

## Mollenhoff critique of June 11 draft of the Landmarks Ordinance

June 16, 2014

### A. General observations

1. Generally, I thought this draft was much improved, but it still needs refinement. I will make my suggestions in general and specific categories.

2. I am concerned that this process is still moving too quickly to allow us citizens to give this complex and technical ordinance the attention it requires. For example, an attorney for the National Trust for Historic Preservation will be giving me his critique of the ordinance draft this week, but not until after your meeting on June 16<sup>th</sup>. Also, we have not yet held our organizational meeting with representatives of Madison's political districts that have historic districts. True, the additional recommendations and refinements this process will generate can be given to the Ad Hoc Committee, but, ideally, all such suggestions should be given to you, the Landmarks Commission, first. After all, you are the experts who are in the best position to evaluate their merits.

3. We should reserve a section of the ordinance for all of the non-regulatory commission functions. It could be titled something like: *Recognition of Historical Resources, Public Education, and Comprehensive Planning*. These functions could include:

- Recognition for landmarks (plaques, their administration and funding). This section is now limited to Section 7(g).

- Recognition for historic districts including street sign markers and perimeter signage and their administration and funding. The draft is silent of this topic.

- Obligation to encourage public education and heritage tourism. These functions are mentioned in Section 1(f) and (g), but without any further detail.

- Need for creating and updating a city-wide preservation plan. The ordinance is silent on this important function. Moreover, the contents of Chapter 8 of Madison's Comprehensive Plan, "Historic and Cultural Resources," are dated and embarrassingly brief, just 9 pages. What a contrast to the 68 page plan done by St. Paul, Minnesota!

- Encouragement of economic incentives. This function is *mentioned* in (4)(g), but only in the list of powers and duties. It deserves a sub-section explication.

4. Somewhere in the MGO, Plan Division staff should be *required* to evaluate all new project proposals for compliance with the Landmarks Ordinance. This was clearly not done for the SBA project even though the term "gross volume" appeared in the ordinance. Instead, staff allowed a project a project that was 17 times larger than what the Landmarks Ordinance would allow to be sent to the Commission. Such errors should not be allowed to occur in the future.

### B. Section by Section comments

#### Section 2 Definitions

The June 11<sup>th</sup> draft adds two key terms for definition: standards and guidelines. The definitions say that "standards" are mandatory and "guidelines" are desirable but not mandatory. The phrase "Standards and Guidelines" appears in two places in the main part of the ordinance that the Ad Hoc Committee will cover in Phase 1: Section 9(b), Creation and Amendment of Historic Districts, and Section 15, Appeals. I will comment more specifically on the impact these terms could have in those two sections.

The following definitions should be added to this section:

As noted in Section 4 (a), the four treatment options that are included in the Secretary's Standards for the Treatment of Historic Properties are:

*Preservation*  
*Rehabilitation*  
*Restoration*  
*Reconstruction*

*Additional Preservation Restrictions* See Section 11 (a).

*Demolition by neglect* See comments in Section 10

*Economic hardship* See comments in Section 17

*Gross volume*

This should be defined as a standard volumetric formula meaning (for a rectangular building) width X depth X height. It may also be necessary to establish protocols for calculating this metric.

*Historic preservation plans*

The specific plans needed for a high quality preservation program should be mentioned here. They include, at minimum, a comprehensive city-wide historic preservation plan.

*Historic resources*

This is a useful abstraction for landmarks, mounds, objects, and the various categories of things we often want to summarize with a single concept.

### **Section 3. Landmark Commission Composition and Terms**

According to the June 11<sup>th</sup> draft, the only required members of the Commission are: (1) an architect; and (2) a realtor. Given the central role of history to the Commission, I think a historian should also be required.

### **Section 4. Powers and Duties**

**(4)(a)** I was not clear on what document was being referenced in the section calling for the Secretary of the Interior's Standards. The draft cites "The Secretary of the Interior's Standards for Rehabilitation." However, this may be a shorthand for another commonly cited title, namely: "The Secretary of the Interiors Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring and Reconstructing Historic Buildings." What document is intended? Why only reference "rehabilitation" when this is just one of four "treatments" that everyone in the historic business uses?

If any of the Secretary's standards are used, we should take all reasonable steps to make such documents easily accessible to potential users.

**(4)(l)?** In addition to the powers and duties included in the latest draft, the commission should be encouraged to be more *proactive* in the following way: "Initiates changes to city ordinances, plans, programs, and policies that will improve the effectiveness of the city's historic preservation program."

**(4)(l)?** Section 10(d) authorizes the “Director of the Building Inspection Division...to enforce the provisions of this ordinance.” The building inspector is clearly an important player in maintaining historic resources and in preventing demolition by neglect. Therefore, this function deserves to be added to the Powers and Duties section. Here is some language that could accomplish this need: “Works with the Director of the Building Inspection Division to cause historic resources to be adequately maintained and to prevent demolition by neglect.”

## **Section 7. Designation of Landmarks**

### **(c) Standards**

Standards 1-4 denote the *historic* (post-European) period. Therefore, a fifth standard should be added to cover locations or objects of archeological (pre-historic) significance.

## **Section 9. Creation and Amendment of Historic Districts**

**(a)** The language of this sub-section should be expanded to include areas that have archeological significance.

### **(b) Standards and Guidelines**

New language in this section calls for the development of standards and guidelines for each of the historic districts. The definitions of these terms make it clear that “standards” are mandatory and guidelines are desirable but not mandatory. It is important to note that in *none* of the subsections of the current ordinance (21-25) does the word “guideline” appear. Rather, “standards” are used throughout.

This raises an important question: Will the language of Sections 21-25 be revised to include “guidelines?” If so, this would constitute a significant softening of the language for Madison’s five historic districts. What, exactly, is the intent of the Landmarks Commission on this important point? Where, exactly, will the softer “guidelines” appear in sections 21 to 25? Will satisfying four out of five guidelines be sufficient to approve a project—as Katherine Cornwell and Bill White argued during the SBA debate?

My worry is that the “guidelines” will function as a Trojan horse in this ordinance rewrite, that is, they will be defined and made an official part of the ordinance lexicon during Phase 1, and then be used during Phase 2 to create loopholes that would allow an SBA-type building to be constructed.

**(b)(1)** I commend the authors of the June 11 draft for explicitly requiring that height and gross volume be listed as “architectural elements” that “shall be visually compatible with the structures and environment with which they are visually related.” This will help eliminate the confusion that marred the Edgewater and SBA debates. (See also “gross volume” in Section 2.)

**(b)(2) and (b)(3)** Open space is one of the most important distinguishing qualities of a historic district; therefore, all reasonable steps should be taken to prevent this priceless ingredient from being incrementally destroyed. However, the June 11<sup>th</sup> draft fails to protect open spaces. Indeed, only in two places does it address this issue: (1) Section 4(f) by allowing the Commission to advise the Plan Commission on proposed land divisions and subdivisions; and (2) by weak, almost inferential language in Sections 21-25. I concluded that these two sections should be clarified and strengthened and that the best solution would be to reword them. Here is some language to suggest the *direction* I think we should go:

“Because open space is one of the most important distinguishing qualities of a historic district, the amount, shape, and patterns of distribution of open space in a project’s VRA shall be optimally

maintained. This Commission may require a larger front yards, side yards, and back yards than allowed by applicable zoning categories.”

## **Section 10. Maintenance of Landmarks, Landmark Sites and Historic Districts. Compliance with Regulations and Penalties for Violations**

### **Section title:**

A better title for subsection 10 might be “Obligation to Maintain Historical Resources.” The advantage of this heading is that it more clearly and easily conveys to most readers that property owners have an affirmative obligation to maintain their property.

I am not persuaded that this section should include “Compliance with Regulations and Penalties for Violations.” Most model ordinances relegate penalties to a separate section entitled “Enforcement.” The advantage of this organization is that all penalties for all infractions can be bundled into a single location. This makes the ordinance more transparent and coherent.

### **Needed: a sub-section dealing with demolition by neglect**

Demolition by neglect is one of the most serious problems of historic preservation and yet this draft does not treat this problem fully and thoughtfully. One of the few places where I could find it treated, albeit in an oblique way, was in Section 10 (d), which empowers the Director of Building Inspection Division to work with other Plan Department staff “to enforce provisions of this ordinance.” This is a far cry from a full-fledged ordinance section. Most model ordinances I have seen provide criteria for the determination of demolition by neglect and a detailed process for resolving the problem. This ordinance should not be forwarded to the Ad Hoc Committee *unless* it has a full-fledged section on demolition by neglect.

## **Section 11. Certificate of Appropriateness**

### **(a) Certificate of Appropriateness Required**

I do not understand the reason for not combining numbers 1 and 2, 3 and 4, and 5 and 6. For example, why couldn’t we simply say: “Exterior alteration of a designated landmark or structure within a historic district.”

**(a)(8)** The term, “Additional Preservation Restriction,” appears in this section and nowhere else. What exactly does it mean? If this term is to be used, then it should be defined in Section 2 and then referenced elsewhere in the ordinance.

**(e)** All of you commissioners will recall the terrible problem we had getting SBA to provide adequate documentation. As I read the documentation requirements for this section, I concluded that they would not be adequate to compel an SBA type developer with the information you and staff need to make an informed decision. Suggestion: Take a look at what you are requiring and ask yourselves whether the words will get you the information you need. This is the time to be explicit and prescriptive.

**(h)** This section should be relocated to the Enforcement Section.

## **Section 13. Standards for demolition or removal.**

The very first sentence after this section title includes a third instance where standards must be applied: removal. Therefore, the section title should read: “Standards for demolition, alteration, and removal”

(f) In this sub-section the term “recompense fee” is used. I think, for the first time. I am not persuaded that this concept is a good one for Madison, but if it is to be a part of the ordinance, then the term should be defined in Section 2 and explicated elsewhere.

## **Section 15. Appeal**

This is undoubtedly the weakest section of the new draft. To allow it to be sent to the Ad Hoc Committee in this form would be unwise.

### **A. The June 11 draft fails to provide clear, tough, and comprehensive review standards that the Common Council can use to approve, modify, or reject the LC recommendation.**

The two *special conditions* used in the current ordinance should be restored in the next draft of this ordinance. They are: the preclusion of any and all other uses for the property and the self-created hardship exclusion. Commissioners will recall that it was these special conditions that caused a majority of alders to reject the SBA project. Now imagine the same project going through the same council *without* these special conditions. Who can doubt that the project would have passed? To remove these special conditions in the appeal language is to make a Council override much easier and therefore irresponsible. Therefore, these special conditions *must* be restored to the ordinance. Otherwise, alders will make their decision based on criteria that are not specifically authorized in the ordinance. They include: whatever is prettier, newer, taller, denser, more expensive, and produces more real estate tax income. Historic preservation would be the big loser.

### **B. The balancing test is ill-conceived and poorly defined.**

It is ill-conceived in that it asks alders to balance the *public interest* “in preserving the subject property” with the *public interest* “of approving or denying a COA.” Today’s ordinance asks alders to balance the “public interest of preserving the subject property” against “the interest of the owner in using it for his or her own purposes”—in other words public versus private interests. It is poorly defined in that it does not provide any standards for the Council to use in balancing public and private interests. Therefore, we must provide standards for this section. This is a case where the best experience from model ordinances should be analyzed and applied to Madison.

### **C. Clarify what standards and guidelines are intended.**

You will recall that the *existing* ordinance requires alders to reverse or modify the Commission ruling “based on standards contained in this ordinance,” but it does not specify *which standards*. Consequently, proponents for the Edgewater and SBA projects used *all* of the following sections of the current ordinance as standards:

Section 1, purpose(s)

Section 9(c), factors and guidelines for the LC to consider when developing the review criteria in historic districts.

Section 21 (c) Criteria for Review in the Mansion Hill Historic District.

The June 11 draft adds clear definitions for “standards” and “guidelines,” but it still does not specify which standards and guidelines should be used. Therefore, a cross-referencing and limiting phrase should be added to the language of 15(d) (1) as follows: “Consider the Standards *in Sections 12 and 13...*” This would eliminate the use of language in the Section 1, Purpose and Intent, and specifically subsection (1)(f) of the existing ordinance (“Strengthen the economy of the city”), as a justification to override the Landmarks Commission.

Similar limiting language will have to be added later after the Commission decides how and whether to use “guidelines.”

### **Section 17 Waivers**

I’m not persuaded that the “waivers” approach is the best way to go for Madison. Most other ordinances in the country refer to this as “economic hardship.” Model ordinances often refer to this as “Consideration of Economic Hardship.” Most model ordinances that deal with economic hardship are much more detailed because this process and its standards are complicated and need to be clear. The six conditions listed under (17)(b) may not be right for Madison. I would suggest looking at the best model ordinances we can find and then taking the best language from them for Madison.