COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 10-04980-A

WALTER S. POLLARD, JR. & others[1]

vs.

BOSTON REDEVELOPMENT AUTHORITY & others[2]

CONSOLIDATED MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT, PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS, AND BOSTON REDEVELOPMENT AUTHORITY'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

Walter S. Pollard, Jr., Kingsford R. Swan, Catherine M. Fitzgibbon Pollard, David Nagle, Siana LaForest, Jason Heinbeck, Stephanie Heinbeck, Luis Prado, Alex Rhem, Kirsten Patzer, and Judy Sullivan (collectively "the Plaintiffs") filed this eight-count Complaint against the Boston Redevelopment Authority ("BRA"), Walnut Avenue Apartments Limited Partnership ("Walnut Apartments"), and the Boston Health Care for the Homeless Program, Inc. ("Boston Health") (collectively "the Defendants"). Pursuant to G. L. c. 121A and St. 1960, c. 652, § 13, the Plaintiffs seek judicial review in the nature of certiorari of the BRA's Report and Decision approving Walnut Apartments's proposal to develop 461 Walnut Avenue, Jamaica Plain, into a mixed use facility providing low-income housing to and medical treatment facilities for homeless individuals. See G. L. c. 249, § 4. This matter is currently before the court on the

[1] Kingsford R. Swan, Catherine M. Fitzgibbon Pollard, David Nagle, Siana LaForest, Jason Heinbeck, Stephanie Heinbeck, Luis Prado, Alex Rhem, Kirsten Patzer, and Judy Sullivan

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

Defendants' Joint-Motion for Summary Judgment, the Plaintiffs' Motion for Judgment on the Pleadings, and the BRA's Cross-Motion for Judgment on the Pleadings. After review of the parties' submissions and the relevant law, the Defendants' Joint-Motion for Summary Judgment is **ALLOWED**; the Plaintiffs' Motion for Judgment on the Pleadings is **DENIED**; and the Boston Redevelopment Authority's Cross-Motion for Judgment on the Pleadings is **ALLOWED**.

BACKGROUND

Pursuant to G. L. c. 121A, and St. 1960, c. 652, as appearing in St. 1965, c. 859, Walnut Apartments submitted an application to the BRA[3] seeking approval for its project located at 461 Walnut Avenue, Jamaica Plain (the "Project" or the "Property"). The Property is located within the Jamaica Plain Neighborhood District, which is governed by Article 55 of the Boston Zoning Code.[4] The Project is located between a one-family residential subdistrict and a three-family residential subdistrict, neither of which permit health care and multi-family uses. Boston Zoning Code, Art. 55 Table A and Map 9B.

The Project will redevelop approximately 30,010 square feet of building floor area on a 36,330 square foot parcel. Administrative Record ("A.R.") 59. The Property is bounded by Walnut Avenue to the east, Iffley Road to the north, and Montebello Road to

---

[3] "The BRA is an urban renewal agency and a redevelopment authority that supervises the adoption and administration of urban renewal plans in Boston. The BRA also serves as the planning board for Boston." St Botolph Citizens Comm., Inc. v. Boston Redev. Auth., 429 Mass. 1, 3, (1999).

[4] The goals and objectives of the Jamaica Plain Neighborhood District

> are to provide adequate density controls that protect established residential areas and direct growth to areas where it can be accommodated; to promote mixed-income residential development; to provide for affordable and market rate housing for individuals and families; to promote a viable neighborhood economy, and provide for new economies and expansion of job opportunities; to provide for the well-planned development of institutions to enhance their public service and economic development role in the neighborhood; to preserve, enhance, and create open space; to protect the environment and improve the quality of life; to promote the most desirable use of land in accordance with the Jamaica Plain Neighborhood Plan; and to promote the public safety, health, and welfare of the people of Boston.

Boston Zoning Code, Art. 55, §55-1

the south. A.R. 74. The current building on the Property was constructed in the 1960s and was intended to be used as a nursing home. A.R. 5. Boston Health operated a "90-bed medical clinic," known as the Barbara McInnis House, at the project site from 1993 until 2008. A.R. 5.[5] The building is currently vacant. A.R. 5.

Walnut Apartments proposes to purchase the Property from Boston Health and substantially renovate the Property. A.R. 60. Walnut Apartments further proposes to create a twenty (20) bed respite care facility for homeless adults on the first floor. A.R. 60. The respite care facility will provide homeless individuals "with pre- and post-operative, recuperative, rehabilitative, and palliative care which the mainstream health care system assumes will be provided in patients' homes." A.R. 64. Walnut Apartments intends to lease the respite care facility to Boston Health, which will operate the respite care facility. A.R. 61.

Walnut Apartments also intends to develop thirty (30) residential studio apartments on the second and third floors of the Property. The Project initially contemplated forty (40) units, however, the number of units were ultimately reduced to thirty-one (31) to alleviate residents' concerns. A.R. 61. One of the units, a one-bedroom unit, will be reserved for the facility manager. A.R. 60. The studio apartments will be rented to "very low-income, chronically homeless and medically vulnerable individuals."[6] A.R. 5, 60. The studio apartments will be managed by the Pine Street Inn,

[5] Walnut Apartments envisions that at any given time between "residents, staff, and guests, the average number of people in the facility will be 65-70 people" which is less than one-half as many as the "165-170 people" normally in the Barbara McInnis House. A.R. 68. To minimize the demand for on-street parking, ten (10) parking spaces in the Property's parking lot will be available to neighborhood residents on evenings and weekends. Boston Redevelopment Authority's Concise Statement of Facts ("Concise Facts"), Ex. 2 at 10.

[6] A major goal of Boston's "Leading the Way III" policy report is to create single person occupancy units because this type of housing provides "a good opportunity to move more of Boston's long-term homeless individuals out of shelter[s] and into permanent housing." Concise Facts, Ex. 4 at 5-6.

through its Paul Sullivan Housing program. A.R. 5. Residents on the second and third floors will be permitted to have overnight guests three nights each week. A.R. 366.

On June 28, 2010, Boston Health submitted A Small Project Review Application to the BRA as required by Article 80E of the Boston Zoning Code. A.R. 3. In October 2010, Walnut Apartments submitted its Application to the "Boston Redevelopment Authority for Authorization and Approval of a Project Under Chapter 121A of the General Laws and the Acts of 1960, Chapter 652." ("Application") A.R. 54. As part of the Application, Walnut Apartments and Boston Health sought zoning deviations to allow: (1) health care and multi-family residential uses; (2) nineteen (19) parking spaces as opposed to thirty (30) spaces as required by the Boston Zoning Code; (3) an increased floor area ratio; and (4) the existing rear yard setback. A.R. 148-149. Between June 2010 and November 2010, the Project was discussed at seventeen (17) community meetings and hearings.[7] Consolidated Statement of Material Facts ("Material Facts") par. 22.

On November 16, 2010, the BRA held a public hearing on Walnut Apartments' Application. A.R. 480. During the hearing, the BRA heard testimony from the project manager, project architect, the applicants, the applicants' counsel, as well as from thirty-two (32) witnesses supporting the Project and fourteen (14) witnesses opposing the Project. A.R. 468-469. The BRA voted to approve the Project, by a 4-0 vote with one abstention. A.R. 469. On November 19, 2010, City of Boston Mayor Thomas Menino approved the BRA's Report and Decision. A.R. 471. On either November 24, 2010, or

[7] In response to citizens' concerns regarding traffic flow, an additional driveway will be added to the Property "that will allow the bulk of traffic" to enter and exit the Property using Walnut Avenue. This will minimize traffic on Montebello Road. Concise Facts, Ex. 2, at 11. To reduce traffic and noise, deliveries and pick-ups will only occur between 9:00 a.m. and 5:00 p.m. A.R. 183.

November 29, 2010, the BRA filed its Report and Decision, as well as Mayor Menino's approval with the Boston city clerk. A.R. 467.

In its Report and Decision, the BRA declared "that the Project Area is substandard and/or decadent [as those terms are defined in G. L. c. 121A, § 1] and that such condition is detrimental to the sound growth of the community." A.R. 481.[8] The BRA found that the Project "does not conflict with the Master Plan for the City of Boston[,]" because the area is "appropriate for the healthcare and residential and related uses contemplated for the homeless and disabled individuals who will be served by the Project." A.R. 482. The BRA further concluded that the Project was not "detrimental to the best interests of the public or the City of Boston[,]" and, in fact, the BRA stated the Project "will provide a public benefit by, among other things, providing a significant number of jobs during renovation and operation of the Project, and helping to meet the needs of the City for affordable housing." A.R. 482. Finally, the BRA found that allowing the zoning deviations would not "substantially derogate[] from the intent and purposes of the Boston Zoning Code." A.R. 483.

Walter S. Pollard, Jr. ("Pollard"), Kingsford R. Swan ("Swan"), and Jason Heinbeck ("Heinbeck") are the lead plaintiffs. (collectively "lead plaintiffs") Material Facts par. 64. The lead plaintiffs contend they are aggrieved by the BRA's Report and

[8] In reaching this conclusion, the BRA cited section (2)(b) and Appendix 4 of Walnut Apartments' Application, which describes the substandard and/or decadent conditions. Appendix 4 includes memoranda from two architects detailing a litany of repairs/upgrades that were necessary to make the building habitable. The repairs/upgrades identified include: (1) removal or encapsulation of hazardous materials, including asbestos; (2) substandard fresh air ventilation; (3) unsafe energy egress; (4) inadequate fire protection, which includes detection and suppression systems; (5) unsafe parking configuration; (6) low levels of insulation; (7) water leaks in several exterior walls, as well as portions of the roof; and (8) a non-functional elevator. A.R. 90-93.

Decision because the Project will diminish their property values,[9] and increase: traffic, demand for on-street parking, artificial light, and noise.[10] Complaint pars. 26-27.

Swan resides in a single-family house at 475 Walnut Avenue. Deposition of Kingsford Swan ("Swan Deposition") at 6; A.R. 161. The Project is located directly across Montebello Road from Swan's house. Material Facts par. 30; A.R. 161. Swan typically parks in his driveway, which is located off of Walnut Avenue. Swan Deposition at 19, 52-53. Because of the Project, Swan contends there will be an increase in traffic and demand for on-street parking surrounding his house. He is also concerned that the increase in delivery trucks will impact his ability to enter and exit his driveway. Swan Deposition at 21-22, 52. Swan also believes that the Project will cause an increase in noise and artificial light. Swan Deposition at 30, 33-34, 54-65.

Pollard resides in a single family house on the corner of Walnut Avenue and Peter Parley Road, which is two blocks from the Property. Deposition of Walter S. Pollard, Jr. ("Pollard Deposition") at 6; A.R. 161. Pollard is unable to view the Project from the first and second floors of his house. Pollard Deposition at 9. As a result of the Project, Pollard believes the amount of on-street parking will decrease, and there will be an increase in noise and truck emissions due to delivery trucks idling around his house. Pollard Deposition at 20-21. Pollard further argues that because medical waste was discovered when the Barbara McInnis House operated on the Property, it is likely that medical waste will again be discovered. Pollard Deposition at 20-21.

---

[9] The lead plaintiffs did not submit expert testimony quantifying the Project's effect on the value of their houses. Swan and Pollard, however, testified concerning their separate conversations with different real estate agents who opined that the value of their houses would likely decrease because of the Project. Swan Deposition at 47-48; Pollard Deposition at 56-58.

[10] The lead plaintiffs admit they "have not attempted to quantify the Project's effect on traffic, parking or noise in their neighborhood." Material Facts par. 46. Rather, the lead plaintiffs base their alleged injuries on their experiences when the Barbara McInnis House operated on the property. Pls.' Mem. in Opp'n to Defs.' Joint Mot. for Summ. J. re: Standing at 5-6.

Heinbeck resides in a second-floor condominium unit within 101 Montebello Road. Deposition of Jason Heinbeck ("Heinbeck Deposition") at 6. Although Heinbeck does not have a deeded driveway parking spot, he often parks in the driveway. Heinbeck Deposition at 10. As a result of the Project, Heinbeck alleges vehicular traffic will increase and that it will be more difficult to find on-street parking. Heinbeck Deposition at 12, 25-26. Heinbeck further alleges there will be an increase in delivery trucks that idle in the area, which will decrease the air quality. Heinbeck Deposition at 14. Heinbeck also contends the delivery trucks necessary to support the Property will increase the noise in the neighborhood. Heinbeck Deposition at 28. Additionally, Heinbeck is concerned with the proposed garbage shed because it is in his direct line of sight. Heinbeck Deposition at 22-23.

DISCUSSION

A. Defendants' Joint-Motion for Summary Judgment re: Standing

The Defendants contend based on the record before the court that the lead plaintiffs are unable to support their allegations that they have suffered a substantial injury as a result of the BRA's decision to approve the Project. In response, the lead plaintiffs argue that because they reside in close proximity to the Project area, and because the proposed Project will decrease the value as well as their enjoyment of their properties, while increasing traffic, noise, demand for on-street parking, and artificial light, that they are persons aggrieved as defined in St. 1960, c. 652, § 13, as appearing in St. 1965, c. 859, § 13.[11]

[11] Plaintiffs argue that their injuries should be measured against the impact of zoning-compliant development. In a related context, the Supreme Judicial Court held that "[a]lthough the magnitude of the threat of harm to a potential plaintiff in relation to the threat of harm from a use permissible as of right is a factor that may be considered, it is not dispositive of the standing issue." Marashlian v. Zoning Bd. of Appeals of Newburyport, 421, Mass. 719, 724 (1996). Although the Court does consider the differences in harm, it ultimately is not important because the lead plaintiffs' alleged injuries are insufficient to establish a substantial injury based on

The issue before the court is whether the lead plaintiffs have standing to challenge the BRA's Report and Decision. Statute 1960, c. 652, § 13 provides in relevant part:

> [A]ny person, whether previously a party to the proceeding or not, who is *aggrieved* by such vote [by the BRA], or any municipal officer or board, may file a petition in the supreme judicial or superior court sitting in Suffolk County for a writ of certiorari against the authority to correct errors of law therein . . . . (emphasis added)

As used in St. 1960, c. 652, § 13, "the term 'person aggrieved' is 'to be given a comprehensive meaning.'" Shriners' Hosp. for Crippled Children v. Boston Redev. Auth., 4 Mass. App. Ct. 551, 555 (1976), quoting Dodge v. Prudential Ins. Co., 343 Mass. 375, 381 (1961). Cognizant of the broad powers delegated to the BRA, the Supreme Judicial Court has stated "that the grant of standing contained in St. 1960, c. 652, § 13, is sufficiently broad to allow for review by a person who alleges a substantial injury as a direct result of the BRA's action." Boston Edison Co. v. Boston Redev. Auth., 374 Mass. 37, 46 (1977).

If this case were before the court on a motion to dismiss, it is clear the lead plaintiffs' alleged injuries would satisfy the substantial injury requirement. See Boston Edison Co., 374 at 43-46 (motion to dismiss contesting Boston Edison's standing correctly denied because a projected loss of approximately $3,000,000 per year for the next thirty-five years as a result of the BRA's approval of a project satisfied the substantial injury requirement); Fabiano v. Boston Redev. Auth., 49 Mass. App. Ct. 66, 70 n.8 (2000) (on a motion to dismiss, plaintiff's allegations that her property abutted the project area and her "allegations of noise, traffic, safety and loss of property value" supported her claim that she suffered a substantial injury); Christensen v. Boston Redev.

---

the record before the court.

Auth., 2001 WL 1334189 at *2-*3 (Mass. Super. 2001) ("Christensen I") (allegations of increased noise, vibrations, pollution, litter, and shadows being cast upon their residences because of the BRA's decision was "sufficient to demonstrate standing *at this stage* [motion to dismiss]") (emphasis added). However, the level of review is quite different when the matter is a summary judgment motion.

To survive the Defendants' joint-motion for summary judgment, the lead plaintiffs must "demonstrate, not merely speculate, that there has been some infringement of [their] legal rights."[12] Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass. App. Ct. 208, 211 (2003). The lead plaintiffs, therefore, must submit sufficient evidence from which a "reasonable person could conclude that the claimed injury likely will flow from the [BRA's] action." Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005). "Conjecture, personal opinion, and hypothesis are therefore insufficient." Id.[13]

Swan is the only lead plaintiff who directly abuts the Property. The court, therefore, will focus its analysis on Swan's alleged injuries as well as those of Pollard and Heinbeck who allege the same injuries as Swan with minor variations. The lead plaintiffs' alleged injuries as a result of the BRA's Report and Decision can be

---

[12] In the Plaintiffs' Memorandum of Law in Support of their Motion for Judgment on the Pleadings, the plaintiffs contend, "[i]t has long been established that abutters have 'aggrieved party' standing in certiorari to challenge government action affecting neighboring properties." at 50. Under zoning statutes, G. L. c. 40A and c. 40B, abutters are entitled to a rebuttable presumption that they are "persons aggrieved." Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 33 (2006). Whether the rebuttable presumption extends to St. 1960, c. 652, § 13 is an unresolved question. The court need not resolve this issue to decide this case, because even if Swan—who directly abuts the Property—is presumed to have standing, the Defendants have challenged the presumption and Swan has not put forth sufficient credible evidence to substantiate his allegations. Id. at 33-34.

[13] In support of their alleged injuries, the lead plaintiffs rely on their previous experiences with the Barbara McInnis House. Pls.' Mem. in Opp'n to Defs.' Joint Mot. for Summ. J. re: Standing at 5-6. Although the lead plaintiffs' prior experiences are relevant, they are not controlling. There is a significant difference between the Barbara McInnis House and the proposed use of the Property. Whereas the Barbara McInnis Houses operated a ninety-bed medical clinic, the proposed Project calls for a twenty-bed respite clinic and a thirty-one unit residential complex. A.R. 59-60. The lead plaintiffs' previous experiences although instructive are insufficient to raise their allegations above conjecture and surmise.

categorized as follows: (1) a decrease in the value of their respective properties; (2) an increase in vehicular traffic and conversely a decrease in the availability of on-street parking; (3) an increase in vehicular emissions due to idling delivery trucks; (4) an increase in noise; (5) an increase in artificial light; and (6) an increase in the improper disposal of medical waste.

1. Property Value

The lead plaintiffs contend their properties will lose value because of the Project. Rather than submit the opinion of a real estate expert, the lead plaintiffs rely on their own opinions and two out-of-court conversations with two different real estate agents. Swan testified that he spoke with an unknown real estate agent, who informed him that "[p]eople would be apprehensive about wanting to move in if [he] wanted to sell his house." Swan Deposition at 48. Pollard testified that he spoke with Joe Fallon, who is a local real estate broker, and that Fallon told him that if the Project were approved it would reduce the value of Pollard's house. Pollard Deposition at 56. The lead plaintiffs' personal opinions regarding the Project's impact on the value of their properties is speculative and insufficient to support their allegation. Ramey v. Zoning Bd. of Appeals of Methuen, 2007 WL 517722 at *1 (Mass. App. Ct. 2007) (unpublished decision pursuant to Rule 1:28) (in the absence of an expert's opinion, plaintiff's own representations regarding diminution in property value are insufficient to survive a motion for summary judgment).

2. Vehicular Impact

Next, the lead plaintiffs contend there will be an increase in motor vehicle traffic in their neighborhood, including an increase in idling delivery trucks, and a decrease in

the availability of on-street parking. Although the lead plaintiffs admit they have not "attempted to quantify the Project's effect on traffic, [or] parking," they contend their prior experiences with the Barbara McInnis House supports their allegations. Material Facts par. 46. For the reasons previously given, the lead plaintiffs' experience with the Barbara McInnis House is unavailing.

The court, therefore, is left with the lead plaintiffs' conclusory and unsupported contentions that the Project will dramatically increase the number of vehicles in the vicinity and the demand for on-street parking. Pollard Deposition at 65 (acknowledging that "there is some speculation" in his conclusion that the "number of visitors, delivery staff and workers put together would exceed those numbers at the Barbara McInnis House[]"); Heinbeck Deposition at 34-36 (implying that because the Property includes nineteen parking spots as opposed to the thirty required by the Boston Zoning Code "there would probably be some [on-street parking] overflow[]"). Without an expert opinion, the lead plaintiffs' personal opinions and assumptions regarding the Project's impact on the neighborhood's traffic patterns is speculative and insufficient to survive the Defendants' joint-motion for summary judgment. Barvenik v. Board of Aldermen of Newton, 33 Mass. App. Ct. 129, 133 (1992), abrogated on other grounds by Marashlian, 421 Mass. at 724 (plaintiff seeking standing on traffic and parking-related grounds must "offer more than conjecture and hypothesis"); Kasparian v. Horning, 2009 WL 1622862 at *8 (Mass. Land Ct. 2009) (effect of traffic and parking on neighborhood required expert testimony and plaintiffs' conclusory and speculative statements did not "constitute competent evidence"). Furthermore, the lead plaintiffs' conclusory opinions are directly

contradicted by the Boston Transportation Department's determination that "19 [parking] spaces are enough due to the type of service being rendered in the building." A.R. 420.

The lead plaintiffs further allege they have standing because the Project will increase vehicular emissions and overall neighborhood noise. The lead plaintiffs admit that they "have not attempted to quantify the Project's effect on . . . noise in their neighborhood." Material Facts par. 46; Swan Deposition at 54 (admitting that he has not "consulted a noise engineer"). The lead plaintiffs' concern for increased emissions and noise is based on their past experiences and speculation that future delivery trucks will allow their engines to run while waiting to make deliveries to the Property. Swan Deposition at 34 (describing how the engines of delivery trucks and vans would be left on while drivers waited in front of his house); Pollard Deposition at 18-19 (detailing how small delivery trucks would "sit and idle" in front of his house and that the trucks made a "racket" and gave off a diesel fuel smell); Heinbeck Deposition at 14 (discussing how on a weekly basis delivery trucks would idle on the street near his home). The allegations of the lead plaintiffs are anecdotal and grounded in past events that have not been quantified with respect to this specific Project. Statement of Material Facts par. 46. Their allegations, therefore, are insufficient to survive the Defendants' joint-motion for summary judgment.

3. Reduced Enjoyment of Plaintiffs' Houses

Finally, the lead plaintiffs assert that the BRA's approval of the Project will "reduce the enjoyment of their homes." Complaint pars. 26-27. This argument encompasses their previously discussed alleged injuries as well as the specific arguments that follow. Swan contends the increased artificial light from the Property constitutes an

injury. Swan Deposition at 54-65. Swan, however, admits that he has not consulted a lighting expert, and throughout his testimony indicates that he would like more lighting on the Montebello Road side of his house. Swan Deposition at 54, 61-65. Heinbeck believes the placement of the ten-foot-by-ten-foot garbage shed in the direct line of sight from his house constitutes an injury. Heinbeck Deposition at 22-24. Heinbeck, however testified that "other than common sense" he has not made any effort to demonstrate the effect of the dumpster on his property. Heinbeck Deposition at 22-23. Pollard alleges he is an aggrieved person because twice while the Barbara McInnis House was open he found medical refuse in front of his house. These allegations are insufficient to confer standing, because these allegations constitute nothing more than the lead plaintiffs' own anecdotes and speculative opinions.

Since I conclude that the lead plaintiffs' alleged injuries are based on speculation, conjecture, and unsubstantiated personal opinions, their alleged injuries are insufficient to withstand the Defendants' joint-motion for summary judgment on the issue of standing. Notwithstanding that conclusion, I will address the issues raised in the parties' cross-motions for judgment on the pleadings.

B. Cross-Motions for Judgment on the Pleadings

The Plaintiffs contend that the BRA's Report and Decision approving the Project was an error of law because its findings are not supported by substantial evidence.[14]

[14] The Plaintiffs' Complaint includes the following claims: the BRA's determination that the Project site is a sub-standard and/or decadent area is erroneous (Count I); the requested zoning deviations substantially derogate from the intent and purpose of the Boston Zoning Code (Count II); the Project conflicts with the Master Plan for the City of Boston (Count III); the BRA's grant of exemptions from the Boston Zoning Code "comprised spot zoning" (Count IV); the BRA's Report and Decision violated "the BRA's Rules and Regulations Governing Chapter 121A Projects" (Count V); the Project is not in the "best interests of the public or the City of Boston" (Count VI); the Project is "inconsistent with the most suitable development of the city" (Count VII); and the BRA improperly granted a "three year extension to the period of property tax exemption" (Count VIII).

In evaluating the BRA's actions under G. L. c. 121A and St. 1960, c. 652, a reviewing court applies the substantial evidence test. Boston Edison Co., 374 Mass. at 48. The substantial evidence test "is commonly understood to require that agency findings rest upon 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Id. at 54, quoting Bunte v. Mayor of Boston, 361 Mass. 71, 74 (1972). Although the reviewing court must examine the entire record it may not substitute its judgment for that of the BRA. Id. at 70; Christensen v. Boston Redev. Auth., 60 Mass. App. Ct. 615, 620 (2004) ("Christensen II").

To approve an application for this type of project, the BRA must determine that the project satisfies the criteria set forth in G. L. c. 121A, §§ 1-2 and St. 1960, c. 652, § 13. The BRA must determine that: (1) the project area is blighted open, sub-standard, or decadent; (2) the project constitutes a public use and benefit; (3) any deviation from the applicable zoning code would not substantially derogate from the intent and purpose of the zoning code; (4) the project does not conflict with the master plan for the city, and the project is consistent with the most suitable development of the city; and (5) the project is not detrimental to the best interests of public safety and convenience.

1. Determination that the Project Area is a Sub-standard and/or Decadent Area

The BRA concluded that the "Project Area is substandard and/or decadent . . . and that such condition is detrimental to the sound growth of the community." A.R. 481. The Plaintiffs contend the BRA's determination is not supported by substantial evidence in part because the BRA used the phrase "and/or," which indicates it could not decide between sub-standard and decadent. This argument merits little discussion. See Boston

Edison Co., 374 Mass. at 59-60 (affirming BRA's finding that the project area was "decadent and/or sub-standard").

General Laws c. 121A, § 1 defines a decadent area 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 in need of major maintenance or repair . . . [which] makes 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.

In finding that the Project was decadent,[15] the BRA relied upon the reports of two architects included within Walnut Apartments's Application. A.R. 90-93. After an extensive inspection of the Property, the architects concluded that the building was in "sub-standard condition and [was] physically deteriorated, in disrepair and [was] essentially uninhabitable." A.R. 92. The architects identified the presence of "[v]ery significant amounts of hazardous materials including asbestos in many visible locations. of the ceilings and floors of all levels." A.R. 92. The architects also noted that the building lacked: (1) adequate air ventilation; (2) electrical systems; (3) fire detection and suppression systems; and (4) insulation. A.R. 92-93. One architect concluded that the building required "significant and costly repairs, alterations, code updates and environmental upgrades in order to be adequate for occupancy[.]" A.R.92. Staff members advised the BRA that the "conversion of a substandard property to a permanent housing use, along with planned exterior and site improvements will revitalize the Project Area and surrounding neighborhood, and contribute to the improvement and welfare of the surrounding neighborhood." A.R. 473.

[15] Since I conclude that the BRA's determination that the Project area was decadent is not in error. I do not address whether the Project area was also sub-standard.

Furthermore, simply because the Property is surrounded by a neighborhood that is described by its residents as a "vibrant and soundly growing" area, the BRA is not precluded from determining that the Property itself is decadent. "Although the conditions of the district as a whole are relevant, the statute is *directed at the project area itself*." Christensen II, 60 Mass. App. Ct. at 622. "Nothing in the statute suggests that [decadent] areas cannot exist in or near otherwise vibrant neighborhoods." Id. The BRA's focus was correctly on the specific property to be redeveloped and not the overall conditions of the neighborhood.

After examination of the complete record of the BRA proceedings, I conclude that substantial evidence supports the BRA's determination that the Project area is decadent.

2. Determination that the Project Provides a Public Use and Benefit

In determining whether a proposed project constitutes a public use and benefit, the BRA "should include an evaluation of both the elimination of blight through construction and the nature of the purposes to be served by the proposed project." Boston Edison Co., 374 Mass. at 61. If a project eliminates "substandard conditions and replac[es] them with something useful and beneficial to the public" the project satisfies St. 1960, c. 652, § 13's requirement that the project constitute a public use and benefit. Id. at 62.

The BRA's Report and Decision finds that the Project area has been a matter of concern to residents for sometime and that the Project will "revitalize the Project Area and the surrounding neighborhood." A.R. 482. The Report and Decision concludes that the Project will "provide a public benefit, by among other things, providing a significant

number of jobs during renovation and operation of the Project, and helping to meet the needs of the City for affordable housing." A.R. 482. There is ample evidence in the record to support the BRA's determination that the Project constitutes a public use and benefit.

The Project will create a significant number of jobs during the renovation phase and additional long-term jobs once the facility opens. A.R. 69. The record indicates the Property was an appropriate location because it previously served as a medical facility and is conveniently located around "numerous human service agencies[.]" A.R. 5. Additionally, the Project is conveniently located within walking distance to "several subway stops on the MBTA Orange Line" and "eight different bus routes." A.R. 5.

As it pertains to the actual facilities, the respite care facility will "expand by 20 percent the City's current capacity to provide" medical services to homeless adults. A.R. 64. Furthermore, one of the major goals articulated in Boston's "Leading the Way III" policy report is to create single person occupancy units because this type of housing provides "a good opportunity to move more of Boston's long-term homeless individuals out of shelter[s] and into permanent housing." Concise Facts, Ex. 4 at 5-6.[16] The Project directly addresses the lack of permanent housing for long-term homeless individuals.

After a review of the complete record before the BRA, I conclude that substantial evidence supports the BRA's determination that the Project constitutes a public good and benefit.

[16] Although the "Leading the Way III" Plan Summary is not part of the administrative record, the BRA was undoubtedly aware of it because the BRA was involved in formulating it. Concise Facts, Ex. 4, at Plan Summary.

3. Determination that the Project does not Derogate From the Intent and Purposes of the Boston Zoning Code[17]

By way of its Report and Decision, the BRA granted permission for the Project to deviate from the Boston Zoning Code with respect to: (1) multi-family residential and health care uses, both of which are forbidden in this area; (2) insufficient off-street parking and loading; (3) excessive floor area ratio; and (4) insufficient rear yard. A.R. 148-149, 483. The Plaintiffs assert that because both multi-family residential and health care uses are prohibited by the Boston Zoning Code, allowing the Project to proceed substantially derogates from the intent and purpose of the Boston Zoning Code.

Statute 1960, c. 652, § 13, as appearing in St. 1965, c. 859, § 2, authorizes the BRA to grant a zoning deviation if the proposed project contravenes "any zoning, building, health or fire law, code, ordinance or regulation[.]" The BRA may grant the necessary zoning deviation "if it finds that such permission may be granted without substantially derogating from the intent and purposes of such law, code, ordinance or regulation[.]" St. 1960, c. 652, § 13. When a zoning deviation allows for the introduction of a non-conforming use into an area zoned for residential use, the proper inquiry is "whether the introduction of the non-conforming use 'would unquestionably alter the essential character of an otherwise residential neighborhood.'" Boston Edison Co., 374 Mass. at 66 (citation omitted).

[17] The Plaintiffs did not address Count IV of their Complaint in their Memorandum of Law in Support of Their Motion for Judgment on the Pleadings but the administrative record permits the Court to dispose of it. Count IV alleges the BRA's grant of exemptions from the applicable zoning regulations constituted spot zoning. Spot zoning is defined as the "singling out of a particular parcel for different treatment from that of the surrounding area, producing, without rational planning objectives, zoning classifications that fail to treat like properties in a uniform manner." National Amusements, Inc. v. Boston, 29 Mass. App. Ct. 305, 312 (1990). In this case, the BRA granted the relevant zoning deviations in furtherance of "rational planning objectives"—providing health care and housing for homeless individuals. A.R. 481-482; Concise Facts, Ex. 2 at 5-6. Accordingly, the Plaintiffs' contention that the zoning deviations constituted spot zoning fails.

Section 55-1 of Article 55 of the Boston Zoning Code, the Jamaica Plain Neighborhood District, identifies:

> [t]he goals and objectives of this Article and the Jamaica Plain Neighborhood Plan are to provide adequate density controls that protect established residential areas and direct growth to areas where it can be accommodated; to promote mixed-income residential development; to provide affordable and market rate housing for individuals and families; to promote a viable neighborhood economy . . . to provide for the well-planned development of institutions to enhance their public service and economic development role in the neighborhood . . . .

Although the Project introduces two uses—multi-family residential and health care—that are prohibited within this sub-district of the Jamaica Plain Neighborhood District, there is evidence that a similar, although substantially larger medical facility operated on the Property from 1993 until 2008. A.R. 5. Thus, the proposed use of the Property is not entirely out of character based on the Property's previous use. I am not in a position to conclude that the Project would unquestionably alter the neighborhood's essential character. I defer to the BRA's experience "in matters involving redevelopment in the City of Boston[.]" Boston Edison Co., 374 Mass. at 70.

With respect to the Plaintiffs' contention that the Project would increase traffic and demand for on-street parking, there is substantial evidence in the record supporting the BRA's determination that it would not. To reduce traffic and noise, deliveries and pick-ups will only occur between 9:00 a.m. and 5:00 p.m. A.R. 183. In an effort to further reduce traffic on Montebello Road, the developers added an additional driveway that would "allow the bulk of traffic" to enter and exit the Property by way of Walnut Avenue. Concise Facts, Ex. 2 at 11. The Boston Transportation Department concluded that nineteen parking spaces would be sufficient to "support the type of service[s] being rendered in the building." A.R. 420. Ten of the nineteen parking spaces will be available

for use by neighborhood residents on weekday nights and all day during the weekend. A.R. 464. The record contains substantial evidence supporting the BRA's conclusion that the Project's traffic impact will not substantially derogate from the intent and purpose of the Boston Zoning Code. There is also substantial evidence in the record supporting the BRA's determination that the zoning deviations granted for the floor area ratio (.783 as opposed to .7) and the insufficient rear yard size (rear lot is eighteen feet as opposed to twenty feet) would not substantially derogate from the intent and purpose of the Boston Zoning Code.

4. Determination that the Project does not Conflict with the City's Master Plan

As required by St. 1960, c. 652, § 13, the BRA found that the Project did not conflict with the Master Plan for the City of Boston, and further found that it was not inconsistent with the most suitable development of the city. The Plaintiffs contend the BRA's decision conflicts with Boston's Master Plan because "the proposed development . . . would seriously undermine the goal of protecting the established Parkside residential area from excessive density [.]" Pls.' Mem. of Law in Supp. of Mot. for J. on Pleadings at 38.

Boston Zoning Code, art. 55, § 55-2 states, "[t]he Jamaica Plain Neighborhood Plan, when approved also shall serve as the portion of the general plan for the City of Boston applicable to the Jamaica Plain Neighborhood District." As detailed previously, the Jamaica Plain Neighborhood District Plan establishes numerous goals and objectives, including: providing adequate density controls to protect established residential areas; promoting mixed-income residential development; providing affordable and market rate housing for individuals; the expansion of job opportunities; providing for the well-

planned development of institutions to enhance their public service; to create and preserve open space; and to use the land in the most desirable way appropriate in accordance with the Jamaica Plain Neighborhood District Plan. Boston Zoning Code, art. 55, § 55-1. In its Report and Decision the BRA determined that "the Project Area is appropriate for healthcare and residential and related uses contemplated for the homeless and disabled individuals who will be served by the Project." A.R. 482. The administrative record contains sufficient evidence to support the BRA's determination.

The Project will provide thirty units of affordable housing for no/low-income individuals. A.R. 5. The Project will also "provide the necessary health and social service support that many individuals need to maintain their housing successfully." A.R. 195 (Letter from the Boston Public Health Commission). The Project will create construction jobs during the redevelopment phase, and upon completion it will create "permanent maintenance, management, and social service employment opportunities[.]" A.R. 63. The Project also promotes the "well-planned development" of institutions because it redevelops a former public health facility into a mixed-use facility that will provide desperately needed healthcare services to a chronically underserved population. A.R. 5, 63-64, 187, 195. The Project will also enhance the amount of open space and add vegetative screening to the Property. A.R. 7, 460-461.

Although the Project satisfies many of the Jamaica Plain Neighborhood District Plan's goals and objectives, the Plaintiffs contend the Project completely undermines the Plan's objective to "provide adequate density control" to protect residential districts. The administrative record contains sufficient evidence to support the BRA's decision on this matter as well. The Property formerly housed the Barbara McInnis House, which

operated a ninety-bed respite care facility. The Project consists of a twenty-bed respite facility and thirty-one single occupancy apartments. A.R. 5. The BRA also found that the Project would not have a substantial impact on the neighborhood. Supra §B.III.

Substantial evidence supports the BRA's conclusion that the Project does not conflict with the City of Boston's Master Plan.

5. Determination that the Project is not Detrimental to the Best Interests of Public Safety and Convenience

For the reasons discussed above, there is substantial evidence in the record supporting the BRA's determination that the Project is not detrimental to the best interests of public safety and convenience.

C. Miscellaneous Matters

The Plaintiffs assert that the public hearing was "merely a perfunctory exercise" because the BRA's Report and Decision was distributed before the hearing began. Pls.' Mem. of Law in Supp. of Mot. for J. on Pleadings at 46. During the public hearing, many of the individuals who spoke against the Project were the same individuals who previously submitted letters to the BRA articulating their reasons against approving the Project. Furthermore, there is no evidence in the record that the BRA did not listen to and consider the statements made during the public hearing. See, e.g., Christensen II, 60 Mass. App. Ct. at 618 (BRA Report and Decision concerning the approval of a G. L. c. 121A project issued on the same day the public hearing was held).

Count Five of the Plaintiffs' Complaint alleges that the BRA's Report and Decision "was undertaken in violation of the BRA's Rules and Regulations Governing Chapter 121A Projects." Complaint par. 48. The Plaintiffs, however, failed to address this claim in either of their memoranda. Although the BRA's notice was not as timely as

required by G. L. c. 121A, § 6A, which requires that notice be provided at least fourteen days prior to the hearing, it is apparent that the BRA's untimely notice did not adversely affect the Plaintiffs, especially in light of the fact that fourteen individuals testified against the Project during the public hearing. Material Facts par. 26: A.R. 469. See Massachusetts Prisoners Ass'n Political Action Comm. v. Acting Governor, 435 Mass. 811, 824 (2002) ("The court's power on certiorari is not exercised to remedy mere technical errors that have not resulted in manifest injustice.").

Count Eight of the Plaintiffs' Complaint alleges that the BRA's grant "of a three year extension to the period of property tax exemption afforded the Project violated Chapter 121A and Section 13." Complaint par. 54. The BRA granted Walnut Apartments's request for an additional three-year property tax exemption extension because the "Project will provide public amenities of affordable housing[.]" A.R. 483. General Laws c. 121A, § 10 provides that any "project or portion thereof of housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing . . . shall receive . . . an initial fifteen year period of tax exemption as provided by section 10 and shall receive an additional period of tax exemption equal to twenty-five years." The administrative record shows the Project was funded in part by loans provided by federal and state government agencies. A.R. 66. It is undisputed that the Project, with its single-room occupancy units, will develop low income housing. A.R. 5. The BRA, therefore, acted within its discretionary power to extend the property tax exemption period by three years. See G. L. c. 121A, § 10.

ORDER

For the above-mentioned reasons, the Boston Redevelopment Authority, Walnut Avenue Apartments Limited Partnership, and the Boston Health Care for the Homeless Program, Inc.'s Joint-Motion for Summary Judgment re: Standing is **ALLOWED**. The Plaintiffs' Motion for Judgment on the Pleadings is **DENIED**, and Boston Redevelopment Authority's Cross-Motion for Judgment on the Pleadings is **ALLOWED**.

S. Jane Haggerty
Justice of the Superior Court

Date: January 13, 2012