

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

LAND COURT DEPARTMENT OF THE
TRIAL COURT

HOLLY HAMER, MARC FASTEAU, AND
ANNE FREDERICKS,

Plaintiffs,

v.

ZONING BOARD OF APPEALS OF THE
TOWN OF GREAT BARRINGTON, RON
MAJDALANY, CAROLINE IVORY,
STEPHEN MCALISTER, MADONNA
MEAGHER, and MICHAEL WISE, in their
official capacities,

Defendants.

CIVIL ACTION NO. 22 MUSC 0002444

VERIFIED COMPLAINT

On March 31, 1932, the Great Barrington airport (“Airport”) existed as a single hangar on a grass runway. On that same date, Great Barrington’s first Zoning Bylaw went into effect, immediately rendering the Airport a preexisting nonconforming use. Over the intervening years, the Airport has expanded dramatically: generating tens of thousands of flights annually, constructing multiple new buildings, and adding new amenities such as flight instruction, a fly-in commercial maintenance and repair facility, and nighttime military helicopter drills. Yet despite being a preexisting nonconforming use, the Airport never received municipal approval for any of these extensions or expansions, as required by law.

While zoning law provides that preexisting nonconforming uses are to be tolerated to a limited extent, the Airport cannot abuse this status. Well-established appellate precedents govern when a preexisting nonconforming use has improperly expanded beyond its original scope.

Under any reading of the undisputed evidence, the Airport’s numerous expansions — of both its footprint and its activities — crosses this line many times over. Precedent prohibits not only extensions or expansions that will be “substantially more detrimental” to the neighborhood, but also prohibits the construction of *any* new buildings to house the preexisting nonconforming use. The Airport has repeatedly ignored both prohibitions.

Unsurprisingly, the harms caused here by the unlimited and unregulated expansion of a commercial-industrial use in a residential zone are precisely those harms that zoning exists to prevent. The Airport’s current scope of unauthorized operation creates an ongoing safety hazard to automotive traffic on Seekonk Cross Road, generates noise pollution and air pollution, and threatens the Town’s sole-source aquifer, all in a residential district where the Airport would be indisputably prohibited by zoning from being built today.

Holly Hamer, Marc Fasteau, and Anne Fredericks (collectively “Plaintiffs”), neighbors to the Airport, appeal the decision of the Zoning Board of Appeals of the Town of Great Barrington (“Zoning Board”) upholding the decision by the Town of Great Barrington Building Inspector (“Building Inspector”) denying the Plaintiffs’ November 15, 2021 G.L. c. 40A, § 7 enforcement request (“Enforcement Request”)¹ with respect to restricting the scope of the current preexisting nonconforming airport use at 70 Egremont Plain Road. In upholding the Building Inspector’s Determination, the Zoning Board failed to properly analyze the scope of the Airport’s extensions and expansions as a preexisting nonconforming use under *Powers v. Building Inspector of Barnstable*, 363 Mass. 648 (1973), and acted in excess of its authority. The decision of the Zoning Board must be annulled as a matter of law.

¹ All supporting exhibits submitted with both the Enforcement Request and Zoning Board Appeal are also exhibits to this appeal. To avoid unnecessary duplication, the Enforcement Request and Zoning Board appeal exhibits are produced without their supporting exhibits. A table identifying each Exhibit in the Enforcement Request and Zoning Appeal and the correlating exhibit numbers to the exhibits in this Complaint is included as Addendum A.

QUESTION PRESENTED

This zoning appeal and request for declaratory judgment by Plaintiffs concerns two questions of law.

The first question is whether structures that did not exist on the locus at the time the Airport became preexisting nonconforming can be used by-right for airport purposes. Under *Powers v. Building Inspector of Barnstable*, 363 Mass. 648 (1973), the answer is clear: “existence of a lawful nonconforming use *does not permit the erection of additional buildings for the extension or enlargement of that use*” (emphasis supplied). Despite the uncontroverted evidence that most (if not all) of the buildings currently at the Airport did *not* exist at the time the Airport became preexisting nonconforming, and contrary to the legal advice from their own Town Counsel, the Zoning Board nonetheless upheld the Building Inspector’s denial of the Enforcement Request on the grounds that the Airport was a preexisting nonconforming use. The Zoning Board’s decision was entirely unsupported by the evidence, exceeded its authority, and must be annulled as a matter of law.

The second question is whether the Airport’s numerous extensions and expansions of its preexisting nonconforming airport use exceed what is allowed by right under state law, applying the three tests established in *Powers v. Building Inspector of Barnstable*, 363 Mass. 648 (1973). Neither the Building Inspector nor Zoning Board disputes that *Powers* applies, nor did either dispute the extensive and uncontroverted documentary evidence submitted by Plaintiffs with the Enforcement Request (in the form of a detailed letter memorandum and numerous supporting exhibits, attached as Exhibit A).

Yet the Zoning Board concluded that this evidence — demonstrating the minimal state of the airport’s operations when it first became preexisting nonconforming in 1932 (that as late as

1944, the Airport “was just a grass field” and “had two little airplanes”) — was not evidence that the airport’s extensive operations now (encompassing multiple buildings, a paved half-mile runway, 51 aircraft based on the field, 29,810 flights annually, a flight school, a commercial maintenance operation, and nighttime military helicopter drills) constituted “a difference in the quality or character, as well as the degree, of the present use” or that “the current use is ‘different in kind in its effect on the neighborhood,’” the tests established in *Powers*. The Zoning Board’s decision was entirely unsupported by the evidence, exceeded its authority, and must be annulled as a matter of law.

Pursuant to G.L. c. 40A, § 17, Plaintiffs request a judgment annulling the Zoning Board’s decision (“Decision”) (Exhibit B), as exceeding the Zoning Board’s authority and being based on legally untenable grounds, as it improperly applied *Powers* and other controlling precedent.

THE PARTIES

1. Holly Hamer is a statutory abutter residing at 99 Seekonk Cross Road, Great Barrington, MA 01230.
2. Marc Fasteau resides at 77 Seekonk Cross Road, Great Barrington, MA 01230.
3. Anne Fredericks resides at 77 Seekonk Cross Road, Great Barrington, MA 01230.
4. The Zoning Board is a duly-appointed and duly-organized municipal board of the Town of Great Barrington, which has its principal office at 334 Main Street, Great Barrington, MA 01230.
5. Ron Majdalany is a duly-appointed member and the chair of the Zoning Board, with an address of 92 Alford Road, Great Barrington, MA 01230.

6. Carolyn Ivory is a duly-appointed member of the Zoning Board, with an address of 54 Grove Street, Great Barrington, MA 01230.

7. Stephen McAlister is a duly-appointed member of the Zoning Board, with an address of 3 Warren Avenue, Great Barrington, MA 01230.

8. Madonna Meagher is a duly-appointed member of the Zoning Board, with an address of 3 Alford Road, Great Barrington, MA 01230

9. Michael Wise is a duly-appointed member of the Zoning Board, with an address of 173 Castle Street, Great Barrington, MA 01230.

JURISDICTION AND VENUE

10. The Land Court has original, concurrent jurisdiction over claims arising under the Zoning Act, G.L. c. 40A, § 17, pursuant to G.L. c. 185, § 1(p).

11. Venue is proper in Berkshire County, where the Airport is located, where the Zoning Board operates, and where the Zoning Board issued the subject Decision.

FACTUAL ALLEGATIONS

G.L. c. 40A, § 6 and the Great Barrington Zoning Bylaw

12. Under G.L. c. 40A, § 6, a local zoning ordinance:

shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction,

extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.

13. In addition, a preexisting nonconforming use may only extend or alter its structures or uses provided “that that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.” G.L. c. 40A, § 6.

14. Consistent with G.L. c. 40A, § 6, Section 1.4.1 of the Great Barrington Zoning Bylaw (“Bylaw”) (Exhibit C) states the applicability of the Bylaw to nonconformities as:

1.4.1 Nonconformities. Except as herein after provided, this Bylaw shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building permit or special permit issued before the first publication of notice of the public hearing on this Bylaw or any amendments thereto, *but shall apply to any change or substantial extension of such use*, to a building permit or special permit issued after the first notice or [of] said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use in a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or a structural change to a single or two family residential structure does not increase the nonconforming nature of said structure. (Emphasis supplied).

15. Section 5 of the Bylaws governs Nonconforming Uses and Structures. Under Section 5.1, “lawfully existing nonconforming uses and structures may continue, *provided that no modification of the use or structure is accomplished, unless authorized hereunder.*” (Emphasis supplied).

16. Under Section 5.2, the Zoning Board may grant a special permit “to change a nonconforming use . . . only if it determines that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.”

17. In making this determination, the Zoning Board shall consider “[c]hange or substantial extension of the use” and “[c]hange from one nonconforming use to another, less detrimental, nonconforming use.”

History of the Zoning Bylaw and Airport Requests or Approvals

18. On March 31, 1932, the Town adopted its first zoning ordinance, requiring a Board of Selectmen (“Selectboard”) permit for “airports with essential accessories” (Exhibit D).

19. This Bylaw was revised in 1948, 1960, and 1974. The special permit requirement for airports remained unchanged, and exists in the Bylaw today.

20. Since the adoption of zoning, the Airport has always been located in a residential zone, and is currently located in the residential district (R4) zone.

21. Under G.L. c. 40A, § 6, the Bylaws, and controlling appellate precedent, the Airport can neither expand its preexisting nonconforming use, nor utilize post-1932 structures for Airport purposes, unless and until it receives affirmative approvals from the Zoning Board.

22. Under G.L. c. 40A, § 6, the Bylaws, and controlling appellate precedent, the Airport can neither expand its preexisting nonconforming use, nor utilize post-1932 structures for Airport purposes, unless and until it receives affirmative approvals from the Selectboard. Bylaw §§ 3 (Use Regulations) & 7.2 (Aviation Fields).

23. The Airport has never received approval for extension or expansion from either the Zoning Board or Selectboard.

24. The only record of a grant of Zoning Board relief with respect to the Airport is from 2017, when the Zoning Board granted a special permit to build a deck at the rear of the existing office building on the property.

25. On May 1, 2020, the Airport applied to the Selectboard for a special permit to increase and expand its operations.

26. On November 23, 2020, the Selectboard unanimously voted 5-0 to deny the Airport's application for a special permit.

27. The Airport has never received a Selectboard special permit.

28. The Town has no record of any other relevant approvals or permits, including building permits, issued to the Airport.

History of the Airport

29. In 1929, Robert K. Wheeler and others bought the Airport property. The evidence suggests that at some point thereafter, prior to 1932, they erected a small office and single airplane hangar.

30. The Airport has always been, and remains currently, privately owned and operated.

31. An article in the *Berkshire County Eagle* from August 12, 1931 (Exhibit E) states that Berkshire Airways "recently built an eight-plane hangar. It is 60 by 60 feet, of all-steel construction." This was described as the "first move" of the company at the Airport, which had previously been used only as "an emergency field" and "the scene of a few weekend air circuses by barnstorming aviators."

32. There is no evidence that the Airport expanded between August 1931, and the adoption of zoning in March 1932.

33. As of the adoption of zoning in 1932, the locus contained a single hangar and an unpaved grass "runway," although it is unclear whether the small office remained as of that date.

34. A photograph in the archives of the Great Barrington Historical Society entitled “Approach to the GB Airport,” dated 1934, shows a single hangar and no paved runway. (Exhibit F). The photograph does not show an office at the Airport in 1934.

35. In an article on January 2, 1935, three years *after* the adoption of zoning, the *Berkshire County Eagle* observed that the Airport “has a hangar sufficiently large to house several planes” (emphasis supplied) (Exhibit G).

36. Neither the original 60-by-60 all-steel hangar nor the small office survive today.

37. A *Berkshire Evening Eagle* article from September 24, 1942 stated that “rapid strides were made in local aviation history” when a “lease was granted to the Lufberry Flying School Inc. . . . to operate at the field,” indicating that no such flight school had operated on the premises previously (Exhibit H).

38. There is no evidence that a flight school was operating on the premises prior to 1932.

39. There is no evidence that commercial airplane maintenance and repair work was being performed at the Airport prior to 1942.

40. The Airport’s own website states that “Berkshire Aviation Enterprises has operated a maintenance facility at Great Barrington Airport since the 1940’s.” (Exhibit I).

41. The Airport’s website statement concedes that its commercial maintenance facility operations *post*-date, rather than *pre*-date, the adoption of zoning in 1932.

42. A *Berkshire Evening Eagle* article from September 24, 1942, (Exhibit H) indicates that the Airport remained largely unchanged from 1932 until that time. That article states that the new owner of the Airport, James Tracy, “purchased the airport about a year ago [1941],

when *it seemed there was little interest*” (emphasis supplied), and then “started, practically alone, eight weeks ago, to make improvements.”

43. Describing those improvements, the *Eagle* article stated that “heavily wooded areas were cut, trees felled and roots pulled out with tractors . . . in all 20 acres were cleared.” The article further noted that “[I]ast week another project was started, that of the construction of a wooden administration building . . . southeast of the hangar, near the Egremont highway.” In addition, the article noted that the Airport create a new “south-north runway about 1200 feet.”

44. Walter Koladza, the longtime owner of the Airport who purchased it in December 1944, described the Airport at the time of his purchase as “*just a grass field*” (emphasis supplied) (Exhibit J).

45. Koladza further stated that as late as 1944, over a decade *after* the adoption of zoning, the Airport “*had two little airplanes, a Taylorcraft and a Cub.*” (emphasis supplied) (Exhibit J).

46. In his 1999 book *Great Barrington, Great Town, Great History*, Bernard A. Drew recites the following chronology, confirming that numerous buildings, navigation upgrades, and the initial paving of the runway occurred many decades *after* 1932:

“A new 60x70-foot hangar for private aircraft was completed in 1953. . . . The airport was hard-surfaced in 1958. A homing radio beacon was installed in 1962, upgraded in 1967. The airport installed a new hardtop runway in November 1966. A 10,000-square-foot steel frame building for the mechanical shop was built in 1969. The original hangar was moved to the far side of the field.”

The Present Airport Use

47. Following the death of longtime Airport owner Walter Koladza in 2004, the current owner received the Airport free of charge as a bequest from Koladza's estate.

48. The Airport is built over the Town's sole-source aquifer on the bank of the Green River, and is located in the Town's Water Quality Protection Overlay District.

49. This aquifer also serves at least one adjacent town.

50. In 2003, the Massachusetts Department of Environmental Protection ("MassDEP") recognized that the aquifer is "highly vulnerable to contamination." (Exhibit K). Furthermore, MassDEP noted fuels, de-icers, salt, and other hazardous chemicals from the Airport as potential sources of contamination.

51. The Airport causes noise pollution in a residential zone.

52. The noise pollution drives residents, in the residential zone, indoors during peak summer months.

53. The Airport sells thousands of gallons of leaded aviation gas annually to planes that utilize the Airport.

54. The Airport has a 10,000 gallon underground fuel storage tank for leaded aviation gas.

55. The use of leaded aviation gas and the exhaust therefrom causes increased airborne lead pollution in the residential zone.

56. There is a history of accidents at the Airport.

57. On information and belief, there have been multiple near misses between airplanes landing or taking off at the Airport and cars traveling on Seekonk Cross Road, which is located at the end of the runway.

58. The Airport has at least five buildings.

59. The Airport operates a flight school that, according to the Airport's own website, requires "an average of 60 to 80 hours of instruction" for certification of each new pilot. (Exhibit M).

60. The Airport has a 2,585-foot paved runway and two instrument approaches. (Exhibit M).

61. The Airport offers scenic flights, airplane rentals, flight training, and a maintenance shop. (Exhibit M).

62. As of 2010, the Airport had "20 aircraft tie downs based onsite, [and] 10 aircraft tie downs that are transient, with a total of 30 tie downs." (Exhibit L).

63. Berkshire Aviation's training and rental plane fleet is comprised of eight aircraft. (Exhibit M).

64. According to the Airport's own special permit application to the Selectboard of May 1, 2020 (Exhibit L), the Airport had "a total of 51 aircraft" based on the field (with MassDOT projecting growth to "59 aircraft" by 2030), and "29,810" flights annually.

65. The Airport hosts nighttime military helicopter training drills.

66. There is no record that any branch of the United States military used the Airport prior to 1932.

67. There is no evidence that any branch of the United States military used the Airport for nighttime helicopter drills prior to 1932.

68. The United States Army states that the first military helicopter, the Sikorsky R-4, was not put into production until 1942,² ten years *after* the introduction of zoning in the Town.

² Nathan Pfau, *Where it all began: 1st production helicopter on display at museum* (July 14, 2017), at https://www.army.mil/article/190855/where_it_all_began_1st_production_helicopter_on_display_at_museum

69. Town records contain no evidence that the Airport has ever sought nor obtained *special* permits to use *any* of the post-1932 structures currently on the locus for airport uses.

70. Town records contain no evidence that the Airport ever sought *building* permits to construct any of the structures currently on the locus, including those that post-date the introduction of zoning in 1932.

71. The Building Inspector has stated that “because NO records have been found one could assume that no permits were sought or issued to create the airport.” (Exhibit N).

72. The below chart summarizes the evidence of the extent of use at the time the Airport became preexisting nonconforming in 1932, and then in 1934, 1944, and at present:

Airport	1932	1934	1944 (12 Years after Zoning)	2020
Number of Buildings	1 or 2	1	1	5
Number of Planes	Unknown	Unknown	2	51
Runway Type	Grass	Grass	Grass	Pavement
Runway Length	Unknown	Unknown	1,200-feet	2,585-feet
Annual Flights	Hundreds	Hundreds	Hundreds	29,810
Commercial Maintenance and Repair	No	No	Yes	Yes
Flight School	No	No	Yes	Yes
Nighttime Military Helicopter Drills	No	No	No	Yes

The Enforcement Request

73. On November 15, 2021, Plaintiffs and 17 other concerned citizens sent the Building Inspector the Enforcement Request pursuant to G.L. c. 40A, § 7.

74. The Enforcement Request requested that the Building Inspector enforce the Bylaw with “respect to the scope of the current Airport use at 70 Egremont Plain Road.” (Exhibit A).

75. The Enforcement Request stated that the Airport is, at best, a preexisting nonconforming use, “to the extent it existed at the locus and met the definition of an ‘airfield’ under the Bylaw prior to the Town’s adoption of zoning on March 21, 1932.” (Exhibit A).

76. The Enforcement Request asked the Building Inspector to “i) determine that the Airport is operating in violation of the Bylaw, ii) order operations of the airport immediately reduced to a level consistent with the scale and scope of operations as of the time the use first became preexisting nonconforming, iii) restrict airport use to those structures lawfully existing (if any) at the time the airport use first became preexisting nonconforming, and iv) take such other necessary action to enforce the Bylaw as is appropriate.” (Exhibit A).

77. The Enforcement Request included a detailed factual narrative of the history of development at the Airport.

78. Neither the Building Inspector (nor the Zoning Board in the subsequent appeal) disputed the accuracy of the facts or exhibits concerning the Airport included in the Enforcement Request.

79. The Enforcement Request described the relevant legal standards and precedents for evaluating the extension or enlargement of a preexisting nonconforming use as established in *Powers* and other relevant case law.

80. The Enforcement Request conducted a factual analysis of each of the three *Powers* tests, and determined that under each or any of those tests, the use of the locus and structures for airport purposes in 2021 exceeded the allowable scope and intensity of airport uses

when measured against the “scope and intensity of the date the airport use because preexisting nonconforming” in 1932. (Exhibit A).

81. Separately, the Enforcement Request demonstrated the Airport has indisputably done what the case law prohibits: erect and use post-1932 structures for the extension or enlargement of a preexisting nonconforming use.

The Building Inspector Denied the Enforcement Request Without Engaging In (or Acknowledging the Applicability of) Any of the Three Powers Tests, and Ignored Controlling Precedent

82. On February 1, 2022, the Building Inspector issued a decision (“BI Decision”) denying the Enforcement Request. (Exhibit O)

83. The BI Decision did not address the four requests made by Plaintiffs.

84. Rather, the Building Inspector stated “I do not find any clear violations of the Zoning Bylaw in the use of the property.”

85. In support of the BI Decision, the Building Inspector cited only three pieces of evidence: 1) the existence of “two permits issued for the property in 1931, prior to the enactment of zoning in Great Barrington, one in June for construction of a hangar . . . and one in September for underground gasoline storage”; 2) the fact that there are “various references in Town records to the property as an airport and communications showing a general awareness of that use”; and 3) that in 2017, a Zoning Board special permit decision (authorizing construction of a deck on the current office) stated that “the Airport was a legal pre-existing nonconforming property.” (Exhibit O).

86. None of the evidence referenced in the BI Decision was attached to the BI Decision.

87. None of the three pieces of evidence cited in the BI Decision are relevant to the questions posed in the Enforcement Request.

88. Whether the Airport is a preexisting nonconforming use is not the question that was asked of the Building Inspector. Indeed, the Enforcement Request *expressly acknowledged* that the Airport is likely a preexisting nonconforming use, on its *very first page*.

89. Instead, as the first page of the Enforcement Request clearly stated, the Airport's preexisting nonconforming status is not the *end* of the enforcement inquiry, but is instead the *starting point*:

[T]he mere existence of the airport prior to 1932 does not authorize the current extent of its operations. To the contrary, Supreme Judicial Court precedent bars the airport from the scale and scope of its current operations — which drastically exceed in scale and scope its operations at the time it first became preexisting nonconforming — unless the airport first obtains additional affirmative Town approvals. It has never obtained such approvals.

Separately, and equally as concerning, SJC precedent explicitly and unambiguously prohibits erection and use of *additional buildings* by a preexisting nonconforming use. Even if the airport use on the locus is entitled to certain minimal preexisting nonconforming protections, the airport is not entitled to use any *post-1932 structure* to further such nonconforming uses. Yet in direct violation of state law, the airport is openly using numerous such structures for airport uses on the locus today. (Exhibit O).

90. The BI Decision did not address whether the Airport's extension, expansion, and enlargement of its preexisting nonconforming use exceeds what is allowed under state law.

91. The BI Decision did not address whether the Airport could utilize structures that did not exist when the Airport first became preexisting nonconforming use.

92. None of the evidence cited in the BI Decision related to either of these two requests.

93. Instead, the Building Inspector took the legally erroneous position that because the Airport is a preexisting nonconforming use, *any* subsequent use of the locus for *any* airport purpose is allowed as a matter of law.

94. The BI Decision did not even mention *Powers*, let alone conduct an analysis of the three *Powers* tests.

**The Zoning Board Failed to Properly Apply the *Powers* tests
and Other Relevant Case Law**

95. On March 2, 2022, Plaintiffs appealed the BI Decision to the Zoning Board.
(Exhibit P).

96. In their appeal, Plaintiffs requested that the Zoning Board
- a) order operations of the airport immediately reduced to a level consistent with the scope and scope of operations as of the time the use first became preexisting nonconforming,
 - b) restrict airport use to those structures lawfully existing (if any) at the time the airport use first became preexisting and nonconforming, and
 - c) take such other necessary action to enforce the Bylaw as is appropriate.

97. The Zoning Board convened a public hearing on Plaintiffs' appeal of the BI Decision on April 5, 2022.³

98. During the hearing, Zoning Board member Steve McAlister declared Plaintiffs' G.L. c. 40A, § 7 Enforcement Request an "absurdity" and stated: "I think, in my layman's view of things, that this is harassment I'm ticked off because I feel this is a waste of this board's time."

99. Mr. McAlister stated that the issue raised by the G.L. c. 40A, § 7 Enforcement Request was "not a matter of law, [but] a matter of common sense and practicality."

100. Mr. McAlister also stated that he didn't think the "Board had the power to do anything about [the Enforcement Request] whether [the Zoning Board] reject[e]d the Building Inspector's Decision or not."

³ The hearing was recorded by Zoom and is a matter of public record; a copy of the recording has been provided to Plaintiffs by the Town, but has not been publicly posted on the Town website as of the date of filing.

101. The Zoning Board encouraged the Building Inspector to elaborate on his decision.

102. The Building Inspector declined, stating he had nothing further to offer beyond the written BI Denial.

103. During the hearing, Counsel for the Plaintiffs explained that the Airport fails all three *Powers* tests based on the historical evidence submitted.

104. Counsel for Plaintiffs also explained why under *Powers*, the Airport was prohibited from doing what it has now done: expand airport uses into buildings built after the Airport became a preexisting nonconforming use absent additional affirmative approvals.

105. During the hearing, counsel for the Airport expressly conceded that “of course the use [of the Airport] is *different in kind* because planes change and engines change . . . [and] there are more structures than there were in 1932.” (emphasis supplied).

106. During the hearing, Town Counsel stated that “he agrees, in general, . . . *that a nonconforming use cannot erect new buildings to serve that use*” (emphasis supplied).

107. During the hearing, a Zoning Board member asked Town Counsel whether the Zoning Board was allowed to keep the record open to introduce additional evidence into the record from other matters previously before the Zoning Board and Selectboard. Town Counsel advised that this was permissible.

108. Subsequently, Zoning Board member Michael Wise stated that “there is enough evidence in the record that’s been provided to us.... I don’t see a need to keep the hearing open.”

109. The Zoning Board voted to close the hearing without accepting any additional written or documentary evidence, other than the materials submitted by Plaintiffs.

110. Upon closing the hearing, the Zoning Board voted unanimously to deny Plaintiffs' appeal, finding that the Building Inspector correctly concluded that there was no violation of the Bylaw by the Airport.

111. On April 19, 2022, the Zoning Board issued its written Decision. (Exhibit B).

112. The Decision accurately quotes the relevant portions of the *Powers* tests, as "Whether the use reflects the 'nature and purpose' of the use prevailing when the zoning by-law took effect;" "Whether there is a difference in the quality or character, as well as the degree of use;" and "Whether the current use is 'different in kind in its effect on the neighborhood.'" (Exhibit B).

113. No evidence other than that submitted by Plaintiffs was entered into the Zoning Board record.

114. The Decision purportedly undertook an analysis of each of the three *Powers* tests, and concluded that the scale and scope of the Airport's current operations did not trigger *Powers*.

115. Nonetheless, the Zoning Board failed to even mention the first *Powers* test in its Decision, beyond stating that "[t]he nature and use in 1932 was a commercial enterprise supporting and housing operations of small aircraft. That is unchanged." (Exhibit B). These two sentences are the entirety of the Zoning Board's "analysis" under the first *Powers* test.

116. The purported analysis under the second and third *Powers* tests demonstrates the Zoning Board's misunderstanding and misapplication of these tests as well.

117. The Zoning Board stated that "[t]here is firm evidence of flying instruction [at the Airport] from no later than 1942." The Decision then states, without any further evidence or discussion, that it is therefore "reasonable to infer that the pilots who ran the airport in the 1930s gave flying lessons." (Exhibit B).

118. There is zero evidence in the record, or that the Plaintiffs could find, that flying lessons were given at the Airport prior to 1942. Therefore, this is not a reasonable inference.

119. After conceding that the “degree of the present use is no doubt greater than it was at the outset in 1931” and “[d]etail about the degree of use in the 1930s is lacking,” the Decision states — without citing any evidence — that “roughly current levels of intensity were probably reached not long after operations began, when the field was used for training pilots during WWII.” (Exhibit B).

120. The United States did not enter WWII until December 1941, nearly a decade after the Airport became a preexisting nonconforming use.

121. Likewise, the Decision states that “it is a reasonable inference that airplanes have been maintained and repaired at the property since operations began,” while acknowledging “the absence of explicit evidence” of such repairs. (Exhibit B).

122. In this “analysis,” the Zoning Board ignored the fact that the Airport’s own website states it “has operated a maintenance facility at Great Barrington Airport since the 1940s,” nearly a decade *after* the Town adopted its first zoning bylaws. (Exhibit I).

123. Similarly, the Decision failed to acknowledge that in 1944, over a decade *after* adoption of the Bylaws, the Airport had only “two little airplanes” but now has 51; a 2,500% increase.

124. Also, in Zoning Board member Wise’s oral recitation of the basis for the Zoning Board’s Decision, he asserted “there has been no material change in the operation of the airport for at least 70 years . . . and to go back another 20 years to 1931 on the basis of one newspaper article is not persuasive.”

125. Under *Powers*, the Building Inspector and Zoning Board are required to compare the use of the Airport at the time it became a preexisting nonconforming use — 1932 — with its current use to determine whether the Airport has impermissibly expanded in size or scope.

126. The assertion that because a use is known to have existed in a certain state at one point in time, and therefore that by definition that same use existed in the equivalent state two decades previously, is not a reasonable inference.

127. In the Decision, the Zoning Board faults the Plaintiffs for not “identify[ing] any point in time between 1931 and now when the extent of change, extension or expansion of the airport would have required a permit from the Town.” (Exhibit B).

128. Plaintiffs are not required to identify a specific point in time when the Airport expanded its size and scope beyond what is allowed for a preexisting nonconforming use.

129. Under Section 3.1 of the Bylaw, “Any building or use of premises not herein expressly permitted is hereby prohibited.”

130. A G.L. c. 40A, § 7 enforcement request is, by definition, an assertion that a building or use is not in compliance with the Bylaw.

131. Finally, the Zoning Board failed to recognize that although *Powers* governs *both* the extension or enlargement of a preexisting use *and* the use of new buildings for that preexisting use, that *Powers* establishes two entirely independent and distinct standards for review of these two issues.

132. The Zoning Board improperly conflated the *balancing* tests from *Powers* (governing whether a preexisting use has expanded its size and scope beyond what is allowed) with the entirely distinct *bright-line* principle reiterated in *Powers* that the “existence of a lawful

nonconforming use *does not permit the erection of additional buildings for the extension or enlargement of that use.*” (Emphasis supplied).

133. The Decision states:

We find that developments on this property have not amounted to a change or substantial extension or expansion of the original airport use. Therefore, the effect of each of the structures added in the 1950s and 1960s did not amount to such a change, expansion, or extension either. If there were no contemporaneous findings on the question of extension or expansion because permits were not obtained for these structures — and the failure to find these decades-old records is not necessarily evidence that they did not exist — our finding now about the lack of such a cumulative effect is a sufficient substitute.

134. There are a number of issues with this finding.

135. First, whether the new post-1932 buildings at the Airport (“added in the 1950s and 1960s”) constituted a “change, substantial extension, or expansion of the original Airport” is irrelevant to the entirely separate legal question of whether it was lawful for the Airport to use such new structures to house *any* quantum of a preexisting nonconforming use.

136. Second, the Zoning Board stated that the absence of “decades-old [building permit] records is not necessarily evidence that they did not exist.”

137. This is a direct contradiction from the Building Inspector’s own statement in response to a duly-submitted public records request under G.L. c. 66, § 10, that “because NO records have been found one could assume that no permits were sought or issued to create the airport.” (Exhibit N).

138. Nor would the existence of a building permit to *construct* a structure in any way authorize or protect the *use* of that structure for a preexisting nonconforming use. *Lord v. Zoning Bd. of Appeals of Somerset*, 30 Mass. App. Ct. 226, 227 (1991).

139. As the one seeking to maintain the minimum protections afforded to a preexisting nonconforming use, the Airport has the burden of proof to establish compliance with *Powers*.

See, e.g., G.L. c. 40A, § 6; *Derby Refining Co. v. Chelsea*, 407 Mass. 703, 712 (1990); *Hall v. Zoning Bd. of Appeals of Edgartown*, 28 Mass. App. Ct. 249, 257 (1990) (entity seeking protection as prior nonconforming use under G.L. c. 40A, § 6 bears burden of proof).

140. The Decision states that “[i]f there were no contemporaneous findings on the question of extension or expansion because permits were not obtained for these structures . . . our finding now about the lack of such a cumulative effect is a sufficient substitute.” (Exhibit B).

141. As a matter of law, the Zoning Board cannot make such a sweeping *nunc pro tunc* determination in an appeal of a G.L. c. 40A, § 7 enforcement decision, nor may it do so in *any* respect absent (at minimum) a proper application submitted by the landowner, subject to public notice, hearing, and decision, consistent with the Bylaw and G.L. c. 40A, § 6.

142. By making this unenforceable declaration in its Decision, the Zoning Board has ironically conceded that the Airport currently *lacks* the required approvals for its current operations, thereby confirming the legal position asserted by the Plaintiffs in the Enforcement Request.

143. No evidence was either introduced or examined indicating that *any* — much less all — of the five buildings currently at the Airport existed at the time the Airport became preexisting nonconforming.

COUNT I

The Decision’s Approval of the Airport’s Use of Structures That Did Not Exist When the Airport First Became a Nonconforming Preexisting Use Is Legally Untenable

144. Plaintiffs incorporates herein by reference each and every allegation contained in paragraphs 1 through 143 above.

145. Controlling appellate precedent uniformly prohibits erection of *additional buildings* for the extension or enlargement of a preexisting nonconforming use.

146. This principle has been established by the Supreme Judicial Court since the earliest days of zoning: “The existence of a nonconforming use of the land when the ordinance was enacted did not, either under its original or its amended terms, legalize new buildings in connection with that use.” *Wilbur v. City of Newton*, 302 Mass. 38, 43 (1938).

147. *Powers* reiterated unambiguously that the “existence of a lawful nonconforming use *does not permit the erection of additional buildings for the extension or enlargement of that use.*” *Powers v. Building Inspector of Barnstable*, 363 Mass. 648, 658 n.4 (1973) (emphasis supplied).

148. There is no statute of limitations on enforcement against unauthorized extension or enlargement of a preexisting nonconforming use. Unauthorized uses do not “self-cure” over time. Being in existence for decades neither makes a use lawful nor establishes a presumption of legality. The law is the exact opposite: “The ten-year limitations period for [enforcing] zoning violations unsanctioned by a permit covers only structural violations. *The omission of protection for use violations not sanctioned by permit is plain on the face of the statute.*” *Lord v. Zoning Bd. of Appeals of Somerset*, 30 Mass. App. Ct. 226, 227 (1991) (emphasis supplied).

149. The evidence before the Zoning Board indicated that the Airport had at most *two* buildings prior to 1932 — a 60-by-60 “all-steel” hangar, and small office that no longer appear to be extant (Exhibit E). According to the records of the Town Assessor, the airport now has at least *five* buildings (Exhibit Q).

150. Town records indicate that the airport has never obtained special permits to use *any* of those post-1932 buildings for airport uses.

151. The Building Inspector confirmed in writing that Town records contain no evidence that the airport ever sought *building* permits to construct those structures, and that “because NO records have been found one could assume that no permits were sought or issued to create the airport.” (Exhibit N).

152. As to the key *Powers* question of whether the Airport has improperly expanded its preexisting nonconforming use into new buildings, counsel for the Airport admitted during the hearing that “there are more structures than there were in 1932.”

153. Furthermore, during the hearing, Town Counsel conceded that “he agrees, in general, . . . that a nonconforming use cannot erect new buildings to serve that use.”

154. Even if the Airport is a preexisting nonconforming use, there is no lawful basis on which post-1932 structures can be used to house that preexisting nonconforming use, given express and outright prohibitions in *Wilbur*, *Powers*, and numerous other decisions.

155. Under *Powers* and *Cox v. Board of Appeals*, 42 Mass. App. Ct. 422, 425-426 (1997), further municipal approvals (here, from both the Zoning Board and the Selectboard) are required by law for the Airport to utilize any of the post-1932 buildings for airport purposes.

156. The Airport has not received any G.L. c. 40A, § 6 findings from the Zoning Board, nor received a Selectboard special permit to operate as an airport in this zoning district.

157. Accordingly, as a matter of law, the Airport cannot use the post-1932 buildings for airport-related uses without obtaining express authorization from the Zoning Board under Section 1.4 of the Bylaw and without obtaining express authorization for the use of the locus as an Airport in the form of a Selectboard special permit under Sections 3.14 and 7.2 of the Bylaw.

COUNT II

The Decision Was Based on a Legally Untenable Ground Because the Zoning Board Ignored and Incorrectly Applied the *Powers* tests

158. Plaintiffs incorporates herein by reference each and every allegation contained in paragraphs 1 through 157 above.

159. The Decision misapplies, and in some cases outright ignores, the three tests for evaluating whether the Airport's extension and enlargement of its preexisting nonconforming use exceeds what is allowed by right under *Powers*.

160. Under *Powers*, if there is either "a difference in the quality or character, as well as the degree, of the present use" from the time the use became preexisting nonconforming, *or* if "the current use is 'different in kind in its effect on the neighborhood'" from the time it became preexisting nonconforming, further municipal approvals are mandated.

161. The Town adopted zoning on March 21, 1932, requiring a Board of Selectmen permit for "airports with essential accessories," and the special permit requirement for airports remains unchanged today.

162. The evidence indicates that as of the adoption of zoning in 1932, the locus contained at most a single hangar, small office, and an unpaved runway.

163. The single hangar was described as a "60 by 60 feet, of all-steel construction" eight-plane hangar.

164. Neither the original 60-by-60 all-steel hangar nor the small office survive today.

165. Even if the minimal extent of operations as of 1932 were presumed sufficient to establish a preexisting nonconforming Airport use as a matter of law, the Airport is still operating in violation of the Bylaw today.

166. Under *Powers*, even if the airport use were preexisting nonconforming, the Airport required Town approval if it wished to exceed the scope of its operations as of 1932, the time at which it first became preexisting nonconforming. The Airport has never obtained such approval, even after adding tens of thousands of new flights annually, multiple new buildings, additional amenities such as flight instruction, a fly-in commercial maintenance and repair facility, and nighttime military helicopter drills.

167. As to the first *Powers* test — “whether the present use reflects the nature and use prevailing when the zoning bylaw took effect” — the answer is clearly no. As of 1932, the evidence indicates that the Airport use consisted at most of limited personal private aviation.

168. There is no evidence that a flight school was operating on the premises prior to 1932 — much less one that, according to the Airport’s own website, now requires “an average of 60 to 80 hours of instruction” for certification of each new pilot (Exhibit M).⁴ As a *Berkshire Evening Eagle* article from September 24, 1942 stated “rapid strides were made in local aviation history” when a “lease was granted to the Lufberry Flying School Inc. . . . to operate at the field,” indicating that no such flight school had operated on the premises previously (Exhibit H).

169. There is no evidence that commercial airplane maintenance and repair work was being performed on the premises prior to 1932. The Airport’s own website states that “Berkshire Aviation Enterprises has operated a maintenance facility at Great Barrington Airport since the 1940’s” (Exhibit I),⁵ conceding that commercial maintenance facility operations *post*-date, rather than *pre*-date, the adoption of zoning in 1932.

170. Whether the addition of nighttime military helicopter training drills “reflects the nature and use prevailing when the zoning bylaw took effect” requires little elaboration. The

⁴ See <http://www.berkshireaviation.com/flight-school>.

⁵ See <http://www.berkshireaviation.com/maintenance>.

first military helicopter, the Sikorsky R-4, was not put into production until 1942,⁶ ten years *after* the introduction of zoning in the Town. Furthermore, there is no evidence of any military use at the Airport before World War II.

171. In *Jasper v. Michael A. Dolan, Inc.*, 355 Mass. 17, 24 (1968), the addition of new services and products to the preexisting nonconforming use (there, the addition of hard liquor to a store previously licensed to sell only beer and wine) meant that the first *Powers* test could not be met. The same logic applies here with respect to Airport’s post-1932 addition of, at minimum, flight instruction, commercial maintenance operations, and nighttime military helicopter drills.

172. Regardless, the Zoning Board failed to conduct any substantive analysis of the first *Powers* test.

173. The second *Powers* test is whether there is a “difference in the quality or character, as well as the degree, of the use” from the date on which the use became preexisting nonconforming. This Court has held that “a pronounced physical expansion necessitates a finding of change or substantial extension of the degree of use as a matter of law” *HAYR, LLC v. Nigosian*, 25 LCR 533, 538 (2017), citing *Sullivan v. Bd. of Appeals of Harwich*, 15 Mass. App. Ct. 286, 288-89 (1983); *see also Billerica v. Quinn*, 320 Mass. 687, 689 (1947).

174. The Airport’s expansion from a 3,600 square foot hangar with an unpaved grass runway in 1932 to five buildings with a paved half-mile runway of 128,950 square feet⁷ — nearly three *acres* — today is under any metric a “pronounced physical expansion.”

⁶ Nathan Pfau, *Where it all began: 1st production helicopter on display at museum* (July 14, 2017), at https://www.army.mil/article/190855/where_it_all_began_1st_production_helicopter_on_display_at_museum

⁷ *See* <http://airnav.com/airport/KGBR> (indicating “Dimensions: 2579 x 50 ft.” and “Surface: asphalt, in fair condition.”).

175. Crucially, the evidence demonstrates that this this expansion all occurred entirely *after* 1932.

176. There is a “difference in the quality or character, as well as the degree, of the present use” between the date on which the Airport use became preexisting nonconforming and today. This means the second *Powers* test has not been met. This conclusion is only reinforced with the additional evidence on the significant change in the degree of use of the Airport between 1932 and present, as described below with respect to the third *Powers* prong.

177. As to the third *Powers* test — whether the “current use is different in kind in its effect on the neighborhood” — “[a] dramatic increase in the intensity of these characteristics can rise to the level of a qualitative change or substantial extension that constitutes an impermissible alteration of the nonconforming use.” *Oakham Sand & Gravel Corp. v. Town of Oakham*, 54 Mass. App. Ct. 80, 84 (2002).

178. During the hearing, counsel for the Airport admitted that of “of course the use [of the Airport] is *different in kind* because planes change and engines change” (emphasis supplied).

179. The Airport’s own filings with the Selectboard state that it currently has “a total of 51 aircraft” based on the field (with MassDOT projecting growth to “59 aircraft” by 2030), and “29,810” flights annually. (Exhibit L).

180. Again, the long-time former Airport owner Walter Koladza himself provides the best evidence of the limited scope of use of the Airport as late as 1944, over a decade *after* the adoption of zoning: The Airport “*was just a grass field*,” and “[*w*]e had two little airplanes” (emphases supplied) (Exhibit J).

181. The difference between two airplanes and 51, between presumably several hundred flights annually then and tens of thousands annually now, between the absence and the

presence of nighttime military helicopter training flights, between the absence and the presence of an extensive in-air instructional program, and between the absence and the presence of a fly-in commercial maintenance and repair shop, are by any measure an intensification and enlargement of the use “different in kind in its effect on the neighborhood.”

182. The numerous neighborhood complaints submitted into the public record of the Airport’s 2020 Selectboard special permit proceeding concerning the significant recent adverse increases in airplane traffic volume and noise also demonstrates this “difference in kind.”

183. The appellate courts have consistently held that changes of this magnitude to a preexisting nonconforming use require further municipal approval. In *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 523 (1965), the court held that a change from a nonconforming use of “four to five boats” moored to a small 12-foot pier to two piers of 80 feet and 90 feet long that included the addition of “repair service, painting, and drydocking” constituted a change in quality or character and degree of use. And in *Cullen v. Building Inspector of North Attleborough*, 353 Mass. 671, 676 (1968), an increase in a nonconforming dairy operation from 60-70 cows to 750-800 cows — a tenfold increase — and the erection of new buildings was held to constitute a change requiring further approval.

184. The evidence amply supports that the intensification and enlargement of the Airport use that has occurred since 1932 renders the Airport use “different in kind in their effect on the neighborhood” from its scope in 1932.

185. Where expansion, extension, or enlargement of a preexisting nonconforming use fails any one of the three *Powers* tests, the expansion, extension, or enlargement is prohibited unless the Zoning Board finds, after application by the use and public hearing, that the

expansion or enlargement of the preexisting nonconforming use is not “substantially more detrimental than the existing nonconforming use to the neighborhood.” G.L. c. 40A, § 6.

186. Under *Cox v. Board of Appeals*, 42 Mass. App. Ct. 422, 425-426 (1997), “a [Zoning Board] finding that the extension of the nonconforming use would not be substantially more detrimental to the neighborhood is simply not enough.” In addition, the “extensions or changes themselves [must] comply with the ordinance or bylaw,” which here would require also obtaining a Selectboard special permit.

187. The Airport has not received any G.L. c. 40A, § 6 findings from the Zoning Board, nor received a Selectboard special permit to operate as an airport in this zoning district.

188. In such circumstances, as a matter of law, the Airport use on the locus must be restricted consistent with the scope and intensity of the Airport use as of the date the Airport use first became preexisting nonconforming and with *Powers*.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully prays that this Court:

- a. Find that the Decision exceeds the authority of the Zoning Board,
- b. Annul the Decision;
- c. Enter judgment in favor of Plaintiffs and against the Zoning Board on Counts I and II of this Complaint;
- d. Enjoin the Airport from utilizing any post-1932 buildings for Airport purposes without first obtaining approval from both the Zoning Board under Section 1.4 of the Bylaw, and from the Selectboard under Sections 3.14 and 7.2 of the Bylaw;

- e. Hold that *Powers* applies and, that as a matter of law, the Airport's expansion, extension, and enlargement requires further municipal approvals pursuant to the *Powers* tests;
- f. Remand this matter to the Zoning Board with orders that the Zoning Board instruct the Building Inspector to enforce the Bylaw consistent with this Court's determination; and
- g. Award such other and further relief as this Court may deem just and proper.

Respectfully submitted,
Holly Hamer, Marc Fasteau, and
Anne Fredericks

By their attorneys,



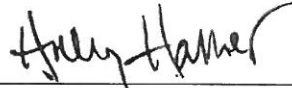
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Date: May 6, 2022

VERIFICATION

I, Holly Hamer, have reviewed the allegations in the Verified Complaint. As to those allegations for which I have personal knowledge, I believe them to be true; as to those allegations for which I lack personal knowledge, I believe them to be true to the best of my information and belief.

Signed under the penalties of perjury this 6th day of May, 2022

A handwritten signature in black ink that reads "Holly Hamer". The signature is written in a cursive style with a long horizontal stroke at the end.

Holly Hamer