

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

January 8, 1999

OPINION NO. 99-001

TO: Larry Nelson, Executive Secretary, Board of Public Works

FROM: Eunice Gibson, City Attorney

SUBJECT: **VARIANCE FEE PURSUANT TO SECTION 37.11(1)(b), MADISON  
GENERAL ORDINANCES**

The Board of Public Works has requested an opinion on how to calculate a variance fee for payment in lieu of construction of on-site stormwater detention basins for the property known as Lot 1, Sauk Junction Plat.

**BACKGROUND**

All newly developed lots (previously undeveloped), in the City of Madison must collect and detain their stormwater runoff in accordance with Chapter 37, Erosion and Stormwater Runoff Control of the Madison General Ordinances (MGO). Section 37.11 allows for an appeal process whereby a property owner may petition the Board of Public Works for a variance to utilize City owned lands or City-contributed detention capacity in lieu of constructing its own detention basins. If a variance is granted, the property owner must pay the City a variance fee, to be calculated pursuant to Section 37.11(1)(b), MGO.

In 1997, when the property at issue was going through the platting process, the issue of on-site detention was discussed with the staff of City Engineering. The owner desired to seek a detention variance and pay a fee in lieu of constructing on-site detention basins. City Engineering was generally supportive as the neighborhood plan showed a large regional detention basin just upstream of this plat. The variance fee was calculated in July of 1997 based on a fair market value of the land of \$1.73 per square foot; however, a variance request was not then taken to the Board of Public Works because City Engineering determined that the existing storm sewer system was unequipped to handle runoff from developed property.

Between July of 1997 and the present date, the property has been improved through the installation of streets, curbs and gutters, and utilities. The current calculation of the fair market value of the property for variance fee purposes is \$8.50 per square foot, as determined by the City's Real Estate staff. The difference between the 1997 variance fee and the current variance fee is approximately \$190,000. If the Board of Public Works decides to grant a variance for this property, the question is how to properly calculate the variance fee.

## DISCUSSION

Section 37.11, MGO, authorizes the Board of Public Works: (a) to hear and decide appeals where it is alleged that there is any error made in administering the ordinance by the City's Administrative Authority; and (b) to grant upon appeal variances from the terms of the ordinance where a literal enforcement of the ordinance would result in a hardship and the public safety and welfare would be served. If it is in the City's best interest to participate with property owners in a runoff control plan and contribute available storm water detention capacity or construct stormwater detention basins on City lands, Section 37.11(1)(b) provides that:

...the participant shall reimburse the City an amount equal to the value of the City lands used but not less than the fair market value of *unimproved lands* (emphasis added) plus the estimated construction cost of the detention capacity that would have been required of the other participant(s) to serve their lands in order to comply with this ordinance.

In the current circumstance, no City lands are to be used and the estimated construction cost is not at issue; the only issue is how to calculate the fair market value of the unimproved lands.

Chapter 37 does not define "unimproved lands". Guidance in construing ordinances, however, is found in Section 1.01, MGO, which provides, in part:

**CONSTRUCTION OF ORDINANCES.** In the construction of the ordinances of the City of Madison the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the ordinance.

- (1) General Rule. All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning.

"Unimproved land" as defined by Blacks Law Dictionary, 5th edition, means "...lands that have never been improved". Blacks defines "improved land" to mean "Real estate whose value has been increased by [the] addition of sewers, roads, utilities and the like". The Iowa Supreme Court found that platted lots were "improved" for tax assessment purposes where streets, curbs, gutters, water and gas mains, sewers and electric lines had been added to the property. Builders Co. v. Martens, 122 N.W.2d 189, 190, 225 Iowa 231 (1963). "Unimproved lands", therefore, are those which have

not been improved by the addition of sewers, streets and utilities. The fair market value of the property at issue should be calculated at its current value as raw land only, without including the value attributed to improvements such as streets, curbs and gutters, and utilities.

If you need any further assistance on this matter, please contact Assistant City Attorney Anne Zellhoefer, of my staff.

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Eunice Gibson  
City Attorney

EG:AZ:sob

cc: Board of Estimates

SUMMARY: When calculating variance fees pursuant to Sec. 37.11(1)(b), MGO, the fair market value of unimproved land should not include the value of sewers, streets, utilities and other like improvements.