MEMORANDUM

TO: Matt Tucker, Zoning Administrator

FROM: John Strange, Assistant City Attorney

DATE: November 9, 2015

RE: Appeal – 906-910 Williamson Street

I. Background

On October 16, 2015, Linda Lehnertz ("Appellant") filed an appeal of the zoning administrator's interpretation of M.G.O. 28.141(4)(f), M.G.O. 28.141(5), and M.G.O. 28.173(1) & (7) in relation to the project at 906-910 Williamson Street. The documents accompanying the Appeal Application detail the substance of the appeal:

1. Parking (which relates to the interpretation of M.G.O. 28.141(4)(f)); and

2. Building Form (which relates to the interpretation of M.G.O. 28.173(1) & (7)).

This appeal presents the unique issue of whether Appellant, a neighbor of the proposed project, has standing to file an appeal to the Zoning Board of Appeals ("ZBA"). The overwhelming majority of appeals to the ZBA result from situations where the zoning administrator's decision directly impacts something the appellant wants (or does not want) to do on their own property. In fact, to my knowledge, there has only been one prior case in the City of Madison where a neighbor has filed an appeal to the ZBA regarding a proposed project on a neighboring property.[1] Normally, neighbors challenge proposed projects by attending commission and council meetings to speak out against the project, utilizing the protest petition process outlined in the ordinances, or filing appropriate civil actions in Dane County Circuit Court.

II. Legal Standard

This is not to say that a neighbor cannot appeal a zoning interpretation. M.G.O. 28.205(5) states that "Appeals to the Zoning Board of Appeals may be taken by any person aggrieved, or by any officer, department, board or bureau of the City affected, by

[1] In that matter (appeal No. 072309-1 filed on February 2, 2009), the appellant challenged the zoning administrator's interpretation that a house could be used for something other than a single-family residence. The appellant in that case lived approximately 151 feet from the proposed project site.

any decision of the Zoning Administrator." This language mirrors the language in Wis. Stat. § 62.23(7)(e)4. (West 2014). More broadly, the "any person aggrieved" language is found in many zoning statutes across the country.

The issue then is whether Appellant has been aggrieved by the Zoning Administrator's interpretations. This is an important question regardless of this particular appeal because of the potential influx of appeals to the ZBA that could result without some clarification of when a person is "aggrieved" under the ordinance.

Appellant cites cases relative to standing to argue that she has been aggrieved. Ordinarily, the analysis of whether someone has standing to sue is a two-step process and requires a determination of (1) whether the plaintiff 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 the Court of Appeals case cited by Appellant in her appeal documents. *See 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).

Under step two, whether the interest is one generally protected by law, courts have recognized that the interest need not be physical or economic, but may be to aesthetic, conservational or recreational interests. *See Fox v. Wisconsin Dept. of Health and Social Svcs.*, 112 Wis. 2d 514, 334 N.W.2d 532 (1983).

III. Standing to Challenge Interpretations Related to Parking

Appellant alleges that she is aggrieved by the Zoning Administrator's decision related to parking because the decision could result in insufficient off-street parking that "has a strong potential to affect my use and enjoyment of my property. Patrons and/or residents of 906-910 will spill-over into the nearby residential area, having adverse effects, including a further restriction in available parking for local residents and their guests. This could also adversely affect [her] property value." As evidence of this alleged injury, she cites a comment from the Traffic Engineering Department that similar projects have resulted in "problems at times with on-street parking in residential areas adjacent to the commercial uses."

Arguably, the allegations in the appeal ("has a strong potential to affect my use and enjoyment of my property") is not consistent with TE's comments ("problems at times with on-street parking in adjacent residential areas"). Furthermore, the allegations in the appeal (that she lives less than one-half mile from the proposed project) does not necessarily mean she is within the zone of "adjacent properties" that TE suggests could see problems with on-street parking.[2] Finally, the appeal alleges that the proposed development "could" adversely affect her property value. However, the appeal provides no evidence to support that notion. Arguably, the project could just as easily positively affect her property value. Moreover, there is no suggestion that if her property value was negatively affected, it would be because of the parking issue.

When considered within the framework of the standing analysis outlined above, one could reasonably argue that the injury alleged as it relates to parking is too hypothetical or conjectural to establish standing. However, given TE's comment, and giving Appellant every benefit of the doubt, she has probably alleged the absolute minimum necessary to establish standing to challenge the parking interpretation.

IV. Standing to Challenge Building Form

I do not believe Appellant has established standing to challenge the zoning administrator's decision related to building form (commercial block vs. flex). The appeal

[2] While courts have interpreted the term "adjacent" to mean simply nearby, not adjoining, abutting or contiguous. *See Superior Steel Prod, Corp. v. Zbytoniewski*, 270 Wis. 245, 247-248, 70 N.W.2d 671, 673 (1955), other courts have interpreted the term to mean adjoining, abutting, or contiguous, not merely nearby. *See Kind v. Vilas County*, 56 Wis. 2d 269, 274, 201 N.W.2d 881, 884 (1972). Notably, Appellant states that she lives less than one-half mile from the proposed project. By the City's measurements, she lives 490 feet away. Since she lives more than 200 feet from the proposed property, she was not required to receive (and did not receive) notice of hearings related to the approval process pursuant to M.G.O. 28.181. In any event, her property is clearly adjoining, abutting, or contiguous with the proposed project.

alleges that Appellant will suffer an aesthetic injury because she "would have to see this building multiple times per day", and that it could affect her property value.

First, as pointed out above, Appellant does not live within 200 feet of the property, and therefore was not required to receive notice under the zoning ordinance. Arguably, this 200 foot notice requirement establishes a bright line for when a neighbor could potentially be aggrieved. Second, Appellant cites no evidence (legal or otherwise) suggesting that merely having to see a building multiple times per day is an injury (aesthetic or otherwise) recognized by law. Or that the relatively subtle differences between a commercial block and flex building would be enough to create such an injury. If it were, then any person who did not like the exact form or design of a building would have standing to file an appeal to the ZBA. Finally, the appeal again alleges that the form of the building could negatively affect her property value, without providing any justification for this alleged injury. As pointed out above, the existence of this building could positively affect the value of Appellant's property. More to the point, even if the building has a negative effect on her property value, there is nothing to suggest it is because of the form of the building (commercial block vs. flex). If these are injuries at all, they are most certainly too hypothetical to confer standing. Accordingly, I believe the appeal fails to establish an injury as it relates to building form that is sufficient demonstrate standing.[3]

V. 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. If that were the case, the ZBA could be flooded with appeals by neighbors who, for example, do not like the way a building looks. Thus, in the rare case of a neighbor challenging a zoning interpretation, the ZBA should be careful not to assume that every person in the neighborhood has standing to challenge a zoning interpretation. For the reasons stated above, in this case, based on what has been submitted, the ZBA should entertain Appellant appeal related to parking, but not to building form. I will be present at the appeal on November 19 should any additional information come to light.

[3] The appeal also implies standing exists to protect the public welfare. While public welfare may be a basis for zoning authority, a general allegation of public welfare is insufficient to establish standing.