

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: March 27, 2013

**MEMORANDUM**

TO: Zoning Board of Appeals

FROM: Maureen S. O'Brien, Assistant City Attorney

RE: Appeal of Zoning Administrator's Interpretation of Zoning Code Ordinance 28.091(1) re: 3600 Portage Road

This issue is not appealable to the Zoning Board of Appeals. It is not an appeal of a decision or determination of the Zoning Administrator. Additionally, the Zoning Board of Appeals ("ZBA") does not have jurisdiction to hear constitutional challenges to zoning ordinances. Therefore the ZBA should dismiss.

**1. The statement at issue is not a decision or determination of the Zoning Administrator, and therefore is not appealable.**

Mr. Vang asks to appeal "the Zoning Administrator's decision and interpretation of the City of Madison's Zoning ordinance Chapter 28.091(1)." Under MGO 28.205(3), the Zoning Board of Appeals has authority to decide appeals regarding a decision or determination by the Zoning Administrator in the enforcement of Chapter 28.

**MGO 28.205(3) Jurisdiction.**

The Zoning Board of Appeals has the following jurisdiction and authority:

- (a) To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Zoning Administrator in the enforcement of this chapter.
- (b) To hear and act upon applications for variances from the terms provided in this chapter (Refer to Sec. 28.184 for procedures and standards).
- (c) To hear and decide appeals where it is alleged there is error in a determination made by the Director of the Department of Planning and Community and Economic Development.
- (d) To hear and decide disputes concerning the district boundaries shown on the official Floodplain Maps.
- (e) To hear and act upon all other matters referred to it upon which it is required to act under this chapter.

Mr. Vang provided a copy of an email from the Zoning Administrator as the decision he seeks to appeal. That email is not a decision or interpretation. It is an explanation of the ordinance and the possible penalties for violation.

In the email the Zoning Administrator wrote, "Please note, Per sec. 28.091(1) of the Madison Zoning Ordinance, camping is not an allowed use of this property. If you allow campers to locate on your property, the City will be issuing you municipal citations for each day the camping activity is occurring on the site. The daily citation amounts are \$177 1<sup>st</sup>, \$303 2<sup>nd</sup>, \$366 3<sup>rd</sup> and each day thereafter."

The statement of the Zoning Administrator regarding the allowable uses of the property, and possible fines, is not a decision or determination for purposes of a ZBA appeal. It is simply a recitation of the ordinance.

The Zoning Administrator's job is to enforce violations. MGO 28.202. The issuance of an enforcement order regarding an actual violation on a specific property could be an appealable decision. However, in the context of a possible future violation, the Zoning Administrator's statement that he intends to enforce the code is simply a part of his job responsibilities. At this point, appeal is premature.

Though the ZBA has the authority to hear appeals from decisions of the Zoning Administrator, the email at issue is not a decision. Therefore the ZBA should dismiss the appeal.

## **2. The Zoning Board of Appeals does not have jurisdiction to hear challenges to the constitutionality of the Zoning Code.**

In his appeal, Mr. Vang does not actually allege error in a decision by the Zoning Administrator. Instead, he alleges that the zoning ordinance itself is unconstitutional. Because deciding constitutional challenges is outside the responsibilities of the Zoning Board of Appeals, the ZBA should dismiss.

The Zoning Board of Appeals is not the appropriate forum to challenge the constitutionality of the zoning code. First, such an appeal is not within the Board's enumerated jurisdiction. See MGO 28.205(3) copied in section 1, above.

Secondly, courts in Wisconsin have long held that administrative agencies such as the ZBA have no authority to invalidate an ordinance. In 1932, the Supreme Court of Wisconsin heard a case regarding the constitutionality of a zoning ordinance. *State ex rel. Tingley v. Gurda*, 209 Wis. 63 (1932). In that case, a landowner was denied a building permit because his land was not zoned for industrial use. *Id.* at 65. He argued to the ZBA that the ordinance zoning his property residential was unconstitutional. *Id.* The board announced that it had no jurisdiction to pass upon the constitutionality of an ordinance and the Wisconsin

Supreme Court agreed:

It has been held that zoning boards of adjustment are not created as appellate bodies, and that legal or constitutional questions involved in zoning requirements are not a subject matter for the determination of such boards, but must be presented for consideration to the proper legal forum. It seems that, generally, their powers of review are limited to practical difficulties, or unnecessary hardship, in the way of carrying out the strict letter of the law.

*Id.* at 68.

More recent Wisconsin cases have held the same. In *Kmiec v. Spider Lake*, 60 Wis. 2d 640 (1973), a property owner challenged the constitutionality of zoning ordinance that zoned his property agricultural. In the context of ruling on the doctrine of exhaustion of remedies, the Supreme Court again held that zoning review boards do not have the authority to provide a remedy to a constitutional challenge:

Such administrative agencies are clothed with no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which it derives its existence. Therefore, the plaintiff's remedy in seeking review by such an administrative agency under ordinary circumstances would afford the plaintiff no relief because it is the plaintiffs' contention that the zoning ordinance relied upon by the defendant is unconstitutional as applied to his property.

*Id.* at 646.

In another case, the Wisconsin Court of Appeals confirmed that a ZBA cannot rule that a zoning ordinance is invalid. This was an appeal to the ZBA of a decision by the building inspector to issue a permit and ignore a zoning ordinance that he believed was vague, arbitrary and invalid. *Ledger v. Waupaca Bd. of Appeals*, 146 Wis. 2d 256 (Ct. App. 1988). The Zoning Board of Appeals upheld the permit, effectively declaring the ordinance invalid. The Wisconsin Court of Appeals held that "our consideration of the case is limited to a single issue: whether the board had the legal authority to rule that a portion of a duly enacted city rezoning ordinance was invalid and unenforceable. As we have said, we believe the board lacks that power." *Id.* at 263.

Therefore, the Zoning Board of Appeals is not the appropriate forum to appeal the constitutionality of a section of the zoning code. Because Mr. Vang's appeal is solely a challenge to the constitutionality of MGO 28.091(1), the Board should dismiss the appeal.