

Date: June 2, 2014
To: Madison Landmarks Commission
From: David Mollenhoff
Subject: Revisions needed for the May 16 draft of the landmarks ordinance

I have carefully reviewed the February 10 and May 16 draft of the landmarks ordinance and have many suggestions. I will divide my comments into two categories: general comments and section by section. I will use the general category when my comments are primarily applicable to *several* sections. I will use the "specific" category, when my suggestions are primarily applicable to one of the numerical sections of the draft.

In this analysis, I will use the following abbreviations:

LO = Landmarks Ordinance
 LC = Landmarks Commission
 HD = Historic Districts
 CC = Common Council

I regret that I did not have more time to prepare this critique. This is a complex ordinance and it deserves careful scrutiny of the public. I hope that you find this analysis useful.

PART I. GENERAL COMMENTS

A. On the need for a new name

When the Landmarks Commission was created in 1970, historic districts were extremely rare and designating landmarks was the primary job of the commission. Today, the scope of the Commission is much broader and includes historic districts, comprehensive planning, advising the Plan Commission and the Urban Design Commission, heritage tourism, marketing, and several others. Consequently, the name should be changed to the *Historic Preservation Commission* or something similar. Such a name reflects the expanded scope of its work.

B. On archeology.

Madison, Wisconsin has the greatest concentration of Indian effigy mounds of any city in North America, and yet the new LO draft is nearly silent on the subject of archeology. Exceptions include:

a. Section 2 (Definitions) defines a landmark as "any land of historic significance due to the a substantial value in tracing the history of humankind...."

b. Section 3 (Landmark Commission Composition) uses the stock language of the Federal Register that includes "archeology."

So why is our ordinance nearly silent on archeology? Are our mounds sufficiently protected? Is an archeologist needed on the LC? Are state statutes sufficient? We need to have a discussion on this point.

C. On the need to clarify the meanings of very similar words used throughout the ordinance.

One of the goals of this repeal and rewrite exercise is to add precision to key words. Nowhere is this more important than in following cluster of words: standards, guidelines, criteria, and factors. These words are apparently used interchangeably throughout the draft, but are they really the same?

The LC should give each word a precise meaning (including in the definition section) and then use them consistently throughout the draft. We should eliminate any unnecessary words.

D. On economic hardship.

This is an area where the new draft is woefully deficient. With the exception of the right of an owner to rescind a landmark designation (Section 8), the new draft is silent on this important subject! To handle this complex and controversial subject, Madison's new ordinance will require a new section entitled "Consideration of Economic Effects," or something similar. This section would acknowledge that preservation sometimes requires special procedures for demonstrated economic hardship. Model ordinances typically require applicants claiming hardship to provide the LC with specific documentation that allows the LC to make an informed decision.

E. On the need for a new section entitled "OBLIGATION TO MAINTAIN HISTORICAL RESOURCES."

In the draft, maintenance requirements are scattered throughout the ordinance. However, in most model ordinances, this subject is handled in a consolidated section. For example, for following sections of the draft ordinance could be located there:

- 10 Maintenance of Landmarks, Landmark Site and Historic Districts
- 16 Conditions Danger to Life, Health, and Property
- 18 Compliance With Regulations

F. On the absence of a section on demolition by neglect

Anyone who followed the Gilman Street Project—one of the most serious and clear-cut examples of demolition by neglect—should be alarmed that the draft ordinance is silent on this subject! The nation's model ordinances devote substantial space to this complex subject and Madison's new ordinance should do the same.

G. On the absence of open space standards in historic districts

The absence of language in Section 9(c), Guidelines for Historic Districts, *requiring* the maintenance of open space patterns in historic districts is alarming. Although no less than 15 "guidelines" are provided in this section, *none* say anything about the preservation of historic open space patterns.

There is one other place in the ordinance that mentions the maintenance of open space and that is in Section (4)(f), Commission Powers and Duties. However, this section directs the LC to issue an *advisory* opinion to the Plan Commission on whether a new lot size in a HD is consistent with historic lot size patterns. This section *implies* that maintaining open space in historic districts is important, but attempts to achieve this goal by using an *indirect* method: keeping lot sizes consistent with historic patterns.

Several steps will be necessary to ensure that open space in Madison's historic districts is preserved. First, a carefully-worded open space guideline should be added to Section 9(c) "Factors and guidelines for the LC to consider *when developing review criteria* in historic districts." Note the italicized words. Second, the open space guideline must also be added to Sections 21 to 25 under "Criteria for Review of Development..." or the corresponding section. Third, the maintenance of the historic lot size requirement now located Section 4 (f) should be added to the guidelines of Section 9 (c) and also to Sections 21 to 25.

We may also want to craft language that requires front, rear, and side yard requirements to approximate historic dimensions.

Here's the key point: If the new LO does NOT contain explicit language *requiring* the maintenance of historic open space patterns, a key historic quality of Madison's historic districts will be lost. This is because the preservation of historic districts requires specific language in the LO that is more restrictive and limiting than the zoning code. Therefore, appropriate new language must be added to the draft.

H. On the need for an expanded enforcement section (Section 11(h))

The ordinance needs an expanded section where *all* transgressions (failure to maintenance, demolition by neglect, doing work without a COA) could be outlined. In the current draft the only penalty covered is for doing work without a COA. Putting such penalties in one place would surely increase clarity and simplify organization.

PART II: SECTION BY SECTION ANALYSIS

Section 1 Purpose and Intent

A. On the need for clarification of the relationship between Madison's two in-effect ordinances: zoning and landmarks.

I was delighted to see language added to this section that clarifies the relationship between the zoning and landmarks ordinances. My hope is that this language will prevent a repeat of what happened with the SBA project. I am referring to the decision of senior planning staff to give this project their approval and to send it to the Landmarks Commission even though it was 17 times larger than what the LO allowed! The City Attorney should not have to write an official opinion on this point to cause senior planners to abandon their belief that zoning trumped landmarks.

Finally, the new ordinance must *require* the Plan Department to determine whether a proposed project complies with the LO *before* they submit it to the official city approval process. Just think of the time and energy this could have saved for the LC, the CC, the public, and all interested parties!

(I have not checked the Plan Commission ordinance language to determine whether it contains reciprocal language on the relationship between zoning and the landmarks ordinance, but if it does NOT, it should. All decision makers including Plan Commissioners must understand that the more restrictive standard applies whenever you have multiple laws in play. The position of the LC may be advisory to the PC, but that does not mean that the PC can override this important form of historic district protection.)

B. Add economic language to the purpose section. Such language appears as “F” in the current ordinance. Here is some placeholder language: “Recognize the role that historic preservation, historic districts, and heritage tourism plays in strengthening the local economy.” The fact is, we need to do a better job of trumpeting this virtue and that includes restoring this fact to the purpose section.

Section 2, Definitions

Many apparently useful, even essential, definitions have been omitted and others that have been inappropriately subordinated to other definitions. Here are several examples:

Alteration(see also rehabilitation and restoration)

Applicant/owner

Balancing

Certificate of appropriateness

Contributing/non-contributing buildings

Demolition by neglect

Economic hardship

Economic incentive

Excluded years (See also period of significance)

Historic preservation plans

Historic resources This is a very useful space-saving abstraction that can be used throughout the LO to denote landmarks, historic districts, objects, structures, mounds, etc.

National Register of Historic Places (see also State Register of Historic Places)

Ordinary maintenance

Period of significance (Is not defined in the VRA definition)

Preservation planner

Rehabilitation (see also alteration, and restoration)

Restoration

Standard/criteria/guidelines/factors (These terms are used interchangeably. See General Comments C above)

State Register of Historic Places

VRA (Why was the method for calculating the VRA changed from the centerline of the front of the lot to the boundary of the lot?)

Section 3. Landmarks Commission Composition and Terms

A. Regarding the professional qualifications of LC members and whether such language yields the best result for Madison.

The current draft requires that two of the seven LC members shall meet the Professional Qualifications and Standards used by the US. Secretary of Interior. There is nothing inherently wrong with stipulating such qualifications. The intent of the drafters was to make sure that LC members in any of the following areas would meet these standards: History, Archeology, Architectural History, Architecture or Historic Architecture.

Unfortunately, such language would allow the LC to have two historians and no architect or two architects and no historian. Surely, the Madison LC should have one historian and one architect that satisfies the Secretary's standards. We should continue to specify these two categories of people because this formula was worked extremely well over the years.

As noted elsewhere, there is also a question of whether we should have an archeologist either on the committee or available to it.

Section 4. Powers and Duties

A. On the need for more broadly conceived power and duties

The entries under this section seem unnecessarily narrow and technical. In fact, there are several additional functions that deserve to be a part of LC powers and duties. They include:

1. Act in an advisory capacity to the city council in all matters pertaining to the city's historical preservation program.

2. Actively support a public education program for historic preservation.

The old ordinance contains the following language in (5)(i)(4): "Work for the continuing education of the citizens of Madison about the historic heritage of the city and the landmarks and landmark sites designated under the provisions of this section. *This education mission of the LC should be retained and updated!* Yes, other organizations do education and advocacy, but that does not mean that his function should be dropped from LC powers and duties! Examples of functions that should be included here include: publishing and keeping current pamphlets that describe Madison landmarks and districts; providing maps showing locations of all historic districts; and collaborating with advocacy and education organizations

Section 5. Powers and Duties of Preservation Planner

I will comment on this separately.

Section 6. Public Hearing Notices under this Section

No comments at this time.

Section 7. Designation of Landmarks

On the need for an additional category under “standards.”

Although this standard language comes from the National Register, this draft OMITTS a standard that appears in all National Register nomination forms: It reads as follows: “Property has yielded, or is likely to yield important in history or prehistory.” Something similar should be added to the standards section. Here is some placeholder language: Contains significant archeological sites and constructs. (See General Comments, B)

Section 8. Rescission (This is one of the few instances in the new draft that attempts to deal with economic hardship. (See also General Comments, D)

A. Need for new definition of owner

This is an odd requirement. Why should rescission be limited to the owner at the time of designation or an property inheritor? Why shouldn't rescission be allowed for any owner, regardless of when he/she/it bought it? After all, the context here is economic hardship and those conditions should apply to all owners.

B. On the need for standards

This section requires the CC to approve, modify, or reject the LC recommendation, but *without standards*. Surely, standards should be provided in the ordinance or else we will have the worst kind of inconsistency: ad hoc du jure.

Section 9. Creation and Amendment of Historic Districts

A. On the need for an archeological category.

The criteria for historic districts do NOT include anything reference to archeology and should. Something like, “has yielded or is likely to yield important archeological information,” would probably work. This should be the new #5.

B. On the need for another very important criterion for historic district standards

A casual reader might think that a 15 category list is exhaustive, but it is not. In fact, this list omits one of the most important standards: the maintenance of historic district open space patterns. See “General Comments.” This standard should be added.

Section 10. Maintenance of Landmarks, Landmark Sites and Historic Districts

No comment at this time.

Section 11. Certificate of Appropriateness

A. On the need for staff to reject a project that cannot possibly meet landmark ordinance criteria

Section 11(e) Application

No application that obviously fails to satisfy landmark ordinance standards should be accepted by City staff. In the case of the Gilman Street project, senior planning managers determined that the project was just what the Mansion Hill Historic District needed and accepted it for submission to the LC.

Unfortunately the project egregiously failed to satisfy the LO! Somewhere in this ordinance staff should

be required to determine—before accepting it for submission to the LC!—that it meets all LO requirements. Just think about the time and effort this project required from the LC and the Common Council! We need to add language to prevent any future actions of this type.

B. On the need for a separate, beefed up enforcement section. Section 11 (h) Penalty for Work Done Without...

Most model ordinances relegate penalties and penalty administration to a separate section on “Enforcement.” We should decide whether this is what ought to happen here. See general comments on “Need for Enforcement Section.(H)”

Section 12. Exterior Alteration or Construction

A. Need for parallel construction

Note how in (12)(b) the phrase “evaluated using the standards in Subsection (9)(c)” is used. Parallel construction and consistency require that similar language be used for (12)(a). Grammatically, it would be better if both clauses would read as follows: “as determined by conformity with standards listed in subsection (9)(c).”

Section 13. Demolition or Removal

No comments at this time.

Section 14. Painting and Restoring Signs on Brick Structure

No comments at this time.

Section 15. Appeal

The proposed draft language for this section is extremely weak and irresponsible. Its sins are as follows:

A. The draft fails to provide clear, tough, and comprehensive review standards that the CC can use to approve, modify, or reject the LC recommendation.

(1) Although the draft includes the clause “based on the criteria for review contained in the ordinance,” it fails to define *what* criteria the CC is supposed to use. During the Gilman Street Project, we learned that applicants can use any of the following 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.

Since a “broad” interpretation can yield many standard-setting sections, it would surely be desirable to specify exactly what sections of the ordinance should be used for this purpose.

(2) Even more serious is the omission of the two tough standards contained in today’s ordinance: the all-important *special conditions*, preclusion of any and all other uses for the property and self-created hardship. We must recall that it was these special conditions that the project could NOT meet that caused a majority of alders to reject the 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 CC override much easier. Therefore,

these special conditions MUST be restored to the ordinance. Otherwise, alders would make their decision based on the following criteria: 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 the CC 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 CC to use in balancing public and private interests. Therefore, we must provide standards for this section.

Section 16. Conditions Dangerous to Life, Health or Property

No comments at this time.

Section 17. Waivers

No comments at this time.

Section 18. Compliance with Regulations

This section should be located in the Obligation to Maintain Historical Resources. See general comments #5.

Section 19. Penalties for Violations

A. On the need to consolidate all penalty details in one section

Although the draft ordinance includes Section 11(h) “Penalty for Work Done Without, or in Violation of, a Certificate of Appropriateness,” there are probably other elements that deserve to be included in this section.

B. On the need to make sure that penalties would be a sufficient deterrent

Would the penalties’ of this section be a sufficient deterrent to illegal and inappropriate development? If not, they should be beefed up. This section should be relocated to a new “Enforcement “ section.

Section 20. Separability

No comments at this time.