



**CITY OF MADISON
ZONING BOARD OF APPEALS
VARIANCE APPLICATION**

\$300 Filing Fee

Type or print legibly using blue or black ink.

Address of Subject Property: 5050 Lake Mendota Drive, Madison, WI 53705

Name of Owner: Kendall and Jessica Harrison

Address of Owner (if different than above): _____

Daytime Phone: 608-516-0478 Evening Phone: same

Email Address: kharrison@gklaw.com; jtyharrison@gmail.com

Name of Applicant (Owner's Representative): Kendall Harrison

Address of Applicant: same

Daytime Phone: _____ Evening Phone: _____

Email Address: _____

Description of Requested Variance:

We are requesting a variance from MGO 28.132 for a deck in our backyard. Specifically, we ask that the deck be allowed to remain as it was originally permitted: at grade on the south and east sides, flush with the retaining wall on the north side, and 5 feet from the property line on the west side. See attached for more details.

See reverse side for more instructions.

OFFICE USE ONLY

Amount Paid: \$300.00
Receipt: 122712-0001
Filing Date: 9-22-22
Received By: NLK
Parcel Number: 070918401260
Zoning District: TR-C1
Alder District: 19-FURMAN

Hearing Date: 10-20-22
Published Date: 10-13-22
Appeal Number: LNDVAR-2022-00009
GQ: _____
Code Section(s): 28.042(2)

Standards for Variance

The ZBA will only grant a variance if it finds that your proposal meets the following standards. Please explain how your variance request meets these standards.

1. There are conditions unique to the property of the applicant that do not apply generally to other properties in the district.

See attached.

2. The variance is not contrary to the spirit, purpose, and intent of the regulations in the zoning district and is not contrary to the public interest.

See attached.

3. For an area (setbacks, etc.) variance, compliance with the strict letter of the ordinance would unreasonably prevent use of the property for a permitted purpose or would render compliance with the ordinance unnecessarily burdensome.

See attached.

4. The alleged difficulty or hardship is created by the terms of the ordinance rather than by a person who has a present interest in the property.

See attached.

5. The proposed variance shall not create substantial detriment to adjacent property.

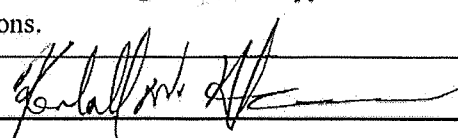
See attached.

6. The proposed variance shall be compatible with the character of the immediate neighborhood.

See attached.

Application Requirements

The Zoning Board of Appeals may refer or deny applicants with incomplete applications. Note, the maximum printed size for drawings is 11" x 17." Please provide the following information:

<input checked="" type="checkbox"/>	Pre-application meeting with staff. Before you submit this application, meet with the Zoning Administrator. Together, you will discuss your proposed project and submission material. Contact Zoning at least one week prior to the application submission deadline to schedule the meeting. Your application will not be accepted unless a pre-application meeting has been held.
<input checked="" type="checkbox"/>	Site plan, drawn to scale. We recommend a registered survey, but it is not required. On the plan, show the following: <ul style="list-style-type: none"> <input type="checkbox"/> Lot lines. <input type="checkbox"/> Existing and proposed structures. Include dimensions and setback distances to all property lines. <input type="checkbox"/> Approximate location of structures on properties next to variance. <input type="checkbox"/> Major landscape elements, fencing, retaining walls or other relevant site features. <input type="checkbox"/> Scale (1" = 20' or 1' = 30' preferred). <input type="checkbox"/> North arrow.
<input type="checkbox"/>	Elevations from all directions showing existing and proposed. Show the existing structure and proposed addition(s).
<input type="checkbox"/>	Interior floor plan of existing and proposed structure , if required. Most additions and expansions will require floor plans.
<input type="checkbox"/>	Front yard variance requests. Show the front yard setback of all other properties on the same block face.
<input type="checkbox"/>	Lakefront setback variance requests. Provide a survey prepared by a registered land surveyor. The survey must show existing setbacks of buildings on adjacent lots.
<input type="checkbox"/>	Variance requests involving slope, grade, or trees. Show: <ul style="list-style-type: none"> <input type="checkbox"/> Approximate location and amount of slope. <input type="checkbox"/> Direction of drainage. <input type="checkbox"/> Location, species and size of trees.
<input checked="" type="checkbox"/>	Email digital copies of all plans and drawings to: zoning@cityofmadison.com.
<input checked="" type="checkbox"/>	CHECK HERE. I understand that as part of my variance request, City of Madison staff will need access to my property. Staff will take photographs and do a pre-hearing inspection of the property. I give City Staff permission to enter my property, inspect the property, and take photographs.
<input checked="" type="checkbox"/>	CHECK HERE. I acknowledge that any statements implied as fact require evidence.
<input checked="" type="checkbox"/>	CHECK HERE. City of Madison staff has given me a copy of the standards that the Zoning Board of Appeals will use to review variance applications.
Property Owner's Signature:	Date:
	9/22/22

-----.(Office Use Only)-----

DECISION

The Board, in accordance with its findings of fact, hereby determines that the requested variance for _____ (does) (does not) meet all the standards for a variance. Further findings of fact are stated in the minutes of this public hearing.

The Zoning Board of Appeals: **Approved** **Denied** **Conditionally Approved**

Zoning Board of Appeals Chair:

Date:

BACKGROUND

Our backyard has three sections: upper; middle; and lower. *See* Ex. A, B, and C. We seek a variance related to a deck on the middle section.

The middle section is very narrow and slopes steeply toward the lake. When we purchased the property in April 2020, the local limestone retaining walls were beginning to crumble. *See* Ex. D. Over time, the crumbling continued and it was becoming difficult to safely walk down to the water. We engaged Corning Graap & Associates LLC (CG) to help us address these issues. This past summer, over three months, using heavy machinery, CG constructed new stone steps and retaining walls and generally made our backyard more attractive and functional.

Part of the project included an area in the middle section of the backyard for a patio or deck from which to enjoy views of the lake. We first considered a patio, but were concerned that construction might affect a mature oak tree located nearby. We consulted two tree experts (Steve Lesch and Joe House). Both told us that if we went forward with a patio in that spot, it would likely kill the tree over time, as oak roots cannot withstand the compaction caused by a patio. *See* Ex. E (report of Joe House). We very much wanted to preserve that oak so we decided to install a deck instead.

We hired John Kohl Builders (JKB) to build the deck. JKB applied for a building permit and CG provided a site plan to the City. After the City issued the building permit, CG dug the footings for the deck and the City approved them. CG then poured the footings and JKB framed out the deck.

Once that work had been completed, the City informed CG it had received a complaint about the deck. Several days later, the City put the building permit on hold. We immediately stopped construction and began a dialogue with the City.

The City advised us the deck did not comply with MGO 28.132. MGO 28.132 addresses setback requirements for certain structures, including decks. The ordinance provides that decks that are fewer than three feet above “adjacent” ground level are not subject to any setbacks. Decks that are greater than three feet above “adjacent” ground level, however, are subject to a six-foot setback in rear yards.

The City explained that though our deck generally was fewer than three feet above the ground immediately beneath it, “adjacent” meant a three-foot perimeter around the deck. Because the northern and western sides of our deck do not have a three-foot perimeter of flat ground, we were informed the deck did not conform to MGO 28.132. This was a surprise to us, as we did not learn about the City’s interpretation of “adjacent” until after the building permit had been suspended.

We met with the City on-site to review the situation. The City acknowledged that we did not misrepresent our intentions about the deck in our site plan or our request for a building permit. We and the City now agree that there was a mutual, good faith misunderstanding, brought about by the complications of applying the “adjacent” grade rule on a terraced slope.

We have expended considerable time, energy and money in reliance on the building permit. We are seeking a variance so that we can add the decking and cable-railing to the already-completed framing. *See* Ex. F (sample of cable-railing).

STANDARDS FOR VARIANCE

1. There are conditions unique to the property of the applicant that do not apply generally to other properties in the district.

The middle section of our rear yard is steep and narrow. Over a run of 40 feet, the property drops 12 feet, for a 30 percent slope. In addition, the middle and lower sections of our rear yard are only 25-feet wide. No other property near ours is that narrow or has a panhandle shape. The shape and pitch of the middle section of our rear yard is unusual and does not leave much room for a fully at-grade deck.

We are one of a handful of properties in the district that share a property line with Merrill Springs Park. Indeed, much of the park belonged to the prior owners of our property before they sold it to the City in December 2011. We chose to put the deck next to an area of the park that is removed from where people gather. The deck is next to a slope that is unmaintained, largely covered with invasive species, not used by park-goers for walking or sitting and separated from the gathering areas of the park by three racks of kayaks.

The south edge of the deck is under five feet away from a mature oak tree. As noted above, we were advised that we could not build a patio in that area without likely killing that tree. *See* Ex. E. To preserve the tree, we chose to build a deck that is modest in size, approximately 14 feet by 15 feet as it is currently framed out.

It might have been possible to construct a multi-level deck that meets MGO 28.132 but a single-level deck is safer and more practical, particularly as we are contemplating a structure under 225 square feet.

2. The variance is not contrary to the spirit, purpose, and intent of the regulations in the zoning district and is not contrary to the public interest.

MGO 28.132 provides that a deck under three-feet high has no setback requirements but a deck greater than three-feet high must be set back six feet from the property line. The purpose of this ordinance, as we understand it, is to make sure that a property owner does not build an elevated deck right next to the property line and thereby disturb the immediate neighbor's enjoyment of their property.

Our deck is not contrary to this purpose. The deck as currently designed and framed is not a tall deck. In fact, the deck is below grade on the southern side, and is at grade on the eastern side and thus complies with MGO 28.132 on those sides. The eastern side of the deck is the only side of the deck where we have an immediate neighbor (5046 Lake Mendota Drive). The proposed deck sits well below their house, approximately 90 feet away and up the slope. The neighbor's lower yard near the deck is full of wildflowers. (Those neighbors have voiced no

concerns about the deck.) The northern side of the deck faces the lake, and thus is not close to any neighbor's property line.

The western side of the deck faces the park. As discussed above, we chose to put the deck next to an unmaintained, natural portion of the park that is sloped and where people do not get together. Steps between the deck and the park provide further separation. The deck is approximately five feet from the property line, just shy of the six-foot setback requirement.

3. For an area (setbacks, etc.) variance, compliance with the strict letter of the ordinance would unreasonably prevent use of the property for a permitted purpose or would render compliance with the ordinance unnecessarily burdensome.

We understand from the City that we could potentially bring the deck into compliance by extending the terraced wall approximately three feet toward the lake and rebuilding the steps next to the new wall. But now that our rear yard project is complete (aside from the deck), we have no way of bringing back in the heavy machinery without destroying the extensive stonework already installed. At this point, it would be unnecessarily burdensome and expensive to require us to attempt to rebuild the terraced wall and steps (likely by hand), especially because, after all that work, the deck would remain in exactly the same place.

A patio with the same footprint in that same area would comply with MGO 28.132. The functional usage of a deck is the same as a patio as both are open air, seasonal, weather-dependent, uncovered structures. Decks and patios are common improvements along the lake; however, because of the mature oak, the slope and the narrowness of the lot, a patio is not a viable option, as over time, it would likely kill the mature oak tree next to it. *See Ex. E.*

A deck has no significant impact above and beyond what we could already do on the property with a patio.

4. The alleged difficulty or hardship is created by the terms of the ordinance rather than by a person who has a present interest in the property.

The difficulty and hardship in meeting the "adjacent" ground requirement of MGO 28.132 is caused by the steepness of the grade, the narrowness of the lot, and the existence of a mature oak. All of these things were true before we purchased the property. In addition, the retaining walls were already beginning to fail when we made the purchase. It is difficult to build an at-grade deck on our sloped lot without significant manipulations to the grade, which could negatively affect the mature oak tree.

Before digging the footings or taking any other steps to build the deck, JKB applied for, and was granted, a building permit. After the footings were dug, the City came to our property and approved them. JKB then framed out the deck (and deck stairs) in reliance on the prior approvals. It was only later that the City suspended the permit. We stopped work immediately. In short, we did not create the difficulty or hardship.

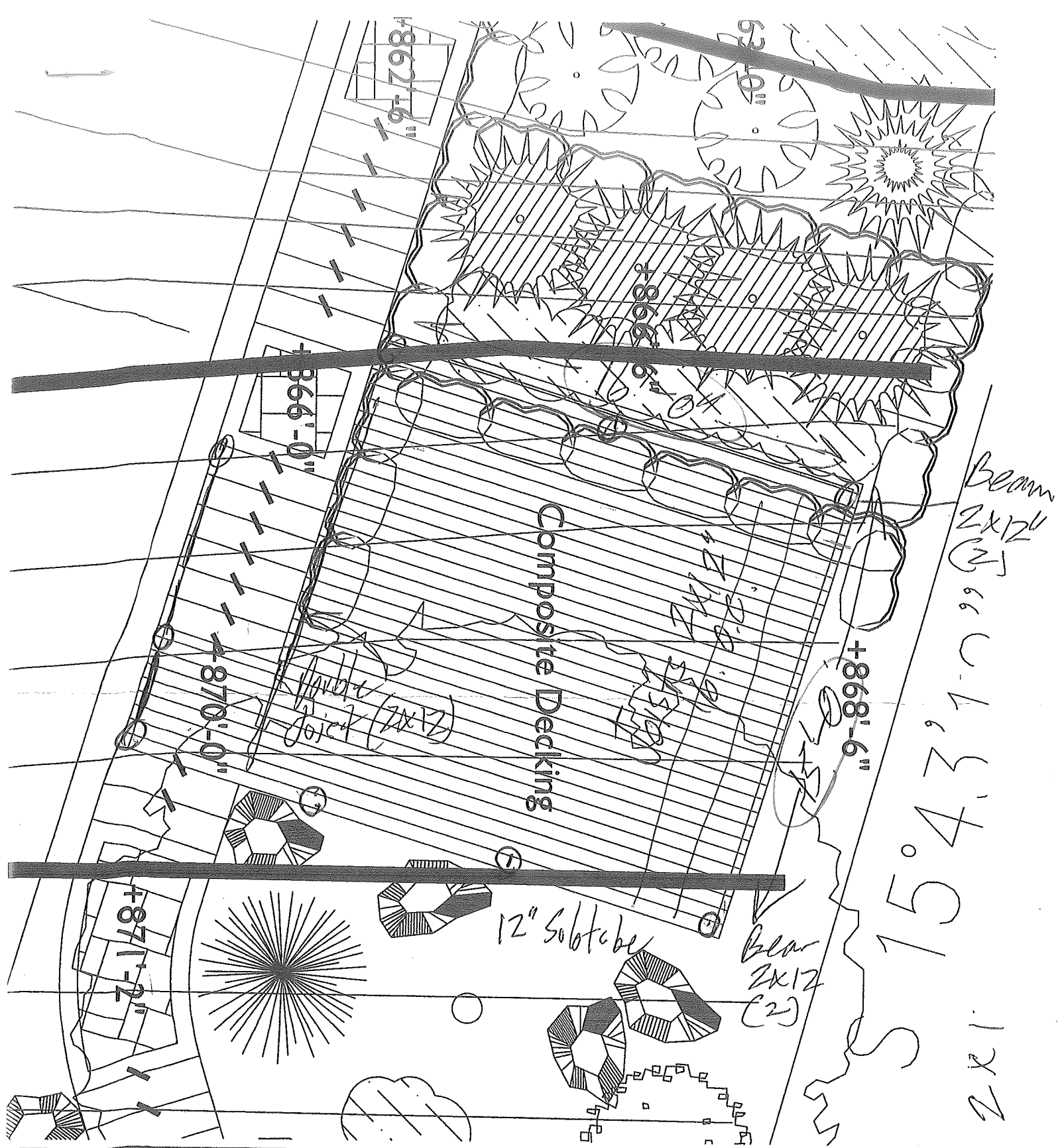
The existing framing mistakenly extends four to six inches beyond the end of the terraced wall on the northern side of the deck. We intend to ask our contractor to cut off that overage and bring the edge of the deck flush with the wall.

5. The proposed variance shall not create substantial detriment to adjacent property.

The proposed variance will not create substantial detriment to the adjacent property. We have only three properties adjacent to ours. One is 5054 Lake Mendota Drive. We share a property line with that neighbor in the upper section of our rear yard. Their property is not adjacent to the middle section of our rear yard, where the proposed deck is located. They have voiced no concerns about the deck. The second is 5046 Lake Mendota Drive. As noted above, our eastern property line abuts their property. The proposed deck is at grade on that property line. The final adjacent property is the park. As we have already discussed, the proposed deck is next to the steeply sloped area of the park, which is unmaintained and largely unpassable. In addition, the deck is separated from the park by the steps. Finally, preserving the oak tree will be a substantial benefit for the park and our neighbors (not a substantial detriment).

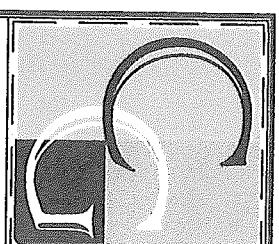
6. The proposed variance shall be compatible with the character of the immediate neighborhood.

The proposed variance would be compatible with the immediate neighborhood. Most (if not all) of the lake lots in the neighborhood have decks or patios from which to enjoy views of the lake when weather permits. The ability to spend time looking at the lake is one of the primary reasons that people purchase homes in this neighborhood.



Checked By: _____
 Drawn By: _____
 Revised: _____
 Revised: _____
 Revised: _____
 Revised: _____
 Revised: _____
 Revised: _____

THE HARRISON RESIDENCE
 5050 LAKE MENDOTA DRIVE
 MADISON, WISCONSIN



Deck 16' x 15' 1/4" = 1'-0"
 and 4' x 4' 1/4" = 1'-0"

This plan made exclusively for the party named in the title block. It remains the property of Corning & Associates, LLC and may not be reproduced or implemented in whole or part by any method without prior written consent of Corning & Associates, LLC.

L1

EXHIBIT

A



EXHIBIT
B



EXHIBIT
C



EXHIBIT
D

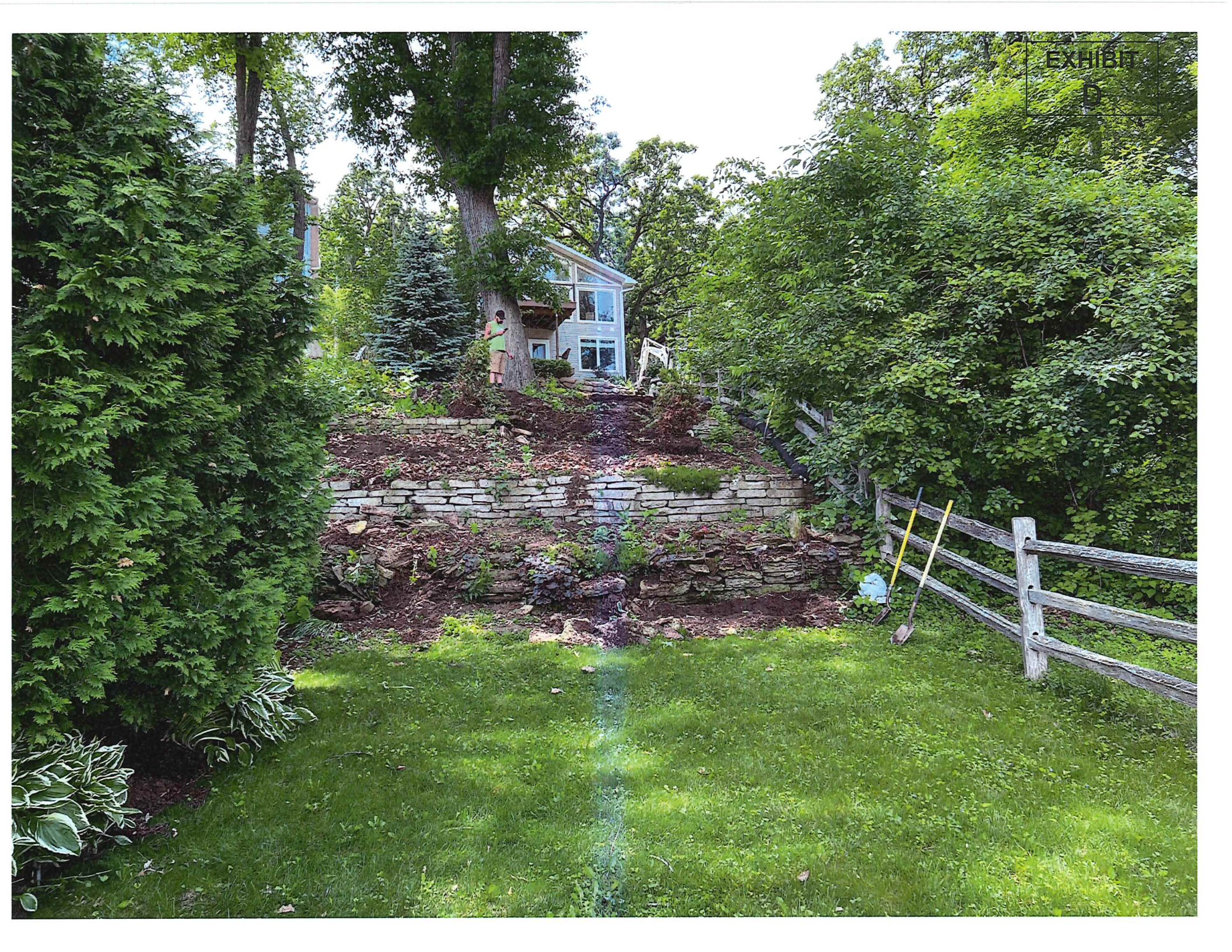
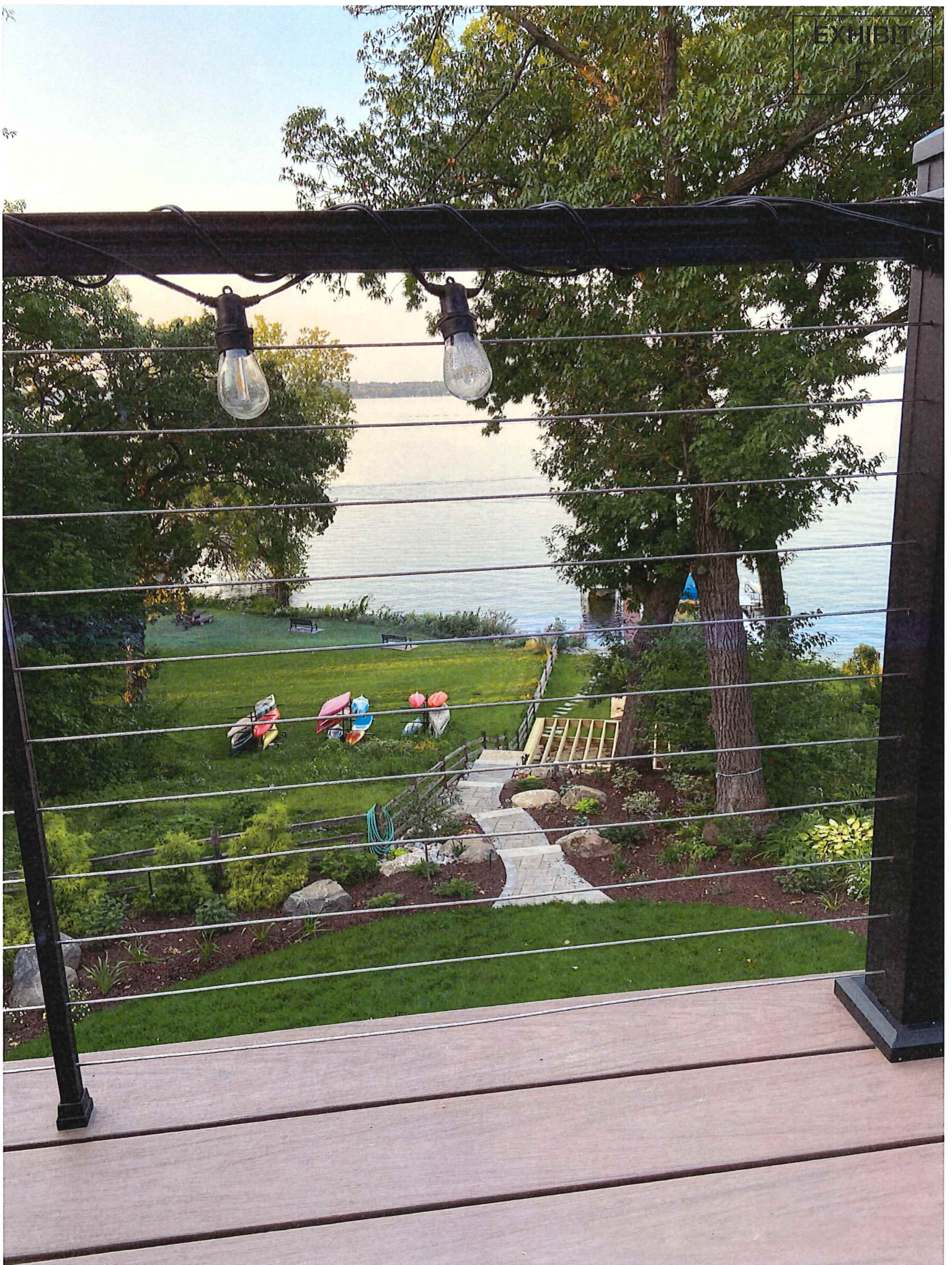


EXHIBIT
F



September 14, 2022

To the Zoning Board of Appeals:

I own Tree House Arbor Science of Madison, am an Internationally Certified Arborist (RM0791A) since 1996 with a B.S. in Forestry from the University of Wisconsin-Madison MS95. I have 30 years of experience in the field and am a member of the Wisconsin Arborist Association and the International Society of Arboriculture.

The Harrisons contacted me in early May 2022 to consult with them regarding the oaks in their backyard. Specifically, they were planning to start hardscape work that summer to rebuild their retaining walls, but were concerned about the impact that the construction might have on their mature oaks.

I first used a sonic tree decay testing device (Tree Check) to test for decay. There were two black oak trees close to the house that showed decay and extensive dieback. In the lower yard sloped area where the retaining walls were to be rebuilt, there is one white oak 38" diameter at breast height(DBH) and one black oak 38" DBH. Both oaks in this middle section showed some decay, but not extensive decay, at the base, with less decay farther up the trunk. Both trees showed strong bud break. In both cases, I recommended monitoring the trees to better understand any changes in the decay area.

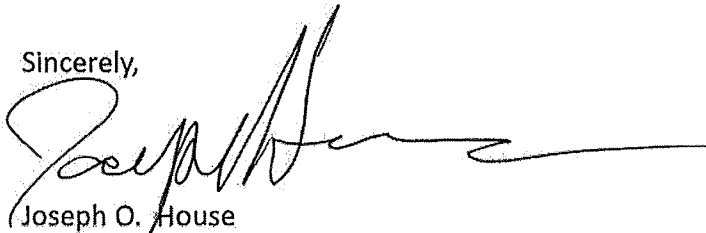
I also noted that the large, white oak is farther down the slope and closer to the retaining walls. I advised the Harrisons that oak roots are shallow and sensitive to soil compaction. They can generally withstand soil compaction in a limited area, as long as the other areas remain minimally compacted. For both oaks, I advised them to route the machinery path as far away as possible from the roots, as close as possible to the fence, and to spread a thick layer of wood chip mulch along the route to distribute the weight of the equipment.

I also advised on how to address roots that need to be cut, or that are damaged by construction. In simple terms, if a cut must be made, the cut should be made cleanly and as close to 90 degrees as possible. This allows the tree to quickly compartmentalize the wound, minimizing the opportunity for fungus and bacteria to enter. A long scrape or smash along a root leaves a larger wound that is less easily compartmentalized by the tree and more likely to become infected.

Specific to the white oak farther down the slope, I advised against a patio. I noted that patios require compaction of the entire patio area, with fill to be brought in which slowly kills a tree over the course of several years. In contrast, decks require only a small number of footings that can be dug to avoid large roots and do not require soil compaction. In my opinion, if the goal is to minimize compaction of soil around sensitive trees, decks are lower impact while patios are high impact.

Last week I had the opportunity to visit the Harrison's property to view the framed-out deck. From what I saw, the deck avoids disturbing the white oak as much as possible. The landscapers removed minimal soil from the downhill side of the oak, and more importantly, the soil under the deck is not built up, which would have added mass and reduced the air available to the oak roots. The uphill side of the deck is tucked down into the slope, but stays at least five feet away from the oak. The deck itself has 4 footings with loose gravel under the framing. A patio in that same area would have required compaction and would have suffocated the roots. After visiting the site, I'm certain that a patio would have severely impacted the life span of the white oak.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joseph O. House', with a long horizontal flourish extending to the right.

Joseph O. House

ISA Certified arborist RM0791A

Tree House Arbor Science of Madison

joe@treehousearbor.com