Hans Hilbert
Dane County Planning and Zoning
210 Martin Luther King Jr Blvd, Room 116
Madison WI 53703

By personal delivery

Dear Mr Hilbert:

We have been awaiting your draft motion concluding our appeal hearing before the Board of Adjustments this past June 22. With the July 11 deadline for an August meeting of the Board, we have decided that even without this, we need to proceed with a request for a re-hearing on this matter. The basis for this request is outlined below.

Due Process Failure; Lack of Timely and Complete Document Exchange:

1. According to what we learned at the conclusion of the hearing, the normal procedures on appeals is to share those documents with both parties in advance of the hearing. Your June 27 letter confirms this process was not followed. We should have received a copy of the Administrator's brief on this case at the same time as the other parties received our brief. Instead, we received that brief a mere 10 minutes before the hearing; clearly without sufficient time to fully address issues raise in the brief. We accept this as a simple administrative oversight, but yet it occurred and has had consequences.
2. In your letter you mentioned, the documents were posted on the Legistar website. That is good to know for future reference, but in itself does not resolve the equal notice requirements, particularly when dealing with members of the public that may not be aware of this site as a posting location for such documents.
3. While the Board of Adjustment rules define most "standard operating procedures", those rules are silent on document exchange and availability of documents via Legistar or any other notice or exchange aspects. This leaves a first-time participant in this process completely un-informed and un-prepared. Without documentation of these procedures, there was no manner by which we would even know the document exchange was to be expected. Codification of "standard operating procedures" is a legal expectation in Wisconsin for this very reason.
4. We emphasize again, that we were not made aware of this procedural oversight until after the Board of Adjustments had made its motion to not hear the matters of my case—ironically also on procedural grounds related to timeliness. Failure to timely exchange is itself grounds for a rehearing.

Impact of Document Exchange on Board Action:

1. This due process failure did play a significant factor in the testimony presented and the information upon which the Board rendered its decision. Specifically, we were left unaware that procedural concerns were being contested by the Administrator. In the audio record from this meeting, one Board member commented that this document exchange would not have impacted the outcome of the procedural ruling, again noting this comment was after the decision was rendered. We strongly disagree. The meager evidence we presented was based

upon literal moments of preparation to defend an unknown procedural concern. We were given less than 10 minutes to review a 15-page document of which the procedural issue was but one point, and a procedural issue that Zoning staff had previously advised was a non-issue.

2. Specifically, the Board's concern (and eventual ruling) that the appellant did not have standing could have been corrected by readily available documentation, had we been permitted to anticipate its need. Access to the briefing would have made us aware of this concern. We could have (and would have) supplied readily available evidence showing both that an accepted offer to purchase does in fact provide standing and that the owner had deferred the county filings to us. No party can be expected to appropriately defend such issues with only 10 minutes notice.
3. Secondarily, but of equal importance, at least some Board members recognized that the question of timeliness of filing does relate to appellant's standing and the associated date of discussions between the appellant and the administrator in which the vague language in the February 10 letter was clarified. If the appellant was known to have standing that awareness added greater importance to the content of the appellant's request for clarification and interpretation by the Administrator. The Board discussed this very point.
4. Additionally, the Board questioned (after testimony was closed) the absence of the current owner from the hearing. I did testify that the owner had received inappropriate counsel and was under the full understanding that 3 legal homes still existed (as a prior sentence of the February letter states). As such, I testified that he had granted as part of our contract, that I would resolve the one-house/two house/three house issues with the County. A better presentation of these facts with supporting documentation was not possible with only 10 minutes preparation.
5. Finally, on matter of the timeliness, Mr. Hans Hilbert, upon my submitting the appeal and my asking specifically whether timeliness would be a concern, commented that the date should be of no or little consequence. He had explained the submittal was reasonably timely even with regard to the February date, given subsequent clarification discussions my submittal addressed. Even if timeliness were a concern, Mr Hilbert said the clock would re-set by simply submitting a zoning request that might be denied. Testimony to this effect was also presented as my further understanding of why I would not have anticipated a need to prepare for the timeliness question (unless I had known it was part of the Administrator's brief).
6. Combined, the advice of Zoning staff and the subsequent failure to exchange documents by Zoning staff left the appellant completely unprepared to defend a technicality vs. the facts of the case. Further while we had requested and received the document 10 minutes prior, we were still at that time unaware that we should have received them many weeks prior. Even our willingness to proceed was tainted by the failure of staff to follow their own procedures, all to our unjust detriment. A re-hearing is justified on this procedural failure alone.

Erroneous Conclusion of Law Regarding "Standing":

1. We have not yet seen proposed wording of, nor has the Board acted on the final ruling, and yet from the audio record a significant basis for this decision is the question of standing by the

appellant. As mentioned on the prior point, the Board questioned whether an accepted offer to purchase was sufficient to warrant standing for the appellant. This prior point was merely addressing evidence that was not presented because of untimely notice. Here my point is that the Board made an erroneous conclusion of law. With a single internet query, we found a newsletter of the American Bar Association that makes it immediately clear that an accepted offer to purchase bears a legally binding property interest that would not be unlike a landhold lease, such as a quarry operator might hold.

2. Specifically, the opening sentence of that newsletter states "As you might remember from your property class in law school, real property interests can be acquired and held in several different ways including as an owner, a possessor or a party entitled to some future or contingent interest." The newsletter later specifically addresses "options to purchase" and "rights of first offer" as holding legal interests in those properties. This was my exact understanding, as explained in my testimony. I am not an attorney, nor was I represented by one, but this is an important matter of property law commonly known in the real estate world, and one that should have be recognized by the Administrator of an agency dealing daily with real estate property law.
3. Again, the final ruling of the Board has not yet been issued, but the deliberation of the board turned strongly toward an assumption that the accepted offer to purchase did not create standing but that the appellant was merely a "potentially interested party". Dismissal of the case on this basis is at best inconsistent with allowing neighbors of a land use that "feel" an adjoining use is impacting them to file an appeal, when in this case the appellant held a legally recognized ownership interest recognized by law. This is not only inconsistent, but is simply contrary to law.
4. The basis of the right to an appeal is not even as stringent as ownership interest, but is simply "any person aggrieved". The history of this committee is to hear appeals by neighboring landowners and others that can be considered nothing more than "potentially interested parties", merely by geographic proximity. Prior to its decision the Board was informed that the appellant had an accepted offer to purchase; that the owner of record did not understand the implications of a vaguely written letter, and; that the appeal was filed within 30 days of the appellant obtaining both legal rights on the parcel and g clarification on that vaguely written letter. Denial on this basis of standing is strongly inconsistent with the "low bar" afforded neighbors of quarry.
5. This property interest was in place at the time of my asking Mr Lane what his office meant by the statement "you have what you have", in the February 10 letter. In the preceding paragraph, the letter states "Dane County Zoning recognizes that three separate principal buildings have existed on the property for more than 25 years and has enjoyed a legal nonconforming status" (emphasis added). To ask the meaning "you have what you have" in light of that prior text is a very important conversation, but only for a person that has a property interest. Under the assumption that we did not have an ownership interest, this importance of this conversation

was not fully considered by the Board. To ask board members what exactly does the owner "have" will likely yield different answers until this case is heard.

6. We specifically requested clarification of the February 10 letter within 30 days of establishing standing through an accepted offer to purchase. An April 26 letter to Mr Lane requesting clarification was followed by a phone conversation explaining our options, including the option of an appeal. We specifically filed the appeal within 30 days of both my letter and our subsequent discussions with Mr Lane.
7. Going back to the prior issues of timely exchange of documents, considerable evidence was not presented with regard to standing and timeliness simply because we were not aware that this was an issue of concern against which we would need to defend. In submitting the appeal, we specifically asked Mr Hans Hilbert about timeliness and his response was that we appeared to have addressed this sufficiently and it should not be an issue since we could merely file a zoning request and have that request denied, with an effect of renewing the clock. With this background and having not been supplied the Administrator's briefing, we were blind-sided by that briefing just 10 minutes before the hearing began. We supplied verbal testimony to the best of our ability, but lacked preparation time to locate and supply the physical documents as further support to our sworn testimony. The lack of physical documents and absence of the prior owner from the hearing clearly impacted the Board's ruling, but is all secondary to this point of law. By my sworn verbal testimony, the Board was aware of our purchase contract and that the owner had deferred communication with the county to me, yet the Board erroneously concluded an offer to purchase was not a real property interest and my verbal testimony about the owner's designation was discounted.
8. All of this is further made irrelevant by the fact that we have now lifted final contingencies and will close on the property prior by August 3. While this is currently still a future date as of this filing, we believe the error in law itself offers a right to hearing and prior to the August hearing we are requesting, we will be sole owners, rather than just possessing an ownership interest.

Urgency of Matter Based on Pending Ordinance Repeal:

1. The combined failures by the Zoning Department and erroneous application of law by the Board of Adjustments has created an urgency that must be reconciled by a timely hearing on the actual facts of the case. These errors have added substantial preparation time and has forced undesired decisions regarding the closing on our purchase. These matters should have been resolved in June.
2. Additionally, Zoning staff are in the process of re-writing the Chapter 10 ordinance under which this appeal is filed and under which the vague February 10 letter was written and under which Roger Lane provided clarification in early May. Proposed changes to the code play substantially into the decision of this case. Likewise, we believe the matters in this case need to be carefully considered in the re-write of Chapter 10. The intent of the language needs to match the legal consequence of the language, both currently and under the proposed revisions. Our

case deserves to be heard under the ordinance as it stands at the time, and this matter needs to be fully clarified as it impacts changes to Chapter 10.

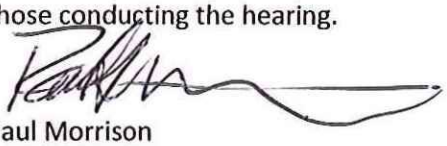
Re-Hearings Based on Board of Review Rules:

1. The Board of Adjustments rules specify "no appeal or application which has been dismissed or denied shall be considered again within one year of the Board's decision without significant material alteration or revision, except pursuant to court order or by motion to reconsider made by a voting member with the majority..." and "No rehearing shall be held except upon the affirmative vote of the majority of the members of the Board finding that substantial new evidence is submitted which could not reasonably have been presented at the previous hearing..."
2. To our understanding, the final action by the Board is still pending for a future meeting, although we have yet to see that wording. We request our concerns be considered prior to that final decision, since finalizing this ruling under these circumstances simply muddies the waters for all.
3. We believe the Board made its (tentative) decision under the assumption that the appellant had been provided a timely document exchange. I had not recognized this failure until after their (tentative) decision had been rendered and Mr Lane explained that we should have (and he believed had) received the documents weeks prior. Mr Hilbert's June 27 letter is new evidence that confirms staff had failed to follow their standard procedures, to the substantial detriment of the appellant.
4. While direct testimony has not been presented to this point, this rehearing request makes the Board aware that an accepted offer to purchase has greater bearing than they understood at the time, even to the point that finalizing their action would be contrary to law, at least contrary to the extent that the legal standing of the appellant was dismissed. This is a legal conclusion consistent with testimony of the appellant, but upon which the Board did not act.
5. We believe a direct court order is not necessary and would merely complicate matters for all parties, while also causing time delays. We are also certain that such a request would be automatically granted either in the case of failure to disclose documents, or an erroneous conclusion of law. We simply request Zoning staff consult legal counsel if they have any doubts on this matter and advise the Board accordingly.
6. Board members themselves, in their deliberations, discussed whether the appellant would have the right to a hearing on the facts of the case (rather than simply the procedural issues), if the procedural questions were resolved. While not voted upon, the audio reflects a verbal understanding that since the actual facts of the case have not yet been heard, the procedural actions of the Board should not impede a future hearing on the factual issues. For the reasons above, we should suffer no further delay in having those facts presented and decided upon.
7. If any hesitance on even a single point, the Board can still suspend their procedural rules to grant a timely hearing of the facts.

Based on all the facts above, whether considered jointly or individually, we believe we should be granted an August re-hearing on the matter. There is no need for additional briefs or delays since only procedural issues have been discussed and the facts of the case are not impacted by timeliness or standing questions that were previously considered. Any additional information can be provided as testimony.

We would further request that the matter of timeliness and standing be dismissed or summarily ruled in favor of the Appellant. Standing is an established matter of law, and is made further irrelevant by our pending August 3 closing on the property. Timeliness is not worthy of re-consideration since we can also file a zoning request for the garage and re-set the clock. And of course, even the Administrator pointed out, the Board can waive this rule, particularly given the unique circumstances detailed above. This case would certainly avoid any concerns of establishing a precedent for the future, since no appellant should encounter these multiple errors. No purpose is served by contesting timeliness in this matter and an intentional delay causes further harm to an appellant that has already been denied a timely hearing. Should the Board still desire to address the timeliness and standing questions, then timeliness, standing and the facts of the case should be heard in their entirety at a single August meeting.

Finally, we believe this re-hearing should occur without additional fee. The errors made by staff and the Board prevented a prior hearing of the actual facts of the case for which we paid. These errors also resulted in other costs and substantial additional time investment to the appellant. No further fees should apply in a case where the facts of the case were never discussed because of procedural error by those conducting the hearing.



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