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MARK BOBROWSKI
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BY FEDEX
April 2, 2015

Clerk
Land Court
3 Pemberton Square
Boston, MA 02108

RE: Hawley, et al v. Planning Board of Cambridge, et al
14 MISC 488218 (RCF) and 14 MISC 488217)(RCF)

Dear Sir/Madam:

Please find enclosed the Plaintiffs' Reply Memorandum. Please docket and file same.

Thank you for your consideration.

Very truly yours,

Mark Bobrowski

MB/jk
Encl.
cc: Atty. Hill
Atty. O'Flaherty
Atty. Buland
Assistant Atty. Gen. Flynn

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

REPLY MEMORANDUM
OF PLAINTIFFS HAWLEY, ET AL

The Plaintiffs hereby submit the following Reply Memorandum in Support of their Motion for Summary Judgement.

I. THE SULLIVAN COURTHOUSE WAS NEVER "LAWFUL".

LMP GP Holdings, LLC (LMP) makes much in its Memorandum (at page 10) of this quote from *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450, 453 (1986):

> If the [post office] use beginning in 1959 could then have been regarded as nonconforming, but immune because of Federal use, it was a lawful use.

LMP goes on to support its argument that the Courthouse was a "lawful" use, at page 11 of its Memorandum:

> The principle that federal and state entities are immune from local zoning is the law - and no less the law because it is established and grounded in constitutional principles and decisional law than if it were established by statute..... The construction of such a building is not a violation of law. It is in accord with it.

So, LMP concludes, the Courthouse meets the definition for the term "Nonconforming Structure" in Section 2.00 of the Cambridge Zoning Ordinance, which states:

> 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.

There is simply no justification to support LMP's assertion that every entity built for a government purpose that exceeds local laws but was immune, can be lawfully grandfathered to a private buyer.

First, the quote offered by LMP is dictum, not the holding. As the Plaintiffs pointed out in their Memorandum, the Falmouth post office was *not* initiated under principles of immunity. The government use was allowed in the district at the time of construction. It became lawfully nonconforming when the zoning was amended several years later. Immunity had nothing to do with the Falmouth case.

Second, that the holding was mere dictum is proven by the nature of the remand ordered in *Durkin*. If the Appeals Court intended to rule (in the abstract as it turned out) that a use initiated under principles of immunity became lawfully nonconforming when the government presence ended, there would have been no need for a full remand 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. The Appeals Court could simply have ruled that the remand was limited to an examination of whether the reuse of the post office caused substantial detriment. That it did not is quite telling.

Third, the Defendants ignore the fact that at least one other state has considered this question and rejected LMP's argument. In *State v. Stonybrook, Inc.*, 149 Conn. 492 (1962), the Connecticut Supreme Court reviewed a similar matter. In 1941, the U.S. government condemned land and began construction of housing units under the Lanham Act, 42 U.S.C. s. 1521. No certificates of occupancy were ever obtained from local authorities nor did the construction conform to local building codes, as was allowed by the Lanham Act. Id. at 495. In 1956, the government sold the entire project to Stonybrook Gardens, Inc., a private entity, and in 1957, the property ended up in the ownership of Stonybrook, Inc. ("Stonybrook"). The owners

of Stonybrook met with local building officials and promised to clean up the many code violations. Instead, the new owners of Stonybrook thereafter balked at the repairs and asserted that they were protected by the immunity afforded by the Lanham Act.

Stonybrook argued that the code provisions cited by the local inspector were adopted in 1943; thus, the buildings predated the code and the project was lawful. Section 502 of the 1943 code did allow "buildings in existence at the time of the passage of this Code" to continue with use or occupancy " if such use or occupancy was legal at the time of the passage of this Code...." Id. at 498. Accordingly, "[t]he basic issue presented by the defendant's claim is whether the use and occupancy of the housing units was legal at the time of the passage of the present building code in 1943 ...." Id. However, there was an earlier version of the local code in place since 1925 (and amended in 1932). Stonybrook did not comply with many of the 1925 or 1932 codes' health and safety provisions - "substantially the same as the present code" - when construction began in 1941. Id.

The Court began its analysis by stating that : "[t]he legality of the use within the meaning of s. 502, depends on the nature of the use rather than on the identity of the user." Id.

> Where a building is constructed or a use commenced in violation of an ordinance which is repealed by another ordinance containing the same restrictions against the building or the use, and also containing a provision that the existing uses of all buildings which complied with the repealed ordinance should be unaffected, the restrictions of the new ordinance apply to the building or the use, and it is not entitled to the status of a legal nonconforming use.....
>
> The sole reason that the housing units here could be used notwithstanding the provisions of the building code was that, under the Lanham Act, the government did not have to comply with the code. Once the government relinquished jurisdiction over the units, governmental immunity ceased. *The Lanham Act conferred no immunity on the property, as such. It merely conferred immunity on the government, and those acting in its behalf, during the period of government ownership and control.* The housing units here were not

> built in accordance with the 1925 building code, as amended in 1932, and they were not in existence when that code was adopted or even when it was amended. *The use and occupancy, as such, did not conform to the provisions of that code. These were substantially the same provisions as are in dispute here, and the units could not become legal nonconforming uses so as to be protected by the present code.* That code is applicable, by its terms, to the units. Since they never became legal nonconforming uses, the application to them of the code is not unconstitutional as a taking of property without due process or as an unreasonable exercise of the police power, or in any other respect. Id. at pp. 499-500. (Emphasis added, citations omitted)

The status of the buildings in *Stonybrook* after the government sold off the project is the same as the status of the Courthouse, post-decommisioning. Section 2.00 of the CZO and G.L. c. 40A, s. 6, like s. 502 of the local code in *Stonybrook*, require a structure to be lawful in order to obtain status as a nonconformity. *Stonybrook* holds that when a structure is built under principles of immunity, it is the government that is immune, not the building. The building is never lawful because it never complied with zoning requirements. But its owner is immune. When the government use ends, the building is subject to enforcement. "The legality of the use within the meaning of s. 502, depends on the nature of the use rather than on the identity of the user." Id. at 498. The legality of the structure within the meaning of Section 2.00 of the CZO and G.L. c. 40A, s. 6 depends on the same exact question.

LMP's error is in asserting, contrary to *Stonybrook*, that the government's immunity somehow rubbed off on the building it left behind, causing it to become "lawful" in the regulatory sense of s.6 or the CZO. It does not. When the government builds a structure or commences a use, it is immune and can't be stopped. When the government leaves, the structure or use needs to be regulated on its own terms, not as if it were still governmentally owned. "Lawful" in the context of the CZO and G.L. c. 40A, s. 6 means in compliance with zoning regulations, or predating zoning altogether. A building is not "lawful" where the owner was immune from the regulations the CZO otherwise sets forth.

Because the Courthouse is not protected as prior, lawful structure, a variance is required to alter it. *Rockwood v. Snow Inn Corp.*, 409 Mass. 361 (1991).

II. THE COURTHOUSE IS NOT ENTITLED TO PROTECTION BASED ON PUBLIC POLICY.

In the Attorney General's Memorandum, at page 10, the Commonwealth makes the argument that classification of the Courthouse as a nonconforming structure - thus eligible for special permit relief under Section 8.22.2.a of the CZO - is "sound public policy." The Attorney General goes on to say that Plaintiffs' argument "would create a rule that would immediately devalue the Commonwealth's properties and prevent the Commonwealth from realizing the full value of these properties." At p. 11.

If "lawful" nonconformity did include structures and uses created under governmental immunity from zoning, one would have to include not just the Courthouse, but also helipads, toxic waste sites, nuclear reactors, military bunkers - in theory, any facility that was created by the government beyond what local codes would allow. These facilities could be sold for private exploitation as grandfathered properties.

The policy suggested by the Attorney General ignores the legislative history of G.L. c. 40A, s. 6, as found 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 39 (1972):

> There is a unanimity of opinion among zoning and planning authorities that the ultimate objectives of 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 by obsolescence, destruction or similar factors.

As recently as 2004, the Appeals Court cited this provision of the DCA Report with approval.1 In *Bruno v. Board of Appeals of Wrentham*, 62 Mass. App. Ct. 527 (2004), the Appeals Court observed that its result in that case was 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. The Attorney General's proposed policy would contradict legislative intent by "function[ing] as a launching pad for expansion as a nonconforming use." *Mendes v. Zoning Bd. of Appeals of Barnstable*, 28 Mass. App. Ct. 527, 529 (1990).

Finally, it would be ironic, at best, if such a policy favored the perpetuation of the Courthouse. Attached as Exhibit 1 is a true copy of excerpts from the Ward Commission Report (1981). The Ward Commission was created in response to a 1977 scandal related to the construction of the University of Massachusetts, Boston and to the construction industry in general:

> CORRUPTION AS A WAY OF LIFE
>
> The final report of the Commission tells in detail a sad and sordid story. The story is not told with the glee of the muck-raker. It is told soberly and factually. No member of the Commission takes pleasure in the telling. The legislature mandated the Commission to report on its findings, and we have. The purpose of the Report is to cause the legislature, and the general public to whom the legislature and the Commission are in the last analysis responsible, to take thought, to ask how our public life may be made better, be carried on in such a way that it may be possible to be proud to be a citizen of the Commonwealth of Massachusetts.
>
> The particular facts of the Commission's long investigation comprise a general pattern: In the award of contracts for the construction of state and county buildings, corruption has been a way of life. For a decade at least, across Republican and Democratic administrations alike, the way to get architectural contracts was to buy them. It was not a matter of few crooks, some bad apples which spoiled the lot. The pattern is too broad and pervasive for that easy excuse. There are, to be sure, honest and hard-working

---

1 See also, *Palitz v. Zoning Board of Appeals of Tisbury*, 2014 WL 79330410 (2015), in which the Supreme Judicial Court cited the DCA Report as legislative history.

> administrators in state agencies, underpaid at best, struggling to do their work well. There are earnest and diligent legislators laboring against the inertia of disbelief that politics can be an honorable calling. In numerical terms, such people are the majority in public life. But at those crucial points where money and power come together, the system has been rotten.

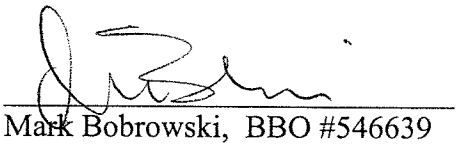
See also Appendix D in Exhibit 2, describing some of the shenanigans surrounding the construction of the Courthouse. The last word goes to the editors of the Lowell Sun on May 12, 1977 (Exhibit 2):

> Another $3 million
>
> The Middlesex courthouse is a synonym for government at its worst. This pretentious building has been more than ten years in the making, and its jail is not open yet. It was begun at an estimated cost of $16 million. That did not last long, though, and through a long show of mismanagement and blunder the cost to date stands at $45 million, and is still rising.
>
> The tall building stands as a monument to the ineffectiveness of the county as a form of government.

CONCLUSION

Plaintiffs respectfully request the Land Court to rule that the special permit granted to LMP GP Holdings , LLC exceeded the authority of the Cambridge Planning Board, and is a nullity.

PLAINTIFFS,
by their attorney,



DATE: April 2, 2015

Mark Bobrowski, BBO #546639
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4Concord, MA 01742
(978) 371-3930

CERTIFICATE OF SERVICE

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

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Cambridge, MA 02141

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Anne Sterman
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Jennifer Flynn
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Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108

DATE: April 3, 2015

Mark Bobrowski

THE SUN

Lowell, Massachusetts

Founded by John H. Harrington

IN 1878

Thursday, May 12, 1977, Vol. 99, No. 110

Another $3 million

Residents of Middlesex County, who are daily regaled by the comic theatre of Commissioner McLaughlin and his troupers, were favored with yet another thigh-slapper the other day. It was revealed that the county has been hit by a $3 million loss in arbitration.

The case was a claim by the Gevyn Construction Company, original contractor for the new county courthouse in East Cambridge. The loss will hit the taxpayers smack in the piggy bank and will add to the other unconscionable costs of keeping the county alive.

The Middlesex courthouse is a synonym for government at its worst. This pretentious building has been more than ten years in the making, and its jail is not open yet. It was begun at an estimated cost of $16 million. That did not last long, though, and through a long show of mismanagement and blunder the cost to date stands at $45 million, and is still rising.

The tall building stands as a monument to the ineffectiveness of the county as a form of government. The commissioners responsible for the construction of the building are not those in office now. But the kind of political atmosphere that made the scandalous increase in building costs possible still pervades the county commissioners' offices.

The award of $3 million in damages came on a claim by Gevyn Construction Company of New York, the original contractor for the courthouse. The company charged the county with being responsible for delays in work and also charged the county with breach of contract. The Gevyn Company was fired about half way through the long construction project because of charges that it had taken many workers off the job in a dispute over payments.

We make no pretense at knowing the facts about the case, but the American Arbitration Association has made its ruling and we're stuck with it.

Somehow it figures...

City Hall

New attack on downtown traffic

By DAVE SYLVESTER
Sun staff

LOWELL — Thomas A. Joyce will report to work next Monday for his $18,600 a year job at the city's Division of Planning and Development, and the city will have a civil traffic engineer, at last.

Nothing in planning is as complex, as critical and as difficult in Lowell as traffic. The narrow streets and wide sidewalks that accommodated the crowds of 19th century mill workers who arrived on trolley or walked to work now have become the biggest barrier to normal economic development in the city.

For years, the downtown businessmen have believed on faith that shoppers would return if the streets were wide enough for easy driving and if there was cheap parking almost next door to each store.

And for years, consultants and officials have battered plans around that would widen

The city council and the downtown sub-committee has eyed the possible Market Street parking garage nervously. Does it make sense to put a 1,000 parking garage on a one-way street? Should a second access be developed, such as through the Lowell Mill or across the canal to Central Street? A professional traffic planner could study this. He could also review the recommendations made by past traffic consultants or state engineers' such as the transportation terminal proposed for the B. and M. Boston commuters or the current $8 million traffic improvements underway in Lowell.

Past traffic expertise has come from an assortment of consultants and planners. In the DPD, traffic problems have drifted among several planners for the past year. The result is that no one person has a clear overview of the problems and plans in progress throughout the city. Some of the bitterest fights have been over traffic

University, he has worked for five years with a private consulting firm under contract with the state DPW for traffic improvements in the northeastern part of the state.

Jack Tavares, DPD program development director, is now drawing up a list of priorities for him to work on.

Besides planning, the need has frequently been mentioned for a certified engineer to design intersection improvements, such as the design of Andover and Douglas Roads. In the past, a simple project has had to be farmed out to high-priced consultants just because no one in the city knew how to place the manholes, lay out the curbing, arrange for the needed city and state permits, design signal improvements.

According to Robert Gilman, DPD director, one intersection design would pay for the engineer's salary for the entire year. Joyce will also be able to draw up construction

Final Report To The General Court Of The Special Commission Concerning State And County Buildings

December 31, 1980

Created by
Chapter 5 of the Resolves of 1978
as amended by Chapter 11 of the Resolves of 1979
and by Chapter 257 of the Acts of 1980.

VOLUME 1

The Commonwealth of Massachusetts

SPECIAL COMMISSION CONCERNING STATE AND COUNTY BUILDINGS
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LEWIS H. WEINSTEIN
BANCROFT LITTLEFIELD, JR.
(Chief Counsel)

December 31, 1980

Mr. Wallace C. Mills
Clerk of the House of Representatives
State House, Room 145
Boston, MA 02108

Dear Mr. Mills:

Enclosed for filing today is the Final Report of the Special Commission Concerning State and County Buildings. The participation of the Attorney General in this Filing is limited in accordance with his separate views in Volume IX.

Very truly yours,

Francis X. Bellotti

Frances Burke

Peter Forbes

Daniel O. Mahoney

Walter J. McCarthy

John William Ward

Lewis H. Weinstein

rsl
Enclosure

ANALYTICAL TABLE OF CONTENTS

VOLUME I

FOREWORD

I

In the award of design contracts for the construction of state and county buildings, we have learned that —

- o Corruption is a way of life in the Commonwealth of Massachusetts
- o Political influence, not professional performance, is the prime criterion in doing business with the state
- o Shoddy work and debased standards are the norm
- o The "system" of administration is inchoate and inferior

CORRUPTION AS A WAY OF LIFE

The final report of the Commission tells in detail a sad and sordid story. The story is not told with the glee of the muck-raker. It is told soberly and factually. No member of the Commission takes pleasure in the telling. The legislature mandated the Commission to report on its findings, and we have. The purpose of the Report is to cause the legislature, and the general public to whom the legislature and the Commission are in the last analysis responsible, to take thought, to ask how our public life may be made better, be carried on in such a way that it may be possible to be proud to be a citizen of the Commonwealth of Massachusetts.

The particular facts of the Commission's long investigation comprise a general pattern: In the award of contracts for the construction of state and county buildings, corruption has been a way of life. For a decade at least, across Republican and

Democratic administrations alike, the way to get architectural contracts was to buy them. It was not a matter of few crooks, some bad apples which spoiled the lot. The pattern is too broad and pervasive for that easy excuse. There are, to be sure, honest and hard-working administrators in state agencies, underpaid at best, struggling to do their work well. There are earnest and diligent legislators laboring against the inertia of disbelief that politics can be an honorable calling. In numerical terms, such people are the majority in public life. But at those crucial points where money and power come together, the system has been rotten.

The name of the game is cash. The work of the Special Commission offers a classic example of the investigation of white collar crime and political corruption. When bribes are paid or money is extorted, and the two are opposite sides of a single coin and hard to distinguish, there has to be cash. Ways to generate it are legion: "bonus" checks to employees who negotiate them and return the cash; false invoices from suppliers which appear as a deductible business expense even while the dollars come back; honoraria for consulting services never performed; fictional business entities through which money is channelled. Behind every hearing by the Commission lies a tortuous trail of paper which requires skilled financial investigators to follow, by painstaking research, the reconstruction of a firm's records, the examination of bank records, the scrutiny of rolls of microfilm.

What the Commission learned was the simple fact about

VOLUME II

REPORT ON THE INVESTIGATION OF MBM AND RELATED ENTITIES

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Worcester County Jail

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University of Massachusetts Building Authority

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Randolph Housing Authority: Housing for the Elderly

Because of cost considerations, Volume XI has not been reproduced in multiple copies. It is, however, available for inspection at the Office of the Clerk of the House of Representatives.

APPENDIX D

MBM'S ATTEMPTS TO WIN CONTRACTS REGARDING THE MIDDLESEX COUNTY COURTHOUSE

Another demonstration of methods that MBM used in seeking contracts is provided by the Middlesex County Courthouse. MBM's attempts to obtain work there began in January 1970, less than one month after MBM won the UMass/Boston contract. The courthouse project had started years earlier and was experiencing severe difficulties.[1] The county commissioners decided to look for a construction consultant,[2] and MBM was interested. MBM conveyed its interest to Endicott Peabody,[3] and Peabody promptly contacted all three county commissioners and their counsel.[4] Peabody soon reported that he had "commitments from all three commissioners" to accept MBM's proposal to provide initial consulting services for a fee of approximately $30,000.[5] MBM was in fact awarded that initial contract on February 24, 1970,[6] resulting in a fee to MBM of $33,960 for less than two months' work which apparently was done in large part by Jack S. Thomas. The major services that MBM provided for the $33,960 fee seem to have been a simple CPM schedule and an 11-page letter whose primary recommendation was that the commissioners engage a construction

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1 See, e.g., Sareen R. Gerson, "County Courthouse--from Beginning to Today," Lexington Minuteman, March 18, 1971, supplement.

2 A copy of the commissioners' resolve was found in MBM's Middlesex County Courthouse file, but there appears to be no record of it in the commissioner's minutes.

3 Memorandum headed "County Court House and Jail," undated but probably January 28, 1970; Peabody spiral notebook.

4 Peabody law firm MBM tub card III, entries for #1/29/70, 2/2/70, 2/9/70, 2/10/70. Letter dated January 30, 1970 from Endicott Peabody to Gerald J. [sic] McKee, Jr., re: Middlesex County Courthouse.

5 Draft memorandum dated February 11, 1970 from Governor [Endicott] Peabody to J[eremiah] D. Lambert, concerning the Middlesex County Courthouse, at 1.

6 See letter dated April 21, 1970 from Jack S. Thomas for MBM to Middlesex County Commissioners, concerning Middlesex County Superior Courthouse, Conclusions and Recommendations, at 1.

manager for the project.[7] Apparently seeing no conflict of interest, MBM began a two-year campaign to win such a construction management contract, which MBM expected to be far more lucrative than its initial consulting contract.[8]

Peabody was eager to assist MBM in its attempt to win the Middlesex County Courthouse construction management contract, believing that his efforts had been instrumental in producing the initial contract[9] and that successful efforts of this nature should be rewarded above and beyond the normal retainer (as with the UMass/Boston contract).[10] As it happened, however, the project came under criticism, and the Massachusetts Legislature in August 1970 refused to provide any additional funds for the courthouse project.[11]

The State Senate's Committee on Counties came under the chairmanship, in January 1971, of Joseph J.C. DiCarlo. Less than a month later, DiCarlo co-sponsored an order calling for a legislative investigation of MBM's UMass/Boston project management contract,[12] and DiCarlo soon thereafter was appointed Senate Chairman of the resulting special investigative committee.[13] As discussed more fully in Chapter VII, DiCarlo was eventually paid more than ten thousand dollars in cash by MBM. In return, DiCarlo produced a favorable committee report for MBM, enabling MBM to win over $1 million worth of extension contracts of the UMass/Boston project. In addition, DiCarlo allegedly agreed to help MBM win the Middlesex County Courthouse construction management contract that MBM had long been seeking.

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7 Thomas 4/21/70 letter to Middlesex County Commissioners, at 7-10.

8 Peabody 2/11/70 draft memorandum to Lambert indicates that the management contract fee was anticipated to be $100,000 or more.

9 See memorandum dated May 7, 1970 from Gov. [Endicott] Peabody to Mr. [Jeremiah D.] Lambert, concerning MBM-Middlesex County contract.

10 See Peabody 2/11/70 draft memorandum to Lambert, and memorandum dated May 8 [1970] from "Chub" [Endicott Peabody] to "Jerry" [Jeremiah D. Lambert], concerning the fee arrangement for the Middlesex County contract.

11 See "House Kills $8.5m for Courthouse," Boston Globe, August 22, 1970.

12 See discussion in Chapter VII infra.

13 See discussion in Chapter VII infra.

Since DiCarlo swore under oath that he did not take any steps to help MBM win the Middlesex County contract,[14] it is appropriate to summarize some of the evidence on the matter. In late August of 1971, DiCarlo apparently was introduced by his colleague, Senator Ronald C. MacKenzie, to Daniel J. Shields and William F. Harding of MBM.[15] Not long after this meeting, the first concrete arrangements were made which led to DiCarlo's alteration of the legislative report about MBM's UMass/Boston contract in return for money from MBM.[16] Within a week of this August 1971 meeting, DiCarlo was quoted in the press as favoring an independent consultant for the Middlesex County Courthouse project.[17] By October 1971, DiCarlo -- who had ascended to the Senate chairmanship of the Joint Rules Committee[18] -- was quoted in several press reports as saying that he would not permit consideration by the Legislature of any bill to fund the completion of the courthouse unless the bill required the retention of an outside consultant to oversee the work.[19] Moreover, DiCarlo was reported in the press to have a specific firm in mind: MBM.[20] In testimony before the Commission in 1980, DiCarlo flatly denied these press accounts from 1971, adding the observation that sometimes the press makes mistakes.[21] While that observation is undoubtedly true, it is also true that

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14 DiCarlo testimony, Sp. Comm. 6/3/80 at 98-102.

15 See letter dated August 30, 1971 from Gerald McKee, Jr. to Endicott Peabody, concerning meetings with Massachusetts officials. Shields and Harding had been President and Vice President of Mauchly Construction Management, Inc., which was then in the process of being acquired by MBM. Shields and Harding saw DiCarlo on behalf of the MBM/MCM combined firm.

16 See discussion in Chapter VII infra.

17 Shelly Cohen, "Bail-out for Courthouse," Medford Mercury and other papers, September 1, 1971.

18 Kenneth Sweeney, "$21 million figure on Mdsx. Courthouse bill; DiCarlo wants more info," Lexington Middleman and other papers, October 21, 1971.

19 Id.; Shelly Cohen, "DiCarlo eyes safeguards," Medford Mercury and other papers, October 7-12, 1971.

20 Shelly Cohen, "County Courthouse gains signatures," South Middlesex Daily News (Framingham), October 31, 1971.

21 DiCarlo testimony, Sp. Comm. 6/3/80 at 101-102.

the articles were by several reporters -- at least some of whom are well respected -- and they appeared over several months without any challenge at the time from DiCarlo.[22]

Daniel Shields provided the Commission with an explanation of why DiCarlo was solicitous of MBM with regard to the Middlesex County Courthouse project. According to Shields's testimony, DiCarlo was to be paid in cash by MBM for DiCarlo's assistance on the Courthouse project.[23] DiCarlo eventually did let the courthouse bill through the Rules Committee without the construction management requirement,[24] but Shields explained that DiCarlo's change of attitude resulted from a disagreement between DiCarlo and McKee about whether the cash payment to DiCarlo for the courthouse assistance was to be part of -- or was to be in addition to -- the amount that DiCarlo was being paid for altering the legislative report on MBM's UMass/Boston contract.[25]

MBM President Gerald McKee, Jr. has denied that MBM ever discussed paying DiCarlo in return for help that DiCarlo might render in MBM's attempts to win the Middlesex County Courthouse contract or other contracts. However, McKee and others testified at the DiCarlo-MacKenzie trial that DiCarlo said, during a meeting in New York after DiCarlo's report on the UMass/Boston contract had been completed, that DiCarlo would not help MBM win other contracts unless MBM paid him promptly.[26]

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22 These articles were among those sent to DiCarlo's office by his clipping service.

23 Shields testimony, Sp. Comm. 6/2/80 at 78-85.

24 The funding authorization bill for the courthouse was passed by the Legislature on January 31, 1972 as Acts of 1972, c.4.

25 Shields testimony, Sp. Comm. 6/2/80 at 81-85.

26 McKee testimony, 5 DiC 1/31/77 at 73-86; Shields testimony, 15 DiC 2/14/77 at 89-94, 143.

Although MBM never did receive the construction management contract that it sought for the Middlesex County Courthouse, it did receive a contract in February 1972 to act as expert witness for the Middlesex County Commissioners in litigation over problems in the courthouse construction project.[27] That contract, which was apparently never noted in the minutes of the Middlesex County Commissioners' meetings, generated almost $100,000 in fees for MBM.[28]

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27 See letter dated February 11, 1972 from Middlesex County Commissioners' counsel R. Robert Popeo to Chairman John F. Dever, recommending the approval of MBM's proposed contract; Proposal dated February 3, 1972 from MBM to Middlesex County Commissioners, concerning construction consulting services.

28 Special Commission staff analysis of payments to MBM for work on the Middlesex County Courthouse. See also Shelly Cohen, "County signs no limit contract with consultants," South Middlesex Daily News (Framingham), February 18, 1972.