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April 29, 2014

TO: Cambridge City Council
Cambridge Planning Board
City Solicitor Nancy Glowa

RE: Response to Attorney Healy

I have reviewed the correspondence of Attorney Martin R. Healy (the "Healy Letter") to Planning Board Chairman Hugh Russell and the members of the Board dated April 22, 2014, and I offer the following response.

Attorney Healy relies principally on the holding in *Durkin v. Bd. of Appeals of Falmouth*, 21 Mass. App. Ct. 450 (1986) to support his contention that "the Courthouse is a 'nonconforming' structure that was 'lawfully in existence' under Section 6 and is fully protected by Section 6 (and Cambridge's iteration of Section 6 in s. 8.00 of the CZO.)" Page 8 of the Healy Letter.

I warn again that *Durkin* does not stand for any proposition other than its limited holding that the former Falmouth post office became "'nonconforming' in fact" when it fell into Durkin's hands. This is not the same as a ruling that it became "nonconforming as a matter of law." In order to understand the limited ruling of the Appeals Court, it is necessary to dig deeper into the facts of the case. I have provided copies of the Appeals Court briefs of Mr. Durkin and the Falmouth Zoning Board of Appeals ("ZBA") to assist you in your investigation.

The Facts in *Durkin*

In 1959, a building permit was issued for a structure later leased by the owner to the U.S. Postal Service. No variance or special permit was requested or granted. *Durkin*, at p. 451 and n. 1. At the time, the property was located in an "AG" District. *Durkin* at n. 2. In the AG District, the Falmouth Zoning By-law allowed structures for:

> [a]ll municipal purposes of the town, county, or commonwealth, including administration of government. *Durkin*, at 451.

It is unclear whether in 1959 the building permit was issued because the use was allowed under

this provision in the AG District or whether the "it was assumed that the zoning bylaws could have no application to the Federal use of the locus...." *Id*; Brief of Durkin, at p. 4. In any event, the zoning for the locus was changed to Residential in 1966. *Durkin*, at 453. All municipal uses were prohibited. Brief of the ZBA, at pp. 5-6.

In 1984, Durkin bought the building without any contingencies because he believed (based, in part, on misinformation provided to him by the ZBA's clerk) that the property was zoned for business. *Durkin*, at 451. The post office was delayed in vacating the building, so he obtained a building permit to renovate the basement to begin his home decorating business. Brief of Durkin, p. viii. It was then that he learned that the property was, in fact, zoned Residential. The cure, he was informed by town officials, was to apply for a special permit pursuant to section 1222 of the by-law to change the post office use to his planned business use. Brief of Durkin, at p. ix; *Durkin*, at 451-52.

The ZBA rejected his application on jurisdictional grounds. The ZBA ruled that the prior post office use was not protected as a nonconforming use:

> Durkin does not possess a pre-existing non-conforming use; rather, Durkin possesses a use which was heretofore immune from zoning. Once that immunity dissipates, current zoning prevails. Brief of the ZBA, at p. 11.

However, the ZBA made a mistake. It failed in its decision to acknowledge that Durkin's property was zoned AG in 1959 (when the structure was built); instead, it assumed that the property was zoned Residential at the time. *Durkin*, at n.2. On summary judgment, the motion judge ruled for the ZBA without making any statement of reasons. *Durkin*, at p. 452. Durkin appealed.

In the appeal, the ZBA called the mistake "de minimis." Brief of the ZBA, at p. 15. To the contrary, it was the key to the ruling of the Appeals Court. The mistake caused the ZBA to ignore Durkin's principal argument. Durkin claimed that the use as a post office could have been lawfully commenced in 1959 under the provisions of the AG District zoning set forth above regarding "all municipal purposes of the town, county, or commonwealth, including administration of government." Brief of Durkin, at p. 4. If, in fact, this was the case, the post office use of the building was preexisting and lawful (as opposed to immune) in 1966 when the zoning changed to Residential.

The Ruling of the Appeals Court

With these facts understood, the ruling of the Appeals Court does not support the Healy Letter's conclusion. The Appeals Court held, at pp. 452-53:

> We are of 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. See e.g., Thanet Corp. v. Board of

> Adjustment of Princeton, 108 N.J. Super. 65, 66-67 (1969). 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. The use, so this record shows, has continued steadily since 1959, under a building permit then issued. (Emphasis added)

The end result was a remand. The Appeals Court sent it back to the ZBA "for wholly new consideration of Durkin's application (a) in view of the board's confusion in its decision now under review ***about the history of the zoning regulations applicable to the locus***, and (b) because of the board's unduly restrictive interpretation of what constitutes a nonconforming use in the circumstances here presented." (Emphasis added) *Id.* at 454.

Conclusion

If the Appeals Court believed that the former post office use created a preexisting lawful nonconforming use of the locus regardless of the reason the building permit was issued in 1959, **there would have been no need for the remand**. The Appeals Court could simply have ruled that the immunity in place for 25 years (from 1959) or 18 years (from 1966) was enough to create status as a lawful nonconforming use. Instead, there was a remand to reopen the circumstances of the issuance of the 1959 permit. Thus, *Durkin* is limited to "the circumstances here presented" in ruling that the use was "'nonconforming' in fact."

I have great respect and admiration for Judge Lombardi (*Currier v. Smith*) and Judge Kilborn (*Tsouvalas v. Danvers ZBA*), who ruled in the cases provided by Attorney Healy. However, I doubt they were presented with this information when they relied on *Durkin* in the Land Court.

Instead, I am reminded of Justice Kass' words in *Mendes v. Zoning Bd.of Appeals of Barnstable*, 28 Mass. App. Ct. 527, 531 (1990), in ruling that a use authorized by a variance cannot be considered a nonconforming use:

> For purposes of deciding whether a use is nonconforming within the meaning of G. L. c. 40A, Section 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.

Doesn't the same rationale apply here? Isn't immunity just as "sparingly granted" as a variance? Wouldn't granting nonconforming status serve as "launching pad" for expansion?

For the reasons set forth above and in my earlier memorandum dated April 9, 2014, I reiterate my earlier conclusion: "There is ... a strong argument that the Sullivan Building is not protected by G.L. c. 40A, s. 6 once it becomes privately held."

Thank you for your consideration.

cc: Atty. Healy (by hand)