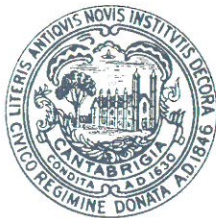


Nancy E. Glowa  
City Solicitor

Arthur J. Goldberg  
Deputy City Solicitor

Vali Buland  
First Assistant City Solicitor



Assistant City Solicitors

Paul S. Kawai  
Samuel A. Aylesworth  
Keplin K. U. Allwaters  
Anne Stermann  
Sean M. McKendry

CITY OF CAMBRIDGE  
OFFICE OF THE CITY SOLICITOR  
795 Massachusetts Avenue  
Cambridge, Massachusetts  
02139

March 24, 2015

Clerk  
Massachusetts Land Court  
3 Pemberton Square  
Boston, MA 02108

Re: Hill v. Russell, et al., Land Court Misc. Case No. 14-488217 and Hawley, et al.  
v. Planning Board of Cambridge, et al.  
Land Court Case No. 14-488218 (Consolidated Cases before Judge Foster)

Dear Sir or Madam:

Pursuant to the Court's order dated January 15, 2015, enclosed for filing in the above-referenced consolidated cases pending before Judge Foster please find:

1. The Defendant City of Cambridge Planning Board's Motion for Partial Summary Judgment with Certificate of Service;
2. The Defendant City of Cambridge Planning Board's Memorandum in Support of Motion for Partial Summary Judgment with Certificate of Service;
3. Certified Copy of the City of Cambridge Zoning Ordinance.

Please contact me if you have any questions.

Very truly yours,

  
Vali Buland

Enclosure

CC: Mark Bobrowski, Esq.  
Daniel Hill, Esq.  
Kevin P. O'Flaherty, Esq.  
Mariana Korsunsky, Esq.  
Jennifer H. Flynn, Esq.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT CONSOLIDATED  
CASES 14 MISC 488217 and 14  
MISC 488218

DANIEL C. HILL,

Plaintiff

v.

HUGH RUSSELL, H. THEODORE COHEN, STEVEN  
COHEN, THOMAS SIENIEWICZ, STEVEN 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, STEVEN 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

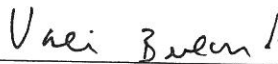
**DEFENDANT CITY OF CAMBRIDGE PLANNING BOARD'S**  
**MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Massachusetts Rules of Civil Procedure, Defendants Hugh Russell, H. Theodore Cohen, Steven Cohen, Thomas Sieniewicz, Steven Winter and Catherine Preston Connolly, as they are members or associate members of the City of Cambridge Planning Board (the "Board") hereby move for the entry of partial summary judgment in their favor, based upon the undisputed facts in this case, that the Middlesex County Courthouse building was a lawful pre-existing nonconforming structure that may be used pursuant to the provisions of the Massachusetts Zoning Act, G.L. c. 40A § 6 and Article 8, Section 8.22.2 of the Cambridge Zoning Ordinance."

The reasons for this motion are set forth in the Board's Memorandum of Law submitted herewith.

Respectfully submitted,  
Hugh Russell, H. Theodore Cohen, Steven  
Cohen, Thomas Sieniewicz, Steven Winter,  
And Catherine Preston Connolly, as they are  
Member of the Cambridge Planning Board

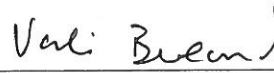
By their Attorneys

  
\_\_\_\_\_  
Vali Buland, BBO # 063710  
Anne Sterman, BO #650426  
City Solicitor's Office  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139(617) 349-4121  
E-mail: vbuland@cambridgema.gov  
asterman@cambridgema.gov

Date: March 24, 2015

Certificate of Service

I, Vali Buland, hereby certify that I have served a copy of the within Defendant City of Cambridge Planning Board's Motion for Partial Summary Judgment by mailing same, first class mail, to Mark Bobrowski, Esq. and Adam J. Costa, Esq., attorneys for Plaintiffs Michael Hawley, et.al. at Bobrowski & Mead, LLC, 9 Damon Mill Square, Suite 4A4, Concord, MA 01742; Daniel C. Hill, Esq., pro se Plaintiff at Hill Law Firm, 43 Thorndike Street, Cambridge, MA 02141; Kevin P. O'Flaherty, Esq. and Mariana Korsunsky, Esq., attorneys for Defendants LMP GP Holdings, LLC at Goulston & Storrs PC, 400 Atlantic Avenue, Boston, MA 02110; Jennifer H. Flynn, Esq., attorney for Defendant Commonwealth of Massachusetts, Office of the Attorney General, One Ashburton Place, 18<sup>th</sup> Floor, Boston, MA 02108 on this 24th day of March, 2015.

  
\_\_\_\_\_  
Vali Buland

## COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT CONSOLIDATED  
CASES 14 MISC 488217 and 14  
MISC 488218

DANIEL C. HILL,

Plaintiff

V.

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

## Defendants

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, STEVEN WINTER,  
and CATHERINE PRESTON CONNOLLY,  
as they are members of the PLANNING BOARD, and  
LMP GP HOLDINGS, LLC, and the  
COMMONWEALTH OF MASSACHUSETTS,

## Defendants

**MEMORANDUM IN SUPPORT OF DEFENDANT CITY OF CAMBRIDGE PLANNING  
BOARD'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, Defendants Hugh Russell, H. Theodore Cohen, Steven Cohen, Thomas Sieniewicz, Steven Winter and Catherine Preston Connolly, as they are members or associate members of the City of Cambridge Planning Board (the "Board") submit this Memorandum in Support of the Board's Motion for Partial Summary Judgment, based upon the undisputed facts in this case, on the issue of whether the Middlesex County Courthouse building was a lawful preexisting nonconforming structure that may be used pursuant to the provisions of the Massachusetts Zoning Act, G.L. c. 40A § 6 ("c. 40A §6") and Article 8, Section 8.22.2 ("Section 8.22.2") of the Cambridge Zoning Ordinance ("Ordinance").<sup>1</sup>

## **I. Statement of the Issues Presented**

Is the Board entitled to summary judgment as a matter of law that: (1) the structure that housed the Middlesex County Courthouse and jail facility at 40 Thorndike Street in Cambridge, Massachusetts (the "Courthouse Building") was a lawful pre-existing nonconforming building where it was constructed to be used as a courthouse and jail facility by Middlesex County and therefore immune from local zoning requirements at the time of its construction under the principle of governmental immunity; and (2) as a lawful pre-existing nonconforming structure the Courthouse Building may be redeveloped and used pursuant to the provisions of c. 40A §6 and Section 8.22.2 of the Ordinance? *See* Board's Notice of Decision in Case # 288 dated October 30, 2014 ("Decision"), attached as Exhibit I to the Complaint of Michael Hawley et. al. ("Hawley Complaint"), page 15.

## **II. Procedural Background**

These consolidated actions are appeals brought pursuant to M.G.L. c. 40A, § 17

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<sup>1</sup> A certified copy of the Cambridge Zoning Ordinance is submitted herewith.

challenging special permits sought by LMP GP Holdings LLC (the “Developer”) to “[c]onvert the existing nonconforming courthouse structure at 40 Thorndike Street to a mixed use office building containing ground floor retail uses, 24 dwelling units and below grade parking.” On October 30, 2014, the Board issued its Decision granting the special permits sought by the Developer with conditions pursuant to Section 8.22.2 of the Ordinance. In their respective complaints, the Plaintiffs challenge, among other things, the Board’s determination that the Courthouse Building is a lawful pre-existing nonconforming structure eligible for a special permit under c. 40A §6 and Section 8.22.2 of the Ordinance.

On January 15, 2015, this Court issued a Notice of Docket Entry (“Notice”) following a Case Management Conference held on January 14, 2015. As discussed at the Case Management Conference and by agreement of the parties, the Notice confirmed that the issue of whether the Courthouse Building was a pre-existing nonconforming structure will be argued on cross-motions for partial summary judgment. The Notice required the parties to file an Agreed Upon Statement of Undisputed Material Facts (“Statement of Facts” or “SOF”) and to submit cross motions for partial summary judgment on the issue of whether the Courthouse Building is a lawful pre-existing nonconforming structure eligible for a special permit under c. 40A §6 and Section 8.22.2 of the Ordinance.

### **III. Statement of Facts**

On February 17, 2015, pursuant to the Court’s Order, the parties filed the Statement of Facts with this Court on which the cross-motions would be based. The undisputed facts agreed to by the parties are as follows:

The Courthouse Building was constructed between 1968 and 1974 on approximately 1.37 acres (59,788 square feet) of land at 40 Thorndike Street in Cambridge that were then owned by Middlesex County. SOF ¶ 1. At the time the Courthouse Building was constructed, it complied

with all applicable dimensional requirements of the Ordinance except the maximum allowed Floor Area Ratio (“FAR”), which at the time was 4.0. SOF ¶ 3. However, as a building of the county government, the Courthouse Building was immune from the FAR requirement of the Ordinance. SOF ¶ 4. The Courthouse Building is 280 feet in height with approximately 590,000 square feet of gross floor area on a 1.37 acre lot. SOF ¶ 1.

In 1997, the Massachusetts legislature abolished Middlesex County as a governmental entity and transferred ownership of the Courthouse Building to the Commonwealth of Massachusetts. SOF ¶ 7. From 1974 to 2009, the Courthouse Building was occupied by the Middlesex Superior Court, the Cambridge District Court, associated Court offices and agencies, and a jail facility. SOF ¶ 8. Between 2007 and 2009, the Commonwealth moved most of its operations out of the Courthouse Building but continued to house a jail facility until the summer of 2014. SOF ¶ 9. The Commonwealth entered into a purchase and sale agreement with the Developer in or about January 2013 for the purchase and sale of the Courthouse Building. SOF ¶ 10. On October 30, 2014, the Board granted special permits to the Developer with conditions authorizing the redevelopment of the Courthouse Building which will result in a twenty (20) story building with 476,303 square feet of gross floor area to be occupied by office retail and multifamily uses. SOF ¶ 11.

#### **IV. Summary of the Argument**

The Courthouse Building, which was constructed by Middlesex County in or about 1974, was immune from local zoning regulation at the time that it was constructed based on governmental immunity. The Courthouse Building will not retain its governmental immunity once all governmental functions have ceased and it is sold to a private developer. The current dimensional requirements of the Ordinance are more restrictive than those that were in place when the Courthouse Building was constructed, and therefore the Developer sought special permits from



the Board to alter the structure and develop the Courthouse Building. Because the Courthouse Building is a lawful pre-existing nonconforming structure, alterations to the Courthouse Building are subject to the provisions of c. 40A § 6 and Section 8.22.2 of the Ordinance.

*Durkin v. Board of Appeals of Falmouth* (“*Durkin*”), 21 Mass. App. Ct. 450 (1986) is directly on point and is controlling. In *Durkin*, the Appeals Court held that uses of government-owned property that never complied with local zoning but were lawfully built or established based on governmental immunity are lawfully nonconforming once they lose their governmental immunity. *Durkin* and subsequent cases decided by the Land Court support the Board’s finding that the Courthouse Building is a lawful pre-existing nonconforming structure and as such may be redeveloped and used pursuant to the provisions of c. 40A § 6 and Section 8.22.2 of the Ordinance. *See* Decision p. 15.

Plaintiffs’ claim that the Courthouse Building was not lawfully constructed and cannot be considered a lawful, pre-existing nonconforming structure is not supported factually or legally. The facts in the instant case are distinguishable from *Mendes v. Board of Appeals of Barnstable*, 28 Mass. App. Ct. 527 (1990), where the Court found that a special permit could not be used to expand a nonconforming use which was never a lawful use, but was allowed under a series of variances. The instant facts are also distinguishable from those in *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124 (2004), where gasoline storage tanks were constructed unlawfully in violation of local zoning regulations. Here, the Courthouse Building was lawfully constructed based on governmental immunity and will be a lawfully pre-existing nonconforming structure when the governmental immunity ends. Moreover, pursuant to G.L. c. 40 A, § 7, even if the Court agrees with Plaintiffs that the Courthouse Building cannot be altered under the provisions of c. 40A § 6 and Section 8.22.2 of the Ordinance, it may remain as it is and may be used for any lawful use with its existing nonconformities, a result that would not

bring the structure further into compliance with the Ordinance or be more compatible with the neighborhood.

**V. Legal Argument**

**A. Standard of Review**

The standard of review at the summary judgment stage is whether the plaintiff can meet its burden to proffer evidence that, at trial, would enable a “fair-minded [finder of fact]” to “return a verdict for the plaintiff.” *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)); *see also Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 716 (1991) (summary judgment is appropriate where plaintiffs lack a “reasonable expectation of proving” their case). Under this standard, based upon the undisputed facts of this case, the Court must find that the Board is entitled to summary judgment in its favor on the issue of whether the Courthouse Building is a lawful preexisting nonconforming structure that may be redeveloped and used pursuant to the provisions of c. 40A § 6 and Section 8.22.2 of the Ordinance.

**B. The Board Correctly Determined that the Courthouse Building is a Lawful Pre-existing Nonconforming Structure Eligible for Relief under c. 40 A § 6 and Section 8.22.2 of the Zoning Ordinance**

**1. The Courthouse Building Was Not Required to Comply with Local Zoning Under the Principle of Governmental Immunity**

At the time the Courthouse Building was constructed, it was not required to comply with local zoning requirements based on the principle of governmental immunity. Massachusetts courts have held that the Commonwealth and instrumentalities of the Commonwealth are generally immune from municipal zoning regulations unless a statute otherwise expressly provides to the contrary. *See e.g., Inspector of Buildings of Salem v. Salem State College*, 28 Mass. App. Ct. 92 (1989). The immunity applies to an entity or agency that is involved in performing essential

governmental functions or to an entity or agency authorized by statute to perform such functions. *See County Commissioners of Bristol v. Conservation Commission of Dartmouth*, 380 Mass. 706, 710-11 (1980); *see also Greater Lawrence Sanitary District v. Town of North Andover*, 439 Mass. 16 (2003) (entities performing essential governmental functions may be subject only to certain local regulations that do not interfere with the essential governmental function). Because the Courthouse Building was constructed by Middlesex County, which was a governmental entity performing an essential governmental function, i.e. the provision of court programs and a jail facility, the Courthouse Building was immune from local zoning requirements when constructed. *County Commissioners of Bristol v. Conservation Commission of Dartmouth*, *supra* at 710-11 (county government is exempt from local zoning regulations).

The Courthouse Building will not retain governmental immunity once all governmental functions have ceased and it is sold to a private entity. *See Village on the Hill Inc. v. Massachusetts Turnpike Authority*, 348 Mass.107, 118 (1964) (land once immune does not retain its immunity after being conveyed in fee to private parties); *see also Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157 (1977) (requirement that a private owner of a commercial airport obtain permits, certificates or approvals from municipal, state or other public officials does not change the status of the airport from that of a private enterprise to a governmental function entitled to exemption from zoning by-laws and ordinances). The current dimensional requirements for the district in which the Courthouse Building is located are more restrictive than those that were in place when the Courthouse Building was lawfully constructed, and the Courthouse Building now exceeds the currently allowable gross floor area (“GFA”), height, and FAR requirements of the Ordinance. However, because the Courthouse Building was lawfully constructed pursuant to governmental immunity, it acquires the status of a lawful pre-existing nonconforming structure when it loses its governmental immunity and as such may be

redeveloped and used under c. 40A § 6 and Section 8.22.2 of the Ordinance.<sup>2</sup> As more fully set forth below, Plaintiffs' claim to the contrary is both factually and legally unsupported and must be rejected by this Court.

2. The Courthouse Building is a Lawful Pre-Existing Nonconforming Structure that may be Used Pursuant to the Provisions of Section 6 and Article 8, Section 8.22.2 of the Ordinance

Although Plaintiffs concede that at the time the Courthouse Building was constructed it was not required to comply with local zoning regulations based on governmental immunity (SOF ¶ 4), they nonetheless illogically assert that the Courthouse Building was “not lawful at the time the applicable provisions of this or prior ordinances became effective” and therefore not a lawfully pre-existing nonconforming structure once the governmental immunity ends. (Hawley Complaint Count I). Plaintiffs are plainly mistaken. Pursuant to settled case law, Middlesex County was immune from the provisions of the Ordinance when the Courthouse Building was constructed. As such, once the governmental immunity ends, the Courthouse Building becomes a lawful pre-existing nonconforming structure. *See e.g. Durkin v. Board of Appeals of Falmouth* (“*Durkin*”), 21 Mass. App. Ct. 450, 452 (1986) (government owned property that never complied with local zoning but was lawfully built or established based on governmental immunity is lawfully nonconforming once it loses governmental immunity). *Cf. Mendes v. Board of Appeals of Barnstable*, 28 Mass. App. Ct. 527, 531 (1990) (a special permit could not be used to expand a

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<sup>2</sup> Even if the Courthouse Building were not entitled to the protections afforded by c. 40A § 6 and Section 8.22.2 of the Ordinance, because it has existed for more than forty (40) years, under either of the statute of limitation periods contained in in G.L. c. 40A § 7 no action can be taken that would require the dimensional violations at the Courthouse to conform to current zoning requirements. The Commonwealth as the current owner of the Courthouse Building or any subsequent owner cannot be required to bring the Courthouse Building into conformity. It may remain as it is and may be used for any lawful use. This underscores the logic of permitting alterations to the Courthouse Building to be made under c. 40A § 6 and Section 8.22.2 of the Ordinance. The special permits approved by the Board in its Decision will result in an improved structure that is more conforming to current zoning requirements and more compatible to the neighborhood than the existing structure is today.

nonconforming use which was never a lawful use, but was allowed under a series of variances. Variance procedures presuppose the prohibition of the use sought).<sup>3</sup> Unlike the applicant in *Mendes*, who obtained a variance for an otherwise prohibited use (a construction business on a lot wholly within a residential zone), the Courthouse Building was lawfully constructed pursuant to governmental immunity and qualifies for the protections afforded by of c. 40A § 6 and Section 8.22.2 of the Ordinance as a lawful pre-existing nonconforming structure.

The Zoning Act protects both uses and structures that were lawfully in existence or lawfully begun against the applicability of subsequently adopted zoning amendments.<sup>4</sup> If a structure lawfully exists before a zoning change becomes applicable, as is the case here, it acquires the status of a lawful pre-existing nonconforming structure when the zoning change becomes applicable, and as such is not required to comply with the provisions of any subsequent zoning change. *See Tamerlane Realty Trust v. Board of Appeals of Provincetown*, 23 Mass. App. Ct. 450, 455 (1987) (the existence of a nonconformity is determined as of the date of the first publication of notice of the public hearing of a subsequent zoning change). Although the Courthouse Building will lose its governmental immunity once the governmental function terminates and the property is

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<sup>3</sup> In *Mendes*, the Court opined that “[f]or purposes of deciding whether a use is a nonconforming within the meaning of G.L. c. 40A §6, the question is not merely whether the use is lawful but how and when it became lawful. It would be anomalous if a variance by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use.” *Mendes, supra*, at 531.

<sup>4</sup> G.L. c. 40A § 6 provides in relevant part that: “[a] zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by Section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.... Pre-existing nonconforming structures or uses 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 (emphasis added).”

transferred to a private entity, it will remain a lawful pre-existing nonconforming structure. A lawful pre-existing nonconforming structure does not lose that status merely by a transfer of property and may remain in existence as a lawful pre-existing nonconforming use or structure. *See Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth*, 385 Mass. 205 (1982).

Although lawful pre-existing nonconforming structures and uses are typically created when zoning ordinances or by-laws are amended such that the legal status of the structure or use that conformed to the prior zoning becomes nonconforming, the Appeals Court has confirmed that a government owned structure that never complied with local zoning, but *was lawfully built or established based on governmental immunity*, is a lawfully pre-existing nonconforming structure once it loses its governmental immunity. *See Durkin* at 452. *Contrast Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124 (2004) (gasoline storage tanks installed *in violation* of zoning regulations were not entitled to Section 6 protections as nonconforming structures because they were *never lawfully in existence*) (emphasis added). Accordingly, in this case, after the property loses its governmental immunity, changes to the formerly immune structure may be made so long as they comply with the applicable provisions of c. 40A § 6 and meet the criteria set forth in Article 8 of the Ordinance.

In *Durkin*, a private land owner applied for a building permit for a structure to be used as a post office under a lease to the Federal government. The structure was subsequently used as a post office for about twenty-five years. In or about 1984, Durkin purchased the structure, which was still being used as a post office, and applied to the town's board of appeals for a special permit to convert the basement to business and professional use and to construct an exterior stair entrance to the basement. Durkin relied on Section 1222 of the town's zoning by-law which essentially

mirrored relevant provisions of c. 40A § 6.<sup>5</sup> The board denied the special permit sought by Durkin, concluding (erroneously) that the post office could not be considered a lawful pre-existing nonconforming use because the post office when built was allowed only by application of governmental immunity. The Appeals Court disagreed, finding that the Board's interpretation of what constitutes a lawful pre-existing nonconforming use was too narrow. The Court held that:

We are of the opinion that the board too narrowly interpreted the term nonconforming (with respect to uses of the locus) in appraising its powers under Section 1222 of the town's by-law. A use of the locus under a lease for a proper Federal purpose may have been immune from *application* of the town by-law. ... If in substance, however, a post office use was not a permitted use within the particular zoning district because *immune*, it still would have been a use of the locus forbidden by the by-law, and thus "nonconforming" in fact. This would have been so even though the by-law could not have been enforced against it because of the Federal immunity. If, in 1959, post office use could be regarded as a "municipal" use under the then existing zoning by-law, the use became nonconforming when in 1966 the zoning of the locus was changed to residential. If the use beginning in 1959 could then have been regarded as nonconforming, but immune because of the Federal use, it was a lawful use (citations omitted) (emphasis in original).

*Durkin, supra*, at 452.

The Land Court has subsequently issued decisions applying the Court's rationale in *Durkin*, confirming that when government owned property is sold and used for private purposes, it acquires lawful pre-existing nonconforming status. *See Currier v. Smith*, 9 LCR 371 (2001) (Lombardi, J.), (former post office was immune from local zoning regulation but was still legally pre-existing nonconforming); *see also Tsouvalis v. Town of Danvers*, 6 LCR 252 (1997) (Kilborn, J.) (former fire station had been a legally pre-existing nonconforming use although the Court found that the use had been abandoned and therefore could not legally be expanded, changed or

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<sup>5</sup> Section 1222 of the town's zoning by-law provided in relevant part that pre-existing nonconforming structures or uses may be extended, altered, changed or rebuilt only by special permit from the board of appeals and that any such extension, alteration, change, or rebuilding shall not be more detrimental than the existing nonconforming use to the neighborhood. *See Durkin, supra*, at 452.



altered pursuant to the provisions of c. 40A § 6.)

In applying the statutory language and applicable case law to the Courthouse Building, which was lawfully built and is lawfully in existence under the principle of governmental immunity, the Board's determination that the Courthouse Building is "[p]rotected by and may be used pursuant to the provisions of c. 40A § 6 and Section 8.22.2 of the Ordinance" is correct as a matter of law and must be upheld by this Court.<sup>6</sup> The *Durkin* case is directly on point and is controlling. The Appeals Court's holding in *Durkin* and subsequent cases decided thereunder support the conclusion that the Courthouse Building is a lawful pre-existing nonconforming structure. The Courthouse Building, like the post office in *Durkin*, was allowed to be built because of governmental immunity even though it did not satisfy all of the existing dimensional requirements of the Ordinance when it was constructed. Pursuant to the holding in *Durkin*, because the Courthouse Building when built was immune from the requirements of local zoning, it is a lawful pre-existing nonconforming structure. As such, it may be changed, altered, expanded or rebuilt so long as such changes are consistent with the provisions of c. 40A § 6 and Section 8.22.2 of the Ordinance.

### **CONCLUSION**

For the reasons stated above, the Board correctly determined that the Courthouse Building is a lawful pre-existing nonconforming structure and as such, the Courthouse is protected by and may be redeveloped and used pursuant to the provisions of c. 40A §6 and Section 8.22.2 of the Ordinance. Therefore, the Board is entitled to summary judgment in its favor as a matter of law.

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<sup>6</sup> Section 8.22 of the Ordinance states: "As provided in Section 6, Chapter 40A, G.L. permits for the change, extension, or alteration of a pre-existing nonconforming structure or use may be granted as permitted in Subsections 8.22.1 and 8.22.2 below. Such a permit, either a building permit in the case of construction authorized in Section 8.22.1 or a special permit in the case of construction authorized in Section 8.22.2, may be granted only if the permit granting authority specified below finds that such change, extension or alteration will not be substantially more detrimental to the neighborhood than the existing nonconforming structure or use."



Respectfully submitted,

Hugh Russell, H. Theodore Cohen, Steven Cohen, Thomas Sieniewicz, Steven Winter, and Catherine Preston Connolly, as they are Members of the Cambridge Planning Board

By their Attorneys

Vali Buland

Vali Buland, BBO # 063710  
Anne Sterman, BBO #650426  
City Solicitor's Office  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139  
(617) 349-4121  
E-mail: vbuland@cambridgema.gov  
asterman@cambridgema.gov

Date: March 24, 2015

Certificate of Service

I, Vali Buland, hereby certify that I have served a copy of the within Defendant City of Cambridge Planning Board's Motion for Partial Summary Judgment and Memorandum in Support of Motion for Partial Summary Judgment by mailing same, first class mail, to Mark Bobrowski, Esq. and Adam J. Costa, Esq., attorneys for Plaintiffs Michael Hawley, et.al. at Bobrowski & Mead, LLC, 9 Damon Mill Square, Suite 4A4, Concord, MA 01742; Daniel C. Hill, Esq., pro se Plaintiff at Hill Law Firm, 43 Thorndike Street, Cambridge, MA 02141; Kevin P. O'Flaherty, Esq. and Mariana Korsunsky, Esq., attorneys for Defendants LMP GP Holdings, LLC at Goulston & Storrs PC, 400 Atlantic Avenue, Boston, MA 02110; Jennifer H. Flynn, Esq., attorney for Defendant Commonwealth of Massachusetts, Office of the Attorney General, One Ashburton Place, 18<sup>th</sup> Floor, Boston, MA 02108 on this 24th day of March, 2015.

Vali Buland

Vali Buland