Dane County Board of Adjustments

Appeal No. 3684

This appeal request to establish and defend the legal status of structures addressed in a letter written by Inspector Patrick Klinkner dated February 10, 2017 to Richard and George Gardipee regarding their 7741/7743 State Highway 69 Belleville WI property, combined with a clarifying and expanding verbal interpretation of this letter by Roger Lane in a phone call on or about May 12, 2017.

I received this letter as part of negotiations during an offer to purchase, a negotiation which began in early March and was accepted April 20th, subject to a contingency that includes the resolution of single home vs. multi-home matter raised but not directly stated in that letter, but was clarified in a phone discussion with Roger Klinker. Specifically, Inspector Klinkner's concluding statement is: **"Therefore, you have what you have, no additions and/or changes can be made to the log cabin and cottage. The original farmhouse is conforming and may be allowed improvements."** This statement does not specifically address the occupancy question, nor does it address the relevant code provisions for pre-2010 residences on A-1 properties as established in the ordinance. In discussion with Roger Lane this past week, he clarified the intended consequence of Inspector Klinkner's letter is that only the original farmhouse remains a legal and improvable residence.

Our intent and permitted history of this site:

Myself, Paul Morrison, combined with my wife LaVay and our adult daughter Brittany McCoy and her husband Matt McCoy have an accepted offer to jointly purchase this parcel. Our intent is to co-own the parcel and co-operate the parcel as a small livestock/cropping farm operation.

For this purpose, we would want to make full use of the two residences that have historically and legally existed on this property; the original farmhouse and a secondary home (the cabin) that would require some modifications for our age-in-place purposes.

This appeal is filed with the full support of the current owners, with the sale contingent upon Dane County acknowledging and accepting that the two homes that have legally existed at this site can still be used, occupied and modified for our purposes.

Dane County records show a zoning permit for the same parcel for an additional storage structure (aka "the cabin" or "log cabin"). Shortly after this the planned use changed and a zoning permit was approved for a "farm residence" in 1986. A building permit and a sanitary permit were also issued in that timeframe. Inspector Klinkner strongly implies, but does not specifically conclude, residential use is no longer valid (as of any specific date). He does, however, conclude that this building is subject to section 10.21 as a non-conforming use to which a non-use timeclock would be or has been ticking, and to which no structural alterations may occur.

Dane County records also show a zoning permit for a "storage and playhouse" structure was issued in 1979, as well as a sanitary permit. While historically taxed as a residence, we concur with Inspector Klinkner that no zoning permit or amended permit support residential use to this structure.

Timeliness of appeal:

With regard to timeliness, there is no date-certain decision to which we can point. Inspector Klinkner's letter initiates the question and is dated more than 30 days prior, but his statement "Therefore, you have what you have..." is certainly not an occupancy decision suggesting any need for an appeal. That letter was issued to the current 72-year-old co-owner that is managing the sale of this parcel on which is his elder brother was the primary operator, who now resides out-of-state. He received the letter while he was likewise out-of-state for the winter and he was advised (poorly) from a retired attorney friend that state statutes precluded Dane County from limiting building modifications (citing statutes allowing home replacement in the event of storm damaged to a residence, so not relevant to this case). The concluding statement in this letter never states an appeal right and is incredibly vague in its conclusion. While a co-owner of record, he had no basis to conclude he might be suffering any loss.

Our cross-country purchase negotiation with this gentleman and his now-fired-retired-attorney-friend has been lengthy. Prior to this past two weeks we had no legal standing to appeal the letter, if an appeal was even necessary or appropriate. The letter provides no explanation of available legal remedy (if even needed), and frankly even we remained unclear on its full legal consequence of "you have what you have".

I believe this to be a timely appeal in that:

1. I am filing within 30 days of our accepting an offer on the parcel.
2. I am filing within 30 days of my discussion with Roger Lane, who interpreted for me that "... you have what you have..." is intended to mean the second (and "third") residence are no longer valid for occupancy, notwithstanding that letter also stating the property has "...enjoyed a legal non-conforming status" for the prior 25 years.
3. I do contest one direct statement in Inspector Klinkner's letter that states "...no additions and/or changes can be made to the log cabin and cottage", because that conclusion is only reached by citing a section of the code from which the residence is specifically excluded (as detailed below).

As purchasers, we are seeking a timely and decisive ruling on the legal status of each "residence" on this property, both regarding occupancy and eligibility to be "added to, altered, restored, repaired..." as provided under s. 10.123(2)(b)1. of the ordinance. While Inspector Klinkner's letter does not specifically answer or rule on this question, I discussed this question with Roger Lane this past week and am proceeding with this appeal based on his (verbal) opinion that the intended consequence of the letter is that there is (or should be) only one legal residence on this parcel. Both our offer to purchase and Roger Lane's verbal clarification on what Inspector Klinkner's letter is intended to express regarding occupancy have occurred within the past 30 days.

<u>History of this Parcel</u>

7741 and 7743 State Highway 69, Belleville WI is a single 55+acre, A-1 parcel purchased by the seller in 1976. For more than 30 years had at least two legally existing residences with two street addresses; the original pre-zoning farmhouse, and a farm residence that was permitted and built in 1985/1986. Town of Montrose has actually billed tax on a third residence for much of this period for a building permitted as a "storage and playhouse" building. We and the 72 year old co-owner that is selling the property are uncertain about the occupancy history of this third structure, but the pre-zoning farm house is still occupied and the second permitted residence (cabin) was occupied until the lease was terminated when the owner decided to put the property up for sale.

Relevant Code

Inspector Klinkner in his letter and Roger Lane in our discussion both reference Section 10.04(1)(a) of the code regarding a single primary building. While this section does desire only a single "principal building", it also provide an exception for secondary residences on A-1 zoned properties, and that exception is for the very reason the zoning permit was originally issued in 1985 and the very reason we desire this parcel. Even today, secondary farm residences can be constructed, but only under a conditional use permit for parent/child and farm help, and now only with a sunset clause. At the time the permit was granted for this property, no such conditional use permitting was required and no sunset existed . This home was properly and fully permitted based on the requirements of that day.

Looking specifically at the current code for A-1 Exclusive district, section 10.123(2)(b) discusses agricultural accessory uses related to residential occupancy in paragraphs 1. and 2. Both the original farmhouse (pre-zoning as Inspector Klinkner also observed), and the cabin were recognized as permitted residences as of 1986. Dane County and the Town of Montrose both recognized and accepted two separate addresses for the two permitted homes, and taxed for a third residence that was not permitted. Section 10.123(2)(b)2. allows legally existing residences (pre-2012 construction) to continue and to be rented when no longer used for agricultural purposes. This has been the case with the cabin on this parcel up until the current owner ceased to rent the cabin when they decided to list the property for sale.

Moving back to 10.123(2)(b)1., we note further clarification with regard to a residential use that *"Any residence lawfully existing as of February 20,2010 shall be considered a permitted use.*

- As to such a residence being a primary or secondary residence, there is no distinction.
- As to lawfully existing, the record does show valid zoning as a residence, along with building and septic permits all issued and implemented prior to 2010.
- Note the ordinance accepts these pre-2010 homes as "permitted uses", not a use subject to a CUP, and not, as we see in the very next line of the ordinance, subject to nonconforming use limitations. Inspector Klinkner's statements regarding the older farmhouse further establish that it is not a practice of Dane County to require issuance of a CUP for an existing (pre2009) farm residence to remain as a residence whether for farm or non-farm use. Simply, the code does not distinguish primary or secondary residences, only the date of construction dictates.

Section 10.123(2)(b)1. continues: *"Notwithstanding the provisions of secs. 10.21 and 10.23 regarding nonconforming uses, such structures may be added to, altered, restored, repaired, replaced or reconstructed, without limitation, provided all the following criteria are met:"*

- To the extent the cabin is deemed a non-conforming use because it is no longer used for agriculture, one must conclude the same for any residence on any A1 Exclusive property (primary or secondary) once the residence is no longer used by the farm operator/employee, including A1 properties sold to non-farmers.
- But also note that paragraph 1. continues by specifying that even if considered "non-conforming" perhaps because of their secondary home status, the nonconforming provisions of the ordinance do not apply to pre-2010 residences with no regard to them being primary or secondary. They are simply defined as permitted uses, not non-conforming uses.

- A legally permitted pre-2010 home is simply not subject to the very provisions Inspector Klinkner has cited. Even if one wishes to consider a secondary residence to somehow be "more" non-conforming than the primary on a site where neither residence has had an ongoing "farm" status, this paragraph says the non-conforming criteria of sections 10.21 and 10.23 do not apply. That exemption logically exists for those homes legitimately built in an era that did not limit a second home from being a full-value home with potential post-farm uses; rental of which is one legitimate code-provide option that was employed in this case until the parcel was marketed for sale. These investments were without the current "time/ownership" clocks limiting their future use, as now applies to homes built through a CUP on A-1 zoned property.

In the case of this property we conclude it is not sections 10.21 and 10.23 that control use, it is instead the criteria contained in paragraphs a., b., and c. of section 10.123(2)(a)1. As a properly zoned, pre-2010 secondary home, we believe this is one of those very rare circumstances, easily missed by Inspector Klinkner.

While Inspector Klinkner's letter describes both the cabin and cottage as "legal, nonconforming" we tend to agree with the implied intent described by Roger Lane, that the cottage is not a legal residence. While taxed as a residence, it was never permitted for that use. We do not intend to use the cottage as a residence, but would maintain and use this 1979 structure as allowed by code. The cabin, however, must be evaluated based on the specific text that applies under s. 10.123(2)(a)1. a., b. and c.

"a. the use remains residential."

- Inspector Klinkner has, we believe inappropriately, drew from the non-conforming criteria from which this lawfully existing residence is specifically separated and exempted. The section 10.21 clock does not apply if this and the two subsequent criteria are met. And as we note below, neither b. (setbacks) or c. (replacement) are at issue to this matter.
- *"The use remains residential"* (this section) is not equivalent in meaning to *"The lawful use of a building or premises existing at the time of adoption of this ordinance may be continued as a nonconforming use, but if such nonconforming use shall be discontinued for a period of one year, such nonconforming use will be deemed to have terminated..."* as found in section 10.21. If that were intended, section 10.123(2)(b)1. would not exist. Instead this section calls out an exemption with more distinct and concise language that does not specify or even imply a timeline. It instead turns on a function—on one specific use to which this whole thing applies; residential use. The cabin has remained residential up until shortly before the property was placed for sale. It has simply stood vacant pending purchase, just like any other farmhouse on any other A1 property.
- To the extent that *"the use remains residential"* is equated to a timeline instead of a consistent pattern of use, this criteria must be equally applied to any residence on A1 Exclusive, not just a secondary residence. Say, for example, there is a death in the family and a home (primary or secondary) is vacant for a time. The estate takes time to settle and the home stands vacant for more than a year, before eventually being purchased or passed on to another owner. Following the conclusions of the February letter, would Dane County not be forced to conclude the residence is no longer a residence because it is now a non-conforming use, and a use that ceased for 12 months? This scenario is not uncommon and I believe ignored by Dane County. I am aware of such cases. Or what about the property with a second home and the child leaves

home for one or more years of education or military service before coming back to the farm. Or where the aging parent in the second home dies and the home sits idle for a year or more during a time of grieving. Must the owners be forced to promptly rent out the second home to maintain this unique grandfathered clause? Likely Dane County never hears about many such cases, but even if they did, would anyone expect such a negative ruling in these cases?

- Further, recall, 10.123(2)(b)1. applies to "lawfully existing residences", not just secondary residences and not even just non-conforming residences. If it did not, any addition, alteration, restoration or repair to ANY residence on A1 land would now require a CUP with a mandatory sunset under 10.123(4). This is clearly not the intent of Inspector Klinkner's letter but is a conclusion that is forced by failing to consider the scope and intent of section 10.123(2)(b)1. Again, consider that these homes were built with proper permits by farmers trying to serve their farm business and family needs within the scope of law, and with no sunset provisions saying the use of their home or second home would cease with the farm operation. The combined meaning of Inspector Klinkner's letter and Roger Lane's interpretation of its intent seemingly forces far broader and highly improbable conclusions. Instead, a specific exemption was created for these homes, whether primary or secondary. That text is the function of section 10.123(2)(b)1.

b. the structure complies with all building height, setback, side yard and rear yard standards of this ordinance

- Perhaps most noteworthy is that this criteria actually parallels 10.21(2). It is not word-for-word, but is identical in intent and consequence. These setbacks further narrow those structures exempt from 10.21 and 10.23 by requiring even a pre-existing home (whether primary or secondary) to meet setbacks. With par. b. being essentially "the same" as 10.21, we better see that it is only criteria a. and c. that differ from the non-conforming provisions.

c. for replacement residences, the structure must be located within 100 feet...

- This criteria has no consequence for the existing residence, only for replacement of such a residence. This is the third and final "condition" with regard to allowing essentially unrestricted alterations to a pre-2010 lawfully existing residence, and this has nothing to do with "...added to altered, restored, repaired...without limitation."

So if paragraph b. is the same as the nonconforming text and paragraph c. only relates to "replace" then all falls to paragraph a. when considering "added to, altered, restored, repaired". Concluding paragraph a. is identical in intent to the continuous occupancy timeclock of Section 10.21 would be the equivalent of deleting section 10.123(2)(b)1. entirely.

We believe the unintended result of Inspector Klinkner's conclusion would render any residence, whether primary or secondary, on any A1 property ineligible for use as a residence on day 366 of vacancy, regardless of why that vacancy occurs.

Interestingly when I first approached staff at the Planning and Zoning office, they reached the same conclusion that this property did have two legal and improvable residences and that our intended use was consistent with the reason for which two residences were still allowed on farms—the parent child

co-operation of a farm. This discussion was before that staff person was aware of Inspector Klinkner's letter.

Section 10.123(2)(b) renders very intentional protections to continue use of homes (primary or secondary to a farm) that these owners built without stated limitations on the future enjoyment, use or modification of those homes. There was no basis for these owners to conclude a secondary home would be treated in any manner different than their primary residence.

Sadly, and of serious concern, is that all reference to these older A1 residences (primary or secondary) *being exempt from "nonconfoming" criteria are scheduled for deletion from the planned revisions to* Dane County Code. Simultaneously I see revisions to the "nonconforming" provisions of the draft revisions to the code do allow some flexibility for alterations/improvements, etc., but with far greater limitations than the existing 10.123(2)(b)1. text for residences on A1. I fear the consequences of this are not well understood. Would all pre-2012 farm residences on A1 Exclusive, as the farmer retires, become nonconforming as soon as they rent out their land? Can a non-farming buyer make improvements without rezoning? Do all A1 Exclusive residences become non-residences just by standing vacant for 12 months—regardless of circumstances as to why and regardless of the quality of the home? Do second residences that were built in an era where their future use and value was un-restricted suddenly become ineligible for any grandfathered post-farm repairs, improvements or even continued residential use? Are we clear that none of these consequences occur if this text is removed? And more serious, if this is intended, do the owners of A1 Exclusive homes have any idea their properties are being so-devalued by these code changes? While Inspector Klinkner's letter does not go anywhere near this path, his conclusions on this case combined with ignoring or deleting text from the current section 10.123 (2((b) from the code revisions appears to have all those consequences.

Dane County Zoning may well argue the logic of one primary building per parcel, yet for A1 parcels a secondary residence is a permitted use and in this case such a permit was issued with no sunset provision in place. We believe Dane County can only conclude "the cabin" at this parcel is a legally allowed second residence with an approximate 1986 construction date and for which continued residential use and improvements are still allowed. This structure would continue to be a valid residence, with family farming by our children or grandchildren after we pass or long-term rental potential or use in.

Dane County Zoning may further argue there is an alternative to the single parcel/double residence option that currently exists. That is to use a valid split they have acknowledged is available for this parcel. While lending limitations make splitting ag parcels from their one or in a few cases multiple residences a more common situation, it is not the most desirable option in all cases. Our lending situation will be unique anyway because of our multi-generation purchase. Further, because we have every intent of co-occupying this farm with our children until our death, all as allowed under current and proposed codes, there is no need for a split at this time. Whether or how our children might wish to split the property some 20 to more than 30 years from now is not something that should be forced upon us now. It is also clear within Town of Montrose code that as long as this second home exists, no other splits would be allowed anyway. Given this, our desire is clearly not "escaping or evading" density limits. It does, however provide options should our children someday desire to configure use of the land *differently than what an immediate split would require.*

Finally, one other pathway to the second residence is a conditional use permit. This is inappropriate since the residence was already fully permitted. Further, because our children have only recently begun their farming operation on a separate ag parcel they don't own, they would not pass the standard criteria of a CUP petition that assumes a long-standing farming history/farm income record, established farm plan etc. Our children are in the unique position of wanting to farm, but not having a family farm and history on which to base the permitting process. While I can offer a 7-generation Wisconsin family farming legacy, I do not have a family farm to hand them. I also am not myself a farmer now, so I cannot even offer my "credit history" on this account. Our children have clients for their existing produce and are in discussion with restaurants on their growth, but lack the historical farm income required for a CUP, nor do they have a conservation plan in advance of purchasing this farm. They simply could not qualify for the CUP process. This unique property allows us to help them acquire a property where they can establish their farm while we can retire and help them while living in a legitimately authorized second home.

Our Farming Plans

Dane County Zoning rightly questions the legitimacy of farming plans or unrealistic schemes to skirt the intent of legitimate second home allowances for agricultural properties. Since this parcel has two existing pre-2012 approved homes, no CUP restrictions exist and this question appears legally immaterial, based on prior arguments. However, the following information supports our case that we have legitimate farming intent, skills and resources such that this farm will operate and will more than supply "substantial farm income" for our parent/child family operation, consistent with the longstanding intent of the second home provisions in the code.

- I am a 7th generation Wisconsin farm boy and currently live on a farm, even though most of the land is rented and I run a custom woodworking business from the farm buildings (commercially zoned).

- Brittany, our daughter is the future principal of the farming operation held jointly with her husband Matt. Since her teens she has raising beef and sheep (and a pig). While some of these animals were also pets of a sort, she raised and sold each of them as meat producing animals. Both Brit and Matt have double major degrees in environmental studies and landscape architecture, so they are well versed in land management, erosion control, plant and soil science, species selection and the environmental impacts of their decisions. Their family and social network is tied to all facets of agriculture and its various support industries. They have a joint interest and focus unlike few couples their age.

- Brit and Matt have already established and started their farming operations on our current property while awaiting a purchase of their own. Over the past two years they have converted 6 acres of land we previously leased out, they cleared and built fencing, established pastures and hay land to support grass-fed beef demands, they conducted soil testing to convert the land from many years of corn/soy rotation and planted both hay and pasture. They have purchased, raised and butchered cattle and sold meat. They selected and purchased a tractor and hay equipment (grain drill, haybine, rake, baler and wagons), in addition to the tractors, limited tillage equipment and manure spreader I already owned. They have rented off-site storage pending construction of their own barn. They have purchased the treated lumber needed to build two barns and are currently milling the siding for those barns. I am a structural engineer and worked in barn construction years ago. They sold their house a year ago to

increase their saving goal toward a farm purchase and have funds set-aside for fencing and for building the first barn yet this year.

- Brit and Matt cannot yet provide a 3-year farm income record simply because they are only a couple years into this as a formal business venture. Logically with a two-year growth cycle for beef, there is not much income of record yet. They have, however, established a client base from past sales and have commitments for future sales. They are also in early negotiation with the owners of two local restaurants that feature local produce and are both losing one of their current suppliers to retirement. Important to this case, however, a 3-year farm record is not required, since no CUP is needed to build a home because two properly permitted homes already exist.

- With Brit and Matt only recently having established their business, we acknowledge they do not have an established farm plan at Dane County Conservation. That had not been a concern till now, both given the temporary location of their venture on our land and in recognition that converting 6 acres from a corn/soybean rental use to hay and rotational grazing is itself a substantial land conservation boost. That same conservation boost will be evident as this new farm location is converted from mostly corn/soybean rental to mostly hay and rotational grazing. They have already planned fencing to minimize grazing impacts on steep slopes and are working out building location and drainage plans to manage manure during winter feeding. A full land conservation plan is appropriate and will be pursued promptly upon completing the purchase of this parcel.

- Matt also works for me in my custom woodworking business that works exclusively in local hardwoods. This 55-acre farm includes about 15 acres of woodland, where the dominant species is walnut; the highest value hardwood native to America. Most farms view woodlots as a once every 15-year harvest under a forest management program and can only expect $0.30 to $0.50 per board foot in stumpage value from those occasional timber sales; perhaps up to $2.00 for a high-grade walnut veneer sale. These infrequent revenues logically do not register as significant annual revenue source. We intend an even more sustainable harvest practice that has a 100 year Wisconsin track record of simultaneously increasing stand density while generating an ongoing harvest value. Our value-added practices generate $3/bd ft in wholesale value for our lowest value lumber, with more than half our wood generating $10-$60/bd ft in finished product value. This land boasts the state champion walnut tree (that we intend to keep healthy), but even two relatively small trees that uprooted in a wind storm this past year will generate more than $10,400 in our hands. These 15 acres will easily and consistently generate $20k per year in value-added agriculture through our established family business, and potentially several times this value in some years.

- Subtracting the 15 acres of woodland and about 5 acres of non-pasture bluffs and farmyard, leaves about 10 acres of pasture and 25 tillable acres that will rotate between pasture and hay, with a small amount of corn rotation for grass control. This 35 acres will easily support 20-30 cattle on a two-year grass fed beef growth cycle. Again, consistent with Brit and Matt's current value-added approach of selling meat instead of just mature animals, just 10 steers per year at the premium value for grass fed meat will generate $25k to $35 per year in beef value, again recognizing the land could support two to three times that animal count.

- Myself and my wife, LaVay, have also just sold our current home. With this sale, we are intentionally retaining 22 acres of additional farmland that adjoins our commercially zoned

woodworking business site. That ag land is currently rented to a 60+ year old crop farmer, but our purpose in keeping this land is to provide for longer-term growth of the farming operation.

Combined, the lumber and beef are still not a large farm operation, but an income of more than $10,400 can be anticipated within one year, with $45-$55,000/yr. probable as the hay land and pastures are established and barns built to support herd growth over three to five years. For a young couple starting without an existing family farm, this land can clearly generate both a "substantial farm income", and a sustainable farm income for the lower input costs expected from rotational grazing and woodlot management.

We believe all the above points further verify that we are not simply using false hope or unrealistic agricultural aspirations as an excuse to allow continued use of the secondary home. Our family has strong agricultural roots and between ourselves and our children we have the knowledge, experience, financial and equipment resources, time and money invested in value-added agricultural plans even before knowing this farm would be listed for sale. We are fulfilling the full intent of the ordinance provisions for second homes on A-1 parcels and doing so consistent with how this land is currently zoned. The pre-existence of two legally permitted homes that have been used consistent with Dane County Codes up until rental was ceased for the pending sale of the land, makes this property uniquely qualified to meet our well-intended and justifiable agricultural intent.

We are not asking anything that is not allowed on A-1 parcels. We are not asking anything beyond was has already permitted on this particular A-1 parcel. We are simply asking that what has been permitted on this parcel be allowed to continue under new ownership. While it is certainly a unique circumstance for a two-home farm to transfer to new owner with both homes being desired by those new owners for agricultural purposes, there is nothing within the code that prohibits such a transaction. We see no basis by which a pre-existing, pre-2010 home becomes ineligible for habitation, or the "added to, altered restored, repaired ..." provisions of Section 10.123(2)(a)1., when being done for the very *purpose it was originally permitted.*

As purchasers, our intent is exactly consistent with the originally permitted use and the longstanding recognition of the value in having multiple generations of a single family jointly contributing to the agricultural operation. We realize that there may be alternate pathways by which our desired use might be achieved, and which may well allow co-ownership and co-residency in a parent/child situation. We believe the code clearly allows the single-parcel-two-house option that has existed on this property for more than 30 years and that is our desire.

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