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

MOTION FOR SUMMARY JUDGMENT

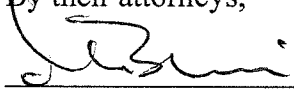
Plaintiffs Hawley, et al, hereby move for summary judgment pursuant to M.R.C.P. 56. As grounds therefore, Plaintiffs refer to the Memorandum in Support of this Motion for Summary Judgment, submitted to the Court on this same day.

The Court is requested to grant the relief set forth in the Memorandum. If the Court determines that such relief is not warranted because there are material facts in dispute, the Court is request to identify those facts and to set a date for a speedy trial to resolve this matter.

DATE: March 24, 2015

Plaintiff,

By their attorneys,



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MEMORANDUM IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS HAWLEY, ET AL

The Plaintiffs Hawley, et al, hereby submit the following Memorandum of Law in Support of their Motion for Summary Judgement.

I. STATEMENT OF LEGAL ELEMENTS

1. Summary judgment should be granted for plaintiffs because there are no genuine issues as to material facts. *Parent v. Stone & Webster Engineering Corp.*, 408 Mass. 108, 111 (1990).

2. The holding in *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450 (1986), does not support Defendants' contention that the Courthouse is a nonconforming structure.

3. The Courthouse is instead a structure built under principles of immunity, and now, after decommissioning, a structure that violates Cambridge zoning regulations but beyond the limitations period of G.L. c. 40A, s. 7. *Mendes v. Zoning Bd. of Appeals of Barnstable*, 28 Mass. App. Ct. 527 (1990); *Palitz v. Zoning Bd. of Appeals of Tisbury*, 2014 WL 7930410 (2015); *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Waltham*, 61 Mass. App. Ct. 124 (2004); *Bruno v. Board of Appeals of Wrentham*, 62 Mass. App. Ct. 527 (2004).

4. The Courthouse was therefore not eligible to apply for a special permit pursuant to Section 8.22.2.a of the Cambridge Zoning Ordinance. *United Real Estate Ventures, Inc. v. Village of Key Biscayne*, 26 So. 3d 48 (2010).

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED FOR PLAINTIFFS BECAUSE THERE ARE NO GENUINE ISSUES AS TO MATERIAL FACTS.

Rule 56© of the Massachusetts Rules of Civil Procedure directs that summary judgment should be granted when "the pleadings, depositions, answers to interrogatories ... together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law."

In *Parent v. Stone & Webster Engineering Corp.*, 408 Mass. 108, 111 (1990), the Supreme Judicial Court explained the burden on the movant:

> A party moving for summary judgment ... has the burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to judgment as matter of law. Community Nat'l Bank v. Dawes, 369 Mass. 550, 554, 340 N.E.2d 877 (1976). CThe movant is held to a stringent standard.... [A]ny doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Because the burden is on the movant, the evidence presented ... always is construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences that can be drawn from it.C 10A C.A. Wright, A.R. Miller, & M.K. Kane, Federal Practice and Procedure ' 2727, at 124-125 (2d ed. 1983). CA court should not grant a party's motion for summary judgment 'merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial.' Hayden v. First Nat'l Bank, 595 F.2d 994, 997 (5th Cir.1979), quoting 10 C.A. Wright & A.R. Miller, Federal Practice and Procedure ' 2725, at 514 (1973).C Attorney Gen. v. Bailey, 386 Mass. 367, 370, 436 N.E.2d 139, cert. denied, 459 U.S. 970, 103 S.Ct. 301, 74 L.Ed.2d 282 (1982). Rather, C[t]he inference to be drawn from the burden placed on the moving party is that his failure to establish the absence of a genuine issue of material fact must, without more from his opponent, defeat his motion.C Community Nat'l Bank v. Dawes, supra. See 10A C.A. Wright, A.R. Miller, & M.K. Kane, Federal Practice and Procedure ' 2739, at 523-524 (2d ed.1983). See also Brunswick Corp. v. Vineberg, 370 F.2d 605, 612 (5th Cir.1967); McDonnell v. Michigan Chapter No. 10, Am. Inst. of Real Estate Appraisers, 587 F.2d 7, 8 (6th Cir.1978); Kaplan, Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II), 77 Harv.L.Rev. 801, 827 (1964).

For the reasons set forth below, Plaintiffs have met their burden under this standard. Accordingly, the motion for summary judgment should be granted. In the alternative, Plaintiffs seek a speedy trial to resolve this matter.

II. THE SULLIVAN COURTHOUSE IS NOT A NONCONFORMING STRUCTURE.

A. INTRODUCTION.

The Agreed Upon Statement of Undisputed Material Facts ("Statement"), submitted independently to the Land Court by the parties, indicates that the Edward J. Sullivan Courthouse (the "Courthouse") was built by Middlesex County between 1968 and 1974 on land owned by

the county at 40 Thorndike Street in East Cambridge. The Courthouse is located in a Business B zoning district. At the time of its construction, the Courthouse did not comply with the district's maximum allowed Floor Area Ratio ("FAR"). However, as a building of the county government, the Courthouse was immune from the FAR requirement as long as it housed an "essential government function." See, *Mass. Bay Trans. Auth. v. City of Somerville*, 451 Mass. 80 (2008). After amendment of the Cambridge Zoning Ordinance ("CZO"), the Courthouse is now noncompliant with the maximum height limitation for the district.

The parties have agreed that a true copy of the CZO will be submitted to the Land Court with these Motions for Summary Judgment.

In 1997, the Legislature abolished Middlesex County as a governmental entity and transferred ownership of the Courthouse to the Commonwealth.

In July of 2014, all governmental functions ceased in the Courthouse. Thereafter, the Cambridge Planning Board, serving as a Special Permit Granting Authority "(SPGA"), granted several special permits to the Defendant LMP GC Holdings, LLC, which has entered into a purchase and sale agreement with the Commonwealth to purchase the Courthouse.

The special permit issued pursuant to Section 8.22.2.a of the CZO is at the center of this Motion for Summary Judgment. This provision states:

> 8.22.2 The following changes, extensions, or alterations of a pre-existing nonconforming structure or use may be granted in the following cases after the issuance of a special permit. Such a permit shall 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 use.
>
> a. In an Office, Business, or Industrial District the Board of Zoning Appeal may issue a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, or the enlargement (but not the alteration) of a nonconforming use, provided any alteration or enlargement of such

> nonconforming use or structure is not further in violation of the dimensional requirements in Article 5.000 or the off street parking and loading requirements in Article 6.000 for the district in which such structure or use is located and provided such nonconforming structure or use not be increased in area or volume by more than twenty-five (25) percent since it first began to be nonconforming.

Furthermore, the CZO, at Section 2.00, defines the term "Nonconforming Structure" to mean:

> Any structure which does not conform to the dimensional requirements in Article 5.000 or to the parking and loading requirements in Article 6.000 of this Ordinance for the district in which it is located; provided that such structure was in existence and lawful at the time the applicable provisions of this or prior zoning ordinances became effective.

Thus, the question to be answered in this Motion for Summary Judgment is this: At the time of SPGA's issuance of the special permit pursuant to Section 8.22.2.a of the CZO, was the Courthouse eligible as a "nonconforming structure" as that term is used in the CZO and G.L. c. 40A, s. 6? For the reasons set forth below, the Plaintiffs argue that it is not, and that any alteration of the Courthouse requires the issuance of a variance.

In undertaking an analysis of this question, Plaintiffs start with the following facts regarding the Courthouse, all of which are embodied in the Statement:

* As long as the Courthouse was used for an essential government function it was immune from zoning enforcement;

* That essential government function ceased to exist in July of 2014;

* Consequently, the Courthouse is now subject to the CZO. *Village on the Hill, Inc. v. Building Commissioner of Boston*, 348 Mass. 107 (1964);

B. THE DEFENDANTS' RELIANCE ON *DURKIN* IS MISPLACED.

The Plaintiffs expect that the governmental and private Defendants will rely chiefly on the holding in *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450 (1986), to support their claims that the Courthouse became a nonconforming structure when essential

government functions ceased in July of 2014. This reliance is misplaced.

In order to grasp the limited nature of the ruling of the Appeals Court, it is necessary to dig deeper into the facts of the case. Plaintiffs have provided copies of the Appeals Court briefs of Mr. Durkin and the Falmouth Zoning Board of Appeals ("ZBA") to assist in this effort. See Exhibits 1 (Brief of Durkin), 2 (Brief of the Falmouth ZBA), and 3 (Reply of Durkin).

In 1959, a building permit was issued for a structure later leased by the owner to the U.S. Postal Service. No variance or special permit was requested or granted. *Durkin*, at p. 451 and n. 1. At the time, the property was located in an agricultural zone - the "AG" District. *Durkin* at n. 2. In the AG District, the relevant Falmouth Zoning By-law allowed structures for:

> [a]ll municipal purposes of the town, county, or commonwealth, including administration of government.

Durkin, at 451. It is unclear whether in 1959 the building permit was issued because the use was allowed under this provision in the AG District or whether the "it was assumed that the zoning bylaws could have no application to the Federal use of the locus...." *Id*; Exhibit 1, Brief of Durkin, at p. 4. In any event, the zoning for the locus was changed to Residential in 1966. *Durkin*, at 453. All municipal uses were then prohibited. Exhibit 2, Brief of the ZBA, at pp. 5-6.

In 1984, Durkin bought the building without any contingencies because he believed (based, in part, on misinformation provided to him by a town official) that the property was zoned for business. *Durkin*, at 451. The post office was delayed in vacating the building, so he obtained a building permit to renovate the basement to begin his home decorating business. Exhibit 1, Brief of Durkin, p. viii. It was then that he learned that the property was, in fact, zoned Residential. The cure, he was informed by town officials, was to apply for a special permit pursuant to Section 1222 of the by-law to change the allegedly nonconforming post office

use to his planned business use. Exhibit 1, Brief of Durkin, at p. ix; *Durkin*, at 451-52.

The Falmouth Zoning Board of Appeals "(Falmouth ZBA") rejected his application on jurisdictional grounds. The Falmouth ZBA ruled that the prior post office use was not protected as a nonconforming use:

> Durkin does not possess a pre-existing non-conforming use; rather, Durkin possesses a use which was heretofore immune from zoning. Once that immunity dissipates, current zoning prevails. Exhibit 2, Brief of the Falmouth ZBA, at p. 11.

However, the Falmouth ZBA made a crucial mistake. It failed in its decision to acknowledge that Durkin's property was zoned AG in 1959 (when the structure was built); instead, it assumed that the property was zoned Residential at the time. *Durkin*, at n.2. On summary judgment, the motion judge ruled for the Falmouth ZBA without making any statement of reasons. *Durkin*, at p. 452. Durkin appealed.

At the Appeals Court, the Falmouth ZBA called the mistake "de minimis." Exhibit 2, Brief of the Falmouth ZBA, at p. 15. However, the mistake caused the Falmouth ZBA to ignore Durkin's principal argument. Durkin claimed that the use as a post office could have been lawfully commenced in 1959 under the provisions of the AG District allowing as of right "all municipal purposes of the town, county, or commonwealth, including administration of government." Exhibit 1, Brief of Durkin, at p. 4. The Appeals Court agreed with Durkin that the mistake was the key to the case:

> We are of 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. See e.g., Thanet Corp. v. Board of Adjustment of Princeton, 108 N.J. Super. 65, 66-67 (1969). *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. The use, so this record shows, has continued steadily since 1959, under a building permit then issued. (Emphasis added)

Id., at 452-53. Note what the Appeals Court does not say. It does not say that if the use started under immunity principles, the use of the locus was nonconforming as a matter of law. The Appeals Court is careful to limit its ruling by the use of quotation marks: it is "'nonconforming' in fact." "Nonconforming in fact" is not the same as "lawfully nonconforming" at the G.L. c. 40A, s. 6 or the CZO contemplates: it is simply an easy way to say the use was "forbidden by the by-law," did not comply with zoning, and nothing more.

The result was a remand. The Appeals Court sent it back to the Falmouth ZBA "for wholly new consideration of Durkin's application (a) in view of the board's confusion in its decision now under review *about the history of the zoning regulations applicable to the locus*, and (b) because of the board's unduly restrictive interpretation of what constitutes a nonconforming use *in the circumstances here presented.*" (Emphasis added) *Id.* at 454.

When the Falmouth ZBA considered this matter after remand later in 1986, the members had little difficulty concluding that the post office use was nonconforming because the zoning had been amended from AG (when the governmental use was allowed as of right) to Residential (when the governmental use was no longer permitted). Principles of immunity had nothing to do with this determination; it was an ordinary transition from a permitted conforming use in 1959 to a use that became lawfully nonconforming in 1966 when the zoning changed. See Exhibit 4, page 2.

If the Appeals Court believed that the former post office use was protected as a nonconforming use regardless of how it was initiated, there would have been no need to remand for an examination of "the history of the zoning regulations applicable to the locus... and the circumstances here presented." The Appeals Court could simply have ruled that the immunity in place for 25 years (from 1959) or 18 years (from 1966) created status as a lawful nonconforming use and it could have instructed the Falmouth ZBA to apply the usual substantial detriment test under Section 1222. The Appeals Court did nothing of the kind - it sent it back for "wholly new consideration." See Exhibit 4.

Consequently, *Durkin* has nothing to offer Defendants. The case is ***not*** about the status of a use or structure being somehow altered by governmental immunity or the termination of such immunity because, it turns out, the post office use ***never needed federal immunity.*** It began as a lawful and conforming use in the AG District in 1959, explicitly authorized by the local zoning by-law: it became lawfully nonconforming in 1966 when the zoning changed. In short, it was just another "protected" or "vested" nonconforming use, as described in the excerpt from *Rathkopf* in note 2, below.

C. THE LAND COURT CASES RELYING ON *DURKIN* ARE NOT PRECEDENT.

Plaintiffs have nothing but respect and admiration for Judge Lombardi and the late Judge Kilborn. However, it is difficult to imagine that they were presented with a clear picture of the facts when they relied on *Durkin* in their rulings.

In *Tsouvalas v. Danvers Zoning Bd. of Appeals*, 6 LCR 252 (1997), Judge Kilborn examined the disposition of a municipal building - a fire station – built before zoning was adopted by the Town. The structure, built in 1925, was located in a residential district after

1946, when the first Danvers Zoning By-Law was adopted. The 1946 zoning by-law allowed municipal buildings as of right. After amendment in 1961, the zoning by-law for the Residence I District did not allow Tsouvalas' proposed use as an oil service business, but it did continue the exemption for municipal uses. Id. at p. 253. The by-law in effect in when Tsouvalas submitted his appeal in 1996 also allowed municipal purposes as of right, subject to certain, irrelevant, exceptions.

First, municipalities are not "immune" from applicable zoning regulations. A city or town must provide for an exemption in its own ordinance or by-law. *Sinn v. Board of Selectmen of Acton,* 357 Mass. 606, 610 (1970). Thus, post-immunity status is not at stake in *Tsouvalas.* The question was the compliance of the fire station with the Danvers Zoning By-law.

Second, Judge Kilborn's analysis avoids explaining why the fire station was not an allowed use - and not a nonconforming use - until its disposition in 1996, as the building inspector and the local zoning board of appeals had ruled. It predated zoning in Danvers. It was allowed in the district under the provisions of the 1946, 1961, and 1996 zoning by-laws. Judge Kilborn's ruling that the station was "forbidden" under the 1961 by-law in the Residence I district ignores the fact that it was an expressly allowed use under Article IV.3 of the 1961 by-law.

Finally, Judge Kilborn's ruling centers on the fact that the use had been abandoned after the town transferred all of its fire fighting equipment and personnel to other facilities in 1995.

In *Currier v. Smith, et al,* 9 LCR 371 (2001), Judge Lombardi reviewed the conversion of a post office to a private use. Judge Lombardi does not quote *Durkin* accurately:

> A use of property under a lease for a proper Federal purpose may be immune from the application of a town's zoning by-law, but it is still considered a "nonconforming" use. Durkin v. Board of Appeals of Falmouth, 21 Mass. App. Ct 450, 452-53

(1986)(remaining decision which denied an application to convert a post office use in a residential zone to business and professional offices). In applying *Durkin* to the facts here, I find and rule that the post office is rightly considered to be a nonconforming structure.

Durkin held that the former post office was "'nonconforming' in fact." This is not a distinction without a difference. As explained above, *Durkin* never ruled that an immune use or structure, once decommissioned, was nonconforming as a matter of law. See the excerpt from *Rathkopf* in n. 2, infra.

Plaintiffs will concede that both Judge Lombardi and Judge Kilborn were entitled to rely in good faith on *Durkin* but only if Defendants will concede that neither learned jurist knew the result of the remand to the Falmouth ZBA.1 In light of those special facts, *Tsouvalas* and *Currier* have little or no value as precedent.

D. AN IMMUNE USE OR STRUCTURE, ONCE DECOMMISSIONED, IS NOT A NONCONFORMITY.

A use or structure initiated under principles of immunity or supremacy is NOT, once decommissioned, a nonconformity.

The legislative history of G.L. c. 40A, s. 6, set forth in the Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, H.R. Rep. No. 5009, at 35 (1972)(the "DCA Report") describes various types of nonconformities:

> *Nonconforming buildings*—e.g., a pre-existing structure that does not meet setback or other dimensional regulations of the ordinance.

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1 In this regard, see Bobrowski, *Handbook of Massachusetts Land Use and Planning Law*, 3rd edition (2011), at p. 191.

Nonconforming use of conforming buildings—e.g., commercial use of conforming dwelling in a residential zone.

Nonconforming use of nonconforming buildings—e.g., neighborhood grocery store in residential zone.

Nonconforming use of land—e.g., nonaccessory parking lot in residential zone.

Conforming structure on nonconforming lot, the boundaries of which were created prior to the adoption of the ordinance or amendment—e.g., a residence located on a 4,000 square foot lot where the minimum lot size for the residential zone is 5,000 square feet.

The DCA Report is often cited by our courts as the chief source of legislative history for the Zoning Act. See, e.g., *Palitz v. Zoning Board of Appeals of Tisbury*, 2014 WL 79330410 (2015); *Bruno v. Board of Appeals of Wrentham*, 62 Mass. App. Ct. 527, 537 (2004).

While this list is likely not intended to be exhaustive, the Courthouse does not meet the most basic requirement for eligibility. As stated in the CZO,2 a nonconforming structure is one that

> does not conform to the dimensional requirements .... for the district in which it is located; provided that such structure was in existence and lawful at the time the applicable provisions of this or prior zoning ordinances became effective.

The Courthouse was not "in existence" at the time the FAR requirement was 4.0. When constructed, the Courthouse had an FAR that exceeded that allowed. See Statement.

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2 It is worth noting that the CZO's definition is entirely consistent with leading treatises on the subject. See Salkin, 2 Am. Law Zoning, s. 12.17 (5th ed.) ("Nonconforming use status is available only for those uses which were legally established before the enactment of the restrictive regulation which rendered the use noncompliant."); Ziegler, 4 Rathkopf's The Law of Zoning and Planning, s. 72.1 (4th ed.)("While any use of land or structure which does not conform to existing zoning regulations may be considered "nonconforming" - regardless of when it was established or under what circumstances - a "protected" or "vested" nonconforming use is ordinarily defined as a use which lawfully existed prior to the enactment of a zoning ordinance, or of an amendment to a theretofore existing zoning ordinance, and which therefore may be maintained after the effective date of the ordinance or amendment although it does not comply with zoning restrictions applicable to the area. While a use of land or a building may become nonconforming through circumstances other than the enactment of a zoning restriction causing the use or building to violate the ordinance, *such other nonconformities will not be considered, in most cases, to be within the class of protected or vested nonconforming uses or structures.*")(emphasis added and citations omitted).

Our appellate courts have been consistent with the definition in the CZO. In *Mendes v. Zoning Bd. of Appeals of Barnstable*, 28 Mass. App. Ct. 527 (1990), the Appeals Court reviewed an attempt to expand a building for construction shop work, authorized by successive variances, by classifying it as an nonconformity. The local by-law, like the CZO, defined the term "nonconforming use" as one "existing at the time the zoning by-law was originally adopted in the area in which such building or use is ... located." Id. at p. 529. The Appeals Court held that "a use achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it." (citations omitted)

Applying this standard, Justice Kass, writing for the panel, ruled that a use authorized by a variance cannot be considered a nonconformity:

> For purposes of deciding whether a use is nonconforming within the meaning of G. L. c. 40A, Section 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.

In the case of the Courthouse, immunity served as a *de facto* variance. So, the same rationale should apply here. Immunity is, if anything, more "sparingly granted" than a variance. Certainly, in the instant matter, conferring nonconforming status would serve as an impermissible "launching pad" for expansion of the Courthouse.

Similarly, in *Palitz v. Zoning Bd. of Appeals of Tisbury*, 2014 WL 7930410 (2015), on March 3, 2015, the Supreme Judicial Court ruled that structures on lots created pursuant to the "Citgo Exception" in G.L. c. 41, s, 81L do not obtain status as nonconforming structures.3 Section 81L states that:

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3 See, Citgo Petroleum Corp. v. Planning Board of Braintree, 24 Mass. App. Ct. 425 (1987).

> the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision.

While such "division" is clearly authorized, the status of the structure on a lot deficient after division in area, frontage, or required setbacks, was unclear. Palitz claimed entitlement to status as a nonconforming structure.

The Supreme Judicial Court ruled that such structures were not nonconforming. After citing the DCA Report, the Supreme Judicial Court ruled that

> the mere fact that the new nonconformities in this case arose pursuant to an s. 81L division did not mean that those nonconformities were entitled to grandfather protection under the Zoning Act or otherwise were excused from complying with the town's zoning by-law."

Id. at Westlaw p. 6. A variance was required to alter the structure.

In *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Waltham*, 61 Mass. App. Ct. 124 (2204), the Appeals Court reviewed the denial of special permits for expanded gasoline storage at a convenience store. In 1972, the owner installed three 6,000 gallon tanks, although it had received municipal approval to install only three 4,000 gallon tanks. The owner later applied for two special permits to bring the total storage capacity to 18,000 gallons. These permits were denied.

The Appeals Court upheld the Land Court's finding that the three 6,000 gallon tanks were not protected by the ten year statute of limitations in G.L. c. 40A, s, 7 because they were not in the ground for ten years. Even if the limitation period applied, it "does not render the prior structure lawful, just immune from enforcement action." Id. at p. 127 n. 9. Thus, it would not become a nonconforming structure.

Six months later, a different panel of the Appeals Court decided *Bruno v. Board of Appeals of Wrentham*, 62 Mass. App. Ct. 527 (2004). The landowner here claimed that an unlawful use beyond the statute of limitations for enforcement set forth in G.L. c. 40A, s. 7 constituted a nonconformity. The Appeals Court cited the holding in *Cumberland Farms* with regard to structures.

> We can think of no valid reason why a different principle should apply to prior unlawful uses. Consequently, we decline to construe the expiration of the six-year limitation period set out in s. 7 as converting an initially unlawful use to a lawful use, as if by a belated or constructive grant of right. Id. at p. 536.

Importantly, the Appeals Court also cited the DCA Report in support of its conclusion. "We have also considered the fact that our reading of s. 6 is consistent with the policy expressed in case law and the legislative history of s. 6, that is, the elimination of nonconforming uses." (citations omitted). Id. at p. 537.4 Thus, *Cumberland Farms* and *Bruno*, like *Mendes* and *Palitz*, show that *how* the use or structure was initiated is a crucial factor in obtaining status as a nonconformity, a status sparingly awarded for the policy reasons set forth in the DCA Report.

Finally, in *Johnson v. Board of Appeals of Wareham*, 360 Mass. 872 (1972), the Supreme Judicial Court examined the conversion of a church, protected as an "exempt" use by G.L. c. 40A, s.3, to office suites.5 The church chose to apply for a variance rather than claim status as a

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4 The DCA Report, at p. 39, states: "There is a unanimity of opinion among zoning and planning authorities that the ultimate objectives o zoning would be furthered by the eventual elimination of nonconformities in most cases. In recognition of this policy most zoning enabling acts have provided for the prohibition or regulation of expansion, conversion or change and structural alteration, or reconstruction of nonconforming uses, the theory being that such prohibition or regulation is constitutionally permissible, and that the objective of elimination would eventually be achieved obsolescence, destruction or similar factors." The DCA Report's discussion of Nonconforming Uses is attached as Exhibit 6.

5 One would suppose that G.L. c. 40A, s. 3 would provide fertile ground for examination of the status of a structure after use for a church or school has ended. *Johnson* is the only reported decision Plaintiffs can find.

nonconforming structure. Without comment, the Supreme Judicial Court affirmed the trial court's decree that the variance was lawful.6

E. THE FLORIDA DISTRICT COURT OF APPEALS, THIRD DISTRICT, AGREES WITH PLAINTIFFS.

Plaintiffs have searched exhaustively for a definitive decision from another state. There is only one to be found. In *United Real Estate Ventures, Inc. v. Village of Key Biscayne*, 26 So. 3d 48 (2010), a three-member panel of the District Court of Appeal of Florida, Third District, examined whether the present day private use of a helipad constructed by the federal government in the 1960's to safely convey President Nixon to and from his "Winter Whitehouse" was, once decommissioned, a nonconforming use. The Court's answer is entirely consistent with the Arguments set forth above: "The federal use of the helipad by President Nixon's administration was immune from enforcement by reason of the Supremacy Clause of the United States constitution and was not conformed into a legal non-conforming use for private individuals when the federal government ceased to use the helipad and conveyed the property to a private third party." The Florida District Court of Appeal was well aware of *Durkin*; it was cited and distinguished on pages 7-9 in the "Village's Response to Motion for Rehearing," dated February 10, 2010, attached hereto as Exhibit 5.

The *Key Biscayne* panel cites *Alaska R.R. Corp. v. Native Village of Eklutna*, 43 P.3d 588 (Alaska 2002) and *Nolan Bros. v. City of Royal Oak*, 557 N.W. 2d 925 (Mich. 1996) in support of its ruling. But these cases stop at the same point as our *Village on the Hill, Inc. v. Building Commissioner of Boston*, 348 Mass. 107 (1964): when the essential government function is gone,

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6 The variance was awarded under the Zoning Enabling Act's s. 15, which contained a substantially more liberal standard for the grant of a variance than the current G.L. c. 40A, s. 10.

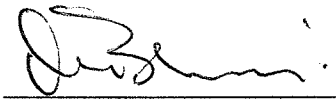
the use or structure is subject to local zoning regulations. Missing from these decisions is the exact status of the use or structure after decommissioning.

CONCLUSION

For the reasons set forth above, the Plaintiffs are entitled to summary judgment. The Courthouse is not a nonconforming structure. The Courthouse was built under principles of immunity. Upon decommissioning, immunity terminates, and the structure does not gain additional protective status as a nonconformity. It always was, and remains, in violation of zoning. If it is to be altered, extended, or reconstructed, the work will require a variance.

The Land Court is requested to rule that the special permit granted by the Planning Board pursuant to Section 8.22.2.a of the CZO is in excess of authority and a nullity.

PLAINTIFFS,
by their attorney,



DATE: March 24, 2015

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CERTIFICATE OF SERVICE

I, Mark Bobrowski, attorney for the Plaintiffs, hereby certify that I served a copy of the attached Memorandum by Fedex to:

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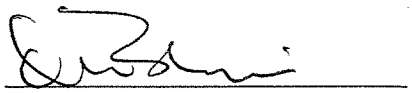

Mark Bobrowski

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