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CITY OF CAMBRIDGE
OFFICE OF THE CITY SOLICITOR
795 Massachusetts Avenue
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April 2, 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 the Defendant City of Cambridge Planning Board's Opposition to Plaintiffs' Motions for Partial Summary Judgment with Certificate of Service.

Please contact me if you have any questions.

Very truly yours,

Vali Buland

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

MEMORANDUM OF DEFENDANT PLANNING BOARD OF CAMBRIDGE IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

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 Opposition to Plaintiffs' Motions for Partial Summary Judgment (collectively "Plaintiffs' Motions")[1] on the issue of whether the Middlesex County Courthouse building in Cambridge, Massachusetts (the "Courthouse Building") was a lawful preexisting nonconforming structure that may be redeveloped and 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"). Plaintiffs' motions for partial summary judgment reveal that Plaintiffs lack any "reasonable expectation" of proving their case based upon the undisputed facts of this case, and therefore the Board is entitled to summary judgment as a matter of law. *See Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 716 (1991).

II. FACTS

The undisputed facts are set forth in an "Agreed Upon Statement of Undisputed Facts" ("SOF") filed with this Court on February 17, 2015. All parties agree that there is no genuine dispute of material fact [2] and that summary judgment should enter as a matter of law on the issue of whether the Courthouse Building is a lawful pre-existing nonconforming structure for purposes

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[1] Plaintiffs Michael Hawley, Graham Gund, Marie Saccoccio and Roger Summons submitted a Motion for Partial Summary Judgment and supporting Memorandum of Law hereinafter referred to as the "Hawley Memorandum". Plaintiff Daniel Hill submitted a Motion for Partial Summary Judgment and supporting Memorandum of Law hereinafter referred to as the "Hill Memorandum". This Memorandum is submitted by the Board as a combined Opposition to the Hawley Memorandum and the Hill Memorandum.

[2] The Hill Memorandum (p. 5, fn. 3) suggests that there may be a disputed material fact with respect to whether parking relief should have been granted to the Developer by the Board pursuant to Section 8.22.2 of the Ordinance. However, this Court's Order of January 15, 2015 reserves all matters related to the granting of the special permit until after the threshed issue presented here is decided on these cross motions for partial summary judgment.

of G.L. c. 40A, § 6 and Section 8.22.2 of the Ordinance.

III. ARGUMENT

A. Plaintiffs Cannot Demonstrate That The Courthouse Building is Not a Lawful Pre-existing Nonconforming Structure and May Not Be Redeveloped and Used Pursuant to the Provisions of G.L. c. 40A, §6 and Section 8.22.2 of the Zoning Ordinance

1. The Courthouse Building is a Lawful Pre-Existing Nonconforming Structure

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 claim that: 1) the Courthouse Building is not a lawful pre-existing nonconforming structure and therefore alterations to the Courthouse Building would require the issuance of a variance, and 2) the Defendants' reliance on *Durkin* as controlling case law is misplaced.

Plaintiffs first argue that even though the Courthouse Building was not required to comply with the district's maximum allowable floor area ratio requirement ("FAR") when constructed, and even though it remained immune from the FAR requirement "as long as it housed an 'essential government function'" (Hawley Memorandum p. 4), it will not acquire lawful pre-existing nonconforming status when the governmental function ceases. Plaintiffs claim this is so because at the time of construction "[i]t did not fully comply with the Zoning Ordinance's dimensional requirements, and therefore it was nonconforming to those requirements" (Hill Memorandum p. 5).[3] Based on this logic, Plaintiffs contend that the Courthouse Building can only be altered or reconstructed pursuant to a variance. (Hawley Memorandum p. 17). However,

[3] Plaintiff Hill further claims that the question presented is whether governmental immunity extends to a private subsequent owner which, he argues, it does not. (Hill Memorandum p. 7). The Board, however, asserted in its Memorandum of Law in support of the Board's Motion for Summary Judgment that the Courthouse Building "[w]ill not retain its governmental immunity once all governmental functions have ceased and it is sold to a private developer." (Board's Memorandum p. 4). *See Village on the Hill, Inc. v. Mass. Turnpike Auth.*, 348 Mass. 107, 118 (1964) (land once immune does not retain its immunity after being conveyed in fee to private parties). Therefore, the Board will not further address this issue here.

regardless of whether the Courthouse Building fully conformed to the dimensional requirements of the Ordinance when it was constructed, it was *lawful* when it was constructed and did not violate the existing zoning regulations because it was immune from those zoning regulations. Therefore, the Courthouse Building was at all times "in existence and lawful" based on governmental immunity. As such, it falls squarely within the Ordinance's definition of a "Nonconforming structure" and is entitled to the protections afforded by G.L. c. 40A, §6 and Section 8.22.2 of the Ordinance.[4]

To support their argument that the Courthouse Building is not a lawful pre-existing nonconforming structure and would require a variance to be altered or reconstructed, the Plaintiffs turn to cases that are plainly inapposite. *See e.g. Bruno v. Bd. of Appeals of Wrentham* (*"Bruno"*), 62 Mass. App. Ct. 527 (2004); *Mendes v. Board of Appeals of Barnstable* (*"Mendes"*), 28 Mass. App. Ct. 527 (1990), and; *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, (*"Cumberland Farms"*), 61 Mass. App. Ct. 124 (2004).

In *Bruno*, the Court found that property used for a truck maintenance facility did not acquire lawful pre-existing nonconforming status because the use of the property as a truck maintenance facility was *never lawful*. Unlike the Courthouse Building, which was in existence and lawful pursuant to governmental immunity, the truck maintenance facility in *Bruno* was begun unlawfully because the property owner failed to apply for a required special permit, and the building inspector mistakenly issued a building permit and subsequently issued a certificate of occupancy despite the lack of the required special permit. The Appeals Court found that because the property owner's use of the property was never lawful, it was not entitled to G.L. c. 40A, § 6

[4] In Article 2 of the Ordinance "Nonconforming structure" is defined as: "Any structure which does not conform to the dimensional requirements of 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. "

protection. *Bruno*, 62 Mass. App. Ct. at 536.

The facts in *Bruno* are clearly distinguishable from the facts here. The Courthouse Building was lawfully constructed because zoning regulations did not apply to it based upon the principle of governmental immunity. Unlike the truck maintenance facility, which was never lawful, the Courthouse Building is eligible to be redeveloped and used pursuant to G.L. c. 40A, §6 and Section 8.22.2 of the Ordinance. Significantly, the Court in *Bruno* acknowledged and contrasted the holding in *Durkin v Board of Appeals of Falmouth* ("*Durkin*"), 21 Mass. App. Ct. 450 (1986), where the Court held that use of property by the federal government that was immune from the application of zoning regulations because of that immunity "could be considered a prior lawful nonconforming use." *Bruno,* 62 Mass. App. Ct. at 535, n. 13.[5]

Like the *Bruno* court, the Court in *Mendes* held that a special permit could not be used to expand a use (a construction business on a lot wholly within a residential zone) which was never a lawful use, but which was allowed under a series of variances. The Court stated that "[f]or purposes of deciding whether a use is 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,* 28 Mass. App. Ct. at 531. Similarly, in *Cumberland Farms,* gasoline storage tanks installed *in violation* of zoning regulations were not

[5] In *Bruno*, the Court further opined that uses that are immune from zoning enforcement based on the statute of limitations period set forth in G.L. c. 40A §7, do not acquire nonconforming status by virtue of immunity from enforcement. Here, the Board is not claiming that the Courthouse Building acquired lawful pre-existing nonconforming status because it is immune from enforcement under G.L. c. 40A §7. Although no action can be taken that would require the dimensional violations of the Courthouse Building to conform to current zoning requirements, the fact that the structure is lawfully permitted to remain and be used "as is" only underscores the logic of permitting alterations that will bring the Courthouse Building into greater compliance with the Ordinance pursuant to G.L. c. 40A § 6 and Section 8.22.2 of the Ordinance. *See also Patenaude v. Zoning Board of Appeals f Dracut,* 82 Mass. App. Ct. 914 (2012) (expiration of time limitation period of G.L. c. 40A, § 7 does not remove illegality of an unlawful structure; it simply protects it from an enforcement action).

entitled to Section 6 protections as nonconforming structures because they were *never lawfully in existence. Cumberland Farms*, 61 Mass. App. Ct. at 128.

The cases relied upon by Plaintiffs are plainly inapposite because the structures or uses at issue in those cases were unlawfully begun and therefore could not achieve protected lawful nonconforming status. Here, it is undisputed that the Courthouse Building was in existence and lawful based on governmental immunity. As such, it should be treated no differently than any other building that was lawfully constructed before the advent of zoning and which later does not comply with the dimensional requirements of an ordinance or by-law. Here, unlike the facts in *Bruno*, *Mendes* and *Cumberland Farms*, the Courthouse Building may be redeveloped and used pursuant to the provisions of c. 40A § 6 and Section 8.22.2 of the Ordinance.[6] *See e.g. Shrewsbury Edgemere Associates Limited Partnerships, 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 G.L. c. 40A, § 6).

Because each of the cases upon which Plaintiffs rely are readily distinguishable from the instant case and inapposite, they do not support Plaintiffs' challenge to the Board's determination that the Courthouse Building may be redeveloped and used under G.L. c. 40A,§ 6 and Section 8.22.2 of the Ordinance.

2. The *Durkin* Case is Controlling Precedent and Supports the Board's Position

Plaintiffs next invite this Court to reevaluate the facts and legal arguments presented to the Appeals Court in *Durkin*, and second-guess the Appeals Court's decision in that case. This Court should reject that invitation. It is not the appropriate role of this Court to review the parties'

[6] Plaintiffs also rely on a number of cases from other jurisdictions. These cases are not controlling in this Court, but in any event are also inapposite. *See e.g. United States Real Estate Ventures, Inc. v. Village of Key Biscayne*, 26 So. 3d 48 (2010) (use of helipad by a United States President which was exempt from local zoning requirements under principles of sovereign immunity had been abandoned for seventeen (17) years resulting in the extinguishment by abandonment of any possible grandfathered rights to the nonconforming use of the property as a helipad).

submissions in a prior case that was resolved by the Appeals Court and determine whether the Appeals Court was right or wrong. Although the Appeals Court decided *Durkin* without the benefit of what would later be contained in the final decision made by the Board of Zoning Appeals of Falmouth ("Falmouth BZA") after remand, the Falmouth BZA's decision on remand has no import with respect to the central holding in *Durkin* or to the factual and legal issues in the instant case.[7]

In *Durkin*, the Appeals Court held that the Falmouth BZA erred in denying a special permit sought by a private party to make alterations and introduce a new use in a building that had formerly housed a post office use that had been immune from local zoning based on the principle of governmental immunity. The arguments made by the Falmouth BZA and rejected by the Appeals Court are essentially the same arguments that Plaintiffs make in the instant case – that the post office's immunity did not qualify the property as a lawful pre-existing nonconforming use once the governmental immunity ended and that Durkin needed a variance to alter the use. The Appeals Court rejected that argument, finding that the Falmouth BZA had too narrowly interpreted the term "nonconforming." The Court held that "[i]f the (post office) use beginning in 1959 could then have been regarded as nonconforming, but immune because of the Federal use, it was a *lawful use*." *Durkin* at 453 (emphasis added). *Durkin* is thus directly on point and controlling. *See also Bruno v. Board of Appeals of Wrentham, supra,* 62 Mass. App. Ct. at 527 n. 13 (explaining that in *Durkin*, the Court affirmed that use of property that was immune from the application of zoning regulations because of governmental immunity "could be considered a prior

[7] The Court remanded the special permit application to the Falmouth BZA to clarify the zoning history of the property and to issue the special permit. The Falmouth BZA ultimately concluded that the former post office building was an allowed use when it was first constructed and was a lawful pre-existing nonconforming use when subsequently sold to a private developer (Hawley Memorandum p. 8). The Falmouth BZA's decision on remand does not change the Appeals Court's central holding in *Durkin* that property that was immune from the application of zoning regulations because of governmental immunity should be considered a prior lawful nonconforming use. *Durkin* at 452.

lawful nonconforming use.") [8]

The Courthouse Building, like the post office building in *Durkin*, did not violate zoning even if at the time it was constructed it exceeded the then-existing dimensional requirements of the Ordinance. Like the post office building in *Durkin,* which the Court describes as having been "nonconforming in fact" because zoning did not apply to it, the Courthouse Building has never been illegal because it was built pursuant to governmental immunity. The Ordinance was simply not applicable to it any more than a zoning bylaw or ordinance upon enactment applies to an existing structure. Because the Courthouse Building was constructed lawfully and exists lawfully, it can be redeveloped and used in accordance with G.L. c. 40A, § 6 and Section 8.22.2 of the Ordinance. To find otherwise would deprive the Board of its ability to make decisions that are consistent with the stated purpose of the Ordinance – in this case – "[t]o conserve the value of land and buildings" and to "[e]ncourage the most rational use of land throughout the City." See Article 1, Section 1.30 of the Ordinance. The special permits issued by the Board to the Developer to redevelop and use the Courthouse Building will result in an improved structure that is more conforming to current zoning requirements than the existing structure and will result is a rational re-use of the Courthouse Building. As such, the Board's decision is consistent with the stated purposes of the Ordinance and should be upheld by this Court on summary judgment.

IV CONCLUSION

For the foregoing reasons, and those discussed in the Board's Memorandum of Law in

[8] The Hawley Memorandum attempts to distinguish two Land Court cases that follow *Durkin.* However each of these decisions apply the Court's rationale in *Durkin* and confirm that when government owned property is sold and used for private purposes, it acquires lawful pre-existing nonconforming status. In *Currier v. Smith,* 9 LCR 371 (2001) (Lombardi, J.), the Court found that a former post office building was immune from local zoning regulation but was still a legally pre-existing nonconforming structure. In *Tsouvalis v. Town of Danvers,* 6 LCR 252 (1997) (Kilborn, J.) the Court held that the use of a structure as a 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 altered pursuant to the provisions of c. 40A§ 6.

Support of its Motion for Partial Summary Judgment, the Board requests that the Court deny Plaintiffs' cross-motions for partial summary judgment, grant the Board's motion for partial summary judgment, and enter summary judgment in the Board's favor on the issue of whether the Courthouse Building was a lawful pre-existing non-conforming structure eligible for redevelopment in accordance with G.L. c. 40A, §6 and Section 8.22.2 of the Ordinance.

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

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Date: April 2, 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 Memorandum in Opposition to Plaintiffs' Motions 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 Damonmill 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 and Jennifer H. Flynn, Esq., attorney for Defendant Commonwealth of Massachusetts, Office of the Attorney General, One Ashburton Place, 18th Floor, Boston, MA 02108 on this 2nd day of April, 2015.

Vali Buland

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