In my statement of eligibility to appeal, I said that I would provide fuller explanations if needed. Assistant City Attorney John Strange questioned various aspects of my eligibility to appeal. Thus, I am providing further information.

Before going further, I think it critical to note that I never claimed, as stated by ACA Strange, to live less than ½ mile from 906 Williamson. I claimed, and do, live half a block away, or less than 1/10 of a mile. Footnote #2 of ACA Strange's memorandum places the distance at 490 feet.

Basic principles of Standing

"[T]he law of standing in Wisconsin should not be construed narrowly or restrictively." *Wisconsin's Environmental Decade, Inc. v. PSC*., 69 Wis. 2d 1, 13, 230 N.W.2d 243 (1975). See also, *Krier v. Vilione*, 2009 WI 45 ¶ 20, 766 NW 2d 517 (2009) ("The law of standing should be liberally construed, and as such, standing is satisfied when a party has a personal stake in the outcome.")

"[S]tanding depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged." *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc*., 2011 WI 36, ¶ 40, 333 Wis.2d 402, footnotes omitted.

- ACA Strange quotes *Metropolitan Builders Association of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, which was discussed and clarified by this subsequent Wisconsin Supreme Court case, ¶ 53.
-ACA Strange cites *Smerz v. Delafield Town Bd*., 2011 WI App 41, 332 Wis. 2d 189, for the proposition that standing is absent unless properties abut. The plaintiff in this case used part of an unpaved alley for extra parking, and property owners adjacent to the alley requested the alley be discontinued. The court based its decision on specific statutory requirements:

> "No discontinuance of an unpaved alley shall be ordered if a written objection ... is filed ... by the owner of one parcel of land *that abuts the portion of the alley to be discontinued and* if the alley provides the only access to off-street parking for the parcel of land owned by the objector. (Emphasis added.)" *Id*, at ¶7.

An injury need not be physical, economic, or pecuniary; it may, for example, be aesthetic, conservational, or recreational. *Chenequa Land Conservancy v. Village of Hartland*, 275 Wis.2d 533, ¶17, 685 NW 2d 573 (2004); *Fox v. Wis. Department of Health and Social Services*, 112 Wis.2d 514, 525, 334 N.W.2d 532 (1983).

"[A]esthetic concerns are, by their very nature, highly subjective and will often be expressed in 'generalized' terms." *Kapischke v. County of Walworth*, 226 Wis.2d 320, f.n. 5, 595 N.W.2d 42 (1999).

The injury may be actual or threatened. "However, the plaintiffs must show that they suffered or were threatened with an injury to an interest that is legally protectable." *Krier*, ¶ 20. See also,

Chenequa Land Conservancy, Inc. v. Vill. of Hartland, 2004 WI App 144, ¶¶ 13-16, 275 Wis.2d 533, 685 N.W.2d 573 ("… the actual or threatened injury be to an interest that is arguably protected by the statutory or constitutional law upon which the plaintiff bases the claim for relief").
"The question of whether the injury alleged will result from the agency action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing." *Wisconsin's Environmental Decade*, at 14.

"Injury alleged, which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, can be a sufficiently direct result of the agency's decision to serve as a basis for standing." *Wisconsin's Environmental Decade*, at 14.

"[T]he magnitude of a plaintiff's injury is not a determinant of his standing. 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'" *State ex rel. v. M&I Peoples Bank*, 95 Wis.2d 303, 309, 290 N.W.2d 321 (1985), citations omitted. (The potential loss in this case was between $49-66 annually, and though a trifle, the injury was enough to confer standing. *Id*, at 309.)

Parking

Although ACA Strange states that I have "probably alleged the absolute minimum necessary to establish standing to challenge the parking interpretation" based on Traffic Engineering's comment and by giving me "every benefit of the doubt."

I don't believe that my standing requires "every benefit of the doubt." The City has recognized that there is, at times, a problem parking in the residential areas due to spillover from Williamson Street uses. Whether this is a constant problem, or just a problem on weekend nights is irrelevant. Even a trifling injury is sufficient to confer standing.

It is common sense that additional parking needs for Williamson residences and businesses will further increase the problems in adjacent residential areas. Whether it is an increase in lack of on-street parking for residents and guests, traffic as people search for a parking place, blocking driveway access, or noisy revelers returning to vehicles, all negatively impact my use and enjoyment of my property.

Williamson Street does not have enough parking to meet even the existing needs of the restaurants, bars, and nightclub. The capacity for these establishments located within approximately ½ block of 906 Williamson is 520 persons (349 primarily alcohol, 171 primarily food). On-site parking for these uses is 31 parking stalls, including 3 accessible stalls. *Any* increase in parking needs is going to shift over to the close residential area because the existing uses more than use up the capacity of Willy Street parking (and, at least for some, an aversion toward parking in the direction of the bike path due to safety concerns).

ACA Strange suggest that the project might just as easily positively impact my property values. The question is not the effect of the project, but the impact of the parking. Further, at least one study has found that development did not have benefits for the surrounding properties.

> "The results of this regression analysis do not support the hypothesis that new development has benefits for surrounding property owners or municipalities through improvement of neighborhood property values. On the contrary, the Kent Street developments appear to create diseconomies for nearby homes." *Development and Neighborhood Revitalization: The Effects of Residential Investment on Property Values in Durham, NC*, Thomas A. Newell, Duke University, 2009.

Building Form

ACA Strange suggests 200 feet as a bright line test for when a neighbor could potentially be aggrieved. This is not a viable test.

- No court has ever even suggested a bright line test, whether for a municipality ordinance, Wis. Stat. § 62.23(7)(e)4, or § 59.694(4) (which is the comparable language for counties).
- The Wisconsin Supreme Court, in interpreting an ordinance that required the exterior architectural appeal of a building not be so at variance with the architectural appeal of existing, or proposed, structures so as to cause a substantial depreciation of the property values in the neighborhood, said that "neighborhood" extends further than adjoining property and "may vary according to existing conditions." The court went on to say that it could not establish, in terms of measurement of feet, "the radius of the area of the largest permissible area which would qualify as a neighborhood under the ordinance …" *Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 274, 69 NW2d 217 (1955).
- Any bright line test would apply to all claims of injury, yet ACA Strange has opined that I have standing to challenge the Zoning Administrator's parking interpretation.
- The courts have already found standing when the aggrieved resident resides at a distance of more than 200 feet. In *Fran Ingebritson v. Zoning Board of Appeals of City of Madison*, Nos. 95-1861, 96-0911 (1997, unpublished opinion), the court found that Ms. Ingebritson had standing, and she lived 250 feet from the property in question (Affidavit of Fran Ingebritson, August 30, 1994).

ACA Strange questions why "relatively subtle differences between a commercial block and flex building would be enough to create such an injury." I did not make that determination. Rather, the Common Council made that determination in adopting the zoning code.

- Two of the purposes of the zoning code are to "preserve the natural scenic beauty of the City and to enhance the aesthetic desirability of the environment as well as the design of buildings" and "encourage reinvestment in established urban neighborhoods while protecting their unique characteristics." MGO28.003 (i) and (m).
- The purposes for the building form stands, MGO 28.171(1) is:

  (a) To ensure compatibility between different land uses and building forms.
  (b) To encourage building forms that respect their context.
  (c) To encourage pedestrian movement by encouraging building forms that present an active face to the street.

- Commercial Block buildings are permitted in the TSS District, Flex buildings are not. There is only one of the three purposes in MGO 28.171(1) that could apply to why flex buildings are not permitted: it is a building form that does not respect the context of a traditional shopping street. Ordinance language addressing massing and articulation are the same for both types (other than commercial block buildings are required to have entrances every 40 feet). The land uses are substantially similar (other than commercial block only allows residential above the ground floor). Thus, the reason that flex buildings are not allowed in a TSS district is that such building do not respect their context.

ACA Strange states that I cite "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."

The courts have determined that aesthetic injuries deserve protection. In *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262 (1955) the court quoted, with approval, *Berman v. Parker*, 1954, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27:

> 'The concept of the public welfare is broad and inclusive. [citation]. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. *Id*, at 272.'

The concept of aesthetic injury goes back further. The court in *Highway 100 Auto Wreckers, In.c. v. City of West Allis*, 6 Wis.2d 637 (1959) quoted *State ex rel. Carter v. Harper* (1923), 182 Wis. 148, 154, 196 N. W. 45:

> "It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities, well may be pondered."

Further, by exercising its powers to declare buildings need to respect their context, the City has determined building forms support public aesthetics. Aesthetic injury is not hypothetical or conjectural when the City has made the determination that certain building forms are out of context in specified districts.

As for evidence, the courts have found that municipalities have the right to protect their residents from various aesthetic damages, and have found standing for aesthetically injured persons.

- In *Larsen v. Munz Corp*., 167 Wis.2d 583, 482 NW 2d 332 (1992) a resident complained that the top two floors of a 10-story building would obstruct his view of the capitol building and argued that an environmental impact statement was needed for the new building. "The single environmental concern involves "aesthetics," more particularly, the plaintiff's, Robert Larsen, and the public's view of the columns beneath the dome of the state capitol." *Id*, at 587. "[H]is sole claim that this proposed building will have an adverse aesthetic impact by partially obstructing the view of the state capitol from his home and from a nearby county park." *Id*, at 598. The court found the resident had standing.

- *Kapischke v. County of Walworth*, 226 Wis.2d 320, 595 N.W.2d 42 (1999) involved a conditional use for a communication tower. The county commission denied the conditional use in part, because of a detrimental aesthetic effect on the community. The court supported the denial. *Id*, at 323.

- In *Muench v. Public Service Comm*., 261 Wis. 492 (1952), the court found that citizens of Wisconsin have the right to enjoy scenic beauty, "a legal right that is entitled to all the protection which is given financial rights." Thus, the appellant was "aggrieved." *Id*, at 511-512.

- Shoreland zoning has a general purpose of protecting natural beauty. *State ex rel. Ziervogel v. Board of Adjustment*, 2004 WI 23, ¶ 22.

- In *Edward Kraemer & Sons v. Sauk County Adj. Bd*, 183 Wis.2d 1, 515 N.W.2d 256 (1994) the county board of adjustment denied a mineral extraction permit " 'to protect the public from the harm that would be involved in the substantial desecration' of a portion of the Baraboo bluffs." The court found that the county board had this authority. *Id*, at 10.

- Promoting the visual integrity of the municipality (community aesthetics) and preserving property values are valid objectives of zoning restrictions. An ordinance directed at these goals, which addressed the accumulation of vehicles in a residential neighborhood, "is an aesthetic concern and might reasonably be expected to detract from property values." *Town of Manitowish Waters v. Philip Malouf*, Nos. 2008AP1839-FT, 2008AP1840-FT, ¶¶ 10, 11, 17, (2008), unpublished.

- In *Racine County v. Plourde*, 38 Wis.2d 403 (1968), the Wisconsin Supreme Court said that an ordinance requiring auto wrecking yards to be 750 feet from any public road or highway "supports the position that the evil the ordinance attempts to eliminate is the unsightly condition created by the storing of dilapidated, smashed and partially dismantled vehicles. The reason for the 750 foot restriction is obviously to reserve to the users of the highway a pleasant view while traveling, and restrict undesirable and incompatible uses to specific areas." *Id*, at 412.

If even occasional travelers of a highway are accorded a pleasant view, my having to look at an incongruous building – as determined by the City -- multiple time a day is "undesirable and incompatible."

Building forms can affect property values. The City itself has recognized that building design/forms affect property values, and courts have recognized that aesthetics affect property values.

- One of the purposes of the Urban Design Commission, MGO 33.24(c) is to "encourage and promote a high quality in the design of new buildings, developments, remodeling and additions so as to maintain and improve the established standards of property values within the City."
- Or, as held by an Alabama court: "[C]urrent authorities recognize neighborhood aesthetics to be integrally bound to property values and to be relevant considerations in zoning when they bear in a substantial way upon land utilization." *Chorzempa v. City of Huntsville*, 643 So.2d 1021, 1024 (1993), citations omitted.
- Or, closer to home, the court found that City Ordinances prohibiting parking of vehicles greater than one ton capacity in residential districts presumably sought to regulate vehicle parking in residential neighborhoods primarily for aesthetic reasons, and that the protection of property values as well as aesthetic considerations are objectives which fall within the exercise of the police power to promote the "general welfare of the community." *City of Madison v. Crossfield*, 267 Wis.2d 961, ¶ 18 (2003)

Further, at least one study has found that aesthetic injuries can have a substantial detrimental effect on property values up to a distance of 500 feet, and a lesser effect at greater distances which are still within the census tract/community. "Properties purchased within 500 ft. of billboards have a decrease in sale price of $30,826 and the correlation is statistically significant ($p \leq .05$)." *Beyond Aesthetics: How Billboards Affect Economic Prosperity*, Jonathan Snyder, Samuel S. Fels Fund, December 2011 (Philadelphia data.)

<u>Floodgates</u>

ACA Strange cautions against opening the floodgates: "If [the relatively subtle differences between a commercial block and flex building were enough to create an injury], 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." And: "… the ZBA could be flooded with appeals by neighbors who, for example, do not like the way a building looks."

- I am not appealing on how the building looks. I am appealing due to a building form that is prohibited in TSS districts under the zoning ordinance.
- Nor do I believe that persons could appeal to the ZBA based on how a building looks. I am not an expert on zoning law, but I believe the looks of a building rests in the hands of the Plan Commission and/or the Urban Design Commission, not the Zoning Administrator. A decision of the Plan Commission is appealable to the Common Council. MGO 28.183(b). And Urban Design Commission decisions are appealable to the Plan Commission.