



CITY OF CAMBRIDGE
COMMUNITY DEVELOPMENT DEPARTMENT

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Community Development

To: Planning Board

From: CDD Staff

Date: July 23, 2014

Re: **PB #288 – 40 Thorndike Street Project Review (continuation)**

On July 29, the Planning Board will be hearing a continuation of case #288, a proposal to convert the former Sullivan Courthouse structure at 40 Thorndike Street to office, residential and retail use. This memo is intended to provide an overview of the case, some detail on the special permits being requested and guidance provided in the zoning, and some comments about the project as it is currently being presented.

Overview

The current building was constructed in the 1970s. Since it was built under the authority of the Commonwealth of Massachusetts for county functions including a courthouse and detention facility, it had immunity from applicable zoning limitations such as FAR. In the intervening time, the base zoning district (Business B) has not changed but the district requirements have changed such that the building is nonconforming in several ways.

As Middlesex County functions have been relocated in recent years, the Commonwealth entertained proposals from private interests to purchase the property. Last year, the Commonwealth entered into an agreement with Leggat-McCall Properties as the selected purchaser.

Leggat-McCall proposes to convert the building to a mix of uses containing primarily office with some complementary residential and retail uses. The proposal is seeking special permits from the Planning Board that fall into two major categories:

1. Alteration of a Nonconforming Structure (Sections 8.22.2 and 5.28.2)
2. Project Review – Urban Design and Transportation (Section 19.20)

Relevant guidance related to these special permits is discussed on the following pages. Additionally, the City Solicitor, responding to requests from the City Council and Planning Board, has prepared a legal opinion on the building's status as a non-conforming building. That opinion is attached.

Since the Board last heard this case on April 29, a community working group has met several times to discuss the proposal with the Applicant. Subsequently, a revised design has been developed and submitted for the Board's review. Many of the changes made since the last presentation to the Board are in response to issues raised within that working group.

Alteration of a Non-Conforming Structure

Relevant Guidance

Nonconforming Structures (Section 8.20)

- *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. (Section 8.22.2)*
- *In an Office, Business, or Industrial District the Board of Zoning Appeal [in this case, the Planning Board is the granting authority pursuant to Section 10.45] 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.*

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

- *Intent (5.28.2):*
 - To allow the economic reuse of buildings that may be substantially out of compliance with the dimensional requirements of the zoning district within which they are located, especially as they are converted to residential use.*
 - To encourage the preservation of buildings of historic or cultural significance by providing opportunities for reuse of the structures.*
 - To establish a framework of development standards and criteria within which existing non-residential buildings that are out of scale and character with surrounding residential uses can be converted to housing of an appropriate style and density while limiting potential negative impacts on neighbors.*
- *Generally Applicable Criteria (5.28.28.1):*
 - 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.*

- (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.*
- *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 (5.28.28.2):*
 - (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.*
 - (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.*
 - (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.*

Staff Comments

Evaluating this proposal as the alteration and conversion of an existing building is one of the more challenging aspects of this case. In many cases where conversions appear before the Planning Board or other agencies, the underlying implication is that the building, despite not meeting all of the zoning requirements, is still part of the historic fabric of the city and is often deemed worthy of preservation. Furthermore, Cambridge's sustainability goals support reusing and improving existing structures to avoid the expense of energy and materials required to construct new buildings.

In this case, many people have suggested that the building has for many years been disruptive to the fabric of the surrounding neighborhood and would not advocate for its preservation as a historic resource. It is also the case that the building will require extensive remediation and rehabilitation to bring it to usable condition. Therefore, it requires more focused thought to address the question of what it means for an alteration and conversion to be more or less "detrimental" to the surrounding area than the existing condition.

Many people have commented on the negative aspects of the existing building. These include the building height and massing, which causes shadow, wind, and obstruction of views and sky, along with the overall “brutalist” architectural style which many find to be unattractive and out of character with other buildings nearby. The ground floor design was not pedestrian-friendly and resulted in a desolate, unactivated streetfront. Traffic and parking on neighborhood streets were also impacted in various ways by the operation of the facility. Noise was noted as an issue, particularly from the detention facility at the top of the building.

The standard in Section 8.22.2 requires the Planning Board to compare the proposed project to the existing use. Part of this comparison involves evaluating the efforts made by the Applicant to mitigate the negative impacts of the existing building. These include measures to mitigate impacts from shadows, wind, light, noise, traffic, vehicular access and egress, and aesthetic character, among other factors. The urban design and transportation criteria applied in the Project Review Special Permit review, discussed further below, provide guidance in these areas. The scale of the project would suggest that significant measures should be employed to reduce those impacts.

This is an unusual case where the implication of the term “existing use” should also be carefully considered. In typical cases, the alternatives to the proposed conversion might be the continuation of the existing use or the demolition and reconstruction of the site. In this case, the existing public use will not continue. Due to the remediation needs of the building, a conforming use could not occupy the building as-of-right without significant rehabilitation. Also due to the remediation needs, the demolition and site preparation required to allow for new construction would be prohibitively expensive. So in a practical sense, “existing use” is an uncertain concept because allowing the building to remain as it exists, without any alteration, would likely result in a building that would remain vacant for some unknown length of time until a feasible alternative could be devised, and at this stage there is no clear sense of what that alternative would be.

Finally, while the residential component is only a small part of the project and the relief sought under Section 5.28.2 relates only to yards and private open space, the Board should still evaluate the considerations applied to other conversions of non-residential buildings to residential use, including privacy impacts on abutters, the character of the residential units and their fit within the neighborhood, and amenities (indoor and outdoor) provided for residents of the building.

Project Review – Urban Design (Section 19.25.2)

Urban design review relies on the Citywide Urban Design Objectives in Section 19.30 of the Zoning Ordinance along with plans and guidelines created for specific areas. This project site falls under the purview of the Eastern Cambridge Design Guidelines, created as part of the Eastern Cambridge Planning Study (ECaPS) in 2003. In the context of that plan, this site is in a “Transition Area” between major commercial and residential centers.

The relevant objectives and guidelines are summarized starting on page 9. In many ways the Eastern Cambridge guidelines repeat or strengthen the citywide objectives so there is considerable overlap. In both cases, the intent is not to require every project to meet every guideline, but to consider them holistically and to decide, on the whole, whether the project is consistent with the goals.

Below is a brief commentary by staff identifying how different aspects of the project relate to the applicable criteria. These comments supplement the comments made in Roger Boothe's communication from earlier this year and reflect some of the recent changes that were made to the design.

Staff Comments – Development Program

The overall program is interesting because it combines many of the uses that would be expected in a multi-building mixed-use development – office, housing, retail, community space and open space – all within a single building site. Both the citywide and Eastern Cambridge objectives encourage mixed-use where allowed in order to contribute to the liveliness of the area throughout the day and week.

The provision of housing units helps to serve the citywide and area objectives of balancing commercial development with residential, although the proposed amount of housing (about 5% of the project) is small relative to the amount of commercial space. Most residential units are “loft” style (similar to a studio layout, with taller ceilings) with some two-bedroom units provided. It is worth considering whether the number and style of units satisfactorily address the citywide goal to provide a range of housing types, including larger units for families.

The provision of retail and community uses at the ground floor, with a central lobby, is another aspect of the project that responds positively to the citywide and Eastern Cambridge guidelines.

Staff Comments – Site Design

The publicly accessible open space at the ground floor is a positive aspect of the project that has been significantly improved since the previous design, reflecting comments from community members and Board members that the previous design felt disconnected from the public realm. Most of the open space is now provided at-grade with better-defined spaces that can be enjoyed for various passive activities. Outdoor space associated with retail uses is still provided. The recommendation made by the Traffic, Parking and Transportation Department to improve and maintain the open space on the Second Street side of the municipal garage helps to support the Eastern Cambridge goal of providing multiple interconnected open spaces. There does not appear to be private open space or common areas for residents of the building, which is a citywide and Eastern Cambridge objective, although the ground-level space will be available to them.

The project promotes greater pedestrian and bicycle connectivity by creating two entrances to the lobby of the building and additional outside entrances for retail establishments. The pedestrian environment for all passersby will be enhanced by street trees and reconstruction of sidewalks, ramps and crosswalks where needed, improving connections to the river and other neighborhood amenities. The provision of parking below-grade also adheres to the guidelines for pedestrian-friendly development.

The long-term and short-term bicycle parking are provided per the recent zoning requirements, although some outdoor bicycle parking on the Second Street side is located somewhat awkwardly near the loading area, which may require attention to ensure that conflicts are avoided. The addition of a Hubway Station is an important benefit to the project, because it will support alternative modes of transportation for building occupants as well as providing service to the general public.

Loading areas are accessed off of Second Street, the side with the least potential traffic impact. The design treatment is intended to mitigate the “blank wall” effect along that side, which the Planning Board should carefully evaluate to decide whether those efforts are satisfactory. Operationally, further attention may need to be paid to this section of Second Street by City departments to make ensure that it will accommodate the anticipated level of truck service, in terms of its width, its surface condition, and potential conflicts with parking or other traffic activity.

Staff Comments – Building Design

The most challenging aspects of this urban design review relate to scale and massing, which suffer from the large “slab” floorplate, height, and unattractive design of the existing building overall. On a positive note, the building does have a “base-middle-top” expression which responds positively to the Eastern Cambridge guidelines. However, the expanse of the building mass at street level, and the height of the building relative to the surrounding area, both contrast with the objectives for Transition Areas in the Eastern Cambridge plan.

The previous and revised designs both take advantage of the different expressions of the building at different heights. Roger Boothe’s previous memo comments on how the base portion of the building is designed to better reflect the surrounding context in scale, rhythm and character, which responds positively to the Eastern Cambridge guidelines and is a dramatic improvement over the existing condition. The project also takes advantage of the ability to define a lower cornice line on the “podium” element to help shield the mass of the “tower” part of the building from up close. The previous memo questioned whether the podium façade could be treated in a less uniform way given the block-long length of the building, which could be discussed by the Board.

The arrangement of uses follows the design guidelines by providing residential frontage facing the neighborhood to the west, less attractive uses such as vehicle access and loading facing the parking garage to the east, and an enhanced entry design on Thorndike Street facing the historic courthouse complex. The commercial frontage facing the residential uses along Spring Street is a potential concern, but it is mitigated by the provision of open space on that side.

Since the last review, many changes have been made to the architecture of the “tower” element of the building. These changes were in response to concerns that the previous glass design, intended to mitigate the visual impact of the building mass on the sky, was nevertheless out of character with the surrounding context. Two floors have been removed from the top of the building and a more distinct cornice line has been established. The revised façade design maintains a modern style but incorporates a terra cotta material meant to evoke the materials palette of surrounding historic buildings and provide a visual pattern and rhythm that relates to the surrounding context. The mechanical penthouse also looks to be improved, although further visual details would be helpful. These changes help to support the goals of the Eastern Cambridge guidelines in terms of architectural style and character.

Staff Comments – Infrastructure/Environmental Impacts

In previous submittals, the Applicant presented information to the Board on a variety of environmental issues that could impact neighboring uses and the public realm, including light, wind, glare, noise and

shadow. In considering the proposal, the Board will need to feel confident that those concerns are mitigated to a satisfactory extent, and at the very least, not exacerbated by the proposed conversion.

As with all projects, the impacts of the project on water, wastewater, and stormwater management will be reviewed carefully by the Department of Public Works and the Water Department. Any required improvements to meet the City's standards will be made by the developer, and if the Planning Board grants a special permit, additional conditions can be included to be addressed further by City departments in more detail at the appropriate time.

Mechanical systems will be provided in an enclosed structure that is set back from the cornice line. Due to the nature of uses in the building, it does not appear to require as extensive an enclosure as might be found in modern research facilities. The project narrative indicates that any noise generated will comply with the Noise Ordinance requirements for residential districts.

According to the City's Green Building requirements, the project will be designed to a standard of LEED Silver or better. In other areas with comparably-scaled commercial development such as Kendall Square, the City has raised the standard to LEED Gold. According to the application's Green Building narrative, this project is designed to achieve LEED Gold with the possibility of meeting LEED Platinum. However, the project is not proposing to include on-site renewable energy and is seeking only some of the available LEED points for energy optimization, which are particular priorities for the City's climate goals.

Project Review – Transportation (Section 19.25.1)

Transportation issues are analyzed in the memo submitted by the Traffic, Parking and Transportation Department (TPT) in January. That analysis is meant to help the Board evaluate the traffic impacts identified in the Transportation Impact Study (TIS) along with requirements the Board may impose to mitigate adverse impacts. The relevant guidance regarding Traffic Impact Findings is copied below.

Relevant Guidance

19.25.1 ... *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 ...*

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 chart below provides a brief summary of the indicators and the mitigation recommended by TPT in their analysis of the original TIS. Because the proposal is now being reduced in size, the Applicant has

revised the trip generation analysis and its effects on the TIS indicators. A supplemental memo from TPT will include any comments related to the reduction in project size and revised TIS.

Traffic Impact Indicators	Exceedences Identified in TIS (Original Application)
Project vehicle trip generation	<ul style="list-style-type: none"> • Weekday daily trips • AM peak hour trips • PM peak hour trips
Change in level of service at intersections	None
Increased volume of trips on residential streets	None
Increase of length of vehicle queues at intersections	None
Lack of sufficient pedestrian and bicycle facilities	<ul style="list-style-type: none"> • Third Street/Thorndike Street (existing condition) • Third Street/Spring Street (existing condition) • Second Street/Spring Street (ped. LOS change A to B) • First Street/Spring Street (ped. LOS change B to C) • O'Brien Hwy/Land Blvd (existing condition)

Mitigation Measures	Recommendations by TPT
Transportation demand management (TDM) and traffic reduction measures	<ul style="list-style-type: none"> • PTDM Plan (as required by PTDM Ordinance) • TDM programs for residents including Charlie Card for new households, transportation coordinator and info center • Silver Level Hubway corporate membership for all tenants
Roadway, bicycle and pedestrian facilities improvements	<ul style="list-style-type: none"> • Install/maintain Hubway Station • Install/maintain benches at First/Otis EZRide stop • Improve pavement markings, ramps and sidewalks at all corners of site according to DPW standards
Safety	<ul style="list-style-type: none"> • Study crash data at Third/Spring, recommend improvements
Other	<ul style="list-style-type: none"> • Include bicycle repair station in building • Provide at least one electric vehicle charging station • Improve/maintain public space next to municipal garage on Second Street

Appendix: Urban Design Objectives and Criteria

Citywide Objective	Considerations
New projects should be responsive to the existing or anticipated pattern of development.	<ul style="list-style-type: none"> • Transition to lower-scale neighborhoods • Consistency with established streetscape • Compatibility with adjacent uses • Consideration of nearby historic buildings
Development should be pedestrian and bicycle-friendly, with a positive relationship to its surroundings.	<ul style="list-style-type: none"> • Inhabited ground floor spaces • Discouraged ground-floor parking • Windows on ground floor • Orienting entries to pedestrian pathways • Safe and convenient bicycle and pedestrian access
The building and site design should mitigate adverse environmental impacts of a development upon its neighbors.	<ul style="list-style-type: none"> • Location/impact of mechanical equipment • Location/impact of loading and trash handling • Stormwater management • Shadow impacts • Retaining walls, if provided • Building scale and wall treatment • Outdoor lighting • Tree protection (requires plan approved by City Arborist)
Projects should not overburden the City infrastructure services, including neighborhood roads, city water supply system, and sewer system.	<ul style="list-style-type: none"> • Water-conserving plumbing, stormwater management • Capacity/condition of water and wastewater service • Efficient design (LEED standards)
New construction should reinforce and enhance the complex urban aspects of Cambridge as it has developed historically.	<ul style="list-style-type: none"> • Institutional use focused on existing campuses • Mixed-use development (including retail) encouraged where allowed • Preservation of historic structures and environment • Provision of space for start-up companies, manufacturing activities
Expansion of the inventory of housing in the city is encouraged.	<ul style="list-style-type: none"> • Housing as a component of large, multi-building development • Affordable units exceeding zoning requirements, targeting units for middle-income families
Enhancement and expansion of open space amenities in the city should be incorporated into new development in the city.	<ul style="list-style-type: none"> • Publicly beneficial open space provided in large-parcel commercial development • Enhance/expand existing open space, complement existing pedestrian/bicycle networks • Provide wider range of activities

ECaPS Category	Relevant Guidelines
Goals (Transition Areas)	<ul style="list-style-type: none"> • Encourage new residential development and conversions of existing buildings to residential use but allow existing commercial uses to remain. • Use finely graduated heights to create transitions in scale from Kendall Square to residential neighborhoods. • Create better pedestrian and bicycle connections between residential neighborhoods, Kendall Square, Central Square, and the Charles River.
Built Form – Street-Level Uses and Design (Mixed-use blocks)	<ul style="list-style-type: none"> • Street-level façades should include active uses such as: <ul style="list-style-type: none"> ○ Residential entrances ○ shops, restaurants and cafés ○ Services for the public or for commercial offices such as fitness centers, cafeterias, daycare centers, etc. ○ Community spaces, such as exhibition or meeting space ○ Art exhibition space/display windows ○ Commercial lobbies and front doors • Office/R&D uses are discouraged from occupying extensive ground-floor frontage. • Major entrances should be located on public streets, at or near corners, and should relate well to crosswalks and pathways that lead to bus stops and transit stations. • Transparent materials and interior lighting should be used to maximize visibility of street level uses. • Blank walls should be avoided along all streets and walkways.
Built Form – Building Height and Orientation (Other Streets)	<ul style="list-style-type: none"> • If the prevailing height of surrounding buildings is 65 feet or less, establish a cornice line that matches the prevailing height of surrounding buildings. For additional height above the cornice line, provide a setback of at least 10 feet from the principal façade. • For retail and office uses, build to the lot line or provide small setbacks (5 to 15 feet) from the right-of-way for café seating, benches, or small open spaces. Setbacks used exclusively for ornamental landscaping are not permitted. • For residential uses, provide small setbacks (5 to 10 feet) for stoops, porches, and front gardens.
Built Form – Scale and Massing (Other Streets)	<ul style="list-style-type: none"> • For new development sites, the block size should be similar to the existing East Cambridge blocks. An attempt should be made to reduce the distance that pedestrians have to walk to a crosswalk in order to safely cross the street.

	<ul style="list-style-type: none"> • Buildings should avoid continuous massing longer than 100 feet facing residential streets and 200 feet facing mixed-use and retail streets. If massing extends beyond this length, it should be made permeable and visibly articulated as several smaller masses using different materials or colors, vertical breaks, bays, or other architectural elements. • In addition to the above limits, buildings should reflect a rhythm and variation appropriate to the urban context. For example, this can be achieved by expressing bay widths of 16 to 25 feet along residential streets and 25 to 50 feet along mixed-use and retail streets. • Buildings should have a clearly expressed base, middle, and top. This may be achieved through changes in material, fenestration, architectural detailing, or other elements. • Use variations in height and architectural elements such as parapets, cornices and other details to create interesting and varied rooflines and to clearly express the tops of buildings. • Emphasize corners using taller elements such as towers, turrets, and bays. • Taller buildings should be articulated to avoid a monolithic appearance: Taller buildings should be point towers instead of slabs, and should have smaller floor plates instead of larger floor plates.
<p>Built Form – Architectural Character</p>	<p>Residential</p> <ul style="list-style-type: none"> • Create varied architecture and avoid flat facades by using bays, balconies, porches, stoops, and other projecting elements. • Maximize the number of windows facing public streets to increase safety. <p>Commercial</p> <ul style="list-style-type: none"> • Create varied architecture and avoid flat facades by using recessed or projected entryways, bays, canopies, awnings, and other architectural elements. • Vary the architecture of individual buildings to create architecturally diverse districts. • Where buildings are set back at upper stories, lower roofs may be used as balconies, balustrades, and gardens.
<p>Built Form – Environmental Guidelines</p>	<ul style="list-style-type: none"> • Design buildings to use natural resources and energy resources efficiently in construction, maintenance, and long-term operation of the building. Buildings on a lot should be sited to allow construction on adjacent lots to do the same. Compliance

	<p>with Leadership in Energy and Environmental Design (LEED) certification standards and other evolving environmental efficiency standards is encouraged.</p> <ul style="list-style-type: none"> • Rooftop mechanical equipment should be sited and shielded to protect neighboring uses from noise impacts.
<p>Built Form – Parking</p>	<ul style="list-style-type: none"> • While underground parking is preferable everywhere, if above ground parking is to be built it should be designed so as not to be visible from public streets or pathways. Above ground structured parking should be lined with active uses (shops, cafes, etc.) along major public streets, or with housing units along residential streets. • Locate vehicular parking entrances on side streets and alleys and provide safe pedestrian access from public streets. • All parking garages must provide direct pedestrian access to the street. • The primary pedestrian exit/access to all garages serving nonresidential uses should be to the street or a public area. • Design and locate lighting fixtures in surface parking lots and garages to enhance safety while minimizing light spillover onto adjacent properties.
<p>Public Realm – Open Space</p>	<ul style="list-style-type: none"> • The provision of open space of diverse sizes and use is encouraged to enhance the public environment in the study area. • The provision of interconnected series of open spaces is encouraged to provide connections to neighborhoods and to encourage pedestrian movement. • Where major new parks are required by zoning, provide programmed, multi-use open space for both recreational and cultural activities. • Locate new open spaces to create linkages and connect to existing parks and open spaces, where possible.
<p>Public Realm – Streets and Sidewalks</p>	<ul style="list-style-type: none"> • Use streetscape elements such as trees, benches, signage, and lighting to support active pedestrian uses and to reinforce the character and identity of each district. • Design streets to encourage pedestrian and cycle activity, and to control vehicle speed in residential areas. • Where appropriate, establish, preserve and highlight views from public streets and spaces to important civic landmarks such as the Charles River cable-stayed bridge and the clock tower in Kendall Square.

	<ul style="list-style-type: none"> • In the design of new streets, provide sufficient pavement width to accommodate on-street parking where appropriate in order to provide short-term parking and to serve local retail. • In the design of new streets, pathways, and parks, provide pedestrian-scale lighting to enhance pedestrian safety. • Refer to the Cambridge Pedestrian Plan and the Cambridge Bicycle Plan for additional guidance on creating a safe and pleasant environment for pedestrians and bicyclists and for guidance on sidewalk width and street trees.
<p>Public Realm – Connections</p>	<ul style="list-style-type: none"> • Provide safe pedestrian and bicycle connections to future regional pathways (Grand Junction railroad, North Point path). • Provide strong pedestrian, bicycle and visual connections to the Charles River and public parks through view corridors, signage, and/or art installations. • Provide safe pedestrian and bicycle connections to existing and new bus stops and to transit stations including Kendall Square, Lechmere, Community College and North Station MBTA stations. In particular, direct access from the residential neighborhood south of Msgr. O’Brien Highway and Cambridge Street to the new T station, if relocated, is desirable. • Improve pedestrian, and bicycle connections to the Charles River, particularly across First Street.
<p>Public Realm – Transportation</p>	<p>Transit</p> <ul style="list-style-type: none"> • Preserve rights of way for future Urban Ring project. • Integrate retail and other public activities with any new transit stations. <p>Pedestrian</p> <ul style="list-style-type: none"> • Provide pedestrian crossings/phases at all major intersections. <p>Bicycle/other non-motorized vehicles</p> <ul style="list-style-type: none"> • Provide bicycle lanes on major streets. • Provide sheltered bicycle racks in all new commercial and multi-family residential buildings and in transit stations. • Provide bicycle racks along the street in retail areas.

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CITY OF CAMBRIDGE

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May 5, 2014

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

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

Dear Mr. Rossi:

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

I. Background of the Edward J. Sullivan Courthouse

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

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

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

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

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

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

II. Legal Analysis

A. The Courthouse is Currently Immune From Local Zoning Regulations

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

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

² Article 8, Section 8.22 of the Ordinance states: “As provided in Section 6, Chapter 40A, G.L. permits for the change, extension, or alteration of a pre-existing nonconforming structure or use may be granted as permitted in Subsections 8.22.1 and 8.22.2 below. Such a permit, either a building permit in the case of construction authorized in Section 8.22.1 or a special permit in the case of construction authorized in Section 8.22.2, may be granted only if the permit granting authority specified below finds that such change, extension or alteration will not be substantially more detrimental to the neighborhood than the existing nonconforming structure or use.”

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

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

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

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

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

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

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

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

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

2. The Durkin Case is Applicable Precedent

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

⁶ Section 6 provides in relevant part that: “[a] zoning ordinance or by-law shall not apply to structures or uses *lawfully in existence or lawfully begun*, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by Section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.... Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension, or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood (emphasis added).”

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

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

We are of the opinion that the board too narrowly interpreted the term nonconforming (with respect to uses of the locus) in appraising its powers under Section 1222 of the town's by-law. A use of the locus under a lease for a proper Federal purpose may have been immune from *application* of the town by-law. ... If in substance, however, a post office use was not a permitted use within the particular zoning district because *immune*, it still would have been a use of the locus forbidden by the by-law, and thus "nonconforming" in fact. This would have been so even though the by-law could not have been enforced against it because of the Federal immunity. If, in 1959, post office use could be regarded as a "municipal" use under the then existing zoning by-law, the use became nonconforming when in 1966 the zoning of the locus was changed to residential. If the use beginning in 1959 could then have been regarded as nonconforming, but immune because of the Federal use, it was a lawful use (citations omitted) (emphasis in original.)

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

Very truly yours,

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

Nancy E. Glowa
City Solicitor