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OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

April 22, 2014

Planning Board Chairman Hugh Russell
and Members of the Planning Board
344 Broadway
Cambridge, MA 02139

Re: Edward J. Sullivan Courthouse, 40 Thorndike Street, East Cambridge

Dear Chairman Russell and Members of the Planning Board:

On March 24, 2014, the Cambridge City Council adopted Policy Order Resolution O-11 requesting the advice of the City Solicitor on the issue of whether the Edward J. Sullivan Courthouse (the "Courthouse") qualifies as a pre-existing nonconforming structure under G.L. c. 40A, § 6 ("Section 6").¹ On April 9, 2014, Mark Bobrowski, as attorney for the James Diman Green Condominium Association delivered to the Planning Board and City Council a letter arguing against a determination that the Courthouse is a pre-existing nonconforming structure under Section 6 (the "Bobrowski Letter"). This letter responds to the Bobrowski Letter.

There are two statutory provisions that are particularly relevant to the future use and improvement of the Courthouse. G.L. c. 40A, § 7 ("Section 7") protects dimensional characteristics that have existed for at least ten years from zoning enforcement actions. Section 6

¹ WHEREAS: Residents as well as the Planning Board have raised the question of whether or not the Sullivan Courthouse can truly qualify as a pre-existing nonconforming structure under the State Law and the Cambridge Zoning Ordinance; and

WHEREAS: As a State owned building the Sullivan Courthouse is now, and at the time of construction, exempt from all local zoning regulation; and

WHEREAS: The change of use from public to private raises the questions of whether the building qualifies as a pre-existing nonconforming structure and should it be treated as such; now therefore be it

ORDERED: That the City Manager be and hereby is requested to seek a legal opinion from the City Solicitor on whether the Sullivan Courthouse qualifies as a pre-existing non-conforming structure and to report back to the City Council and Planning Board with this legal opinion.

Planning Board Chairman Hugh Russell and Members of the Planning Board
April 22, 2014
Page 2

provides additional protection for “structures or uses lawfully in existence or lawfully begun” but that do not comply with existing zoning regulations. Specifically, Section 6 allows pre-existing nonconforming uses and structures lawfully to continue (provided they are not abandoned) even if they are less than ten years old, and it also enables them to be altered and expanded upon the issuance of special permits. The Cambridge Zoning Ordinance (“CZO”) contains provisions that effectively mirror Section 6. *See* CZO § 8.00.

BACKGROUND FACTS

We are in substantial agreement with the Bobrowski Letter on several of the key background facts:

- The governmental use of the Courthouse, when originally built and today, is a permissible use under the CZO. Moreover, the private uses that are proposed for the Courthouse are also allowed uses under the CZO. Thus, there is no controversy as to the uses: all are conforming and permissible without the need to invoke Section 6 and Section 7.
- At the time the Courthouse was built, it was fully in accord with all applicable dimensional requirements of the CZO, with the exception of a limitation on Floor Area Ratio (“FAR”), which in 1965 was 4.0.
- The Courthouse was allowed to be built despite the fact that its FAR did not satisfy the then-existing 4.0 FAR because the County² was “immune” from the application of the CZO’s dimensional requirements.³
- After the Courthouse was built, Cambridge adopted a more restrictive FAR requirement of 2.75/3.00. The Courthouse pre-exists the currently applicable FAR requirement.

² The Courthouse was originally built by the Middlesex County Commissioners. Ownership was subsequently transferred to the Commonwealth. Like the Commonwealth, the County was entitled to state governmental immunity from application of local zoning requirements. *See County Commissioners of Bristol v. Conservation Commission of Dartmouth*, 380 Mass. 706, 710-11 (1980).

³ Mr. Bobrowski comments, in his zoning treatise, that a use established under a zoning immunity is “nonconforming in fact” under Section 6. *See* M. Bobrowski, *Handbook of Massachusetts Land Use and Planning*, at ¶ 6.04, p.191 (Third Ed. 2011). *Durkin v. Board of Appeal of Falmouth*, 21 Mass. App. Ct. 450, 453 (1986) describes such uses as “lawful” nonconformities (“If the [post office] use . . . could then have been regarded as nonconforming, but immune because of Federal use, it was a lawful use.”)

Planning Board Chairman Hugh Russell and Members of the Planning Board
April 22, 2014
Page 3

- There was no “height” limitation in existence when the Courthouse was constructed. Thus, the lawfully built Courthouse pre-existed the current height limitations of the CZO.
- The Courthouse currently is carrying out an essential government function—the jail—and the governmental immunity that applies to the property will continue until such use ceases.

Disagreements with the Bobrowski Letter

The Bobrowski Letter does not address the statute of limitations set forth in Section 7, which provides, *inter alia*, that:

no action, criminal or civil, the effect or purpose of which is to compel the removal, alteration, or relocation of any structure by reason of any alleged violation of the provisions of . . . any ordinance . . . shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within ten years next after the commencement of the alleged violation.

Because the alleged FAR nonconformity has existed since at least 1970 – well beyond the ten year limitations period in Section 7 – it is clear that no enforcement action may be taken against the FAR of the building. Mr. Bobrowski does not contend otherwise. It defies common sense to suggest that the City must allow the status quo FAR nonconformity to continue but is powerless to allow the existing Courthouse structure to be put to a more beneficial, and less impactful, redevelopment.

Property owned and operated by the Commonwealth⁴ for the purpose of performing an essential government function is generally immune from local zoning requirements. That immunity ends when a private party purchases land from the government and the essential governmental function ends. *See Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157 (1977) (private owner of airport could not use land acquired from the Commonwealth for airport use where the Commonwealth had not used the land for an airport use and an airport use was prohibited under local zoning); *Village on the Hill, Inc. v. Mass. Turnpike Auth.*, 348 Mass. 107, 118 (1964) (“Certainly, after the authority has conveyed in fee to private persons excess land formerly owned by it, such land does not remain exempt from zoning provisions because once owned by the authority.”). But the mere fact that governmental immunity comes to an end when the

⁴ For the reasons set forth in footnote 2, the term “Commonwealth” as used in this letter is intended to encompass the Middlesex County Commissioners as well as the Commonwealth.

Planning Board Chairman Hugh Russell and Members of the Planning Board
April 22, 2014
Page 4

essential governmental function ends does not answer the question of whether a structure or use that was lawfully begun while the immunity was in effect is protected by Section 6, and may therefore be altered by a special permit.

That specific issue was addressed in *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450 (1986), in which the plaintiff had purchased property that had previously been used as a post office. Plaintiff, relying on a by-law that was substantively identical to Section 6, applied for a special permit to convert the use of the basement in the former post office to business and professional office use and to construct an exterior stair entrance to the basement. The Board of Appeal denied the application, ruling that the post office could not be considered a “lawful nonconforming use” because it was allowed only by application of a governmental immunity from zoning. *Id.* at 452. However, the Appeals Court disagreed with the Board’s “narrow” interpretation of its own authority, explaining as follows.

A use of the locus under a lease for a proper Federal purpose may have been immune from application of the town by-law. If in substance, however, a post office use was not a permitted use within the particular zoning district because immune, it still would have been a use of the locus forbidden by the by-law, and thus nonconforming in fact. This would have been so even though the by-law could not have been enforced against it because of the Federal immunity.

Id. (emphasis in original; internal quotations and citations omitted). In other words, a use that is conducted as the result of immunity from zoning *is* a use that is “lawfully begun,” and it is protected as a nonconforming use under Section 6. *See also* Barry P. Fogel, Cheryl A. Blaine and H. Theodore Cohen, “Alteration of Nonconforming Structures and Uses Under the Zoning Act: Is There a Difference Between Lawful and Unlawful,” Massachusetts Bar Association, Section Review, Volume 4, No. 3 (2014) (summarizing holding in *Durkin*).

The Bobrowski Letter attempts to minimize the importance of *Durkin* by saying that it only addressed whether an enforcement action could be taken against the property. However, *Durkin* did not involve an enforcement action; it was an appeal by the property owner from the denial of a special permit he had requested under a by-law that was substantively identical to Section 6, and the Appeals Court overturned the Board’s denial and remanded the case back to the Board. It is clear, then, that *Durkin* speaks to the proper interpretation of Section 6.

Moreover, the Bobrowski Letter ignores two more recent Land Court decisions that construed *Durkin* to mean that structures built and uses begun pursuant to a governmental immunity from zoning are subject to Section 6’s protection for lawfully existing nonconformities when the property is sold to private parties and converted to private use. *See Currier v. Smith*, 9 LCR 371 (July 23, 2001) (Lombardi, J.) (applying *Durkin* and ruling that a former post office building that did not comply with dimensional zoning requirements but that had been built pursuant to the federal government’s zoning immunity rendered the building a legally nonconforming structure);

Planning Board Chairman Hugh Russell and Members of the Planning Board
April 22, 2014
Page 5

Tsouvalis v. Town of Danvers, 6 LCR 252 (Kilborn, J.) (applying *Durkin* and ruling that a former municipal fire station whose use did not conform with zoning was a legally nonconforming use entitled to grandfather protection by application of *Durkin*, but also ruling that the firehouse had lost its protected status because the use had been abandoned). These two Land Court cases are attached for your review.

It is also noteworthy that all but one of the Massachusetts cases cited in the Bobrowski Letter pre-date *Durkin*, and have nothing to do with whether structures or uses first established by application of a governmental immunity are deemed to be “lawfully in existence” under, and therefore fully protected by, Section 6. See *Village on the Hill, Inc. v. Massachusetts Turnpike Authority*, 348 Mass. 107 (1964) (land that the Massachusetts Turnpike Authority (“Authority”) had owned but had not built on or used for its own purposes did not remain exempt from zoning once the Authority conveyed it to a private party for private use); *Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157 (1977) (private owner of an airport could not use land acquired from the Commonwealth for airport use where the Commonwealth had not used the land for an airport use and an airport use was prohibited under local zoning); *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 922 (1985) (private property owner could not rebuild his garage where it had been rendered nonconforming, because the nonconformity was “self-inflicted” by his subdividing the property).

Only one Massachusetts case cited in the Bobrowski Letter was decided after *Durkin*, *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124 (2004), and it is similarly inapposite to the Section 6 issue presented here. *Cumberland Farms* ruled that the structures at issue (namely, gasoline storage tanks), which had been installed in violation of local zoning regulations (i.e., they were not subject to any immunity or exemption), were not entitled to protection as nonconforming uses under Section 6 merely because the statute of limitations period under Section 7 had expired. Thus, *Cumberland Farms* addressed an illegal structure built in violation of the zoning by-law, rather than a structure, like the Courthouse, that was constructed lawfully by application of a governmental zoning immunity.⁵

The Bobrowski Letter also relies on cases outside of Massachusetts. When these cases are examined closely, however, it becomes apparent that they do not shed any light on the proper construction of Section 6. The principal case cited, *United Real Estate Ventures, Inc. v. Village of Biscayne*, 26 So.3d 48 (2010), was decided by a three-member panel of the Third District for the District Court of Appeal of Florida (one of several intermediate appellate courts in Florida). It is not a full decision, in that it merely applies a certiorari standard of review to a magistrate’s application of Florida law. *Village of Biscayne* is also devoid of any analysis and merely states, in conclusory fashion, that the magistrate did not violate the plaintiff’s due process rights in

⁵ Even if *Cumberland Farms* applied here (it does not), it would not alter the conclusion that no enforcement action may be taken against the Courthouse – no matter who owns it – based on dimensional features (like the FAR) that have existed for at least ten years.

Planning Board Chairman Hugh Russell and Members of the Planning Board
April 22, 2014
Page 6

finding that a helipad that had been used by the President of the United States pursuant to the Supremacy Clause of the U.S. Constitution could not continue to be used as a helipad after the federal government sold the property to a third party for private use. *Village of Biscayne* does not cite any Florida zoning statute, let alone a statute that contains the language, and affords the protection, provided under Section 6.

The Bobrowski Letter also cites the two cases that *Village of Biscayne* relied upon, but these cases are similarly unavailing. The first case, *Alaska R.R. Corp. v. Native Village of Eklutna*, 43 P.3d 588 (Alaska 2002), involved a proposed continuation of a once-governmental use by a quasi-governmental entity. An Alaska zoning statute provided grandfathering protection to zoning changes applicable to mining operations, but only where the mine owner had obtained a “special exception” to the zoning by submitting an operations and amortization plan. Because the quarry operator in that case had not submitted the requisite plan, the “special exception” did not apply. *Native Village of Eklutna* left open the issue of whether the mining use continued to have the benefit of state governmental immunity. The second case, *Nolan Bros v. City of Royal Oak*, 557 N.W.2d 925 (Mich. 1996), dealt with an amendment that changed the zoning of the locus from commercial to residential at a time when the locus was owned by a state entity. The court held that, under Michigan law, the zoning amendment could be applied to a subsequent private purchaser of the parcel who sought to construct a new structure (not use an existing structure) for a new private warehouse use. *Nolan Bros.* stands for the unremarkable proposition that zoning immunity does not run with the land, but the case does not address, even tangentially, whether any Michigan statute analogous to Section 6 affords protection to structures that were built or uses that were begun during the time that the land was immune from zoning.

Under Section 7, any structure is exempt from zoning enforcement actions based on dimensional features (like the FAR of the Courthouse) that have existed for at least ten years. For this reason alone, the Courthouse can continue to be used, with its existing dimensions, no matter who the owner is or what the use is (provided that the proposed use complies with existing zoning, which it does). Further, application of the Massachusetts cases that have addressed the Section 6 issue compel the conclusion that structures built and uses commenced by the government at a time when the property was immune from zoning are deemed to be “lawfully in existence or lawfully begun” under Section 6, and therefore are afforded the same protections as every other legally nonconforming structure and use.

If Massachusetts law is to change on this point, only the Legislature may properly bring that about. The change would require that Section 6 be rewritten, such that the reference to “a zoning ordinance or by-law shall not apply to structures or uses *lawfully in existence* or lawfully begun,” would be replaced with “a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, unless the structures or uses were lawful only by application of a zoning immunity.”

Planning Board Chairman Hugh Russell and Members of the Planning Board
April 22, 2014
Page 7

Further, any such rewriting of the law would have severely adverse public policy implications. The interpretation urged by the Bobrowski Letter would imply, for instance, that a government entity does not act “lawfully” when it builds a structure or begins a use pursuant to its immunity from zoning.⁶ Furthermore, it would mean that buildings that were constructed pursuant to a governmental immunity, and which involve a significant long-term investment on behalf of the Commonwealth, effectively cannot be sold at full value, because no purchaser would pay full price for an illegal structure. Applying such a rule across the Commonwealth would immediately devalue the Commonwealth’s portfolio of buildings and properties, prevent the Commonwealth from recovering its investment where it becomes necessary to sell the properties, act as a disincentive for the private reuse of government facilities, and result in waste and increased costs attributable to the unwanted demolition of buildings that are removed from Section 6’s protection. This would not only diminish the Commonwealth revenues, but it may also cause former government buildings to remain vacant and dormant after the public need for them has waned, a poor outcome for both the Commonwealth and the communities in which its facilities are located.

Conclusion:

For all these reasons we urge the City of Cambridge to conclude that:

1. the Courthouse is exempt from any zoning enforcement action based on any alleged violation of FAR, because the building has had the same FAR for well beyond the ten year limitations period of Section 7; and
2. the Courthouse, which indisputably fully satisfied all dimensional and use requirements applicable at the time of construction, with the sole exception of FAR, was nonetheless “lawfully” constructed because the Commonwealth was exempt from application of those previously existing, now superseded, FAR limitations when the Courthouse was built.

⁶ As noted in footnote 2, *Durkin v. Board of Appeal of Falmouth*, 21 Mass. App. Ct. 450, 453 (1986) describes such uses as “lawful” nonconformities (“If the [post office] use . . . could then have been regarded as nonconforming, but immune because of Federal use, it was a lawful use.”)

Planning Board Chairman Hugh Russell and Members of the Planning Board
April 22, 2014
Page 8

As such, the Courthouse is a “nonconforming” structure that was “lawfully in existence” under Section 6 and is fully protected by Section 6 (and Cambridge’s iteration of Section 6 in § 8.00 of the CZO).

Sincerely,

A handwritten signature in black ink, appearing to read "Martin R. Healy", with a long horizontal flourish extending to the right.

Martin R. Healy

cc: Nancy Glowa, City Solicitor
Donna P. Lopez, City Clerk