

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

Date: December 4, 2009

MEMORANDUM

TO: Mayor Cieslewicz
Members of the Common Council

FROM: Michael P. May, City Attorney
Katherine C. Noonan, Assistant City Attorney

RE: Edgewater Hotel: Appeal of Landmarks Commission Denial of Certificate of Appropriateness and Variance

Pursuant to Sec. 33.19(5)(f), MGO, Hammes Company has appealed the November 30, 2009, decision of the Landmarks Commission denying a Certificate of Appropriateness and a Variance for the Edgewater Project. Sec. 33.19(5)(f), MGO, provides for an appeal by the applicant of the denial of a request for a Certificate of Appropriateness. Chapter 33 does not contain a provision for an appeal from a decision denying a Variance under Sec. 33.19(15). The Landmarks Commission considered the Variance request only after determining that the proposal did not meet the standards for a Certificate of Appropriateness.

The Appeal will be before the Council on December 8, 2009. If a 2/3 majority of the Common Council (14 votes) grants a Certificate of Appropriateness, no variance would be needed.

Landmarks Commission Action.

Certificate of Appropriateness.

The motion to grant a Certificate of Appropriateness, which failed on a 5-2 vote, was as follows:

Maniaci moved, seconded by Rosenblum, to grant a Certificate of Appropriateness for the project as submitted given the criteria in the ordinance, with the following conditions:

- #1: Staff approval of the design details for the rehabilitation of the 1940's hotel tower according to the Secretary of Interior Standards for Historic Rehabilitation, with minor changes being approved by staff, or by the Landmarks Commission at staff's discretion.
- #2: Landmarks Commission final review and approval of the design details for the new top floor addition, Rigadoon Room and front entrance element.
- #3: Staff approval of the design details and minor changes to the 1970's addition and the proposed public plaza, with any major changes, as determined by staff, to return to the Commission for further approval.

Variance.

Following the denial of the request for a Certificate of Appropriateness, the Landmarks Commission considered a Request for a Variance and also for a Certificate of Appropriateness should the Variance be granted. The Variance request was based on Guideline Criteria 1. In Sec. 33.19(10)(e)1., which addresses the gross volume of the proposal. The motion to grant a Variance, and subsequently, a Certificate of Appropriateness, failed on a 5-2 vote and was as follows:

Maniaci moved, seconded by Rosenblum, that the Commission finds that the proposed project will be visually compatible with the historic character of all buildings directly affected by the project and of all buildings within the visually related area and that based upon the evidence presented to us, we find as fact that the massing of the project which would otherwise not be permitted by the ordinance would enhance the quality of the design for the new building or structure and the new structure otherwise complies with the criteria 2-5 of the Mansion Hill Historic District for new construction in the historic district and would also have beneficial effect on the historic character of the visually related area, and issues a Certificate of Appropriateness based upon variance of 33.19(10)(e)(1) pursuant to 33.19(15)(c)(3) and 33.19(15)(d)(2) with the following conditions:

- #1: Staff approval of the design details for the rehabilitation of the 1940's hotel tower according to the Secretary of Interior Standards for Historic Rehabilitation, with minor changes being approved by staff, or by the Landmarks Commission at staff's discretion.
- #2: Landmarks Commission final review and approval of the design details for the new top floor addition, Rigadoon Room and front entrance element.
- #3: Staff approval of the design details and minor changes to the 1970's addition and the proposed public plaza, with any major changes, as determined by staff, to return to the Commission for further approval.

Third Motion.

A third motion, regarding whether a new hotel addition with a visually compatible gross volume is appropriate for the site, was approved by a voice vote. The motion was as follows:

Levitan moved, seconded by Maniaci, that the Commission could find that a new hotel addition on the proposed site could be approved with a revised design that would have a gross volume that is visually compatible with the buildings and environment with which it is visually related.

Granting a Certificate of Appropriateness.

The standards for granting a Certificate of Appropriateness are somewhat different for the Landmarks Commission and the Common Council. Both must base their determination on the standards in the ordinance, however, the Common Council also carries out a public/private interest balancing test.

Landmarks Commission.

Sec. 33.19(5)(b)4.c. requires the Landmarks Commission, when considering a request for a Certificate of Appropriateness to determine:

“Whether, in the case of any property located in an Historic District designated pursuant to the terms of subsection (6)(d) hereunder, the proposed construction, reconstruction or exterior alteration does not conform to the objectives and design criteria of the historic preservation plan for said district as duly adopted by the Common Council. “

The objectives and design criteria of the Mansion Hill Plan that are adopted in Sec. 33.19(10) are as follows:

- “1. The gross volume of any new structure shall be visually compatible with the buildings and environment with which it is visually related (visually related area).
2. In the street elevation(s) of a new building, the proportion between the width and the height in the façade(s) shall be visually compatible with the buildings and the environment with which it is visually related (visually related area).
3. The proportions and relationships between width and height of the doors and windows in the new street façade(s) shall be visually compatible with the buildings and environment with which it is visually related (visually related area).
4. The rhythm of solids to voids created by openings in the façade of the new structure should be visually compatible with the buildings and environment with which it is visually related (visually related area).
5. All new street facades should blend with other buildings via directional expression. When adjacent buildings have a dominant vertical or horizontal expression, this expression should be carried over and reflected.”

Common Council.

As noted above, the appeal brings before the Council the Landmarks decision to deny the Certificate of Appropriateness. It does not bring before the Council the related decision by the Commission to deny a variance. The ordinance specifically refers to an appeal of the decision under subsection (5)(b), the Certificate of Appropriateness, and makes no mention of appeal of decisions under subsection (15), the variance procedure. In fact, as will be discussed below, the standards to be applied by the Common Council have their own variance-like language that would become confusing if the somewhat different language for the Commission to grant a variance were also appealable.

On appeal, the Common Council standard includes a balancing test addressing public and private interests. Specifically, sec. 33.19(5)(f), MGO, provides that the Council may

“... by a 2/3 vote of its members, based on the standards contained in this ordinance, reverse or modify the decision of the Landmarks Commission if, after balancing the interest of the public in preserving the subject property and the interest of the owner in using it for his or her own purposes, the Council finds that, owing to special conditions pertaining to the specific piece of property, failure to grant the Certificate of Appropriateness will preclude any and all reasonable use of the property and/or will cause serious hardship for the owner, provided that any self-created hardship shall not be a basis for the reversal or modification of the Landmarks Commission vote.”

The above language bears some resemblance to language typically associated with standards for granting variances in the context of zoning codes. The Mansion Hill Historic District is not, however, in the City's Zoning Code, therefore the extensive law on granting zoning variances is not legal precedent for this decision.

Rather, we read the language on “balancing” of interests as requiring the Common Council to use such a balancing test in applying the standards of the ordinance. Although the Council must apply all five criteria in Sec. 33.19(10)(e), it is criteria number 1., requiring that “the gross volume of any new structure shall be visually compatible with the buildings and environment with which it is visually related (visually related area)”, that was primarily at issue for the Landmarks Commission.

In determining whether to reverse or modify the Landmarks Commission, the Council is to balance, on the one hand, “the interest of the public in preserving the subject property,” and, on the other hand, “the interest of the owner in using it for his or her own purposes.” In order to reverse or modify the Landmarks Commission, the Council must find that:

“...owing to special conditions pertaining to the specific piece of property, failure to grant the Certificate of Appropriateness will preclude any and all reasonable use of the property and/or will cause serious hardship for the owner, provided that any self-created hardship shall not be a basis for the reversal or modification of the Landmarks Commission vote.”

In applying the language of the ordinance, the Council is to give the words their ordinary and common sense meaning. *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶10, 315 Wis. 2d 350, 760 N.W. 2d 156 (2009). Unless some technical terms are involved, the ordinary dictionary meanings of the words may be applied. *Id.*

We do not understand there to be any argument that failure to grant the Certificate will “preclude any and all reasonable use of the property.” Nor do we understand there to be any argument that any claimed hardship was “self-created.” Thus, the question comes down to whether the Council finds that “owing to special conditions pertaining to

the specific piece of property,” failure to grant the Certificate “will cause serious hardship for the owner.”

Obviously, you can each consult your own experience and dictionaries to determine common and ordinary meaning of phrases like “serious hardship.” For reference, my *Random House Dictionary of the English Language (2d Ed.)* defines “serious”, in the context used here, as “weighty or important”. “Hardship” is defined as “a condition that is difficult to endure; suffering; deprivation; oppression.”

Some questions have arisen as to what matters the Council may consider in application of the public and private balancing test and the determination of hardship. We believe that the Council may consider any factors that are relevant to such determinations, and in doing so may consider the purpose and intent of the Landmarks ordinance.

If you have any further questions on the issues to come before you on Tuesday night, please contact one of us.

CC: Brad Murphy
Bill Fruhling
Mario Mendoza

Sec. 33.19(5)(f), MGO reads as follows:

Appeal. An appeal from the decision of the Landmarks Commission to grant or deny a Certificate of Appropriateness under Subsection (5)(b) and (c) may be taken to the Common Council by the applicant for the permit. In addition, an appeal from the decision of the Landmarks Commission to grant or deny a Certificate of Appropriateness for any building or demolition project requiring a public hearing, whether this determination is made upon receipt of the application for a demolition permit or at the end of the one-year period in a case where action on the application has been suspended, or to suspend action on a demolition application, may also be taken to the Common Council by the Alderperson of the district in which the subject property is located, or by 20% of the property owners within 200 feet of the subject property.

Such appeal shall be initiated by filing a petition to appeal, specifying the grounds therefore, with the City Clerk within ten (10) days of the date the final decision of the Landmarks Commission is made. The City Clerk shall file the petition to appeal with the Common Council. After a public hearing, the Council may, by favorable vote of two-thirds (2/3) of its members, based on the standards contained in this ordinance, reverse or modify the decision of the Landmarks Commission if, after balancing the interest of the public in preserving the subject property and the interest of the owner in using it for his or her own purposes, the Council finds that, owing to special conditions pertaining to the specific piece of property, failure to grant the Certificate of Appropriateness will preclude any and all reasonable use of the property and/or will cause serious hardship for the owner, provided that any self-created hardship shall not be a basis for reversal or modification of the Landmark Commission’s decision.