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MICHAEL S. NUESSE

**ATTORNEY AT LAW
115 NORTH STREET
HINGHAM, MA 02043**

MEMBER OF THE MASSACHUSETTS & MAINE BAR
www.nuesselaw.com

TELEPHONE (781)749-3440
FAX (781)749-9923
EMAIL msn.law@comcast.net

VIA HAND DELIVERY

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To City Council, City Manager, City Solicitor and Planning Board

At the request of the Neighborhood Association of East Cambridge (NAEC), I have reviewed the City Solicitor's letter regarding the analysis of whether the Sullivan Courthouse can be considered as a pre-existing nonconforming structure. The question before you is whether a building built outside of code requirements when it was built can benefit from non-conforming structure and/or use status such that a Special Permit could be granted under Article 8.22 of the Cambridge Zoning Ordinance were the developer to establish that the proposed changes would not be substantially more detrimental to the neighborhood than the existing nonconforming structure and/or use. I urge you to find that it cannot.

My previous letter to the Planning Board and City Council explained why the Planning Board should conclude that the developer has not met that burden. This letter focuses on the legal issue raised by the recent City Council policy order and the subsequent letter by City Solicitor Nancy Glowa.

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. As you are aware, 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 as it is common for municipalities that regulate by FAR not to also have height limitations 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. 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 2.75/3.0 FAR in effect today). Clearly, the building was not built in compliance with local zoning requirements.

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 -- the intended object of G.L. c. 40A, s. 6 and Article 8.22 of the Ordinance.

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." (emphasis added).

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 ignores the rules of statutory construction which require the language of a statute to be "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Johnson v. Kindred Healthcare, Inc., 466 Mass. 779, 783-784 (2014). "A zoning by-law should be construed sensibly, with regard to its underlying purposes." Valcourt v. Zoning Bd. of Appeals of Swansea, 48 Mass. App. Ct. 124, 129 (1999).

Nonconforming grandfathering provisions are designed to protect structures that were lawfully in existence prior to the zoning changes that made them nonconforming. Plotka v. Hause, 2014 WL 527580 Mass. Land Ct. (2014).

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 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, emphasis added.

Durkin 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. Indeed, important to the Court's holding in Durkin was that Section 7 protection in that case was "especially appropriate when, as the present record shows, the noncompliance is not highly significant." *Id.* at 454, emphasis added. The Court went on to note that the new use would be substantially LESS detrimental to the neighborhood. On remanding the application for further consideration, the Court also reminded the town to consider the fact that the buyer relied on the town building commissioner's representations that the parcel was zoned for commercial use prior to purchasing the parcel. *Id.* at n.4. It is clear that Durkin has little relevance to the Courthouse situation, especially where the noncompliance of the Courthouse, at over 500,000 square feet and more than 2x the original FAR, certainly can't be seen as "not highly significant". Indeed, a subsequent Appeals Court case explained that essential to the holding of Durkin was that "the noncompliance was not highly significant." Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct. 527, 535 n.13 (2004).

Rather than citing to Bruno, the City Solicitor instead states that the rationale in Durkin has been applied in subsequent Land Court decisions and cites to the two cases cited in 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) 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) was a fire station that was built prior to the enactment of any zoning laws. As the zoning laws changed over the years, at times the fire station was in compliance and at other times it was not. 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. Neither Durkin nor these Land Court cases provide solid ground on which to find that the substantial nonconformity of the Sullivan Courthouse with the zoning code at the time it was built can be ignored by this Board.

The City Solicitor's suggestion that the running of the statute of limitations would justify considering the structure "lawful" is also without support. In fact, the reliance by the City Solicitor on Durkin for this proposition is misplaced where this

aspect of Durkin was called into doubt in Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct. 527, 535 n.13 (2004). Indeed, the case law is clear that "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, because of its immunity not the running of the statute of limitations. However, the Zoning Act does not require this Board to perpetuate a grossly nonconforming structure and use that has been harming the neighborhood from its inception. In my view, the zoning laws do provide the neighborhood the right to demand that the harm come to an end - that the nonconforming structure which now lacks government protection be required to conform with current zoning. I urge this Board to deny a Special Permit under both Articles 8.22 and 10.00, or dismiss the application outright as beyond the jurisdiction of the Planning Board.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Michael S. Nuesse', written over a horizontal line.

Michael S. Nuesse

Cc: NAEC
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