COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

HRPT MEDICAL BUILDINGS REALTY TRUST *vs.* BOSTON ZONING COMMISSION & others. [FN1]

12-P-734

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Passing the question whether the motion judge was correct in his conclusion that the plaintiff is without standing to maintain its complaint, [FN2] we affirm the summary judgment of the Land Court dismissing the complaint.

The plaintiff's complaint challenges the validity of the designation, by the defendant Boston Zoning Commission (Commission), as a 'planned development area' (PDA) certain property owned by the defendant MK Parcel 7 Development LLC (MK Parcel 7) which is adjacent to property owned by the plaintiff near Kenmore Square in Boston. To the extent the plaintiff's challenge rests on its contention that the Commission was obliged to make an independent determination that the proposed project satisfies the criteria set forth in § 80C-4 of the Boston Zoning Code (and, in particular, the requirement that 'nothing in such plan will be injurious to the neighborhood or otherwise detrimental to the public welfare, weighing all the benefits and burdens'), the claim is without merit. As the motion judge correctly observed, that provision (which was enacted by the Commission) is directed to the Boston Redevelopment Authority (BRA) and imposes no such obligation on the Commission. The plaintiff does not advance any other basis on which it contends we should conclude that the Commission's PDA designation does not fit within the extraordinarily broad presumption of validity it enjoys as a legislative act. See generally *Johnson v. Edgartown,* 425 Mass. 117, 121 (1997); *Durand v. IDC Bellingham, LLC,* 440 Mass. 45, 50-51 (2003). [FN3] The plaintiff fares no better to the extent its argument instead is based on the contention that the BRA's favorable recommendation of the proposed PDA lacked sufficient basis in fact. It is not clear that any deficiency in the BRA's assessment of a PDA proposal may serve as a basis to challenge the validity of a subsequent PDA designation by the Commission. [FN4] But assuming favorably to the plaintiff, *arguendo,* that a § 10A challenge to a PDA designation by the Commission encompasses review of the propriety of the BRA's favorable recommendation of the PDA, the review would be based on the administrative record before the BRA. See *Manning v. Boston Redev. Authy.,* 400 Mass. 444, 449 (1987). Accordingly, there is no merit to the plaintiff's assertion that the case is an improper subject for summary judgment, based on genuine issues of material fact requiring a trial for resolution. Moreover, based on the administrative record, and extending appropriate deference to the BRA's assessment of it, like the motion judge we discern no error in the BRA's conclusion that the proposed project satisfied the criteria set forth in § 80C-4 of the Boston Zoning Code. See *id.* at 452- 453. [FN5]

Finally, there was no error in the motion judge's refusal to enter a declaration of the 'extent' to which the PDA designation affects the plaintiff's property, pursuant to G. L. c. 240, § 14A. Such a declaration is available to resolve uncertainty concerning the interpretation or applicability of zoning provisions as to property regulated thereby. It is undisputed that the plaintiff's property is not within the area subject to the PDA designation. There is accordingly no question of how its terms would apply to the plaintiff's property. The plaintiff cites no case, and we are aware of none, in which a party has sought and obtained, under G. L. c. 240, § 14A, a declaration of how indirect, nonregulatory, effects resulting from development or use of an adjacent site pursuant to a zoning provision (but not regulating its property) might in the future affect the use and enjoyment of its property.

Judgment affirmed. [FN6]

By the Court (Green, Fecteau & Milkey, JJ.),

Entered: October 10, 2012.

FN1. City of Boston, and MK Parcel 7 Development LLC.

FN2. Though the defendant Boston Zoning Commission is without authority to approve or construct the roadways proposed to cross the plaintiff's property, the plaintiff argues with some persuasive force that the roadways extending onto adjacent tracts are an integral element of the proposed project that is the subject of the Commission's approval at issue in the present case, or that a reconfiguration of the project, and its internal roadways, could in some circumstances result in elimination of the roadways proposed to cross the plaintiff's property. Our view of the merits of the case obviates any need to resolve the question.

FN3. We note that, though the plaintiff's complaint challenged the validity of the PDA designation on so-called 'spot zoning' grounds, its brief before this court disavows any such contention.

FN4. The plaintiff suggests that the correctness of the BRA's favorable recommendation of a proposed PDA is a proper subject for review in a challenge brought under § 10A of the Boston Zoning Enabling Act, as inserted by St. 1987, c. 371, § 2, and draws an analogy to the BRA's role in conducting site-plan review under article 31 of the Boston Zoning Code prior to issuance of a building permit for an urban renewal project by the Boston building commissioner. See *St. Botolph Citizens Comm., Inc.* v. *Boston Redev. Authy.*, 429 Mass. 1, 9-10 (1999). To similar effect is the manner in which a municipal board of health's evaluation of a proposed subdivision is subject to review in an appeal of subsequent planning board action on the subdivision. See *Loring Hills Developers Trust v. Planning Bd. of Salem*, 374 Mass. 343, 350 (1978). However, in both settings the preliminary review occurs pursuant to a legislatively imposed directive, and the subsequent challenge pertains to an administrative (rather than a legislative) action. In the present case, by contrast, the BRA's favorable recommendation was the product of a requirement imposed by the Commission itself, and preceded legislative action by the Commission on the proposed PDA. Though the analogy to preliminary administrative review of proposed legislation in other settings is not perfect, we note as well that a legislative enactment is not necessarily vulnerable to a claim of invalidity by reason of shortcomings in the review by an administrative body preceding its eventual legislative enactment, conducted pursuant to a requirement imposed by the legislative body itself. See *Crall v. Leominster,* 362 Mass. 95, 99-100 (1972). Cf. *Bane v. Superintendent of Boston St. Hosp.,* 350 Mass. 637, 638 (1966). As with the question of the plaintiff's standing, see note 2, *supra,* our view of the case obviates any need to resolve the question.

FN5. We also note that the plaintiff has not named the BRA as a party defendant to its complaint. Compare *Loring Hills Developers Trust v. Planning Bd. of Salem*, *supra* at 350.

FN6. Though we affirm the judgment of dismissal, we do not consider the plaintiff's appeal to be frivolous. We accordingly deny the request by MK Parcel 7 for an award of its appellate fees and costs.

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