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CAMBRIDGE, MASSACHUSETTS

Martin R. Healy
617.570.1371
mhealy@goodwinprocter.com

Goodwin Procter LLP
Counselors at Law
Exchange Place
Boston, MA 02109
T: 617.570.1000
F: 617.523.1231

May 15, 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:

I am informed that the legal opinion of City Solicitor Nancy E. Glowa upholding the authority of the Planning Board to grant zoning relief for the above-referenced premises has been criticized because it does not directly respond to Professor Bobrowski's April 29, 2014 memorandum to the Cambridge City Council and Planning Board.

City Solicitor Glowa has correctly identified the controlling authority to answer the question addressed to her. There is nothing in the Bobrowski memorandum which calls into question the Glowa opinion.

As an initial matter, it is worth considering what Professor Bobrowski does not say. Professor Bobrowski does not dispute that the Courthouse, as it exists today, is protected by the statute of limitations under G. L. c. 40A, § 7 ("Section 7") and therefore may be re-used for any allowed use as long as the structure is not altered. Nor does Professor Bobrowski take issue with the fact that the sole issue of "nonconformity" with respect to the Courthouse arises from the 4.0 floor area ratio ("FAR") requirement that existed in 1965.¹

Professor Bobrowski instead focuses on the more limited question of whether the Planning Board has authority under G.L. c. 40A, § 6 ("Section 6") to grant relief allowing the Courthouse structure to be altered so that it can be put to a more beneficial use. On that question, Professor Bobrowski does not offer a "yes" or "no" opinion, but observes that "there is a strong argument" that the Planning Board lacks such authority. To the contrary, under existing Massachusetts law, there is a far stronger argument in favor of Planning Board authority.

Professor Bobrowski strains to distinguish and dismiss as irrelevant *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450 (1986)—the single most relevant case in Massachusetts

¹ After construction of the Courthouse, the FAR requirement was reduced from 4.0 to 2.75.

regarding the question at hand. But the language in *Durkin* cannot be ignored. In *Durkin*, the Zoning Board of Appeals (“ZBA”) rejected an application under a by-law equivalent of Section 6 (“Section 6 By-Law”) to modify the use of a former post office to a commercial use not allowed in the residential zone on the ground that, when the post office use began, it was immune from zoning (as opposed to lawful under zoning) and therefore that it was not protected under a by-law that mirrored Section 6 (“Section 6 By-Law”). The Superior Court affirmed the ZBA’s decision. On appeal, the applicant advanced an alternative argument that the post office use may have been an allowed “municipal” use when it first began, and therefore could qualify under the Section 6 By-law. The Appeals Court stated as follows:

We are of the opinion that the [ZBA] too narrowly interpreted the term “nonconforming” (with respect to uses of the locus) in appraising its powers under the [Section 6 By-Law]. 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 would still have been a use of the locus forbidden by the by-law, and thus “non-conforming” in fact. This would have been so even though the by-law could not have been enforced against it because of the Federal immunity. If, in 1959, post office use could be regarded as a “municipal” use under the then existing zoning by-law, the use became nonconforming when in 1966 the zoning of the locus was changed to residential. If the use beginning in 1959 could then have been regarded as nonconforming, but immune because of the Federal use, it was a lawful use.

Id. at 452-53 (italics in original; citation omitted; bold and underline added). Clearly, the Appeals Court was indicating that the ZBA had authority under the Section 6 By-Law if **either** (a) the post office use began as a lawful conforming “municipal” use which later became nonconforming when the land was placed in a residential zone; **or** (b) the post office use began as a lawful nonconforming use (*i.e.*, a use that did not conform with the by-law but was lawful by application of a zoning immunity).²

Professor Bobrowski states that “there would have been no need for the remand” if the “former post office use created a preexisting nonconforming use of the locus regardless of the reason the building permit was issued in 1959.” But it is precisely because the Appeals Court found that

² Two Land Court decisions have since adopted this interpretation of *Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450 (1986). See *Currier v. Smith*, 9 LCR 371 (July 23, 2001) (Lombardi, J.); *Tsouvalis v. Town of Danvers*, 6 LCR 252 (Kilborn, J.). Professor Bobrowski offers no response to these decisions other than to indicate that he disagrees with them. He cites to no case (and we are not aware of one) that supports his different interpretation of *Durkin*.

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the ZBA had authority under the Section 6 By-Law to allow alteration of a pre-existing non-conforming use (regardless whether it had begun as an expressly allowed use or a lawful immune use) that a remand was absolutely necessary. Because the ZBA had authority under the Section 6 By-Law, the ZBA had to address the one issue that it had never reached – *i.e.*, whether the plaintiff applicant’s proposed change in use was substantially more detrimental to the neighborhood than the existing lawfully nonconforming use.

Professor Bobrowski also claims that the remand required the ZBA to “reopen the circumstances of the issuance of the 1959 permit.” This is not what the remand order says. Instead, the Appeals Court remand order states that: “The Superior Court is to enter an order that the board (after further notice and hearing) shall reconsider its decision on Durkin’s application for a special permit and make new findings, appropriately taking into account what is said in this opinion.” While this remand order did not prevent the ZBA from addressing the status of the building’s use when it began, the only “new findings” that the ZBA was required to make in light of the Appeals Court’s rationale pertained to whether the proposed change in use was substantially more detrimental to the neighborhood than the post office use had been.³

In short, *Durkin* and the Land Court cases construing it make clear that a use or structure that is allowed as the result of an immunity from zoning is a lawfully non-conforming use or structure under Section 6, and therefore is subject to the protections afforded in Section 6. Accordingly, the Planning Board has authority to allow by special permit alterations of the Courthouse structure.

Sincerely,



Martin R. Healy

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

³ Professor Bobrowski also asserts that a use that begins as an allowed use by application of a zoning immunity – which is unquestionably a “lawful use” that is “nonconforming in fact” under *Durkin* – should nonetheless be excluded from Section 6’s protections because uses and structures authorized by variances are not subject to Section 6’s protections. However, there is no Massachusetts case law that equates governmental immunity to variances for purposes of applying the protections of Section 6 and, in fact, *Durkin*—the controlling law here—reaches the opposite conclusion.