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Hi Marsha,

You asked me to provide comments regarding the January 10th letter which the Zoning Administrator ("ZA") sent to you and Alder Knox. That letter (1) questions the date of the ZA's determination and (2) claims that your appeal was not timely filed.

The short version is:

- (1) The application does not ask you for a determination date. Since the ZBA rules are not clear as to what that date should be, and since past appeals have relied upon the date of the Plan Commission/Council meeting, you should be allowed to use the date of the Plan Commission meeting.
- (2) Your appeal was filed 20 days after the Plan Commission meeting. The 15 day limit for filing an appeal under ZBA rule B.1. has not been enforced. Of the four appeals in 2023, three were clearly untimely (appeals were filed 21 days, 51 days, and 76 days after the postmark date on the Official Notice).
The Supreme Court of Wisconsin essentially said "fair is fair" is a similar timeliness case when a petition was filed late: late petitions had been accepted in the past, so the court deemed the petition at issue to be timely filed (and created a bright line rule going forward).
- (3) ZBA rule B.3. gives 25 days to file an appeal: if "a communication purporting to be an appeal" is received, the writer is supplied with the proper form and given an extra 10 days to file the appeal. I requested the appeal form on your behalf, so if the ZBA determines my request was a "communication purporting to be an appeal," then your appeal was timely.

I also included some information regarding the ability of the ZBA to suspend its rules and its ability to act sua sponte (on its own motion).

You were not required to provide a date of determination

The ZA said: "The materials you submitted did not specify the date of the Zoning Administrator determination."

The application did not require a date of determination.

The date of determination has not been routinely provided in past appeals. Legistar reflects 19 records for matters where (1) the controlling body was the Zoning Board of Appeals ("ZBA") and (2) the title of the matter contains the word "appeal."

- Many of the appeals involve an enforcement action where building inspection has notified the property owner of noncompliance and most of those appeals include the

Official Notice. For these appeals, the date of mailing is when the 15 days starts to run.

- Other appeals provide no clue as to the determination date. For example, Legistar 71917 (appeal of the ZA's decision as it applies to a use) includes no information as to when the determination was made. The question of timeliness was not addressed by the ZA and was not discussed at the ZBA meeting.

Determining the date of the making of any order, ruling, decision or determination from which an appeal is taken

The ZA's letter on timeliness says:

The determination was made prior to several public meetings and staff reports, including one written by Urban Design Commission staff (July 26, 2023) and Planning staff (August 28, 2023). The Plan Commission made their final action approving the conditional use at their meeting on October 30, 2023.

The most favorable reading of the determination date, as applied to your application, is October 30, 2023, the date the Plan Commission approved the conditional use for the project at 1609 S. Park St.

When Official Notices are mailed, the ZBA procedures are quite clear the 15 days starts to run as of the postmark date. In other cases, such as your appeal, the 15 days starts to run as of the date of making any decision or determination. The ZBA procedures do not define what counts as the date of decision/determination. If the ZA cannot define what that date is, you should be able to use the most favorable reading of the determination date.

The 19 Legistar records include three matters in which the appellant was not the owner/owner's representative/developer. In two of these matters the appeal was filed subsequent to a City meeting (Plan Commission or Council) and the ZA did not raise any issue about the decision/determination date.

- Legistar 46724, an appeal of the ZA's decision classifying the use of the proposed Olbrich Biergarten. Council approved the alcohol license for the Biergarten on 3.7.2017 and the appeal was filed on 3.21.2017.
- Legistar 41247, an appeal of various issues related to a proposed project at 820 South Park Street. Plan Commission approved the conditional uses for the project on 12.7.2015 and the appeal was filed 12.23.2015. The staff report was dated November 18, 2015.
- The third matter was my appeal relating to 906 Williamson. I had received specific zoning interpretations in response to my questions. In response to my direct question about the timeframe to appeal, the ZA told me it was 15 days from the date of his email explaining his determinations (which was 4 days prior to the Plan Commission meeting).

In accordance with past practice, the decision/determination date should be deemed to be the date of the Plan Commission, or Council, meeting. How a provision has been interpreted by the ZA in the past is used to support a current interpretation. (For example, in 2015 the ZA told me: "Yes, I agree, the wording is inconsistent here. We are charged

with interpreting the code, and we have interpreted the staff-allowed reduction to apply to any use, not just nonresidential uses. This interpretation is consistent with how we have handled parking reductions for years, dating back to the old zoning code.”)

Whether the appeal was timely under ZBA Procedures rule B.1.

Rule B.1. provides:

Time of Appeal. Every appeal shall be taken within fifteen (15) days from the date of notice of refusal of a permit or from the date of the making of any order, ruling, decision or determination from which an appeal is taken. Where official notice is mailed, the time to appeal shall begin running from the postmark date. A written appeal, specifying the grounds therefore, must be filed within fifteen (15) days with the Zoning Administrator. The date of the decision of the Zoning Administrator or other such officer shall not be counted, but the date of filing the appeal and Sundays and holidays shall be counted, except that if the last day falls on a Sunday or legal holiday, the time for filing shall be extended to the next secular day.

Your appeal was filed 20 days after the Plan Commission meeting. (It was actually 21 days, but the 20th day was a Sunday, so under B.1. filing on Monday counts as the 20th day.) Your timeliness memo addresses the fact that you were told the 15 day limit is not always enforced.

The enforcement of the 15 day requirement appears, at best, to be scattered. None of the ZBA meetings available at the Madison City Channel site (beginning in May 2020) discussed timeliness of an appeal. Three of the four appeals that came before ZBA in 2023 were clearly untimely, yet the ZA did not raise timeliness as an issue, nor did the ZBA meeting include any discussion about timeliness.

- Legistar 81236 is currently before the ZBA. It was originally scheduled for the 12.21.2023 ZBA meeting, but was referred at the request of the applicant to the 1.18.2024 ZBA meeting, and then again referred to a future ZBA meeting by mutual request of the applicant and City Attorney.

The appeal was filed 11.15.2023. The postmark date of the official notice is not mentioned, but the appeal states the enforcement letter was made effective as of 10.25.2023. The appeal was filed **21 days** after the effective date of the official notice (and the postmark date of the official notice was at least days earlier).

- Legistar 79194 was before the ZBA in August. The appeal was filed 7.13.2023. The postmark date of the Official Notice was 4.28.2023. That Official Notice stated, as they all do: “All applications for appeal of orders shall be submitted to the Building Inspection Director in writing within fifteen (15) days of the postmark on the Official Notice.”

The appeal was submitted **76 days** after the postmark date of the official notice.

- Legistar 76607 was before the ZBA on 4.20.23. The Official Notice was issued, per the appeal letter, on 12.12.2022. The appeal was filed 2.1.2023, or **51 days** after the official notice.

The Supreme Court of Wisconsin addressed timeliness in *St. John's Home v. Continental Casualty Co.*, 150 Wis.2d 37, 441 N.W.2d 219 (1989). In that case the court's clerk's office closed at 5:00 pm. An attorney arrived at 5:15pm to file a petition for review and a law clerk unlocked the office and allowed the attorney to leave the petition on the receptionist's counter. The petition was deemed to be untimely filed. On a motion for reconsideration the court acknowledged documents had, in the past, been accepted for filing even though it was past the normal 5:00 closing time. Essentially, the court said "fair is fair" and deemed the petition to be timely filed while also creating a bright-line rule going forward.

In light of the fact that in the past it has happened that documents including petitions for review have been received after the normal business hours of the clerk's office, we conclude that this petition too should be deemed to have been timely filed under these circumstances. We believe, however, that the timeliness of the filing of a petition for review should not be governed by happenstance.

Therefore, for the future, we reject - as too problematic and cumbersome - any rule which would condone the after-hours delivery and receipt of a petition for review. *Id.*, at 43-44.

Similarly, the ZBA hearings are quasi-judicial hearings. When a unambiguous ZBA rule is disregarded by allowing appellants to file 21-76 days after the postmark date of an Official Notice, one can argue that strict enforcement of a murky decision/determination date is unfair. The ZBA could choose to follow the path used in *St. John's Home* and deem your appeal to be timely filed based on its past acceptance of untimely appeals.

Whether the appeal was timely under ZBA Procedures rule B.3.

Rule B.3. provides:

Insufficient Form. Any communication purporting to be an appeal or application to the Board for a permit shall be regarded as a mere notice of intent to seek relief until it is made in the form required. Upon receipt of any such communication, the writer shall be supplied with the proper forms for presenting his or her appeal and if he or she fails to supply the requested data in the proper form within ten (10) days in addition to the fifteen (15) days specified in Subsection (1) of this section, his or her case may be dismissed by the Board for lack of prosecution.

"Any communication purporting to be an appeal ... shall be regarded as a mere notice."

- I offered to obtain an appeal form for you since the form was not available on-line. I emailed the ZA: "I searched for the form used to appeal a determination of the Zoning Administrator. I cannot find the form online. Could you email me that form (or a link to where I can find it)? Also, that form states there is a \$200 filing fee. This fee is not listed under MGO 28.206. Which ordinance requires the \$200 fee?"
- While I was not the appellant, the rule does not require the communication to be from the appellant. (Though perhaps the first sentence could be read to imply the appellant needs to ask since the second sentence refers to "his or her appeal." But this is a ZBA rule and up to the ZBA to interpret.)

- While a mere request for a form might not purport to relate to an appeal, I did also ask about filing fees and where that authority came from in the ordinances. Those questions support my email being a notice of intent to seek relief.

"Upon receipt of any such communication, the writer shall be supplied with the proper forms."

- I emailed 11.12.2023, a Sunday, at 3:38 pm.
- I was provided the form on 11.14.2023 at 3:50 pm. (November 14th was the 15th day after the Plan Commission decision.)

If the ZBA finds my email a "communication purporting to be an appeal," then your appeal was timely since it was filed within 25 days (the 10 days in addition to the 15 days, as specified in ZBA rule B.3.).

ZBA Procedures rule E.

Should the ZBA find your appeal untimely under both rule B.1. and B.3., rule E. provides that the ZBA can suspend the rules: "The suspension of any rule of procedure may be ordered at any meeting by an affirmative vote of not less than four (4) members of the Board."

Sua sponte

In *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Board of Adjustment*, 131 Wis. 2d 101, 108, 388 N.W.2d 593 (1986), the Supreme Court of Wisconsin discussed *State ex rel. A. Hyneck & Sons Co. v. Board of Appeals*, 267 Wis. 309, 64 N.W.2d 741, vacated on reh'g, 267 Wis. 315a, 66 N.W.2d 623 (1954). In the *Hyneck* case, "neighbors protested the issuance of a building permit to the zoning board. The protest was not, however, filed within the appeal period. Nevertheless the board conducted a hearing. The board acted sua sponte, not on an appeal initiated by the neighbors."

In *Brookside*, the court did not disapprove of the Board of Appeals acting sua sponte, or on its own motion, to address issues raised in the appeal which were untimely.

Joint Filing

As a side note, it is curious that you and Alder Knox were required to file separate appeals even though you made clear at the start you were filing a joint appeal as Alders. Staff told you filing jointly was not an option. But in Legistar 79194, the two appellants filed a joint appeal last July.

If you have any questions or concerns, please let me know,

Linda