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City Council
Planning Board
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

RE: Sullivan Building, East Cambridge

Dear Members:

Please be informed that I represent the James Green Condominium Association of 101 Third Street, Cambridge, Massachusetts, as well as other neighbors.

My clients have asked me to provide an opinion as to whether the Sullivan Building, once decommissioned, constitutes a prior lawful nonconforming structure.

1. Facts.

As I understand the facts, the construction of the Sullivan Building commenced circa 1965 and was initially undertaken by Middlesex County. At some point, ownership of the Sullivan Building was assumed by the Commonwealth. After serious concerns emerged with regard to asbestos and other problems, the use of the building was discontinued for courthouse purposes, and, later, as a detention facility. In 2012, the Sullivan Building was sold to Leggett McCall. Leggat McCall plans to transform the 22-story courthouse and detention center at 40 Thorndike St. into an office building geared toward high-tech firms.

The Sullivan Building is more than 280 feet in height, which is noncompliant with the 80 feet height limitation in the district. Leggatt McCall has applied for permits to modify the structure pursuant to Section 8.22 of the Cambridge Zoning Ordinance, which 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 the 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

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substantially more detrimental to the neighborhood than the existing nonconforming structure or use.

2. Opinion.

"Nonconforming structures" are governed by G.L. c. 40A, s. 6 of the Zoning Act. Cambridge's Section 8.22 is in harmony with the statute. The term "nonconforming structure" generally applies when a "preexisting structure ... does not meet setback or other dimensional requirements of the ordinance." Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, at p. 35 (1972). Structures not lawful when created are not nonconforming structures. *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972 (1985); *Cumberland Farms, Inc. v. Zoning Bd. Of Appeals of Walpole*, 61 Mass. App. Ct. 124, 128 n.9 (2004).

The Sullivan Building was constructed under the doctrine of government immunity or "supremacy" principles. The federal, state or county government may trump local regulations when its noncompliant structure its used for a governmental purpose.

However, when the government building is decommissioned, the status of the structure, once turned over to the private sector, is not necessarily that of a protected nonconforming structure. In *Building Inspector of Lancaster v. Sanderson*, the Supreme Judicial Court ruled that the defendant's acquisition of land formerly owned by the Commonwealth did not confer nonconforming status on that land for the purpose of expanding his private airport. This result is consistent with the holding in *Village on the Hill, Inc. v. Mass. Turnpike Authority*, 348 Mass. 107, 118 (1964). There, the SJC ruled that after the Authority "has conveyed in fee to private persons excess land formerly owned by it, such land does not remain exempt from zoning provisions because once owned by the authority."

Cases from other jurisdictions reach the same result. In *United Real Estate Ventures, Inc. v. Village of Key Biscayne*, 26 So. 3d 48, (2010), the District Court of Appeal of Florida, Third District, upheld a circuit court ruling regarding the status of the helipad built on former President Nixon's estate:

> The federal use of the helipad by President Nixon's administration was immune from enforcement by reason of the supremacy clause of the United States Constitution and was not conformed into a legal non-conforming use for private individuals when the federal government ceased to use the helipad and conveyed the property to a private third party. *See Alaska R.R. Corp. v. Native Village of Eklutna*, 43 P.3d 588 (Alaska 2002); *Nolan Bros. V. City of Royal Oak*, 219 Mich. App. 611, 557 N.W. 2d 925 (1996).

The *Key Biscayne, Eklutna,* and *Royal Oak* cases are attached for your convenience.

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3. Conclusion.

I do not interpret the ruling in *Durkin v. Bd. of Appeals of Falmouth*, 21 Mass. App. Ct. 450, 453 (1986), which called a former post office building turned over to private hands "nonconforming in fact," to be of much assistance in the current debate because (among other reasons) the Falmouth structure was ruled immune from zoning enforcement, not eligible for relief under G.L. c. 40A, s. 6.

There is instead a strong argument that the Sullivan Building is not protected by G.L. c. 40A, s. 6 once it becomes privately held. If that is the case, the renovation of the building is not eligible for a special permit under Section 8.22 of the Cambridge Zoning Ordinance. The Sullivan Building, like the structure in *Cumberland Farms*, infra, would be a violative structure beyond the statute of limitations for enforcement set forth in G.L. c. 40A, s. 7.

Thank you for your consideration.

Very truly yours,

Mark Bobrowski

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