
May 19, 2014
To City Council
cc: Planning Board
cc: City Solicitor
cc: City Manager

I am a member of the Neighborhood Association of East Cambridge (NAEC). While I am an attorney, I do not practice zoning law and I do not represent the NAEC - my comments are only in my capacity as a resident and East Cambridge neighbor who has lived at 100 Spring St for the past 20 years.

I have reviewed the City Solicitor's letter regarding the analysis of whether the Sullivan Courthouse is a pre-existing nonconforming structure such that a Special Permit could be granted under Article 8.22 of the Cambridge Zoning Ordinance were the developer to establish that the change will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.[fn 1]

The City Solicitor's analysis recognizes that despite the zoning laws in effect at the time of the construction of the Sullivan Courthouse that limited the development of the 40 Thorndike Street parcel to a maximum floor area ratio ("FAR") of 4.0, the State constructed the Sullivan Courthouse to 9.94 FAR. My research indicates that floor area ratios are used as a measure of the intensity of the site being developed and are designed to correlate the size of a development to the acceptable impacts it will have on its surroundings. As the City Solicitor noted, there was no height limit applicable to the parcel at the time of the construction but that is not surprising where municipalities often regulate by FAR only as FAR directly affects the maximum height of a structure -- a developer can either spread the allowable area over one floor or over multiple floors, but whether a short, wide building or a tall narrow building, the building cannot exceed the allowable floor area ratio. According to Wikipedia, zoning based on FAR is advantageous over other parameters such as height, width, or length, because floor area correlates well with other considerations relevant to zoning regulation, such as parking, traffic, population of the parcel, load on municipal services, etc., and these impacts tend to be constant for a given total floor area, regardless of how that area is distributed horizontally and vertically. Here, the Sullivan Courthouse, at 9.94 FAR is well over twice the allowable 4.0 FAR that was in effect at the time of its construction (and more than 3x larger than the existing 2.5/3.0 FAR in effect today).

Despite recognizing that the construction of the Sullivan Courthouse was not in compliance with the zoning laws in effect at the time of its construction, the City Solicitor nevertheless concludes that the building should be considered a "lawful" pre-existing nonconforming structure similar to that of a building that was built in compliance with the zoning laws and grew to nonconformity due to subsequent zoning changes -- what appears to be the intended object of G.L. c. 40A, s. 6 and Article 8.22 of the Ordinance.[fn 2].

The City Solicitor reaches this conclusion by reasoning that because the State was immune from enforcement of the zoning laws, the violation of the zoning laws should be considered "lawful" and therefore protected by Section 6 of the Zoning Act. This interpretation does not seem to take into consideration the underlying purposes of the zoning laws -- Zoning laws are designed to prevent over-crowding of land, to avoid undue concentration of population, to facilitate the adequate provision for transportation, water, sewage. And nonconforming grandfathering provisions are designed to protect structures that were lawfully in existence prior to the zoning changes that made them nonconforming.

In concluding that the Courthouse, due to the State's immunity from zoning laws, should be considered "lawfully in existence," the City Solicitor relies heavily on Durkin v. Board of Appeals of Falmouth, 21 Mass. App. Ct. 450, 452 (1986). However, Durkin is immediately distinguishable where the Court's ultimate conclusion was that Section 7 of the Zoning Act provided protection to the use of the locus as a post office "pursuant to the 1959 building permit." Id. at 453. This provides no guidance as to the protection provided by Section 6 of the Zoning Act to nonconforming structures, much less guidance regarding structures built without a building permit and in substantial violation of the applicable zoning laws. Moreover, important to the Court's holding in Durkin was that Section 7 protection was "especially appropriate when, as the present record shows, the noncompliance is not highly significant." Id. at 454.

The City Solicitor states that the rationale in Durkin has been applied in subsequent Land Court decisions and cites to the two cases that were cited and attached to the letter from the developer's attorneys on the issue. However, neither of these cases apply Durkin to its facts. In Currier v. Smith, 9 LCR 371 (2001) (Lombardi, J.), the Court noted that the party challenging the permit did "not contest the Bank's assertion that the post office qualifies for protection as a preexisting nonconforming building." n. 8. The fact that the Court cites to Durkin to treat it as such, does not give any weight to the Durkin decision. The challenge the plaintiff raised was to the use, to which the Court responded the proposed use was allowed as of right so it did not matter that the previous use as a Federal post office could be considered exempt from application of the bylaws. Again, this does not address whether a building built in violation of the zoning laws should be treated as the equivalent of a building that was built prior to more stringent laws and by mere application of subsequent laws became nonconforming entitled to Section 6 protection.

Similarly, at issue in Tsouvalis v. Town of Danvers, 6 LCR 252 (1997) (Kilborn, J.) was a fire station that was built prior to the enactment of any zoning laws. As the zoning laws changed over the years, the fire station was no longer in compliance. The Court, relying on Durkin, merely stated that simply because "the firehouse use was 'immune,' to use the Durkin terminology, because the use was maintained by the town, did not make the use allowed." The facts did not raise the question of whether a building built in violation of the existing zoning laws is "lawful" simply because of its immunity to an enforcement action. More importantly, a subsequent Appeals Court case explained the holding of Durkin as finding "a prior lawful nonconforming use because of [Federal] immunity and **the fact that the noncompliance was not highly significant.**" Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct. 527, 535 n. 13 (2004), emphasis added. Durkin does not appear to provide solid ground on which to find that

the substantial nonconformity of the Sullivan Courthouse can be extended by the mere granting of a Special Permit.

The City Solicitor's suggestion that the running of the statute of limitations would justify considering the structure "lawful" also seems questionable. In fact, although relied on by the City Solicitor, this proposition in Durkin was called into doubt in Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct. 527, 535 n.13 (2004). The case law seems to support that the "expiration of the limitations period of G.L. c. 40A, s. 7 does not remove the illegality of an unlawful structure; it simply protects it from enforcement action." Patenaude v. Zoning Bd. of Appeals of Dracut, 82 Mass. App. Ct. 914, 914 (2012). The Court in Patenaude went on to say:

For purposes of deciding whether a use is nonconforming within the meaning of G.L. c. 40A, § 6, the question is not merely whether the use is lawful but how and when it became lawful. Just as in Mendes, supra, where we observed that "[i]t would be anomalous if a variance ... functioned as a launching pad for expansion as a nonconforming use," in the present case it would be anomalous indeed if an unremedied violation, protected from enforcement by reason of the limitation period imposed by § 7, could serve as a launching pad for obtaining the grandfather protection extended to legally conforming lots rendered nonconforming by the adoption of more stringent zoning regulations.

That is precisely the situation here. The Sullivan Courthouse has been protected from enforcement action, albeit due to its immunity not the running of the statute of limitations; however, the Zoning Act does not appear to require this to serve as the basis to perpetuate a grossly nonconforming structure that has been harming the neighborhood from its inception. It would seem that the zoning laws do provide the neighborhood (and the City) the right to demand that the harm come to an end - whether it be through the denial of a Special Permit under both Articles 8.22 and 10.00, or dismissing the application outright as beyond the jurisdiction of the Planning Board.

I hope the City will reconsider its conclusions and enforce the Zoning Laws consistent with their intended purposes.

Sincerely,

Bethany Stevens
100 Spring St
calliebeth@comcast.net
(617) 335-8933

[fn 1] Article 8, Section 8.22 of the Ordinance states: "As provided in Section 6, Chapter 40A, G.L. permits for the change, extension, or alteration of a pre-existing nonconforming structure or use may be granted as permitted in Subsection 8.22.1 and 8.22.2 below. Such a permit, either a building permit in the case of a construction authorized in Section 8.22.1 or a special permit in the case of construction authorized in Section 8.22.2, may be granted only if the permit granting

authority specified below finds that such change, extension or alteration will not be substantially more detrimental to the neighborhood than the existing nonconforming structure or use." NAEC submitted a previous letter from Attorney Michael Nuesse regarding the reasons why the Board should conclude that the developer has not met its burden under Article 8.22. While I believe that the impacts of a privately developed 500,000 square foot structure proposed by the developer will be substantially more detrimental to the neighborhood than the 500,000 square foot public use structure that only operated Monday-Friday 8:30 - 4:30, this letter focuses on the issue raised by the recent City Council policy order.

[fn 2] Cambridge Art. 2.000 defines "nonconforming structure" as "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."