these reasons, the proposed Amendments would effectuate a substantial change to the Code.

Past Practice at BPDA

We continue to take issue with BPDA's assertion that these proposed changes are somehow a confirmation of BPDA's past interpretation of the zoning code to exclude watersheet when calculating FAR. Our brief review of relevant BPDA files shows great inconsistency in this arena, including projects for which watersheet is apparently included when calculating FAR. This underscores that these changes are not a mere clarification but instead a significant departure and change from what the City Council originally intended. Further, even if the BPDA can identify limited past precedent of a *policy* of excluding watersheet from FAR, any such policy would not override, overrule or contradict the correct legal interpretation of calculating FAR upon which Flatley appropriately relied when valuing and purchasing its waterfront parcels and determining the development potential of each under the Zoning Code as written.

[1] See Meriam-Webster definition at https://www.merriam-webster.com/dictionary/total.

Repercussions and Consequences of the Proposed Changes

City-Wide Impacts on Water Adjacent Parcels

Passage of these amendments will impact all parcels within the City that contain watersheet (though, as noted below, they will impact Flatley the most). Like Flatley, any and all of these property owners would presumably have reasonably relied on the correct legal interpretation of Lot and FAR when purchasing and valuing their properties, and the after-the-fact material change to these definitions – as is currently proposed – would therefore cause them harm. The proposed Amendments would, on many waterfront parcels, significantly reduce the as of right density on those parcels, and would, relatedly, significantly reduce the value of these properties.

Policy Repercussions and Impacts

Regulatory Taking

The proposed Amendments, if adopted, would effect a regulatory taking as to Flatley's property. This year, the Supreme Judicial Court clarified the standard that applies to regulatory takings claims in *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 489 Mass. 702 (2022). Specifically, the Court stated that the trial judge must consider each of the following "fact-dependent" factors: (1) the economic impact of the regulation; (2) the regulation's interference with reasonable investment-backed expectations, and (3) the character of the government action. Each of these factors would weigh in Flatley's favor in a takings challenge.

As to the first factor, if the proposed new FAR definition were applied to Flatley's property, it would have a substantial economic impact on Flatley's contemplated development. In fact, Flatley estimates that the value of its contemplated project would be reduced by approximately 22% if the proposed Amendments are applied to it. In *FBT*, the Court held that regulatory action that reduced a property's value by around 50% was "substantial" and weighed in favor of finding a regulatory taking, but gave no indication that there was any "magic" percentage of loss that was needed for this factor to weigh in the property owner's favor. 489 Mass. at 713-14.

As to the second factor, the Court noted that a property owner's expectation when purchasing the property is the most important factor in determining the reasonableness of an owner's investment-backed expectations, and that investments made after an acquisition may also be considered. 489 Mass. at 711-13. Flatley purchased its property at 425 Medford Street several decades ago in reasonable reliance on the Code's then-plain language, which provides that land under water may be included in the denominator for FAR calculations. Flatley has also put substantial time and money into preparing a development plan based on the current definition of FAR. And, the portion of Flatley's property that is under water has been taxed at the same rate as the remainder of the land, which contributed to the expectation that, at the very least, the land under water would not be used to hinder development (such as by excluding it from the FAR calculation). Therefore, the second factor also weights in favor of finding a regulatory taking.

As to the third factor, the Court explained that the character of the government action is more likely to constitute a regulatory taking where it is targeted at a particular owner or development than

when it is one of general applicability. 489 Mass. at 716-17. Here, while the Amendments are cast as generally-applicable, they clearly are being proposed in order to address Flatley's particular project. Indeed, it seems clear that the BPDA would not be pursuing the Amendments if it were not for Flatley's proposed project.[2] The most recent proposed revisions to the Amendment make this even more obvious.

Impacts on Private Funding for Substantial Resiliency Measures

The private development community in the City of Boston has been at the very forefront of innovative design, implementation and financing of resiliency solutions. We acknowledge that the City has been very proactive in identifying the problem and taking steps to mandate certain measures to ensure that new structures are designed and located responsibly, but resiliency measures to address known and quantified threats to areas of the City are being driven and paid for by the private development community.

Flatley's protective and costly plan at 425 Medford Street is an excellent example. The benefits expected to flow from the resiliency measures Flatley proposes will go far beyond benefiting the Flatley parcel, and will extend well into the neighborhoods of Charlestown. We cannot ignore the fact that these protective and enhanced resiliency measures can be undertaken only when the proposed project has the financial strength to provide the financial resources. If development is severely curtailed or limited by the introduction of a new FAR calculation that materially reduces FAR and development potential, those financial resources will simply go away, as will the private developer's ability to fund and implement enhanced resiliency measures. There can be no mistake that these proposed zoning amendments constitute a direct attack on density along the waterfront. And the practical consequence of reduced private investment in greatly needed resiliency measures is real.

Adequate and Appropriate Regulation by Chapter 91 Already Exists

Substantial limits and restrictions on waterfront development are already in place under M.G.L. Chapter 91, one of the most protective and restrictive programs to regulate waterfront development in the country. As BPDA is aware, the Massachusetts Department of Environmental Protection (DEP) administers a very important and prescriptive regulatory program under the state's Public Waterfront Act (M.G.L. Chapter 91) and every property located on or impacting tidelands must be licensed pursuant to that program.

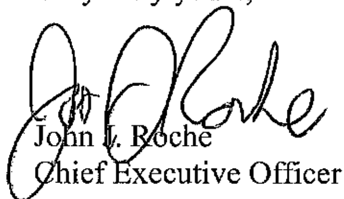
Through Chapter 91, the Commonwealth seeks to preserve and protect the rights of the public, and to guarantee that private uses of tidelands and waterways serve a proper public purpose. In order to do this, state licensing mandates the preservation of pedestrian access along the water's edge

[2] Flatley has been engaged in a discussion with the BPDA since January of this calendar year regarding Flatley's interpretation of FAR (as set forth herein). For many months, the BPDA indicated that was "looking into" the appropriate way to calculate FAR for lots with watersheet, but instead of engaging directly with Flatley or submitting a response to Flatley's legal memorandum submitted to BPDA legal in January of 2022, the City proposed this Zoning Amendment in August. Further, at the first hearing for this Amendment, both City staff and members of the public repeatedly noted that the Amendment had been submitted in response to Flatley's proposed development.

and the enhancement of public use and enjoyment of the water by conditioning development of projects on tidelands. These conditions already include significant density and use restrictions, regulating building height in relation to the water as well as the amount of open space where non-water dependent uses are proposed within buildings, typically a 1:1 ratio. With respect to building height, Chapter 91 requires that buildings for nonwater-dependent uses (i) cannot exceed 55 feet if located within 100 feet of the high-water mark, and (ii) cannot exceed 55 feet plus ½ foot for every additional foot of separation from the high-water mark. 310 CMR 9.51(3)(e). These requirements already provide adequate, appropriate and significant restrictions on density on waterfront parcels. To further restrict the scope of development on these already heavily regulated parcels would be devastating to their potential development, and seemingly unnecessary given the strident protections already afforded by Chapter 91.

These comments are offered to assist BPDA in its consideration of the proposed zoning amendments and the actual and practical consequences and impacts that they will have on the regulated community if implemented. Please let us know if you have any questions and we will look forward to addressing these comments at BPDA's upcoming second meeting on the proposed amendments on September 14th.

Very truly yours,



John J. Roche
Chief Executive Officer

September 28, 2022
To BPDArpz
From Joanne Massaro
Comments on Amendments to Zoning Code on FAR

To Whom It May Concern,
I am writing to express my support for the zoning amendments proposed by the BPDA that clarify FAR definitions and calculations for development on waterfront parcels.

While these issues may be arcane to many of us- and may explain what appears to be lack of interest from the community- the implications are practical. Mayor Wu has made clear that her administration is committed to resiliency and preparedness in response to climate change, especially as it impacts the waterfront. With these amendments, the BPDA is taking a stand to combat misinterpretation of the current wording that has lead to proposals for overbuilding based on miscalculations of FAR.

Affected owners/developers may have a different view on these amendments, citing precedents or pre-existing understandings. While their concerns should be heard, they shouldn't override the public's interests that will be protected by these fair and reasonable clarifications.

Thank you for the opportunity to comment and offer my support.
Joanne Massaro

October 6, 2022

Arthur Jemison, Director
Boston Planning & Development Agency
One City Hall Square
Boston, MA 02201

Re: NAIOP comments on Revised Proposed Amendments of Floor Area, Gross and Other Definitions in Article 2 and Article 2A of the Boston Zoning Code

Dear Director Jemison,

NAIOP Massachusetts, The Commercial Real Estate Development Association, is grateful for the opportunity to offer comments in response to the revised draft of the proposed zoning amendments regarding Articles 2 and 2A (the Articles). NAIOP appreciates that in response to public comment on its initial proposal, the BPDA has revised its proposed language in the Articles to align the definition of water area to be excluded with M.G.L. Chapter 91 definitions, such that (i) piers and wharves are included within the definition of "Lot Area"; and (ii) the watersheet exclusion has been moved from the definition of "Floor Area Ratio" to the definition of "Lot Area".

NAIOP offers the below comments and hopes the BPDA can address the concerns listed below in order to ensure a clear, predictable zoning update.

I. NAIOP is unclear as to the precise issue that the proposed changes are designed to address and believes that amendments to the Articles should be narrowly tailored to the purpose they are trying to achieve. For example, the language as proposed may create more confusion as these definitions will not apply to any area covered by Harborpark zoning articles (see attached draft map for reference) because the Harborpark articles have their own definitions of Lot Area which explicitly supersede those found in Articles 2 and 2A. NAIOP urges the BPDA to clearly state the goals of the Articles' adoption to ensure that project proponents understand their intended application.

II. Certain definitions, such as "Filled Tidelands" and "Flowed Tidelands" are terms only used in Harborpark zoning articles, which have their own definitions for these terms. Therefore, NAIOP is unclear as to why the language in the Articles currently reflects these terms if they are not referenced anywhere else within the Zoning Code. **NAIOP recommends removing the definition for "Filled Tidelands" and "Flowed Tidelands" to ensure the terms in the Articles are consistent throughout the Zoning Code.** If future zoning code changes require reference to these terms, it would be more appropriate to define those terms within the context of those future changes.

    If these definitions are retained, **NAIOP respectfully suggests modifying the definition for Flowed Tidelands in both Article 2 and Article 2A as indicated in red below,** as the time of license application under Chapter 91 does not appear relevant to potential future uses of this term in the zoning context.

    Flowed Tidelands. *Present submerged lands and tidal flats which are subject to tidal action ~~at the time of license application under Chapter 91~~.*

III. NAIOP has three recommendations regarding the proposed definition of Lot Area to be included in Article 2 and Article 2A.

i. It is critical that in the case of a Pier or a Wharf, the excluded area must be beyond *both* the High Water Mark *and* the Project Shoreline (rather than beyond one or the other).

ii. As the definitional terms referenced in this section are not from the Massachusetts General Law, Chapter 91, but instead from the accompanying regulations, 310 CMR 9.00, NAIOP recommends that the regulations be referenced instead of the general laws.

iii. In order to account for future resiliency measures which may extend beyond the High Water Mark and the Project Shoreline (as those terms are defined in Chapter 91 regulations), it would also be helpful to include language that ensures the Lot Area definition would not exclude these resiliency measures. They would be excluded under the currently proposed definition.

NAIOP suggests that the Lot Area definitions in the Articles be amended as follows in red for clarity and consistency both with the Zoning Code and the relevant state references:

b) any area of water and associated submerged land or tidal flat lying (i) below the ~~high tide line~~ High Water Mark, ~~or~~ (ii) beyond the Project Shoreline of any wharf, ~~or~~ pier, or pile supported structure, and (iii) outside the boundaries of any additional areas utilized or to be utilized for coastal resiliency measures, as applicable, on any navigable river or stream, any Great Pond, or any portion of the Atlantic Ocean within Boston, as such capitalized terms are defined in 310 CMR 9.00, ~~defined by Massachusetts General Law Chapter 91 or its successor~~.

NAIOP Massachusetts represents the interests of companies and other parties involved with the development, ownership, management, and financing of commercial properties. NAIOP has over 1,700 members who are involved with office, research & development, lab, industrial, mixed use, multi-family, retail and institutional space.

Thank you for your consideration of our comments. We look forward to meeting with the BPDA staff to ensure that the regulated community's feedback is incorporated into these discussions. Please contact me if you have any questions or if additional information is needed.

Sincerely,

Tamara C. Small
Chief Executive Officer
NAIOP Massachusetts, The Commercial Real Estate Development Association

cc: Michael Christopher, Director of Development Review, BPDA
Richard McGuinness, Deputy Director for Climate Change and Environmental Planning, BPDA
Bryan Glascock, Deputy Director for Regulatory Planning and Zoning, BPDA
Chris Busch, Assistant Deputy Director for Climate Change and Environmental Planning, BPDA

clf
conservation law foundation

For a thriving New England

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October 7, 2022

Boston Planning and Development Agency
1 City Hall Plaza, 9th Floor
Boston, MA 02201
Attn: Bryan Glascock

Re: Proposed Zoning Amendments of Floor Area and Other Definitions

Dear Mr. Glascock:

The Conservation Law Foundation ("CLF") submits this letter in support of BPDA's Proposed Zoning Amendments of Floor Area and Other Definitions. CLF is a non-profit, member-supported organization dedicated to protecting New England's environment. CLF protects New England's environment for the benefit of all people and uses the law, science, and the market to create solutions that preserve our natural resources, build healthy communities, and sustain a vibrant economy. CLF's advocacy includes participation in proceedings that impact Chapter 91 compliance, and equitable access to and climate resilience of the Commonwealth's tidelands.

As the BPDA has explained, the proposed amendment closes a loophole in the existing zoning regulations. Currently, the regulations allow submerged, undevelopable land to be included in the total parcel area, thereby inappropriately inflating building mass by right under a miscalculated floor area ratio ("FAR"). This allows for buildings too large for the actual (unsubmerged) land to be built on the parcel. By removing submerged land from the parcel size, BPDA makes a commonsense change that better aligns with the spirit of the zoning scheme and the Commonwealth's Chapter 91 regulations. By correcting this calculation, we anticipate that waterfront developments will have more appropriately sized building massing and by extension more open space and better waterfront visibility. Indeed, as the BPDA stated at the September 14, 2022, public meeting, "the whole point of [FAR] is to create a relationship between the bulk . . . of the building and the land on which it sits. . . . To interpret it any other way would create . . . an absurd result where you could have dry land that's postage-stamp sized and an acre of land under water. . . . [That] does not entitle you to a great big building on the postage stamp."[1,2]

Avoiding this "absurd result" is one powerful way to preserve the character of waterfront neighborhoods and promote the public's access to them, by avoiding the sort of walled-off waterfront that results, in part, from development disproportionate to the land available. The

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[1] 2nd Public Meeting on Proposed Zoning Amendments of Floor Area and Other Definitions, Sept. 14, 2022 (12:00 minute mark).

[2] In contrast, and as expressed by stakeholders during the public comment process, CLF agrees that it is reasonable for piers to continue to be included in the parcel area, given that those structures are not submerged and are thus part of the developable parcel.

current language regarding parcel size makes little sense. It also threatens communities we must prioritize, both in access to the waterfront and protection from the effects of climate change. CLF appreciates the comments during the September 14th meeting that emphasized the need for even more internal consistency across the zoning code. That said, the currently proposed amendments will effect positive change even without further revision. The BPDA and Zoning Commission have the legal authority to improve the zoning regulations now, and they should do so.

Thank you for your consideration of these comments.

Sincerely,

Margaret L. Sullivan
Senior Attorney
Conservation Law Foundation

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Joseph Aiello
Grace Macomber Bird
Jamie M. Fay
Robert Golledge
Elizabeth Grob
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Malia Lazu
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Shelagh Mahoney
Martin O'Neill
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Demetriouse Russell
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October 7, 2022 Via email: BPDArpz@Boston.gov

Boston Planning and Development Agency
1 City Hall Plaza, Floor 9
Boston MA. 02201

Attn: Bryan Glascock

Re: Proposed Zoning Amendments of Floor Area and Other Definitions

Dear Mr. Glascock,

Boston Harbor Now respectfully submits the following comments on the Proposed Zoning Amendments of Floor Area and Other Definitions put forward by the Boston Planning and Development Agency (BPDA). Our organization has been following this process, and we have attended the July 20th, 2022 public meeting and watched the recording of the most recent Sept. 19th, 2022 meeting.

As longtime stewards of the Boston Harborwalk, Boston Harbor Now is committed to ensuring the waterfront we build today and in the future is designed to be more resilient and inclusive. We use the term "Harborwalk 2.0" to capture the aspirations of this work to ensure that the waterfront is accessible and welcoming, is prepared for the coastal impacts of climate change, and centers equity and inclusivity in its design and programming. We see this zoning amendment as a way to advance plans for a more welcoming waterfront and generate renewed conversations about flood infrastructure implementation in areas vulnerable to coastal flooding. We expect this zoning clarification will help to create a Boston waterfront that remains consistent with Chapter 91 and adapts to the demands of the 21st century.

By requiring a stricter interpretation of Lot Area, future projects will no longer be able to use submerged land that is not associated with a wharf or pier as a part of the Lot Area and Floor Area Ratio (FAR) calculation. The reduction in Lot Area and FAR will result in developments that will have a smaller building envelope by right and, by extension, sites with more open space and better waterfront visibility thanks to reduced building height. We appreciate that the proposed zoning amendment language will better align Boston's zoning code with Massachusetts General Law Chapter 91. The updated code ultimately is likely to result in somewhat reduced building massing along the waterfront, which embodies the spirit of Chapter 91 by preserving public access and views to the waterfront, keeping it open and welcoming to everyone. In much the same way that the Municipal Harbor Plans allow for larger buildings at the culmination of a public process, adjustments may be made to zoning in special cases.

While we expect all waterfront projects to meet the existing Chapter 91 requirements, we believe these regulations will need to evolve to address the impact of climate

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change and other future challenges. Existing Chapter 91 regulations do not address climate change and resilience infrastructure, and we believe this zoning change may begin to incentivize district-wide flood protection. We recognize that creating infrastructure that provides both coastal storm flood protection and meaningful waterfront access is a financial and physical challenge for the City. Going forward, as in the past, the City is likely to rely on private development projects to build this infrastructure by allowing and funding district-wide flood protection on private land. We encourage the City to use the proposed zoning changes to FAR and Lot Coverage as leverage to incentivize the creation of this infrastructure.

Under the proposed zoning, wharves and piers that extend into the water are counted in the Lot Area and FAR calculation. In the event nature-based shoreline strategies are implemented along land that is presently submerged in order to protect against the anticipated higher tides of sea level rise and storm surge elevations, it may be appropriate to treat this reclaimed area similarly. In instances where physical changes contribute to district-wide coastal storm flood protection, the BPDA could recalculate the project's Lot Area and FAR to reflect the increased area of the site. Resurfaced land should continue to remain undevelopable; however, when they dedicate site area to flood protection that is functional, publically accessible, and inviting, developers should not be penalized for their efforts to protect against anticipated impacts of climate change. The City should make developers aware of this as a potential mechanism to increase their allowed development envelope by increasing the denominator used as the Lot Area in FAR calculations.

In order to bring the technical language of the zoning amendment in line with Chapter 91, we propose the following edits:

> *b) any area of water and associated submerged land or tidal flat lying (i) below the ~~high tide line~~ High Water Mark ~~or~~ and (ii) beyond the Project Shoreline of any wharf, ~~or~~ pier, or pile supported structure (as applicable) on any navigable river or stream, any Great Pond, or any portion of the Atlantic Ocean within Boston as such terms are defined in 310 CMR 9.00 ~~defined by Massachusetts General Law Chapter 91 or its successor~~.*

We appreciate the opportunity to comment and look forward to following the process for codifying this zoning amendment in addition to the BPDA's other waterfront work. Boston Harbor Now staff would be happy to speak further with BPDA if there are additional questions.

Sincerely,

Katherine F. Abbott
President and CEO
Boston Harbor Now

October 7, 2022 (Adding to my comments of August 3, 2022)
To Bryan Glascock
From Mike Mickelson, Charlestown resident and member of IAG for 425 Medford St.
Re I continue to support the proposed Zoning Amendments
"Proposed Zoning Amendments of Floor Area and Other Definitions
https://www.bostonplans.org/news-calendar/calendar/2022/09/14/far-gfa-meeting-2

Please allow me to supplement my comments dated 8/3/22. I am writing again after reading the thoughtful 9/14/22 comments from Flatley Corporation. Flatley disagrees with BPDA's interpretation of the Boston Zoning Code. I continue to agree with BPDA's interpretation and applaud their efforts to clarify the Code.

The disagreement is related to whether the seaward portion of a waterfront lot should be excluded from the calculation of Floor Area Ratio. BPDA intends it to be excluded, but Flatley argues that the existing wording says or at least implies that there is no such salt-water exclusion in the Code. Which interpretation is correct?

Interpretation Argument 1. The zoning code for New York City answers that question by example. The NYC definition of Floor Area Ratio resembles that for Boston:

NYC code 12-10	"Floor area ratio" is the total floor area on a zoning lot, divided by **the lot area of that zoning lot**.
Boston Code Article 2a	"Floor Area Ratio. The ratio of gross floor area of a structure to **the total area of the lot."**

For waterfront parcels the NYC zoning code implements the salt-water exclusion by providing additional wording for waterfront lots in their "Article VI Special Regulation Applicable to Certain Areas." Boston Zoning Code implements the salt-water exclusion by providing a definition of "Lot Area."

NYC code 62-31	On waterfront zoning lots, the areas of the upland lot and the seaward lot shall be computed separately. All bulk regulations pertaining to the upland lot shall be satisfied entirely on such portion of the zoning lot
Boston Code Article 2a	"Lot Area. The horizontal area of the lot exclusive…of any salt-water area below the mean high-tide line."

There is no disagreement about the meaning of that part of the NYC zoning code. Nor should there be for Boston.

Interpretation Argument 2. We see that "Floor Area Ratio" and "Lot Area" are both defined in Article 2a. In my opinion, "Lot Area" is defined for the purpose of clarifying the meaning of "Floor Area Ratio." Flatley argues that they are not related. If so, what is the purpose the careful definition of "Lot Area?" Its very existence implies that it has a purpose.

Clarify wording. Although I argued in favor of BPDA's interpretation of existing Code, the existing wording warrants improvement. The fact that there is reasonable disagreement shows that the Code could be clearer. One should not have to hire a lawyer to interpret the Code. Furthermore, clarity would help ISD Plans Examiners avoid mistakes in their Refusal Letters. Everyone is in favor of clarity.

Mike Mickelson