Zoning Board of Appeals
Request for Rehearing (Legistar 81875)

We are requesting a rehearing with respect to our appeal on timeliness, Legistar 81875.

The decision/determination date varies by the issue in our appeal

The Zoning Board Of Appeals ("ZBA") did not decide the date of the Zoning Administrator's ("ZA") decision/determination. The ZBA discussion at the February 15th meeting seemed to indicate, without deciding, (1) that our appeal was late no matter what the decision/determination date might be, and (2) that the decision/determination date is the date the decision/determination was first publically available.

We appealed four decisions/determinations of the ZA. We believe that the decision/determination date should be separately analyzed with respect to each of those four grounds for appeal. Since no appellant can know what is in the mind of the ZA, or what internal documents might reveal, the earliest possible decision/determination date is the date the information became publically available. (Though we have some questions about using this date since several court cases looked to when the appellants had actual knowledge.)

As will be shown below, the ZA's decisions/interpretations became public knowledge at different points in the process. For example, the UDC staff report only spoke to the pick-up window. Despite assertions made by the ZA and the City Attorney's Office (both claimed that there was not any change in the ZA's determination throughout the entire public hearing process), there were changes in how the TOD compliance of the pick-up window was explained. Whether those changes reflected revisions to an interpretation or merely corrections to how the interpretation was explained, for the public the change was a change in interpretation.

The following reflects the dates, by our grounds for appeal, when various statements were made regarding zoning interpretations. It shows there was not just a single decision/determination date for all the grounds of our appeal.

<u>Grounds for appeal #1</u>

MGO 28.104(8)(c): "Vehicle access sales and service windows shall be located under the building in which they are located, and the building shall have commercial or residential uses as allowed in the base district along the primary street frontage."

- UDC staff report 7/26. "As determined by the Zoning Administrator, the proposed vehicle sales and service window, as designed, is consistent with both the TOD Overlay requirements in that it is **within the existing building structure**, and the Supplemental Regulations because the vehicle sales and service window is screened from view by a wall."

- UDC staff report 8/16. "As determined by the Zoning Administrator, the proposed vehicle sales and service window, as designed, is consistent with both the TOD Overlay requirements in that it is **within the existing building structure as a result of the canopy roof addition**, and the Supplemental Regulations because the vehicle sales and service window is screened from view by a wall."

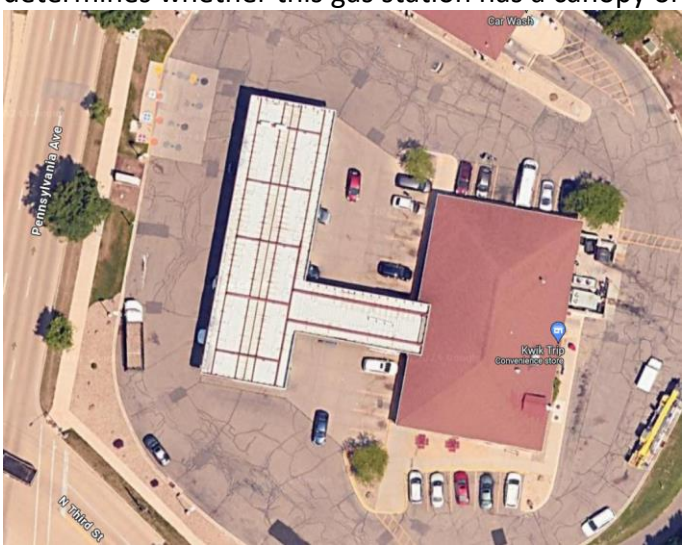
- Plan Commission staff report 8/28. "Per zoning staff, the proposed enclosure for the drive-thru complies with the TOD Overlay District."

- Zoning comments at the 8/28 Plan Commission meeting. "The other question about the drive-thru, I do want to just clarify that **it is not a canopy**. A canopy is a defined thing. It has posts and a roof and no wall. This is a wall, so it's a building addition." "So the addition that they did build encloses the window, it puts it under the roof of the addition and so the zoning administrator's interpretation is that that satisfies that requirement in the TOD overlay."

- ZA PowerPoint presentation materials, page 6: "**Canopy addition** over drive-through ≠ "under the building"

As can be seen from the above, the pick-up window was first "within the existing building structure," then it was "within the existing building structure as a result of the canopy roof addition," then Zoning staff told the Plan Commission "it is not a canopy" by virtue of the wall, yet the ZA calls the structure a "canopy addition."

Whether a structure is a canopy or a roof might seem picky. However, when interpreting the zoning code, such distinctions matter. For example, whether a structure is a canopy or a roof determines whether this gas station has a canopy or a building addition.



Thus, the reports of the ZA's decision/determination changed, and it was not until the 8/28 Plan Commission meeting that the decision/determination was clarified with respect to the "under the building" requirement.

Grounds for appeal #2

This issue is whether the ordering facility also needs to be "under the building in which they are located, and the building shall have commercial or residential uses as allowed in the base district along the primary street frontage."

The UDC staff reports only addressed the pick-up window. The only possibility for public awareness that the ZA had decided the ordering facilities were not required to be under the building was the broad comment in the 8/28 Plan Commission staff report: "Staff notes that Zoning has determined that this development would comply with this recently adopted [TOD] ordinance …"

Public comments for the August 28th Plan Commission meeting (pdf page 16 of document #9 of Legistar 78428) raised the issue of the ordering facility needing to be under the building. The Plan Commission referred the matter and the applicants did not return until 2 months later. Certainly it is reasonable to assume that zoning read the public comments and that the ZA might reconsider, based on further reflection, whether the development complied with the TOD ordinance.

While one might argue the 8/28 staff report was adequate notice of the ZA's decision/determination (that the development complies with the TOD ordinance), there is no specificity in that determination. Did the ZA even consider the ordering facility? If not, would the ZA consider the issue after being put on notice and provide a decision/determination by the 10/30 Plan Commission meeting?

We believe the ZA's decision/determination was made as of 10/30, when there was public knowledge that the ZA would not be addressing this issue.

Grounds for appeal #3

This issue addresses the application of MGO 28.006, Scope of regulations. This ordinance requires "all uses of land or buildings established" after adoption of an ordinance to comply with all applicable regulations. It also requires enlargements of or additions to existing uses to comply with all applicable regulations.

This issue was never decided/determined by the ZA, or at least there was not any public knowledge of any decision/determination since neither staff reports nor zoning/planning testimony addressed the issue.

When is there public knowledge that the issue will not be addressed? MGO 28.006 was raised in public comments for the August 28th Plan Commission meeting (pdf page 19 of document #9 of Legistar 78428). It is reasonable to assume that zoning read the public comments and that the ZA might consider the scope of MGO 28.006 and address the issue in the supplemental staff report for the October 30th Plan Commission meeting. Since the issue was never addressed, public knowledge of the decision/determination that MGO 28.006 was inapplicable did not exist until after the October 30th Plan Commission meeting.

Grounds for appeal #4

This issue addresses the ability to use the existing asphalt between the building and S Park as a drive-thru lane.

This issue was first addressed in the 8/28 Plan Commission staff report:

> "Per §28.104(8) M.G.O. the site standards for automobile infrastructure do apply. Vehicle access sales and service windows and drives shall not be allowed between the primary street-facing façades and the primary public or private street, shall be setback from the primary and secondary street equal to or greater to than the principal building setback, shall be located under the building in which they are located, and the building shall have commercial or residential uses as allowed in the base district along the primary street frontage. Per zoning staff, the proposed enclosure for the drive-thru complies with the TOD Overlay District. Staff note that existing drive-thru infrastructure is not subject to the site standards for automobile infrastructure on the TOD Overlay District. Staff also believe the Supplemental Regulations for vehicle access sales and service windows are met."

August 28th is the earliest possible date for a decision/determination by the ZA on the issue of the asphalt, if the date of the ZA determination is when the determination became publically available.

Summary

- Issues #1, by virtue of changes, has an earliest possible determination date of August 28th.
- Issue #2 was never specifically addressed even though it was raised, and it only became clear at the October 30th Plan Commission meeting that it would not be addressed.
- Issue #3 was never addressed and it only became clear at the October 30th Plan Commission meeting that it would not be addressed.
- Issue #4 has an earliest possible determination date of August 28th.

An inappropriate standard of review was used

As stated by the ZBA Chair: "The burden is on the applicant at this point to show that the zoning administrator's determination was incorrect." We do not believe this standard of review was correct since the ZA does not have the authority to make the initial timeliness determination and does not have the authority to withdraw an application.

Duty of the ZBA to act

Attorney Haas said in an email of January 17th that the ZA "removed [our appeal] from the ZBA agenda because City ordinance directs the Administrator to forward appeals to Board if it is required to act on the appeal, and the Board is not required to act on untimely appeals."

MGO 28.205(3) addresses the jurisdiction of the Zoning Board of Appeals. Pursuant to MGO 28.205(3)(a), the ZBA has the and authority to: "hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Zoning Administrator in the enforcement of this chapter."

It is under the zoning administrator's duties, MGO 28.202(2)(i) that the ZA has the duty to "receive, file and forward to the Zoning Board of Appeals all applications for appeals, variances or other matters on which the Zoning Board of Appeals is required to act *under this ordinance*." (emphasis added)

Under MGO 28.205, the ZBA is required to act on appeals where the appellant alleges the ZA made an error. Whether an appeal is timely is determined pursuant to the ZBA rules, not the ordinance.

Jurisdictional issues: timeliness and standing should be treated the same

Attorney Haas said in an email of January 17th: "Timeliness and standing are jurisdictional questions and the ZBA's decisions regarding them will determine whether a hearing on the merits of the appeal is held."

As these are both jurisdictional issues, they should be treated the same – either the ZA can make the initial determination, subject to appeal, or the ZBA makes the decision(s) before proceeding to the merits.

There have been two instances where the City Attorney's office raised potential problems regarding whether the appellant had standing, Legistar 40711 and 41247. In both appeals, the City Attorney's office wrote memos, but left the decision on standing to the ZBA. The memo for Legistar 41247 says: "Prior to considering the substance of Appellant's appeal, the ZBA must determine if she has been aggrieved."

ZBA Attorney McReynolds, in an email dated February 12th, told us, if the ZBA found we were timely, that the "original appeal will be noticed and heard at the next meeting including any arguments about whether the appellants have standing to bring the appeal" and that "the ZBA could decide to discuss standing during an appeal even if City staff do not raise the issue. However, it would need to be brought up in the context of an appeal that is on the agenda as part of that appeal. As you are probably aware, standing is usually so obvious that it need not be discussed unless the other party (in this case the Zoning Administrator) raises the issue."

Standing has clearly been handled as an issue to be decided by the ZBA, not as an issue where the ZA can make the determination subject to appeal. Since timeliness is also a jurisdictional issue, it should be addressed in the same manner – as a matter for the ZBA to decide in connection with the appeal.

The ZA lacks authority to withdraw an application

The ZA's duties end once the ZA has performed the duty under the ordinance to "receive, file and forward to the Zoning Board of Appeals all applications for appeals …" Once the application has been forwarded, especially when evidenced by placement of the appeal on the ZBA agenda, the ZA's duty has ended. The ZA does not have explicit authority to withdraw an application for appeal. The ZBA rules specifically address whether an appellant may withdraw an appeal application (under ZBA rule 12, an "appellant may withdraw his appeal at any time prior to action thereon, with the consent of the Board") but there is not any comparable provision allowing the ZA to withdraw an application.

Why it matters

Requiring us to prove that the zoning administrator's determination on timeliness was incorrect sets a much higher bar for us to overcome. As noted by one Board member at the February 15th meeting, it does not matter what the determination date is because we filed late no matter what the determination date may be.

On the other hand, if the ZA's position on timeliness is only informational, the ZBA makes the timeliness decision based on all the evidence. For example, the ZBA could consider the fact that three of the four appeal applications submitted in 2023 were late.* (The fourth application did not indicate any date for the ZA's determination and timeliness was not addressed.) The ZBA could consider whether to fashion a remedy, as did the Wisconsin Supreme Court, based on fairness. The ZBA could decide to suspend its rule.

> * Attached is an exhibit showing the first two pages of Legistar 79194. The official notice has a postmark date of 04/28/2023. The appeal was filed 07/13/2023, or 76 days after the official notice (61 days late). ZBA rule B.1.provides: "Where official notice is mailed, the time to appeal [15 days] shall begin running from the postmark date."

The ZBA may well determine that the ZA's decision/determination date varies by our appeal issues as discussed above. Perhaps some decision/determinations were made as of August

28th, making our appeal 68 days late (as compared to the 61 days late for Legistar 79194). Perhaps some decision/determinations were made as of October 30th, making our appeal 5 days late (the appeal in Legistar 76608, decided in 2023, was also 5 days late).

The record

MGO 28.205(5)(c) requires the ZA to "transmit all the papers constituting the record upon which the action appealed from was taken to the Zoning Board of Appeals." The only item submitted by the ZA was a PowerPoint presentation. This ordinance requirement would appear to include any documentation, such as emails and meeting notes, involving issues raised in our appeal to show when various determinations were made and/or revised.

We believe the above information causes a reasonable belief that evidence at the February 15th hearing was materially inaccurate or incomplete.

Respectfully Submitted,

Alder Isadore Knox

Alder Marsha Rummel

CITY OF MADISON
ZONING BOARD OF APPEALS
APPEAL APPLICATION

$200 Filing Fee

Ensure all information is **typed** or legibly **printed** using blue or black ink.

Notices are sent to the District Alderperson and to owners of record as listed in the Office of the City Assessor. Maximum size for all drawings is 11" x 17".

Name of Applicant: SHELDON ROBERTS, DON JENSEN

Address: 5 VINJE CT, 9 VINJE CT
MADISON, WI 53716

Daytime Phone: 608-843-0452 Evening Phone: 608-843-0452

Email: 7sheldons@gmail.com

1. The undersigned hereby appeals the decision of the Zoning Administrator in regard to Madison General Ordinance Section No. 28.142(11)(a)
2. When relevant to a specific property, fill out below:
   Street Address: 5 VINJE CT, MADISON
3. ☑ List of grounds for the appeal, statements, evidence of fact, and any additional information associated with the appeal are provided on a separate attachment.

Applicant Signature: Sheldon Roberts A pdf file with all documentation is being e-mailed to Katie Buc

FOR OFFICE USE ONLY

Amount Paid:	$200.00	Zoning District:	SR-C1
Receipt:	131071-0005	Hearing Date:	8.10.23
Filing Date:	7.13.23	Published Date:	8.3.23
Received By:	NJK	Appeal Number:	LNDAPP-2023-00003
Parcel Number:	0710152 06264	GQ:	
Alder District:	16-CURRIE		

DECISION

The Board, in accordance with the findings of fact, hereby determines that the requested appeal for _____ is

☐ Approved ☐ Denied ☐ Conditionally Approved

Zoning Board of Appeals Chair:

Date:

Complaint

BUILDING INSPECTION OFFICIAL NOTICE

CASE NUMBER: CB2023-109-02326 **PROPERTY:** 5 VINJE CT

INSPECTION DATE: 04/26/2023 03:29 AM

MAILED DATE: 04/28/2023

INSPECTOR: TRENT SCHULTZ
ZONING CODE ENFORCEMENT OFFICER I
(608) 266-5917
twschultz@cityofmadison.com

ROBERTS, SHELDON & SANDY
5 VINJE CT
MADISON, WI 53716

This notice does not start any legal action. The Building Inspection Division is willing to answer questions pertaining to this Official Notice in order to assist you in correcting the violations. If you have questions or concerns, it is important to contact the inspector as soon as possible. You are responsible for contacting the assigned inspector before the due date to arrange for any reinspections requiring access to the interior of the property.

If the violations are not corrected by the due dates listed below, the Building Inspection Division may issue a citation or refer the case to the City Attorney's Office for prosecution. The Madison General Ordinances allow for a fee of $75.00 to be charged for any inspections that do not result in full compliance, including inspections that result in an extended due date. To avoid penalties or fees you are encouraged to correct the violations as soon as possible in advance of the due date and then notify the assigned inspector to verify the corrections made. Compliance shall be on a continual basis. Continued or repeated violations may result in the issuance of citations without further warning or written notice.

Any items on this notice that are not corrected by the originally required compliance date may be subject to rent abatement claims. Items that could be subject to abatement in the inspector's opinion have been marked "Y" in the abatable column. Actual abatement and eligibility, if applied for, will be determined by the Hearing Examiner.

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. Appeal information may be obtained by calling (608)266-4551.

Item No.	Violation Section No.	Abate	Corrections Required	Due Date
1.	28.142(11)(a)	No	Reduce the height of the screening hedge (arborvitae) in the rear yard to not more than 6 ft. NOTE: A screening hedge is a hedge that is more than 50% opaque. To gain compliance, the arborvitae must be trimmed in such a way that above 6 ft, they are less than 50% opaque.	06/01/2023