COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-2863-G

Notice sent
2/29/2012
O.G. B.
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K. L. S.
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PATRICK GALVIN & another[1]

vs.

BOSTON ZONING COMMISSION & others[2]

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

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The plaintiffs, Patrick Galvin and Mark Alford brought this action against the Boston Zoning Commission ("BZC"), the Boston Redevelopment Authority ("BRA"), the Boston College Task Force ("Task Force"), and the Trustees of Boston College ("Trustees"). Plaintiffs originally brought five claims: they sought to annul the actions and decision of the BZC, requested declaratory relief, and alleged contract zoning, violations of the Open Meeting law, and of due process.[3] Plaintiffs sought leave to amend the complaint and were permitted to add an Article 29 count (Spurlock, J.). No amended complaint was filed at the time the summary judgment motion was served a year later.

At this juncture, the plaintiffs allege that the BZC's and the BRA's review and adoption of Boston College's ("BC") Institutional Master Plan ("IMP") were: 1) arbitrary and capricious; 2) a violation of Article 29 of the Massachusetts Declaration of Rights; and 3) illegal contract

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[1] Mark Alford

[2] Boston Redevelopment Authority; Boston College Task Force; and Trustees of Boston College

[3] Plaintiffs concede the open meeting count is subject to dismissal.

zoning.[4] All the defendants now move for summary judgment.

For the reasons that follow, the defendants' joint motion for summary judgment is **ALLOWED**.

BACKGROUND

The following facts are not disputed. Galvin purports to live at and have an ownership interest in 34 Lake Street in Brighton. Alford purports to live at and have an ownership interest in 40 Lake Street in Brighton. BC's campus is divided into two major areas: 1) the Chestnut Hill Lower Campus and 2) the Brighton Campus. Galvin and Alford's residences abut the Brighton Campus.

The Boston Zoning Enabling Act ("Enabling Act"), St. 1956, c. 665, § 1, established the BZC. The Enabling Act authorizes the BZC to adopt zoning regulations to promote the "health, safety, convenience, morals or welfare" of the inhabitants of the City of Boston. St. 1956, c. 665, § 2. Likewise, it outlines the procedure that the BZC must follow in adopting an amendment or change to the City of Boston Zoning Code (the "Code"). St. 1956, c. 665, § 3.

Before making any such changes or alterations, the BZC must provide the BRA with an opportunity to make a recommendation of the proposed action, provide notice to the public and hold a hearing. Id. The BRA was established under G. L. c. 121, § 26QQ, and serves as the planning authority and urban renewal agency for Boston. In addition, the Mayor of the City of Boston must approve all zoning changes. Id.

Article 80D of the Code authorizes the BRA to review the design and impact of

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[4] No misconduct is attributed and no theory of liability is offered with regard to the Trustees of Boston College.

development proposals and to enter into cooperation agreements. The Code provides special regulations for institutions' expansion. The principal means for reviewing an institution's expansion is by viewing the institution's IMP. An IMP describes an institution's entire long-range development program, considered in the context of it's overall development program. The IMP process is comprehensive and is mainly set forth in Article 80D of the Code.

The process begins when an institution files an IMP Notification Form ("IMPNF") with the BRA. The BRA publishes notice of receipt of the IMPNF and the due date by which the BRA must receive comments from the public about it. The BRA then holds a scoping session with the applicant and municipal public agencies to issue a Scoping Determination of the elements that the applicant must include in its IMP. The institution than files an IMP with the BRA in response to the Scoping Determination. The BRA must publish its receipt of the IMP and the due date by which it must receive comments from the public about the IMP. The BRA also provides the public notice of a hearing on the IMP, holds the hearing, and votes on an adequacy determination. If the BRA adopts the IMP, it then transfers it to the BZC and petitions the BZC for its approval. The BZC publishes notice of a public hearing, holds a public hearing, and votes on the IMP. If the BZC votes in favor of the IMP, it forwards the IMP to the Mayor for his signature.

In this case, BC's Chestnut Hill and Brighton campuses were governed by an earlier IMP, which was initially adopted in 2000. In 2003, BC began working on a new, ten-year IMP. In 2004, BC purchased 43.3 of the sixty-five acres of land that the Roman Catholic Archdiocese and the Saint John's Seminary owned in Brighton in close proximity to its Chestnut Hill Campus. In 2006 and 2007, BC purchased the remainder of this land. The IMP development process

involved community outreach with the Task Force and the Boston College-Newton Neighborhood Council. The Task Force held public meetings regarding the development of the IMP beginning in April 2004.[5]

In February 2006, the BC Board of Trustees approved a $1.6 billion Strategic Plan that called for hiring up to an additional hundred faculty and allocating $800 million for the construction and renovation of building facilities. Consistent with this Strategic Plan, BC submitted an IMPNF for the proposed $1.6 billion, ten-year plan, which included, among other things: (a) construction of four new academic buildings on Middle Campus in Chestnut Hill; (b) the construction of a 200,000 square foot Brighton Athletic Center; and (c) 610 additional new beds for undergraduate housing. The only two IMP elements that the plaintiffs mentioned in their complaint were those pertaining to undergraduate housing on Brighton Campus and the Brighton Athletic Center.

On December 11, 2007, the BRA provided public notice of its receipt of BC's IMPNF. On February 21, 2008, the BRA issued its Scoping Determination on the IMP. The Scoping Determination noted that there were concerns about the placement of undergraduate housing on the Brighton Campus and requested that BC study and present alternative housing proposals. It also requested that the IMP provide an alternative-sized seating configuration for the baseball facility as well as a discussion of potential alternative locations for this facility and proposed mitigation measures. After receiving the Scoping Determination, BC continued to meet with the Task Force and local neighbors to address specific alternatives.

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[5] The Task Force is a body wholly without statutory authority, its members appointed by the mayor. It is loosely advisory and has no decision-making role.

On June 20, 2008, BC filed its IMP with the BRA. The IMP contained some of the same projects that were contained in the IMPNF, with the exception of certain projects to which the Scoping Determination and/or neighbors had sought changes. The changes included that the project would meet one hundred percent of the undergraduate housing demand. Additionally, two options were added that would eliminate the 500 beds proposed for the Brighton Campus and the size of the Brighton Athletic Center was reduced. On June 30, 2008, the BRA provided notice of its receipt of BC's IMP and stated that public comments must be submitted to the BRA by August 22, 2008. Comments were filed both in favor and in opposition to BC's proposed IMP.

On September 18, 2008, BC submitted a Notice of a Project Change ("Notice") to the BRA. The Notice alerted the BRA to the fact that BC had purchased 2000 Commonwealth Avenue. Despite the Notice, the BRA Director found that the proposed IMP responded in part to the BRA's request for BC to explore student housing alternatives and concluded that no further scoping was necessary. However, the BRA Director did find that additional time for review and comment was appropriate, and he extended the public comment period by two weeks.

On December 2, 2008, the Boston Civic Design Commission voted to recommend approval of BC's IMP to the BRA. BRA recommended certain modifications to the IMP, which included reducing the number of seats at the baseball facility and removal of the proposal for 350 beds at the undergraduate housing near the School of Theology and Ministry Library. On January 19, 2009, the BRA provided public notice that it would hold a public hearing regarding BC's IMP. On January 29, 2009, the BRA Board voted to issue an adequacy determination with respect to the IMP and petitioned the BZC to consider the IMP.

The BZC provided public notice that it had scheduled a public hearing for March 18, 2009 regarding the BRA's petition for approval of the IMP. The BZC decided to postpone the hearing to allow BC to prepare a single, restated document detailing its modifications, which it then submitted on March 19, 2009. The BZC published notice of the May 6, 2009 hearing on BC's IMP. The BZC held the hearing and many people spoke both in favor of and in opposition to the IMP. At the conclusion of the hearing, the BZC voted to adopt the IMP 9 to 1. The BZC, though, imposed the following condition: BC will commence construction of a new undergraduate residence as the first Proposed Project under the IMP, but the first Proposed Project may be built concurrently with another project listed on the IMP.

The BZC forwarded the IMP as approved to Mayor Menino. In an effort to reaffirm BC's commitment to provide housing to one hundred percent of its student body, Mayor Menino amended the IMP to remove the language that allowed BC to begin other projects concurrently with the construction of the new undergraduate residence. The BZC scheduled a public hearing to address this amendment and provided notice of this hearing. On June 10, 2009, the BZC voted in favor of the amendment. Mayor Menino signed the amendment on June 10, 2009.

The IMP, as adopted, is expected to result in $1 billion in planned construction and renovation, create an estimated 12,243 jobs and $737 million in labor income for local residents, and provide a total of ten-year economic impact of $1.57 billion. This economic impact will be in addition to the $1.3 billion annual economic impact of BC on the region as a whole.

The plaintiffs filed this action against the defendants, alleging that decisions of the BRA and BZC in adopting the IMP were arbitrary and capricious, as public opposition to the IMP was widespread. Additionally, the plaintiffs allege that the IMP process was conducted in violation

of Article 29. Specifically, the plaintiffs allege that the ultimate approval of the IMP was the preordained product of agreements and ex parte communications between BC, the Mayor's office, the BZC, and the BRA. The plaintiffs allege that the public hearings were a "sham"and that the official votes and process were underway well before the public hearings. The plaintiffs allege that Lynda Bernard, who was a BZC Commissioner, influenced other commissioners and campaigned on behalf of BC. The defendants now move for summary judgment as to all of the plaintiffs' claims.

DISCUSSION

I. Plaintiffs' Rule 56(f) Motion

Under Mass. R. Civ. P. 56(f), a court may defer judgment on a summary judgment motion if the non-moving party can show "an authentic need for, and an entitlement to, an additional interval in which to marshal facts essential to mount an opposition." Resolution Trust Corp. v. North Bridge Assoc., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994). To avoid the defendants' summary judgment motion on Mass. R. Civ. P. 56(f) grounds, the plaintiffs' request for relief under the rule must be: (1) timely; (2) supported by an authoritative affidavit; (3) provide "'good cause for the failure to have discovered the facts sooner;'" (4) provide "a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist;" and (5) indicate how the facts the plaintiffs believe it will discover will affect the outcome of the defendants' motion. Alphas Co., Inc. v. Kilduff, 72 Mass. App. Ct. 104, 110 (2008), citing Resolution Trust Corp., 22 F.3d at 1203. However, even in cases where all five factors are proven sufficiently, the court will not allow a Rule 56(f) motion when it is clearly "a stalling tactic or an exercise in futility." Resolution Trust Corp., 22 F.3d at 1203.

As reasons for continuing the defendants' motion for summary judgment, the plaintiffs contend that they need additional time to complete discovery because they have come into possession of numerous emails which give rise to their claims that the IMP process was infected with bias. Additionally, the plaintiffs contend that the defendants have opposed the taking of depositions noticed by the plaintiffs.

Considering the legal standard above, this court is unpersuaded by the plaintiffs' request. Twenty months passed between the plaintiffs' filing of their initial complaint and their first request for discovery.[6] The claimed evidence of bias in agency emails came to counsel via a FOIA request by a non-party. The evidence was certainly available earlier; in fact, it has existed and could have been accumulated before the case was filed. It is difficult to see plaintiffs' conduct as anything but dilatory.

Moreover, plaintiffs, without apology, claim to be within their rights to have waited until the end of the discovery period to depose many chief and lesser executives of the City of Boston and Boston College. Scheduling difficulties and requests for protective orders were clearly foreseeable, and it is hard to hear plaintiffs' complaints.

It appears to this court that the plaintiffs are falling back on Rule 56(f) in order to extend the litigation and frustrate resolution of this land use matter, which the court cannot allow to occur. See Massachusetts Sch. of Law at Andover, Inc. v. American Bar Assoc., 142 F.3d 26, 45 (1st Cir. 1998) (affirming denial of plaintiff's rule 56(f) motion given plaintiff's "lethargic approach to discovery"); C.B. Trucking, Inc. v. Waste Mgmt., Inc., 137 F.3d 41, 45 (1st Cir. 1998) (finding where plaintiff not diligent in pursuing discovery, rule 56(f) motion

[6] The case was filed on July 9, 2009 and discovery requests were first made by plaintiff in April 2011.

"unjustified"). There are both judicial and legislative mandates that seek to accelerate zoning determinations. Section 10A of the Enabling Act; Superior Court Standing Order 1-88 .

For the foregoing reasons, the plaintiffs' request to defer summary judgment is **DENIED**.

II. The Merits of the Defendants' Motion for Summary Judgment

A. Standard of Review

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on each relevant issue and that the summary judgment record shows the party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden by submitting affirmative evidence negating an essential element of the non-moving party's case, or by demonstrating that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. Flesner v. Technical Commission Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 710 (1991).

"If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact[.]" Pederson, 404 Mass. at 17. The court views the evidence in the light most favorable to the nonmoving party. Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 539 (1995).

B. Judicial Review of the BRA's and BZC's Decisions

i. BZC Decision

Section 10A of the Enabling Act, (as inserted by Sty. 1987, c. 371, § 2), provides that, in an appeal from a decision of the BZC amending the Code, "the court shall hear all pertinent evidence and determine the facts, and, upon the facts as so determined, annul such action if found to exceed the authority of such commission, or make such other decree as justice and equity may require." "[I]n considering the validity of zoning amendments . . . the courts have looked to principles established in cases decided under G. L. c. 40A." National Amusements, Inc. v. Boston, 29 Mass. App. Ct. 305, 308-309 (1990). As such, the appeal is a review *de novo*. See Bicknell Realty Co. v. Board of Appeal of Boston, 330 Mass. 676, 679 (1953). Cf. Manning v. Boston Redevelopment Auth., 400 Mass. 444, 447 (1987) (noting application of *de novo* review to BZC zoning amendment prior to enactment of section 10A of Enabling Act).

When a court reviews a challenge to a zoning decision, it must determine whether the zoning amendment violates state law or a constitutional provision, Durand v. IDC Bellingham, 440 Mass. 45, 52 (2003), is arbitrary or unreasonable, or is substantially unrelated to the public welfare. Johnson v. Edgartown, 425 Mass. 117, 121 (1997). The plaintiffs must demonstrate that the challenged amendment "bears [no] rational relation to any permissible public object which the legislative body may plausibly be said to have been pursuing." W.R. Grace & Co.-Conn. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002), quoting Sturges v. Chilmark, 380 Mass. 246, 256 (1980). "If the reasonableness of a zoning regulation is fairly debatable, the judgment of the local legislative body (here the zoning commission of Boston) should be sustained and the reviewing court should not substitute its own judgment." National Amusements, Inc., 29 Mass. App. Ct. at 309. Where the material facts are undisputed, the court may resolve the appeal on summary judgment. Hall v. Klofft, 2009 WL 6458043 at *1 (Mass.

Super. 2009).

Here, the plaintiffs allege that the BZC did not deliberate, analyze, or assess evidence in rendering its decision. As such, the plaintiffs argue that the BZC's approval of BC's IMP was arbitrary and capricious. However, the court finds that the plaintiffs have not established that the BZC's approval of the BC's IMP violated state law or their federal constitutional rights, that it was arbitrary or capricious, or that it was substantially unrelated to the public welfare. Rather, the undisputed facts show that the benefits of the IMP include, among other things: an anticipated $1 billion in planned construction and renovation costs; 12,000 jobs; and $737 million in labor income for local residents. Additionally, BC committed to providing housing for its entire student body.

Furthermore, the IMP approval process resulted in several mitigation commitments from BC, including, but not limited to, that it will: (1) notify the Mayor's office and BRA before purchasing property for $5 million or more in Boston, (2) propose efforts designed to eliminate occupancy by its students of one and two-family houses in 02134 and 02135 zip codes, and (3) establish a mortgage program to assist full-time faculty and staff purchase homes in the Allston-Brighton neighborhood. Based on this evidence, the court finds that the BZC's adoption of the IMP could rationally be related to alleviating the burden on residents of the Allston-Brighton neighborhood by increasing student housing, assisting its faculty members, as well as providing jobs and labor income for local residents. As the reasonableness of the IMP at issue is fairly debatable, this court will not disturb the BZC's judgment. National Amusements, Inc., 29 Mass. App. Ct. at 309.

The plaintiffs also seek to demonstrate that the BZC's adoption of the IMP was arbitrary

and capricious as more people opposed the IMP than supported it. It is undisputed that there was both support and opposition to the IMP; however, the fact that more people may have opposed the IMP than favored it does not invalidate the adoption of it or demonstrate that its adoption does not substantially favor the public welfare. See Barrett v. Building Inspector of Peabody, 354 Mass. 38, 43 (1968) (evidence regarding level of support or opposition is "of no consequence" in a zoning amendment challenge).

Lastly, the plaintiffs also allege that the entire IMP review and approval process was infected by bias in violation of Article 29 of the Declaration of Rights. As a result, the plaintiffs allege that the BZC's approval of the IMP was in violation of their state constitutional rights. However, for the reasons that appear below, the court finds that the plaintiffs have not established an Article 29 violation. As such, the court upholds the decision of the BZC.

ii. BRA Decision

The plaintiffs also allege that the BRA's approval of the IMP was arbitrary and capricious. The plaintiffs allege that the BRA's decision, like the BZC's decision, is subject to *de novo* review pursuant to § 10A of the Enabling Act. However, in 304 Stuart St., LLC v. Boston Redevelopment Auth., the Land Court held "the plain and unambigous language in § 10A authorizes only appeals from the [BZC's] actions." 2011 WL 4506194 at *1 (Land Court 2011). The court finds this ruling instructive here.

When acting in its planning board capacity, BRA's zoning recommendations to the BZC are "preliminary and advisory only" and do not bear on the ultimate validity of zoning regulations. See Crall v. Leominster, 362 Mass. 95, 99-100 (1972). "Accordingly, where the BRA's zoning recommendations and reports did not bind the Commission, it is only the

Commission's act which are subject to *de novo* judicial review under § 10A."[7] 304 Stuart St., 2011 WL 4506194 at *2 (Land Court 2011). Indeed, to the extent that BRA's IMP approval proceedings under Section 80D of the Code are reviewable, they would be subject to an administrative record review. See Manning, 400 Mass. at 446-447.[8] Thus, the only available avenue for the plaintiffs to challenge the BRA's decision is through writ of certiorari, which they have not pled.[9] Therefore, the court will not undertake to review BRA's decision.

C. Article 29 Claims

The plaintiffs' second contention is that the adoption of the IMP violated Article 29 of the Massachusetts Declaration of Rights ("Article 29"). Specifically, the plaintiffs argue that BRA's and BZC's adoptions of the IMP were infected with constitutionally impermissible bias.

In relevant part, Article 29 provides: "[i]t is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice . . . [i]t is the right of every citizen to be tried by judges as free impartial, and independent as the lot of humanity will admit . . . ." By its plain terms, Article 29 applies solely to the judiciary.

The defendants contend that the proceedings before the BRA and the BZC were

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[7] The plaintiffs argue that the BRA's approval of the Planned Development Area ("PDA") in 304 Stuart St., was advisory only and not binding on the BZC. They allege that the circumstances differ here, as in order for the BZC to review an IMP, the BRA must first approve it. Thus, the plaintiffs argue that the BRA's decision is binding on the BZC. However, the court finds this argument unpersuasive. Like the BRA's approval of a PDA, the BRA's approval of an IMP is not binding on the BZC, but is simply a prerequisite for the BZC's review of the IMP. Thus, the court finds that the ruling in 304 Stuart St. is applicable here and the BRA's decision is not subject to *de novo* review pursuant to § 10A of the Enabling Act.

[8] Neither the Enabling Act nor the Code provide for an appeal of BRA actions under Section 80D.

[9] Certiorari is a limited procedure which may be used to correct substantial errors of law committed by a judicial or quasi-judicial tribunal (but not administrative, political or legislative decisions). St. Botolph Citizens Comm., Inc., v. Boston Redevelopment Auth., 429 Mass. 1, 7 (1999).

legislative in nature and therefore Article 29 does not apply. This court finds the defendants' arguments persuasive while noting that another judge of this court (Spurlock, J) has previously ruled that the proceedings were quasi-judicial in nature.[10]

The court finds more persuasive the argument that the BRA and the BZC decisions here were legislative because of the nature of the decision made. It is well-understood that an adjudicatory proceeding is one in which the legal rights, duties or privileges of specifically named persons must be determined after an opportunity for an agency hearing. Mullin v. Planning Bd. of Brewster, 17 Mass.App.Ct. 139, 142 (1983). Such a proceeding involves particular persons, their business or property, and their relation to a particular transaction rather than a question of governmental policy. Id. at 142-143.

While the Trustees of Boston College might be construed as a particular person, that is too narrow a view of the issue. The adoption of this Institutional Master Plan covering over one hundred acres resulted in land uses including high density residential, entertainment space, academic space, athletic space, covered parking and open space; it was not a particular transaction. Many abutters were undoubtedly affected. Such a decision and such a proceeding could hardly be characterized as the relation of particular persons to their business or property. It would be "impracticable to include" such a large number of interested parties in an adjudicatory proceeding. Cast Iron Soil Pipe Institute v. Board of State Examiners of Plumbers and Gas Fitters, 8 Mass.App.Ct. 575, 586(1979). Clearly, the adoption of this IMP was more a legislative question than an adjudication.

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[10] However, this determination was entered in the context of leave to amend the complaints (Paper 19). This judge does not consider the summary judgment decision controlled by that ruling.

This court is satisfied that the BRA and BZC's deliberations with regard to this IMP were legislative. Thus, Article 29 is not implicated.

But even if the proceedings were legislative, the plaintiffs have not established genuine issues of material fact and their Article 29 claims would fail as a matter of law.

The plaintiffs makes two main allegations with respect to their Article 29 claims: 1) the IMP approval was a product of agreement or agreements that predated the public hearing; and 2) there were many secret meetings and communications among the BRA, the Mayor's Office, and BC. Each of these allegations is addressed.

The plaintiffs first essentially argue that the BRA and the BZC engaged in ex parte communications and cast their official votes before the public hearings, and that there were deals being cut behind the scenes as a result of ex parte meetings. Even viewing these allegations in a light that is most favorable to the plaintiffs, these claims would be governed by the "Open Meeting Law", G. L. c. 39, § 23B.

The Open Meeting Law states "[a]ll meetings of a governmental body shall be open to the public . . . ." G. L. c. 39, § 23B. It provides a process for addressing secret meetings, deliberations, and votes. See Id. The plaintiffs' allegations that the BRA and BZC members cast their votes prior the public hearings, while disguised as Article 29 violations, are essentially allegations of violations of the Open Meeting Law. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 642 (2008) (finding that where a public meeting "is merely a ceremonial acceptance or a perfunctory ratification of decisions, it plainly does not help to accomplish the purpose of the Open Meeting Law, and will not operate as a cure"). As this court (Spurlock, J.) has previously noted, allegations of a violation of the Open Meeting Law based on conversations that occurred

prior to meetings in which a governmental body voted must be dismissed if not brought within twenty-one days of the vote.[11] See G. L. c. 39, §23B. As the plaintiffs did not bring these claims within twenty-one days of the votes, the court will not address them in a new guise.[12]

Lastly, the plaintiffs' claims that there were ex parte communications among the BRA, the BZC, BC, and the Mayor's Office fail. While the plaintiffs proffered evidence of communications, none of these communications involve members of the BRA Board or the BZC who actually voted on the IMP at issue. Rather, the communications involved members of BRA Staff, the BRA Director, BC, and the Mayor's Office. The plaintiffs cannot demonstrate a genuine issue of material fact as to whether there was in fact an Article 29 violation involving the *voting* members of the BRA or the BZC.

For the foregoing reasons, the defendants' Motion for Summary Judgment is **ALLOWED** as to this claim.

D. Contract Zoning

The plaintiffs' final challenge to the IMP is that it constitutes contract zoning. Contract zoning involves a process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property. Durand, 440 Mass. 45 at 52-53. As discussed previously, the plaintiffs have not proffered evidence demonstrating that an agreement or contract was made among the voting members of the BRA, the BZC, and BC. Additionally, even if the

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[11] Explicitly, plaintiffs do not seek to relitigate this issue.

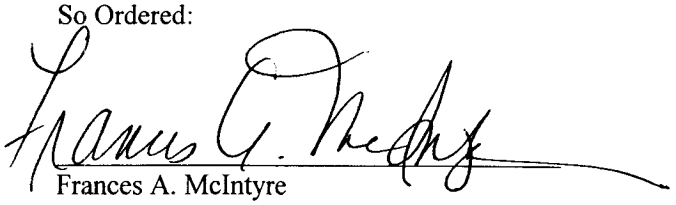
[12] The plaintiffs filed their original complaint on July 9, 2009, which was longer than twenty-one days after the BRA's and the BZC's public hearings and votes.

court were to conclude that the defendants had reached an agreement prior to the public hearing, again, this essentially would be a violation of the Open Meeting Law and must have been brought within twenty-one days of the hearing. As it was not, the defendants' Motion for Summary Judgment as to this claim is **ALLOWED**.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendants' Motion for Summary Judgment be **ALLOWED**, and judgment is to enter on all counts for the Defendants.

So Ordered:



Frances A. McIntyre
Justice of the Superior Court

DATED: February 27, 2012