

CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 344 BROADWAY, CAMBRIDGE, MA 02139

NOTICE OF DECISION

Case Number:	288
Address:	40 Thorndike Street
Zoning:	Business B
Applicant:	LMP GC Holdings LLC c/o Leggat McCall Properties LLC 10 Post Office Square, Boston, MA 02109
Owner:	Commonwealth of Massachusetts, Division of Capital Asset Management and Maintenance One Ashburton Place, Boston, MA 02108
Application Date:	November 21, 2013
Date of Planning Board Public Hearing:	January 7, 2014
Date of Planning Board Decision:	September 30, 2014
Date of Filing Planning Board Decision:	October 30, 2014

Application: Request for Project Review Special Permit (Section 19.20), Alteration of Non-conforming Structure (Section 8.22.2.a), Conversion of Non-Residential Structure to Residential Use (Section 5.28.2) and Off-Site Accessory Parking (Section 6.22.2) to permit the conversion of the former Sullivan Courthouse building to a mixed-use building with 476,303 square feet of Gross Floor Area occupied by office, multifamily residential and retail uses.

Decision: GRANTED, with Conditions.

Appeals, if any, shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after filing of the above referenced decision with the City Clerk. Copies of the complete decision and final plans, if applicable, are on file with the Community Development Department and the City Clerk.

Authorized Representative of the Planning Board: Jeffrey C. Roberts JCR 10/30/14.

For further information concerning this decision, please contact Liza Paden at 617-349-4647, or lpaden@cambridgema.gov.

DOCUMENTS SUBMITTED

Application Documents and Supporting Material

1. Special Permit application dated 11/21/14, containing the Project Description, Traffic Narrative, Infrastructure Systems, Noise Narrative, Conformance and Appendices, Volume One
2. Special Permit application dated 11/21/14, containing Existing and Proposed plans, Volume Two
3. Green Building report dated 2/25/14
4. Construction Mitigation submission dated 2/27/14
5. Letter to the Planning Board from Martin R. Healy, Goodwin Proctor LLC, dated 4/22/14
6. Planning Board presentation for 4/29/14, including Environmental Notification Form, filed 1/15/14 and MEPA Review, views, and lighting study
7. Letter to the Planning Board from Martin R. Healy, Goodwin Procter, LLP, dated 5/15/14
8. Revised Planning Board submittal dated 7/22/14
9. Planning Board presentation dated 7/29/14
10. Letter and materials to the Planning Board from Robert M. Dickey, Executive Vice President/Partner of Leggat McCall Properties, dated 9/23/14, including a letter to the Planning Board from Martin R. Healy, Goodwin Procter LLP, dated 9/23/14 and a list of letters and petitions in support

City of Cambridge Documents

11. City Manager Letter dated 10/7/13
12. City Council Order dated 10/7/13
13. Memo to the Planning Board from Susan Clippinger, Director of TP&T, dated 1/7/14
14. Memo to the Planning Board from John Bolduc, Environmental Planner, dated 2/28/14
15. Memo to the Planning Board from the Cambridge Pedestrian Committee, dated 2/28/14
16. Extension of time to 5/1/14

17. Extension of time to 6/20/14
18. Letter to Richard C. Rossi, City Manager, from Nancy E. Glowa, City Solicitor, dated 5/5/14
19. Extension of time to 8/15/14
20. Memo to the Planning Board from CDD staff, dated 7/23/14
21. Memo to the Planning Board from Susan Clippinger, dated 7/29/14
22. Extension of time to 10/15/14
23. Letter to Richard C. Rossi, City Manager, from Nancy E. Glowa, City Solicitor, dated 9/30/14
24. Extension of time to 10/30/14

Other Documents

25. Letter to the Planning Board from Rhoda Fantasia, dated 1/7/14
26. Email to the Planning Board from Hazel Arnett, dated 1/19/14
27. Letter to the Planning Board from Barbara Broussard, dated 1/21/14
28. Letter to the Planning Board from John Paul, dated 1/23/14
29. Email to the City Council from Michael Hawley, dated 1/26/14
30. Letter to the Planning Board from Joseph Fantasia, dated 1/26/14
31. Email to the Planning Board from Thomas Feraco, dated 1/30/14
32. Letter to the Planning Board from Eric Batcho, dated 1/31/14
33. Letter to the Planning Board from Donna M. Keefe, dated 2/3/14
34. Letter to the Planning Board from Fabrizio Gentili, dated 2/3/14
35. Letter to the Planning Board, et al, from Maya Bittar, et al, The James Diman Green Condominium Association, dated 2/4/14
36. Letter to the Planning Board from Barbara Broussard, President of the East Cambridge Planning Team, dated 2/6/14

37. Letter to the Cambridge Public Servants, from Elizabeth Summons, dated 2/9/14
38. Letter to the Cambridge Public Servants, from Roger Summons, dated 2/9/14
39. Email to the Planning Board from Paul Kroner, dated 2/10/14
40. Email to the Planning Board from David de Swaan Arons, dated 2/10/14
41. Email to the Planning Board from Abigail Lewis-Bowen, dated 2/10/14
42. Email to the City of Cambridge from Henry Lieberman, dated 2/10/14
43. Letter to the Planning Board from Maya K. Bittar, dated 2/10/14
44. Letter to the Planning Board from Deborah Johnes and Lesley Boson, dated 2/10/14
45. Letter to the Planning Board from Nina Kanikar Meng You, dated 2/10/14
46. Letter to the Planning Board from Dan Colonnese, dated 2/11/14
47. Email to the Planning Board, with attachment, from Jay Wasserman, dated 2/11/14
48. CC email to Barbara Broussard, East Cambridge Planning Team, from James Rafferty, Adams & Rafferty, dated 2/12/14
49. Email to the Planning board from Ellen Adelson, dated 2/12/14
50. Letter to the Planning Board from Ilan Levy, dated 2/17/14
51. Letter to the Planning Board from Jacob D. Albert, dated 2/17/14
52. Letter to the Planning Board from Seth Teller, Neighborhood Association of East Cambridge, dated 2/19/14
53. Letter to the Planning Board from Bethany and Jack Stevens, dated 2/20/14
54. Email to the Planning Board from Samuel Murphy, dated 2/23/14
55. Email to the Planning Board from Bob Liu and Jinlan Yang, dated 2/23/14
56. Email to the Planning Board from Jack Boesen, dated 2/23/14
57. Letter to the Planning Board, et al, from Karen and Frank Field, dated 2/23/14
58. Email to the Planning Board from Michael Austin, dated 2/25/14

59. Email to the Planning Board from Ken Gaulin, dated 2/24/14
60. Letter to the Planning Board from Peter A. Crawley, et al, dated 2/24/14
61. Letter to the Planning Board from Councilor Leland Cheung, dated 2/24/14
62. Letter to the Planning Board from Alan Greene, dated 2/24/14
63. Letter to the Planning Board, et al, from Anne and Richard Taylor, dated 2/24/14
64. Email to the Planning Board from Monica Raymond, dated 2/24/14
65. Email to the Planning Board from Carolyn V. Oatley, dated 2/24/14
66. Email to the Planning Board from Abe Lateiner, dated 2/24/14
67. Email to the Planning Board from Yumi Izuyama, dated 2/24/14
68. Email to the Planning Board from Rajiv Manglani, dated 2/24/14
69. Email to the Planning Board from Kate Skubecz, dated 2/24/14
70. Email to the Planning Board from Deborah A. Colburn, dated 2/24/14
71. Letter to the Planning Board form Jan Devereux, dated 2/24/14
72. Email to the Planning Board from Carole Bellew, dated 2/24/14
73. Email to the Planning Board from Kennie Lyman, dated 2/24/14
74. Email to the Planning Board from Amy Stone, dated 2/24/14
75. Email to the Planning Board from Gaylen Morgan, dated 2/24/14
76. Email to the Planning Board from Agnes Criss, dated 2/24/14
77. Email to the Planning Board from H. Susan Freireich, dated 2/24/14
78. Email to the Planning Board from Remy Trahant, dated 2/25/14
79. Email to the Planning Board from Catherine B. Hoffman, dated 2/25/14
80. Email to the Planning Board from Paul Stone, dated 2/25/14
81. Email to the Planning Board from Jeanne Koopman, dated 2/25/14

82. Email to the Planning Board from Ovadia R Simha, dated 2/24/14
83. Letter to the Planning Board from Patrick Magee, Atwood's Tavern, East Cambridge Business Association, dated 2/25/14
84. Email to the Planning Board from Genevieve Coyle, dated 2/25/14
85. Email to the Planning Board from Annette Ghelfi, dated 2/25/14
86. Email to the Planning Board from Peter Fougere, dated 2/25/14
87. Letter to the Planning Board from Marie Elena Saccoccio, Attorney At Law, dated 2/25/14
88. Letter to the Planning Board from Patrick Magee, East Cambridge Business Association, dated 2/25/14
89. Letter to the Planning Board from Tom Stohlman, dated 2/25/14
90. Email to the Planning Board from Ben Morse, dated 2/25/14
91. Email to the Planning Board from Bill Morse, dated 2/25/14
92. Email to the Planning Board from Mike Connolly, dated 2/25/14
93. Email to the Planning Board from Carolyn Shipley, dated 2/25/14
94. Email to the Planning Board from Jay Featherstone, dated 2/25/14
95. Email to the Planning Board from Michael Hawley, dated 2/25/14
96. Email to the Planning Board from Sheli and Henry Wortis, dated 2/25/14
97. Email to the Planning Board from Christopher Keppelman, dated 2/25/14
98. Email to the Planning Board from Susan Redlich, dated 2/25/14
99. Email to the Planning Board from Shelley Rieman, dated 2/25/14
100. Email to the Planning Board from David Whelan, dated 2/25/14
101. Email to the Planning Board from Albert Huang, dated 2/25/14
102. Email to the Planning Board from Mark Eastly, dated 2/25/14
103. Email to the Planning Board from Lee Farris, dated 2/25/14

104. Email to the Planning Board from Joel Springer, dated 2/25/14
105. Email to the Planning Board from James Madden, dated 2/26/14
106. Letter to the Planning Board from Michael S. Nuesse, attorney at law, dated 2/26/14
107. Email to the Planning Board from James Madden, dated 2/26/14
108. Email to the Planning Board from Carol O'Hare, 2/27/14
109. Letter to the Planning Board from Barbara Broussard, President of the East Cambridge Planning Team, dated 2/27/14
110. Email to the Planning Board from Carol O'Hare, dated 2/27/14
111. Email to the Planning Board from Seth Zeren, dated 2/28/14
112. Email to the Planning Board from Susan Strang, dated 3/1/14
113. Email to the Planning Board from Seth Teller, dated 3/3/14
114. Email to the Planning Board from Stephen Kaiser, dated 3/3/14
115. Email to the Planning Board from Chris Matthews, dated 3/3/14
116. Letter to the Planning Board from Stephen H. Kaiser, dated 3/3/14
117. Email to the Planning Board from Matt Moran, dated 3/4/14
118. Email to the Planning Board from Alex Papazian, dated 3/4/14
119. Email to the Planning Board from Stephen Kaiser, dated 3/6/14
120. Letter to Mr. Dickey, from Councilor Timothy J. Toomey, Jr., dated 3/10/14
121. Copy of letter to Abigail Lewis-Brown, Acting President, Neighborhood Association of East Cambridge, from Barbara Broussard, President of the East Cambridge Planning Team dated 3/18/14
122. Email to the Planning Board from Michael Hawley, dated 3/19/14
123. Letter to the Planning Board from Michael Hawley, dated 3/19/14
124. Letter to the Planning Board from Michael Hawley and Nina You, The James Diman Green Condominium Association, dated 3/31/14

125. Letter and attached cases to the City Council and the Planning Board from Mark Bobrowski, Blatman, Bobrowski & Mead, LLC, dated 4/9/14.
126. Letter to the Planning Board from Michael Hawley, Concerned Abutters and the James Green Association, dated 4/9/14
127. Email to the Planning Board from Michael Hawley, for James Capano, dated 4/17/14
128. Letter to the Planning Board from Robert M. Dickey, Executive Vice President/Partner of Leggat McCall Properties , applicant, dated 4/23/14, and attached letter from Martin R. Healy, Goodwin Proctor LLP, dated 4/22/14
129. Email to the Planning Board from Landan Khamsi, dated 4/23/14
130. Email to the Planning Board from Adam Mara, dated 4/22/14
131. Email to the Planning Board from Greg Zaff, dated 4/18/14
132. Email to the Planning Board from Rachel Gould, dated 4/18/14
133. Letter to the Planning Board from Shelley Neill, Executive Director, Multicultural Arts Center, dated 4/18/14
- 134.
135. Letter to the Planning Board from Peter Mayfield, Associated Beverage Group, dated 4/25/14
136. Letter to the Planning Board from Robert Velej, David's Famous Name Shoes, Inc. dated 4/25/14
137. Letter to the Planning Board from Andrew G. Montone, Cambridge Art and Frame, dated 4/25/14
138. Letter to the Planning Board from Morgan Pierson, dated 4/25/14
139. Email to the Planning Board from Pam Latimer, dated 4/27/14
140. Letter to the Planning Board from Gregory Golding, dated 4/23/14
141. Email to the Planning Board from Stephen H. Gardiner, dated 4/24/14
142. Email to the Planning Board from Arleen Henry, dated 4/25/14
143. Email to the City Council, from Minga Claggett-Borne, dated 4/27/14
144. Email to the Planning Board from Hazel Arnett, dated 4/24/14

145. Email to the Planning Board from Councilor Craig Kelley, dated 4/24/14
146. Email to Liza Paden from Michael Hawley, dated 4/26/14
147. Letter to the Planning Board from William J. Beckman, Linear Retail Properties, dated 4/28/14
148. Email to the Planning Board, Kate McDonough, dated 4/28/14
149. Letter to the Planning Board from Graham Gund, dated 4/24/14
150. Email to the Planning Board from Dennis Warren, Warren Business Media, dated 4/28/14
151. Letter to the Planning Board from Marie Elena Saccoccio, Attorney at Law, dated 4/27/14, with additional signatories
152. Letter to the Planning Board from Michael Hawley, The James Diman Green Condominium Association, dated 4/28/14
153. Response to Attorney Healy, from Mark Bobrowski, Blatman, Bobrowski & Mead, LLC, dated 4/29/14
154. Letter to the Planning Board from Councilor Timothy J. Toomey, Jr., dated 4/29/14
155. Letter to the Planning Board from Alan Green, dated 4/29/14.
156. Email to the Planning Board from Sheli Wortis, dated 4/28/14.
157. Email to the Planning Board from tony Wagner, Ed.D, dated 4/28/14.
158. Email to the Planning Board from Torgun Austin, dated 4/28/14.
159. Email to the Planning Board from Martha Older, dated 4/28/14.
160. Email to the Planning Board from Kelly Courtney, dated 4/29/14
161. Email to the Planning Board from Marilyn Wellons, dated 4/29/14.
162. Email to the Planning Board from Susan Strang, dated 4/29/14.
163. Letter to the Planning Board from O. Robert Simha, dated 5/10/14
164. Letter to the Planning Board from Michael Hawley, The James Diman Green Condominium; Association, dated 5/19/14
165. Letter to the Planning Board, et al from Michael S. Nuesse, dated 5/19/14

166. Email to the Planning Board from Robert Buder, dated 5/29/14
167. East Cambridge Businesses for A Smaller Sullivan Courthouse Redevelopment, dated June 2014
168. Letter to the Planning Board from Helen Kobeck, et al, dated 6/1/14
169. Letter to the Planning Board from Judith Vreeland, dated 6/2/14
170. Letter to the Planning Board from Mark P. Rogers, et al, dated 6/9/14
171. Letter To Whom It May Concern from Tony Marques, dated 6/18/14
172. Email to the Planning Board from Ellen Huang, dated 6/19/14
173. Email to the Planning Board from Mark Tang, dated 6/23/14
174. Email to the Planning Board from Alice Lin, dated 6/24/14
175. Email to the Planning Board from Selene Angier, dated 6/25/14
176. Email to the Planning Board from Olga Sokolova, dated 7/1/14
177. Letter to the Planning Board, et al from Michael Hawley, the James Diman Green Condominium Association, dated 7/10/14
178. Email to the Planning Board from Michael Hawley, dated 7/11/14
179. Letter to the Planning Board, et al, from Neighborhood Association of East Cambridge, dated 7/16/14
180. Letter to the Planning Board from Mary Ellen Doran, dated 7/18/14
181. Email to the Planning Board from Frances Antupit, dated 7/19/14
182. Letter to the Planning Board from Roberta and Tatsuya Goto, dated 7/20/14
183. Letter to the Planning Board from Barbara Broussard, East Cambridge Planning Team, dated 7/21/14
184. Letter to the Planning Board from the East Cambridge Planning Team, dated 7/21/14
185. Letter to the Planning Board from Barbara Broussard, dated 7/21/14
186. Letter to the Planning Board from Stephen H. Kaiser, dated 7/22/14

187. Email to the Planning Board from Jay Wasserman, dated 7/22/14
188. Email to the Planning Board from David de Swaan Arons, dated 7/22/14
189. Email to the Planning Board from Bethany Stevens, dated 7/22/14
190. Letter to the Planning Board from Neighborhood Association of East Cambridge, dated 7/22/14
191. Letter to the Planning Board from the Neighborhood Association of East Cambridge, dated 7/22/14
192. Copy of Letter to Maeve Valleyly Bartlett, Secretary of Executive Office of Energy and Environmental Affairs, from Stephen H. Kaiser, PhD, dated 7/23/14
193. Letter to the Planning Board from Charles J. Marquardt, dated 7/24/14
194. Letter to the Planning Board from Sarah E. Kennedy, director of Government Affairs, Cambridge Chamber of Commerce, dated 7/24/14
195. Email to the Planning Board from Joseph Aiello, dated 7/28/14
196. Petition of supporters dated 7/29/14
197. Letter To Whom It May Concern from John Levantakis, Arams #2 House of Pizza, dated 7/29/14
198. Email to the Planning Board from Chris Matthews, dated 7/29/14
199. Email to the Planning Board from Susan Markowitz, dated 7/29/14
200. Email to the Planning Board from Carol O'Hare and Walter McDonald, dated 7/29/14
201. Email to the Planning Board from Jacquelyn Smith, dated 7/29/14
202. Email to the Planning Board from Shelley Rieman, dated 7/29/14
203. Letter To Whom It May Concern from R and Caye Kafofo, dated 7/29/14
204. Letter To Whom It May Concern from Bill Strazzullo, and Family, dated 7/29/14
205. Public Comment to the Planning Board from Stephen Kaiser, dated 7/29/14
206. Letter to the Planning Board from John M. Braithwaite, dated 8/23/14

- 207. Email to the Planning Board from Robert L. Doyle, MD, dated 8/24/14
- 208. Email to the Planning Board from John Filoon, dated 8/24/14
- 209. Email to the City Council from Michael Hawley, dated 9/8/14
- 210. Email to the Planning Board from Susan Johansen, dated 9/13/14
- 211. Letter to the Planning Board, et al, from Abigail Lewis-Bowen for the Neighborhood Association of East Cambridge, dated 9/18/14
- 212. Email to the Planning Board from Ladan Khamisi, dated 9/20/14
- 213. Letter to the Planning Board from George N.J. Sommer, III, dated 9/22/14
- 214. Letter to the Planning Board from Stephen H. Kaiser, dated 9/23/14
- 215. Email to the Planning Board from Susan Koechner, dated 9/23/14
- 216. Email to the Planning Board from Farhad Khamisi, dated 9/24/14
- 217. Letter to the Planning Board from Councilor Mark McGovern, dated 9/25/14
- 218. Email to the Planning Board from Ed & Carol Green, dated 9/25/14
- 219. Email to the Planning Board from Bill Johansen, dated 9/25/14
- 220. Letter to the Planning Board from Barbara Broussard, dated 9/27/14
- 221. Email to the Planning Board from Susan Strang, dated 9/29/14
- 222. Email to the Planning Board from Heather Hoffman, dated 9/29/14
- 223. Email to the Planning Board from Kathy Desmond, dated 9/29/14
- 224. Email to the Planning Board from Ivy A. Turner, dated 9/29/14
- 225. Email to the Planning Board from Michael Connolly, dated 9/29/14
- 226. Email to the Planning Board from Jeanne Koopman, dated 9/29/14
- 227. Letter to the Planning Board from Nancy Stiening, dated 9/29/14
- 228. Email to the Planning Board from Al and Teresa Jacobson, dated 9/29/14

- 229. Email to the Planning Board from Jeff DaSilva, dated 9/29/14
- 230. Email to the Planning Board from Jacquelyn Smith, dated 9/29/14
- 231. Email to the Planning Board from Lauren O'Neal, dated 9/30/14
- 232. Email to the Planning Board from Roger Summons, dated 9/30/14

APPLICATION SUMMARY

The Special Permit Application, as modified by supplemental Application Materials, proposes to convert the existing Sullivan Courthouse building at 40 Thorndike Street, containing 513,241 square feet of Gross Floor Area occupied (prior to its vacancy) by governmental facilities including offices, courtrooms and detention facilities (the "Sullivan Courthouse"), to a mixed-use building with 452,237 square feet of Gross Floor Area occupied by commercial office and retail uses and 24,066 square feet occupied by residential uses.

The proposed change in use will involve the following alterations to the building and site, among alterations, which are described in detail in the Application Materials:

- Demolition and removal of the top two stories;
- Removal of the existing building façade and replacement with new materials;
- Installation of new mechanical systems at the roof level;
- Reconfiguration and reconstruction of interior spaces, most notably at the ground level, where new building entries will be created;
- Installation of bicycle parking facilities within the below-grade portion of the building and on outdoor portions of the site;
- Replacement of an existing at-grade parking facility with a publicly beneficial open space along Spring Street; and
- Construction of outdoor open spaces on portions of the building roof.

Accessory parking will be provided by maintaining ninety-two (92) parking spaces in the existing on-site parking facility below-grade, and by securing a long-term lease arrangement to provide four hundred twenty (420) spaces either from the municipal parking garage on First Street, which would meet the as-of-right standards for location of accessory parking, or within the parking facility at the Cambridgeside Galleria mall, also on First Street, which requires a special permit due to the greater distance between the facility and the principal use.

The requested special permits are described below.

- A Project Review Special Permit is required pursuant to Section 19.20, because the project involves a change of use of a building to include new uses exceeding fifty thousand (50,000) square feet of Gross Floor Area.

- A special permit is required pursuant to Section 8.22.2, Paragraph (a), to allow the alteration of a pre-existing nonconforming structure to accommodate a new use. Such special permit is normally within the purview of the Board of Zoning Appeal, but in this case may be granted by the Planning Board pursuant to Section 10.45 because the application also requires special permits under the purview of the Planning Board.
- A special permit is required pursuant to Section 5.28.2 for the proposed residential portions of the building in order to modify the yard and open space requirements normally applicable to a residential building in the district.
- A special permit is required pursuant to Section 6.22.2 to permit off-site accessory parking for non-residential uses on a lot that is greater than three hundred (300) feet, but not greater than one thousand (1,000) feet, from the lot on which the principal use is located. Such special permit is normally within the purview of the Board of Zoning Appeal, but in this case may be granted by the Planning Board pursuant to Section 10.45 because the application also requires special permits under the purview of the Planning Board.

PUBLIC HEARING PROCESS

The public hearing for this special permit case was opened and testimony heard on January 7, 2014. The hearing was then continued to March 4, 2014. On March 4, no testimony was taken and no substantive discussion was held, and the Applicant and Planning Board mutually agreed to an extension of the time period for final action to May 1, 2014. The hearing was continued on April 29, 2014, at which time public testimony was heard, and the Applicant and Planning Board mutually agreed to an extension of the time period for final action to June 20, 2014. At the Planning Board meeting on June 17, 2014, as a matter of general business, the Applicant and Planning Board mutually agreed to an extension of the time period for final action to August 15, 2014. During the intervening time, the Applicant engaged in discussion with community members outside of the hearing process.

The Planning Board hearing was continued on July 29, 2014, at which the Applicant presented revised application materials and public testimony was heard. The Applicant and Planning Board mutually agreed to an extension of the time period for final action to October 15, 2014. The Planning Board continued its deliberation on September 30, 2014, after which the Board stated findings, voted to grant the requested special permits, with conditions, and the Applicant and Planning Board mutually agreed to an extension of the time period for filing the Special Permit Decision to October 30, 2014. All time extensions referred to above were recorded and filed with the City Clerk.

FINDINGS

After review of the Application Materials and other documents submitted to the Planning Board, testimony given at the public hearing, and review and consideration of the applicable requirements and criteria set forth in the Zoning Ordinance with regard to the special permits being sought, the Planning Board makes the following Findings:

1. Alteration of a Nonconforming Structure (Section 8.22)

The Board first addressed the question of whether the project meets the standards for approval of alterations to a pre-existing nonconforming structure. In making its findings the Board is instructed by Section 8.22.2 of the Zoning Ordinance and subsequent Paragraph (a), copied below.

8.22.2 The following changes, extensions, or alterations of a pre-existing nonconforming structure or use may be granted in the following cases after the issuance of a special permit. Such a permit shall 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 use.

- a. In an Office, Business, or Industrial District the Board of Zoning Appeal may issue a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, or the enlargement (but not the alteration) of a nonconforming use, provided any alteration or enlargement of such nonconforming use or structure is not further in violation of the dimensional requirements in Article 5.000 or the off street parking and loading requirements in Article 6.000 for the district in which such structure or use is located and provided such nonconforming structure or use not be increased in area or volume by more than twenty-five (25) percent since it first began to be nonconforming.*

The current structure does not conform to the dimensional requirements of the Business B district with regard to Floor Area Ratio (FAR) and height. When the Sullivan Courthouse was constructed, it was not required to comply with local zoning requirements for either the construction of the building or its use as a courthouse and jail facility. Questions were raised in public testimony as to whether the building can be considered a lawful pre-existing nonconforming structure. The Cambridge City Solicitor has provided a legal opinion on the matter, which was entered into the record during the public hearing and taken into consideration by the Planning Board. In her opinion dated May 5, 2014, the City Solicitor concluded that the building is a lawful pre-existing nonconforming structure and therefore is protected by and may be used pursuant to the provisions of Section 6 of the Zoning Act and Section 8.22 of the Zoning Ordinance. The Board accepts this conclusion as a basis for its further Findings, with reference to letters from the City Solicitor to the City Manager dated

May 5, 2014 and September 30, 2014, which are included as an appendix to this Special Permit Decision.

The building is located in the Business B zoning district, and the proposal is to alter the existing structure and to change its use from a government courthouse and jail facility to a mix of office, residential and retail uses with publicly beneficial open space. All existing and proposed uses are allowed as-of-right in the Business B district, and therefore no alteration or enlargement of a nonconforming use is proposed. The proposed alteration will not result in any increase in floor area, volume or height, and will not decrease yard setbacks or open space. To the extent that new nonconformities may be created, they would result from the addition of residential uses to the site, because residential uses have different dimensional requirements than non-residential uses in the Business B district; however, because the residential uses will occupy an existing structure built for non-residential use, the project is eligible for special permit relief pursuant to Section 5.28.2 of the Zoning Ordinance, which has been requested in the Special Permit Application and is addressed further below in these Findings. The proposal describes how parking and bicycle parking requirements for the proposed new uses will be met, and those are discussed further below in these Findings. Therefore, the Board concludes that the proposed alteration is eligible for special permit relief pursuant to Section 8.22.2, Paragraph (a). Because this special permit is normally within the purview of the Board of Zoning Appeal, but the proposal also requires special permits for which the Planning Board is the designated granting authority, it is within the Planning Board's purview to grant this special permit pursuant to Section 10.45 of the Zoning Ordinance.

The criterion informing whether the Board should grant the requested special permit is whether the Board finds the alteration not to be "substantially more detrimental to the neighborhood than the existing nonconforming use," a standard which the Board finds reasonably applies to the structure, given that the existing and proposed uses are both conforming to the Zoning Ordinance but the dimensional nonconformities of the structure are significant. The Board acknowledges that a new structure of this size and intensity would not be permitted at this location, with its proximity to lower-scale residential uses, given current zoning restrictions and planning guidelines for the area. However, given that it is a pre-existing structure, the Board is basing its judgment on the impact of the proposed alterations as they compare to the existing conditions of the site.

The Board finds that the proposed new uses in the building, primarily office with smaller amounts of residential and ground-floor retail, will not be substantially more detrimental than the existing courthouse and jail uses. At the present time, the courthouse and jail facilities have been vacated from the building, but when they were operating at full capacity the character and intensity of use was comparable to what would be expected for an office building of a similar size. The proposed reduction in the size of the building will mitigate any potential impacts related to the intensity of the office use. Residential uses in the lower parts of the building will help to make the building more compatible with surrounding residential uses, and the retail and publicly beneficial open space proposed at the ground floor will help to make the building more welcoming to the surrounding neighborhood. It should be noted

that traffic impacts of the proposed new uses have been studied as required under the Project Review Special Permit provisions of Section 19.20 of the Zoning Ordinance, and are discussed further below in these Findings. For these reasons, and because the proposed uses are permitted in the zoning district, the Board finds that the proposed change in the use of the building will not be more detrimental than the existing use.

The Board acknowledges that the existing structure has many detrimental aspects, including the height and shadow impacts on surrounding lower-scale buildings, the “brutalist” architectural style of the building, the fortress-like character of the podium element, and the visible on-grade parking facilities. In many respects, the proposed alteration will remedy these impacts. The height of the building will be reduced by two stories, which will only slightly reduce the impacts of height, shadows, wind and overall massing, but will certainly not be more detrimental than the existing building. The proposed replacement of the building’s cladding will result in a warmer, more contextual aesthetic that is preferable to the exposed concrete construction associated with the brutalist style of the existing building. The alterations at the ground level will provide greater pedestrian access to the ground floor of the building, replace surface parking with open space and improve pedestrian and bicycle connections around the site, which will be substantial improvements over the existing conditions. Therefore, the Board finds that the proposed alterations to the structure will not be more detrimental to the neighborhood than the existing structure, and are expected to mitigate many of the detrimental aspects of the building as it exists today.

For the reasons set forth above, the Board finds that the proposal meets the standards and criteria for issuance of a special permit pursuant to Section 8.22.2, Paragraph (a).

2. Conversion of a Non-Residential Structure to Residential Use (Section 5.28.2)

Although the special permit criteria for alteration of a nonconforming structure applies generally to the project, the proposed addition of residential uses introduces new dimensional requirements in the Business B district that would not apply if the building were entirely non-residential. Specifically, according to Section 5.28.1, Paragraph (c) of the Zoning Ordinance, “A dwelling in a Business B district shall be subject to the same dimensional requirements and other restrictions as a dwelling in a Residence C-3 district.” Based on the dimensions of the existing structure, the proposed residential spaces within the building would not meet the Residence C-3 requirements for minimum yards (which are determined by a mathematical formula) and private open space.

For this reason, the Applicant has requested a special permit pursuant to Section 5.28.2 of the Zoning Ordinance, which permits modifications to base zoning requirements in order to convert a non-residential structure to residential use. Specifically, Sections 5.28.23 and 5.28.25 allow the following modifications:

5.28.23 *Yard Requirements*

The required yards shall be those of the structure existing at the time of the conversion to residential use. However, any construction occurring outside the limits of the existing structure shall be subject to the yard requirements of the district in which the structure is located.

5.28.25 Private Open Space Requirements

The Private open space requirement shall be that required in the district in which the structure is located, except as modified herein.

The dimensional and locational limitations for Private open space set forth in Section 5.22 shall not apply; any combination of at-grade private open space and decks and balconies at other levels shall be permitted as shall walks intended for non vehicular use. However, in every case where those requirements of Section 5.22 waived by this Paragraph (a) are not met, all portions of the surface of the lot shall be Green Area as defined in Article 2.000 that are (1) not covered by the building or (2) devoted to the minimum area necessary to provide at grade, conforming parking spaces and the minimum necessary circulation and driveways for no more than one parking space per dwelling unit. The amount of Private open space required may be reduced by the Planning Board should the Board find that full compliance cannot reasonably be expected given the existing development of the lot and the provision of parking necessary to serve the dwelling units.

However, where open space requirements are not met, the Applicant shall explore the use of portions of the interior of the building to provide recreational opportunities not possible on the exterior.

The Board finds that the proposal is eligible for this special permit relief because the proposed yard is that of the existing building, and the complex nature of the project does not allow for the provision of private open space meeting the requirements of Section 5.22 of the Zoning Ordinance. Moreover, portions of the site not covered by the building shall be occupied by publicly beneficial open space that will be usable by residents of the building.

In making its findings the Board is instructed by the Criteria for Approval of a Special Permit set forth in Section 5.28.28, copied below with the Board's commentary provided.

5.28.28.1 Criteria Applicable to All Projects

(a) Provision of Parking. Where it is proposed to add dwelling units above the limits established in the base zoning regulations, the Board shall evaluate the impact of increased numbers of dwelling units above that normally permitted in the district on the demand for on-street parking by residents and visitors to the proposed building, particularly in neighborhoods where off street parking is limited.

In reaching a determination, the Board may require that the Applicant provide elements of a Parking Analysis as set forth in Section 6.35.3 of the Zoning Ordinance. Where a project is subject to additional criteria as specified in Section 5.28.28.2 below, a Parking Analysis shall be required to be included with the Special Permit Application.

The number of dwelling units will be far below the maximum number permitted in the base zoning regulations. Parking for residents will be provided on-site, within the building, at the required ratio of one space per dwelling unit.

- (b) Privacy Considerations. Where significant variations from the normally required dimensional standards for the district are proposed, the Board shall evaluate the impact on residential neighbors of the new housing use and any other proposed use as it may affect privacy. The location and size of windows, screening elements, decks, entries, security and other lighting, and other aspects of the design, including the distribution of functions within the building, shall be reviewed in order to assure the maintenance of reasonable levels of privacy for abutters. In reviewing a proposed development plan, the Board shall consider, among other factors, the potential negative impacts of the new activity on abutters as a result of the location, orientation, and use of the structure(s) and its yards as proposed.*

The closest residential neighbors to the proposed residential units are on other blocks separated by Spring Street, Third Street and Thorndike Street. The proposed residential units will not impact the privacy of residential neighbors as they will primarily face a public way across from non-residential uses. Design modifications that were made to reduce the amount of glass in the proposal will also mitigate privacy impacts on abutters. Issues regarding the placement and potential impacts of lighting were discussed in the public hearing, and the final design of outdoor and indoor lighting systems will be reviewed as a Condition of this Special Permit to ensure that impacts are mitigated. Furthermore, as stated in the submitted Acoustical Report, the impacts of noise from the former jail facility will be mitigated in the new proposal.

- (c) Reduction in Private Open Space. Where it is proposed to reduce the amount of on-site Private Open Space below that required in the applicable district, the Board shall evaluate the proposal in light of the following:*
- (1) The extent to which screening and buffering from neighbors will be accomplished*
 - (2) The quality and viability of the proposed open spaces as they are designed*
 - (3) The tradeoff in benefits and negative impacts of the loss of green space in order to provide the required amount of parking, including consideration*

of the feasibility of alternate parking arrangements that might produce additional green area, such as placing some or all parking within the structure

- (4) The availability of common recreational spaces within the building to compensate for the loss of usable outdoor open space*

Although private open space is not provided for residents, a new publicly beneficial open space will be provided on the site that will provide recreational opportunities for residents. That space will also serve as a landscaped buffer between the building and neighboring residential buildings on the opposite side of Spring Street.

- (d) Community Outreach. The Planning Board shall consider what reasonable efforts have been made to address concerns raised by abutters and neighbors to the project site. An applicant seeking a special permit under this Section 5.28.2 shall solicit input from affected neighbors before submitting a special permit application. The application shall include a report on all outreach conducted and meetings held, shall describe the issues raised by community members, and shall describe how the proposal responds to those issues.*

Extensive community outreach was conducted before and during the course of review of this project, as evidenced in Application Materials and supplements as well as in the extraordinary volume of correspondence received by the Planning Board from the public. The proposal, especially as it was revised during the course of review, provided reasonable responses to comments and concerns voiced by community members.

5.28.28.2 Additional Criteria Applicable to Larger Projects

Where the proposed project includes more than 10,000 Gross Square Feet or more than ten (10) dwelling units, and the proposed Gross Floor Area or number of dwelling units is above the maximum allowed under base zoning regulations, the Board shall evaluate the proposal in light of the following:

- (a) The implications of the size or number of additional dwelling units on the anticipated demand for parking. In order to assist the Planning Board in evaluating parking impacts, an applicant for a special permit shall be required to submit a Parking Analysis, as set forth in Section 6.35.3 of the Zoning Ordinance, as part of the special permit application.*

As previously noted, the number of dwelling units will be far below the maximum permitted in the base zoning regulations. On-site parking will be provided at a ratio of one space per dwelling unit.

- (b) The appropriateness of the proposed layout of floor space within the building for a multifamily residential use, with attention to the typical range of unit sizes and types that would be expected for housing in the neighborhood. Considerations may include the suitability of proposed unit configurations for a variety of households, the extent to which unusual unit sizes or shapes may impact parking or overall quality of life for neighbors, and the availability of customary amenities for residents such as storage, utilities, common rooms and recreational facilities.*

The design and layout of units is not typical of residential development in the area as a result of the unique conditions of the structure itself, which lends itself to more “studio-loft” types of units. Nonetheless, the Board finds that the addition of units to the base of the building is a positive element of the project and the Board does not find that the unit configuration would result in a detrimental impact on parking or quality of life for neighbors. Some larger, two-bedroom units are provided, which is an added benefit, though some three-bedroom units would have been preferred. Also, the Applicant has agreed to provide affordable units and middle-income units above and beyond the inclusionary housing requirements, which has been made a Condition of this Special Permit.

- (c) The potential mitigating effects of the proposed occupancy of dwelling units. For instance, units designed for elderly residents or live/work spaces for professionals or artists may provide desirable housing options for Cambridge residents with fewer adverse impacts on parking or neighborhood character.*

There are no special occupancy restrictions proposed for the dwelling units except for the aforementioned units set aside for low, moderate and middle-income households. Although the number of units will be small, they will provide some unique housing options that are not otherwise available to Cambridge residents. Overall, the proposed dwelling units are not expected to negatively impact the surrounding neighborhood.

For the reasons set forth above, with reference to the additional Findings set forth in this Decision, the Board finds that the proposal meets the standards and criteria for issuance of a special permit pursuant to Section 5.28.2.

3. Project Review Special Permit (19.20)

The project requires a Project Review Special Permit pursuant to section 19.20 of the Zoning Ordinance given that it proposes a change of use where the total Gross Floor Area of the new uses exceeds fifty thousand (50,000) square feet. In granting a Project Review Special Permit, the Planning Board must evaluate the traffic and urban design impacts of the proposal according to the criteria and objectives set forth in the zoning, copied below.

(19.25.1) Traffic Impact Findings. Where a Traffic Study is required as set forth in Section 19.24 (2) the Planning Board shall grant the special permit only if it finds that the project will have no substantial adverse impact on city traffic within the study area as analyzed in the Traffic Study. Substantial adverse impact on city traffic shall be measured by reference to the traffic impact indicators set forth in Section 19.25.11 below.

(19.25.11) Traffic Impact Indicators. In determining whether a proposal has substantial adverse impacts on city traffic the Planning Board shall apply the following indicators. When one or more of the indicators is exceeded, it will be indicative of potentially substantial adverse impact on city traffic. In making its findings, however, the Planning Board shall consider the mitigation efforts proposed, their anticipated effectiveness, and other supplemental information that identifies circumstances or actions that will result in a reduction in adverse traffic impacts. Such efforts and actions may include, but are not limited to, transportation demand management plans; roadway, bicycle and pedestrian facilities improvements; measures to reduce traffic on residential streets; and measures undertaken to improve safety for pedestrians and vehicles, particularly at intersections identified in the Traffic Study as having a history of high crash rates.

The indicators are: (1) Project vehicle trip generation weekdays and weekends for a twenty-four hour period and A. M. and P.M. peak vehicle trips generated; (2) Change in level of service at identified signalized intersections; (3) Increased volume of trips on residential streets; (4) Increase of length of vehicle queues at identified signalized intersections; and (5) Lack of sufficient pedestrian and bicycle facilities. The precise numerical values that will be deemed to indicate potentially substantial adverse impact for each of these indicators shall be adopted from time to time by the Planning Board in consultation with the TPTD, published and made available to all applicants.

The project exceeds the threshold for a Traffic Impact Study (TIS), and such study was completed, included within the Application Materials and certified complete by the Traffic, Parking and Transportation Department (TPT) on November 21, 2013. A report was provided by TPT to the Planning Board on January 7, 2014. Additionally, after modifications were made to the proposal during the course of review, an amendment to the TIS was provided with a revised Vehicle Trip Summary, and TPT provided a report on such revisions to the Planning Board on July 29, 2014.

The original TIS identified exceedences of the indicators for vehicle trip generation throughout the day and during A.M. and P.M peak hours, as well as pedestrian level of service at various locations around the project site. No indicators were exceeded for vehicular level of service at signalized intersections or increased volume of trips on residential streets. The revisions to the TIS noted that with the reduction in project size (which occurred when the Applicant revised the design to remove the existing top two stories of the building), the project would no longer exceed the indicator for vehicle trip generation in the A.M. peak hour. Other indicators are not affected by that project revision.

To mitigate the anticipated impacts, the aforementioned reports from TPT recommend forward-thinking measures that anticipate a greater shift over time to non-auto modes of transportation. Along with providing convenient, easily accessible bicycle parking facilities as required by zoning, TPT recommends providing a bicycle repair station and public bicycle sharing (*i.e.*, Hubway) station. TPT also recommends improving the usability and attractiveness of pedestrian facilities by improving sidewalks and crosswalks around the site and funding improvements to the open space at the adjacent City parking garage as well as creating open space on the project site itself. Although the project proposes to utilize existing parking spaces, the commercial uses will be subject to ongoing programmatic requirements to encourage non-auto transportation under the Parking and Transportation Demand Management (PTDM) Ordinance and TPT further recommends that Transportation Demand Management requirements be applied to the residential units. TPT also recommends funding the installation of EZRide bus shelters, installing an electric vehicle charging station and conducting a study to recommend safety improvements at Third and Spring Streets. The Board finds that these recommended mitigation measures are appropriate to the impacts identified in the TIS, and should be incorporated as Conditions of this Special Permit.

Looking more broadly at transportation impacts, the Board acknowledges the point raised by many members of the public that traffic on Third Street already appears congested during peak travel times. However, the proposed parking for the project (which is discussed further in these Findings) will be accessed from First Street, which is planned to be extended to connect directly to the regional highway system following the relocation of the MBTA Lechmere Station, a project that is currently in the design phase. Therefore, there will not be much incentive for traffic coming to and from the project to use Third Street or other neighborhood streets. The results of the TIS support this expectation. Furthermore, although not addressed in the TIS, the Board notes that the existing courthouse facility (before it was vacated) had its own set of negative traffic and parking impacts that will be eliminated by the proposed conversion.

For the reasons set forth above pertaining to the application of traffic impact indicators, mitigating measures and other considerations, the Planning Board finds that the project will have no substantial adverse impact on city traffic within the area studied in the TIS.

(19.25.2) Urban Design Findings. The Planning Board shall grant the special permit only if it finds that the project is consistent with the urban design objectives of the city as set forth in Section 19.30. In making that determination the Board may be guided by or make reference to urban design guidelines or planning reports that may have been developed for specific areas of the city and shall apply the standards herein contained in a reasonable manner to nonprofit religious and educational organizations in light of the special circumstances applicable to nonprofit religious and educational activities.

In evaluating whether the proposed project is consistent with the urban design objectives set forth in Section 19.30 of the Zoning Ordinance, the Board acknowledges that the intent of the urban design objectives is to provide guidance but not to establish strict requirements, as set forth in Section 19.30:

A project need not meet all the objectives of this Section 19.30 where this Section serves as the basis for issuance of a special permit. Rather the permit granting authority shall find that on balance the objectives of the city are being served.

In this case, the proposal is not to construct a new building but to alter a pre-existing nonconforming structure that would not be permissible given the City's current planning and zoning. Therefore, the Board has based its evaluation on the quality and effectiveness of efforts that have been made to improve the building so that it better aligns with the City's objectives, and has based its ultimate Finding on whether, on balance, the City's objectives are being met by the proposed alteration.

(19.31) New projects should be responsive to the existing or anticipated pattern of development.

The project is responsive to the existing pattern of development in the sense that it reuses an existing building. However, as the Board has noted in a prior section of these Findings, the existing building itself is out of conformance with the plans and zoning regulations established for the area. Given the Board's finding that the project meets the criteria for granting a special permit to alter the existing building to accommodate a new conforming use, it is rational to evaluate the proposal in light of efforts made to bring the building into greater harmony with surrounding uses.

The proposed modification to the building establishes a podium that better responds to the scale, character and use of surrounding development. The proposed new façade treatment will soften what is now a hard edge to the building and will be more sensitive to adjacent historic structures. The proposed materials, relying on an earth-based terra cotta cladding, will also be more compatible with surrounding buildings by making reference to their red brick and stone materials without directly copying them.

In evaluating the project relative to anticipated patterns of development, the Board considered the objectives set forth in the Eastern Cambridge Design Guidelines, which are applicable in this area. The proposal meets the guideline of providing active retail uses at the ground floor, and providing a mix of spaces to accommodate a range of specific use types. The Board encourages the Applicant to refer to the list of desired retail uses set forth in the guidelines when identifying retail tenants for the spaces. Although the overall height of the existing building is not consistent with the guideline to encourage a transition from higher-scale commercial areas to lower-scale residential areas, the proposal will make a positive change by reducing the height of the building. The existing building does meet the guideline of establishing a cornice line at about sixty-five feet and stepping-back taller portions of the building in order to shield building mass from pedestrians, and the proposed modification preserves and enhances this condition. The building also follows the recommended pattern of bay widths, and the proposed modifications provide greater articulation on the façade to achieve a less monolithic appearance. The project follows the guidelines by providing vehicular access and service

functions on the least sensitive side of the building, facing the municipal parking garage. Bicycle facilities are provided as previously described, and the project will not impact future rights-of-way for the Urban Ring. The project also serves environmental objectives by preserving an existing structure, which conserves the embodied energy in the building frame. For these reasons the Board finds that the proposed modification is responsive to the Eastern Cambridge Design Guidelines.

(19.32) Development should be pedestrian and bicycle-friendly, with a positive relationship to its surroundings.

The aforementioned modifications to the podium of the building will result in a much more pedestrian and bicycle-friendly building. The ground floor will be brought closer to grade, with more accessible pedestrian entrances, inviting ground-floor lobby and retail spaces, publicly beneficial open space, and transparent glazing at the lower floors. As previously noted, bicycle facilities will be provided in the form of conveniently located short-term and long-term bicycle parking spaces as required by zoning, a bicycle repair station and a public bicycle sharing station.

(19.33) The building and site design should mitigate adverse environmental impacts of a development upon its neighbors.

As previously noted in these Findings, vehicular access, loading and service will be provided on the east side of the building where the abutting uses – the municipal parking garage and some commercial buildings – will be the least sensitive to those impacts. The exact screening of those facilities will be reviewed as part of ongoing design review by Community Development Department staff.

Stormwater will be managed pursuant to Department of Public Works regulations, which are intended to reduce the impact on the city's drainage system through the use of collection tanks and increased permeable area.

Shadow impacts will be slightly mitigated by the reduction in height of the building. Existing retaining walls will be brought into the proposed site landscaping and buffered to reduce their visual impact. The proposed articulation of the façade will help to break down the length, scale and monotonous character of the existing building. The blank walls of the original proposal will be broken down through the vertical expression of bays and two-story horizontal banding to help provide more appropriate scale to the building.

Lighting impacts and wind impacts were the topics of much discussion at the public hearings. The Applicant provided a study of the potential impacts of indoor lighting, and the Board will include in the Conditions of this Special Permit a requirement for ongoing review of outdoor and indoor lighting systems with the aim of minimizing off-site light spillage, especially where it impacts abutting residential properties. The Applicant has also provided a study of the potential wind impacts, which will not be substantially different from the impacts of the existing building in its present use. Nonetheless, the

Board will also include a requirement to fund a peer review of the Applicant's wind impact study with the goal of identifying additional mitigating measures that could further reduce wind impacts on pedestrians.

A tree replacement plan is provided in the proposal. Some existing marginal trees on the site will be removed, and new trees will be planted in landscaped areas and other locations where they will help to mitigate wind impacts.

Environmental improvements to the site will be achieved by removal of toxic materials that are present in the existing building, replacement of existing building systems with modern systems that have greater energy and water efficiency, and Transportation Demand Management (TDM) measures that will help reduce auto emissions. The project will be subject to the Green Building Requirements of the Cambridge Zoning Ordinance, and the Applicant has indicated a goal of achieving LEED certification at the Gold level.

(19.34) Projects should not overburden the City infrastructure services, including neighborhood roads, city water supply system, and sewer system.

Traffic impact findings have been previously set forth in these Findings, which provide the Board's rationale for finding that the project will not overburden neighborhood roads. As previously noted, the project will adhere to Department of Public Works stormwater management standards to reduce impacts on the city sewer system, and will meet LEED standards for energy and water efficiency to reduce impacts on other utilities and services.

(19.35) New construction should reinforce and enhance the complex urban aspects of Cambridge as it has developed historically.

The project does not propose new construction but rather the alteration of an existing structure to accommodate new conforming uses. Nonetheless, the change will result in a transformed building with a varied mix of uses. The office component of the building will include space for smaller innovation companies. The residential component (discussed further below) will provide different unit types and different levels of affordability. The ground-floor section, which is the most public-facing part of the project, will include retail and community uses with a variety of spaces and configurations to serve different needs. The Board encourages an ongoing dialogue with neighbors to identify specific retail uses that will enhance the offerings and services to the community.

(19.36) Expansion of the inventory of housing in the city is encouraged.

The project includes twenty-four (24) residential dwelling units on the lower floors of the building facing Third Street, in a configuration of mainly loft-style studio apartments with some two-bedroom units also provided. Although the number of dwelling units is small in relation to the overall development, the dwelling units enhance the urban

character of the project and provide unique residential opportunities. The dwelling units are designed to make best use of the existing structure, which, due to its large floor plates and tall ceilings, is not conducive to conventional residential unit types.

At the suggestion of the Board, the Applicant has agreed to exceed the minimum requirement for the number of inclusionary housing units required by Section 11.200 of the Zoning Ordinance (“Affordable Units”) by providing one-third of the total number of dwelling units as Affordable Units (made affordable and available to low-to-moderate-income households in accordance with the provisions of Section 11.200 of the Zoning Ordinance) and to provide an additional one-third of the total number of the dwelling units as units that will be affordable to middle-income households, while allowing the remaining one-third of the dwelling units to be market-rate units without price restrictions.

(19.37) Enhancement and expansion of open space amenities in the city should be incorporated into new development in the city.

A publicly beneficial open space is proposed along Spring Street where existing parking is located, which will provide unique and attractive opportunities for use by occupants of the building as well as neighborhood residents. The design of the space has been improved during the course of review, with a large portion of the space provided at sidewalk level to encourage use by the general public, and some partially elevated portions providing opportunities for outdoor dining and other amenities associated with the retail spaces in the building. Along with providing recreational opportunities, the open space will serve as a link in the network of public open spaces throughout the neighborhood. The Board suggests further work with City staff on the detailed design and activation strategies for the space, including potential way finding systems. Additionally, as a traffic mitigation condition, the Applicant has agreed to undertake improvements to the open space adjacent to the municipal parking garage along Second Street.

For the reasons set forth above, the Planning Board finds that the proposed alterations to the structure, the site and the use are consistent with the urban design objectives of the City as set forth in Section 19.30 of the Zoning Ordinance.

4. Off-Site Accessory Parking

The Applicant proposes that off-site accessory parking will be most preferably provided by way of a long-term lease agreement with the City of Cambridge to guarantee the use of up to four hundred twenty (420) parking spaces in the municipal parking garage located on First Street, in addition to the ninety-two (92) spaces provided on-site within the building. That municipal garage had previously served, to a great extent, the parking needs associated with the building when it operated as a courthouse facility. However, since such a lease arrangement shall require City authorization of a disposition of municipal property and is therefore not yet secured, the Applicant has requested a special permit to approve an

alternative arrangement, which would be to provide those four hundred twenty (420) parking spaces in the parking facility at the Cambridgeside Galleria, also located on First Street.

The Board acknowledges that the original proposal to provide parking in the municipal garage remains the preferred option of both the Applicant and the Planning Board, given its closer proximity to the building and its opportunities for mutually beneficial public-private partnerships.

With regard to the alternate proposal, the Board makes the following findings, with reference to the standards set forth in Section 6.22.2, copied below.

6.22.2 The Board of Zoning Appeal may grant a special permit for off site accessory parking not allowed in Subsection 6.22.1 (a) provided that convenient and safe access from the parking facility to the use being served is provided in accordance with the following conditions:

- (a) No off site accessory parking facility may be located on a lot which has a more restrictive zoning classification than the lot on which the use being served is located.*
- (b) Off site accessory parking facilities shall be located within four hundred (400) feet of the lot being served for residential uses and within one thousand (1000) feet of the lot for other uses.*

The more preferable parking location, at the municipal garage on First Street, would be permitted as-of-right pursuant to Subsection 6.22.1 because it would serve non-residential uses and because it is located within three hundred (300) feet of the uses that it would serve.

The proposed alternative parking facility, at the Cambridgeside Galleria, is within one thousand (1,000) feet of the lot on which the principal uses are proposed, and the proposed uses are permitted in the district where the parking facility is located (which has designations of Business A and PUD-4). Accessory parking for proposed residential uses will be provided on-site in the below-grade garage, and therefore the off-site facility will serve only non-residential uses. Safe and convenient sidewalk connections will provide pedestrian access from the principal uses to the off-site parking facility. Therefore, the Board finds that the alternative off-site parking location at the Cambridgeside Galleria meets the standards set forth in Section 6.22.2 necessary to grant a special permit.

In the case of either potential off-site parking facility, in accordance with Section 6.23 of the Zoning Ordinance pertaining to control of parking facilities, the Board finds that a long-term lease agreement that complies with Section 6.23, evidence of which shall be provided to the City prior to issuance of a Building Permit to construct the uses that are served by that parking, shall be satisfactory to demonstrate control of the accessory parking spaces as required in Section 6.23.

5. General Criteria for Issuance of a Special Permit (10.43)

The Planning Board finds that the project meets the General Criteria for Issuance of a Special Permit, as set forth below.

10.43 Criteria. Special permits will normally be granted where specific provisions of this Ordinance are met, except when particulars of the location or use, not generally true of the district or of the uses permitted in it, would cause granting of such permit to be to the detriment of the public interest because:

(a) It appears that requirements of this Ordinance cannot or will not be met, or ...

The Board finds that after receiving the requested special permits, the proposed development will meet the requirements of the Ordinance.

(b) traffic generated or patterns of access or egress would cause congestion, hazard, or substantial change in established neighborhood character, or ...

With reference to the traffic impact findings previously set forth, the Board finds that the traffic impacts of the project will not cause congestion, hazard or change in established neighborhood character.

(c) the continued operation of or the development of adjacent uses as permitted in the Zoning Ordinance would be adversely affected by the nature of the proposed use, or ...

With reference to the findings previously set forth, and the additional requirements set forth as Conditions of this Special Permit Decision, the continued operation or development of adjacent uses will not be adversely impacted by the proposed alterations to the pre-existing nonconforming structure and its occupancy by new uses that are permitted as-of-right in the district.

(d) nuisance or hazard would be created to the detriment of the health, safety and/or welfare of the occupant of the proposed use or the citizens of the City, or ...

With reference to the findings previously set forth, and with the understanding that all applicable health, safety and environmental regulations shall be met during the course of construction along with construction management requirements that will be made Conditions of this Special Permit Decision, the Board finds that the proposed new uses and building alterations will not cause detriment to the health, safety or welfare of occupants of the building or citizens of Cambridge. Moreover, the proposed alterations will ameliorate the potential risks to health, safety and welfare that the existing building may present if it remains unoccupied.

(e) for other reasons, the proposed use would impair the integrity of the district or adjoining district, or otherwise derogate from the intent and purpose of this Ordinance, and ...

With reference to the findings previously set forth, the Board finds that the proposed new uses and alterations to the pre-existing nonconforming structure will not impair the integrity of the district or adjoining district and will not otherwise derogate from the intent and purpose of this Zoning Ordinance.

- (f) *the new use or building construction is inconsistent with the Urban Design Objectives set forth in Section 19.30.*

With reference to the urban design findings previously set forth, the proposed new uses and building alterations will be consistent with the urban design objectives set forth in Section 19.30 of the Zoning Ordinance.

DECISION

Based on a review of the Application Documents, testimony given at the public hearings, and the above Findings, the Planning Board hereby GRANTS the requested Special Permits subject to the following conditions and limitations. Hereinafter, for purposes of this Decision, the Permittee shall mean the Applicant for the requested Special Permits and any successor or successors in interest.

1. All use, building construction, and site plan development shall be in substantial conformance with the Application Documents dated November 21, 2013 as modified in the Application Documents dated July 22, 2014, in accordance with all supplemental documents and information submitted by the Applicant to the Planning Board as referenced above and in accordance with all other Conditions set forth in this Special Permit Decision. Appendix I summarizes the dimensional features of the project as approved.
2. The project shall be subject to continuing design review by the Community Development Department (CDD). Before issuance of each Building Permit for the project, CDD shall certify to the Superintendent of Buildings that the final plans submitted to secure the Building Permit are consistent with and meet all conditions of this Decision. As part of CDD's administrative review of the project, and prior to any certification to the Superintendent of Buildings, CDD may present any design changes made subsequent to this Decision to the Planning Board for its review and comment.

Elements of the proposed design that shall require explicit approval by CDD prior to issuance of a building permit include the following:

- a. Treatment of the ground-floor façade on Second Street, where loading and service activities are located, to minimize visual and other impacts on the public realm.
 - b. Outdoor and indoor lighting systems, with the goal of minimizing light spillage onto adjacent sites and into the night sky.
 - c. Rooftop mechanical systems, including any enclosures, screening devices and other appurtenances.
 - d. Detailed landscape plans for the publicly beneficial open space on Spring Street, including any wayfinding systems that may be implemented.
3. All authorized development shall abide by all applicable City of Cambridge Ordinances, including the Noise Ordinance (Chapter 8.16 of the City Municipal Code).
 4. Throughout design development and construction, the project shall conform to the Green Building Requirements set forth in Section 22.20 of the Cambridge Zoning Ordinance. Compliance with such requirements shall be certified by the Community Development Department prior to issuance of a Building Permit and again prior to issuance of a Certificate of Occupancy for development authorized by this Special Permit, pursuant to the procedural requirements of Section 22.20.

5. The Transportation Mitigation requirements set forth in the memorandum from Susan Clippinger, Director of Traffic, Parking and Transportation, dated January 7, 2014 and attached to this Special Permit Decision, shall be made Conditions of this Special Permit. The Traffic, Parking and Transportation Department (TPT) shall certify that all applicable Conditions are being met prior to issuance of any Building Permit or Certificate of Occupancy for development authorized by this Special Permit. Any minor alterations to the specific location or design of any required Transportation Mitigation improvements shall be subject to final approval by TPT.
6. The Permittee shall produce evidence of a long-term lease agreement subject to the requirements of Section 6.23 of the Zoning Ordinance guaranteeing use of up to four hundred (420) parking spaces in an existing off-site parking facility, either at 14 Thorndike Street (otherwise known as the First Street Municipal Parking Garage) or at 100 Cambridgeside Place (otherwise known as the Cambridgeside Galleria mall), to serve the principal non-residential uses authorized by this Special Permit, which shall be certified by the Community Development Department prior to issuance of a Building Permit to construct such uses.
7. The permitted development shall be subject to the requirements of the Parking and Transportation Demand Management (PTDM) Ordinance. The Cambridge PTDM Officer shall certify that all applicable PTDM requirements are being met prior to issuance of a Certificate of Occupancy for uses authorized by this Special Permit, and ongoing compliance with applicable PTDM requirements shall be a Condition of this Special Permit.
8. The Permittee shall be required to incur the cost of retaining a consultant specializing in analysis of wind impacts, selected at the discretion of the City, for the purpose of conducting a peer review of the wind analysis provided in the Application Materials and assessing whether additional measures should be employed that would further mitigate the wind impacts resulting from the presence of the building as it has been approved. Any such mitigating measures shall be implemented, subject to approval by the Community Development Department, so long as such measures would not result in a substantial deviation from the plans approved by the Planning Board in this Special Permit Decision.
9. Of the twenty-four (24) dwelling units authorized by this Special Permit, no less than one-third of the units shall be designated Affordable Units, as defined in Section 11.200 of the Zoning Ordinance, and in addition to those Affordable Units, no less than one-third of the dwelling units shall be provided as Middle-Income Units, for which occupancy shall be restricted to households whose income does not exceed one hundred twenty percent (120%) of area median income, and which shall be priced such that the rent (including utilities) or monthly mortgage payment (including insurance, utilities and real estate taxes) is affordable to households earning between eighty percent (80%) and one hundred twenty percent (120%) of area median income range paying thirty percent (30%) of their income, or other standard as may be established by the Cambridge Affordable Housing Trust. Adherence to this Condition shall be deemed to satisfy and exceed the Inclusionary Housing requirements set forth in Section 11.200 of the Zoning Ordinance. Except for the particular provisions related to occupancy and pricing of Middle-Income Units set forth above, all dwelling units that are

subject to the requirements of this Condition shall be administered in accordance with the standards set forth in Section 11.200 of the Zoning Ordinance and the City's normal practices for administering the Inclusionary Housing Program. The Community Development Department shall certify compliance with this Condition prior to issuance of a Building Permit for development authorized by this Special Permit.

10. The Permittee shall prepare and implement a Retail Tenancy Plan, which shall describe the procedures and timeline by which retail space will be marketed and tenants selected for the retail spaces authorized by this Special Permit and shall identify an individual responsible for implementing such plan on behalf of the Permittee. An initial Retail Tenancy Plan shall be reviewed and certified by the Community Development Department prior to issuance of a Building Permit for development authorized by this Special Permit, but may be amended after that time. A component of the Retail Tenancy Plan shall be the formation of a community advisory committee that shall, at a minimum, provide feedback on the types of uses that are most desired by neighborhood residents, particularly for the smaller retail spaces in the project. An updated Retail Tenancy Plan, including a report on feedback received from the community advisory committee and other outreach efforts, shall be reviewed and certified by the Community Development Department prior to issuance of a Certificate of Occupancy for any retail space authorized by this Special Permit.
11. The Permittee shall prepare and implement a Construction Management Program in accordance with Section 18.20 of the Zoning Ordinance. Such program shall be reviewed and approved by the Department of Public Works and the Traffic, Parking and Transportation Department, along with any other agencies as deemed appropriate by the City, prior to any construction activities. As a component of the Construction Management Program, the Permittee shall institute a community outreach program, which shall include regular meetings with an advisory committee of neighbors to provide updates, receive feedback and address specific concerns during the construction process, as well as a web site and e-mail notification list for construction updates, a designated point of contact to which community members can address questions and receive responses, and other outreach efforts as appropriate.

Voting in the affirmative to GRANT the Special Permits were Planning Board Members H Theodore Cohen, Steve Cohen, Hugh Russell, Tom Sieniewicz, Steven Winter, and Associate Member Catherine Preston Connolly, appointed by the Chair to act on the case, constituting at least two thirds of the members of the Board, necessary to grant a special permit.

For the Planning Board,



Hugh Russell, Chair.

A copy of this decision #288 shall be filed with the Office of the City Clerk. Appeals, if any, shall be made pursuant to Section 17, Chapter 40A, Massachusetts General Laws, and shall be filed within twenty (20) days after the date of such filing in the Office of the City Clerk.

ATTEST: A true and correct copy of the above decision filed with the Office of the City Clerk on October 30, 2014, by Jeffrey C. Roberts, authorized representative of the Cambridge Planning Board. All plans referred to in the decision have been filed with the City Clerk on said date.

Twenty (20) days have elapsed since the filing of the decision. No appeal has been filed.

DATE:

City Clerk of Cambridge

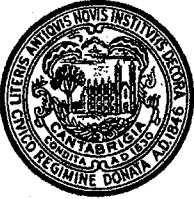
Appendix I: Approved Dimensional Chart

	Existing	Allowed or Required	Proposed	Permitted
Lot Area (sq ft)	59,788	5,000 min	No change	No change
Lot Width (ft)	297	none	No change	No change
Total GFA (sq ft)	513,241	See below	476,303	476,303 ¹
Residential Base	n/a	179,364 max	24,066	Consistent with Application Documents and applicable zoning requirements ¹
Non-Residential Base	n/a	164,417 max	452,237	
Inclusionary Bonus	n/a	53,809 max	0	
Total FAR	8.58	See below	7.97	Consistent with Application Documents and applicable zoning requirements ¹
Residential Base	n/a	3.0 max	0.4	
Non-Residential Base	n/a	2.75 max	7.56	
Inclusionary Bonus	n/a	0.9 max	0	
Total Dwelling Units	n/a	259 max	24	24
Base Units	n/a	199 max	20	See below ²
Inclusionary Bonus Units	n/a	60 max	4	
Base Lot Area / Unit (sq ft)	n/a	300 min	2,989	
Total Lot Area / Unit (sq ft)	n/a	230 min	2,491	
Building Height (ft)	282'-3"	80	258'-3"	Consistent with Application Documents and applicable zoning requirements ¹
Front Setback (ft) – Spring St	46'-2"	n/a	No change	
Front Setback (ft) – Second St	12'-5"	n/a	No change	
Front Setback (ft) – Thorndike	0	n/a	No change	
Front Setback (ft) – Third St	12'-2"	n/a	No change	
Open Space (% of Lot Area)	0%	4.7%	1.4%	Consistent with Application Documents and applicable zoning requirements ¹
Private Open Space	0%	4.7%	1.4%	
Permeable Open Space	0%	2.0%	1.4%	
Off-Street Parking Spaces	40	387 _{min} -750 _{max}	512	512 ³
Long-Term Bicycle Parking	0	166 min	166	Consistent with Application Documents, PTDM and other applicable requirements
Short-Term Bicycle Parking	10	50 min	50	
Loading Bays	4	3 min	3	

¹ Dimensions permitted as alterations to a nonconforming structure pursuant to Sections 8.22.2(a) and 5.28.2 of the Zoning Ordinance in accordance with this Special Permit Decision.

² Affordable housing units shall be provided in excess of the Inclusionary Housing requirements in accordance with Condition #9 of this Special Permit Decision.

³ Ninety-two (92) spaces shall be provided on-site and four hundred twenty (420) spaces shall be provided in an existing off-site parking facility in accordance with this Special Permit Decision.



CITY OF CAMBRIDGE
Traffic, Parking and Transportation
344 Broadway
Cambridge, Massachusetts 02139

www.cambridgema.gov/traffic

Susan E. Clippinger, Director
Brad Gerratt, Deputy Director

Phone: (617) 349-4700
Fax: (617) 349-4747

MEMORANDUM

To: Cambridge Planning Board
From: Susan Clippinger, Director TP&T *As. for Sue Clippinger*
Date: January 7, 2014
Re: 40 Thorndike Street - Edward J. Sullivan Courthouse Redevelopment Project.

The Traffic, Parking & Transportation (TP&T) Department has reviewed the Transportation Impact Study (TIS) for the proposed Sullivan Courthouse Redevelopment Project located at 40 Thorndike Street by LMP GP Holdings LLC/Leggat McCall Properties LLC. We certified the TIS as complete and reliable on November 21, 2013.

The proposed project is to renovate and repurpose the approximately 510,000 s.f. Edward J. Sullivan Courthouse into a mixed-use building consisting of approximately 471,854 s.f. Technical Office use, 15,000 s.f. Retail use, and 24 housing units. The Project proposes 92 on-site parking spaces and proposes to lease 420 spaces in the adjacent City owned First Street Parking Garage, for a total of 512 parking spaces. The project will remove the existing curb cut and garage access on Third Street and provide a new parking entry on Second Street. Three loading zones will also be provided on Second Street as well as a dedicated bicycle parking entry to 166 indoor, weather protected long-term bicycle spaces. The Project will also provide 50 short-term bicycle spaces on-site.

The Courthouse Redevelopment Project will generate the following Trips:

- 2,226 daily vehicle trips including, 253 AM and 270 PM peak hour vehicle trips
- 1,856 daily transit trips (220 AM Peak/226 PM Peak hour transit trips),
- 474 daily pedestrian trips (39 AM/53 PM Peak hour transit trips), and
- 256 daily bicycle trips (28 AM/30 PM Peak hour bicycle trips).

Planning Board Exceedances. The Traffic Impact Study indicated the Project had 19 Planning Board special permit transportation criteria exceedances. Three exceedances were from exceeding the Weekday, AM and PM peak hour vehicle trip thresholds, and 16 exceedances were from Pedestrian Level of Service Criteria. The full summary is attached. The TP&T Department's comments are below.

Auto Parking. The Project proposes 512 parking spaces including, 92 spaces located on-site in two below-grade levels of the existing building and 420 spaces within 300' in the City's First Street Garage (proposed to be leased long-term by the proponent from the City).

The Traffic Impact Study estimated a Project parking need of approximately 529 spaces based on an estimated 1,150 employees (2.5 employees per 1,000 sf, 42% drive-alone and 4% carpool). The actual employee density of the building will vary depending on the tenant. We believe 512 spaces is a reasonable number to meet the Project's

parking needs. We recommend that prior to the Project's first Building Permit, the Proponent be required to show documentation that they have secured 420 spaces to serve employees at the Courthouse Project. The documentation must be approved by the CDD and TP&T Departments.

Bicycle Parking. The proposed bicycle parking will meet the zoning requirement.

Transportation Mitigation. To mitigate the Project's Planning Board exceedances we recommend the Proponent be obligated to the following:

1. Hubway Station.
 1. The Proponent proposed to fund the installation of a Hubway station on-site. The Proponent should fund the station, which should be done prior to the issuance of the Project's first Certificate of Occupancy Permit.
 2. The Project should at a minimum be a Silver Level Corporate Member of Hubway for all employees, including Retail employees.
2. The Proponent should provide air pumps and other bicycle tools, such as a "fix-it" stand in the Courthouse building's bicycle storage area. This improvement should be installed prior to the first Occupancy Permit.
3. The Proponent should fund the purchase and installation, per City approval, of benches at the inbound and outbound EZ Ride stops at First Street and Otis Street. The Proponent should provide the City a check prior to their first Certificate of Occupancy.
4. In response to the high crash rate at Third and Spring Streets, and in partnership with TP&T, the Proponent should examine police reports of all crashes that occurred between 2002 and 2012 at Third Street and Spring Street intersection, and evaluate the intersection in relation to the trips that will result from the Courthouse development. Based on the analyses, identify engineering and enforcement measures to improve the safety at the Third Street and Spring Street intersection. Reversing the direction of Spring Street will be one of the actions evaluated. This work must be completed prior to first Certificate of Occupancy.
5. In connection with the landscaped courtyard being created at the south side of the Sullivan Courthouse Redevelopment Project along Spring Street, create and maintain a complimentary landscaped courtyard space on Second Street in the open space adjacent to the City's First Street garage, on City land. This improvement will enhance the pedestrian environment for the retail, residential and office uses at the Courthouse Project. The public space will require design approval from the Community Development Department, and the physical improvements and land will continue to be owned by the City. The landscaping improvements should be completed prior to the issuance of the first Certificate of Occupancy for the Project.
6. The Proponent should refresh all pavement markings and rebuild any non-compliant pedestrian ramps at the four corners of the Project site, plus complete any other improvements required by the City's Public Works Department as part of their normal construction process. This should be completed prior to the Project's first Certificate of Occupancy.
7. We recommend the Proponent provide a minimum of one level-2 charging station (two charging points) for employees, visitors, or residents at the Courthouse building. The charging station should have prominent signs in the garage, and employees should be notified of their availability through employee communications. The charging station should be installed prior to the issuance of the first Certificate of Occupancy.

8. Lastly we recommend that Proponent implement the following Residential Transportation Demand Management (TDM) measures to minimize auto trips for the residential units by encouraging walking, bicycling and transit as a preferred mode of transportation:
 - a. Provide an MBTA Charlie Card, with the value of a combined bus/subway pass (currently set at \$70 but is subject to MBTA fare increases) to each adult member of a new household during the first month of initial occupancy of a new household. Up to two Charlie Cards total per household are required. This requirement renews each time a new household moves in to incentivize new households to use public transportation.
 - b. Post information in an area that is central, visible, convenient, and accessible to all residents and visitors such as:
 - Available pedestrian and bicycle facilities in the vicinity of the Project site.
 - MBTA maps, schedules, and fares.
 - Area shuttle (i.e. EZ-Ride Shuttle) map and schedule.
 - "Getting Around in Cambridge" map (available at the Cambridge Community Development office).
 - Bicycle parking.
 - Ride-matching and Car-sharing information.
 - Other pertinent transportation information.
 - c. Designate a Transportation Coordinator (TC) for the site to manage the TDM program. The TC will also oversee the marketing and promotion of transportation alternatives to all residents at the site in a variety of ways including posting information in prominent locations, Project's web site and property newsletter, and responding to individual requests for information.
 - d. The TC should participate in any TC trainings offered by the City of Cambridge or local Transportation Management Associations.

PTDM Plan. The project is required to complete a Parking and Transportation Demand Management Plan (PTDM).

cc. Adam Shulman, TP&T, Brian Murphy, Susanne Rasmussen, Cara Seiderman, Liza Paden, Roger Boothe, CDD, Robert Dickey, Leggat McCall Properties.

Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Vali Buland
First Assistant City Solicitor



Assistant City Solicitors

Paul S. Kawai
Elizabeth A. Lashway
Samuel A. Aylesworth
Amy L. Witts
Keplin K.U. Allwaters

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,



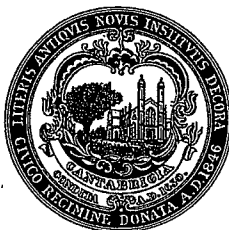
Nancy E. Glowa
City Solicitor

use and not more detrimental to the community) from enforcement of the zoning by-law, unless proceedings are initiated within six years after the beginning of an alleged violation...." *Durkin* at 453, *supra*.

Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Vali Buland
First Assistant City Solicitor



Assistant City Solicitors

Paul S. Kawai
Elizabeth A. Lashway
Samuel A. Aylesworth
Amy L. Witts
Keplin K. U. Allwaters

CITY OF CAMBRIDGE

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

September 30, 2014

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

Re: 40 Thorndike Street Special Permit Application, PB # 288

Dear Mr. Rossi:

At the July 29, 2014 Planning Board hearing regarding the above captioned matter, members of the Planning Board ("Board") requested through Assistant City Manager for Community Development Brian P. Murphy that I provide responses to the following questions: (1) whether there is a deed restriction that could affect the future use of the Sullivan Courthouse site located at 40 Thorndike Street; and (2) whether the case of Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527 (1990) is relevant to my analysis of the nonconforming status of the property discussed in my opinion to the City Council dated May 5, 2014 (see attached).

I. Background

The Commonwealth of Massachusetts holds title to the property located at 40 Thorndike Street in Cambridge on which the former Edward J. Sullivan Courthouse sits. The courthouse property is comprised of the square block between Thorndike and Spring Streets from north to south and between Second and Third Streets from east to west totaling 59,880 square feet (the "Property"), as a result of five separate conveyances and one confirmatory deed to Middlesex County in the early 1800s.¹

¹ In 1813 the Lechmere Point Corporation conveyed several parcels of land to the County, including a portion of the Property, which stretches seventy-five feet across the westernmost part of the Property along Third Street between Thorndike and Spring Streets (the "Lechmere Point Deed" and/or the "Lechmere Point Parcel"), recorded at Book 200, Page 519. In 1836, the County acquired an additional parcel of land from Edmund Munroe (the "Munroe Parcel"). The Munroe Parcel abutted a private way that ran through the Property between Spring and Thorndike Streets, known as Munroe Street. Munroe Street is now part of the Property. In 1836, the County acquired another parcel of land from Thomas F. Norris. This parcel of land is wedged between the Lechmere Point Parcel and the Munroe Parcel (the "Norris Parcel"). On February 3, 1851 the County acquired an additional parcel of land from Edmund Munroe (the "Second Munroe Parcel"), and on February 13, 1851 the County acquired three parcels of land from Rhoda Morse (the "Morse Parcels"). On March 25, 1851, Edmund Monroe signed a confirmatory deed transferring all on his land located between Third and Second Streets and between Spring and Thorndike Streets to the County (the "Confirmatory Deed").

The Commonwealth assumed ownership of the Property in the 1990s when Middlesex County was abolished. In 2012, the Commonwealth's Division of Capital Asset Management and Maintenance ("DCAMM") issued a Request for Proposals ("RFP") for the sale and development of the 22 story courthouse Property. LMP GP Holdings LLC ("the Developer") was the successful bidder, and entered into a purchase and sale agreement with the Commonwealth to purchase the Property.

The Developer has applied to the Planning Board for a special permit. In connection with its special permit application, the Developer submitted the "Ownership Certificate" that is required to be signed by the property owner or authorized agent, which was signed by DCAMM Commissioner Carole Cornelison, who certified that the Commonwealth owns the Property.

II. Does the Planning Board Have Authority to Consider An Apparent Deed Restriction in Determining Whether to Grant a Special Permit?

A. The Planning Board is Required to Adhere to the Criteria Set Forth in the Zoning Act and the Cambridge Zoning Ordinance in its Review of Special Permit Applications

In Massachusetts, the issuance of special permits by a special permit granting authority is governed by Section 9 of the Zoning Act, G.L. c. 40A §9 ("Section 9"). The Zoning Act authorizes municipalities to create zoning bylaws or ordinances to address their specific zoning needs and to condition projects consistently with local zoning bylaws or ordinances through use of a special permit. *Id.* For the reasons set forth below, I do not believe a court would conclude that the Planning Board has the authority to consider the validity of an apparent deed restriction in determining whether to grant a special permit.

Special permits provide relief from otherwise applicable zoning laws, but are unlike variances, in that the criteria for the issuance of special permits have already been specified within the zoning bylaws or ordinances. The issuance of a special permit is left to the reasoned discretion of the Special Permit Granting Authority ("SPGA"), which in Cambridge is either the Planning Board or the Board of Zoning Appeal. While the SPGA has reasonable discretion to grant or deny special permits, the exercise of its reasonable discretion must be consistent with the Zoning Act and the Cambridge Zoning Ordinance ("Ordinance" or "CZO") and the permitted use must be "in harmony with the general purpose and intent" of the Ordinance. G.L. c.40A, §9. The SPGA's decision cannot be based upon a "legally untenable ground" nor can it be "unreasonable, whimsical, capricious or arbitrary." See *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970).

Municipalities must create sufficient standards upon which the grant of a special permit is made. Section 10 of the Ordinance sets forth the criteria for granting special permits in Cambridge. The Board may not base its decision on criteria not found in the

Zoning Act² or the Ordinance.³ See Dowd v. Bd. of Appeals of Dover, 5 Mass.App.Ct. 148, 156-157 (1977)) (Board of Appeals could not deny a special permit based upon a concern that the property owner would not comply with the special permit conditions); Texstar Construction Corporation v. Board of Appeals of Dedham, 26 Mass.App.Ct. 977, 978 (1988) (There is no question that if the Board of Appeals had grounded its denial solely upon Texstar's prior zoning violations it would have exceeded its legitimate authority.)

Because the Property is nonconforming, the Board must make a "finding ... that [a] change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood" in order to issue a special permit. G.L. c.40A, §6. The building was formerly a jail and courthouse, and the Board must therefore analyze the question of whether the proposed use is substantially more detrimental than those uses.

B. The Planning Board Is Not Properly the Arbiter of Private Property Disputes

Our courts have held that "...zoning authorities are not the arbiters of private property disputes between landowners." See, e.g. Brady v. City Council of Gloucester, 59 Mass.App.Ct. 691, 696-697 (2003), citing Hahn v. Planning Bd. of Stoughton, 24 Mass.App.Ct. 553, 555 (1987). Private property disputes fall under the original jurisdiction of either the Land Court or the Superior Court. Brady at 59 Mass.App.Ct. 697. In Hahn, the planning board's regulations required that existing rights of way and easements be shown on any submission related to a proposed subdivision; however, the existence of an easement was disputed by the owner and the board was aware of the dispute. The court found that the existence or nonexistence of the easement was irrelevant to the planning board's authority to grant approval of a subdivision plan and that "[i]f and when the easement is shown to exist, persons having standing to prevent obstruction of the easement will have ample opportunity to protect their rights." Hahn at 556.

² There are no explicit criteria set forth in the Zoning Act authorizing an SPGA to request title information in considering an application for a special permit such as this.

³ Article 10, Section 10.40 of the Ordinance provides as follows:

Special permits will normally be granted where specific provisions of this Ordinance are met, except when particulars of the location or use, not generally true of the district or of the uses permitted in it, would cause granting of such permit to be to the detriment of the public interest because:

- a) It appears that requirements of this Ordinance cannot or will not be met, or
- b) Traffic generated or patterns of access or egress would cause congestion, hazard, or substantial change in established neighborhood character, or
- c) The continued operation of or the development of adjacent uses as permitted in the Zoning Ordinance would be adversely affected by the nature of the proposed use, or
- d) Nuisance or hazard would be created to the detriment of the health, safety and/or welfare of the occupant of the proposed use or the citizens of the City or
- e) For other reasons, the proposed use would impair the integrity of the districts or adjoining district, or otherwise derogate from the intent and purpose of this Ordinance, and
- f) The new use or building construction is inconsistent with the Urban Design Objectives set forth in Section 19.30. (§10.43).

Planning board regulations must be “comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them,” Parker v. Black Brook Realty Corporation, 61 Mass.App.Ct. 308, 309 (2004), quoting Castle Estates, Inc. v. Park and Planning Board of Medfield, 344 Mass. 329, 334 (1962.) A planning board “exceeds its authority if requirements are imposed beyond those established by the rules and regulations.” Parker, supra, quoting Beale v. Planning Board of Rockland, 423 Mass. 690, 694-697 (1996). The only cases that we are aware of in which courts have found that SPGAs may properly consider private property disputes are subdivision cases, in which certain requirements such as rights in adjacent ways are necessary components of the proposed subdivision. See, e.g. Beale, supra at 696 (planning boards must exercise their powers under subdivision control law “[w]ith due regard for the provision of adequate access to all of the lots in a subdivision....”; Parker v. Black Brook Realty Corporation, 61 Mass. App. Ct. 308, 310 (2004) (abutters’ challenge to applicant’s rights in a parkway goes to the very heart of the proposed development where the locus was left without one of two means of access upon which the board predicated their approvals of the subdivision.). We know of no case that authorizes planning boards to consider property disputes in the context of granting special permits pursuant to Section 6 of G.L. c. 40A. Therefore, absent any law explicitly allowing title to be considered by the Planning Board, any such use restriction would not prevent relief being granted to the applicant in this context.

Although Section 10.47.1 of the Ordinance requires applications for special permits to be accompanied by certain information, the required information does not include certification that title to the property is free from any defect which might prohibit or encumber the applicant’s use of the land as planned, nor is there a requirement that applicants provide the Board with a copy of their property deed or make a showing of good title. Requiring an applicant to establish that there are not easements or restrictions on the use of the land could be construed as inserting criteria not required either by the Zoning Act or by the Ordinance, see Dowd, supra, and could subject a decision based in part upon such a requirement to a court finding that the decision is based either on a legally untenable ground, or is unreasonable, whimsical, capricious, or arbitrary. Id.; MacGibbon, supra at 635.

Further, to the extent that a deed restriction is otherwise enforceable, a decision to grant a special permit by a planning board has been held not to override the terms of that restriction; See 5 Rathkopf, The Law of Zoning and Planning §82:2, and courts have held that zoning restrictions operate independently from title issues. Id. A commonly held view of many states’ courts is that zoning ordinances do not in any way affect a valid private restriction on the use of land and that “if a property owner is otherwise entitled to a variance or special exception, it should be granted notwithstanding private covenants which would prohibit the proposed use.” 5 Rathkopf, The Law of Zoning and Planning §82:3 (citing cases from Indiana, Maine, Maryland, Michigan, North Carolina, Pennsylvania, Washington, and Wisconsin.) Thus, a planning board does not generally have jurisdiction under either statutory, municipal, or case law to determine if a deed restriction is an enforceable bar to a project.

III. A Court Would be Unlikely to Find that the Apparent Deed Restriction Would Prohibit the Redevelopment of the Property

A. Deed Restrictions Are Extinguished After Fifty Years Unless They are Re-recorded or a Public Trust is Created

The Massachusetts Legislature has enacted several statutes to help keep title to real estate clear. See e.g., G.L. c. 184 §§23, 26, 28, 30; G.L. c. 260 §31A. For example, G.L. c. 260 §31A prevents any right of entry for a condition broken created before January 2, 1955, from being enforced after January 1, 1964 (except upon certain conditions not applicable here); and G.L. c. 184 §28 establishes a fifty year statute of limitation on any restriction imposed before January 1, 1962 (except upon certain conditions also not applicable here.)

Chapter 184, Section 28 states in relevant part: "No restriction imposed before January 1, 1962 shall be enforceable after the expiration of fifty years from its imposition unless a notice of restriction is recorded before the expiration of such 50 years or January 1, 1964, whichever is later, and in case of such recording, 20 years have not expired after the recording of any notice of restriction without the recording of a further notice of restriction."

Chapter 184, Section 30 provides that a restriction can only be enforced if it is determined at the time of the proceeding that the restriction is of actual and substantial benefit to the person claiming rights of enforcement.

However, if a deed creates a "public trust", the above statutes will not apply, and the restriction remains in perpetuity. See e.g., Opinion of the Justices to the Senate, 369 Mass. 979 (1975); Dunphy v. Commonwealth, 368 Mass. 376 (1975); Salem v. Attorney General, 344 Mass. 626 (1962). A public trust is created where the words "forever" or "in perpetuity" without any conditions or other limitation are used. Opinion of the Justices to the Senate, 369 Mass. at 981.

In the Opinion to the Justices, the court was asked to provide the Senate with an opinion on the City of Revere's plan to take parkland and build a school thereon. The land was conveyed to Revere by three separate deeds from three individuals. Each of the deeds made specific reference to the use of the land as parkland. The court noted that if there were provisions for reversion, or right of entry in the grantor, or other disposition of the land if used for other than the intended purpose, the land would not be determined to be held in trust. Id. at 984.⁴ Only one of the three deeds was found to have created a public trust.

⁴The first deed ("Deed One") specified that "[t]he above described premises are, however conveyed on the Express Condition that the same shall be appropriated, improved and forever used by the grantee as and for a public park and play ground for the use of the inhabitants of the town of Revere and for no other purpose and that if said grantee shall fail to keep and perform said Condition then and in such event this deed shall become and be absolutely null and void" Id. at 981, FN 4. This provision was determined by the court not to have created a public trust. The possibility of a "reverter" was deemed to be inconsistent with the intent to create a public trust in perpetuity. Id. at 985. This court found that Deed One created a contract and imposed obligations on the city, which if valid, could not be impaired by the Legislature by statute, and that while the Legislature cannot impair parties' contractual obligations, it can limit private rights in land

B. A Public Trust Does Not Appear to Have Been Created by the Apparent Deed Restriction in the Lechmere Point Deed

The Lechmere Point Deed by its terms appears to contain a restriction on the use of the Property. The 1813 conveyance from the Lechmere Point Corporation⁵ to Middlesex County stated, in part that the property was being conveyed:

...forever, for the use and purposes of erecting & keeping thereon a Gaol and other buildings for County uses & for no other use or purpose whatever upon the express condition that no dwelling house, or building, intended for or used as a dwelling house, nor any other building shall be erected on the premises, unless the walls thereof are entirely of brick & stone, except buildings intended for wood houses, or necessary offices to dwelling houses, and that it shall be lawful for the Corporation, or their agents to enter upon & pull down & remove any building erected contrary to this condition. Middlesex South Registry of Deeds, book 200, page 519.

The Lechmere Point Parcel is approximately 15,000 square feet of land, out of the 59,880 square feet which comprise the total lot size of the Property. None of the other deeds to the Property contains any restrictions on use. Thus, only approximately 15,000 square feet of the subject lot could be potentially subject to this apparent deed restriction.

The apparent restriction in the Lechmere Point Deed does not appear to unequivocally indicate that the deed created a public trust. The deed allowed for other uses of the land, which would likely be determined by a court to convert the language from a public trust to a contract. In a case where it was “far from clear that ‘the grantor[] ... intended to create [a trust] in perpetuity for the public benefit’, did not use conditional language such as “forever” or “in perpetuity”, but rather contained the possibility of a “reverter” if an armory was not constructed within a certain time period, the court stated “the creation of a possibility in reverter is inconsistent with an intent to create a public trust in perpetuity.” Memorial Association of Whitman v. Town of Whitman, 65 Mass.App.Ct. 1120, quoting Opinion of the Justices at 984 (citations omitted) (unpublished opinion.)

provided that there is a reasonable length of time for enforcing those rights after the statute is enacted. Id. at 986. That contract is no longer enforceable as G.L. c.184 §28 and G.L. c.260§31A act as a statute of limitations on enforcement of those contractual rights.

The second deed (“Deed Two”), the only deed which was found to have created a public trust, provided: “The premises hereby conveyed are to be forever used by the Town of Revere as part of a public park[sic] and playground now in process of development” Id. at 981. The court found that the use of the word “forever” expressed the intent to create a trust in perpetuity and that a public trust was created. Id. at 985.

The third deed (“Deed Three”) stated: “The premises hereby conveyed are to be used by the Town of Revere as a part of a Public Park and Playground now in process of development.” Id. at 981. The court found that the wording used was consistent with merely describing the use contemplated by the Town of Revere at the time of the making of the deed. Id. at 985. Nothing in the wording indicated that that use was “an essential factor in the scheme of benefaction.” Id. Citing Loomis v. Boston, 331 Mass. 129, 131-132, citing MacDonald v. Street Commr’s of Boston, 268 Mass. 288, 294-297 (1929). Therefore a public trust was not created.

⁵ The Lechmere Point Corporation was created for the purposes of developing Lechmere-Point Farm. The Corporation constructed houses, several of which still remain at 45-51 Gore Street, Cambridge.

While no clear right of reversion was included, Lechmere Point did retain the right to enter and remove certain structures if they were built on the land. In addition, the Lechmere Point Deed allowed the County to build certain dwelling houses on the Property, despite the restrictive language that the Property be used for building and maintaining a courthouse and jail and other buildings for County uses. When the language as a whole is read together, it appears likely that a court would find that a contract, and not a public trust, was created by the Lechmere Point Deed. See Opinion of the Justices, 369 at 984.

To the extent that there is ambiguity in the restriction, a court would likely find further support by virtue of the ambiguity for a determination that no public trust was created by the Lechmere Point Deed and that the restriction merely created a contract. "Although the '[t]he existence of a trust does not depend upon the terminology used,' ... absent ambiguity, courts must examine the language employed in the deed to determine whether a conveyance establishes a public trust." Memorial Association of Whitman, supra. If a court were to find that the ambiguous language, the right to construct certain structures on the Property and/or the right to enter the Property to remove certain structures resulted in a conclusion that the restriction created merely a contract and not a public trust, then G.L. c. 184 §28 and G.L. c.260 §31A would each act as a statute of limitation on the enforcement of the contractual rights set forth in the restriction, See Opinion of the Justices, at 987. Thus, even if there were an enforceable deed restriction, it would no longer be enforceable pursuant to G.L. c.184, §28. Finally, it is important to note that zoning principles encourage the reuse of pre-existing buildings. See e.g. McKenzie v. Zoning Board of Appeals of the Town of Wayland, 1990 WL 10092043 (Land Court No. 131524 (1990)), where the Land Court recognized that it does not serve the public to allow buildings to continue to deteriorate, and that it is the legislative policy as to nonconforming structures to allow them to be altered, reconstructed, extended or structurally changed so long as the nonconforming nature is not increased.

As noted above, there is no explicit provision for consideration of title issues provided in the Zoning Act or in the Ordinance relative to G.L. c. 40 §6 special permits. Given the above analysis regarding the validity and enforceability of the apparent deed restriction in this case, I believe the Planning Board would likely be found to have exceeded its authority if it were to make a determination regarding the validity of the apparent deed restriction, and whether such a restriction would prohibit the redevelopment of the Property.

IV. Mendes v. Board of Appeals of Barnstable Is Not Relevant to the Non-Conforming Status of the Sullivan Courthouse

The case of Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527 (1990) does not address the issue of governmental immunity. In Mendes, a business owner operated a construction business on a lot of land that was wholly within a residential zone. Unlike the use of the Property, the use in Mendes was never a permissible use, but was allowed under a series of variances. The town enacted a bylaw which precluded the issuance of further variances on the land due to its proximity to a highway. The property owner subsequently sought a special permit to increase the size of the existing non-conforming building or structure.

The Appeals Court found that the special permit process could not be used to expand the nonconforming use since the use had been allowed through variances. The Court stated: "[I]n view of the different approaches to the grant of a variance and a special permit, the former grudging and restricted, the latter anticipated and flexible, we do not think the Legislature intended in G.L. c. 40A, §6 to authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special permit." Mendes at 531 (citations omitted.)

There was no discussion in the Mendes case of the issues discussed in Durkin v. Board of Appeals of Falmouth, 21 Mass. App. Ct. 450 (1986) relating to governmental immunity. In Durkin, the Appeals Court held 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. Durkin at 452 (emphasis added.) Whereas in Mendes, the Court opined that "[f]or 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. It would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use. Variance procedures presuppose the prohibition of the use sought and operate as a safety valve to relieve an owner of real estate from the hardship of compliance with a zoning regulation resulting from particular physical characteristics that burden the real estate." Mendes at 531.

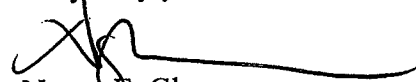
Given that the use in Mendes was authorized by a series of variances, it is distinguishable from Durkin because the governmental use at issue in Durkin was determined by the court to be "nonconforming in fact" due to its governmental immunity, which would not be true of a use authorized by variance. Therefore, I believe that the Mendes case is inapposite and does not change my prior opinion.

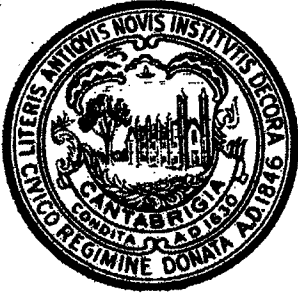
V. Conclusion

For the reasons stated above, it is my opinion that the Planning Board would likely be determined by a court to have exceeded its authority if it were to attempt to determine the validity of the apparent deed restriction, to consider the apparent deed restriction, or to base its special permit decision upon the apparent deed restriction. In addition, even if the Planning Board were to consider the apparent deed restriction, it is unlikely that the apparent deed restriction would be found by a court to be either a public trust or, if it were determined to be a restriction based in contract, that it was still enforceable.

Finally, having reviewed the Mendes case and the submissions of neighbors and the applicant, it is my opinion that the Mendes case is inapposite and has no bearing upon and does not change my May 5, 2014 opinion.

Very truly yours,


Nancy E. Glowa



CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 344 BROADWAY, CAMBRIDGE, MA 02139

Notice of Extension of Time

Case No: 288

Address: 40 Thorndike Street

Applicant: LMP GP Holdings c/o Leggat McCall Properties

Owner: Commonwealth of Massachusetts, Division of Capital Asset Management and Maintenance

Application Date: December 12, 2013

Public Hearing Dates: January 7, 2014, April 29, 2014, July 29, 2014 and September 30, 2014

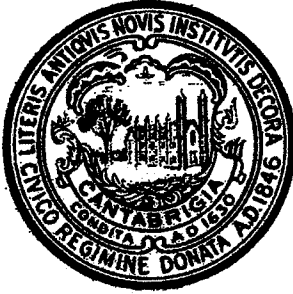
Application: Special Permit application to convert existing non conforming structure (former Sullivan Courthouse) to a mixed use office building containing ground floor retail uses, twenty four dwelling units, and below grade parking, seeking a Project Review Special Permit (Section 19.20), Special Permit for Alteration of Nonconforming Structure (Section 8.22.2.a), Special Permit for Conversion of Nonresidential Structure to Residential Use (Section 5.28.2).

At the General Business meeting of September 30, 2014, the Planning Board voted an extension of time for the issuance of a decision by the Planning Board to October 30, 2014 as outlined in the attached letter of October 1, 2014 from Robert M. Dickey, Leggat McCall Properties, representing the applicant.

Authorized Representative to the Planning Board

For further information, please contact Liza Paden at 617 354 5640 or lpaden@cambridgema.gov.

2014 OCT 8 AM 11 49
OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS



CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 344 BROADWAY, CAMBRIDGE, MA 02139

Planning Board Waiver Form

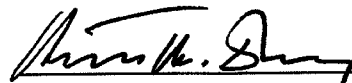
Date: 10/1/14

Cambridge Planning Board
Community Development Department
344 Broadway
Cambridge, MA 02139

RE: Case # 288.

Address: 40 Thorndike Street

LMP GP Holdings, LLP c/o Leggat McCall Properties, Petitioner, hereby waives the Petitioner's right to a Decision by the Planning Board on the above reference Case #288, within the statutory time period as required by Section 15 of the Zoning Act of the Commonwealth of Massachusetts, Massachusetts General Laws, Chapter 40A and hereby agrees to extend such time period to file the Final Decision with the City Clerk to October 30, 2014.

 Signature
ROBERT M. DICKEY



CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 344 BROADWAY, CAMBRIDGE, MA 02139

Notice of Extension of Time

Case No: #288

Address: 40 Thorndike Street

Applicant/Owner: LMP GP Holdings LLC c/o Leggat McCall Properties LLC

Application Date: December 12, 2013

Public Hearing Date: January 7, 2014

Application: Special Permit application to convert existing non conforming structure (former Sullivan Courthouse) to a mixed use office building containing ground floor retail uses, twenty four dwelling units, and below grade parking, seeking Project Review Special Permit (Section 19.20), Special Permit for Alteration of Nonconforming Structure (Section 8.22.2-a), Special Permit for Conversion of Nonresidential Structure to Residential Use (Section 5.28.2).

At the General Business meeting of June 17, 2014, the Planning Board voted an extension of time for the issuance of a decision by the Planning Board to August 15, 2014 as outlined in the attached letter of June 16, 2014 from James J Rafferty, representing the applicant.

The time for decision had been previously extended to May 1, 2014 (granted March 4, 2014), and subsequently extended to June 20, 2014 (granted April 29, 2014).

Jeffrey C. Roberts

Authorized Representative of the Planning Board: Jeffrey C. Roberts

For further information, please contact Liza Paden at (617) 349-4647 or lpaden@cambridgema.gov.

2014 JUN 19 PM 2 54
OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

ADAMS & RAFFERTY
ATTORNEYS AT LAW
A Professional Association *
675 Massachusetts Avenue
Cambridge, MA 02139

James J. Rafferty, P.C.
jrafferty@adamsrafferty.com

Telephone (617) 492-4100
Fax (617) 492-3131

June 16, 2014

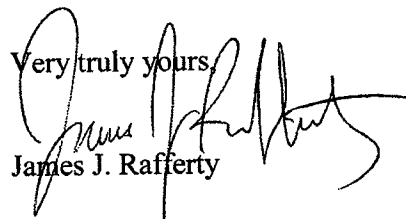
Liza Paden
Cambridge Community Development
344 Broadway
Cambridge MA 02139

**Re: Leggat McCall Properties
Planning Board Case # 288**

Dear Ms. Paden:

Please be advised that the applicant in the above-captioned matter assents to an extension of time for the issuance of a decision by the Planning Board to August 15, 2014.

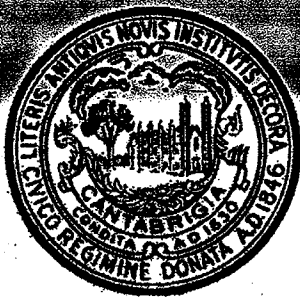
Thank you for your cooperation and assistance.

Very truly yours,

James J. Rafferty

JJR/pwc

cc: Robert Dickey, Leggat McCall

**not a partnership*



CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 344 BROADWAY, CAMBRIDGE, MA 02139

Notice of Extension of Time

Case No: 288

Address: 40 Thorndike Street

Applicant: LMP GP Holdings c/o Leggat McCall Properties

Owner: Commonwealth of Massachusetts, Division of Capital Asset Management and Maintenance

Application Date: December 12, 2013

Public Hearing Date: January 7, 2014, April 29, 2014

Application: Special Permit application to convert existing non conforming Courthouse Structure to a mixed use office building containing ground floor retail uses, twenty four dwelling units, and below grade parking.

At the General Business meeting of April 29, 2014, the Planning Board voted an extension of time for the issuance of a decision by the Planning Board to June 20, 2014 as outlined in the attached letter of April 23, 2014 from James J Rafferty, representing the applicant.

Authorized Representative to the Planning Board

For further information, please contact Liza Paden at 617 354 5640 or lpaden@cambridgema.gov.

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OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

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jrafferty@adamsrafferty.com

Telephone (617) 492-4100
Fax (617) 492-3131

April 23, 2014

Liza Paden
Cambridge Community Development
344 Broadway
Cambridge MA 02139

mtm: SC
TS
all y from

Re: Leggat McCall Properties
Planning Board Case # 288

Dear Ms. Paden:

Please be advised that the applicant in the above-captioned matter assents to an extension of time for the issuance of a decision by the Planning Board to June 20, 2014.

Thank you for your cooperation and assistance.

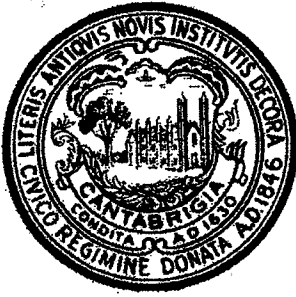
Very truly yours,


James J. Rafferty

JJR/pwc

cc: Robert Dickey, Leggat McCall

**not a partnership*



CITY OF CAMBRIDGE, MASSACHUSETTS

PLANNING BOARD

CITY HALL ANNEX, 344 BROADWAY, CAMBRIDGE, MA 02139

Notice of Extension of Time

Case No: 288

Address: 40 Thorndike Street

Applicant: LMP GP Holdings c/o Leggat McCall Properties

Owner: Commonwealth of Massachusetts, Division of Capital Asset Management and Maintenance

Application Date: December 12, 2013

Public Hearing Date: January 7, 2014

Application: Special Permit application to convert existing non conforming Courthouse Structure to a mixed use office building containing ground floor retail uses, twenty four dwelling units, and below grade parking.

At the General Business meeting of March 4, 2014, the Planning Board voted an extension of time for the issuance of a decision by the Planning Board to May 1, 2014 as outlined in the attached letter of March 3, 2014 from James J Rafferty, representing the applicant.

Authorized Representative to the Planning Board

For further information, please contact Liza Paden at 617 354 5640 or lpaden@cambridgema.gov.

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OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

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Telephone (617) 492-4100
Fax (617) 492-3131

March 3, 2014

Liza Paden
Cambridge Community Development
344 Broadway
Cambridge MA 02139

Re: Leggat McCall Properties
Planning Board Case # 288

Dear Ms. Paden:

Please be advised that the applicant in the above-captioned matter assents to an extension of time for the issuance of a decision by the Planning Board to May 1, 2014.

Thank you for your cooperation and assistance.

Very truly yours,


James J. Rafferty

JJR/pwc

cc: Robert Dickey, Leggat McCall

**not a partnership*