



CITY OF CAMBRIDGE

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January 15, 1991

TO: Robert W. Healy
City Manager

FROM: Russell B. Higley
City Solicitor

RBH

RE: Council Order #27
Date: September 17, 1990
Subject: Zoning Regulations regarding alterations to
pre-1920 homes which have pre-existing
nonconforming status.

In regard to the above City Council Order the following will examine the impact of applicable zoning regulations on structures and uses thereof which have achieved pre-existing nonconforming status. This status is afforded to those structures or uses lawfully in existence or lawfully begun prior to the adoption of a zoning ordinance or by-law. Nonconforming structures or uses are protected under relevant zoning regulations, as they are not made to conform to zoning requirements adopted after they were lawfully in existence or lawfully begun. However, this status also subjects these properties to regulations when a change of use or structural alteration is proposed. Structures which were constructed prior to 1920 have in all probability attained pre-existing nonconforming status as they pre-date the current Cambridge Zoning Ordinance and

previous ordinances, adopted in 1924, 1943, 1961 and 1970. The Revised Ordinances of 1892 of the City of Cambridge probably govern said structures. If built in compliance with the construction requirements contained therein, these structures have achieved nonconforming status. Consequently, these structures are afforded both protection under the current zoning ordinance and are subject to regulations when alterations are sought to be performed.

Pursuant to M.G.L. c. 40A, §6, pre-existing nonconforming structures and uses do not fall within the purview of current zoning regulations, but are subject to various rules when changes are proposed. Section 6 reads in relevant part:

"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 a building or special permit issued after the first notice of public hearing, 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, except where reconstruction, alteration or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.

Section 6 further states that where a pre-existing nonconforming structure is proposed to be altered, the special permit granting authority must find that "such change or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.", prior to the grant of a special permit.

Article 8.000, Section 8.11 of the City of Cambridge Zoning

Ordinance contains essentially the same considerations as those contained in M.G.L. c. 40, §6 in regard to nonconforming structures and uses. Section 8.11 states as follows:

"This ordinance shall not apply to existing buildings or structures, nor to the existing use of any building or structure of land, to the extent to which it is used at the time of first publication of notice of public hearing by the Planning Board of applicable provisions of this or any prior ordinance, but it shall apply to any change of use thereof and to any alteration of a building or structure when the same would amount to reconstruction, extension or structural change 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."

Section 8.22 lists specific instances when permits are to be granted where changes, extensions or alterations of pre-existing nonconforming structures are proposed. As in M.G.L. c. 40A, §6, special permits are to be granted in these specified instances, only where the proposed changes will "not be substantially more detrimental to the neighborhood than the existing nonconforming use."

In order for a structure or use to fall within the purview of M.G.L. c. 40A, 6 and sec. 8.11 of the zoning ordinance, it must meet one of the three criteria contained therein. There must be either (1) a change of use, (2) an alteration when the same would amount to reconstruction, extension or structural change, or (3) alteration to provide for a substantially different use or for the same use to a substantially greater extent.

The first category, a "change of use", applies where there is any change of a nonconforming use. If no alterations are made,

however, a change from a permitted use to another permitted use does not require the obtainment of a special permit. The change of use under sec. 8.11 "applies only when the use, although changed, is still nonconforming." Nichols v. Board of Zoning appeal of Cambridge, 26 Mass. App. Ct. 631, 633, 530 N.E. 2d 1257, 1259 (1988).

A three-pronged test was established by the Appeals Court decision rendered in Powers v. Building Inspector of Barnstable, 363 Mass. 648, (1973) in order to determine whether the current use of a particular property is to be granted nonconforming use status. The following has been termed the "Powers Test": 1) whether the use reflects the "nature and purpose" of the use prevailing when the zoning by-law took effect (2) whether there is a difference in the quality or character, as well as the degree of use 3) whether the current use is different in kind in its effect on the neighborhood." The practical effect of the "Powers Test" is to determine whether the use of a property is pre-existing and nonconforming. If the property's use meets the three criteria an examination must then be made relative to a change of that use and the resulting application of zoning regulations.

The second category requires a special permit in the case of alterations which amount to reconstruction, extension or structural change. There is limited Massachusetts case law which interprets and applies the relevant portions of M.G.L. c. 40A, §6 and Section 8.11 of the zoning ordinance. (See, Opinion letter submitted on November 27, 1990 to Robert W. Healy from Russell B. Higley in

regard to 32 Lee Street). The Appeals Court has dealt with this issue on a case-by-case basis and has examined each factual situation independently. It is evident from these decisions, that if significant changes are proposed to be performed, particularly if they affect a structure's exterior, they may be deemed to rise to the level of reconstruction, extension or structural change. Such significant changes may include removal of multiple interior walls, removal of staircases, removal and relocation of windows, etc.

The third category of cases which necessitate the obtainment of a special permit was examined in the case of Nichols v. Board of Zoning of Cambridge previously cited herein. The Nichols decision set forth the standard applicable to the third category of M.G.L. c. 40A, §6 and sec. 8.11 of the ordinance, where a structure is altered "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." Under Nichols, "when 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." 530 N.E. 2d at 1259. The Court found that the alterations made by Mr. Nichols in the conversion of his garage into a home office did not rise to the level of reconstruction, extension or structural change, but "were alterations as a matter of law and were not ordinary repairs." 530 N.E. 2d at 1259. It should be noted that the alterations proposed neither changed the footprint

of the building nor increased its nonconformity.

The Nichols decision is strict in its application. A special permit must be obtained prior to the performance of alterations on a nonconforming structure in order to change its pre-existing use, even where the structural nonconformity remains unchanged. This rule applies to changes to both permitted and nonconforming uses.

Thus, if changes of use or structural alterations are proposed to be performed on a home constructed before 1920, a special permit is required in the aforementioned circumstances under applicable zoning laws.

OPIN#2\ORDINANC\1920HOME.ALT



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EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

January 28, 1991

To The Honorable, The City Council:

With reference to Awaiting Report Item No. 18, relative to zoning regulations regarding alternations to pre-1920 homes which have pre-existing non-conforming status, please find attached a response from Russell B. Higley, City Solicitor, concerning this matter.

Very truly yours,

Robert W. Healy
City Manager

RWH/mev
attachments

Agenda # 2

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Response to Awaiting Report Item Number
18 regarding pre-1920 homes which have
pre-existing non-conforming status.

In City Council,

January 28, 1991

Placed on file