COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

CONSOLIDATED CASES 14 MISC 488217 and 14 MISC 488218
(Consolidated before Judge Foster)

DANIEL C. HILL,

Plaintiff

v.

HUGH RUSSELL, H. THEODORE COHEN, STEVEN COHEN, THOMAS SIENIEWICZ, STEVE WINTER, and CATHERINE PRESTON CONNOLLY, as they are members of the CAMBRIDGE PLANNING BOARD, and LMP GP HOLDINGS, LLC,

Defendants

14 MISC 488217

AND

MICHAEL HAWLEY, GRAHAM GUND, MARIE SACCOCCIO, and ROGER SUMMONS,

Plaintiffs

v.

PLANNING BOARD OF CAMBRIDGE, and HUGH RUSSELL, H. THEODORE COHEN, STEVEN COHEN, THOMAS SIENIEWICZ, STEVE WINTER, and CATHERINE PRESTON CONNOLLY, as they are members of the PLANNING BOARD, and LMP GP HOLDINGS, LLC, and the COMMONWEALTH OF MASSACHUSETTS,

Defendants

14 MISC 488218

MEMORANDUM IN SUPPORT OF LMP GP HOLDINGS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Mass. R. Civ. P. 56, Land Court Rule 4, and this Court's order dated January 15, 2015, Defendant LMP GP Holdings, LLC ("LMP") submits this Memorandum in support of its motion for partial summary judgment.

Statement of the Issues Presented

Is LMP entitled to judgment as a matter of law that the Sullivan Courthouse building in East Cambridge (the "Courthouse Building") is a pre-existing nonconforming structure that may be altered pursuant to M.G.L. c. 40A, § 6 ("Section 6") and Cambridge Zoning Ordinance Article 8 ("Article 8") where: (1) the Courthouse Building is a lawfully pre-existing nonconforming structure; (2) both Section 6 and Article 8 allow for the alteration of such structures; (3) there is directly applicable and controlling case law in LMP's favor on the issue; and (4) logic and common sense support this outcome?

Summary of Argument and Statement of Legal Elements

1. At the time of its construction, the Courthouse Building complied with Cambridge zoning except in one respect—it exceeded the maximum 4.0 FAR. However, under well-settled law, as stipulated by the parties, the Courthouse Building was immune from the FAR requirement (and all other requirements) of the Ordinance. See, e.g. Inspector of Buildings of Salem v. Salem State College, 28 Mass.App.Ct. 92, 95 (1989); Massachusetts Bay Transportation Authority v. City of Somerville, 451 Mass. 80, 86 (2008); Village on the Hill v. Massachusetts Turnpike Authority, 348 Mass. 107, 118 (1964); see generally, Bobrowski, Handbook of Massachusetts Land Use and Planning Law, 3rd Edition, at § 4.20 ("Generally,

federal and state governments have been held immune from municipal regulation"), citing Durkin v. Board of Appeals of Falmouth, 21 Mass.App.Ct. 450, 455 (1986). Because it was constructed in compliance with applicable law, the Courthouse Building, even though nonconforming with the FAR provision of the Ordinance was lawful when built and remains so today. See, Durkin v. Board of Appeals of Falmouth, 21 Mass.App.Ct. 450, 453 (1986) ("If the use beginning in 1959 could then have been regarded as nonconforming, but immune because of Federal use, it was a lawful use.") (emphasis added).

2. Section 6 provides in relevant part that "a zoning ordinance or by-law shall not apply to structures....lawfully in existence...but shall apply to...any reconstruction, extension or structural change of such structure...[but] [p]re-existing nonconforming structures...may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." Article 8 echoes Section 6 and provides that "[a]s provided in Section 6, Chapter 40A, G.L., permits for the change, extension, or alteration of a pre-existing nonconforming structure...may be granted as permitted in Subsections 8.22.1 and 8.22.2 below. Such a permit...a special permit in the case of construction authorized in Section 8.22.2 may be granted only if the permit granting authority finds that such change, extension, or alteration will not be substantially more detrimental to the neighborhood than the existing nonconforming structure." Accordingly, under the plain language of Section 6 and Article 8 "nonconforming structures" are structures which do not comply with zoning but are "lawfully in existence," like the Courthouse. See, generally, M. Bobrowski

Handbook of Massachusetts Land Use and Planning, at § 6.05, p. 191 (Third Ed. 2011).

3. By a straight forward application of the statutory language, LMP is entitled to summary judgment because the Courthouse Building was lawfully begun and is lawfully in existence under the principle of governmental immunity. As a structure that came into existence lawfully and without the need of any variance or other local zoning approval, the Courthouse Building is a pre-existing nonconforming structure under Section 6 and under Article 8.

4. Moreover, directly applicable and controlling case law is on LMP's side. The Appeals Court has ruled in Durkin v. Board of Appeals of Falmouth, 21 Mass.App.Ct. 450 (1986) that a building built legally under the immunity principle, but which does not comply with local zoning, is nonconforming "in fact," and that once that building comes out of government ownership and "loses" its immunity, it may be altered as a pre-existing nonconforming use (or, by logical extension, structure) pursuant to Section 6 and similar provisions of local zoning bylaws. See Durkin, supra at 452 (overturning a zoning board's view that a "constitutionally immune use could not be treated as a lawful conforming use" and remanding the matter to the local board for findings under Section 6 and a local zoning bylaw substantively identical to Section 6). Durkin has been followed and applied by this Court. See, Currier v. Smith, 9 LCR 371 (July 23, 2001) (Lombardi, J.) and Tsouvalis v. Town of Danvers, 6 LCR 252 (Kilborn, J.).

5. This result is not only mandated by law, it is consonant with logic and common sense. Even if the Courthouse Building had been constructed unlawfully (which is not the case), the City of Cambridge could not require its removal or require that it be brought into compliance with zoning. The Courthouse Building is protected from any municipal enforcement action by M.G.L. c. 40A, § 7 ("Section 7"). Section 7 protects nonconformities which have existed for

over 10 years from municipal enforcement actions. The Courthouse Building has existed for over 40 years. Accordingly, even if by application of the statutory language of Section 6 and Article 8 the Courthouse Building did not qualify as a preexisting nonconforming structure that can be altered by special permit, and even if the holdings of Durkin and its progeny did not determine the same thing, due to the protection afforded by Section 7 the Courthouse Building would be entitled to remain in place exactly as it is and there would be no way for the municipality to force or require the Commonwealth to make any changes to the Courthouse Building or require that it be brought into conformity with zoning. Moreover, the Courthouse Building as it exists today would still be available for use by the Commonwealth. Under these circumstances, it makes no logical sense to prevent the Courthouse Building from being redeveloped for a higher and better use—a redevelopment which will actually diminish some of the building's existing dimensional nonconformities.[1] Finally, to rule otherwise would be to encourage the waste of a valuable resource and to potentially diminish not only the value of this Commonwealth asset but other similar assets in the Commonwealth's ownership. This would work a serious harm to the Commonwealth and its taxpaying citizens.

6. Plaintiffs have argued that the Courthouse Building is analogous to a structure allowed by a variance. The Plaintiffs cite Mendez and other cases to argue that because the

[1] As noted, when the Courthouse Building was constructed in 1974 it complied with all aspects of the Ordinance save one: it exceeded the then-applicable 4.0 FAR. Subsequently, the FAR provision was amended to reduce the allowable FAR to 2.75/3.0 and an 80-foot height limit was adopted for the zone in which the Courthouse Building is located. Accordingly, the Courthouse Building pre-exists the adoption of those now applicable and relevant zoning limitations. Moreover, the alterations proposed in connection with the Project will actually reduce the nonconformities by eliminating two stories from the existing 22-story structure and reducing overall FAR.

nonconformities of a structure authorized by a variance cannot be expanded or increased via a Section 6 Finding, neither should Section 6 allow alteration of the Courthouse Building. But the Courthouse Building is not a structure authorized by a variance. It exists as a result of a different and more primary and ancient legal principle—sovereign immunity. Accordingly, the variance cases relied on by Plaintiffs are inapposite and of no relevance. Plaintiffs also have cited to and relied upon cases like Cumberland Farms. In Cumberland Farms a property owner made improvements to a property without first obtaining the required zoning relief. The Court ruled that the improvements that had been introduced illegally did not become preexisting nonconforming structures because of the mere passage of time and the resulting benefit of Section 7 protection. The case has no relevance because the Courthouse Building was not built illegally.

The Plaintiffs also cite cases that stand for the proposition that once the governmental use of a preexisting noncompliant structure or use ceases, so does the governmental immunity. LMP does not dispute that law, but it does not control this case. LMP is not arguing that the governmental immunity of the Courthouse Building will run with the land or that because the Courthouse Building was once immune, it will retain its immunity when transferred out of Commonwealth ownership. In fact, LMP's awareness of this legal principle is the reason that LMP has applied for zoning permits for its proposed redevelopment of the Courthouse Building. LMP well understands that once the Commonwealth sells LMP the Courthouse Building and Property, the governmental immunity from zoning ceases and the Property and Courthouse Building are subject to zoning. However, it is equally the case that the Courthouse Building becomes subject to zoning as a preexisting nonconforming structure, not as an illegal structure or

one that was introduced by variance.

Finally, Plaintiffs have argued that cases from outside of Massachusetts are somehow instructive on the question of whether the Courthouse Building is a preexisting nonconforming structure under Massachusetts law. Those cases obviously do not control and are of no precedential value whatsoever. Moreover, they are distinguishable in significant respects.

Factual and Procedural Background

These consolidated actions are appeals brought by Plaintiffs pursuant to M.G.L. c. 40A, § 17 to challenge certain special permits granted by the Board to LMP in connection with LMP's proposed acquisition and redevelopment of the Courthouse Building and Property. One of the special permits Plaintiffs challenge is a special permit granted pursuant to Article 8, Section 8.22, which allows alteration of a pre-existing nonconforming structure by special permit upon findings by the Board.

In their complaints, Plaintiffs allege, among other things, that the Courthouse Building is not a pre-existing nonconforming structure and so a special permit under Article 8 is not available to LMP. Plaintiffs argue that in order to alter the Courthouse Building, LMP needs a variance.

On January 14, 2015, the parties appeared for a Case Management Conference. During that conference, the Court and parties agreed that the issue of whether the Courthouse Building is a pre-existing nonconforming structure and therefore able to be altered pursuant to Article 8 could be resolved on cross-motions for summary judgment. The Court and parties further agreed that there is no dispute as to any material fact and the issue could be resolved as a matter of law. Accordingly, the Court instructed the parties to file a joint statement of undisputed facts (the

"Statement of Facts") on which the cross-motions would be based. The parties did so. The undisputed facts agreed to by the parties are as follows:

The Courthouse Building was constructed between 1968 and 1974. Statement of Facts ¶1. At the time the Courthouse Building was constructed, it complied with all applicable dimensional requirements of the Cambridge Zoning Ordinance (the "Ordinance") except with respect to the Ordinance's maximum allowed Floor Area Ratio ("FAR"), which were 4.0. Statement of Facts ¶3. The Courthouse Building was in excess of the FAR.[2] Statement of Facts ¶3. However, as a building of the county government, the Courthouse Building was immune from the FAR requirement of the Ordinance and from all other municipal zoning requirements. Statement of Facts ¶4.

The Commonwealth subsequently became owner of the Courthouse Building and Property, which housed the Middlesex Superior Court, the Cambridge District Court, associated Court offices and agencies, and the Middlesex County jail facility. Statement of Facts ¶8. The Commonwealth has moved its operations out of the Courthouse and intends to transfer the Courthouse Building and Property to LMP. Statement of Facts ¶9. LMP intends to redevelop the Property and Building for mixed use to include commercial/retail uses on the ground floor

[2] The Courthouse Building is approximately 280 feet in height and contains approximately 590,000 square feet of floor area on a 1.37 acre lot—roughly an FAR of about 8.6. Statement of Facts ¶1. At the time that the Courthouse Building was constructed, the Ordinance did not contain any height limitation with respect to the Business B zoning district in which the Courthouse Building and Property are located. Subsequently, the Ordinance was amended to create an 80-foot height limit for the district. Statement of Facts ¶5. The FAR requirement also was amended after the Courthouse Building was constructed to reduce FAR in the district to 2.75/3.0. Statement of Facts ¶5.

and residential and offices uses above. Statement of Facts ¶11.[3]

Summary Judgment Standard

A moving party is entitled to summary judgment where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.[4] See Mass. R. Civ. P. 56(c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711-12 (1991); see also Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983) ("Summary judgment is a device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved.") (internal quotation marks omitted).

Discussion

I. Governmental Immunity and the Courthouse Building

It is well-established that the government (both federal and state) is immune from local zoning. The reported Massachusetts appellate cases show that, absent a specific statutory provision to the contrary, the Commonwealth is generally immune from local zoning ordinances. See, e.g. Inspector of Buildings of Salem v. Salem State College, 28 Mass.App.Ct. 92, 95 (1989); Massachusetts Bay Transportation Authority v. City of Somerville, 451 Mass. 80, 86 (2008); Village on the Hill v. Massachusetts Turnpike Authority, 348 Mass. 107, 118 (1964); see

[3] All these uses are allowed by right in the Business B district. Statement of Facts ¶2. Among other things, LMP's project will entail the elimination of two stories of the existing 22-story Courthouse Building and a reduction of the building's FAR. Statement of Facts ¶11.

[4] A fact is "material" only when it possesses the capacity, if determined as the nonmoving party wishes, to alter the outcome of the lawsuit under the applicable legal principles. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (construing Fed. R. Civ. P. 56); Avnet v. GZA Geoenvironmental, Inc., 2 Mass. L. Rptr. 93, 94 (Mass. Super. Ct. Apr. 15, 1994). A dispute is "genuine" only when the relevant evidence could lead a reasonable factfinder to decide it in the manner described by the nonmoving party. See Anderson, 477 U.S. at 248.

generally, M. Bobrowski, Handbook of Massachusetts Land Use and Planning Law, at § 4.20, at p. 146, et seq. (Third Edition 2011) ("Generally, federal and state governments have been held immune from municipal regulation"), citing Durkin v. Board of Appeals of Falmouth, 21 Mass.App.Ct. 450, 455 (1986). This immunity extends to county government because "an entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulations (absent statutory provisions to the contrary)." County Commissioners of Bristol v. Conservation Commission of Dartmouth, 380 Mass. 706 (1980) (county's construction of jail immune from Dartmouth zoning by-law).[5] It is undisputed that at the time the Courthouse was constructed, it was immune from Cambridge zoning. Statement of Facts ¶11.

The legal immunity from local zoning means that the Courthouse Building, while exceeding the then applicable FAR limit, was constructed legally. See, Durkin v. Board of Appeals of Falmouth, 21 Mass.App.Ct. 450, 453 (1986) ("If the use beginning in 1959 could then have been regarded as nonconforming, but immune because of Federal use, it was a lawful use.") (emphasis added). It was not constructed in violation of zoning nor did it require any zoning relief in order to be built. No zoning regulations applied to its construction or its use.[6]

II. Section 6 and Article 8 Protect Lawful Structures

Section 6 and Article 8 of the Ordinance protect uses and structures that are lawfully in

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[5] The Courthouse Building was built by Middlesex County. Ownership subsequently was transferred to the Commonwealth. Statement of Facts ¶7.

[6] The 4.0 FAR limit that existed when the Courthouse Building was constructed was later changed to reduce allowable FAR even more. The allowable FAR under the current Ordinance is 2.75/3.0. Also, after the Courthouse Building was constructed, a height limitation of 80 feet was introduced. Statement of facts ¶¶5 and 6. The Courthouse Building preexisted these changes and so, as to the existing bulk and dimensional provisions of the Ordinance, the building is a pre-existing nonconforming structure.

existence. Section 6 provides in relevant part that "a zoning ordinance or by-law shall not apply to structures....lawfully in existence...but shall apply to...any reconstruction, extension or structural change of such structure...[but] [p]re-existing nonconforming structures...may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." Article 8 echoes Section 6 and provides that "[a]s provided in Section 6, Chapter 40A G.L., permits for the change, extension, or alteration of a pre-existing nonconforming structure...may be granted as permitted in Subsections 8.22.1 and 8.22.2 below. Such a permit...a special permit in the case of construction authorized in Section 8.22.2 may be granted only if the permit granting authority finds that such change, extension, or alteration will not be substantially more detrimental to the neighborhood than the existing nonconforming structure." Where a use or a structure lawfully exists before a zoning bylaw or ordinance is enacted, the use or structure has the status of a lawful pre-existing nonconforming use or structure. See Shrewsbury Edgemere Associates Limited Partnership, et al., v. Bd. of Appeals of Shrewsbury, 409 Mass. 317, 321 (1991) (a use or structure that existed prior to the enactment of zoning is a "nonconforming" use or structure for purposes of Section 6).

III. By the Plain Language of Section 6 and Article 8, the Courthouse Building is a Pre-existing Nonconforming Structure and is able to be Altered Under Section 6 and Article 8.

As noted above, a building which is constructed by a governmental entity under the immunity principle applicable to the federal and state governments is a building that is "lawfully"

constructed. It is not the case, as Plaintiffs contend, that such building is constructed "illegally" or in violation of zoning. The principle that federal and state entities are immune from local zoning is the law—and no less the law because it is established by and grounded in constitutional principles and decisional law than if it were established by statute. The interpretation urged by Plaintiffs, that a governmental entity does not act "lawfully" when it builds or begins to use a structure pursuant to its legal immunity from zoning, must be rejected. The construction of such a building is not a violation of law. It is in accord with it. The construction of such a building is not a violation of zoning. It is legally immune from it. It is constructed as if zoning did not exist. Local zoning regulations simply do not apply to it in the same way that they do not apply to a building that was constructed before local zoning was enacted.[7]

As a building constructed under the legal principle of governmental immunity, the Courthouse Building was lawfully constructed and is lawfully in existence. Accordingly, by application of the plain language of Section 6 and Article 8, the Courthouse Building clearly qualifies for the protections afforded by Section 6 and Article 8. The plain and unambiguous language of those statutes provide that local zoning regulations do not apply to buildings such as the Courthouse Building that are lawfully in existence even though they do not comply with current, otherwise applicable, zoning. Courts are constrained to follow the plain language of a

[7] Zoning was enacted in Cambridge in 1924. Many buildings in Cambridge were constructed prior to 1924. The former Church building in which Plaintiffs Hawley and Summons allege they live and the former Courthouse buildings in which Plaintiff Gund alleges he lives and where Plaintiff Hill allegedly leases space all were constructed prior to 1924. Those buildings are not required to comply with the dimensional requirements of subsequently enacted zoning because they were constructed at a time when there was no applicable zoning and therefore enjoy pre-existing nonconforming status as to dimensional nonconformities. In the same way, the Courthouse Building was constructed without any applicable zoning requirements due to its legal immunity from such requirements.

statute. Vining v. Commonwealth, 63 Mass.App.Ct. 690, review denied, 445 Mass. 1103 (2005): Service v. Newburyport Housing Authority, 63 Mass.App.Ct. 278, review denied, 444 Mass. 1105(2005); and Conroy v. City of Boston , 392 Mass. 216 (1984). The Court need go no further than the plain language of the operative statutes to determine that LMP is entitled to Summary Judgment as a matter of law on the issue presented. [8]

IV. Under Durkin and its Progeny, the Courthouse Building Qualifies as a Pre-Existing Nonconforming Structure Which May Be Altered Under Section 6 and Article 8

In Durkin, the Appeals Court examined and resolved the question of whether a use allowed pursuant to governmental immunity qualifies as a pre-existing nonconforming use such that it can be extended or altered under Section 6 (and under similar provisions in local zoning bylaws).

In Durkin, a post office was constructed on leased property in Falmouth under the government immunity principle. In 1984, some 25 years after the post office was constructed and opened, the property on which the post office was located and on which it had been operating continuously, was conveyed to a private party. The new owner intended to alter the structure and introduce a new business use. The new owner sought the equivalent of a Section 6 special permit

[8] Even if application of the plain language of Section 6 did not mandate this result, a municipality may grant a more liberal treatment to the owner of a nonconforming property than under Section 6. See Marinelli v. Board of Appeals of Stoughton, et al., 65 Mass.App.Ct. 902, 903(2005). See also, Disalvo v. Chatis, Land Court Misc. Case No. 149615 (1991). Additionally, when it comes to interpretation and application of a zoning ordinance to a particular situation, a local zoning board's "home grown knowledge about the history and purpose of its town's zoning" is entitled to "substantial deference." See Duteau v. Zoning Bd. Of Appeals of Webster, 47 Mass.App.Ct. 664, 669 (1999) and Manning v. Boston Redevelopment Auth., 400 Mass. 444, 452-53 (1987).

under the Falmouth zoning bylaw to add the use and alter the building. The local zoning board denied the special permit on the "ground that it did 'not have the power...to grant' it because...[t]he board took the position...in effect, that a constitutionally immune use could not be treated as a lawful nonconforming use." Durkin at 452. The property owner appealed the zoning board's ruling to the Superior Court, which upheld the zoning board. The property owner then appealed to the Appeals Court.

The Appeals Court reversed, finding that the zoning board had "too narrowly interpreted the term 'nonconforming'" and ruling that "[i]f in substance, however, a post office use was not a permitted use within the particular zoning district because immune, it still would have been...'nonconforming' in fact...[and] [i]f the use beginning in 1959 could then have been regarded as nonconforming, but immune because of the Federal use, it was a lawful use." Durkin at 453. [9] Accordingly, the Appeals Court remanded the matter to the Superior Court and instructed the Superior Court to enter an order requiring the zoning board to hold a hearing on Durkin's application for a special permit. In other words, the Appeals Court rejected the zoning board's view—and the view that Plaintiffs argue here—that a constitutionally immune use could not qualify as a nonconforming use, finding that such use was "nonconforming in fact," and that it was therefore appropriate for the zoning board to consider Durkin's application for a Section 6 special permit. In so ruling, the Appeals Court has resolved the issue presented and confirmed that structures that were lawfully built or uses lawfully established pursuant to governmental

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[9] In his zoning treatise, Mr. Bobrowski cites Durkin for the proposition that a use established under governmental zoning immunity is "nonconforming in fact" under Section 6. See M. Bobrowski, Handbook of Massachusetts Land Use and Planning, at §6.04, p. 191 (Third Ed. 2011).

immunity are lawfully nonconforming once they are transferred into private hands and become, for the first time, subject to zoning, and may be altered through the Section 6 special permit process.

This Court has cited and followed Durkin, finding that structures constructed and in existence and uses commenced pursuant to the legal rule of governmental immunity are legally nonconforming structures/uses, within the protection of Section 6 and can be altered pursuant to the Section 6 process.

For example, in Currier v. Smith, 9 LCR 371 (2001) (Lombardi J.) this Court applied Durkin in ruling that a former post office, immune from zoning regulation when built by reason of governmental immunity, was a legally pre-existing nonconforming structure which could be altered under Section 6. The defendant in Currier sought and was granted a Section 6 special permit to alter a former post office building which had been constructed under the government immunity principle and which, when constructed, did not comply with certain dimensional regulations contained in the relevant municipal zoning bylaw.[10] An abutter challenged the Section 6 special permit, arguing as Plaintiffs do here, that the building, having been built pursuant to government immunity, could not be considered nonconforming. This Court, applying Durkin, disagreed and ruled that the building "is rightly considered to be a nonconforming structure." Currier, 9 LCR at 375.

In the case of Tsouvalis v. Town of Danvers, 6 LCR 252 (1997) (Kilborn, J.), this Court, citing Durkin, ruled that a former fire station was a pre-existing nonconforming use that could be altered by a Section 6 special permit (although the Court also found that the right to continue the

[10] The exact manner in which the structure was not in compliance with zoning is not explained.

nonconforming use had been abandoned). See Tsouvalis, 6 LCR at 253-254.

Accordingly, Durkin and the cases of this Court which cite and rely on it, confirm that structures and uses lawfully commenced pursuant to governmental immunity have the status of pre-existing nonconforming structures/uses when those buildings pass into private ownership, and likewise confirm that the new owners are entitled to seek permits to expand or alter the structures/uses pursuant to the provisions of Section 6 and local municipal bylaws that have such provisions.

V. This Result is Not Only Mandated by the Plain Language of Section 6 And the Controlling Holding of Durkin, it is Consistent with Logic and Common Sense.

In relevant part, M.G.L. c. 40A, § 7 ("Section 7") protects from municipal zoning enforcement actions noncompliant dimensional aspects of a building (like FAR, height and the like) that have existed for at least ten years. In that regard, Section 7 provides that "no action criminal or civil, the effect of which is to compel the removal, alteration or relocation of any structure by reason of any alleged violation of the provisions of...any ordinance...shall be maintained, unless such action, suit or proceedings is commenced and notice thereof recorded in the registry of deeds...within ten years after the commencement of the alleged violation." See also, Lord v. Zoning Board of Appeals of Somerset, 30 Mass.App.Ct. 226, 227 (1991); see also, Durkin, supra at 453.

The Courthouse Building has been in existence since at least 1974—over forty years. Accordingly, no enforcement action may be taken that would require the Commonwealth to conform the Courthouse Building to existing FAR requirements, height requirements or any other dimensional requirement of the Ordinance. The Courthouse Building, as it exists, may

remain indefinitely and may continue to be used, with its existing dimensions, no matter who is the owner and for any number of allowed uses, including office, retail and residential—the very uses proposed by LMP. It is illogical to argue, as Plaintiffs apparently must, that the City must allow the Courthouse Building to remain as it exists, but empty, instead of allowing the Commonwealth to realize value by selling it to a private party for redevelopment into better, and more dimensionally compliant, uses. This is the inevitable end to which Plaintiffs' arguments lead. Accepting Plaintiffs' arguments would create a rule that would immediately devalue the Commonwealth's portfolio of buildings and properties and would prevent the Commonwealth from realizing the full value of those buildings and properties. The inevitable end to which Plaintiffs' arguments lead is wasteful in the extreme and would lead to a situation where government buildings cannot be sold, but instead should stand vacant after public need for them has ceased. This would result in significant harm to the Commonwealth's assets and, ultimately, to its taxpayers.

VI. The Cases that Plaintiffs Have Cited and Relied Upon Are Inapposite

In proceedings before the Board and in other contexts, Plaintiffs have cited to certain Massachusetts cases that they claim are controlling and that (they claim) stand for the proposition that a building constructed under government immunity cannot be considered a pre-existing nonconforming use entitled to the protection and process of Section 6. The cases are inapposite and do not overrule Durkin or the plain language of Section 6.

Plaintiffs cite, for example, the case of Mendes v. Board of Appeals of Barnstable, 28 Mass.App.Ct. 527 (1990), but Mendes does not address the issue presented here. In Mendes, a property owner operated a business in a residential zone. The business use was never a

permissible use, but had been allowed through a series of variances, as had the building in which the business was conducted. The town then enacted a bylaw which precluded issuance of any further variances. The property owner subsequently sought a Section 6 permit to increase the size of the nonconforming building that had been erected on the premises pursuant to the variances. The Mendes court ruled that a use and building introduced via a variance is not a pre-existing nonconforming use within the meaning and protection of Section 6. The case does not address the question presented here—namely, what is the status of a structure introduced not by variance but by the principle of governmental immunity? As to that question, Durkin, not Mendes, is controlling.

But Mendes does shed some light on the legal difference between structures built pursuant to governmental immunity and those built under a variance. Mendes explains that the latter cannot be considered a pre-existing nonconforming use because "[i]t came about, not through preexisting right, deprivation of which might raise constitutional questions, but through the after-the-fact dispensation of a variance." Mendes, 28 Mass.App.Ct.at 530. In contrast, the right by which the Courthouse Building was constructed—the right of governmental immunity—is a "preexisting right," the deprivation of which would raise constitutional questions. As noted above, the principle of governmental immunity is rooted in the supremacy clause of the Constitution and in well-settled principles of federal and state sovereignty which "precede" zoning. For these reasons then, Mendes is inapposite.

Plaintiffs also have cited Cumberland Farms, Inc., v. Zoning Board of Appeals of Walpole, 61 Mass.App.Ct. 124 (2004) as standing for the proposition that the Courthouse Building cannot qualify as a pre-existing nonconforming structure. The case holds no such thing.

In that case, a property owner installed three underground gasoline storage tanks without first obtaining the required zoning relief. The owner then sought to replace those tanks with larger tanks by obtaining a Section 6 special permit. The case has no bearing on this matter for two primary reasons. First, as was true of the Mendes case, Cumberland Farms does not involve the question presented here—whether a structure built pursuant to the legal rule of governmental immunity is a pre-existing nonconforming use subject to the protection and processes of Section 6. Durkin continues to control that issue. Durkin is not even mentioned in Cumberland Farms, much less is it overruled. Additionally, the nonconforming structures in Cumberland Farms were introduced "illegally." In contrast, the Courthouse Building was introduced pursuant to law and exists pursuant to law, having been constructed pursuant to the legal rule of governmental immunity. Cumberland Farms simply does not address the legal question at issue here and is completely distinguishable on the facts.

Likewise cases cited by Plaintiffs such as Village on Hill, Inc. v. Mass. Turnpike Authority, 348 Mass. 107 (1964) and Building Inspector of Lancaster v. Sanderson, 372 Mass. 157 (1977) have no bearing. These cases stand for the unremarkable (and uncontested) proposition that governmental immunity does not "run with the land." LMP does not contend otherwise. But the principle, true as it is, has no application to the question presented here. Such cases would only become applicable in the event LMP was claiming that it did not have to comply with zoning in proceeding with its project because it was shielded from application of the Ordinance by a continuing governmental immunity. LMP makes no such claim. In fact, this lawsuit is the result of LMP seeking and obtaining zoning relief which LMP acknowledges its project requires. But the fact that governmental immunity ends when property is transferred from

the government to a private party does not answer the question of whether a structure lawfully constructed while immunity was in effect is a nonconforming structure within the protection of Section 6. That question, as we have seen, is answered by the plain language of Section 6 itself and Durkin.

Finally, Plaintiffs have cited cases from outside of Massachusetts, such as United Real Estate Ventures, Inc., v. Village of Biscayne, 26 So.3d 48 (2010); Alaska R.R. Corp. v. Native Village of Eklutna, 43 P.3d 588 (Alaska 2002) and Nolan Bros. of Texas, Inc. v. City of Royal Oak, 557 N.W.2d 925 (Mich.App. 1996). The cases do not, of course, involve the question presented in this matter: under Massachusetts law does a building like the Courthouse Building qualify as a pre-existing nonconforming structure, protected by Section 6 and able to be altered pursuant to its provisions?

Village of Biscayne is devoid of any analysis and merely states in summary fashion that the magistrate did not violate the plaintiff's due process rights in finding that a helipad that had been used by the President of the United States could not continue to be used as a helipad once the federal government sold the property to a private party. The case does not cite much less does it analyze, any Florida zoning statute that could be claimed to be similar to Section 6.

In Native Village of Eklutna, the court left open the issue of whether a mining use continued to have the benefit of governmental immunity and there was no discussion of any issue similar to the Section 6 nonconforming structure issue presented in this case.

Finally, Nolan Bros stands for the well-settled, uncontested, and immaterial proposition that governmental zoning immunity does not run with the land.

Accordingly, the extra-jurisdictional cases do not address, even tangentially, any statute

that is analogous to Section 6, nor do they provide any insight into whether structures that were built pursuant to governmental immunity are pre-existing nonconforming structures under Massachusetts law.

Conclusion

For the foregoing reasons, this honorable Court should enter partial summary judgment in favor of LMP GP Holdings, LLC on the question presented.

Respectfully submitted,

LMP GP HOLDINGS, LLC,

By its attorneys,

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Dated: March 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2015 a true copy of the above document was served by first-class mail upon the attorney of record for each of the parties in this case.

Mariana Korsunsky