



CITY OF CAMBRIDGE  
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300  
FAX. 349-4307

EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

RICHARD C. ROSSI  
Deputy City Manager

November 23, 1992

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 21, regarding an update on the reforming of the Zoning Ordinance in Article 8 vis a vis the Nichols Decision, please find attached a response received from Russell B. Higley, City Solicitor.

Very truly yours,

Robert W. Healy  
City Manager

RWH/mev  
attachment



# CITY OF CAMBRIDGE

Office of the City Solicitor  
City Hall

795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Tel. (617) 349-4121  
Fax. (617) 349-4307 4134

Russell B. Higley  
City Solicitor

Donald A. Drisdell  
Deputy City Solicitor

Michael C. Costello  
Assistant City Solicitor

Birge Albright  
Legal Counsel

Gail S. Gabriel  
Legal Counsel

92 NOV 17 AM 10:35  
OFFICE OF THE CITY SOLICITOR

Diane Wynshaw-Boris  
Legal Counsel

Laura H. Yager  
Legal Counsel

Linda A. Stamper  
Legal Counsel

Arthur J. Goldberg  
Legal Counsel

November 16, 1992

Mr. Robert W. Healy  
City Manger  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

RE : Council Order No. 18, dated November 2, 1992,  
RE : Update on the reforming of the Zoning  
Ordinance in Article 8 vis a vis the Nichols  
decision

Dear Mr. Healy,

The following is submitted in response to the above-referenced Council Order after consultation with the staff of the Community Development Department.

Enclosed please find proposed revisions to Article 8.000, Section 8.22, et seq. of the Zoning Ordinance which were submitted to the City Council on November 20, 1991. Also enclosed please find a **Memorandum**, submitted with the proposed revisions, which discusses the practical effects of the revisions.

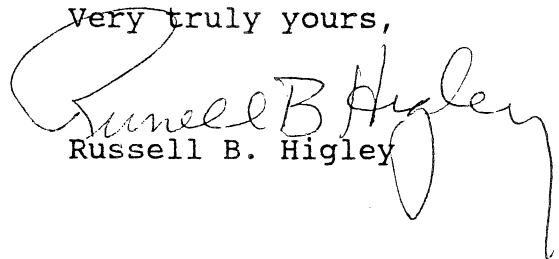
The Nichols decision remains effective as it applies to nonconforming properties. Therefore, the submitted revisions will have the same practical effects on those properties.

In regard to any further revisions, input from the City

Council would be required relative to specific areas where change in the submitted revisions is deemed to be necessary.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Russell B. Higley". The signature is written in black ink and is positioned above the typed name.

Russell B. Higley

encl.

Revision to Section 8.22

8.22 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 in the following cases. Such a permit 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 use.

8.22.1 The following alterations, reconstructions, extensions, and/or enlargements of nonconforming structures, which do not result in a use for a substantially different purpose of for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit by the Superintendent of Buildings.

- a. Any conforming construction to a structure located on a lot which is nonconforming due to its lot size or lot width, but which meets the requirements of section 5.21.1.
- b. Conforming construction where only the requirements of

Article 6.000 are nonconforming and where no change to those elements regulated by Article 6.000 are required or proposed.

- c. Any construction occurring entirely within a structure including structural changes, provided there is no increase or additional violation of Article 5.000.
- d. Relocation, enlargement or addition of windows, doors or similar openings to the exterior of a building provided the facade of the building upon which such relocation, enlargement or addition is occurring conforms to the yard requirements of Article 5.000, or faces a public street.
- e. Demolition of a structure or portions of a structure which reduces the extent of an existing nonconformity, or does not increase or effect any nonconformity, and which does not result in a further increase in the extent of any other violation or create a new violation.
- f. Conforming additions, under Article 5.000, to a structure not conforming to the requirements of Article 5.000 provided no nonconforming element or aspect of the nonconforming structure is extended

or increased and further provided that the nonconforming structure is not thereby increased in area or volume by more than ten (10) percent since the structure first became nonconforming.

g. Repair, reconstruction or replacement of any lawfully established non-conforming portions of a building including but not limited to porches, decks, balconies, bay windows and building additions, provided the repair, reconstruction or replacement does not exceed the original in foot print, volume, area or volume of the entire building.

\*\*\* h. Construction of a dormer or an addition to a nonconforming one or two family dwelling which will further violate the yard and height requirements of Article 5.000, but no other requirement of Article 5.000 including FAR, in the following cases:

1. A dormer or addition to the second story which does not extend beyond the existing first story of the structure.
2. A dormer on the third story no longer than 15 feet which does not extend beyond the existing second story not above the existing ridge line provided

the total linear length of all dormer on the third story of the building does not exceed fifteen (15) feet.

\*\*\* Section h paragraphs 1 and 2 were formally section 8.22 d paragraphs 1 and 2 of the ordinance except for the indicated changes.\*\*\*

\*\*\*\* 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.

- b. In an Office, Business or industrial district the Board of Zoning Appeal may grant a special permit for the issuance of a certificate of occupancy for the occupancy of an existing building designed and built for nonresidential use by any use permitted as of right in a Business or Industrial district in Article 4.000 of this Ordinance, provided such new use will be carried out entirely within the existing building and provided the off street parking and loading requirements in Article 6.000 for the district in which such building is located will not be further violated.
  
- c. In a Residence District the Board of Zoning Appeal may grant a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, but not the alteration or enlargement of a nonconforming use, provided any enlargement or alteration of such nonconforming 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 is located and provided such nonconforming structure will not be increased in are or volume by more than twenty-five (25) percent since it first began to be nonconforming.

8.22.3 Any alteration or enlargement or a nonconforming structure or of a nonconforming use not otherwise permitted in Section 8.22.1 and 8.22.2 above shall be a variance.

\*\*\*\* Sections 8.22.2 and 8.22.3 were formally sections 8.22 a, b, c, d, and e, except for those revisions so indicated. \*\*\*\*

November 20, 1991

MEMORANDUM

REVISIONS TO SECTION 8.22

The following memorandum is submitted in regard to the proposed revisions to section 8.22. Included in the following is a brief legal analysis, as well as illustrations of the practical effects of sections 8.22 a-g.

I. 8.22.1

The following alterations, reconstructions, extensions and/or structural changes, which do not result in a use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit form the Superintendent of Buildings.

The language contained in 8.22.1 which states, "....for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use...." mirrors the language contained in M.G.L. c.40A sec.6.

II. M.G.L.c. 40A sec. 6

Existing structures, uses or permits; certain subdivision plans;  
application of chapter

" Except as hereinafter provided, a zoning ordinance or by-

law shall not apply to structures or uses lawfully in existence or lawfully begun.....but shall apply to any change or substantial extension of such use.....to any reconstruction, extension or structural change of such structure.....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 ....."

III. Nichols v. Board of Zoning Appeal

The decision rendered by the Appeals Court of Massachusetts in the case of Nichols v. Board of Zoning Appeal has set a precedent affecting the way in which nonconforming properties must be treated under the Cambridge Zoning Ordinance. The effect of the Nichols decision will be altered by the proposed revisions to section 8.22.

The Nichols Case

Factual Background

The property contained a pre-existing nonconforming structure. The owner sought to perform alterations to the structure for the conversion of a garage for home office use. The proposed alterations were interior and minor, i.e. relocating a window.

Decision of the Court

The Appeals Court held that the owner must obtain a special permit for this intended construction and change of use. The Court applied the following language of section 8.11 of the Zoning Ordinance to these circumstances :

"This Ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or

structure or of land, to the extent that it was used at the time of the first publication of notice of public hearing.....but it shall apply.....to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent."

The Court found,

"[w]hen.....a nonconforming structure is altered to provide for a use different from the use prior to alteration.....the ordinance applies even if the new use is a permitted one."

The extent of the alterations necessitating resort to the Board of Zoning Appeal for relief is almost irrelevant in light of the fact that Nichols performed only minor changes. Furthermore, the change of use may be from one permitted use to another permitted use to trigger the application of section 8.11.

IV. Case Law Regarding "Substantially Different Manner"  
Language

1. Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990) pertains to a change in use.

The Court used the following factors to determine whether change or substantial extension of a nonconforming use has occurred:

1. whether current use reflects nature and purpose of prior use ;
2. whether there is a difference in quality or character, as

well as degree of use,

and ;

3. whether current use is different in kind in its effect on the neighborhood.

2. Board of Selectmen of Blackstone v. v. Tellestone, 4 Mass. App. Ct. 311 1976.

The character of a nonconforming use under factor 2, does not change solely by an increase in volume or because of expanded hours of operation or because equipment is modernized.

3. Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205, appeal after remand, 388 Mass. 1013 (1982).

Hotel was at one time full service resort hotel, providing lodging, meals and entertainment for overnight guests. In recent years the management has represented to the public that the hotel is one of the largest entertainment resort complexes on Cape Cod, containing three clubs. Court found that the current use of the hotel had an effect on the neighborhood which was different in kind from the effect of the prior use so that current operation of the hotel was no longer permissible.

4. Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890 (1980).

Court held that business activities on property constituted an impermissible extension of a nonconforming use established in 1963. A new and used truck dealership had been situated on the property. However, in 1975, the property was used exclusively for the

maintenance of service excavation vehicles, trucks, and other heavy equipment, which were left on the property in a disorganized manner. The Court concluded that such facts provided the basis for finding that the nature, purpose, quality and character and degree of use of the property were substantially different from the prevailing use in 1963. The Court further found, that the use was different in its effect upon the neighborhood.

V. EXAMPLES OF EFFECTS OF PROPOSED REVISIONS TO  
8.22 SECTIONS A-J

The following examples are provided to illustrate the practical effects of the proposed ordinance revisions. A number of these examples contain descriptions of actual properties where alterations were proposed following the rendering of the Nichols decision. All of the properties so noted obtained relief from the Board of Zoning Appeal prior to their alteration. The proposed revisions will nullify the need for such relief.

A) Example

Case of 32 Lee Street - The lot is of substandard size. The residence was built prior to the adoption of the current zoning ordinance. The proposed alterations were interior and conforming. The alterations were intended to convert the premises from a three to a two family dwelling.

B) Example

A two family residence conforming to all setback, lot size and lot width requirements, but does not have available parking. The owners seek to add a deck or a bathroom which involves conforming

construction.

C) Example

The total interior renovation of a single family residence which currently violates height or setback requirements.

D) Example

Case of 232 Brattle Street - The owners sought to widen the windows of the structure on all sides. One side of the property does not conform to the yard setback requirements.

E) Example

Case of Fairmont Street - The owner sought to remove an ell from a nonconforming single family dwelling. The nonconformity of the structure was due to set back and floor area. The removal makes the structure conforming for purposes of floor area and set back requirements.

F) Clarification and Illustration

If a structure is nonconforming because of setback requirements, that portion of the structure which causes the nonconformity may not be extended. For example, if the nonconformity is caused by the back wall of a structure, that portion may not be altered, unless it conforms to the requirements of Article 5.000, and does not increase the size of the structure by more than 10%.

G) Example

The property is nonconforming because of height requirements. The owner wishes to repair or replace a rotted deck within the footprint of the existing deck.

PETITION OF

*Repealing Zoning Ordinance Section 8.22*

Petition filed with the City Clerk November 23, 1992

(all hearings to be completed 65 days from In City Council date)

*7 days Nov.  
31 days Dec.  
27 days Jan*

*65 days = January 27, 1993*

In City Council November 23, 1992

Referred to the Planning Board for report November 23, 1992

Planning Board Hearing \_\_\_\_\_

(CITY COUNCIL must act within 90 days of the ORDINANCE COMMITTEE hearing which would be \_\_\_\_\_.)

City Council hearing published \_\_\_\_\_ on \_\_\_\_\_

and \_\_\_\_\_

Hearing before the Ordinance Committee \_\_\_\_\_

Reported to the City Council \_\_\_\_\_

Passed to a second reading on \_\_\_\_\_

published in \_\_\_\_\_ on \_\_\_\_\_

Planning Board report received on \_\_\_\_\_

Ready for ordination on \_\_\_\_\_

Passed to be ordained on \_\_\_\_\_

published in \_\_\_\_\_ on \_\_\_\_\_

COMPLETION DATE \_\_\_\_\_

*1/5/93 - Placed on file due to hearing  
not held in requested time.  
see 1/11/93 for repelling*

4.



CITY OF CAMBRIDGE  
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300  
FAX. 349-4307

EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

RICHARD C. ROSSI  
Deputy City Manager

November 23, 1992

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 21, regarding an update on the reforming of the Zoning Ordinance in Article 8 vis a vis the Nichols Decision, please find attached a response received from Russell B. Higley, City Solicitor.

Very truly yours,

Robert W. Healy  
City Manager

RWH/mev  
attachment



# CITY OF CAMBRIDGE

Office of the City Solicitor  
City Hall

795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Tel. (617) 349-4121

Fax. (617) 349-~~4307~~ 4134

Russell B. Higley  
City Solicitor

Donald A. Drisdell  
Deputy City Solicitor

Michael C. Costello  
Assistant City Solicitor

Birge Albright  
Legal Counsel

Gail S. Gabriel  
Legal Counsel

92 NOV 17 AM 10:35  
OFFICE OF THE CITY MANAGER  
Diane Wynshaw-Boris  
Legal Counsel

Laura H. Yager  
Legal Counsel

Linda A. Stamper  
Legal Counsel

Arthur J. Goldberg  
Legal Counsel

November 16, 1992

Mr. Robert W. Healy  
City Manger  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

**RE : Council Order No. 18, dated November 2, 1992,  
RE : Update on the reforming of the Zoning  
Ordinance in Article 8 vis a vis the Nichols  
decision**

Dear Mr. Healy,

The following is submitted in response to the above-referenced Council Order after consultation with the staff of the Community Development Department.

Enclosed please find proposed revisions to Article 8.000, Section 8.22, et seq. of the Zoning Ordinance which were submitted to the City Council on November 20, 1991. Also enclosed please find a **Memorandum**, submitted with the proposed revisions, which discusses the practical effects of the revisions.

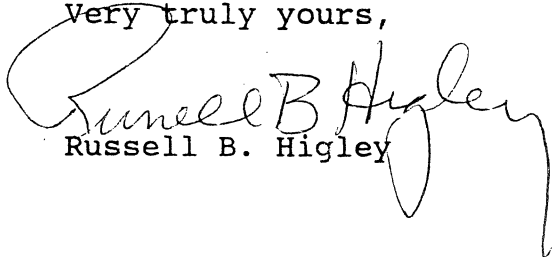
The Nichols decision remains effective as it applies to nonconforming properties. Therefore, the submitted revisions will have the same practical effects on those properties.

In regard to any further revisions, input from the City

Council would be required relative to specific areas where change in the submitted revisions is deemed to be necessary.

Thank you for your attention to this matter.

Very truly yours,



Russell B. Higley

encl.

Revision to Section 8.22

8.22 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 in the following cases. Such a permit 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 use.

8.22.1 The following alterations, reconstructions, extensions, and/or enlargements of nonconforming structures, which do not result in a use for a substantially different purpose of for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit by the Superintendent of Buildings.

a. Any conforming construction to a structure located on a lot which is nonconforming due to its lot size or lot width, but which meets the requirements of section 5.21.1.

b. Conforming construction where only the requirements of

Article 6.000 are nonconforming and where no change to those elements regulated by Article 6.000 are required or proposed.

- c. Any construction occurring entirely within a structure including structural changes, provided there is no increase or additional violation of Article 5.000.
- d. Relocation, enlargement or addition of windows, doors or similar openings to the exterior of a building provided the facade of the building upon which such relocation, enlargement or addition is occurring conforms to the yard requirements of Article 5.000, or faces a public street.
- e. Demolition of a structure or portions of a structure which reduces the extent of an existing nonconformity, or does not increase or effect any nonconformity, and which does not result in a further increase in the extent of any other violation or create a new violation.
- f. Conforming additions, under Article 5.000, to a structure not conforming to the requirements of Article 5.000 provided no nonconforming element or aspect of the nonconforming structure is extended

or increased and further provided that the nonconforming structure is not thereby increased in area or volume by more than ten (10) percent since the structure first became nonconforming.

- g. Repair, reconstruction or replacement of any lawfully established non-conforming portions of a building including but not limited to porches, decks, balconies, bay windows and building additions, provided the repair, reconstruction or replacement does not exceed the original in foot print, volume, area or volume of the entire building.

\*\*\* h. Construction of a dormer or an addition to a nonconforming one or two family dwelling which will further violate the yard and height requirements of Article 5.000, but no other requirement of Article 5.000 including FAR, in the following cases:

1. A dormer or addition to the second story which does not extend beyond the existing first story of the structure.
2. A dormer on the third story no longer than 15 feet which does not extend beyond the existing second story not above the existing ridge line provided

the total linear length of all dormer on the third story of the building does not exceed fifteen (15) feet.

\*\*\* Section h paragraphs 1 and 2 were formally section 8.22 d paragraphs 1 and 2 of the ordinance except for the indicated changes.\*\*\*

\*\*\*\* 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.

- b. In an Office, Business or industrial district the Board of Zoning Appeal may grant a special permit for the issuance of a certificate of occupancy for the occupancy of an existing building designed and built for nonresidential use by any use permitted as of right in a Business or Industrial district in Article 4.000 of this Ordinance, provided such new use will be carried out entirely within the existing building and provided the off street parking and loading requirements in Article 6.000 for the district in which such building is located will not be further violated.
  
- c. In a Residence District the Board of Zoning Appeal may grant a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, but not the alteration or enlargement of a nonconforming use, provided any enlargement or alteration of such nonconforming 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 is located and provided such nonconforming structure will not be increased in area or volume by more than twenty-five (25) percent since it first began to be nonconforming.

8.22.3 Any alteration or enlargement or a nonconforming structure or of a nonconforming use not otherwise permitted in Section 8.22.1 and 8.22.2 above shall be a variance.

\*\*\*\* Sections 8.22.2 and 8.22.3 were formally sections 8.22 a, b, c, d, and e, except for those revisions so indicated. \*\*\*\*

November 20, 1991

MEMORANDUM

REVISIONS TO SECTION 8.22

The following memorandum is submitted in regard to the proposed revisions to section 8.22. Included in the following is a brief legal analysis, as well as illustrations of the practical effects of sections 8.22 a-g.

I. 8.22.1

The following alterations, reconstructions, extensions and/or structural changes, which do not result in a use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit form the Superintendent of Buildings.

The language contained in 8.22.1 which states, "....for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use...." mirrors the language contained in M.G.L. c.40A sec.6.

II. M.G.L.c. 40A sec. 6

Existing structures, uses or permits; certain subdivision plans;  
application of chapter

" Except as hereinafter provided, a zoning ordinance or by-

law shall not apply to structures or uses lawfully in existence or lawfully begun.....but shall apply to any change or substantial extension of such use.....to any reconstruction, extension or structural change of such structure.....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 ....."

### III. Nichols v. Board of Zoning Appeal

The decision rendered by the Appeals Court of Massachusetts in the case of Nichols v. Board of Zoning Appeal has set a precedent affecting the way in which nonconforming properties must be treated under the Cambridge Zoning Ordinance. The effect of the Nichols decision will be altered by the proposed revisions to section 8.22.

#### The Nichols Case

##### Factual Background

The property contained a pre-existing nonconforming structure. The owner sought to perform alterations to the structure for the conversion of a garage for home office use. The proposed alterations were interior and minor, i.e. relocating a window.

##### Decision of the Court

The Appeals Court held that the owner must obtain a special permit for this intended construction and change of use. The Court applied the following language of section 8.11 of the Zoning Ordinance to these circumstances :

"This Ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or

structure or of land, to the extent that it was used at the time of the first publication of notice of public hearing.....but it shall apply.....to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent."

The Court found,

"[w]hen.....a nonconforming structure is altered to provide for a use different from the use prior to alteration.....the ordinance applies even if the new use is a permitted one."

The extent of the alterations necessitating resort to the Board of Zoning Appeal for relief is almost irrelevant in light of the fact that Nichols performed only minor changes. Furthermore, the change of use may be from one permitted use to another permitted use to trigger the application of section 8.11.

IV. Case Law Regarding "Substantially Different Manner" Language

1. Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990) pertains to a change in use.

The Court used the following factors to determine whether change or substantial extension of a nonconforming use has occurred:

1. whether current use reflects nature and purpose of prior use ;
2. whether there is a difference in quality or character, as

well as degree of use,

and ;

3. whether current use is different in kind in its effect on the neighborhood.

2. Board of Selectmen of Blackstone v. v. Tellestone, 4 Mass. App. Ct. 311 1976.

The character of a nonconforming use under factor 2, does not change solely by an increase in volume or because of expanded hours of operation or because equipment is modernized.

3. Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205, appeal after remand, 388 Mass. 1013 (1982).

Hotel was at one time full service resort hotel, providing lodging, meals and entertainment for overnight guests. In recent years the management has represented to the public that the hotel is one of the largest entertainment resort complexes on Cape Cod, containing three clubs. Court found that the current use of the hotel had an effect on the neighborhood which was different in kind from the effect of the prior use so that current operation of the hotel was no longer permissible.

4. Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890 (1980).

Court held that business activities on property constituted an impermissible extension of a nonconforming use established in 1963. A new and used truck dealership had been situated on the property. However, in 1975, the property was used exclusively for the

maintenance of service excavation vehicles, trucks, and other heavy equipment, which were left on the property in a disorganized manner. The Court concluded that such facts provided the basis for finding that the nature, purpose, quality and character and degree of use of the property were substantially different from the prevailing use in 1963. The Court further found, that the use was different in its effect upon the neighborhood.

V. EXAMPLES OF EFFECTS OF PROPOSED REVISIONS TO  
8.22 SECTIONS A-J

The following examples are provided to illustrate the practical effects of the proposed ordinance revisions. A number of these examples contain descriptions of actual properties where alterations were proposed following the rendering of the Nichols decision. All of the properties so noted obtained relief from the Board of Zoning Appeal prior to their alteration. The proposed revisions will nullify the need for such relief.

A) Example

Case of 32 Lee Street - The lot is of substandard size. The residence was built prior to the adoption of the current zoning ordinance. The proposed alterations were interior and conforming. The alterations were intended to convert the premises from a three to a two family dwelling.

B) Example

A two family residence conforming to all setback, lot size and lot width requirements, but does not have available parking. The owners seek to add a deck or a bathroom which involves conforming

construction.

C) Example

The total interior renovation of a single family residence which currently violates height or setback requirements.

D) Example

Case of 232 Brattle Street - The owners sought to widen the windows of the structure on all sides. One side of the property does not conform to the yard setback requirements.

E) Example

Case of Fairmont Street - The owner sought to remove an ell from a nonconforming single family dwelling. The nonconformity of the structure was due to set back and floor area. The removal makes the structure conforming for purposes of floor area and set back requirements.

F) Clarification and Illustration

If a structure is nonconforming because of setback requirements, that portion of the structure which causes the nonconformity may not be extended. For example, if the nonconformity is caused by the back wall of a structure, that portion may not be altered, unless it conforms to the requirements of Article 5.000, and does not increase the size of the structure by more than 10%.

G) Example

The property is nonconforming because of height requirements. The owner wishes to repair or replace a rotted deck within the footprint of the existing deck.

4



CITY OF CAMBRIDGE  
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300  
FAX. 349-4307

EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

RICHARD C. ROSSI  
Deputy City Manager

November 23, 1992

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 21, regarding an update on the reforming of the Zoning Ordinance in Article 8 vis a vis the Nichols Decision, please find attached a response received from Russell B. Higley, City Solicitor.

Very truly yours,

Robert W. Healy  
City Manager

RWH/mev  
attachment



# CITY OF CAMBRIDGE

Office of the City Solicitor  
City Hall

795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Tel. (617) 349-4121

Fax. (617) 349-4307 4134

Russell B. Higley  
City Solicitor

Donald A. Drisdell  
Deputy City Solicitor

Michael C. Costello  
Assistant City Solicitor

Birge Albright  
Legal Counsel

Gail S. Gabriel  
Legal Counsel

92 NOV 17 AM 10:35  
OFFICE OF THE CITY CLERK

Diane Wynshaw-Boris  
Legal Counsel

Laura H. Yager  
Legal Counsel

Linda A. Stamper  
Legal Counsel

Arthur J. Goldberg  
Legal Counsel

November 16, 1992

Mr. Robert W. Healy  
City Manger  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

**RE : Council Order No. 18, dated November 2, 1992,  
RE : Update on the reforming of the Zoning  
Ordinance in Article 8 vis a vis the Nichols  
decision**

Dear Mr. Healy,

The following is submitted in response to the above-referenced Council Order after consultation with the staff of the Community Development Department.

Enclosed please find proposed revisions to Article 8.000, Section 8.22, et seq. of the Zoning Ordinance which were submitted to the City Council on November 20, 1991. Also enclosed please find a **Memorandum**, submitted with the proposed revisions, which discusses the practical effects of the revisions.

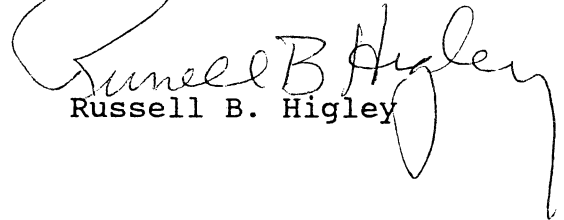
The Nichols decision remains effective as it applies to nonconforming properties. Therefore, the submitted revisions will have the same practical effects on those properties.

In regard to any further revisions, input from the City

Council would be required relative to specific areas where change in the submitted revisions is deemed to be necessary.

Thank you for your attention to this matter.

Very truly yours,

  
Russell B. Higley

encl.

Revision to Section 8.22

8.22 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 in the following cases. Such a permit 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 use.

8.22.1 The following alterations, reconstructions, extensions, and/or enlargements of nonconforming structures, which do not result in a use for a substantially different purpose of for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit by the Superintendent of Buildings.

a. Any conforming construction to a structure located on a lot which is nonconforming due to its lot size or lot width, but which meets the requirements of section 5.21.1.

b. Conforming construction where only the requirements of

Article 6.000 are nonconforming and where no change to those elements regulated by Article 6.000 are required or proposed.

- c. Any construction occurring entirely within a structure including structural changes, provided there is no increase or additional violation of Article 5.000.
- d. Relocation, enlargement or addition of windows, doors or similar openings to the exterior of a building provided the facade of the building upon which such relocation, enlargement or addition is occurring conforms to the yard requirements of Article 5.000, or faces a public street.
- e. Demolition of a structure or portions of a structure which reduces the extent of an existing nonconformity, or does not increase or effect any nonconformity, and which does not result in a further increase in the extent of any other violation or create a new violation.
- f. Conforming additions, under Article 5.000, to a structure not conforming to the requirements of Article 5.000 provided no nonconforming element or aspect of the nonconforming structure is extended

or increased and further provided that the nonconforming structure is not thereby increased in area or volume by more than ten (10) percent since the structure first became nonconforming.

g. Repair, reconstruction or replacement of any lawfully established non-conforming portions of a building including but not limited to porches, decks, balconies, bay windows and building additions, provided the repair, reconstruction or replacement does not exceed the original in foot print, volume, area or volume of the entire building.

\*\*\* h. Construction of a dormer or an addition to a nonconforming one or two family dwelling which will further violate the yard and height requirements of Article 5.000, but no other requirement of Article 5.000 including FAR, in the following cases:

1. A dormer or addition to the second story which does not extend beyond the existing first story of the structure.
2. A dormer on the third story no longer than 15 feet which does not extend beyond the existing second story not above the existing ridge line provided

the total linear length of all dormer on the third story of the building does not exceed fifteen (15) feet.

\*\*\* Section h paragraphs 1 and 2 were formally section 8.22 d paragraphs 1 and 2 of the ordinance except for the indicated changes.\*\*\*

\*\*\*\* 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.

- b. In an Office, Business or industrial district the Board of Zoning Appeal may grant a special permit for the issuance of a certificate of occupancy for the occupancy of an existing building designed and built for nonresidential use by any use permitted as of right in a Business or Industrial district in Article 4.000 of this Ordinance, provided such new use will be carried out entirely within the existing building and provided the off street parking and loading requirements in Article 6.000 for the district in which such building is located will not be further violated.
  
- c. In a Residence District the Board of Zoning Appeal may grant a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, but not the alteration or enlargement of a nonconforming use, provided any enlargement or alteration of such nonconforming 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 is located and provided such nonconforming structure will not be increased in area or volume by more than twenty-five (25) percent since it first began to be nonconforming.

8.22.3 Any alteration or enlargement of a nonconforming structure or of a nonconforming use not otherwise permitted in Section 8.22.1 and 8.22.2 above shall be a variance.

\*\*\*\* Sections 8.22.2 and 8.22.3 were formerly sections 8.22 a, b, c, d, and e, except for those revisions so indicated. \*\*\*\*

November 20, 1991

MEMORANDUM

REVISIONS TO SECTION 8.22

The following memorandum is submitted in regard to the proposed revisions to section 8.22. Included in the following is a brief legal analysis, as well as illustrations of the practical effects of sections 8.22 a-g.

I. 8.22.1

The following alterations, reconstructions, extensions and/or structural changes, which do not result in a use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit from the Superintendent of Buildings.

The language contained in 8.22.1 which states, "....for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use...." mirrors the language contained in M.G.L. c.40A sec.6.

II. M.G.L.c. 40A sec. 6

Existing structures, uses or permits; certain subdivision plans;  
application of chapter

" Except as hereinafter provided, a zoning ordinance or by-

law shall not apply to structures or uses lawfully in existence or lawfully begun.....but shall apply to any change or substantial extension of such use.....to any reconstruction, extension or structural change of such structure.....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 ....."

### III. Nichols v. Board of Zoning Appeal

The decision rendered by the Appeals Court of Massachusetts in the case of Nichols v. Board of Zoning Appeal has set a precedent affecting the way in which nonconforming properties must be treated under the Cambridge Zoning Ordinance. The effect of the Nichols decision will be altered by the proposed revisions to section 8.22.

#### The Nichols Case

##### Factual Background

The property contained a pre-existing nonconforming structure. The owner sought to perform alterations to the structure for the conversion of a garage for home office use. The proposed alterations were interior and minor, i.e. relocating a window.

##### Decision of the Court

The Appeals Court held that the owner must obtain a special permit for this intended construction and change of use. The Court applied the following language of section 8.11 of the Zoning Ordinance to these circumstances :

"This Ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or

structure or of land, to the extent that it was used at the time of the first publication of notice of public hearing.....but it shall apply.....to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent."

The Court found,

"[w]hen.....a nonconforming structure is altered to provide for a use different from the use prior to alteration.....the ordinance applies even if the new use is a permitted one."

The extent of the alterations necessitating resort to the Board of Zoning Appeal for relief is almost irrelevant in light of the fact that Nichols performed only minor changes. Furthermore, the change of use may be from one permitted use to another permitted use to trigger the application of section 8.11.

IV. Case Law Regarding "Substantially Different Manner" Language

1. Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990) pertains to a change in use.

The Court used the following factors to determine whether change or substantial extension of a nonconforming use has occurred:

1. whether current use reflects nature and purpose of prior use ;
2. whether there is a difference in quality or character, as

well as degree of use,

and ;

3. whether current use is different in kind in its effect on the neighborhood.

2. Board of Selectmen of Blackstone v. v. Tellestone, 4 Mass. App. Ct. 311 1976.

The character of a nonconforming use under factor 2, does not change solely by an increase in volume or because of expanded hours of operation or because equipment is modernized.

3. Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205, appeal after remand, 388 Mass. 1013 (1982).

Hotel was at one time full service resort hotel, providing lodging, meals and entertainment for overnight guests. In recent years the management has represented to the public that the hotel is one of the largest entertainment resort complexes on Cape Cod, containing three clubs. Court found that the current use of the hotel had an effect on the neighborhood which was different in kind from the effect of the prior use so that current operation of the hotel was no longer permissible.

4. Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890 (1980).

Court held that business activities on property constituted an impermissible extension of a nonconforming use established in 1963. A new and used truck dealership had been situated on the property. However, in 1975, the property was used exclusively for the

maintenance of service excavation vehicles, trucks, and other heavy equipment, which were left on the property in a disorganized manner. The Court concluded that such facts provided the basis for finding that the nature, purpose, quality and character and degree of use of the property were substantially different from the prevailing use in 1963. The Court further found, that the use was different in its effect upon the neighborhood.

V. EXAMPLES OF EFFECTS OF PROPOSED REVISIONS TO  
8.22 SECTIONS A-J

The following examples are provided to illustrate the practical effects of the proposed ordinance revisions. A number of these examples contain descriptions of actual properties where alterations were proposed following the rendering of the Nichols decision. All of the properties so noted obtained relief from the Board of Zoning Appeal prior to their alteration. The proposed revisions will nullify the need for such relief.

A) Example

Case of 32 Lee Street - The lot is of substandard size. The residence was built prior to the adoption of the current zoning ordinance. The proposed alterations were interior and conforming. The alterations were intended to convert the premises from a three to a two family dwelling.

B) Example

A two family residence conforming to all setback, lot size and lot width requirements, but does not have available parking. The owners seek to add a deck or a bathroom which involves conforming

construction.

C) Example

The total interior renovation of a single family residence which currently violates height or setback requirements.

D) Example

Case of 232 Brattle Street - The owners sought to widen the windows of the structure on all sides. One side of the property does not conform to the yard setback requirements.

E) Example

Case of Fairmont Street - The owner sought to remove an ell from a nonconforming single family dwelling. The nonconformity of the structure was due to set back and floor area. The removal makes the structure conforming for purposes of floor area and set back requirements.

F) Clarification and Illustration

If a structure is nonconforming because of setback requirements, that portion of the structure which causes the nonconformity may not be extended. For example, if the nonconformity is caused by the back wall of a structure, that portion may not be altered, unless it conforms to the requirements of Article 5.000, and does not increase the size of the structure by more than 10%.

G) Example

The property is nonconforming because of height requirements. The owner wishes to repair or replace a rotted deck within the footprint of the existing deck.



CITY OF CAMBRIDGE  
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300  
FAX. 349-4307

EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

RICHARD C. ROSSI  
Deputy City Manager

November 23, 1992

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 21, regarding an update on the reforming of the Zoning Ordinance in Article 8 vis a vis the Nichols Decision, please find attached a response received from Russell B. Higley, City Solicitor.

Very truly yours,

Robert W. Healy  
City Manager

RWH/mev  
attachment



## CITY OF CAMBRIDGE

Office of the City Solicitor  
City Hall

795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Tel. (617) 349-4121

Fax. (617) 349-~~4307~~ 4134

Russell B. Higley  
City Solicitor

Donald A. Drisdell  
Deputy City Solicitor

Michael C. Costello  
Assistant City Solicitor

Birge Albright  
Legal Counsel

Gail S. Gabriel  
Legal Counsel

Diane Wynshaw-Boris  
Legal Counsel

Laura H. Yager  
Legal Counsel

Linda A. Stamper  
Legal Counsel

Arthur J. Goldberg  
Legal Counsel

92 NOV 17 AM 10:35  
OFFICE OF THE CITY CLERK

November 16, 1992

Mr. Robert W. Healy  
City Manger  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

RE : Council Order No. 18, dated November 2, 1992,  
RE : Update on the reforming of the Zoning  
Ordinance in Article 8 vis a vis the Nichols  
decision

Dear Mr. Healy,

The following is submitted in response to the above-referenced Council Order after consultation with the staff of the Community Development Department.

Enclosed please find proposed revisions to Article 8.000, Section 8.22, et seq. of the Zoning Ordinance which were submitted to the City Council on November 20, 1991. Also enclosed please find a **Memorandum**, submitted with the proposed revisions, which discusses the practical effects of the revisions.

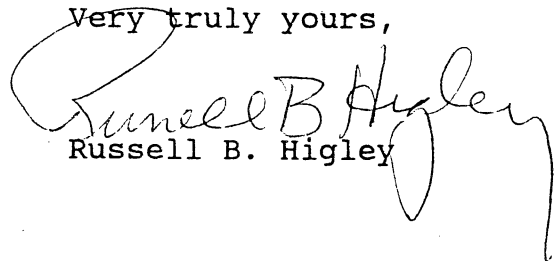
The Nichols decision remains effective as it applies to nonconforming properties. Therefore, the submitted revisions will have the same practical effects on those properties.

In regard to any further revisions, input from the City

Council would be required relative to specific areas where change in the submitted revisions is deemed to be necessary.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Russell B. Higley". The signature is written in dark ink and is positioned above the printed name.

Russell B. Higley

encl.

Revision to Section 8.22

8.22 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 in the following cases. Such a permit 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 use.

8.22.1 The following alterations, reconstructions, extensions, and/or enlargements of nonconforming structures, which do not result in a use for a substantially different purpose of for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit by the Superintendent of Buildings.

- a. Any conforming construction to a structure located on a lot which is nonconforming due to its lot size or lot width, but which meets the requirements of section 5.21.1.
- b. Conforming construction where only the requirements of

Article 6.000 are nonconforming and where no change to those elements regulated by Article 6.000 are required or proposed.

- c. Any construction occurring entirely within a structure including structural changes, provided there is no increase or additional violation of Article 5.000.
- d. Relocation, enlargement or addition of windows, doors or similar openings to the exterior of a building provided the facade of the building upon which such relocation, enlargement or addition is occurring conforms to the yard requirements of Article 5.000, or faces a public street.
- e. Demolition of a structure or portions of a structure which reduces the extent of an existing nonconformity, or does not increase or effect any nonconformity, and which does not result in a further increase in the extent of any other violation or create a new violation.
- f. Conforming additions, under Article 5.000, to a structure not conforming to the requirements of Article 5.000 provided no nonconforming element or aspect of the nonconforming structure is extended

or increased and further provided that the nonconforming structure is not thereby increased in area or volume by more than ten (10) percent since the structure first became nonconforming.

g. Repair, reconstruction or replacement of any lawfully established non-conforming portions of a building including but not limited to porches, decks, balconies, bay windows and building additions, provided the repair, reconstruction or replacement does not exceed the original in foot print, volume, area or volume of the entire building.

\*\*\* h. Construction of a dormer or an addition to a nonconforming one or two family dwelling which will further violate the yard and height requirements of Article 5.000, but no other requirement of Article 5.000 including FAR, in the following cases:

1. A dormer or addition to the second story which does not extend beyond the existing first story of the structure.
2. A dormer on the third story no longer than 15 feet which does not extend beyond the existing second story not above the existing ridge line provided

the total linear length of all dormer on the third story of the building does not exceed fifteen (15) feet.

\*\*\* Section h paragraphs 1 and 2 were formally section 8.22 d paragraphs 1 and 2 of the ordinance except for the indicated changes.\*\*\*

\*\*\*\* 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.

- b. In an Office, Business or industrial district the Board of Zoning Appeal may grant a special permit for the issuance of a certificate of occupancy for the occupancy of an existing building designed and built for nonresidential use by any use permitted as of right in a Business or Industrial district in Article 4.000 of this Ordinance, provided such new use will be carried out entirely within the existing building and provided the off street parking and loading requirements in Article 6.000 for the district in which such building is located will not be further violated.
  
- c. In a Residence District the Board of Zoning Appeal may grant a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, but not the alteration or enlargement of a nonconforming use, provided any enlargement or alteration of such nonconforming 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 is located and provided such nonconforming structure will not be increased in are or volume by more than twenty-five (25) percent since it first began to be nonconforming.

8.22.3 Any alteration or enlargement or a nonconforming structure or of a nonconforming use not otherwise permitted in Section 8.22.1 and 8.22.2 above shall be a variance.

\*\*\*\* Sections 8.22.2 and 8.22.3 were formally sections 8.22 a, b, c, d, and e, except for those revisions so indicated. \*\*\*\*

November 20, 1991

MEMORANDUM

REVISIONS TO SECTION 8.22

The following memorandum is submitted in regard to the proposed revisions to section 8.22. Included in the following is a brief legal analysis, as well as illustrations of the practical effects of sections 8.22 a-g.

I. 8.22.1

The following alterations, reconstructions, extensions and/or structural changes, which do not result in a use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit from the Superintendent of Buildings.

The language contained in 8.22.1 which states, "....for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use...." mirrors the language contained in M.G.L. c.40A sec.6.

II. M.G.L.c. 40A sec. 6

Existing structures, uses or permits; certain subdivision plans;  
application of chapter

" Except as hereinafter provided, a zoning ordinance or by-

law shall not apply to structures or uses lawfully in existence or lawfully begun.....but shall apply to any change or substantial extension of such use.....to any reconstruction, extension or structural change of such structure.....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 ....."

III. Nichols v. Board of Zoning Appeal

The decision rendered by the Appeals Court of Massachusetts in the case of Nichols v. Board of Zoning Appeal has set a precedent affecting the way in which nonconforming properties must be treated under the Cambridge Zoning Ordinance. The effect of the Nichols decision will be altered by the proposed revisions to section 8.22.

The Nichols Case

Factual Background

The property contained a pre-existing nonconforming structure. The owner sought to perform alterations to the structure for the conversion of a garage for home office use. The proposed alterations were interior and minor, i.e. relocating a window.

Decision of the Court

The Appeals Court held that the owner must obtain a special permit for this intended construction and change of use. The Court applied the following language of section 8.11 of the Zoning Ordinance to these circumstances :

"This Ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or

structure or of land, to the extent that it was used at the time of the first publication of notice of public hearing.....but it shall apply.....to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent."

The Court found,

"[w]hen.....a nonconforming structure is altered to provide for a use different from the use prior to alteration.....the ordinance applies even if the new use is a permitted one."

The extent of the alterations necessitating resort to the Board of Zoning Appeal for relief is almost irrelevant in light of the fact that Nichols performed only minor changes. Furthermore, the change of use may be from one permitted use to another permitted use to trigger the application of section 8.11.

IV. Case Law Regarding "Substantially Different Manner" Language

1. Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990) pertains to a change in use.

The Court used the following factors to determine whether change or substantial extension of a nonconforming use has occurred:

1. whether current use reflects nature and purpose of prior use ;
2. whether there is a difference in quality or character, as

well as degree of use,

and ;

3. whether current use is different in kind in its effect on the neighborhood.

2. Board of Selectmen of Blackstone v. v. Tellestone, 4 Mass. App. Ct. 311 1976.

The character of a nonconforming use under factor 2, does not change solely by an increase in volume or because of expanded hours of operation or because equipment is modernized.

3. Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205, appeal after remand, 388 Mass. 1013 (1982).

Hotel was at one time full service resort hotel, providing lodging, meals and entertainment for overnight guests. In recent years the management has represented to the public that the hotel is one of the largest entertainment resort complexes on Cape Cod, containing three clubs. Court found that the current use of the hotel had an effect on the neighborhood which was different in kind from the effect of the prior use so that current operation of the hotel was no longer permissible.

4. Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890 (1980).

Court held that business activities on property constituted an impermissible extension of a nonconforming use established in 1963. A new and used truck dealership had been situated on the property. However, in 1975, the property was used exclusively for the

maintenance of service excavation vehicles, trucks, and other heavy equipment, which were left on the property in a disorganized manner. The Court concluded that such facts provided the basis for finding that the nature, purpose, quality and character and degree of use of the property were substantially different from the prevailing use in 1963. The Court further found, that the use was different in its effect upon the neighborhood.

V. EXAMPLES OF EFFECTS OF PROPOSED REVISIONS TO  
8.22 SECTIONS A-J

The following examples are provided to illustrate the practical effects of the proposed ordinance revisions. A number of these examples contain descriptions of actual properties where alterations were proposed following the rendering of the Nichols decision. All of the properties so noted obtained relief from the Board of Zoning Appeal prior to their alteration. The proposed revisions will nullify the need for such relief.

A) Example

Case of 32 Lee Street - The lot is of substandard size. The residence was built prior to the adoption of the current zoning ordinance. The proposed alterations were interior and conforming. The alterations were intended to convert the premises from a three to a two family dwelling.

B) Example

A two family residence conforming to all setback, lot size and lot width requirements, but does not have available parking. The owners seek to add a deck or a bathroom which involves conforming

construction.

C) Example

The total interior renovation of a single family residence which currently violates height or setback requirements.

D) Example

Case of 232 Brattle Street - The owners sought to widen the windows of the structure on all sides. One side of the property does not conform to the yard setback requirements.

E) Example

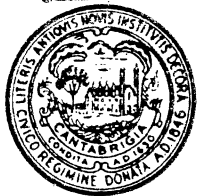
Case of Fairmont Street - The owner sought to remove an ell from a nonconforming single family dwelling. The nonconformity of the structure was due to set back and floor area. The removal makes the structure conforming for purposes of floor area and set back requirements.

F) Clarification and Illustration

If a structure is nonconforming because of setback requirements, that portion of the structure which causes the nonconformity may not be extended. For example, if the nonconformity is caused by the back wall of a structure, that portion may not be altered, unless it conforms to the requirements of Article 5.000, and does not increase the size of the structure by more than 10%.

G) Example

The property is nonconforming because of height requirements. The owner wishes to repair or replace a rotted deck within the footprint of the existing deck.



CITY OF CAMBRIDGE  
CAMBRIDGE, MASSACHUSETTS 02139

TEL. 349-4300  
FAX. 349-4307

EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

RICHARD C. ROSSI  
Deputy City Manager

November 23, 1992

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 21, regarding an update on the reforming of the Zoning Ordinance in Article 8 vis a vis the Nichols Decision, please find attached a response received from Russell B. Higley, City Solicitor.

Very truly yours,

Robert W. Healy  
City Manager

RWH/mev  
attachment



## CITY OF CAMBRIDGE

Office of the City Solicitor  
City Hall

795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Tel. (617) 349-4121

Fax. (617) 349-4307 4134

92 NOV 17 AM 10:35  
OFFICE OF THE CITY SOLICITOR

Russell B. Higley  
City Solicitor

Donald A. Drisdell  
Deputy City Solicitor

Michael C. Costello  
Assistant City Solicitor

Birge Albright  
Legal Counsel

Gail S. Gabriel  
Legal Counsel

Diane Wynshaw-Boris  
Legal Counsel

Laura H. Yager  
Legal Counsel

Linda A. Stamper  
Legal Counsel

Arthur J. Goldberg  
Legal Counsel

November 16, 1992

Mr. Robert W. Healy  
City Manger  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

RE : Council Order No. 18, dated November 2, 1992,  
RE : Update on the reforming of the Zoning  
Ordinance in Article 8 vis a vis the Nichols  
decision

Dear Mr. Healy,

The following is submitted in response to the above-referenced Council Order after consultation with the staff of the Community Development Department.

Enclosed please find proposed revisions to Article 8.000, Section 8.22, et seq. of the Zoning Ordinance which were submitted to the City Council on November 20, 1991. Also enclosed please find a **Memorandum**, submitted with the proposed revisions, which discusses the practical effects of the revisions.

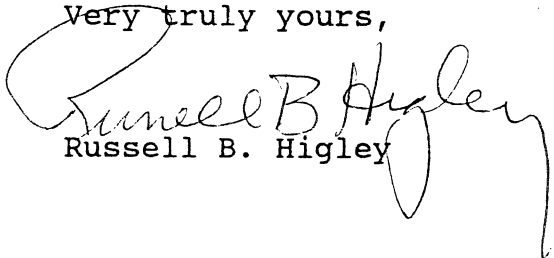
The Nichols decision remains effective as it applies to nonconforming properties. Therefore, the submitted revisions will have the same practical effects on those properties.

In regard to any further revisions, input from the City

Council would be required relative to specific areas where change in the submitted revisions is deemed to be necessary.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Russell B. Higley". The signature is written in black ink and is positioned to the right of the typed name.

Russell B. Higley

encl.

Revision to Section 8.22

8.22 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 in the following cases. Such a permit 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 use.

8.22.1 The following alterations, reconstructions, extensions, and/or enlargements of nonconforming structures, which do not result in a use for a substantially different purpose of for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit by the Superintendent of Buildings.

- a. Any conforming construction to a structure located on a lot which is nonconforming due to its lot size or lot width, but which meets the requirements of section 5.21.1.
- b. Conforming construction where only the requirements of

Article 6.000 are nonconforming and where no change to those elements regulated by Article 6.000 are required or proposed.

- c. Any construction occurring entirely within a structure including structural changes, provided there is no increase or additional violation of Article 5.000.
- d. Relocation, enlargement or addition of windows, doors or similar openings to the exterior of a building provided the facade of the building upon which such relocation, enlargement or addition is occurring conforms to the yard requirements of Article 5.000, or faces a public street.
- e. Demolition of a structure or portions of a structure which reduces the extent of an existing nonconformity, or does not increase or effect any nonconformity, and which does not result in a further increase in the extent of any other violation or create a new violation.
- f. Conforming additions, under Article 5.000, to a structure not conforming to the requirements of Article 5.000 provided no nonconforming element or aspect of the nonconforming structure is extended

or increased and further provided that the nonconforming structure is not thereby increased in area or volume by more than ten (10) percent since the structure first became nonconforming.

g. Repair, reconstruction or replacement of any lawfully established non-conforming portions of a building including but not limited to porches, decks, balconies, bay windows and building additions, provided the repair, reconstruction or replacement does not exceed the original in foot print, volume, area or volume of the entire building.

\*\*\* h. Construction of a dormer or an addition to a nonconforming one or two family dwelling which will further violate the yard and height requirements of Article 5.000, but no other requirement of Article 5.000 including FAR, in the following cases:

1. A dormer or addition to the second story which does not extend beyond the existing first story of the structure.
2. A dormer on the third story no longer than 15 feet which does not extend beyond the existing second story not above the existing ridge line provided

the total linear length of all dormer on the third story of the building does not exceed fifteen (15) feet.

\*\*\* Section h paragraphs 1 and 2 were formally section 8.22 d paragraphs 1 and 2 of the ordinance except for the indicated changes.\*\*\*

\*\*\*\* 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.

- b. In an Office, Business or industrial district the Board of Zoning Appeal may grant a special permit for the issuance of a certificate of occupancy for the occupancy of an existing building designed and built for nonresidential use by any use permitted as of right in a Business or Industrial district in Article 4.000 of this Ordinance, provided such new use will be carried out entirely within the existing building and provided the off street parking and loading requirements in Article 6.000 for the district in which such building is located will not be further violated.
- c. In a Residence District the Board of Zoning Appeal may grant a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, but not the alteration or enlargement of a nonconforming use, provided any enlargement or alteration of such nonconforming 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 is located and provided such nonconforming structure will not be increased in are or volume by more than twenty-five (25) percent since it first began to be nonconforming.

8.22.3 Any alteration or enlargement or a nonconforming structure or of a nonconforming use not otherwise permitted in Section 8.22.1 and 8.22.2 above shall be a variance.

\*\*\*\* Sections 8.22.2 and 8.22.3 were formally sections 8.22 a, b, c, d, and e, except for those revisions so indicated. \*\*\*\*

November 20, 1991

MEMORANDUM

REVISIONS TO SECTION 8.22

The following memorandum is submitted in regard to the proposed revisions to section 8.22. Included in the following is a brief legal analysis, as well as illustrations of the practical effects of sections 8.22 a-g.

I. 8.22.1

The following alterations, reconstructions, extensions and/or structural changes, which do not result in a use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit form the Superintendent of Buildings.

The language contained in 8.22.1 which states, "....for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use...." mirrors the language contained in M.G.L. c.40A sec.6.

II. M.G.L.c. 40A sec. 6

Existing structures, uses or permits; certain subdivision plans;  
application of chapter

" Except as hereinafter provided, a zoning ordinance or by-

law shall not apply to structures or uses lawfully in existence or lawfully begun.....but shall apply to any change or substantial extension of such use.....to any reconstruction, extension or structural change of such structure.....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 ....."

III. Nichols v. Board of Zoning Appeal

The decision rendered by the Appeals Court of Massachusetts in the case of Nichols v. Board of Zoning Appeal has set a precedent affecting the way in which nonconforming properties must be treated under the Cambridge Zoning Ordinance. The effect of the Nichols decision will be altered by the proposed revisions to section 8.22.

The Nichols Case

Factual Background

The property contained a pre-existing nonconforming structure. The owner sought to perform alterations to the structure for the conversion of a garage for home office use. The proposed alterations were interior and minor, i.e. relocating a window.

Decision of the Court

The Appeals Court held that the owner must obtain a special permit for this intended construction and change of use. The Court applied the following language of section 8.11 of the Zoning Ordinance to these circumstances :

"This Ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or

structure or of land, to the extent that it was used at the time of the first publication of notice of public hearing.....but it shall apply.....to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent."

The Court found,

"[w]hen.....a nonconforming structure is altered to provide for a use different from the use prior to alteration.....the ordinance applies even if the new use is a permitted one."

The extent of the alterations necessitating resort to the Board of Zoning Appeal for relief is almost irrelevant in light of the fact that Nichols performed only minor changes. Furthermore, the change of use may be from one permitted use to another permitted use to trigger the application of section 8.11.

IV. Case Law Regarding "Substantially Different Manner" Language

1. Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990) pertains to a change in use.

The Court used the following factors to determine whether change or substantial extension of a nonconforming use has occurred:

1. whether current use reflects nature and purpose of prior use ;
2. whether there is a difference in quality or character, as

well as degree of use,

and ;

3. whether current use is different in kind in its effect on the neighborhood.

2. Board of Selectmen of Blackstone v. v. Tellestone, 4 Mass. App. Ct. 311 1976.

The character of a nonconforming use under factor 2, does not change solely by an increase in volume or because of expanded hours of operation or because equipment is modernized.

3. Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205, appeal after remand, 388 Mass. 1013 (1982).

Hotel was at one time full service resort hotel, providing lodging, meals and entertainment for overnight guests. In recent years the management has represented to the public that the hotel is one of the largest entertainment resort complexes on Cape Cod, containing three clubs. Court found that the current use of the hotel had an effect on the neighborhood which was different in kind from the effect of the prior use so that current operation of the hotel was no longer permissible.

4. Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890 (1980).

Court held that business activities on property constituted an impermissible extension of a nonconforming use established in 1963. A new and used truck dealership had been situated on the property. However, in 1975, the property was used exclusively for the

maintenance of service excavation vehicles, trucks, and other heavy equipment, which were left on the property in a disorganized manner. The Court concluded that such facts provided the basis for finding that the nature, purpose, quality and character and degree of use of the property were substantially different from the prevailing use in 1963. The Court further found, that the use was different in its effect upon the neighborhood.

V. EXAMPLES OF EFFECTS OF PROPOSED REVISIONS TO  
8.22 SECTIONS A-J

The following examples are provided to illustrate the practical effects of the proposed ordinance revisions. A number of these examples contain descriptions of actual properties where alterations were proposed following the rendering of the Nichols decision. All of the properties so noted obtained relief from the Board of Zoning Appeal prior to their alteration. The proposed revisions will nullify the need for such relief.

A) Example

Case of 32 Lee Street - The lot is of substandard size. The residence was built prior to the adoption of the current zoning ordinance. The proposed alterations were interior and conforming. The alterations were intended to convert the premises from a three to a two family dwelling.

B) Example

A two family residence conforming to all setback, lot size and lot width requirements, but does not have available parking. The owners seek to add a deck or a bathroom which involves conforming

construction.

C) Example

The total interior renovation of a single family residence which currently violates height or setback requirements.

D) Example

Case of 232 Brattle Street - The owners sought to widen the windows of the structure on all sides. One side of the property does not conform to the yard setback requirements.

E) Example

Case of Fairmont Street - The owner sought to remove an ell from a nonconforming single family dwelling. The nonconformity of the structure was due to set back and floor area. The removal makes the structure conforming for purposes of floor area and set back requirements.

F) Clarification and Illustration

If a structure is nonconforming because of setback requirements, that portion of the structure which causes the nonconformity may not be extended. For example, if the nonconformity is caused by the back wall of a structure, that portion may not be altered, unless it conforms to the requirements of Article 5.000, and does not increase the size of the structure by more than 10%.

G) Example

The property is nonconforming because of height requirements. The owner wishes to repair or replace a rotted deck within the footprint of the existing deck.



## CITY OF CAMBRIDGE

Office of the City Solicitor  
City Hall

795 Massachusetts Avenue  
Cambridge, Massachusetts 02139

Tel. (617) 349-4121

Fax. (617) 349-4307 4134

Russell B. Higley  
City Solicitor

Donald A. Drisdell  
Deputy City Solicitor

Michael C. Costello  
Assistant City Solicitor

Birge Albright  
Legal Counsel

Gail S. Gabriel  
Legal Counsel

RECEIVED  
92 NOV 17 AM 10:35  
OFFICE OF THE CITY MANAGER

Diane Wynshaw-Boris  
Legal Counsel

Laura H. Yager  
Legal Counsel

Linda A. Stamper  
Legal Counsel

Arthur J. Goldberg  
Legal Counsel

November 16, 1992

Mr. Robert W. Healy  
City Manger  
City Hall  
795 Massachusetts Avenue  
Cambridge, MA 02139

**RE : Council Order No. 18, dated November 2, 1992,  
RE : Update on the reforming of the Zoning  
Ordinance in Article 8 vis a vis the Nichols  
decision**

Dear Mr. Healy,

The following is submitted in response to the above-referenced Council Order after consultation with the staff of the Community Development Department.

Enclosed please find proposed revisions to Article 8.000, Section 8.22, et seq. of the Zoning Ordinance which were submitted to the City Council on November 20, 1991. Also enclosed please find a **Memorandum**, submitted with the proposed revisions, which discusses the practical effects of the revisions.

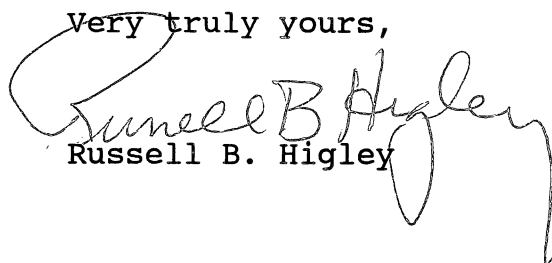
The Nichols decision remains effective as it applies to nonconforming properties. Therefore, the submitted revisions will have the same practical effects on those properties.

In regard to any further revisions, input from the City

Council would be required relative to specific areas where change in the submitted revisions is deemed to be necessary.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Russell B. Higley". The signature is written in a cursive style with a large initial "R" and a long, sweeping tail that extends downwards and to the right.

Russell B. Higley

encl.

Revision to Section 8.22

8.22 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 in the following cases. Such a permit 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 use.

8.22.1 The following alterations, reconstructions, extensions, and/or enlargements of nonconforming structures, which do not result in a use for a substantially different purpose of for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit by the Superintendent of Buildings.

- a. Any conforming construction to a structure located on a lot which is nonconforming due to its lot size or lot width, but which meets the requirements of section 5.21.1.
- b. Conforming construction where only the requirements of

Article 6.000 are nonconforming and where no change to those elements regulated by Article 6.000 are required or proposed.

- c. Any construction occurring entirely within a structure including structural changes, provided there is no increase or additional violation of Article 5.000.
- d. Relocation, enlargement or addition of windows, doors or similar openings to the exterior of a building provided the facade of the building upon which such relocation, enlargement or addition is occurring conforms to the yard requirements of Article 5.000, or faces a public street.
- e. Demolition of a structure or portions of a structure which reduces the extent of an existing nonconformity, or does not increase or effect any nonconformity, and which does not result in a further increase in the extent of any other violation or create a new violation.
- f. Conforming additions, under Article 5.000, to a structure not conforming to the requirements of Article 5.000 provided no nonconforming element or aspect of the nonconforming structure is extended

or increased and further provided that the nonconforming structure is not thereby increased in area or volume by more than ten (10) percent since the structure first became nonconforming.

- g. Repair, reconstruction or replacement of any lawfully established non-conforming portions of a building including but not limited to porches, decks, balconies, bay windows and building additions, provided the repair, reconstruction or replacement does not exceed the original in foot print, volume, area or volume of the entire building.

- \*\*\* h. Construction of a dormer or an addition to a nonconforming one or two family dwelling which will further violate the yard and height requirements of Article 5.000, but no other requirement of Article 5.000 including FAR, in the following cases:

- 1. A dormer or addition to the second story which does not extend beyond the existing first story of the structure.
- 2. A dormer on the third story no longer than 15 feet which does not extend beyond the existing second story not above the existing ridge line provided

the total linear length of all dormer on the third story of the building does not exceed fifteen (15) feet.

\*\*\* Section h paragraphs 1 and 2 were formally section 8.22 d paragraphs 1 and 2 of the ordinance except for the indicated changes.\*\*\*

\*\*\*\* 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.

- b. In an Office, Business or industrial district the Board of Zoning Appeal may grant a special permit for the issuance of a certificate of occupancy for the occupancy of an existing building designed and built for nonresidential use by any use permitted as of right in a Business or Industrial district in Article 4.000 of this Ordinance, provided such new use will be carried out entirely within the existing building and provided the off street parking and loading requirements in Article 6.000 for the district in which such building is located will not be further violated.
  
- c. In a Residence District the Board of Zoning Appeal may grant a special permit for the alteration or enlargement of a nonconforming structure, not otherwise permitted in Section 8.22.1 above, but not the alteration or enlargement of a nonconforming use, provided any enlargement or alteration of such nonconforming 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 is located and provided such nonconforming structure will not be increased in are or volume by more than twenty-five (25) percent since it first began to be nonconforming.

8.22.3 Any alteration or enlargement or a nonconforming structure or of a nonconforming use not otherwise permitted in Section 8.22.1 and 8.22.2 above shall be a variance.

\*\*\*\* Sections 8.22.2 and 8.22.3 were formally sections 8.22 a, b, c, d, and e, except for those revisions so indicated. \*\*\*\*

November 20, 1991

MEMORANDUM

REVISIONS TO SECTION 8.22

The following memorandum is submitted in regard to the proposed revisions to section 8.22. Included in the following is a brief legal analysis, as well as illustrations of the practical effects of sections 8.22 a-g.

I. 8.22.1

The following alterations, reconstructions, extensions and/or structural changes, which do not result in a use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use, shall be permitted after the issuance of a building permit form the Superintendent of Buildings.

The language contained in 8.22.1 which states, "....for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent than the existing use...." mirrors the language contained in M.G.L. c.40A sec.6.

II. M.G.L.c. 40A sec. 6

Existing structures, uses or permits; certain subdivision plans;  
application of chapter

" Except as hereinafter provided, a zoning ordinance or by-

law shall not apply to structures or uses lawfully in existence or lawfully begun.....but shall apply to any change or substantial extension of such use.....to any reconstruction, extension or structural change of such structure.....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 ....."

### III. Nichols v. Board of Zoning Appeal

The decision rendered by the Appeals Court of Massachusetts in the case of Nichols v. Board of Zoning Appeal has set a precedent affecting the way in which nonconforming properties must be treated under the Cambridge Zoning Ordinance. The effect of the Nichols decision will be altered by the proposed revisions to section 8.22.

#### The Nichols Case

##### Factual Background

The property contained a pre-existing nonconforming structure. The owner sought to perform alterations to the structure for the conversion of a garage for home office use. The proposed alterations were interior and minor, i.e. relocating a window.

##### Decision of the Court

The Appeals Court held that the owner must obtain a special permit for this intended construction and change of use. The Court applied the following language of section 8.11 of the Zoning Ordinance to these circumstances :

"This Ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or

structure or of land, to the extent that it was used at the time of the first publication of notice of public hearing.....but it shall apply.....to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent."

The Court found,

"[w]hen.....a nonconforming structure is altered to provide for a use different from the use prior to alteration.....the ordinance applies even if the new use is a permitted one."

The extent of the alterations necessitating resort to the Board of Zoning Appeal for relief is almost irrelevant in light of the fact that Nichols performed only minor changes. Furthermore, the change of use may be from one permitted use to another permitted use to trigger the application of section 8.11.

IV. Case Law Regarding "Substantially Different Manner" Language

1. Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990) pertains to a change in use.

The Court used the following factors to determine whether change or substantial extension of a nonconforming use has occurred:

1. whether current use reflects nature and purpose of prior use ;
2. whether there is a difference in quality or character, as

well as degree of use,

and ;

3. whether current use is different in kind in its effect on the neighborhood.

2. Board of Selectmen of Blackstone v. v. Tellestone, 4 Mass. App. Ct. 311 1976.

The character of a nonconforming use under factor 2, does not change solely by an increase in volume or because of expanded hours of operation or because equipment is modernized.

3. Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205, appeal after remand, 388 Mass. 1013 (1982).

Hotel was at one time full service resort hotel, providing lodging, meals and entertainment for overnight guests. In recent years the management has represented to the public that the hotel is one of the largest entertainment resort complexes on Cape Cod, containing three clubs. Court found that the current use of the hotel had an effect on the neighborhood which was different in kind from the effect of the prior use so that current operation of the hotel was no longer permissible.

4. Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890 (1980).

Court held that business activities on property constituted an impermissible extension of a nonconforming use established in 1963. A new and used truck dealership had been situated on the property. However, in 1975, the property was used exclusively for the

maintenance of service excavation vehicles, trucks, and other heavy equipment, which were left on the property in a disorganized manner. The Court concluded that such facts provided the basis for finding that the nature, purpose, quality and character and degree of use of the property were substantially different from the prevailing use in 1963. The Court further found, that the use was different in its effect upon the neighborhood.

V. EXAMPLES OF EFFECTS OF PROPOSED REVISIONS TO  
8.22 SECTIONS A-J

The following examples are provided to illustrate the practical effects of the proposed ordinance revisions. A number of these examples contain descriptions of actual properties where alterations were proposed following the rendering of the Nichols decision. All of the properties so noted obtained relief from the Board of Zoning Appeal prior to their alteration. The proposed revisions will nullify the need for such relief.

A) Example

Case of 32 Lee Street - The lot is of substandard size. The residence was built prior to the adoption of the current zoning ordinance. The proposed alterations were interior and conforming. The alterations were intended to convert the premises from a three to a two family dwelling.

B) Example

A two family residence conforming to all setback, lot size and lot width requirements, but does not have available parking. The owners seek to add a deck or a bathroom which involves conforming

construction.

C) Example

The total interior renovation of a single family residence which currently violates height or setback requirements.

D) Example

Case of 232 Brattle Street - The owners sought to widen the windows of the structure on all sides. One side of the property does not conform to the yard setback requirements.

E) Example

Case of Fairmont Street - The owner sought to remove an ell from a nonconforming single family dwelling. The nonconformity of the structure was due to set back and floor area. The removal makes the structure conforming for purposes of floor area and set back requirements.

F) Clarification and Illustration

If a structure is nonconforming because of setback requirements, that portion of the structure which causes the nonconformity may not be extended. For example, if the nonconformity is caused by the back wall of a structure, that portion may not be altered, unless it conforms to the requirements of Article 5.000, and does not increase the size of the structure by more than 10%.

G) Example

The property is nonconforming because of height requirements. The owner wishes to repair or replace a rotted deck within the footprint of the existing deck.



CITY OF CAMBRIDGE  
CAMBRIDGE, MASSACHUSETTS 02139

TEL 349-4300  
FAX 349-4307

EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

RICHARD C. ROSSI  
Deputy City Manager

November 23, 1992

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 21, regarding an update on the reforming of the Zoning Ordinance in Article 8 vis a vis the Nichols Decision, please find attached a response received from Russell B. Higley, City Solicitor.

Very truly yours,

Robert W. Healy  
City Manager

RWH/mev  
attachment

Consent Agenda # 4 0-1

Awaiting Report Item Number 21,  
regarding an update on the reforming  
of the Zoning Ordinance in Article  
8 vis a vis the Nichols Decision.

1/5/93 Placed on file  
due to hearing  
not held in required  
time  
1/11/93 - See refiling

In City Council,

November 23, 1992

Referred to the Ordinance  
Committee + Planning  
Board  
Copy sent to Planning Board  
11/24/92  
11/30/92 Referred to the  
Ordinance Committee