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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

SUFFOLK, ss.

10 MISC. 441680 (JCC)

304 STUART STREET LLC and
003 REALTY LIMITED PARTNERSHIP,

Plaintiffs,

v.

BOSTON REDEVELOPMENT AUTHORITY, ROBERT L. FONDREN, JAMES C. CLARK, DAVID MARR, JAY HURLEY, JANE COOPER BRAYTON, WILLIAM TARLOW, M. PAT TIERNEY, JILL HATTON, and JOHN M. ARROYO, as they are members of the Boston Zoning Commission, and not individually, CITY OF BOSTON, BERKELEY/COLUMBUS REAL ESTATE LLC and LIBERTY MUTUAL GROUP,

Defendants.

ORDER ALLOWING DEFENDANT BOSTON REDEVELOMENT AUTHORITY'S MOTION TO DISMISS

INTRODUCTION

The Plaintiffs in this case, 304 Stuart Street LLC ("304 Stuart Street") and 003 Realty Limited Partnership ("RLP") (collectively, "Plaintiffs") challenge the Planned Development Area Overlay District ("PDA") zoning designation of a 1+ acre site in Boston's Back Bay, owned by Defendants Berkeley/Columbus Real Estate LLC and Liberty Mutual Group ("the Liberty Mutual site"). The Plaintiffs, whose properties are located on the same block as, and abut, the Liberty Mutual site, have appealed the PDA

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zoning designation under § 10A of the Boston Zoning Enabling Act [1] ("§ 10A"), seeking to have the PDA zoning of the Liberty Mutual site annulled. Among other things, Plaintiffs claim that both the vote of the Defendant Boston Zoning Commission ("Commission") amending the Boston Zoning Code (the "Code")[2] to make Liberty Mutual's land eligible for PDA designation, and the favorable recommendation of said amendment by the Defendant Boston Redevelopment Agency ("BRA"), were based on legally untenable grounds, were arbitrary and capricious, and were not based on substantial evidence.[3] The Plaintiffs also claim that the Commission was without authority to approve the PDA zoning designation for the Liberty Mutual site, at least in part because the Commission's vote was infected by the BRA's unauthorized action in approving the PDA Development Plan *before* the Code was amended to make the site eligible for a PDA.

On March 16, 2011, the BRA filed a Motion to Dismiss the Plaintiffs' Complaint, pursuant to Mass R. Civ. P. 12 (b) (1) and 12 (b) 6. In its Motion, the BRA argues that the Plaintiffs have no private right of action under the Enabling Act or the Code to challenge the BRA's approval of a PDA Development Plan. Accordingly, the BRA argues, the Plaintiffs lack standing and the Amended Complaint fails to state a proper claim against the BRA. The Plaintiffs have opposed the BRA's Motion, claiming that they have standing as "aggrieved persons" to appeal the BRA's actions under § 10A. For the reasons set forth below, the BRA's Motion to Dismiss is **ALLOWED**.

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[1] St. 1956, c.665, as amended.

[2] The Boston zoning regulations adopted under the Boston Zoning Enabling Act.

[3] In the event that the PDA zoning actions are allowed to stand, the Plaintiffs have alternatively requested determinations under G. L. c. 240, § 14A either: that the continued application of the Code's height and floor area ratio restrictions to Plaintiffs' properties is obsolete and invalid, *or* that the PDA designation of the Liberty Mutual site unfairly excludes Plaintiffs' properties, such that Plaintiffs' properties are entitled to be governed by the same PDA zoning regulations as apply to the Liberty Mutual site .

DISCUSSION

A motion to dismiss under either Mass. R. Civ. P. 12 (b)(1) or Mass. R. Civ. P. 12(b)(6) may be granted only "where it appears with certainty that the non-moving party is not entitled to relief under any combination of facts that he could prove in support of his claims." *Sullivan v. Chief Justice,* 448 Mass. 15, 21 (2006). Accepting the factual allegations in the Amended Complaint as true, I conclude that the Plaintiffs have failed to state a claim against the BRA. Contrary to the Plaintiffs' contentions, the remedy set forth in § 10A is limited to appeals from the actions of the *Commission,* and does not provide a direct avenue of appeal from actions taken by the BRA. Moreover, the Plaintiffs have expressly disavowed any alternative claim for a record review of the BRA's proceedings.

Notably, § 10A is the sole jurisdictional basis recited in the Amended Complaint with respect to Plaintiffs' claims against the BRA. This is the same (and sole) jurisdictional basis, moreover, that the Plaintiffs rely upon in opposing the BRA's Motion to Dismiss, insisting that the BRA's actions are subject to *de novo* review under § 10A. Contrary to the Plaintiff's contentions, however, there is nothing in the language of § 10A which either expressly or impliedly authorizes aggrieved persons to appeal the BRA's actions with respect to recommending proposed text or map amendments to the Code, or with respect to approving a PDA Development Plan. Rather, the plain and unambiguous language in § 10A authorizes only appeals from the *Commission's* actions.[4]

[4] Section 10A of the Enabling Act provides in relevant part:

> "Any persons aggrieved by a decision of the zoning commission approving a zoning map amendment or a zoning regulation or amendment thereof, or by any procedural defect therein, or any municipal board or officer, may appeal such decision to the superior court in the county of Suffolk or to the land court; provided, however, that such appeal is filed in said court within thirty days after such decision became effective in accordance with the provisions of section three."

The case law cited by the Plaintiffs does not support a more expansive interpretation of § 10A. In particular, Plaintiff's reliance upon *Loring Hills Developers Trust v. Planning Board of Salem,* 374 Mass. 343, 349-50 (1978) is misplaced. In *Loring Hills*, the Supreme Judicial Court concluded, *inter alia*, that a planning board may not override an adverse recommendation of a board of health with respect to a proposed subdivision plan, and that a statutory appeal from a subdivision approval or disapproval may place in issue the validity of such recommendation. Thus, the Court allowed the recommendation of the board of health to be reviewed *de novo* as part of the G.L. c. 41, § 81BB appeal from the planning board decision.

The BRA's role under the Zoning Enabling Act with respect to a PDA designation is not, however, analogous to a board of health's role under the Subdivision Control Law. Unlike the board of health report, which is statutorily binding on a planning board under the Subdivision Control Law,[5] there is nothing in the Zoning Enabling Act which makes the BRA's recommendations binding on the Commission with respect to its adoption or amendment of zoning regulations and boundary designations (including PDA designations).[6] Rather, the BRA's role under the Enabling

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[5] Pursuant to G. L. c. 41, § 81U, the applicant for subdivision approval must file its subdivision application with the planning board and also submit a copy of the application to the board of health. The board of health "shall report to the planning board in writing approval or disapproval of said plan, and in the event of disapproval shall make specific findings as to which, if any, of the lots shown on such plan cannot be used for building sites without injury to the public health, and include such specific findings and the reasons therefore in such report, and where possible shall make recommendations for the adjustment thereof.... Section 81U goes on to provide that if the plan does not comply with the recommendations of the board of health, the planning board shall modify and approve or shall disapprove such plan."

[6] § 3 of the Enabling Act sets forth the procedures to be used in Boston for adoption and amendment of zoning boundaries and regulations. Said § 3 includes a requirement that no zoning boundaries or regulations may be adopted or amended until either: (a) the BRA shall have submitted to the Commission a report with recommendations concerning the proposed adoption or amendment, or (b) 20 days shall have elapsed without the BRA submitting such a report. In direct contrast with Section 81U of the Subdivision Control Law, there is nothing in the Enabling Act which binds the Commission to follow the BRA's zoning recommendations. The § 3 requirement for BRA recommendations is more similar to the statewide Zoning

Act is more properly analogous to a planning board's advisory role under § 5 of the statewide Zoning Act, G.L. c. 40A. *See St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority*, 429 Mass. 1, 3 (1999) (in addition to its statutory roles as an urban renewal agency and redevelopment authority, the "BRA also serves as the planning board for Boston. See St. 1960, c. 652, s.12"). It is settled that a planning board's zoning recommendations to the legislative body are "preliminary and advisory only" and do not bear on the ultimate validity of zoning regulations. *See, e.g., Crall v. City of Leominster*, 362 Mass. 95, 99-100 (1972) (citing *Burlington v. Dunn*, 318 Mass. 216, 218 (1945); *see also Hallenborg v. Town Clerk of Billerica,* 360 Mass. 513, 517-519 (1971) and cases cited therein. Accordingly, where the BRA's zoning recommendations and reports do not bind the Commission, it is only the Commission's actions which are subject to *de novo* judicial review under § 10A.

The Plaintiffs' challenge to the PDA designation *procedure* does not raise a cognizable § 10A claim against the BRA, either. One of the grounds on which the Plaintiffs seek to have the Liberty Mutual site PDA zoning invalidated is that the Commission's vote establishing the PDA designation was based upon a PDA Development Plan approval made by the BRA in contravention of the requirements contained in Section 80C of the Code.[7] However, while § 10A plainly provides for an

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Act requirement (applicable statewide to all municipalities except Boston) that a municipal legislative body may not enact or amend zoning legislation until either: (a) the local planning board has submitted a report with recommendations thereon, after holding a public hearing, or (b) 21 days have elapsed after said hearing without such a report. See G.L. c. 40A, § 5.

[7] Article 3, Section 3 -1A of the Code re-states the zoning adoption/amendment procedures contained in § 3 of the Enabling Act, but adds further requirements specifically applicable to establishment of a PDA Overlay District:

> "The whole or any part of a subdistrict may be established as a planned development area if such area contains not less than one acre and the commission has received from the Boston Redevelopment Authority, and has approved, a

appeal from the Commission's zoning decisions based on procedural defects in such decisions, it does not also not provide for a direct appeal from the BRA's approval of a PDA Development Plan — a procedure governed by Section 80C of the Code but not addressed in § 3 of the Enabling Act.[8]

To the extent that the BRA's PDA Development Plan approval proceedings under Section 80C of the Code could be subject to direct judicial review at all,[9] they would be subject to an administrative record review and not the § 10A *de novo* review sought by the Plaintiffs. *See Manning v. Boston Redevelopment Authority*, 400 Mass. 444 (1987) (the BRA's actions approving a PDA Development Plan were reviewed on the administrative record in conjunction with a *de novo* appeal of the Commission's actions establishing a PDA). *Compare St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Agency*, 429 Mass. *supra* at 8-10 (where the BRA was acting solely in its capacity as planning board in making an adequacy determination under the Code for a large-scale development project, its decision was not reviewable by an action in the nature of certiorari, inasmuch as the applicable provisions of the Code contemplated a comprehensive review and approval process, similar to site plan review and culminating in issuance or denial of a building permit from which action parties are provided an explicit right of review and appeal under the Code).

Here, the Plaintiffs have repeatedly insisted, both in their Opposition to the BRA's Motion to Dismiss and in their subsequent Opposition to the BRA's Motion for a

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development plan.....Before transmittal to the commission, such development plan... shall have been approved by said Authority after a public hearing...."

[8] As noted above, the Enabling Act does not specify that BRA *approval* is a prerequisite for Zoning Commission action on any proposed zoning enactment.

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

Protective Order, that their claims against the BRA arise exclusively under § 10A, and do not include any claims for administrative record review. Indeed, their Opposition to the BRA's Motion for a Protective Order contains the following emphatic statement:

> Notably, the First Amended Complaint does *not* present any claim for judicial review of the decision of any administrative agency or for any other proceeding on the administrative record pursuant to the standards set forth in G.L. c. 30A, § 14, G.L. c. 249, § 4, or similar statutes.

Plaintiffs' Opposition, p. 4 (emphasis in original).[10]

Accordingly, because I conclude that the First Amended Complaint fails to state a cognizable claim against the BRA under § 10A or under any other statutory provision, the BRA's Motion to Dismiss the Plaintiffs' claims against the BRA is **ALLOWED**.

So Ordered.

By the Court (Cutler, J.)

Attest:

Deborah J. Patterson, Recorder

Dated: September 23, 2011

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

[10] Similar statements are contained elsewhere in the Opposition.