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STATE AUDITOR'S REPORT ON
CERTAIN ACTIVITIES OF THE
ARCHITECTURAL ACCESS BOARD
JANUARY 1, 2006 TO DECEMBER 31, 2007

OFFICIAL AUDIT
REPORT
MAY 20, 2008

TABLE OF CONTENTS/EXECUTIVE SUMMARY

INTRODUCTION

1

The Architectural Access Board (AAB) is a regulatory agency within the Massachusetts Department of Public Safety which was established in 1968 under Massachusetts General Law Chapter 22, Section 13A. The AAB's legislative mandate states that it shall develop and enforce regulations, specifically, 521 Code of Massachusetts Regulations (CMR), designed to make public buildings accessible, functional, and safe for use by persons with disabilities.

The AAB consists of nine members: the Secretary of Public Safety or his designee, the Secretary of Elder Affairs or his designee, the Director of the Office on Disability or his designee, and six members appointed by the Governor. The AAB appoints an Executive Director who is responsible for its administrative operations. The Executive Director hires, with the AAB's approval, additional staff to support the performance of AAB's duties. Since the early 1980s the administrative staff has consisted of the Executive Director and three additional staff members.

In accordance with Chapter 11, Section 12, of the Massachusetts General Laws, we conducted an audit of the AAB's oversight of its regulations. Our audit covered the period January 1, 2006 to December 31, 2007, and was conducted in accordance with applicable generally accepted government auditing standards. Specifically, our objective was to determine the effectiveness of the oversight policies, procedures, and systems in order to determine whether the AAB is efficiently and effectively fulfilling its mission of ensuring that public buildings and facilities are safe and accessible to disabled persons.

AUDIT RESULTS

6

INTERNAL CONTROLS NEED IMPROVEMENT TO ENSURE COMPLIANCE WITH AAB DECISIONS

6

Our audit revealed that the AAB was not in compliance with its own internal policies and procedures for ensuring compliance with its decisions. We found that in 41% of the cases tested requiring corrective action by the property owner, the AAB's deadline for corrective action had expired. In addition, the AAB's files did not include documentation that indicated either that compliance was achieved or that a follow-up review was performed by the AAB. Without effective controls in place, AAB cannot ensure that decisions rendered have been resolved in accordance with its regulations. As a result, the possibility exists that public safety and accessibility issues have not been corrected, and that persons with disabilities are being placed at risk.

INTRODUCTION

Background

The Architectural Access Board (AAB) is a regulatory agency within the Massachusetts Department of Public Safety which was established in 1968 under Massachusetts General Law (MGL) Chapter 22, Section 13A. The AAB's legislative mandate states that it shall develop and enforce regulations, specifically, 521 Code of Massachusetts Regulations (CMR), designed to make public buildings (buildings constructed by the Commonwealth or any political subdivision with public funds and open to public use, as well as privately financed buildings that are open to and used by the public) accessible, functional, and safe for use by persons with disabilities. These regulations are designed to provide full and free use of buildings and facilities (all or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, sidewalks, curb cuts, parking lots, or other real or personal property located on a site) so that persons with disabilities may have the education, employment, living, and recreational opportunities necessary to be as self-sufficient as possible and to assume full responsibilities as citizens.

The AAB consists of nine members: the Secretary of Public Safety or his designee, the Secretary of Elder Affairs or his designee, the Director of the Office on Disability or his designee, and six members appointed by the Governor. As mandated by MGL Chapter 22, Section 13A, the Governor, Secretary, and Executive Director shall exercise their best efforts to ensure at least two members of the AAB are registered architects. The AAB appoints an Executive Director who is responsible for its administrative operations. The Executive Director hires, with the AAB's approval, additional staff to support the performance of its duties. Since the early 1980s the administrative staff has consisted of the Executive Director and three additional staff members.

The AAB's rules and regulations have been incorporated in the Massachusetts building code as a "specialized code," making them enforceable by all local and state building inspectors, as well as the AAB itself. The authority of the AAB is triggered by any construction, renovation, remodeling, or alteration of a public building or facility, or a change in use of a building from private to public.

The AAB's primary responsibilities/duties consist of:

- Establishing and/or amending rules and regulations designed to make public buildings accessible, functional, and safe for use by persons with disabilities.

- Providing technical assistance and training to professional groups, public officials, state agencies, and building inspectors regarding AAB's rules and regulations.
- Reviewing complaints of noncompliance with AAB rules and regulations from any person, including complaints initiated by its own staff. If the AAB finds that a person is not in compliance, it may issue an order to compel such compliance.
- Reviewing requests for variances from AAB rules and regulations. In order for the AAB to grant a variance, compliance must be proven to be impracticable. Impracticability is defined as being either "technologically infeasible" or the "cost of compliance is excessive without any substantial benefit to persons with disability."
- Conducting hearings every other Monday to consider requests for variances by building owners and others responsible for complying with the regulations, and hearing complaints about buildings that are believed to be in violation of the AAB regulations.
- Imposing fines if, after a hearing the AAB determines that a person has failed to comply by the date specified in the AAB's order. Fines are payable to the Commonwealth and are not to exceed one thousand dollars per day for each violation for each day of noncompliance.
- Issuing advisory opinions upon request to clarify questions of jurisdiction over a particular building or facility, or questions of compliance with the regulations.

AAB decisions shall be subject to review in superior court upon petition by aggrieved persons within thirty days after the decision is rendered. The court may enter an order enforcing, modifying, or setting aside the order of the AAB, or it may remand the proceeding to the AAB for such further action as the court may direct.

The AAB received the following number of variance requests and complaints in calendar years 2006 and 2007:

<u>Type</u>	<u>2006</u>	<u>2007</u>	<u>Total</u>
Variance Requests	187	206	393
Complaints	222	579	801

The reason for the significant increase in complaints from 2006 to 2007 was attributed to curb cut/sidewalk complaints in the City of Boston (423 in 2007). The AAB's Executive Director explained that the primary cause for this increase was the City's response to an August 2004 complaint (still unresolved after more than three years) and the related publicity the case received. This has resulted in heightened scrutiny by advocacy groups for the disabled, which led to an

increase in complaints. As of December 31, 2007, reviews of these complaints either were ongoing, (403 of the 423 complaints), or the AAB had issued an order to the City to comply with its regulations.

In response to the numerous complaints filed with the AAB regarding curb cuts and sidewalk slopes throughout the City of Boston, and in order to facilitate the City of Boston's compliance, the AAB's staff conducted a training session on the requirements of 521 CMR for 50 members of the City of Boston's Department of Public Works on March 27, 2008.

The above-referenced 2004 complaint which generated the heightened scrutiny involved a section of sidewalk on Huntington Avenue that the complainant alleged was not in compliance with AAB regulations due to an uneven, excessive slope, resulting in an unsafe, inaccessible sidewalk for persons with disabilities. The following represents a chronology of the key events that ensued:

- AAB heard the case in January 2005 and decided in favor of the complainant.
- The City appealed the case to Suffolk Superior Court and the Court ruled in favor of the AAB's decision in June 2005.
- After ongoing communications between the City and the AAB, the AAB ordered that the sidewalk be brought into full compliance by November 30, 2005.
- From December 2005 to May 2006, the City submitted two variance requests, which the AAB denied. In addition, the AAB voted to levy fines of \$500/day retroactively from November 30, 2005 if full compliance was not achieved by July 1, 2006.
- In July 2006 the AAB conducted a site visit and found the sidewalk to be non-compliant and voted to levy fines totaling \$123,500.
- On September 6, 2006 the City filed a second appeal with the Superior Court.
- In August 2007, the Superior Court ordered the AAB and the City to try to resolve the dispute.
- On September 25, 2007 the AAB notified the Court that the parties were unable to reach an agreement.
- On December 3, 2007 the Court ruled in favor of the AAB, stating, "In summary the City has failed to show that the AAB's decision was not based on substantial evidence, was arbitrary and capricious, or was based on an error of law. Therefore, the City's Motion for judgment on the pleadings is denied and the ruling of the AAB approved."

- As of March 31, 2008, fines had accrued to approximately \$427,000, and continue at the rate of \$500 per day on a seven-day basis.

On March 24, 2008, the AAB voted to write a collection notice to the City of Boston for the outstanding fines (approximately \$427,000) as authorized by 521 CMR. The AAB will further require the City of Boston to produce plans and a date for compliance for the areas that remain in violation of 521 CMR along the portion of sidewalks on Huntington Avenue between Massachusetts Avenue and Gainsborough Street.

The AAB typically holds five hearings per meeting, twice per month, for a total of ten hearing sessions per month. The AAB's Executive Director informed us that the number of City of Boston complaints has impacted the ability of the AAB to respond to other complaints and variance applications. Specifically, he advised:

- More hearings are needed to resolve the City of Boston's complaints.
- To date, the City's responses have included multiple time extension requests, which will eventually lead to a hearing because of the City's failure to be specific in giving the AAB firm compliance plans and completion dates for the resolution of the violation.
- Having to commit more of the hearing slots for Boston curb cut and sidewalk resolution could potentially lengthen the time in which other complaints and variance applications are resolved.
- Given that many variance applications have close ties to construction project budgets, the slowdown in the ability to answer whether or not a petitioner will have variance relief could have far-reaching effects on project budgets.

As previously noted, the increased volume of complaints has impacted the AAB's ability to ensure compliance with its decisions. As a result, the potential exists that unsafe, handicapped-inaccessible situations are not being resolved on a timely basis, and that persons with disabilities are being placed at risk.

Audit Scope, Objectives, and Methodology

In accordance with Chapter 11, Section 12, of the Massachusetts General Laws, we conducted an audit of AAB for the period January 1, 2006 to December 31, 2007. Our audit was conducted in accordance with applicable generally accepted government auditing standards. Our objective was to determine the effectiveness of the oversight policies, procedures, and systems in order to determine

whether the AAB is efficiently and effectively fulfilling its mission of ensuring that public buildings are safe and accessible to disabled persons. Specifically, we evaluated AAB's internal controls over the processing of complaints and variance requests, conducting hearings, and collecting fines. To accomplish our objectives, we performed the following tests and procedures:

- Interviewed AAB's staff to obtain an understanding of AAB's policies and procedures.
- Evaluated management and administrative internal controls.
- Reviewed AAB's policies and procedures.
- Reviewed a sample of complaints, variance requests, and hearing files.
- Reviewed fine assessment activity and supporting files.

At the conclusion of our audit, we met with AAB's management to discuss our findings.

Based on our review, we determined that, except for the issue noted in the Audit Results section of this report, the AAB maintained adequate internal controls and complied with applicable laws and regulations for the areas tested.

AUDIT RESULTS

INTERNAL CONTROLS NEED IMPROVEMENT TO ENSURE COMPLIANCE WITH AAB DECISIONS

Our audit revealed that the AAB was not in compliance with its own internal policies and procedures for ensuring compliance with its decisions. We reviewed a total of 127 cases received in 2006 and 2007. In 97 of the cases, the AAB's decision required the owner to take corrective action. We found that in 40 of the 97 cases (41%), the AAB's deadline for corrective action had expired; however, the files did not include documentation either that compliance was achieved (e.g. pictures, correspondence from an inspector) or that a follow-up review was performed by the AAB. The following represents a breakdown of the cases reviewed:

<u>Year</u>	<u>Type</u>	<u>Total Reviewed</u>	<u>Required Action</u>	<u>No Documentation/ Follow-up</u>
2006	Variance	31	25	13
2007	Variance	30	16	12
2006	Complaints	33	26	7
2007	Complaints	<u>33</u>	<u>30</u>	<u>8</u>
Totals		<u>127</u>	<u>97</u>	<u>40</u>

The AAB's stated policy, which is not included in the AAB's policy/procedure manual, is to obtain documentation to support that compliance was achieved in cases where it determined that action was required by the owner in order to achieve compliance with AAB regulations. In the event that documentation is not received by established deadline dates, the AAB is required to follow up on cases in a timely manner to determine their current status and take additional action, if necessary, to ensure compliance with AAB regulations.

In addition, M.G.L., Chapter 22, Section 13A, states, in part:

The board shall receive complaints of noncompliance with this section or any rule or regulation promulgated hereunder from any person or may receive complaints initiated by its own staff. If the board finds, after notice and opportunity for a hearing, that any person is not in compliance with this section or with any rule or regulation promulgated hereunder, it may issue an order to compel such compliance. Such order may specify the date and the manner by which such person shall cure the noncompliance found by the board, and may require that pending the cure of such noncompliance a performance bond be furnished, payable to the commonwealth, in such penal sum as the board finds reasonable. The board shall have the authority to issue subpoenas.

In the event that a person fails to cure such noncompliance by the date specified in the board's order, the board shall be empowered, after further hearing, to impose a fine payable to the commonwealth not to exceed one thousand dollars per day for each violation for each day of noncompliance.

The AAB has acknowledged that its follow-up reviews should be conducted more promptly, and has attributed its lack of follow-up action to the significant increase in complaints against the City of Boston. As a result, the AAB cannot ensure that a portion of the decisions rendered have been properly addressed and resolved in accordance with its regulations. In addition, the possibility exists that these unresolved public safety and accessibility issues are placing persons with disabilities at risk. (Prior to the completion of our audit, the AAB conducted a review of the 40 cases identified in our audit. The results of their review are contained in the Auditee's Response.)

Recommendation

Based on the results of our audit, we recommend that the AAB take the necessary corrective actions to effectively implement internal controls that will ensure compliance with AAB's decisions in a timely manner. Specifically, it should:

- Review and update its policy and procedures manual. The update should include a section on control procedures and supervisory monitoring requirements that will ensure compliance with AAB's decisions.
- Identify all current cases where supporting documentation has not been received by the established deadline date. Follow-up action should be taken to determine the current status of the case and to ensure compliance with AAB's decisions.
- Review staffing levels to ensure that the current staff is able to effectively accomplish AAB's legislative mandate.

Auditee's Response

- *In regards to reviewing and updating the policy and procedures manual; this project must be undertaken by the current Board Membership and Staff. To that end, the Executive Director has submitted to the Department of Public Safety, on two different occasions, requests for financial support to hold a workshop retreat (the Board has conducted such events in the past in order to deal with such matters) to review and update the current policy manual and procedures of the Board.*
- *The finding that in 41% of the cases tested requiring corrective action by the property owner, the AAB's deadline for corrective action had expired, and the files did not include documentation and either that compliance was achieved or that a*

follow up review was performed by the AAB, have been subject to a thorough review by the staff and myself.

- *Of the 41% of the cases that fell into a dormant state, either because we missed it, or failed to discover we were beyond the Board's deadline for compliance, after you pointed out these cases to us we found that approximately 34% were in fact in compliance and the property owner, or individual who was responsible to notify us had merely failed to do so. Those cases now have the letters and photographs of completed work in the respective files. The other 7% were either still under construction and needed an extension of time to complete the work or they in fact had not done a thing to meet the Boards requirements and deadlines set for compliance. Those cases where we found that the property owner ignored the Boards authority, are now on the Board hearing schedule for complaint and or fine hearings.*
- *Do to the large volume of cases and the need to manage staff time, and as discussed with the audit team, the staff does continue to check and respond to our pop up reminder system on set deadlines, however, there are times, and I believe this is an inherent skill that a good investigator learns over time, when you know which cases will be completed by the owner based on a sense of trust that is developed between the investigating compliance officer and the property owner. The fact that a picture and or letter of compliance, has not made it into the file, does not necessarily mean persons with disabilities are at risk. In all 41% of the cases the auditors highlighted as deficient, there was significant work completed in each case. In other words, we believe it is safe to say, that no complaint or variance application looked at during the audit, was in a place that would lead one to believe that, "nothing had been done" on the case. We concede that there were cases that needed follow up and we are looking at ways to improve the tracking system for the AAB.*
- *In regards to the staffing levels currently within the department, it is unlikely that funding will be available to hire another full-time employee therefore the current staff will continue to work with an effort to effectively accomplish the Board's legislative mandate, as they have done in the past.*