Common Council Organizational Committee
Meeting of February 7, 2017
Agenda #10, Legistar #44769: Robert's Rules, Reconsideration and Real Estate Development

Summary

Alders have the right under City ordinances to make a motion for reconsideration (assuming the Alder voted in the majority or was not present due to an excused absence). In apparent response to the reconsideration request on 418 Division, Alder Zellers requested a discussion on reconsideration and when Council decisions are deemed irrevocable. (Legistar 39978)

A motion to reconsider could be treated the same as a motion to rescind – allowed at any time prior to when the ordinance takes effect.

> "A motion to rescind will not be considered after publication of the legislation sought to be rescinded." MGO 2.26.

If such an ordinance change were to be adopted, logistic issues may need to be addressed. In the case of rezoning requests, the ordinances should likely be modified to state that Council approval is not final until the subsequent Council meeting. Such language may be needed to prevent a developer from arguing that s/he has taken some action based on the Council vote that cannot be undone.

City Attorney May's Memorandum states that neither his office nor Planning staff support such a delay. Apparently Planning staff does not want to further extend a long approval process. Planning staff's desires should not override the rights that are granted to Council members. Further, the process is already a long one, and an additional two weeks is relatively insignificant. For example, 418 Division started, at the latest, on February 18, 2016 when the purchase agreement was signed.

City Attorney May's Memorandum also expresses a reluctance to address what may be a one-off incident. Yet MGO 2.21(2) was added to address what may be a one-off incident: specifying that a Council vote to override a mayoral veto is subject to a motion for reconsideration.

There are exceptions to the right to make a motion for reconsideration. One of those exceptions is when "any vote which has caused something to be done that it is impossible to undo." In the case of 418 Division, Mr. Krupp claimed to have taken action. Yet the nature of that action remains unclear, as does whether the action(s) could be undone. The Council may wish to consider the extent to which proof of a developer's claims is required.

City Attorney May's Memorandum states that Planning staff believe the long approval process provides "much time and opportunity for input from city residents." Whether there is a lot of time and opportunity is a matter of opinion. But a fact is that Wis. Stat. §62.23(7)(d) provides nearby owners the right to file a protest petition. In the case of 418 Division, neighbors had 2 ½ days to exercise that right, from the Monday Plan Commission meeting until Thursday noon. This, in my opinion, offends traditional notions of fair play and substantial justice. At a minimum, protest petitions should not be due until noon of the Monday preceding the Council meeting.

Since the question arose in the context of a specific project, a review of the timeline related to the project may be useful.

Timing of 418 Division Rezoning

Commercial Offer to Purchase signed: 2/15/2016

- accepted 2/18/16, as amended

418 Division's neighborhood interactions

- 5/10/16 Preservation and Development Committee meeting (introductory presentation)
- 6/29/16: neighborhood meeting
- 7/21/2016: MNA Board meeting (did not support rezoning)
- 8/4/2016: neighborhood meeting
  - An attendee asked Mr. Krupp at the end of this meeting whether Mr. Krupp would be making any changes based on what he heard that evening. Mr. Krupp said "no."

Plan Commission: 8/8/2016

- "The Plan Commission stated that the zoning change to the TSS District was not compatible with the existing uses of the neighborhood and that due to the narrowness of Division and Helena Streets, the transition from one side to the other is insufficient as proposed. In giving due consideration of the recommendations in the City of Madison Comprehensive Plan, the Plan Commission also found that the density was incompatible with the Comprehensive Plan. In regards to the Zoning Map Amendment Standards, they found that it did not conform with the adopted plans (Map Amendment Standard per Sec. 28.182(7)) including the Comprehensive Plan." (Action Details as reflected on Legistar for the 8/8 Plan Commission meeting.)

Planning Department email stating that reconsideration had been requested: 8/11/2016

- "The Planning Division has been informed that a member of the Plan Commission (who is eligible) wishes to move reconsideration of the decision regarding the 418 Division Street proposal made at the August 8 meeting. At the August 29 meeting, if the motion to reconsider is successful, the Plan Commission could then open new public hearings on the questions that same night."
- Planning did not know which member requested reconsideration. "We were informed by the Chair of the Plan Commission that someone contacted him who is eligible to move reconsideration." (email of Chris Wells to me on 8/15)

Developer signed the State Brownfields Grant Agreement: 8/22/2016

- Mr. Krupp used this grant agreement as one of the actions he took in reliance on the Council's rezoning approval.
  - "The only remaining contingency that needed to be satisfied was the rezoning approval. I now have a binding contract to purchase with a closing scheduled in the first week of October. Furthermore, I have signed a contract with WEDC to receive a grant that will assist in the remediation of the site." (email from Mr. Krupp to City Attorney May, dated 9/20/2016)
- Mr. Krupp signed the agreement even prior to Plan Commission approval.
- City Attorney May reported, in an email dated 9/20/2016: "WEDC waited to sign the agreement until after Council action on September 6."

Reconsideration of Plan Commission: 8/29/2016

- Planning staff labeled Mr. Krupp's changes as "a number of minor changes to the version last before the Plan Commission." These changes were improved accommodations for

bicycles, a bike storage room near the rear entry door, larger balconies and a larger rooftop terrace, and elimination of the semi-private plaza. https://madison.legistar.com/View.ashx?M=F&ID=4641162&GUID=B9D2B713-C47E-40BD-BD38-DD32FD63D7EA

- None of the changes addressed the reasons given at the 8/8 meeting for non-approval of the rezoning.

Protest Petition Filed: 9/1/2016

- MGO 28.182(5)(c)4., requires petition to be filed by "noon on the Thursday before final Common Council consideration."
- Neighbors had 2 ½ days to obtain signatures.
- Petition denied.

Common Council: 9/6/2016

- Approved 11-7.

Developer removed Conditions: 9/7/2016

- Mr. Krupp claimed that contingencies were removed, and provided a copy of a notice dated 9/7 in which "Buyer waives and satisfies all contingencies set forth in the Purchase Agreement."
- This notice dated 9/7 states that the offer made was a "Commercial Offer to Purchase." A Commercial Offer to Purchase is a State form, WB-15, and is designed to be used by brokers. The form contains few contingencies. A WI State Bar article states:

  > "The form's express contingencies are much more limited than what is normally found in a typical commercial real estate contract and, consequently, purchasers should consider adding additional contingencies. Additional contingencies could include items such as a zoning review …" http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=81&Issue=8&ArticleID=1645

- It is unclear what contingencies existed.
  - In a 9/20 email to City Attorney May, Mr. Krupp claimed that the "only remaining contingency that needed to be satisfied was the rezoning approval." Then he also states that he "signed a contract with WEDC to receive a grant that will assist in the remediation of the site."
  - At the neighborhood meeting, I asked Mr. Krupp whether his purchase was contingent upon City approvals. He said no, that his only contingency was the state remediation money.
  - After the Council meeting on reconsideration, I spoke with Mr. Krupp and, after discussion of what he did, or did not, say at the neighborhood meeting, he responded that it did not really matter - that any action taken was enough, and that he had notified WEDC after the Council meeting.
- Should a person have a right to rely upon an ordinance change that is not yet enacted?

Approval letter: 9/9/2016

Reconsideration request made: 9/15/2016

Protest petitions filed: 9/15/2016

- Petitions filed in case the matter would be noticed on the Council's 9/20 agenda (and thus subject to vote on 9/20 should the reconsideration motion pass)
- Signatures were more than the minimum required.

Ordinance Enactment date: 9/16/2016

Common Council Reconsideration: 9/20/2016

- "The rules are very clear that when an action's been taken, one way or another, and a party directly affected by it has relied upon that, then the item cannot be reconsidered." Mayor Soglin, minute 53:48 of Madison City Channel video.
- "I am going to rule that the motion is out of order. That we've got evidence that a party has acted and relied upon on the Council's action in adopting its position two weeks ago. I've reviewed this with the City Attorney. He concurs." Mayor Soglin, minute 55:45.
- Motion to override the ruling of the Chair: 9-9

<u>Alders' right to request reconsideration</u>

MGO 2.21 RECONSIDERATION OF QUESTION.

(1) It shall be in order for any member who voted in the affirmative on any question which was adopted, or for any member who voted in the negative when the number of affirmative votes was insufficient for adoption to move a reconsideration of such vote, at the same or next succeeding regular meeting of the Council. It shall be in order for any member who was, due to an excused absence, not present at the time the question was considered to move reconsideration of such vote at the next succeeding regular meeting of the Council. A motion to reconsider having been lost shall not be again in order. A motion to reconsider shall not be in order when the same result can be obtained by another motion. (Am. by Ord. 5188, 10-20-75; ORD-15-00088, 9-11-15)

(2) A vote by the Common Council on overriding a mayoral veto (whether the vote failed or succeeded) is subject to a motion for reconsideration. Any such motion must be made and acted upon no later than the next regular meeting of the Council or it is out of order. Any such motion may not be referred to any committee or to a subsequent meeting of the Council. (Cr. by ORD-15-00088, 9-11-15)

Robert's Rules Of Order provide that a motion to reconsider cannot be applied when "something has been done as the result of the vote that the assembly cannot undo." This exception was potentially application to 418 Division. As stated in a 9/20 email from City Attorney May: "If the developer took significant actions – say entry into contracts that cannot be suspended – the motion might not be in order."

- Mr. Krupp signed the State Brownfields Grant Agreement on 8/22/2016. Does a phone call notifying the State of the Council's 9/6 vote count as a significant action? Even if it does, it appears that such action could be undone – Mr. Krupp did not claim to have signed a remediation contract, or to have spent any grant money.
- Mr. Krupp asserts that the "only remaining contingency that needed to be satisfied was the rezoning approval." (Email of 9/20 to City Attorney May.) This contradicts what he said in the neighborhood meeting.

<u>Alders' Right to Request Reconsideration</u>

Treat a Motion to Reconsider the same as a Motion to Rescind by clarifying that a motion to reconsider "will not be considered after publication of the legislation sought to be rescinded."

- Since both motions allow the Council to change a decision, it would be reasonable to address both motions in the same manner.
- MGO 2.26 Motion to Rescind:
  - A motion to rescind an action of the Common Council will be considered only if notice of intent to make said motion had been given at the preceding regular Council meeting. The notice of said motion shall be in writing and shall be accompanied by a copy of the appropriate legislation effectuating such rescission. A motion to rescind without such notice

will be considered only in an emergency situation as determined by the presiding officer and will only be adopted by a two-thirds (2/3) vote. A motion to rescind will not be considered after publication of the legislation sought to be rescinded.

- The Council may wish to seek advice on when Alders may effectively make such motions. A number of rezonings in 2016 reflect an enactment date 10-11 days after the Council meeting approving the rezoning. (Other ordinances adopted in 2016 reflect an enactment date generally ranging from 9-12 days after the Council meeting.) Thus, a motion to rescind could be viewed as essentially precluded:
  - An Alder must give notice of intent to make a motion to rescind at the preceding regular Council meeting.
  - Even if an Alder gave notice of intent at the same meeting in which the rezoning was approved, by the time the Alder made the motion at the regular meeting (at least two weeks later), the ordinance would be in effect and the motion to rescind would not be considered.
- City Attorney May's memorandum expressed concern about creating a process for what may be a one-off incident. Yet MGO 2.21 was amended to specifically allow a vote on overriding a Mayoral veto to be reconsidered (Legistar 38997). One could expect that a motion for reconsideration of a rezoning request would arise at least as often as reconsideration of a mayoral veto.

Even if the ordinances were changed to permit an Alder to make a motion to reconsider up to the time of publication, publication would have occurred prior to the Council meeting. Additional changes may be needed to ensure preservation of an Alder's right to request reconsideration.

- Currently:
  "Pursuant to Sec. 36 of Robert's Rules of Order, the "effect of making a motion to reconsider is the suspension of all action that depends on the result of the vote proposed to be reconsidered …." Thus, a motion to reconsider means that the matter previously passed is not effective until the motion to reconsider is taken up by the Council."
  City Attorney's Office Memorandum, Point of Order - Motion for Reconsideration, July 13, 2004.
- Allow an Alder to give written notice of intent of a Motion to Reconsider at any time prior to the publication of the ordinance.
- Once written notice is given, any actions taken after that point in time would not create an exception to the Alder's right to reconsideration. For example, if a developer removed contingencies after written notice was given, assuming the developer was notified of the written notice, such removal would not come within "something to be done that it is impossible to undo."
- The written notice would halt publication of the ordinance. (State law provides that ordinances must be published within 15 days.)

Other logistics may need to be addressed:

- Delay Planning's approval letter until the ordinance is enacted.
- Make clear to developers that Council approval is not final until the time for reconsideration has elapsed. Attorney May states that this his office does not support this change, but provides no explanation. The City Planning department apparently believes residents have had enough time for input and such a move would cause undue delay. Yet Mr. Krupp was able to have the Plan Commission reconsider rezoning 2 weeks after the Commission's original denial.

<u>Action that could be taken to protect residents' due process rights</u>

Whether or not the Council chooses to modify the ordinance on motion for reconsideration, I hope residents' rights to file a protest petition will be reviewed. The 418 Division reconsideration may have been entirely avoidable had residents been provided their due process rights.

MGO 28.182(5)(c) provides that residents near a property requesting rezoning may file a protest petition. State law grants this right:

62.23(7)(d)

> 2m. a. In case of a protest against an amendment proposed under subd. 2., duly signed and acknowledged by the owners of 20 percent or more either of the areas of the land included in such proposed amendment, or by the owners of 20 percent or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20 percent or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of three–fourths of the members of the council voting on the proposed change.

With 418 Division, residents had merely 2 ½ days to file a petition: MGO 28.182(5)(c)4.c. requires protest petitions to be "delivered to the City Clerk by noon on the Thursday before final Common Council consideration." : MGO 28.182(5)(c)4.b. requires signatures to be notarized.

A mere 2 ½ days to file a petition that is a state granted right seems hardly adequate. In 2016, 11 out of 21 Council meetings occurred the week following the Plan Commission meeting. In any rezoning approval was granted at any of these 11 Plan Commission meetings, residents only had 2 ½ days to file a protest petition.

And the 2 ½ days seems even more unfair when appeal to the Council from a conditional use approval gives nearby residents 10 days to file an appeal. MGO 28.183 (5)(b).

At a minimum, changing the ordinance to require protest petitions to be filed the Monday before the Council meeting would increase fairness. And it would not create a lot of last minute work for Planning: few protest petitions are filed; and, there are not generally a large number of properties to verify. Further, since residents are instructed to contact the Zoning Administrator regarding protest petitions, https://www.cityofmadison.com/development-services-center/resources/development-center-terminology, Planning will generally know in advance when a rezoning may be challenged and would have plenty of time to determine the area from which valid signatures could be obtained.

Respectfully Submitted,
Linda Lehnertz