

In re Appeal of Violations Occurring at 2784 Waubesa Ave., Town of Dunn by

ALAN AND HOLLY BIRKLE

v.

DANE COUNTY ZONING DEPARTMENT

**APPELLANTS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN
SUPPORT OF THEIR BRIEF IN OPPOSITION TO DANE COUNTY DEPARTMENT
OF PLANNING AND ZONING'S ORDER FINDING VIOLATIONS OCCURRING
AT 2784 WAUBESA AVE., TOWN OF DUNN, DANE COUNTY, WISCONSIN**

NOW COME Appellants Alan and Holly Birkle (the “Birkles”), by their undersigned attorneys, and for their Proposed Findings of Fact and Conclusions of Law in support of their Brief in Opposition to Dane County Department of Planning and Zoning’s Order Finding Violations Occurring at 2784 Waubesa Ave., Town of Dunn, Dane County, Wisconsin (the “Appeal”), state as follows:

PROPOSED FINDINGS OF FACT

1. On June 9, 2020, the Birkles submitted a Shoreland Zoning Permit application to the Dane County Planning & Zoning Department (the “Zoning Department”). [Affidavit of Elizabeth C. Stephens (“Stephens Aff.”) ¶ 2.]
2. On June 9, 2020, the Birkles submitted a Shoreland Mitigation Permit application to the Dane County Land & Water Resources Department (the “Land & Water Department”). (*Id.*)
3. The Birkles’ original Shoreland Zoning Permit and Shoreland Mitigation Permit applications included a preliminary Stormwater Mitigation Plan, which indicated the placement of

unspecified riprap material along the Property's shoreline and within its vegetative buffer zone ("VBZ"). [Affidavit of Peter Fortlage ("Fortlage Aff.") ¶ 5, Ex. 1.]

4. On August 19, 2020, at the invitation and direction of the Land & Water Department and the Zoning Department, the Birkles submitted a revised Stormwater Mitigation Plan to both departments. (*Id.*)

5. The August 19, 2020 Stormwater Mitigation Plan specifically identified the limestone riprap as the riprap material proposed for placement along the Property's shoreline and within its VBZ. (*Id.*)

6. On August 24, 2020, Hans Hilbert, Dane County Assistant Zoning Director, sent a letter to the Birkles, which stated, in relevant part:

Prior to the issuance of a zoning permit for the proposed residential development the following conditions must be satisfied:

2. Obtain an approved shoreland mitigation permit including vegetative buffer component.

Once th[is] requirement [is] satisfied your shoreland zoning permit will be issued with the following conditions and you may proceed to obtain your general zoning permit.

1. No change of topography within 5 feet of a property line.

2. No disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit.

[Affidavit of Alan Birkle ("Birkle Aff.") ¶ 2, Ex. 1.]

7. On September 11, 2020, the Birkles re-submitted the August 19, 2020 Stormwater Mitigation Plan to Mr. Hilbert and the Zoning Department. (Fortlage Aff. ¶ 6.)

8. On or about September 14, October 16, and October 21, 2020, the Birkles submitted revised Stormwater Mitigation Plan concepts to the Land & Water Department and/or the Zoning

Department; however, the proposed placement of the limestone riprap remained consistent across each of the revised plans. (Fortlage Aff. ¶ 7, Ex. 2.)

9. On November 2, 2020, the Land & Water Department approved the Birkles' proposed Stormwater Mitigation Plan. The Stormwater Mitigation Plan approved by the Land & Water Department proposed the placement of the limestone riprap along the Property's shoreline and within its VBZ. (Birkle Aff. ¶ 3, Ex. 2.)

10. On November 2, 2020, the Land & Water Department issued the Birkles the Shoreland Mitigation Permit. (*Id.*)

11. On November 3, 2020, the Zoning Department issued the Birkles the Shoreland Zoning Permit. The Shoreland Zoning Permit was conditioned on the Birkles' agreement that there be "[n]o disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit." (*Id.* ¶ 4, Ex. 3.)

12. Between November 18, 2020 and December 9, 2020, the Birkles installed the limestone riprap along the Property's shoreline, and within its VBZ. (*Id.* ¶ 5.)

13. The Birkles installed the limestone riprap along the Property's shoreline and within its VBZ consistent with the site plans submitted as part of the Stormwater Mitigation Plan. (*Id.*)

14. The Birkles installation of the limestone riprap along the Property's shoreline and within its VBZ complied with the Shoreland Zoning Permit's conditions. (*Id.*)

15. On January 24, 2021, the Wisconsin Department of Natural Resources ("WDNR") issued a letter to the Birkles seeking to confirm that the limestone riprap placed along the Property's shoreline, and within its VBZ qualified as riprap exempt from WDNR oversight under Wis. Stat. § 30.12(1g)(jm). (*Id.* ¶ 6, Ex. 4.)

16. On February 2, 2021, the WDNR issued a determination finding that the placement of the limestone riprap was exempt from WDNR oversight under Wis. Stat. § 30.12(1g)(jm). (*Id.* ¶ 11, Ex. 7.)

17. On or about May 11, 2021, the Land & Water Department visually observed the Property, including the limestone riprap placed along its shoreline and within its VBZ. (Stephens Aff. ¶ 3, Ex. 1.)

18. On May 12, 2021, the Land & Water Department sent an email to the Zoning Department stating:

Large slab limestone boulders have been installed above the riprap and appear to me more of a retaining wall/seating area and more decorative than functional. [*sic*] This was not shown on the approved plan and may interfere with the rain garden.

(*Id.*)

19. On May 17, 2021, the Zoning Department responded, stating:

The proposed deck was approved as a minor structure, so the mitigation plan required a buffer plan. A condition of the [Shoreland Zoning Permit] was that no disturbance to the VBZ [*sic*] unless part [*sic*] of the [shoreland] mitigation plan, can you verify that the VBZ plan didn't call for such a retaining wall?

(*Id.*)

20. On May 18, 2021, the Land & Water Department replied to the Zoning Department's May 17, 2021 inquiry, stating:

The [stormwater mitigation plan] showed 2 rows of limestone. I assumed that was the riprap. Wish I would have caught that.

(*Id.*)

21. Despite confirmation from the Land & Water Department that the limestone riprap were placed consistent with the Stormwater Mitigation Plan, the Shoreland Mitigation Permit, and the Shoreland Zoning Permit, the Zoning Department nevertheless issued a Notice of Violation to the Birkles on May 25, 2021, stating:

... I have determined that a retaining wall has been built on the shoreland and above the ordinary high water mark of Lake Waubesa. The site plan submitted for shoreland zoning permitting did not indicate a retaining wall in this location.

While your site plan indicated that riprap would be placed within this location, riprap must have its base below the ordinary high water mark and may extend no further than 36 inches above the ordinary high water mark.

(Birkle Aff. ¶ 7, Ex. 5.)

22. On May 26, 2021, the Birkles contacted the Land & Water Department and the Zoning Department to inform them that the Notice of Violation had been issued in error. (*Id.* ¶ 8, Ex. 6.)

23. The Land & Water Department responded, stating:

Just to clarify, the approved plans ... dated 10/21/20 shows “clean stone riprap” not a retaining wall. In addition to the shoreland zoning violation, it appears the wall will conflict with the rain garden outlet.

(*Id.*)

24. The Land & Water Department did not inform the Birkles that it had conceded to the Zoning Department that the Birkles’ placement of the limestone riprap along the Property’s shoreline and within its VBZ was included as part of the approved Stormwater Mitigation Plan. (*Id.* ¶ 9.)

25. Despite numerous requests by the Birkles for the Land & Water Department and/or the Zoning Department to reconsider the Notice of Violation or to conduct an on-site inspection, the Zoning Department refused to reverse its Notice of Violation. (*Id.* ¶ 10.)

26. The Zoning Department’s June 8, 2021 response to the Birkles was inaccurate. (*Id.*)

27. The Zoning Department did not acknowledge its admission to the Land & Zoning Department affirming that the Shoreland Zoning Permit allowed disturbances to the Property’s shoreline as approved by the Shoreland Mitigation Permit. (Stephens Aff. ¶ 5, Ex. 3.)

28. The Zoning Department also admitted that the Land & Water Department approved the placement of the limestone riprap along the Property's shoreline. (Birkle Aff. ¶ 9.)

29. In a private email sent to the Town of Dunn, the Zoning Department falsely claimed that "[t]he plan [the Birkles] submitted for the shoreland mitigation permit from LWRD had the retaining wall on it, but it is not something [the Land & Water Department] reviewed as part of [its] approval, nor is it within the [Land & Water Department's] authority to approve structures." (Stephens Aff. ¶ 9, Ex. 4.)

30. Despite the vigorous insistence of the Zoning Department to the contrary, the Birkle's placement of the limestone riprap is riprap. It is not a retaining wall. (Birkle Aff. ¶¶ 6, 11, Ex. 4, 7.)

31. The Birkles reasonably relied on the validity of the permits issued and placed the limestone riprap consistent with their terms and at substantial expense.

PROPOSED CONCLUSIONS OF LAW

1. The placement of the limestone riprap along the Property's shoreline and within its VBZ is riprap as that term is described under Wis. Stat. § 30.12(1g)(jm).

2. The placement of the limestone riprap along the Property's shoreline and within its VBZ complies with Stormwater Mitigation Plan and the Shoreland Mitigation Permit.

3. The placement of the limestone riprap along the Property's shoreline and within its VBZ complies with the Shoreland Zoning Permit.

4. The placement of the limestone riprap along the Property's shoreline and within its VBZ complies with the County's ordinances.

5. The placement of the limestone riprap along the Property's shoreline and within its VBZ was authorized by the Zoning Department and the Land & Water Department.

6. The Zoning Department's Notice of Violation is arbitrary and unreasonable.
7. The Zoning Department's Notice of Violation was issued in error of law.
8. The Zoning Department's Notice of Violation was issued outside its jurisdiction.
9. The Zoning Department's Notice of Violation is rescinded.
10. The placement of the limestone riprap along the Property's shoreline and within its VBZ is permitted and shall be allowed to remain in place without modification.

Dated this 9th day of September, 2021.

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**APPELLANTS BRIEF IN OPPOSITION TO DANE COUNTY DEPARTMENT OF
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WAUBESA AVE., TOWN OF DUNN, DANE COUNY, WISCONSIN**

NOW COME Appellants Alan and Holly Birkle (the “Birkles”), by their attorneys, Axley Brynelson, LLP, and submit their Brief in Opposition to Dane County Department of Planning and Zoning’s (the “Zoning Department”) Order (the “Order”) Finding Violations Occurring at 2784 Waubesa Ave., Town of Dunn, Dane County, Wisconsin (the “Property”).

INTRODUCTION

The Birkles appeal an Order of the Zoning Department finding that the limestone riprap located along the Property’s shoreline were placed in violation of Shoreland Zoning Permit No. DCPSHL-2020-0063 (the “Shoreland Zoning Permit”).¹ In support of its Order, the Zoning Department asserts that the limestone riprap were not included as a component of Birkles’ site plan for the Property’s vegetative buffer zone (“VBZ”), which called for riprap to be placed in that location, and instead constitute an impermissible “retaining wall.” The Zoning Department is wrong in both respects.

¹ The Birkles’ Notice of Appeal of the Zoning Department’s Order dated June 25, 2021, including all arguments and attachments, are incorporated herein by reference.

The Birkles’ proposal to place the limestone riprap along the Property’s shoreline, and within its VBZ, was submitted to the Zoning Department as part of its revised Stormwater Mitigation Plan dated August 25, 2020. Furthermore, the Wisconsin Department of Natural Resources (the entity upon which the Zoning Department relies for riprap determinations) found that the Birkles’ placement of the limestone riprap constituted exempted riprap under Wis. Stat. § 30.12(1g)(jm). As a result, the Zoning Department’s assertions, as set forth in its Notice of Violation, that the Birkles either did not propose to place the limestone riprap as part of their site plan, or that their placement was not approved under the Shoreland Mitigation Permit (or the Shoreland Zoning Permit, is disingenuous at best, and entirely inaccurate at worst.

Accordingly, for the reasons stated in the Birkles’ June 25, 2021 Appeal, as well as those set forth more fully below, the Birkles respectfully request that the Board of Adjustment (the “Board”) (1) rescind the Zoning Department’s Notice of Violation; (2) affirm that the limestone riprap are placed consistent with the Shoreland Mitigation Permit and the Shoreland Zoning Permit; and (3) uphold and enforce the terms and conditions set forth under the Shoreland Mitigation Permit and the Shoreland Zoning Permit.

FACTUAL BACKGROUND

On June 9, 2020, the Birkles submitted applications for the Shoreland Zoning Permit and the Shoreland Mitigation Permit to the County. (Birkles’ Proposed Statement of Facts and Conclusions of Law (“PFOF”) ¶ 1, 2.) The Birkles’ original Shoreland Zoning Permit and Shoreland Mitigation Permit applications included a preliminary Stormwater Mitigation Plan, which indicated the placement of unspecified riprap material along the Property’s shoreline and within the VBZ. (PFOF ¶ 3.)

On August 19, 2020, at the request of the Land & Water Department and the Zoning Department, the Birkles submitted a revised Stormwater Mitigation Plan to both departments and specifically identified the limestone riprap as the riprap material proposed for placement along the Property's shoreline and within its VBZ. (PFOF ¶ 4, 5.) On August 24, 2020, Hans Hilbert, Dane County Assistant Zoning Director, sent a letter to the Birkles, which stated, in relevant part:

Prior to the issuance of a zoning permit for the proposed residential development the following conditions must be satisfied:

2. Obtain an approved shoreland mitigation permit including vegetative buffer component.

Once th[is] requirement [is] satisfied your shoreland zoning permit will be issued with the following conditions and you may proceed to obtain your general zoning permit.

1. No change of topography within 5 feet of a property line.
2. No disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit.

(PFOF ¶ 6.) In response, on September 11, 2020, the Birkles re-submitted the updated Stormwater Mitigation Plan to Mr. Hilbert, which once again identified the limestone riprap as the proposed riprap material to be used along the Property's shoreline and within its VBZ.² (PFOF ¶ 7.)

On November 2, 2020, the Land & Water Department approved the Birkles' proposed Stormwater Mitigation Plan, (which proposed that the limestone riprap be used as the riprap material to be placed along the Property's shoreline and within its VBZ), and issued the Birkles the Shoreland Mitigation Permit. (PFOF ¶ 10.) On November 3, 2020, consistent with the conditions set forth in its August 24, 2020 correspondence, the Zoning Department issued the

² On September 14, October 16, and October 21, 2020, the Birkles submitted revised Stormwater Mitigation Plan concepts to the Land & Water Department (in response to requests for revision by the Land & Water Department); however, the placement of the limestone riprap remained consistent throughout each of the revised plans. (PFOF ¶ 8.)

Birkles the Shoreland Zoning Permit. (PFOF ¶ 11.) The Shoreland Zoning Permit was conditioned on the Birkles' agreement that there be "[n]o disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit." (*Id.*) Between November 18, 2020 and December 9, 2020, the Birkles installed the limestone riprap along the Property's shoreline, and within its VBZ, as set forth in the Stormwater Mitigation Plan and Shoreland Mitigation Permit approved by the Land & Water Department. (PFOF ¶ 12.)

On January 24, 2021, the Wisconsin Department of Natural Resources ("WDNR") issued a letter to the Birkles seeking to confirm that the limestone riprap placed along the Property's shoreline, and within its VBZ did, in fact, qualify as riprap exempt from WDNR oversight under Wis. Stat. § 30.12(1g)(jm). (PFOF ¶ 15.) On February 2, 2021, after reviewing the Stormwater Mitigation Plan, the Shoreland Mitigation Permit, and the Shoreland Zoning Permit, WDNR issued a determination finding that the placement of the limestone riprap was exempt from WDNR oversight under Wis. Stat. § 30.12(1g)(jm), stating:

[WDNR has] determined no program jurisdiction over this project site. The site photos provided by the warden were reviewed in conjunction with a desktop review of the site and the plans and specifications document you provided. Based on information we have at this time, the activity appears to substantially meet requirements for an exempt riprap replacement project.

(PFOF ¶ 16.)

On or about May 11, 2021, the Land & Water Department visually observed the Property, including the limestone riprap placed along its shoreline and within its VBZ. (PFOF ¶ 17.) On May 12, 2021, the Land & Water Department sent an email to the Zoning Department stating:

Large slab limestone boulders have been installed above the riprap and appear to me more of a retaining wall/seating area and more decorative than functional. [*sic*] This was not shown on the approved plan and may interfere with the rain garden. (PFOF ¶ 18.)

On May 17, 2021, the Zoning Department responded, stating:

The proposed deck was approved as a minor structure, so the mitigation plan required a buffer plan. A condition of the [Shoreland Zoning Permit] was that no disturbance to the VBZ *[sic]* unless part *[sic]* of the [shoreland] mitigation plan, can you verify that the VBZ plan didn't call for such a retaining wall? (PFOF ¶ 19.)

On May 18, 2021, the Land & Water Department replied to the Zoning Department's May 17, 2021 inquiring, stating:

The [stormwater mitigation plan] showed 2 rows of limestone. I assumed that was the riprap. Wish I would have caught that.

(PFOF ¶ 20.)

Despite the Land & Water Department's confirmation to the Zoning Department that the limestone riprap were placed consistent with the Stormwater Mitigation Plan, the Shoreland Mitigation Permit, and the Shoreland Zoning Permit, the Zoning Department nevertheless issued a Notice of Violation to the Birkles on May 25, 2021, stating:

... I have determined that a retaining wall has been built on the shoreland and above the ordinary high water mark of Lake Waubesa. The site plan submitted for shoreland zoning permitting did not indicate a retaining wall in this location.

While your site plan indicated that riprap would be placed within this location, riprap must have its base below the ordinary high water mark and may extend no further than 36 inches above the ordinary high water mark.

(PFOF ¶ 21.)

On May 26, 2021, the Birkles contacted the Land & Water Department and the Zoning Department to inform them that the Notice of Violation had been issued in error as the limestone riprap constituted riprap according to the DNR, and that they were placed consistent with the Stormwater Mitigation Plan approved by the Land & Water Department and in conformity with the Shoreland Mitigation Permit issued by Land & Water Department. (PFOF ¶ 22.) The Land & Water Department responded, stating:

Just to clarify, the approved plans ... dated 10/21/20 shows “clean stone riprap” not a retaining wall. In addition to the shoreland zoning violation, it appears the wall will conflict with the rain garden outlet.

(PFOF ¶ 23.) However, the Land & Water Department failed to acknowledge its private concession to the Zoning Department that the Stormwater Mitigation Plan proposed the placement of the limestone riprap or that the Stormwater Mitigation Plan constituted approval of their placement.

(PFOF ¶ 24.) Nor did the Land & Water Department acknowledge that the placement of the limestone riprap was consistent with the detailed visual representations included in the Stormwater Mitigation Plan that it approved. (PFOF ¶¶ 4, 5, 7, 8, 13, 14.)

Despite numerous requests by the Birkles for the Land & Water Department and/or the Zoning Department to reconsider the Notice of Violation or to conduct an on-site inspection, the Zoning Department refused to reverse its Notice of Violation, stating on June 8, 2021:

It is unfortunate that the plans submitted to Dane County Land and Water as part of the shoreland mitigation permit application differed from what was reviewed and approved through shoreland zoning, but that does not change what was approved as far as structures and required setbacks.

Your options for compliance are either to remove the retaining wall from the vegetative buffer zone or obtain a variance from the Dane County Board of Adjustment.

(PFOF ¶ 26.)

The Zoning Department’s June 8, 2021 response to the Birkles was inaccurate. It failed to acknowledge the Land & Water Department’s private admission that the limestone riprap *were* proposed as part of the Stormwater Mitigation Plan, or that the Birkles submitted a revised Stormwater Mitigation Plan to the Zoning Department on August 19, 2020 which proposed to place the limestone riprap in the very location that caused the Zoning Department to issue its Notice of Violation. (PFOF ¶ 27.) Nor did the Zoning Department acknowledge its own admission to the Land & Zoning Department affirming that the Shoreland Zoning Permit was valid provided

any disturbances to the vegetative buffer zone were consistent with the Shoreland Mitigation Permit (which, in this case, they were). (PFOF ¶ 28.)

LEGAL STANDARD

Under Wis. Stat. § 59.694(4) and DCCO § 11.99(2)(b), the Dane County Board of Adjustment (the “Board”) is authorized to hear and decide any appeal by any person aggrieved by a decision of the zoning administrator where it is alleged there was error in the enforcement of a zoning ordinance. *See Bd. of Regents of Univ. of Wisconsin v. Dane Cty. Bd. of Adjustment*, 2000 WI App 211, 238 Wis. 2d 810, 618 N.W.2d 537. Decisions to enforce a zoning ordinance represent legislative acts. *Quinn v. Town of Dodgeville*, 122 Wis.2d 570, 578, 364 N.W.2d 149 (1985). Legislative acts cannot be sustained where they serve no legitimate purpose and they are arbitrary and unreasonable. *Kmiec v. Town of Spider Lake*, 60 Wis.2d 640, 647, 211 N.W.2d 471 (1973). Accordingly, the Board’s review of a decision to enforce a zoning ordinance must require a determination of whether the authority acted in excess of its power or under error of law. *Buhler v. Racine County*, 33 Wis.2d 137, 146, 146 N.W.2d 403 (1966).

In Wisconsin, a municipal body is not immune from the application of the doctrine of estoppel and it makes no difference whether the activities are governmental or proprietary. *See, e.g., St. Croix County v. Webster*, 111 Wis. 270, 87 N.W. 302 (1901); *Eau Claire Dells Imp. Co. v. City of Eau Claire*, 172 Wis. 240, 179 N.W. 2 (1920); *Milwaukee County v. Badger Chair & Furn. Co.*, 223 Wis. 118, 269 N.W. 659 (1936); *Park Bldg. Corp. v. Industrial Comm.* (1960), 9 Wis. 2d 78, 100 N.W.2d 571; *Lang v. City of Cumberland*, 18 Wis. 2d 157, 118 N.W.2d 114 (1962). An estoppel *in pais* consists of action or nonaction on the part of the one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action or

nonaction, to his detriment. *See Dixon v. Davidson*, 202 Wis. 19, 231 N.W. 276 (1930); *see also Callaway v. Evanson*, 272 Wis. 251, 75 N.W.2d 456 (1956).

ARGUMENT

I. The Zoning Department’s Order Constitutes An Error Of Law, Is Arbitrary And Unreasonable, And Cannot Be Sustained.

The Zoning Department’s issuance of the May 25, 2021 Notice of Violation has no basis in law or fact and should be rescinded. The Zoning Department’s Notice of Violation inaccurately asserts that the Birkles’ placement of the limestone riprap constitutes a “structure” under some unspecified Dane County Ordinance; that the proposed placement of the limestone riprap was not approved by the Shoreland Zoning Permit; and, that the limestone riprap are not “riprap,” as that term is commonly understood by WDNR. The Zoning Department’s analysis errs in every respect.

The Birkles were issued a Shoreland Mitigation Permit and a Shoreland Zoning Permit authorizing the placement of the limestone riprap along the Property’s shoreline and within its VBZ. (PFOF ¶ 1, 2.) The Land & Water Department *explicitly* signed off on the placement of the limestone riprap, which were included as part of the Stormwater Mitigation Plan, stating “[t]he shoreland mitigation permit application and associated mitigation plan have been reviewed and approved.” (PFOF ¶ 10.) The Land & Water Department privately admitted this fact.³ (PFOF ¶ 28.) Furthermore, even if it was true that the placement of the limestone riprap was not submitted to the Zoning Department (and it is not), the Shoreland Zoning Permit issued by the Zoning Department allows for the “disturbance of the vegetative buffer zone ... [if] it is part of an approved shoreland mitigation permit.” (PFOF ¶ 11.) Therefore, whether the placement of the

³ The Zoning Department also admitted this fact, albeit not to the Birkles. (PFOF ¶ 28.) In a private email sent to the Town of Dunn, the Zoning Department stated “[t]he plan [the Birkles] submitted for the shoreland mitigation permit from LWRD had the retaining wall on it, but it is not something [the Land & Water Department] reviewed as part of [its] approval, nor is it within the [Land & Water Department’s] authority to approve structures.” (PFOF ¶ 29.)

limestone riprap was reviewed or approved by the Zoning Department is immaterial. The issuance of the Shoreland Zoning Permit was conditioned on modifications to the VBZ made in accordance with the approved Shoreland Mitigation Permit, which is precisely what occurred here. (PFOF ¶ 6, 11.) As a result, the Zoning Department's issuance of the Notice of Violation is an error of law and demands reversal.

In addition, the Zoning Department's characterization of the limestone riprap as a "retaining wall" is equally unavailing and constitutes yet another error of law. Although the Zoning Department rightly acknowledges that WDNR regulates determinations and placement of riprap, it wrongly characterizes the placement of the limestone riprap as a "retaining wall." (PFOF ¶ 12.) Indeed, WDNR (the very entity the Zoning Department admits has oversight over such determinations) concluded that the placement of the limestone riprap were "substantially compliant" with the placement of riprap and declined to assert any programmatic jurisdiction. (PFOF ¶ 16.) Nevertheless, the Zoning Department not only characterized the placement of the limestone riprap as such in its Notice of Violation, it also attempted to agitate other public agencies to come to the same conclusion by similarly mischaracterizing their placement as a "retaining wall." (PFOF ¶ 29.) Despite the vigorous insistence of the Zoning Department to the contrary, the Birkles' placement of the limestone riprap is riprap. (PFOF ¶ 30.) It is not a "retaining wall." (*Id.*) WDNR confirmed as much. (PFOF ¶ 16.) As a result, the Zoning Department's erroneous characterization of the placement of the limestone riprap as a "retaining wall" is contrary to the statutes, WDNR determination, and is further evidence of the Zoning Department's error of law in issuing the Notice of Violation.

Finally, although referenced, *supra*, it is worth drawing specific attention to the Zoning Department's and the Land & Water Department's inconsistent statements related to the placement of the limestone riprap along the Property's shoreline and within its VBZ. For instance:

- On May 12, 2021, the Land & Water Department emailed the Zoning Department stating that the placement of the limestone riprap “was not shown on the approved plan” The Zoning Department replied on May 17, 2021, stating “the mitigation plan required a buffer plan. A condition of the [Shoreland Zoning Permit] was that no disturbance to the [vegetative buffer zone] unless part of the mitigation plan, can you verify that the VBZ plan didn't call for such a retaining wall?” The Land & Water Department responded on May 18, 2021, stating “[t]he [Stormwater Mitigation Plan] showed 2 rows of limestone. I assumed that was the riprap. Wish I would have caught that.” (PFOF ¶ 20.) (Emphasis added.)
- On May 26, 2021, the Land & Water Department emailed the Birkles, stating “the approved plans ... dated 10/21/20 shows “clean stone riprap” not a retaining wall.”⁴
- On June 8, 2021, in contradiction to the Land & Water Department's confirmation that the plans *did* propose the placement of the limestone riprap, the Zoning Department emailed the Birkles, stating “[n]one of the plans contained within this file include a retaining wall along the shoreline, only exiting riprap is shown.”⁵
- On June 23, 2021, the Zoning Department emailed the Town of Dunn, (again, despite confirmation from the Land & Water Department that the placement of the limestone riprap was included in the proposed plan), stating “[t]he plan [the Birkles] submitted for the

⁴ The three-dimensional plans submitted as part of this same plan clearly showed the intended placement of the limestone riprap which, ultimately, were placed consistent with the plan.

⁵ This statement contradicts the Birkles' submission of the revised Stormwater Mitigation Plan to the Zoning Department showing the proposed placement of the limestone riprap on August 19, 2021.

shoreland mitigation permit .. had the retaining wall on it We suspect that it was an intentional omission from the plan for zoning.”⁶

These contradictory statements demonstrate the Zoning Department’s and the Land & Water Department’s intent to mislead, misconstrue, and/or misstate the facts associated with the Birkles’ permit applications, as well as with the permits actually issued. Moreover, they are *prima facie* evidence of bad faith. The Birkles were excessively transparent with both departments in providing their site plans, seeking their guidance and approval, and complying with the site plans (as submitted) throughout the construction process. Based on these facts, it seems more likely that the departments are now attempting to back-pedal their approval of the placement of the limestone riprap because they “[w]ish[ed they] would have caught [it]” before, than it was an attempt by the Birkles’ to “omit” elements of their site plan for review.

II. The Shoreland Mitigation Permit And The Shoreland Zoning Permit Were Issued Consistent With The County’s Ordinances And Should Be Enforced.

There is nothing about the placement of the limestone riprap that runs contrary to the County’s ordinances or the law. Rather, it appears that the departments simply do not like the outcome of their decisions. For instance, the Zoning Department may permit the construction of structures within the vegetative buffer zone under DCCO § 11.04(4), and the Land & Water Department is afforded similar authority under DCCO §§ 11.04(5), 11.11(3), and 11.05(5)(a)(13)d. As a result, both the Shoreland Mitigation Permit and the Shoreland Zoning Permit were validly issued and cannot now be invalidated. Furthermore, the Birkles reasonably relied on the validity of the permits issued and placed the limestone riprap consistent with their terms and at substantial expense. (PFOF ¶ 31.) For the Zoning Department to now cry foul about the placement of the

⁶ The Zoning Department made this statement despite that the revised Stormwater Mitigation Plan showing the proposed placement of the limestone riprap was delivered to it on August 19, 2020. (PFOF ¶ 29.)

limestone riprap, is little more than a transparent attempt to invalidate a validly issued permit it regrets issuing⁷. As a result, the County is estopped from rescinding the validly issued permits, and the Board must uphold their terms.

CONCLUSION

For the reasons set forth above, the Birkles respectfully request that the Board:

- (1) rescind the Zoning Department's Notice of Violation;
- (2) affirm that the limestone riprap are placed consistent with the Shoreland Mitigation Permit and the Shoreland Zoning Permit; and
- (3) uphold and enforce the terms and conditions set forth under the Shoreland Mitigation Permit and the Shoreland Zoning Permit.

Dated this 9th day of September, 2021.

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⁷ In addition, the Zoning Department has refused to provide the Birkles with the specific ordinance(s) that form the bases for the alleged violation. This refusal prevents the Birkles from addressing—or even remediating—the alleged violation and is a violation of their due process rights.

DANE COUNTY ZONING DEPARTMENT

**AFFIDAVIT OF ALAN BIRKLE IN SUPPORT OF ALAN AND HOLLY BIRKLE
BRIEF IN OPPOSITION TO DANE COUNTY DEPARTMENT OF PLANNING AND
ZONING'S ORDER FINDING VIOLATIONS OCCURRING AT 2784 WAUBESA AVE.,
TOWN OF DUNN, DANE COUNY, WISCONSIN**

1. No change of topography within 5 feet of a property line.

2. No disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit.

Attached hereto as **Exhibit 1** is a true and correct copy of the correspondence I received from Dane County Planning and Development Department dated August 24, 2020.

3. On November 2, 2020, the Land & Water Department issued to me the Shoreland Mitigation Permit. Attached hereto as **Exhibit 2** is a true and correct copy of the Shoreland Mitigation Permit issued to me on November 2, 2020.

4. On November 3, 2020, consistent with the conditions set forth in its August 24, 2020 correspondence, the Zoning Department issued me the Shoreland Zoning Permit. The Shoreland Zoning Permit was conditioned on our agreement that there be “[n]o disturbance of the vegetative buffer zone unless it is part of an approved shoreland mitigation permit.” Attached hereto as **Exhibit 3** is a true and correct copy of the Shoreland Zoning Permit issued to me on November 3, 2020.

5. Between November 18, 2020 and December 9, 2020, we had the limestone riprap installed along the Property’s shoreline, and within its VBZ, as set forth in the Stormwater Mitigation Plan and Shoreland Mitigation Permit approved by the Land & Water Department.

6. On January 24, 2021, the Wisconsin Department of Natural Resources (“WDNR”) issued a letter to me seeking to confirm that the limestone riprap placed along the Property’s shoreline, and within its VBZ did, in fact, qualify as riprap exempt from WDNR oversight under Wis. Stat. § 30.12(1g)(jm). Attached hereto as **Exhibit 4** is a true and correct copy of the letter I received from the WDNR dated January 24, 2021.

7. Despite the Land & Water Department’s confirmation to the Zoning Department that the limestone blocks were placed consistent with the Stormwater Mitigation Plan, the

Shoreland Mitigation Permit, and the Shoreland Zoning Permit, the Zoning Department nevertheless issued a Notice of Violation to me on May 25, 2021, stating:

... I have determined that a retaining wall has been built on the shoreland and above the ordinary high water mark of Lake Waubesa. The site plan submitted for shoreland zoning permitting did not indicate a retaining wall in this location.

While your site plan indicated that riprap would be placed within this location, riprap must have its base below the ordinary high water mark and may extend nor further than 36 inches above the ordinary high water mark.

Attached hereto as **Exhibit 5** is a true and correct copy of the May 25, 2021 Notice of Violation I received from Dane County Planning & Development Zoning Division.

8. On May 26, 2021, I contacted the Land & Water Department and the Zoning Department to inform them that the Notice of Violation had been issued in error as the limestone blocks constituted riprap according to the DNR, and that they were placed consistent with the Stormwater Mitigation Plan approved by the Land & Water Department and in conformity with the Shoreland Mitigation Permit issued by Land & Water Department. Attached hereto as **Exhibit 6** is a true and correct copy of my electronic correspondence with the Land & Water Department and the Zoning Department.

9. The Land & Water Department failed to acknowledge its private concession to the Zoning Department that the Stormwater Mitigation Plan proposed the placement of the limestone blocks or that the Stormwater Mitigation Plan constituted approval of their placement.


10. Despite my numerous requests for the Land & Water Department and/or the Zoning Department to reconsider the Notice of Violation or to conduct an on-site inspection, the Zoning Department refused to reverse its Notice of Violation, stating on June 8, 2021:

It is unfortunate that the plans submitted to Dane County Land and Water as part of the shoreland mitigation permit application differed from what was reviewed and approved through shoreland zoning, but that does not change what was approved as far as structures and required setbacks.

Your options for compliance are either to remove the retaining wall from the vegetative buffer zone or obtain a variance from the Dane County Board of Adjustment.

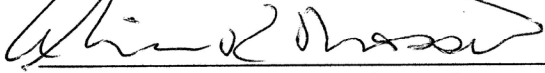
11. On February 2, 2021, the WDNR issued a determination finding that the placement of the limestone riprap was exempt from WDNR oversight under Wis. Stat. § 30.12(1g)(jm). Attached hereto as **Exhibit 7** is a true and correct copy of my electronic correspondence with the WDNR.

12. I reasonably relied on the validity of the permits issued and placed the limestone riprap consistent with their terms and at substantial expense.



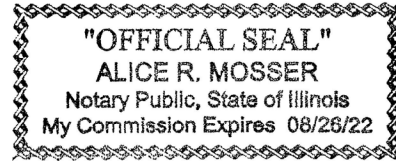
Alan Birkle

Subscribed and sworn to before me
this 9th day of September, 2021.



Notary Public, State of Wisconsin

My commission expires: 8-26-2022



STATE OF WISCONSIN

DANE COUNTY

BOARD OF ADJUSTMENT

In re Appeal of Violations Occurring at 2784 Waubesa Ave., Town of Dunn by

ALAN AND HOLLY BIRKLE

v.

DANE COUNTY ZONING DEPARTMENT

**AFFIDAVIT OF PETER D. FORTLAGE IN SUPPORT OF ALAN AND HOLLY
BIRKLE BRIEF IN OPPOSITION TO DANE COUNTY DEPARTMENT OF
PLANNING AND ZONING'S ORDER FINDING VIOLATIONS OCCURRING AT 2784
WAUBESA AVE., TOWN OF DUNN, DANE COUNY, WISCONSIN**

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Peter D. Fortlage, being first duly sworn, on oath deposes and states as follows:

1. I am a professional engineer employed by Burse Surveying and Engineering, Inc.
2. I was hired by Alan and Holly Birkle to prepare an erosion control plan and to assist in the preparation of the Shoreland Zoning and Shoreland Mitigation Permit applications and the Stormwater Mitigation Plan for the property located at 2784 Waubesa Avenue, Town of Dunn, Dane County, Wisconsin.
3. I make this affidavit based on my own knowledge and information.
4. I assisted in the preparation and submission of the Shoreland Zoning Permit and Shoreland Mitigation Permit applications, which included a preliminary Stormwater Mitigation Plan identifying the placement of unspecified riprap material along the Property's shoreline and within its vegetative buffer zone ("VBZ").

5. On August 19, 2020, at the request of the Land & Water Department and the Zoning Department, I submitted a revised Stormwater Mitigation Plan to the Zoning Department and the Land & Water Department. The August 19, 2020 Stormwater Mitigation Plan specifically identified the limestone blocks as the riprap material proposed for placement along the Property's shoreline and within its VBZ. Attached hereto as **Exhibit 1** is a true and correct copy of the August 19, 2020 revised Stormwater Mitigation Plan.

6. On September 11, 2020, I re-submitted the August 19, 2020 revised Stormwater Mitigation Plan to Mr. Hilbert, which identified the limestone blocks as the proposed riprap material to be used along the Property's shoreline and within its VBZ.

7. It appears that they Land & Water Department failed to acknowledge that the Stormwater Mitigation Plan it approved on November 2, 2020 proposed the placement of the limestone blocks along the Property's shoreline and within its VBZ. Attached hereto as **Exhibit 2** is a true and correct copy of portions of the August 19, 2020 Stormwater Mitigation Report (as revised on October 21, 2020).


Peter D. Fortlage

Subscribed and sworn to before me
this 9th day of September, 2021.

Bonnie DeRose
Notary Public, State of Wisconsin
My commission expires: 10/23/22



In re Appeal of Violations Occurring at 2784 Waubesa Ave., Town of Dunn by

ALAN AND HOLLY BIRKLE

v.

DANE COUNTY ZONING DEPARTMENT

**AFFIDAVIT OF ELIZABETH C. STEPHENS IN SUPPORT OF ALAN AND HOLLY
BIRKLE BRIEF IN OPPOSITION TO DANE COUNTY DEPARTMENT OF
PLANNING AND ZONING'S ORDER FINDING VIOLATIONS OCCURRING AT 2784
WAUBESA AVE., TOWN OF DUNN, DANE COUNY, WISCONSIN**

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Elizabeth C. Stephens , being first duly sworn, on oath deposes and states as follows:

1. I am the attorney for Alan and Holly Birkle in this matter and I make this affidavit based on my own knowledge and information.

2. On June 9, 2020, the Birkles submitted applications for the Shoreland Zoning Permit and the Shoreland Mitigation Permit to the County.

3. On or about May 11, 2021, the Land & Water Department visually observed the Property, including the limestone riprap placed along its shoreline and within its VBZ. Attached hereto as **Exhibit 1** is a true and correct copy of a portion of the records submitted by Dane County in response to my public records request.


4. The Birkles were issued a Shoreland Mitigation Permit and a Shoreland Zoning Permit authorizing the placement of the limestone riprap along the Property's shoreline and within

its VBZ. Attached hereto as **Exhibit 2** is a true and correct copy of Shoreland Zoning Permit issued to the Birkles.

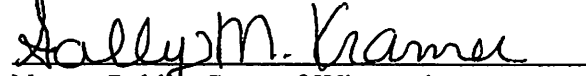
5. The Zoning Department failed to acknowledge its own admission to the Land & Zoning Department affirming that the Shoreland Zoning Permit was valid provided any disturbances to the vegetative buffer zone were consistent with the Shoreland Mitigation Permit (which, in this case, they were). Attached hereto as **Exhibit 3** is a true and correct copy of portions of the August 19, 2020 Stormwater Mitigation Report (as revised on October 21, 2020).

6. In a private email sent to the Town of Dunn, the Zoning Department stated “[t]he plan [the Birkles] submitted for the shoreland mitigation permit from LWRD had the retaining wall on it, but it is not something [the Land & Water Department] reviewed as part of [its] approval, nor is it within the [Land & Water Department’s] authority to approve structures.” Attached hereto as **Exhibit 4** is a true and correct copy of records submitted by Dane County in response to my public records request.

7. Attached hereto as **Exhibit 5** is a true and correct copy of the Birkles’ appeal submitted on June 25, 2021.


Elizabeth C. Stephens

Subscribed and sworn to before me
this 9th day of September, 2021.


Notary Public, State of Wisconsin
My commission expires: 3-28-22.

