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

Date: March 19, 2024

MEMORANDUM

TO: Common Council

FROM: Kate Smith, Office of the City Attorney

RE: 1908 Arlington Place Certificate of Appropriateness Appeal

Before Council is an appeal of a Certificate of Appropriateness ("CoA") granted by the Landmarks Commission for a land division at 1908 Arlington Place. 1908 Arlington Place, while not a landmark site itself, is in the University Heights Historic District and subject to MGO Sec. 41.18(4):

> (4) **Land Divisions and Combinations** . The commission shall approve a certificate of appropriateness for land divisions, combinations, and subdivision plats of landmark sites and properties in historic districts, unless it finds that the proposed lot sizes adversely impact the historic character or significance of a landmark, are *incompatible with adjacent lot sizes*, or *fail to maintain the general lot size pattern of the historic district.* (emphasis added)

At its meeting, Landmarks Commission heard public comment and reviewed materials prepared by the applicant and by staff and concluded that the proposed land division was compatible with adjacent lot sizes and that it maintained the general lot size pattern of the historic district. Landmarks Commissioned approved the CoA. The CoA was appealed to Common Council as allowed under MGO Sec. 41.20. The Council is tasked with:

> (4) After a public hearing, the Common Council may, by favorable vote of a majority of its members, reverse or modify the decision of the Landmarks Commission with or without conditions, or refer the matter back to the Commission with or without instructions, *if it finds that the Commission's decision is contrary to the applicable standards* under Secs. 41.18, 41.19, or any district-specific standards contained in Subchapter G. (emphasis added)

If the Council chooses to deny (or modify) the CoA, it will need to **state findings and cite evidence** to how the Landmarks Commission's decision was contrary to the standards in MGO Sec. 41.18(4). Specifically, why the proposed land division is incompatible with adjacent lot sizes or fails to maintain the general lot size pattern of the historic district. **The reasoning on the record should be clear for a potential court review on appeal.**

The appellants circulated a *Memorandum of Facts and Law*[1] ("the memo") to all alders via email on March 14, 2024, and another email ("the email") to alders on March 18, 2024, in response to the Planning Division Staff Report[2]. The memo and the email make arguments about the history and development pattern of the University Heights Historic District[3] and the ordinance language in MGO Chapter 41. The principal legal argument by the appellants in both the memo and the email is that the Landmarks Commission, guided by City staff, used an incorrect definition of 'adjacent' in its deliberations and conclusion.

ADJACENT . . . . WHAT DO THOSE EIGHT LETTERS MEAN?

When Abraham Lincoln wrote "law is nothing else but the best reason of wise men applied for ages to the transactions and business of mankind," he, perhaps, envisioned a nobler business for mankind to grapple with than "what is the definition of adjacent?" But grapple we must.

I. Is there binding legal precedent for a definition of 'adjacent'?

No. Appellants are asking the Common Council to use interpretations in three cases, none of which are binding legal precedent. Appellants cite the U.S. Supreme Court case *Sackett v. Environmental Protection Agency*[4], the Wisconsin Supreme Court case *Superior Steel Prod. Corp. v. Zbytoniewski*[5] and the unpublished Wisconsin Court of Appeals case *Manning v. Vinton Construction.*[6]

First, United States Supreme Court decisions generally do not control interpretation of Wisconsin municipal law unless the court case involves that law. The United States Supreme Court has jurisdiction over all federal issues and state issues in discrete categories - if there is a conflict between states or if the state statute implicates federal constitutional issues. Madison's Historical Preservation Ordinance has not been interpreted by the United States Supreme Court.

Not all Wisconsin appellate court cases create statewide precedent at the local level – it depends on the ruling of the case. For example, when the Wisconsin Court of Appeals found that Madison's ordinance on inclusionary zoning was prohibited because it violated state statute, that ruling applied statewide.[7] The ruling meant that any municipality who had a similar ordinance could not enforce it because the highest over-seeing court made a finding that this type of local regulation violated state statute. That matters because local municipalities are creatures of the state, meaning they only have the authority specifically granted by state statute. So, if there is a ruling that a category of municipal regulation conflicts or violates state-given authority, it applies to all municipalities.

---

[1] *Memorandum of Facts and Law in Support of the Appeal of the Decision of the City of Madison Landmarks Commission Approving on February 12, 2024, a Certificate of Appropriateness to 1908 Arlington Place LLC for a Land Division at 1908 Arlington Place in the University Heights Historic District* submitted by Lester A. Pines, Jean Halferty and Monica Messina. March 14, 2024 email.
[2] *Planning Division Staff Report* prepared by Heather Bailey, Preservation Planner, available as an attachment to the Legistar File 82175.
[3] Research and analysis of development patterns in the University Heights Historic District are the purview of the City's Preservation Planner, Dr. Heather Bailey Ph.D., not the Office of the City Attorney.
[4] *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 715, 143 S. Ct. 1322, 1362, 215 L. Ed. 2d 579 (2023).
[5] *Superior Steel Prod. Corp. v. Zbytoniewski*. 270 Wis. 245, 247, 70 N.W.2d 671, 673 (1955).
[6] In the email, appellants cite "*Manning v Minton Construction Co.*" Based on the citation provided, I believe 'Minton' is instead 'Vinton.' *Manning v. Vinton Const. Co.,* 2014 WI App 110, 357 Wis. 2d 721, 855 N.W.2d 903.
[7] *Apartment Ass'n of S. Cent. Wisconsin, Inc. v. City of Madison,* 2006 WI App 192, 296 Wis. 2d 173, 722 N.W.2d 614. Case decided by the Wisconsin Court of Appeals and denied review by the Wisconsin Supreme Court, so the Court of Appeals ruling was the final decision.

It is simply not the case that there exists a statewide definition of 'adjacent' nor is there the type of case law on the issue that creates statewide precedent. In *Superior Steel Prod. Corp. v. Zbytoniewski,*[8] the 1955 Wisconsin Supreme Court tackled statutory interpretation as it related to an insurance claim arising from damages to a parked car on the side of the highway. The insurance provider alleged that the car owner was negligent because they parked their car illegally. In order to determine that, the Court engaged in statutory interpretation of the midcentury Department of Transportation laws. This ruling does not create binding precedent to municipal land division and historic preservation ordinances.

Appellants argue in the email that the interpretation in *Superior Steel* was upheld in *Manning v. Vinton Construction.*[9] This is a misleading argument. While the *Manning* Court relied on the *Superior Steel* definition of 'adjacent' in its contract language analysis, the case is unpublished. Legally, unpublished opinions are of no precedential value. Even if the case were published, the court examined 'adjacent' in the context of interpreting a private parties' contract clause.[10] The legal parameters and precedents in contract law do not apply in this matter involving municipal land division regulations.

II. Municipalities are able to interpret their own unique ordinances.

It is true that there is no enumerated definition of 'adjacent' in MGO Chapter 41 (Historic Preservation) nor in MGO Chapter 28 (Zoning Code). The Landmarks Commission interpreted 'adjacent' to mean 'adjoining' and appellants argue it means 'neighboring' (meaning not necessarily touching).

Generally speaking, when acting in a quasi-judicial capacity, municipalities are able to interpret their own ordinances. The Common Council, like the Landmarks Commission, will need to make an interpretation of the language in MGO Sec. 41.18(4). The Common Council will hear evidence and make a finding in this case. That decision is appealable through certiorari review, or the mechanism by which a court may test the validity of a decision rendered by a municipality.[11]

On certiorari review, the court's review is limited to: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.[12] There is a presumption of correctness to how a municipality interprets its own ordinances, provided the ordinance in question is unique and was drafted by the municipality in an effort to address a local concern.[13] MGO Sec. 41.18 falls into that category of ordinances. Therefore when analyzing if the municipality proceeded on a correct theory of law, there will be a presumption that the municipality should interpret its own ordinance.

a. I didn't go to law school! How do I interpret an ordinance?

Save yourself $150,000 – the basic start to any statutory interpretation question begins with the plain language of the statute. Statutory language is given its common, ordinary, and accepted meaning.[14] The context of the language is also relevant:

---

[8] *Superior Steel Prod. Corp. v. Zbytoniewski*. 270 Wis. 245, 247, 70 N.W.2d 671, 673 (1955).
[9] *Manning v. Vinton Const. Co.,* 2014 WI App 110, 357 Wis. 2d 721, 855 N.W.2d 903/

[10] *Id*. at ¶ 33.
[11] *See Acevedo v. City of Kenosha*, 2011 WI App 10, 331 Wis.2d 218, ¶ 8, 793 N.W.2d 500 (Ct.App.2010).
[12] *Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment,* 74 Wis.2d 468, 475, 247 N.W.2d 98 (1976).
[13] *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 60, 332 Wis. 2d 3, 32, 796 N.W.2d 411, 425.
[14] *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124.

.

> Context is important to meaning. . . . Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results . . . A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole. Many words have multiple dictionary definitions; the applicable definition depends upon the context in which the word is used.[15]

The appellant's memo asks the Common Council to use dictionary definitions cited by the United States Supreme Court to interpret 'adjacent' to mean 'neighboring.'[16] Since many words have multiple dictionary definitions, here is a sampling of dictionary definitions of 'adjacent':

- **Merriam-Webster**: "a**:** not distant **:** nearby/b**:** having a common endpoint or border/c**:** immediately preceding or following"[17]
- **Black's Law Dictionary (11th ed. 2019)**: "Lying near or close to, but not necessarily touching."
- **Oxford English Dictionary**: "Next to or very near something else; neighboring; bordering, contiguous; adjoining."[18]
- **Cambridge Dictionary**: "very near, next to, or touching."[19]

Following principals of statutory interpretation, when there are multiple definitions of a word, an analysis of the context and the relationship to other statutes helps avoid an inconsistent interpretation.

b. Let's take to the ordinances!

In Madison General Ordinances Chapter 41, 'adjacent' is also found in MGO Secs. 41.27(1)(a)2., 41.27(7)(a)3., 41.26(7)(a)3., 41.25(4)(e)2., and 41.02. In these ordinance sections 'adjacent' is consistent with 'adjoining.' For example, in MGO Sec. 41.25(4)(e)2. requires that "rectangular or continuous soffit vents are permitted if they are finished or painted the same color as the *adjacent* soffit."

Appellants' memo and email both argue that the appeal language in MGO 41.20 reinforces the concept that 'adjoining' means 'neighboring'. That language in MGO 41.20(1) states "The applicant, the alder of the district in which the subject property is located, or the owners of twenty percent (20%) of the number of parcels of property within two hundred (200) feet of the subject property may appeal to the Common Council the decision of the Landmarks Commission to approve or deny a certificate of appropriateness or variance request." First off, 'adjacent' is not found in MGO Sec. 41.20(1). Second, MGO Sec. 41.03(5) provides general administrative provisions for measuring two hundred feet:

---

[15] *Id* at ¶ 49.
[16] The Memo, p. 9.
[17] Merriam-Webster Definition of Adjacent https://www.merriam-webster.com/dictionary/adjacent (last viewed March 19, 2024).
[18] Oxford English Dictionary Definition of Adjacent https://www.oed.com/dictionary/adjacent_adj?tab=meaning_and_use#12665105 (last viewed March 19, 2024).
[19] Cambridge Dictionary Definition of Adjacent https://dictionary.cambridge.org/us/dictionary/english/adjacent (last viewed March 19, 2024).

> Measuring 200 Feet Around Properties. Certain provisions of this chapter reference properties that are within two hundred (200) feet of a subject property. Under this chapter, measurements around properties shall be taken from the lot lines of the subject property two hundred (200) feet in all directions. In the case of landmark properties, measurements shall take into account all historic resources within the two hundred (200) foot measurement. In the case of historic districts, measurements shall take into account all historic resources within two hundred (200) feet that are contained within the district. Any improvements located on lots that fall within this measurement shall be considered within two hundred (200) feet of the subject property.

While the language above does not include 'adjacent' it does reinforce the concept that measurements are taken from the lot lines, or the from fixed points that are adjoining the subject site. MGO 41.20(1) does not contradict the interpretation of 'adjacent' to mean 'adjoining.'

There is significant interplay between the provisions of Chapter 41 and Chapter 28, the Zoning Code. 'Adjacent' appears 130 times in Chapter 28, and while there is not a definition assigned to it in the ordinance, the context consistently supports the interpretation of 'adjacent' as 'adjoining.' Below are two zoning code sections that highlight 'adjacent' as synonymous with 'adjoining':

- **MGO 28.144 – Development Adjacent to a Landmark or Landmark Site.** Any development on a zoning lot adjoining a landmark or landmark site for which Plan Commission or Urban Design Commission review is required shall be reviewed by the Landmark Commission to determine whether the proposed development is so large or visually intrusive as to adversely affect the historic character and integrity of the adjoining landmark or landmark site. Landmark Commission review shall be advisory to the Plan Commission and the Urban Design Commission.
- **MGO 28.139 – Development Adjacent to Public Parks**
  (1) Nonresidential development immediately adjacent to the boundary of a City-owned public park shall be reviewed as a conditional use.

c. Finally, what are past practices?

In interpreting ordinance language, you may find it helpful to understand how it has been interpreted and applied in the past. In the Planning Division Staff Report for Landmarks Commission and the verbal presentation, Preservation Planner Heather Bailey explained that it is the established practice of Planning and Zoning staff to interpret 'adjacent' as 'adjoining' when applying provisions of Chapters 41 and 28. In the staff report prepared for the Common Council meeting, she writes:

> While not specifically defined in the zoning code, the City consistently uses "adjacent lot" to mean adjoining. In other words, lots that directly abut one another in a 360-degree view. This method of review and interpretation of adjacency has been used in every land combination/division approval from the Landmarks Commission since that process was implemented in 2015. They have also used that definition of "adjacency" since they began providing advisory comments to Plan Commission on developments adjacent to a designated landmark in 1996.

III. Conclusion

It is the opinion of the Office of the City Attorney that defining ‘adjacent’ to mean ‘adjoining’ is consistent with intra-ordinance language, dictionary definitions and established past practices. Using the rules of statutory interpretation, understanding ‘adjacent’ to mean ‘neighboring’ would provide inconsistent results within the larger context of zoning ordinances. That being said, municipalities are able to interpret their own ordinances. If the Council chooses to interpret the ordinance language differently, those reasons must clearly articulated during the quasi-judicial deliberations.

Choosing to interpret ‘adjacent’ as ‘neighboring’ but not ‘adjoining’ will likely require substantial ordinance revisions to ensure that the provisions of the Zoning Code and Historic Preservation read as they were intended so as not to create instability and inconsistent statutory interpretations.