HILL LAW

April 3, 2015

BY HAND

Clerk
Land Court
3 Pemberton Square, 5th Floor
Boston, MA 02108

Re: Hill v. Cambridge Planning Board, et. al.
Land Court Misc. No. 14-488217

Hawley, et al. v. Cambridge Planning Board, et. al.
Land Court Misc. No. 14-488218

Dear Sir or Madam:

Please find enclosed the plaintiff Daniel C. Hill's Opposition to Defendants' Motions for Partial Summary Judgment in the above-referenced matter.

Thank you for your attention to this matter.

Very truly yours,

Daniel C. Hill

Enc.
cc: Kevin O'Flaherty, Esq.
Anne Sterman, Esq.
Jennifer Flynn, Esq.
Mark Bobrowski, Esq.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

Land Court Department
(Consolidated Cases) (RBF)

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 GC HOLDINGS, LLC, and the COMMONWEALTH OF MASSACHUSETTS,

Defendants

14 MISC 488218

AND

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 PLANNING BOARD, and LMP GC HOLDINGS, LLC, and the COMMONWEALTH OF MASSACHUSETTS,

Defendants

14 MISC 488217

DANIEL C. HILL'S OPPOSITION TO DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Consistent with the Court's Order dated January 15, 2015, the defendants have each moved, separately, for summary judgment in their favor on the narrow issue of whether the subject property located at 40 Thorndike Street (the "Property") was eligible for a special permit under the Cambridge Zoning Ordinance ("CZO"), §8.22.2 and G.L. c. 40A, §6. These motions must be denied for the reasons discussed in the plaintiff's summary judgment brief filed last month, and for the further reason that there is a dispute of material fact – specifically, that the modified nonconforming structure would comply with the off street parking and loading requirements in Article 6 of the CZO. See, CZO, §8.22.2.

Legal Argument

Plaintiff Daniel C. Hill has filed a Motion for Partial Summary Judgment on the narrow issue of whether the former courthouse building at 40 Thorndike Street (the "Structure") is eligible for a special permit under CZO, §8.22.2 and G.L. c. 40A, §6, to allow the reconstruction and alteration of a pre-existing, nonconforming structure. As explained in Hill's Memorandum of Law, the structure is not eligible for such a special permit, because the Structure did not conform to the CZO when it was built and the government immunity that allowed the Structure to be built notwithstanding its zoning nonconformity does not bestow grandfathering protection under zoning when the Structure is no longer used for the public purposes that the immunity was there to protect. Thus, as a matter of law, under no circumstances could the Cambridge Planning Board have lawfully granted the requested zoning relief under Article 8 to LMP GC Holdings, LLC ("LMP").[1]

The importance of the Appeals Court's holding in Durkin v. Board of Appeals of

[1/] The plaintiffs in the companion case have made similar arguments in support of their own Motion for Summary Judgment filed with this Court.

Falmouth, 21 Mass. App. Ct. 450 (1986) has been exaggerated. In their briefs, LMP and the City misrepresent the holding in Durkin, suggesting that it is directly on point. As explained in the plaintiff's summary judgment brief, the underlying zoning board decision in Durkin was clouded by confusion of fact, leading the Appeals Court to remand the case for a "wholly new consideration of Durkin's application," including figuring out whether the post office use of the building was lawful in the zoning district when it commenced. Importantly, if the Court thought that a use immune from zoning enforcement qualified for grandfathering under the statute, there would have been no need for that fact-finding mission. Tellingly, the Court expressly directed the zoning board's attention to "generally relevant (but not controlling) authorities" that it laid out in the decision's appendix, and which included Connecticut v. Stonybrook, Inc., 181 A.2d 601 (Conn. 1962), which held that:

> [t]he sole reason that the housing units here could be used notwithstanding the provisions of the building code was that, under the [federal] Lanham Act, the government did not have to comply with the code. Once the government relinquished jurisdiction over the units, government immunity ceased. The Lanham Act conferred no immunity on the property, as such. It merely conferred immunity on the government, and those acting on its behalf, during the period of government ownership and control.

Stonybrook, Inc., 181 A.2d at 605-606. If, as LMP would have it, the Durkin decision stands for the proposition that a use or structure immune from zoning enforcement when it was conceived qualifies for protection under G.L. c. 40A, §6, why would the Appeals Court direct the Falmouth Zoning Board's attention to a case that is the mirror opposite? The reality is that Durkin is not good precedent for this narrow question of law, given the unique facts of that case and the at best ambiguous remand instructions.

LMP contends that they have "logic and common sense" on their side, but for the reasons discussed in the plaintiff's summary judgment brief, transferring the benefits of government

immunity to a private developer once the property "has become wholly excess to" the government function for which the immunity served is illogical and nonsensical. Village on the Hill, Inc. v. Massachusetts Turnpike Authority, 348 Mass. 107, 118 (1964). In the Village on the Hill case, which LMP says "has no bearing," the Court held that [c]ertainly, after the [Turnpike] authority has conveyed in fee to private persons excess land formerly owned by it, such land does not remain exempt from zoning provisions because once owned by the authority." Ibid. LMP and the City concede that zoning immunity ends upon the transfer of the Structure to LMP, but do not appreciate or acknowledge the consequence of their position that the *privilege* of zoning immunity, available only to public entities, has a legacy that will endure forever, regardless of ownership or use. That legacy is the privilege that allows a private developer to build a 258'-3" tall Structure in a zoning district that caps the heights of structures at 80 feet, which would not be legal but for the immunity that was attached to the Structure for 40 years, but which supposedly ends when the Commonwealth conveys the property to LMP. This is the City's and LMP's "logic."

Relatedly, the defendants rely heavily on the fact that the Structure was "legal" when it was built. A structure with a variance is also "legal," but that does not make it a "lawful" pre-existing, nonconforming use or structure. Mendes v. Bd. of Appeals of Barnstable, 28 Mass. App. Ct. 527, 531 (1990). The distinction sought by LMP for government-immune structures defies logic, as in both cases nonconformities exist which are immune from enforcement. The concept that a grandfathered structure must have been "lawful" when it commenced has always been interpreted by Massachusetts courts as meaning that the structure was conforming to whatever zoning requirements existed at that time (in some cases, none).

Relevant to the "logic" defense is the substantial additional value LMP gets if it can

bootstrap onto the Commonwealth's zoning immunity than if the Structure has to comply with the current zoning dimensional requirements. Specifically, the renovated Structure proposed by LMP would be 258'-3" tall compared to the 80' maximum height of buildings in the underlying zoning district. See, Decision, p. 35 (attached as Exhibit A to the plaintiff's Complaint). If municipalities cannot "sell" zoning relief (Rando v. Town of N. Attleborough, 44 Mass. App. Ct. 603, 607 (1998)), does the transfer of the Commonwealth's immunity privilege to LMP, which has undeniable value, constitute an improper "sale" of zoning relief?

Even if the Structure was a "lawful" pre-existing, nonconforming structure for purposes of CZO §8.22 and G.L. c. 40A, §6 notwithstanding its nonconformity at conception, the defendants cannot obtain the summary judgment they are seeking because there is another pre-requisite to obtaining the special permit sought here, which the defendants have conveniently ignored – the structure as altered must comply with Article 6 of the CZO, regulating off-street parking and loading. Section 8.22.2 expressly provides:

> (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.

(emphasis added). There is a genuine dispute of material fact as to whether the altered Structure proposed by LMP would comply with CZO Article 6, which dispute precludes summary judgment to the defendants. Mass. R. Civ. P. 56.

The Planning Board's Decision, attached as Exhibit A to the Complaint, exposes the

delusion of the LMP's off-street parking plans. The Board noted that the although LMP "proposes" to lease the First Street Garage from the City of Cambridge to provide 420 parking spaces for its 40 Thorndike Street project, LMP asked the Board to approve an "alternative arrangement" to lease 420 parking spaces from the Cambridgeside Galleria shopping mall another block away from 40 Thorndike Street. The Board made no findings as to whether LMP has any rights to lease parking spaces from Cambridgeside, a private entity, much less whether taking 420 spaces from the mall would jeopardize the mall's own compliance with Article 6 of the CZO. Without any proof that the Cambridgeside lease is feasible, the Board's findings that LMP complied with Article 6 is based on pure speculation.

Interestingly, LMP sought approval for the Cambridgeside arrangement rather than the First Street Garage proposal because the First Street Garage lease would "require City authorization of a disposition of municipal property and is therefore not yet secured." Decision, p. 27. Yet, the Board made no finding that the *Cambridgeside* arrangement was "secured," so why was the Board willing to accept a speculative Cambridgeside arrangement if it apparently wasn't ok with a speculative First Street Garage arrangement? While this goes to the arbitrariness of the Board's decision, which is not before the Court on this motion, these uncontested facts also evince a parking plan that is half-baked and in no condition for the Board to have found that it complies with Article 6.[2]

[2/] The Board commented on page 27 of its Decision that the First Street Garage previously served the parking needs of the Structure when it operated as a courthouse, perhaps implying that with the decampment of the courthouse to Woburn the Garage can accommodate the new use of 40 Thorndike Street. There is evidence that the Board may have been under the impression that the Garage is now substantially vacant, a myth that can be dispelled by visiting the Garage on any given workday between 10:00 AM and 5:00 PM. Complaint, ¶16.

LMP is seeking summary judgment on the question, as framed in its Memorandum, of whether "the [Structure] is a pre-existing nonconforming structure that may be altered pursuant to G.L. c. 40A, §6 and Cambridge Zoning Ordinance Article 8." Since there is a dispute over whether the Structure as modified would comply with Article 6, LMP cannot, as a matter of law, obtain summary judgment on the question it presented in its Motion.[3]

WHEREFORE, for the reasons discussed above, the Court should deny the defendants' motions for partial summary judgment, and rule that the Structure is not eligible for a special permit under G.L. c. 40A, §6 and CZO §8.22.2 to alter a lawful, pre-existing nonconforming structure.

PLAINTIFF,

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Dated: April 2, 2015

[3/] LMP states on page 6 of its brief that "the parties agreed that there is no dispute as to any material fact" on the issue LMP has presented for summary judgment. This plaintiff does not recall making any such stipulation at the January 14, 2015 conference and doubts that he would have. In any event, if this plaintiff agreed that facts were undisputed, it would have been limited to the zoning and title history of the Property, and not to whether there are other barriers to LMP obtaining a special permit under the CZO.

CERTIFICATE OF SERVICE

I certify that I served the foregoing on all parties by first class mail to their counsel of record as follows on this 2nd day of April, 2015.

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