

LEGAL MEMORANDUM

TO: David De Angelis & Thomas Harrigan
 Village Manager and Zoning Administrator

FROM: Hector de la Mora

DATE: April 12, 2021

RE: Discretionary Authority of the Board of Trustee under Ord. Sec. No. 335-30 with respect to maximum allowable impervious surface and building footprint.

Mandel Group Properties LLC has made a redevelopment request for the School Sister of Norte Dame property which includes approval of a certified survey map to divide the entire tract into four lots and to rezone a portion of the tract from I-1 to RM-1, RS-3, and RS-4 with a Planned Development Overlay District (“PDO”).

You have asked for an opinion regarding the following two questions:

- (1) Whether the Village Board has the discretion in applying its PDO ordinance in the event that it ultimately determines to grant approval to the PDO redevelopment request to alter the maximum impervious surface requirements applicable to any lot created within an underlying zoning district such as RS-3 or RS-4?
- (2) Whether the Village Board has the discretion to alter the maximum building footprint within lots created in an underlying RS-3 or RS-4 zoning district in the event that it ultimately determines to grant approval to the PDO redevelopment request?

Following are the provisions regulating impervious surfaces within RS-3 and RS-4 districts:

Ord.§335-19H. RS-3 Single-Family Residential District	Maximum impervious surface: 30% of lot area.
Ord.§335-20H. RS-4 Single-Family Residential District	Maximum impervious surface: 40% of lot area.

Ord.§335-30D. (1) which addresses “*stormwater management requirements*” provides:

PDO Districts shall comply at all times with MMSD District Rules and Regulations Chapter 13 relating to stormwater management requirements within the underlying zoning district.

The expectation of strict compliance with the underlying zoning requirement is reinforced by the wording of the immediately following provision contained in Ord.§335-30D. (2) which provides:

PDO Districts may, however, deviate from the requirements of the underlying zoning district with respect to maximum building height, yard areas, lot dimensions, setbacks and parking requirements.

Under a commonly applied rule of ordinance interpretation, namely **Expressio unius est exclusio alterius** ("*the express mention of one thing excludes all others*"), when an ordinance (a legislative enactment) includes a list of specific items, that list is presumed to be exclusive; the ordinance applies only to the listed items and not to others.

The Wisconsin Supreme Court in *Columbia County v. Bylewski*, 94 Wis. 2d 153, 169, 288N.W.2d 129 (1980) described the rule for construction of a municipal ordinance in this manner “...(*the expression of one thing is the exclusion of another*) which provides that “. . . *the express mention of one matter excludes other similar matters not mentioned....*”

Thus applying the rule of construction, ***expressio unius est exclusio alterius***, it is clear that the absence of any reference to a deviation from an impervious surface requirement while other types of dimensional attributes are specifically mentioned leads me to conclude that the Village Board under Ord.§335-30D. (2) lacks the discretion to deviate from the respective maximum impervious surface requirement contained in Ord.§335-19H. **RS-3** and Ord.§335-20H. **RS-4**.

With respect to the second question posed, following are the provisions regulating building footprints within RS-3 and RS-4 districts:

Ord.§335-19G. RS-3 Single-Family Residential District	Maximum building footprint area: 20% of lot area.
Ord.§335-20G. RS-4 Single-Family Residential District	Maximum building footprint area: 25% of lot area.

Again, Ord.§335-30D. (2) provides:

PDO Districts may, however, deviate from the requirements of the underlying zoning district with respect to maximum building height, yard areas, lot dimensions, setbacks and parking requirements.

Thus, Ord.§335-30D. (2) grants express authority for the Village Board to exercise discretion with respect to (a) yard areas and (b) setbacks, both dimensional requirements which when applied, directly influence a maximum building footprint located in a RS-3 or RS-4 underlying zoning district.

Please do not hesitate to contact me should you wish to discuss this matter further.