Term

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

WALTER S. POLLARD, JR., & others [FN1] *vs.* BOSTON REDEVELOPMENT AUTHORITY & others. [FN2]

12-P-488

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs appeal from the grant of summary judgment in this certiorari action in which they challenge the Boston Redevelopment Authority's (BRA) approval of a combination respite care and low-income housing facility at 461 Walnut Avenue in the Jamaica Plain neighborhood of the city of Boston, pursuant to G. L. c. 121A. The proposed project would renovate a former ninety-bed medical respite facility for the homeless and often disabled individuals into a similar twenty-bed facility together with approximately thirty studio rental units intended for medically vulnerable and often disabled formerly homeless individuals. We affirm. Before reaching the merits, we pause to address the issue of standing, which ordinarily would be a threshold issue. Although the Superior Court judge ruled that the plaintiffs are not 'persons aggrieved,' St. 1965, c. 859, § 2, and therefore lack standing, the parties agree [FN3] that we need not reach the issue of standing if we conclude that the plaintiffs' arguments on the merits otherwise fail. As set out more fully below, we conclude that the decision of the BRA was supported by substantial evidence and we, accordingly, do not reach the issue of standing. [FN4] See *Boston Edison Co.* v. *Boston Redev. Authy.,* 374 Mass. 37, 63 n.17 (1977).

Turning to the merits, the plaintiffs contend that three [FN5] determinations by the BRA were not supported by substantial evidence: (1) that the project area is 'decadent,' 'substandard,' or a 'blighted open area'; (2) that requested zoning deviations do not substantially derogate from the intent and purpose of the zoning code; and (3) that the project does not conflict with the master plan for the city of Boston. See G. L. c. 121A, §§ 1 & 2; St. 1965, c. 859, § 2. Our task is to review the action of the BRA under the substantial evidence test, which is 'commonly understood to require that agency findings must rest upon 'such evidence as a reasonable mind might accept as adequate to support a conclusion." *Boston Edison Co., supra* at 54, quoting from *Bunte v. Mayor of Boston,* 361 Mass. 71, 74 (1972). Although we review the entire record for substantial evidence, we do not substitute our own judgment for that of the BRA. *Christensen v. Boston Redev. Authy.,* 60 Mass. App. Ct. 615, 620 (2004). After a review of the entire record, we conclude that that substantial evidence supported each of the BRA's challenged determinations.

Substantial evidence exists for the BRA's finding that the area is 'decadent' within the meaning of G. L. c. 121A, § 1. [FN6] A decadent area is defined in relevant part as:

'an area which is detrimental to safety, health, morals, welfare or sound growth of a community because of the existence of buildings which are out of repair, physically deteriorated, unfit for human habitation, or obsolete, or in need of major maintenance or repair, . . . [which] make[s] it

improbable that the area will be redeveloped by the ordinary operations of private enterprise, or by reason of any combination of the foregoing conditions.'

G. L. c. 121A, § 1. The BRA may find a project area decadent even when the surrounding community is thriving; it is the project area itself -- and not the neighborhood -- that is to be assessed. *Christensen, supra* at 622.

Here, architects stated that the building, constructed in 1966, is 'physically deteriorated, in disrepair and is essentially uninhabitable.' They also reported that the building contains asbestos, has a leaking envelope, lacks appropriate insulation, requires replacement plumbing, lacks adequate ventilation systems, has an unsafe electrical system, and has inadequate fire detection systems, among other problems. The parcel had been vacant for approximately two years at the time of the BRA decision. Such evidence is sufficient to support the BRA's finding that the building is 'decadent' under G. L. c. 121A, § 1. Compare, e.g., *Boston Edison Co., supra* at 60 (building condition survey supported decadence finding); *Shriner's Hosp. for Crippled Children v. Boston Redev. Authy.,* 4 Mass. App. Ct. 551, 558-559 (1976) (photos and documentary evidence showed structural deterioration and supported such finding). We are furthermore not persuaded by the plaintiffs' argument that the BRA decision was merely a 'bare repetition of the statutory language.' *Shriner's Hosp. for Crippled Children, supra* at 558. The BRA's report and decision clearly identified its reasons and also explicitly incorporated documents that further identified reasons for its finding that the project area is 'decadent.'

Similarly, the record contains substantial evidence to support the BRA's finding that requested zoning variances do not substantially derogate from the intent and purposes of the zoning code. Although the 'standard for granting a zoning variance under [St. 1960] c. 652, § 13 [predecessor to St. 1965, c. 859, § 2], that the deviation will not substantially derogate from the intent and purposes of the zoning code, is very similar to one of the standards for the grant of a variance from the zoning code under G. L. c. 40A, § 10[,] . . . the power of the BRA to grant variances is less circumscribed than that of the permit granting authority under G. L. c. 40A, § 10.' *Boston Edison Co., supra* at 64. The inquiry is 'whether the introduction of the nonconforming use ' would unquestionably alter the essential character of an otherwise residential neighborhood." *Id.* at 66, quoting from *Atherton v. Board of Appeals of Bourne,* 334 Mass. 451, 455 (1956). '[T]he proper approach for determining whether a variance should be granted involves consideration of the property uses existing in the area in relation to the specific new use proposed.' *Id.* at 66. The project requires variances for multi-family and medical care uses, as well as variances for insufficient floor area ratio, insufficient rear yard size, and for the number of parking spaces.

The purposes of the zoning code for the Jamaica Plain Neighborhood District include:

'provid[ing] adequate density controls that protect established residential areas . . . promot[ing] mixed-income residential development; provid[ing] for affordable and market rate housing for individuals and families; . . . expansion of job opportunities; . . . [and] well-planned development of institutions to enhance their public service and economic development role in the neighborhood . . . .'

Boston Zoning Code, art. 55, § 55-1. The plaintiffs argue that the zoning code's goal of density control is not met because the project, currently the site of an abandoned building, will provide respite care for twenty individuals as well as thirty-one [FN7] single occupancy apartments for the formerly homeless. The plaintiffs contend that there will be an increase in traffic, together with a decrease in available on-street parking as the main density-related effects of project. Even accepting arguendo that traffic will increase and available parking will decrease as a result of the renovation of the currently abandoned property, the BRA was entitled to place those effects into context. The project area, as recently as three years ago, contained a larger ninety-bed respite care facility. Moreover, the community's density concerns had been addressed by providing ten neighborhood-use parking spaces at the project area, by lowering the proposed number of single-occupancy apartments at the site, and by introducing another driveway to direct exiting traffic to the more arterial Walnut Avenue. In addition, the Boston Transportation Department has determined that the number of parking spaces on site is adequate for the proposed project.

The BRA was also entitled to consider the evidence showing that the project will further other goals of the zoning code. For instance, the project will create jobs both during construction and after the facility is in use. The project will provide for low-income, affordable housing, allowing for 'mixed-income residential development.' Finally, the project will provide a much-needed public service by providing medical care and housing for the homeless.

Given the similar prior use of the facility, the accommodations made by the BRA, and that the project's proposed use meets many goals of the zoning code, we cannot say that the nonconforming use would 'unquestionably alter the essential character' of the neighborhood. The BRA had substantial evidence to conclude that the deviations did not substantially derogate from the intent and purposes of the zoning code.

Finally, for similar reasons, we also conclude that substantial evidence supported the BRA's determination that the project does not conflict with the master plan for the city of Boston. The BRA's interpretation of the master plan is entitled to great weight. *Boston Edison Co., supra* at 71-72. The parties agree that the Neighborhood Plan for Jamaica Plain, which implements the zoning code, also serves as the master plan for that neighborhood. Boston Zoning Code, art. 55, § 55-2. As such, the purposes of the master plan are the same as those of the zoning code and, for the reasons set out above, the BRA's determination that the project does not conflict with the master plan is supported by substantial evidence.

Judgment affirmed.

By the Court (Meade, Sikora & Wolohojian, JJ.),

Entered: October 12, 2012.

FN1. Kingsford R. Swan, David Nagle, Jason Heinbeck, and Luis Prado. Six other plaintiffs (Catherine M. Fitzgibbon Pollard, Siana LaForest, Stephanie Heinbeck, Alex Rhem, Kirsten Patzer, and Judy Sullivan) participated in the Superior Court action below, but did not appeal.

FN2. Walnut Avenue Apartments Limited Partnership and Boston Health Care for the Homeless Program, Inc.

FN3. Both sides made this acknowledgement at oral argument.

FN4. For the same reason, we need not reach the question whether summary judgment was the appropriate mechanism for raising and deciding the issue of standing below. See *Soares v. Lakeville Baseball Camp, Inc.,* 369 Mass. 974, 975 (1976); *Beryl v. Superintendent,* 55 Mass. App. Ct. 906, 907 (2002). Moreover, no party objected to the procedure below, nor do the plaintiffs argue on appeal that there was any error or irregularity in employing the mechanism of summary judgment in this case. We accordingly need not consider the procedural mechanism used below because any error in the procedure (if indeed there is one) has been waived. We note that the merits were raised and decided on cross motions for judgment on the pleadings, which was the appropriate mechanism for obtaining judicial review of the merits. *Beryl, supra.*

FN5. Although raised below, the plaintiffs do not argue on appeal, that the BRA erred in finding that the project provides a public use and benefit. St. 1965, c. 859, § 2

FN6. Because we hold there was substantial evidence to find the area decadent, we need not, and do not, decide whether the BRA also had substantial evidence to find the area 'substandard.'

FN7. In addition to the thirty units for rental, there is one for the on-site manager.

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