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April 3, 2015

VIA HAND DELIVERY

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:

LMP GP LLC's Opposition to Plaintiffs' Motions for Partial Summary Judgment.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,

Kevin P. O'Flaherty

Enclosure

cc (w/encl): Ms. Jennifer Noonan
Sessions Clerk to Judge Foster (by hand)
Mark Bobrowski, Esq. (by mail and email)
Daniel Hill, Esq. (by mail and email)

Vali Buland, Esq. (by mail and email)
Anne Sterman, Esq. (by mail and email)
Jennifer H. Flynn, Esq. (by mail and email)
Mariana Korsunsky, Esq.

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, and the COMMONWEALTH OF MASSACHUSETTS

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,

Defendants

14 MISC 488218

OPPOSITION OF LMP GP HOLDINGS, LLC TO PLAINTIFFS' MOTIONS 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 opposition to the Plaintiffs' motions for partial summary judgment (collectively, the "Motions").[1]

Discussion

I. The Foundation of Plaintiffs' Motions Is The False Premise That The Courthouse Building Was Not Lawfully Constructed. The Courthouse Building Was Lawfully Constructed And Lawfully Exists. Plaintiffs' Motions Fail For This Reason Alone.

The fundamental premise of plaintiffs' arguments is that the Courthouse Building is not entitled to treatment as a pre-existing nonconforming structure because it was not "lawfully" built. Plaintiffs must cling to the untenable position that the Courthouse Building was constructed "illegally" and in "violation of zoning" because they know that the plain language of Section 6 and Article 8 expressly protects a structure like the Courthouse Building which was lawfully begun and is lawfully in existence. Plaintiffs' foundational premise is false, and the arguments based on it fail.

The Conclusion of the Hawley Memorandum summarizes the fundamental premise of the Hawley Motion as follows:

> The Courthouse is not a nonconforming structure. The Courthouse was built under principles of immunity. Upon decommissioning, immunity terminates,

[1] This Memorandum is a consolidated opposition to the Motion for Partial Summary Judgment of Daniel C. Hill (the "Hill Motion") in Misc. Case No. 488217, and to the Motion for Summary Judgment of Michael Hawley, Roger Summons, Graham Gund and Marie Saccoccio (the "Hawley Motion") in Misc. Case No. 488218. Capitalized terms not otherwise defined will have the meaning ascribed to them in LMP's Motion for Partial Summary Judgment and Memorandum in Support of that motion, which are incorporated herein by reference. The memorandum of law in support of the Hill Motion will be referred to as the "Hill Memorandum" and the memorandum of law in support of the Hawley Motion will be referred to as the "Hawley Memorandum."

> 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, reconstructed, the work will require a variance.

Hawley Memorandum at 17.

The Hill Memorandum states the fundamental premise of the Hill Motion as follows:

> In the ordinary course, the Cambridge Planning Board would lack authority, under Bruno and other authorities, to issue a special permit to alter a pre-existing, nonconforming structure under the Zoning Ordinance and G.L. c. 40A, § 6 for the alteration of a building that was not "lawful" when it was built.

Hill Memorandum at 6.

Plaintiffs variously cite to and rely on cases like Mendes (holding that structures which come into being pursuant to a variance are not entitled to nonconforming structure status), Bruno (holding that illegal uses that are protected from zoning enforcement by the passage of time under G.L. c. 40A, § 7 do not qualify as nonconforming uses) and Cumberland Farms, (holding that structures introduced illegally are not nonconforming structures). The cases are inapposite and the argument they are offered to support fails because the Courthouse Building was not built pursuant to any variance and did not come into existence illegally or in violation of Cambridge zoning.

The Courthouse Building was lawfully constructed under and according to the legal principle of governmental immunity. The principle of governmental immunity literally takes precedence over zoning and renders it inapplicable. The Courthouse Building "precedes" zoning like a building constructed prior to the enactment of zoning "precedes" zoning. The Courthouse Building was constructed as if allowed by zoning or as if zoning did not exist, because at the time of its construction Cambridge zoning simply did not apply to it. Construction of the Courthouse

Building did not violate zoning. The principle of government immunity trumped zoning and rendered it inapplicable. The Courthouse Building did not and cannot have violated a law that did not and does not, by the operation of governmental immunity, apply to it. When the Courthouse Building was constructed under the principle of immunity, it did not, as a matter of fact, conform to Cambridge zoning. It was, to borrow the Durkin court's phrase, "nonconforming in fact."[2] But it did not violate zoning.[3] Zoning was simply inapplicable to it—the way a speed limit is inapplicable to an emergency vehicle responding to a call. The emergency vehicle does not conform to the speed limit in fact, but it also is not violating the law because the speed limit is inapplicable to it.

Not only was Cambridge zoning inapplicable to the Courthouse Building when it was constructed, it remains inapplicable as long as the Courthouse Building is in government ownership and use. While owned and used by the Commonwealth, the Courthouse Building would not have been subject to an enforcement action because it was not required to comply with Cambridge zoning. It is only when the government ceases to own and use the Courthouse Building when it is sold to LMP that Cambridge zoning, for the first time, will become applicable to it, and the Courthouse Building, for the first time, will become subject to it. See, Village on the Hill, Inc. v. Mass. Turnpike Auth., 348 Mass. 107, 118 (1964)(zoning becomes applicable to property formerly owned by government that was exempt from zoning under principles of immunity when the property is conveyed to private party). However, when the

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[2] While "nonconforming in fact," the Courthouse Building did not violate the zoning law and was not illegal because, by the principle of immunity, the Ordinance was not applicable to it. In that sense, the Courthouse Building when constructed was like a building that is constructed prior to zoning which cannot be said to "violate" a zoning bylaw or ordinance which has yet to be enacted.

[3] The Durkin court makes this point as well when it stated: "[i]f the use beginning in 1959 could have been regarded as nonconforming, but immune because of the Federal use, it was a lawful use." Durkin at 453.

Ordinance does become applicable and the Courthouse Building becomes subject to zoning, it will do so as the Courthouse Building currently exists. When the Courthouse Building is sold to LMP, the provisions of the Ordinance with respect to FAR and height will for the first time become applicable. At that time, the Courthouse Building will become subject to the current 2.75/3.00 FAR limit for commercial/residential uses and the 80 foot height limit—provisions that were enacted by Cambridge after the Courthouse Building was constructed. The Courthouse Building will become subject to those provisions as a building which lawfully pre-exists the applicability of those provisions, and which is, therefore, a lawful pre-existing nonconforming structure.

Because the Courthouse Building was constructed lawfully and exists lawfully, it falls squarely within the protections that Section 6 and Article 8 afford to lawfully pre-existing nonconforming structures. The plain language of Section 6 (which is incorporated by reference into Article 8) provides that a zoning ordinance or by-law "shall not apply" to two categories: (1) structures or uses lawfully in existence or lawfully begun; and (2) a building [permit] or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five. The Courthouse Building falls into the first category. Accordingly, it is expressly protected by the plain language of Section 6. To find or hold otherwise would be to ignore this plain language and to destroy the Commonwealth's valuable vested rights in a legally constructed and legally existing nonconforming structure.

II. Durkin Is Controlling And Mandates Summary Judgment For LMP, The Municipal Defendants And DCAM.

In their Motions, plaintiffs argue that LMP's reliance on Durkin is "misplaced" because

(they claim) Durkin is "limited" by its facts and does not settle the issue presented: whether a building constructed under the principle of governmental immunity and which, when built, did not comply with a certain dimensional requirement of the then-existing municipal zoning ordinance, will, after it passes into private ownership:

(a) have the status of a pre-existing nonconforming structure which may be altered by special permit pursuant to Section 6 of chapter 40A and Article 8 of the Cambridge Zoning Ordinance, or

(b) have the status of an immune, but noncompliant structure, that does not have the status of a pre-existing nonconforming structure when it is transferred to a private party, and, therefore, may only continue to exist and may only be altered by a variance.[4]

The Hawley Memorandum presents the appellate briefs filed by the parties in Durkin and argues that a review of the parties' submissions supports the view that the Appeals Court decision did not address the question presented here. In fact, however, a review of the parties' briefs makes clear that the question presented here was addressed and resolved in Durkin and that Durkin mandates summary judgment for LMP, the municipal defendants and the Commonwealth.

In Durkin, a private property owner sought the equivalent of a Section 6 Finding under a provision of the Falmouth Zoning Bylaw that provided in relevant part that pre-existing nonconforming structures or uses may be extended, altered, changed or rebuilt only by special

[4] See Hawley Memorandum, at page 5 and Hill Memorandum, page 2. As to the analysis of the Durkin case, Plaintiff Hill adopts and repeats the arguments made by the Hawley plaintiffs.

permit from the zoning board and subject to a zoning board finding that any such rebuilding, change, extension or alteration was not more detrimental than the existing nonconforming use or structure to the neighborhood. Durkin at 452. The property in question had been used as a post office. The property owner desired to introduce a new, nongovernmental use, and make some physical alterations to the structure, and sought the equivalent of a Section 6 Finding to do so.[5]

The zoning board denied the special permit on the ground that it lacked "power to grant" a special permit "because there was no pre-existing nonconforming use …lawfully in existence prior to the change in the zoning by-laws that rendered it nonconforming." Id. According to the Appeals Court, "[t]he board took the position that the Federal government is 'immune from zoning regulations when…land is leased to the government by a private landowner' but, in effect, a constitutionally immune use could not be treated as a lawful nonconforming use." Id. This, of course, is the exact position taken by the plaintiffs here—that a constitutionally immune structure cannot be treated as a lawful nonconforming structure for which Section 6 relief or Article 8 relief is available.

In its brief to the Appeals Court in Durkin, the Falmouth zoning board argued that the Durkin property "was not a 'nonconforming use' regardless of its prior zoning history [because] [t]he federal government's immunity from local zoning regulations does not create any retrospective rights in favor of a subsequent purchase." Falmouth Board Brief at 4. [6] The zoning board took the position that while the prior post office use was allowed due to the fact that it was

[5] In Durkin, the property owner sought the finding under Article 1222 of the Falmouth zoning bylaw which in all material respects tracks the provisions of Section 6 and is the Falmouth zoning bylaw's analog to Article 8 of the Ordinance.

[6] A copy of the Falmouth zoning board of appeals' appellate brief is attached as Exhibit 2 to the Hawley Memorandum.

immune from local zoning, that immunity could not qualify the property as a lawful pre-existing nonconforming use once it came out of governmental ownership and was transferred to private hands. Falmouth Board Brief at 2. Instead, the zoning board argued, Durkin needed a variance, not a special permit, to alter the use. Falmouth Board Brief at 11-12. This is the same argument plaintiffs make here. Plaintiffs here claim that a special permit under Section 6 and Article 8 are not available to LMP and that LMP needs a variance because (they argue) a structure built under the principle of governmental immunity does not and cannot qualify as a lawful, pre-existing nonconforming structure.

In Durkin the Appeals Court rejected the zoning board's argument, finding that the zoning board had "too narrowly interpreted the term 'nonconforming'…in appraising its powers under Section 1222 of the town's by-law." Durkin at 452. The Appeals Court held that an immune use did qualify as a pre-existing nonconforming use and the zoning board did have jurisdiction to consider Durkin's application for a special permit and Durkin was not required to seek a variance. The Appeals Court held that even though immune, the use was "nonconforming in fact," and that even if in 1959 the nonconforming but immune use had begun, it had begun as a "lawful use" –lawful under the principle of governmental immunity. Id.

On the basis of these holdings, the Appeals Court ordered the Superior Court to remand the matter to the Falmouth zoning board so that the board could reconsider Durkin's application for a special permit and make the necessary Section 6 findings.

Plaintiffs argue that the Appeals Court remanded the case so that the zoning board could first determine whether in 1959 the post office use was in fact an allowed use under Falmouth

zoning which was subsequently disallowed by a later zoning amendment in 1966. In other words, plaintiffs argue that the remand required that the zoning board make a determination that Durkin's use was the typical pre-existing nonconforming use situation and that principles of immunity were not implicated or involved in the decision. In plaintiffs' view, the Appeals Court, sub silentio, ruled that if and only if the zoning board in Falmouth first made that threshold determination that the property was the typical nonconforming use should it proceed to consider whether Durkin was entitled to a special permit and Section 6 Findings, but otherwise, the principle of governmental immunity would offer nothing to Durkin and he would be required to obtain a variance.

But that is not what the Durkin court ordered. The Appeals Court remand was not qualified in that way. While the Appeals Court ordered that the zoning board clarify its apparent confusion about the zoning history of the property, it also ordered the board to hear and make findings on Durkin's special permit application for a change or alteration to a pre-existing nonconforming use. It did not order that the zoning board first had to determine that Durkin's situation was the typical nonconforming use scenario in order to proceed to consider the special permit application and Section 6 Finding. The Appeals Court ordered that the zoning board reconsider the Section 6 special permit application regardless of any preliminary clarification as to the zoning history of the property. Why?

It did so because, while the zoning history needed to be clarified as a preliminary step in the board's decision on Durkin's Section 6 special permit application , in the end, regardless of whether the clarification was that the nonconforming status was the result of pre-existence or governmental immunity, the board was required to take up Durkin's special permit application.

In other words, however the board resolved its confusion as to the property's zoning history, in the court's view, the use was pre-existing nonconforming, and, under either scenario, the board was required to take up and make findings on Durkin's Section 6 special permit application. If the board determined that at the time the building was constructed and the post office use was begun a post office use was an allowed use under Falmouth zoning, these facts would present the typical situation where a preexisting allowed use was made nonconforming by a subsequent zoning change and Durkin would fall within the protection of Section 6. If however, the post office use in 1959 was not an allowed use, the principle of governmental immunity meant that the property was exempt from zoning, "nonconforming in fact," but legally so. Accordingly, when the property came out of government use, it would be entitled to protection as a pre-existing nonconforming use by reason of government immunity and Durkin would be entitled to the protection of Section 6. In either case, then, Durkin's application for special permit and a Section 6 Finding had to be taken up by the board, because, as the Durkin court ruled, the Falmouth zoning board of appeals had erred when it had concluded that a "constitutionally immune use could not be treated as a lawful nonconforming use." Durkin at 452.

Finally, any question as to the central holding of Durkin was resolved by the Appeals Court itself. In Bruno the Appeals Court explained that in Durkin it had held "that use of property by the Federal government that was immune from the application of local zoning regulations due to Federal supremacy could be considered a prior lawful nonconforming use because of that immunity." Bruno v. Board of Appeals of Wrentham, 62 Mass.App.Ct.527, n. 13

(2004). Accordingly, Durkin is directly on point and controlling.[7]

III. The Purposes Behind The Protection Provided Nonconforming Structures And The Language Of Section 6 And Article 8 Construed To Effect Those Purposes Demonstrate That Once In Private Hands The Courthouse Building Is Entitled To Protection As A Lawful Pre-Existing Nonconforming Structure.

Court rulings, statutes and ordinances that protect nonconforming structures and uses are based upon the law's reluctance to give zoning ordinances a retroactive effect which would destroy substantial, existing, lawful property rights. See Rathkof's The Law of Zoning and Planning, § 72:3 (4th ed.). To achieve protected nonconforming status, a structure (in the case of a nonconforming structure) must have been lawful when initiated. See Rathkof's The Law of Zoning and Planning, § 72:12 (4th ed.).[8] It is beyond dispute that the Courthouse Building, a structure built under the principle of governmental immunity, was lawfully built. Because of the legal principle of governmental immunity, municipal zoning was simply inapplicable to the Courthouse Building when it was constructed. At the time of the Courthouse Building's construction, it was as if zoning expressly allowed the proposed structure. In that respect, the

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[7] The fact that on remand the Falmouth zoning board sitting in 1986 assumed that a building inspector in 1959 had issued a building permit to Durkin's predecessor because the building inspector had considered the use of the property as a post office to be an allowed use does nothing to change the Appeals Court's ruling in Durkin nor its subsequent explanation of Durkin's primary holding in Bruno. The fact is that the court in Durkin concluded that the property was entitled to treatment as a pre-existing nonconforming use whether it was a use that conformed to zoning when introduced and then was rendered nonconforming by a subsequent zoning change—the typical situation—or by reason of its introduction as a use "nonconforming in fact" to then existing zoning, but lawfully immune from it by the principle of governmental immunity. The unmistakable fact is that the Durkin court took direct aim at the zoning board's position that "a constitutionally immune use could not be treated as a lawful nonconforming use," and rejected it, concluding that "the board too narrowly interpreted the term 'nonconforming (with respect to uses of the locus)." The court left it to the Falmouth zoning board to determine which path to legal nonconformity it would have Durkin follow. For these same reasons, the extra-jurisdictional cases cited in a Durkin footnote, including Connecticut v. Stonybrook, Inc., 181 A.2d 601 (Conn. 1962) are, as the Durkin court notes, not controlling.

[8] As plaintiffs repeatedly argue in their briefs, a use or structure that was initiated or introduced illegally, as in the Cumberland Farms and Bruno cases, do not acquire the protection of nonconforming use status. The Courthouse Building was not introduced illegally but pursuant to the legal principle of sovereign immunity.

Courthouse Building is like any other building lawfully constructed. Subsequent to its construction, the Ordinance was amended to add the current FAR and height requirements. The Courthouse Building existed prior to the enactment of those currently applicable municipal zoning requirements. That type of structure is clearly entitled to lawful nonconforming structure status and to the protection that Section 6 and Article 8 would provide. 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).

Having been lawfully constructed and being lawfully in existence, even though "nonconforming in fact" with existing (and prior) zoning, the nonconforming but lawful status of the Courthouse Building is a substantial existing property right that has "vested." Under a reasonable interpretation of Section 6, and consistent with Durkin, that vested right must be accorded protection under Section 6 and Article 8. The very purpose of such statutory provisions is the protection of such rights. Those rights can be transferred. See City of Revere v. Rowe Contracting Co., 362 Mass. 884, 885 (1972). Accordingly, any attempt to deny those vested rights by application of regulations that did not apply to the Courthouse Building when it was constructed and up to the point it is transferred to LMP would constitute an unconstitutional taking of the Commonwealth's vested rights in the Courthouse Building and would improperly and unfairly devalue the Commonwealth's asset. The Commonwealth is entitled to transfer the Courthouse Building with its vested rights, and the Commonwealth is entitled to be paid for all of its property's valuable vested rights.

That is why, as previously noted, Section 6 protects "lawfully existing structures" from

the application of zoning ordinances or bylaws and allows their alteration via a discretionary special permit and not a variance (zoning relief to which no one is entitled). That is why the Cambridge Zoning Ordinance will protect a "nonconforming structure," which it defines as 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." Ordinance, Article 2. Again, the Courthouse Building did not, in fact, comply with the 4.0 FAR when it was constructed, but by the principle of immunity, that FAR limit (and the rest of the Ordinance) was inapplicable. Accordingly, the Courthouse Building did not violate that or any other provision of the Ordinance when it was built. It simply was not subject to them. Likewise, the Courthouse Building does not comply with the current Ordinance with respect to FAR (2.75/3/0) and height (80 feet). However, no enforcement action can be taken against the Courthouse Building because those limits are not applicable to the Courthouse Building under the principle of governmental immunity. When the Courthouse Building is sold to LMP, those requirements for the first time will become applicable. However, the Courthouse Building lawfully pre-exists the applicability of those requirements the same way that a building constructed before the enactment of zoning lawfully pre-exists zoning.

IV. The Extra-Jurisdictional Cases That Plaintiffs Cite And Rely On Cannot Overrule Massachusetts Law And Are Inapposite.

Plaintiffs cite to and rely on several extra-jurisdictional cases. These cases do not and cannot overrule the plain language of Section 6 and Article 8 or the controlling ruling of Durkin.

The Hawley Plaintiffs rely heavily on United Real Estate Ventures, Inc. v. Village of Key

Biscayne, 26 So.3d 48 (2010). Key Biscayne is a decision of a three-judge panel applying a *certiorari* standard of review to a magistrate's application of a local Florida zoning ordinance. The decision lacks any detailed analysis and merely concludes that the magistrate did not violate the plaintiff's due process rights in finding that a helipad that had been constructed and used by the President of the United States Richard Nixon under principles of sovereign immunity could not many years after it had ceased to be used as a helipad be put back to helipad use by a subsequent private owner of the former Nixon property. The Hawley plaintiffs argue that this case supports their argument that immune uses cannot be treated as pre-existing nonconforming uses (under Massachusetts law) when the immunity ends upon sale to a private party.

Key Biscayne does not, of course, overrule Durkin or construe Section 6 or Article 8. It is inapposite on that basis alone. Moreover, a careful review of the magistrate's decision demonstrates that the underlying decision actually turned on the magistrate's view that the nonconforming use had been abandoned and not that an immune use could not qualify as a nonconforming use.[9]

The Magistrate's Decision details the relevant facts. The case involved a helipad built by the Federal government for use by Richard Nixon on Florida property he owned and which functioned as his "Florida Whitehouse" during the time he was President. Magistrate's Decision at 2. Local zoning prohibited such use, but it was allowed under principles of governmental immunity. Id. President Nixon and the Federal government ceased using the helipad in 1974, and the property was transferred to a private party. Id. For some 17 years, from 1974 to 1991,

[9] The magistrate's ruling (the "Magistrate's Decision") is reproduced as part of Exhibit 5 to the Hawley Memorandum.

the helipad was not used. Id. Thereafter, in about 2004, a subsequent private owner began using the helipad. Id. A local building official issued a cease and desist order. Id. at 1. The owner claimed the use when created was immune under the principle of governmental immunity and that he should be permitted to continue such use as a successor in interest to the government and as a "nonconforming use." Id. at 3. The magistrate ruled against the owner, finding that even if there had been some grandfathered rights, such rights would have been lost by abandonment because, under the relevant local zoning bylaw, a nonconforming use is considered abandoned 6 months after discontinuation of the use, and the uncontradicted evidence was that the use had been not operated for 17 years "resulting in the extinguishment of any rights." Id. at 4. Accordingly, the case actually turned on the finding of abandonment, not a holding that an immune used could never be a nonconforming use. Moreover, the cases cited by the appellate court in its *certiorari* decision, Alaska Railroad and Nolan Bros., stand for the uncontested and irrelevant proposition that governmental immunity does not "run with the land." [10] For all these reasons, Key Biscayne does not help plaintiffs' cause.

V. Cases Like Mendes, Bruno, and Cumberland Farms Are Inapposite.

As noted above, plaintiffs cite to Mendes, Bruno and Cumberland Farms to argue that the Courthouse Building is not entitled to treatment as a pre-existing nonconforming structure. The cases do not control the issue presented. Durkin does.

Mendes stands for the proposition that uses or structures which come into existence by reason of a variance cannot be altered or extended via a Section 6 Finding/special permit. The case is inapplicable because the Courthouse Building did not come into existence by reason of a

[10] The Hill Memorandum also cites to and relies on the Nolan Bros., and Alaska Railroad cases and to the case of

variance. It came into existence under the principle of governmental immunity and there is good reason for the law to treat the two distinct situations differently.

A variance is a creature of municipal zoning law. It provides municipal permission for something that municipal zoning law otherwise prohibits. Accordingly, variances are granted "sparingly" and only upon satisfaction of strict statutory criteria. See G.L. c. 40A, § 10. As something that comes into being through a municipal decision-making process, it makes sense that the law allows the municipality to continue tightly to control any extension or alteration to what the municipality has permitted. But, as noted, the Courthouse Building is not the creature of municipal law or municipal decision making. It exists legally under the principle of sovereign immunity, which is above municipal law and outside of and not subject to municipal decision making. Accordingly, it is appropriate that municipal zoning only applies when the immunity ends, and not retroactively, but prospectively so as not to violate constitutional principles and vested rights.[11]

The Bruno and Cumberland Farms cases also are distinguishable because each dealt with a situation where a use or structure had been introduced illegally. In those circumstances, the Bruno and Cumberland Farms courts ruled that a structure or use introduced illegally is not transformed into a legally nonconforming use or structure by the operation of G.L. c. 40A, § 7 which protects such uses and structures from local zoning enforcement actions if in existence for

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Pima County for the same immaterial and uncontested proposition.

[11] Moreover, in Mendes, the property owner was trying to obtain a Section 6 Finding with respect to a matter that the operative zoning regulation expressly prohibited. By invoking Section 6, the property owner was attempting an end run around an express prohibition. Here, in contrast, the Ordinance expressly encourages adaptive reuse of existing buildings as in the public interest. See Ordinance Article 22.21 (the purpose of this section is "to encourage the reuse of existing buildings"). There is no "end run." Instead there is consistency with and fulfillment of the purposes of the Ordinance.

more than 10 years. The cases are inapposite because, as noted above and as Durkin has held, a structure that comes into existence legally under the principle of governmental immunity is entitled to treatment as a pre-existing nonconforming structure.

VI. Hill's Pending Discovery Does Not Preclude Summary Judgment

A footnote in the Hill Memorandum suggests that his pending discovery requests create a material issue of fact which would preclude Summary Judgment for LMP (and, supposedly, for the Commonwealth and City). As plaintiff/attorney Hill well knows, at the hearing conducted by the Court on January 14, 2015, as reflected in this Court's Order dated January 15, 2015, the parties agreed in open court that there are no issues of material fact in dispute with respect to the issue presented here and that the issue could be resolved as a matter of law on cross-motions for summary judgment. Plaintiff/attorney Hill suggests that alleged factual issues with respect to the question of whether LMP has satisfied certain alleged parking requirements so as to be entitled to a special permit under Article 8 precludes summary judgment on the issue presented. But plaintiff/attorney Hill confuses the issue

presented with the ultimate merits of the Planning Board's action on LMP's special permit application. The issue presented here is whether the Courthouse Building qualifies as a legally pre-existing nonconforming structure that would entitle LMP to seek a special permit under Article 8 in the first place. The issue is not whether the Article 8 special permit LMP ultimately received was properly granted. That issue will come after the first, threshold, issue is resolved. Accordingly, the issue presented for resolution by the parties' cross motions, as the parties and the Court have previously agreed, is ripe for resolution on summary judgment.

Conclusion

For the foregoing reasons, this honorable Court should deny the Hawley Motion and the Hill Motion, should allow the Motions of LMP, the City and the Commonwealth and should enter partial summary judgment on the question presented in favor of LMP, the City and the Commonwealth.

Respectfully submitted,

LMP GP HOLDINGS, LLC,

By its attorneys,

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Dated: April 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2015 a true copy of the above document was served by first-class mail and e-mail upon the attorney of record for each of the parties in this case.

Kevin P. O'Flaherty

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