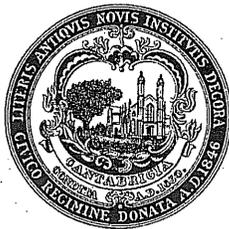


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

May 5, 2014

Richard C. Rossi
City Manager
City Hall
Cambridge, MA 02139

Re: Awaiting Report No. 14-22 Re: Report on Whether the Sullivan Courthouse qualifies as a Pre-existing Non-conforming Structure

Dear Mr. Rossi:

This will respond to the above referenced Council Order, in which the City Council requested that the City Manager seek a legal opinion from this office on whether the Sullivan Courthouse qualifies as a pre-existing nonconforming structure, and to report back to the City Council and Planning Board with this legal opinion.

I. Background of the Edward J. Sullivan Courthouse

The Edward J. Sullivan Courthouse ("Courthouse") was constructed between 1968 and 1974 on approximately 1.37 acres (59,788 square feet) of land then owned by Middlesex County located at 40 Thorndike Street in East Cambridge. Between 1965 and 1968 a former jail at the site was demolished, the site was excavated, and in or about 1968, actual construction of the Courthouse structure began. After several interruptions, the Courthouse was substantially completed in or about 1974. From 1974 until about 2009, the Courthouse was occupied by the Middlesex Superior Court, the Cambridge District Court, associated Court offices and agencies and a jail facility.

In 1997, the Massachusetts State Legislature abolished Middlesex County as a governmental entity. The 1997 legislation transferred ownership of the Courthouse to the Commonwealth of Massachusetts. Between 2007 and 2009 the various court programs were relocated from the Courthouse to a new courthouse in Woburn. The Courthouse is currently being partially utilized by the Commonwealth to house a jail facility. The jail facility is expected to be relocated in the near future.

In 2011 and again in 2012, the Commonwealth of Massachusetts, acting through its Division of Capital Asset Management and Maintenance ("DCAMM") issued a Request for

Proposals (“RFP”) for the sale and redevelopment of the Courthouse. A private developer, LMP GP Holdings LLC (the “Developer”), as the successful bidder, entered into a purchase and sale agreement with the Commonwealth for the purchase of the Courthouse. It is anticipated that the sale of the Courthouse will occur after the jail facility is relocated.

In December 2013, the Developer submitted an application to the Planning Board seeking special permits to “[c]onvert the existing nonconforming Courthouse structure at 40 Thorndike Street to a mixed use office building containing ground floor retail uses, 24 dwelling units, and below grade parking.” The requested uses are all allowed uses in the Business B zoning district in which the Courthouse is located.¹ The Developer’s application is currently pending before the Planning Board.

Whether the Courthouse building qualifies as a lawful pre-existing nonconforming structure under Section 6 (“Section 6”) of the Massachusetts Zoning Act, G.L. c. 40A (the “Zoning Act”) determines the nature of the zoning relief that will be required in order for the Developer to effectuate its plans for the Courthouse. Section 6 provides in relevant part that local zoning ordinances and by-laws 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. If the Courthouse is a lawful pre-existing nonconforming structure, permits for the change, extension, or alteration of the Courthouse structure may be granted in accordance with Section 6 and the provisions of Sections 8.22 of the Ordinance, so long as the proposed change, extension or alteration “will not be substantially more detrimental to the neighborhood than the existing nonconforming structure or use.”² The City Council and the Planning Board have requested guidance from this office as to whether the Courthouse is in fact a lawful pre-existing nonconforming structure and may thus be eligible for the special permits the Developer has requested for the redevelopment of the existing Courthouse structure.

II. Legal Analysis

A. The Courthouse is Currently Immune From Local Zoning Regulations

At the outset it is important to note that when it was constructed, the Courthouse was not required to comply with local zoning requirements for either the construction of the Courthouse structure or its use as a courthouse and jail facility.³ Because the

¹ See, Cambridge Zoning Ordinance (“Ordinance”), Article 4, Sections 4.31(g), 4.34 and 4.35.

² 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 Subsections 8.22.1 and 8.22.2 below. Such a permit, either a building permit in the case of 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.”

³ Massachusetts Courts have held that the Commonwealth and instrumentalities of the Commonwealth are generally immune from municipal zoning regulations unless a statute otherwise expressly provides to the contrary. See e.g., *Inspector of Buildings of Salem v. Salem State College*, 28 Mass. App. Ct. 92 (1989). The

Courthouse was constructed by Middlesex County, which was a governmental entity performing an essential governmental function, i.e. the provision of court programs and a jail facility, the Courthouse was immune from local zoning requirements. *See e.g., County Commissioners of Bristol v. Conservation Commission of Dartmouth*, 380 Mass. 706, 710-11 (1980), (county government is exempt from local zoning regulations). At the time that the 595,000 square foot, twenty-two story Courthouse, which is approximately 280 feet tall, was constructed there were no height limitations in the Business B zoning district in which the Courthouse is located. The Courthouse structure complied with all applicable dimensional requirements of the Ordinance with the exception of the Ordinance's maximum allowed Floor Area Ratio ("FAR"), which at that time was 4.0⁴; the Courthouse structure has an FAR of approximately 9.94. However, because the Courthouse was immune from any such local zoning requirements, zoning relief was not required for its construction. *Id.*

The current dimensional requirements for the district in which the Courthouse is located are more restrictive than those that were in place when the Courthouse building was constructed, and the Courthouse structure now exceeds the currently allowable gross floor area ("GFA"), height, and FAR requirements of the Ordinance.⁵ Because the Courthouse is currently still being used by the Commonwealth as a jail facility, which is an essential governmental function, it retains its governmental immunity from local dimensional requirements. *Id.* The Courthouse will lose its governmental immunity once the governmental function ceases and the building is sold to a private developer. *See Village on the Hill Inc. v. Massachusetts Turnpike Authority*, 348 Mass.107, 118 (1964) (land once immune does not retain its immunity after being conveyed in fee to private parties); *See also, Building Inspector of Lancaster v. Sanderson*, 372 Mass. 157 (1977) (requirement that a private owner of a commercial airport obtain permits, certificates or approvals from municipal, state or other public officials does not change the status of the airport from that of a private enterprise to a governmental function entitled to exemption from zoning by-laws and ordinances). The question that remains is whether the Courthouse structure will acquire the status of a lawful pre-existing nonconforming structure when it loses its governmental immunity.

immunity applies to an entity or agency that is involved in performing essential governmental functions or an entity or agency authorized by statute to perform such functions. *See, County Commissioners of Bristol v. Conservation Commission of Dartmouth*, 380 Mass. 706, 710-11 (1980); *see also, Greater Lawrence Sanitary District v. Town of North Andover*, 439 Mass. 16 (2003) (entities performing essential governmental functions may be subject only to certain local regulations that do not interfere with the essential governmental function).

⁴ *See, Cambridge, Zoning Ordinance, Article 5, Section 5.2* (1962-1970 editions of Ordinance).

⁵ *See, Ordinance, Section 5.33, Table 5-3.*

B. Section 6 and Relevant Caselaw Determine Whether The Courthouse Will Acquire the Status of a Lawful Pre-existing Nonconforming Structure When It Is Sold to a Private Party and Loses its Governmental Immunity

1. Section 6 Authorizes Certain Changes to Lawful Pre-existing Nonconforming Uses and Structures

As noted above, Section 6 of the Zoning Act protects uses and structures that were lawfully in existence or lawfully begun against the applicability of subsequently adopted zoning amendments.⁶ If a use or a structure lawfully exists before a zoning change becomes applicable, it acquires the status of a lawful pre-existing nonconforming use or structure when the zoning change becomes applicable, and as such is not required to comply with the provisions of the zoning change or any subsequent zoning change. *See Tamerlane Realty Trust v. Board of Appeals of Provincetown*, 23 Mass. App. Ct. 450, 455 (1987) (the existence of a nonconforming use or structure is determined as of the date of the first publication of notice of the public hearing of a subsequent zoning change). A lawful pre-existing nonconforming use or structure is not extinguished merely by a transfer of property and may remain in existence as a lawful pre-existing nonconforming use or structure. *See Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth* 385 Mass. 205 (1982).

2. The Durkin Case is Applicable Precedent

Although lawful pre-existing nonconforming uses or structures are typically created when zoning ordinances or by-laws are amended such that the legal status of a use or structure that conformed to the prior zoning becomes nonconforming, the Appeals Court has confirmed that uses or structures of government owned property that never complied with local zoning, but *were lawfully built or established based on governmental immunity* are lawfully nonconforming once they lose their governmental immunity. *See, Durkin v. Board of Appeals of Falmouth*, 21 Mass. App. Ct. 450, 452 (1986) (emphasis added). *Contrast, Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124 (2004), (gasoline storage tanks installed *in violation* of zoning regulations were not entitled to Section 6 protections as nonconforming structures because they were *never lawfully in existence*) (emphasis added.) Accordingly, after the property loses its governmental immunity, changes to the formerly immune use or structure may be made so

⁶ Section 6 provides in relevant part that: “[a] zoning ordinance or by-law 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.... Pre-existing nonconforming structures or uses may be extended or altered, provided, 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 (emphasis added).”

long as they comply with the provisions of Section 6. *See Durkin v. Board of Appeals of Falmouth, supra* at 452.

In *Durkin*, a private land owner applied for a building permit for a structure to be used as a post office under a lease to the Federal government. The structure was subsequently used as a post office for about twenty-five years. In or about 1984, Durkin purchased the structure, which was still being used as a post office, and applied to the town's board of appeals for a special permit to convert the basement to business and professional use and to construct an exterior stair entrance to the basement. Durkin relied on Section 1222 of the town's zoning by-law which essentially mirrored relevant provisions of Section 6.⁷ The board denied the special permit sought by Durkin, concluding erroneously that the post office could not be considered a lawful pre-existing nonconforming use because the post office when built was allowed only by application of governmental immunity. The Appeals Court disagreed, finding that the Board's interpretation of what constitutes a lawful pre-existing nonconforming use was too narrow. The Court held as follows:

We are of the opinion that the board too narrowly interpreted the term nonconforming (with respect to uses of the locus) in appraising its powers under Section 1222 of the town's 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 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. 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 (citations omitted) (emphasis in original.)

Durkin, supra at 452. The Land Court has subsequently issued decisions applying the Court's rationale in *Durkin*, finding that uses begun pursuant to governmental immunity are subject to Section 6 protection as lawfully pre-existing nonconforming uses when the property is sold and used for private purposes. *See, Currier v. Smith*, 9 LCR 371 (2001) (Lombardi, J.), (former post office was immune from local zoning regulation but is still legally pre-existing nonconforming); *See also, Tsouvalis v. Town of Danvers*, 6 LCR 252 (1997) (Kilborn, J.), (former fire station had been a legally pre-existing nonconforming use although Court found that the use had been abandoned and therefore could not legally be expanded, changed or altered pursuant to the provisions of Section 6.)

⁷ Section 1222 of the town's zoning by-law provided in relevant part that pre-existing nonconforming structures or uses may be extended, altered, changed or rebuilt only by special permit from the board of appeals and that any such extension, alteration, change, or rebuilding shall not be more detrimental than the existing nonconforming use to the neighborhood. *See Durkin, supra* at 452.

3. The Courthouse is a Lawful Pre-existing Nonconforming Structure

The Appeals Court's holding in *Durkin* and subsequent cases decided thereunder support the conclusion that the Courthouse is a lawful pre-existing nonconforming structure. The Courthouse, like the post office in *Durkin*, was allowed to be built because of governmental immunity even though it did not satisfy all of the existing dimensional requirements of the Ordinance when it was constructed.⁸ The Courthouse, like the post office, was thus nonconforming in fact. After the Courthouse was constructed, subsequent zoning requirements became more restrictive, but as the Courthouse was immune from the Ordinance's dimensional requirements and pre-existed those more restrictive requirements, the Ordinance could not be enforced against it.⁹ Moreover, pursuant to the holding in *Durkin*, because the Courthouse structure when built was nonconforming but immune because of its governmental use, it is a lawful nonconforming structure. *Durkin, supra*. As a lawful pre-existing nonconforming structure, then, it may be changed, altered, expanded or rebuilt so long as such changes are done consistently with the provisions of Section 6 of the Zoning Act and Section 8.22 of the Ordinance.

C. The Courthouse Structure Is Further Protected Against Enforcement by the Statute of Limitations Set Forth in G.L. 40A, Section 7

Even if it can be argued that the Courthouse was unlawfully built and thus similar to the unlawfully constructed gasoline storage tanks in *Cumberland Farms* and thus not entitled to the Section 6 protections afforded pre-existing nonconforming structures or uses, the Courthouse structure would still be protected against enforcement actions pursuant to the provisions of Section 7 of the Zoning Act ("Section 7"). Section 7 contains two separate limitation periods for actions to redress zoning violations. The first limitation period is the six year statute of limitations applicable to both structural violations and use violations if the property has been improved and used in accordance with the terms of an original building permit. The second limitation is applicable only to structural violations, and applies to structures built without a valid building permit. This limitation states in relevant part: "no action criminal or civil, the effect 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... within ten years after the commencement of the alleged violation." *See also, Lord v. Zoning Board of Appeals of Somerset*, 30 Mass. App. Ct. 226, 227 (1991), (ten year statute of limitations protects structural violations unsanctioned by a building permit); *See also, Durkin, supra* at 453.¹⁰

⁸ The Courthouse use was an allowed use at the time of its construction.

⁹ The case of *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124, *supra*, is inapposite, because whereas the gasoline storage tanks at issue in that case were constructed *unlawfully* in violation of local zoning regulations, the Courthouse was lawfully built, and even when the governmental immunity comes to an end, the structure will continue to be a lawful preexisting nonconforming structure. *Durkin, supra* at 452.

¹⁰ The Court in *Durkin* interprets the first limitation period in Section 7 as "[p]rotecting the use of the locus pursuant to the 1959 building permit (and perhaps any use reasonably similar in character to the post office

Accordingly, either of the statute of limitation periods provided in Section 7 would protect the Courthouse structure from any enforcement action, because the nonconforming FAR has existed since at least 1974, well beyond either of the two limitation periods set forth in Section 7. Therefore, no enforcement action may be taken that would require the dimensional violations at the Courthouse to conform to current zoning, and the Courthouse structure can thus house any lawful use.

III. Conclusion

In my opinion, for the reasons stated above, Section 6 of the Zoning Act and Massachusetts decisional case law decided thereunder support the conclusion that the Courthouse is a lawful pre-existing nonconforming structure and as such, the Courthouse is protected by and may be used pursuant to the provisions of Section 6 of the Zoning Act and Section 8.22 of the Ordinance.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Nancy E. Glowa', with a long horizontal line extending to the right.

Nancy E. Glowa
City Solicitor