MEMORANDUM

TO: City of Madison Zoning Board of Appeals

FROM: John Strange, Assistant City Attorney

DATE: January 8, 2016

RE: Appeal – 820 Park Street

I. Background

On December 23, 2015, Kitty Kocol (on behalf of all persons listed on an attached memorandum) ("Appellant") appealed the decision of the Zoning Administrator in regard to Madison General Ordinance Section 28.205(5) and others. The appeal is related to a proposed project at 820 Park Street that is going before the Common Council on January 19, 2016 for a decision on the applicant's rezoning request.

After reviewing the documents filed by the Appellant, I do not have enough information to conclude that Appellant (or any of the neighbors on whose behalf she has filed) is a "person aggrieved" by a "decision" of the zoning administrator. M.G.O. 28.205(5). Therefore, it is unclear whether this appeal is valid.

Prior to reaching the substance of the appeal, the Zoning Board of Appeals ("ZBA") must determine if Appellant is aggrieved and if the zoning administrator has made a decision that can be appealed.

II. Appellant must be aggrieved to appeal.

M.G.O. 28.205(5) provides that "Appeals to the Zoning Board of Appeals may be taken "by any person aggrieved" by a decision of the Zoning administrator.

To be aggrieved, the ZBA must determine (1) whether the Applicant has suffered threatened or actual injury, and (2) whether the interest asserted is recognized by law. *See Norquist v. Zeuske*, 211 Wis. 2d 241, 564 N.W.2d 748 (1997). This is the same basic two-step standing test outlined in *Metropolitan Builders Ass'n of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, ¶ 13, 282 Wis. 2d 458, 466.

> Under this two-step test, the first step is to determine 'whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law.' Step one, the direct injury requirement, has two components. First, the injury must not be hypothetical or conjectural.

> Second, there must be a close causal relationship between the alleged injury and a change in the physical environment.

Milwaukee Brewers Baseball Club v. Wisconsin Dept. of Health and Human Social Svcs., 130 Wis. 2d 56, 64, 387 N.W.2d 245 (1986). *See also Smerz v. Delafield Town Bd.*, 2011 WI App 41, 332 Wis. 2d 189 (finding that neighboring landowners lacked standing to challenge discontinuation of unpaved alley segments near their properties, even though they lived on the same block as the alleys and used them for parking, because their properties did not "abut" the discontinued portions).

In the overwhelming majority of cases appealed to the ZBA, the appellant has asked for permission to do something on his or her property and that request for permission has been denied. In those cases, it is easy to see how the appellant has been aggrieved. In this case, Appellant is not an applicant who asked for permission to do something. Furthermore, it is unclear from the documents she has filed how she has been aggrieved.

Prior to considering the substance of Appellant's appeal, the ZBA must determine if she has been aggrieved. To determine that the Appellant is aggrieved, the ZBA must find that she meets the two-part test set out above.

III. Appellant must identify a decision that is appealable.

It is equally unclear from the Appellant's filings whether the Zoning Administrator has made a "decision" that is subject to appeal.

M.G.O. 28.205, which allows the appeal of "decisions" of the zoning administrator, was created pursuant to the statutory enabling authority that authorizes the creation of a board of appeals: "The board of appeals shall…decide appeals where it is alleged there is *error in any order, requirement, decision or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto*." Wis. Stat. § 62.23(7)(e)4. (West 2014)(emphasis added).

The jurisdiction of the Board of Appeals, therefore, lies in hearing appeals of decisions made by the zoning administration relating to the enforcement of zoning ordinance. However, this does not mean that every action taken by the Zoning Administrator in the course of his or her duties is a decision relating to the enforcement of the zoning ordinance. For example, for every proposed rezoning that comes before the Common Council, city staff (be they planners or zoning officials) provide the Plan Commission and Common Council with information relative to the zoning code, comprehensive plan, and other similar planning tools that is relevant to the proposed rezoning. The Attorney General has stated that "such recommendations are clearly

preliminary and advisory only and do not constitute a 'decision,'…or an 'order, requirement, decision or determination made…in the enforcement of [an ordinance adopted pursuant to the enabling authority]." 69 *Wis. Op. Atty. Gen.* 146 (1980). Such rezoning determinations are "'merely to inform the governing authority" and the board of appeals "lacks jurisdiction" to review such determinations. *Id.*

Applicant's filings do not distinguish the type of information provided by city staff in this case from the type of information the Attorney General has explained does not constitute a decision that falls within the jurisdiction of a board of appeals. In any event, prior to considering the substance of Appellant's appeal, the ZBA must also determine if the zoning administrator has made a decision that can be appealed.

IV. Conclusion

One of the roles of the ZBA is to allow aggrieved persons to appeal decisions of the zoning administrator. However, the ZBA is not a forum for "any person" to file an appeal about any action of the zoning administrator.

Appellant should be allowed to explain beyond her initial filings how she believes her appeal is appropriately before the ZBA, but the ZBA should only hear the substance of the appeal if it is satisfied that the above requirements have been met.