

**MOHS, MACDONALD, WIDDER, PARADISE & VAN NOTE, LLC**

**ATTORNEYS AT LAW**

**20 NORTH CARROLL STREET**

**MADISON, WISCONSIN 53703**

**PHONE: (608) 256-1978 FAX: (608) 257-1106**

**www.mmwp-law.com**

**FREDERIC E. MOHS**  
fred@mmwp-law.com  
**DANIEL A. MACDONALD**  
macdon@chorus.net  
**THEODORE C. WIDDER, III**  
tripp@mmwp-law.com

**GREGORY J. PARADISE**  
greg@mmwp-law.com  
**JOHN W. VAN NOTE**  
john@mmwp-law.com  
**TIMOTHY F. UMLAND**  
tim@mmwp-law.com

August 13, 2014

Dear Friends of Historic Preservation:

By this time you will have received Franny Ingebritson's invitation to two meetings of the Madison Alliance for Historic Preservation, one Tuesday, August 19<sup>th</sup>, and the second Monday, September 8<sup>th</sup> — both at 7:00 p.m. I am writing this letter because there is another dimension to the Landmarks Ordinance redraft effort that residents and property owners of historic districts should understand. As most know, in 1970 the Madison City Council unanimously adopted the present Landmarks Ordinance with support of both newspapers. It has served the City well. So why is there a need for a redraft? The answer is that certain development interests, represented by the lobbyists, were unhappy when the City Council, by a large margin, refused to overturn the Landmarks Commissions' refusal to grant a Certificate of Appropriateness for the Brown project. As you may recall, Steve Brown Apartments (hereinafter "SBA") was attempting to demolish a non-contributing building, move a contributing building, and demolish a contributing building-127 West Gilman Street, a property that he owned for 21 years, and that was the subject of an action by the City Attorney alleging demolition by neglect. It has been suggested that SBA wants to give it another try, perhaps with a more modest project, and hopes to have the advantage of a weakened Landmarks Ordinance that instead of emphasizing historic preservation of contributing buildings would emphasize additions to tax base and economic development as priority Landmarks Ordinance goals.

Lobbyists for development interests had been numerous and energetic in their contact with City officials. Some of the same lobbyists appeared supporting the SBA project. At that time they argued that the Landmarks Ordinance was vague and difficult to understand which suited their purpose. On the other hand historic preservationists, owners, and residents of Landmarks Districts not only understood the Ordinance well, but just as importantly, had been relying on it for years. For the past four of five years development lobbyists have been hard at work making contacts with alders and other City officials. Some of them even made two trips to Madison's Sister City, Freyburg, Germany, first with Mayor Cieslewicz and then with Mayor Soglin and other City staff. Back here in Madison they succeeded in attracting allies such as Downtown Madison, Inc. and the Chamber of Commerce, even though both have historically been in favor of historic preservation and possibly still are. The key to their strategy was to change the focus from historic preservation to economic development and increased tax base.

The lobbyists have worked hard to create a contest between existing, and sometimes moderately run-down properties in historic districts and shiny new buildings that are multiples in volume compared to their potential neighbors. The SBA project was 17 times larger in volume than its neighbors. They are a direct contradiction to the Landmarks Ordinance and the Mansion Hill Historic Plan and Development Handbook. But it isn't just Mansion Hill, the First Settlement Historic District is relatively tiny and would take only one or two inappropriate intrusions to make it a joke. Even University Heights, with its vast inventory of highly valued residential properties, is not exempt. University Heights is bounded by University Avenue and Breese Terrace. There is multi-family on both. How tempting it would be to move new development up to Lathrop Street or Kendall and then maybe across those streets with developments. With the wrong kind of ordinance developers will certainly try. It is just too tempting. These are great locations.

Third Lake Ridge along Lake Monona offers a tempting opportunity to build lakefront condos starting at the Elk's Club going east to BB Clark Beach. Heck, if they can get to BB Clark Beach, how about going all the way to Olbrich Park? What I am getting at is that our Landmark's Ordinance should not contain general language that can be seized upon in support of demolition of contributing buildings or construction of buildings that are out of scale with their neighbors in violation of historic district plans. The test that we need to apply is whether or not residents will have confidence in the protections of our historic districts or will legitimately fear continuous and expensive legal battles with repeated attacks from developers who find some encouragement in a redrafted, and weakened, Landmark Ordinance.

The developers are serious. In addition to the usual lobbyists, some developers have hired Jeff Vercauteren, recently elected President of Capital Neighborhoods, to represent them. Some of the developers have already tried to develop in the Mansion Hill Historic District. Attached is Jeff's testimony at the July 3, 2014 Ad Hoc Landmarks Ordinance Review Committee. I have extracted key sentences that I believe are the true message of his remarks with added underlining to further emphasize what I believe is his message. For instance, "We've got the ordinance for the past 40 years or so. We have seen some things about it that work pretty well and there are other things that don't work quite as well..." He talks about the Bassett Neighborhood, which of course is not a historic district, where he lives:

"There were a lot of run down structures, and pretty tired housing stock and through a lot of good investment that was consistent with the neighborhood's character we've seen Bassett revitalized.

I'm probably a little bit biased here, but I would say it's the most livable downtown neighborhood right now just given all those infill developments, the redevelopments and the new development mix, it's what's best for the neighborhood.

So I think it's important to have that flexibility with our Historic Districts, as well as we make sure to appreciate the character of those, the historical features of those, but

also to allow for the kind of smart, well thought out redevelopments or replacement of properties that aren't consistent with that character of the historic district and make sure our new Ordinance can adapt to those kinds of developments."

Of course Jeff is "a little bit biased" he is a paid lobbyist for developers and they would love to have him convince the Ad Hoc Committee that Madison's Historic Districts should be more like Bassett, which is not a historic district, and whose plan permits and encourages redevelopment.

Then, at the next meeting of the Ad Hoc Committee Jeff testified and submitted the attached document dated Wednesday, July 23<sup>rd</sup>. As you can see in the overview, he provided that the provisions that he was submitting were "for information only and should not be considered policy recommendations for the Committee at this time." Nevertheless, look at what he has submitted for some reason or other.

"Purpose and Intent.

- Purpose includes "encouraging new development to sensitively incorporate historic structures and artifacts.
- Purpose includes "to enhance property values and to increase economic and financial benefits to the city and its inhabitants."
- Purpose includes stabilizing and improving property values, strengthening the economy of the city, and combat urban blight and decay."

Each of these have nothing to do with historic preservation and everything to do with building.

Then, under definitions, he wants to talk about non-contributing features, which is not helpful, but then gets into "unnecessary hardship" exists where (1) the existing property cannot yield a reasonable return, (2) the plight is due to unique circumstances, and (3) hardship is not the result of any act or omission of the applicant." The key here is "the existing property cannot yield a reasonable return." Now, obviously, the "reasonable return" depends on how much someone is paid for the property. If it looks like there is a chance to demolish the historic building and build a large new building it will be worth a lot more as a development site compared to fixing up a deteriorated, but contributing, building. In other words, making this work out for the developer is what it is all about.

When it gets down to "approval standards," we already have all of this. Then they want consideration of "...factors such as state of repair of the building, the reasonableness of the cost of restoration, existing or potential usefulness, and the character of the neighborhood." Wait a minute, there are so many escapes in this that no one is going to want to put significant money into a rehabilitation if it looks like their neighbors has lots of options not to participate.

Finally, the last bullet point provides for escapes if "... (1) the historic integrity of the building has been irretrievably lost, (2) the structure lacks historic or architectural significance, (3) preservation of the landmark is not technically or economically feasible, and (4) there is no feasible alternative to demolition." Do you get that? The developer is going to present evidence that there is no way that he can economically do anything but tear down buildings in a historic district and build a new structure. Economics runs all through this. The problem is if you provide for an escape for properties with poor maintenance or that have great potential for new development, what you end up with is a totally toothless, ineffective ordinance. Only fools will believe in it.

This is important. The fundamental financial mechanism in a historic district is that it absolutely requires people to maintain their buildings, maybe not in the best condition, but certainly in a condition that preserves them. Every historic district in the country has buildings that languish for years and were finally picked up by somebody who did a great job on them. Testing whether a building in a historic district competes satisfactorily against new construction should not even be considered, but that is what is going to come before the Ad Hoc Committee and that is why people interested in historic preservation need to be heard now.

The Downtown Plan for Madison, adopted by the City Council in 2012, defined what parcels are available for development in the Mansion Hill and First Settlement Historic Districts. Basically, they are a couple of newer buildings and parking lots. That is it. We want our historic districts to be like those in Lincoln Park, Georgetown, Savannah, Charleston or New Orleans. Certainly they will be different, this is Madison and our historic neighborhoods are newer. Nevertheless, ours will become more valuable year after year as they tell the story of Madison's first neighborhoods and their development.

If you are still reading this, thanks. I hope you can come to the scheduled meetings of the Ad Hoc Council Committee, and if necessary to City Council meetings in order to support a strong and effective Landmark's Ordinance. In the meantime, as you learn more about this, I hope you will call your Alder and voice your support for a redrafted Landmarks Ordinance that is unequivocal in its support for our historic neighborhoods.

Sincerely,

Frederic E. Mohs

FEM: eh  
Enclosure

**Madison Alliance for Historic Preservation**  
(A provisional Group)  
*Five Historic Districts and all Landmarked Buildings and Sites*

□... An Invitation... □

**July 29, 2014**

**Dear Friends of Historic Preservation**

**The City of Madison is about to approve a new Landmarks Ordinance.**

The Landmarks Commission has been working on a revised ordinance for three years and has recently referred their draft to the Ad Hoc Landmarks Ordinance Revision Committee; consisting of five alders and staffed by Amy Scanlon, the city's Preservation Planner. The Ad Hoc Committee will make recommendations to the Common Council and the Common Council will probably act on the ordinance in October.

The Ad Hoc Committee has scheduled review meetings for August 14 and 27 and September 11 and 18. It will also meet on September 30 if necessary. All meetings are held at 5:30PM at a location noted on the City of Madison's website.

Madison's original ordinance was approved in 1970 and will now be repealed and rewritten. During the last 44 years historic preservation has become more sophisticated and demanding and the new ordinance is designed to meet today's needs.

We invite all preservationists to a community conversation on the new draft ordinance. We have created the Madison Alliance for Historic Preservation, as a provisional group, for this purpose. We are inviting representatives from all five Madison local historic districts, owners of Madison landmarks, and others interested in historic preservation. We want to get the best possible ordinance. To do this we will review the draft and make recommendations to the Ad Hoc Committee and the Common Council.

We are pleased that Bert Stitt, a highly respected community facilitator, has volunteered to guide our conversations. Please consider joining us at one or both of these meetings: August 19<sup>th</sup> - 7:00 pm at Madison Public Library and September 8<sup>th</sup> - 7:00 pm at (TBD)

A packet of documents including the new draft ordinance will be distributed in advance of the first meeting. We hope you will be able to join us for these important community preservation conversations.

Please let us know by (????) whether you plan to attend these meetings and help us get a state-of-the-art ordinance.

In Historic Preservation

Franny Ingebritson / Fred Mohs / David Mollenhoff

**Susan Schmitz**, President, Downtown Madison Inc. (DMI):

I support the process. I'm here to talk about the process and process only. I've been a part of many Ad Hoc Committees. Very often the conversation goes right to the wording or specific recommendations without the group taking some time to talk about what they're really trying to do here and talk about principles and goals, etc., and so when I saw what happened with the process for the City TIF Policy, which I thought was awesome the way the staff worked with having E.D. Dir. Aaron Olver first doing the Power Point, the education part. Then the group really talked about what do we want a TIF policy for Madison to look like?

You guys took the time to do that so by the time you created the policy it wasn't that hard because you did that ahead of time.

I'm here to ask if you could use that same process again because I think that would help, and to take a look at principles and goals behind what a good Landmarks Ordinance would be so that supports investment in Madison's historic neighborhoods as John Strange has pointed out. You'll see me again.

**Jeff Vercauteren**, Lawyer/Lobbyist; Member of DMI Board of Directors and Chair of DMI's Ad Hoc Landmarks Ordinance Review Committee. Recently elected Pres. of Capitol Neighborhoods Inc. by one vote:

I'm new to this City process, so I am glad to have the opportunity to come in and speak with this committee. Some of you know me primarily through my background in Capitol Neighborhoods and then Capitol Neighborhoods Vice Pres. for the past 1 1/2 years. I should say I'm not appearing for Capitol Neighborhoods today.

I've gotten together with a group of downtown property owners who are interested in this issue and have engaged me to represent them in this process.

Taking off on what Susan had to say, I think it's important at the outset to have a broader discussion of what we're trying to accomplish with this process and what we're hoping to get out of this process and really what we would like for the future of our historic districts.

We've got the Ordinance for the past 40 years or so. We've seen some things about it that work pretty well and there's some other things that don't work quite as well. My approach to this process is to take a good look at what's working with the ordinance, what's not working, and think about the next 40 years and the next 100 years of this ordinance and where we're heading with our historic districts.

Since I have lived and work downtown for the past 6 years, I've gotten a feel for the different neighborhoods. Downtown is interesting because we have Mansion Hill and First Settlement Historic Districts mixed in with the rest of downtown.

I live in Bassett so I like to do comparisons with Bassett a lot because that's the neighborhood I know best. What we've seen as a City in Bassett over the past 15 to 20 years is a real transformation in that neighborhood. I've been talking to people who were around Bassett 20 years ago. It wasn't a very safe place. There were a lot of run down structures, and pretty tired housing stock and through a lot of good investment that was consistent with the neighborhood's character we've seen Bassett revitalized.

I'm probably a little bit biased here, but I would say it's the most livable downtown neighborhood right now just given all those infill developments, the redevelopments and new development mix, it's what's best for the neighborhood.

So I think it's important to have that flexibility with our Historic Districts, as well as we make sure to appreciate the character of those, the historical features of those, but also to allow for the kind of smart, well thought out redevelopments

or replacement of properties that aren't consistent with that character of the historic district and make sure our new Ordinance can adapt to those kinds of developments.

I guess that is all I will say now, I look forward to working through this process with you and my group has already starting to think about some areas where we can address some changes to the Ordinance.



## OVERVIEW OF LANDMARKS ORDINANCES

This document provides an overview of certain provisions in landmarks and historic preservation ordinances from a representative class of municipalities of varying population sizes and geographic locations to serve as background information for consideration by the Ad Hoc Landmarks Ordinance Review Committee. These provisions are for information only and should not be considered policy recommendations for the committee at this time.

The document is organized by the following sections frequently found in landmarks and historic preservation ordinances:

1. Purpose and Intent
  2. Definitions
  3. Approval Standard
  4. Standard of Review
  5. Landmark and Historic District Designation
  6. Commission Membership
- 

### 1. Purpose and Intent

Many ordinances include statements of purpose and intent similar to the language of the current ordinance; the following are examples of provisions not included in the current ordinance:

- Purpose includes “encouraging new development to sensitively incorporate historic structures and artifacts.” *Portland Ord. 33.846.030(A)*.
- Purpose includes “to enhance property values and to increase economic and financial benefits to the city and its inhabitants.” *Riverside Ord. 20.05.010*.
- Purpose includes to stabilize and improve property values, strengthen the economy of the city, and combat urban blight and decay. *Wichita Ord. 2.12.1017*.

### 2. Definitions

The current ordinance lacks definitions for several key terms that are found in other municipal ordinances, such as “contributing feature,” “compatibility,” and “demolition by neglect.” Additional definitions could be considered, including the following:

- “Compatibility” means a positive relationship to existing buildings and their environs based on the individual visual character of the area. Compatibility considers the relationship between buildings and structures within view of the property, placing greater weight on adjacent historic structures. *Savannah Ord. 8-3030*.

- “Contributing Feature” means “a significant building, site, structure, or object which adds to the architectural qualities, character-defining features, historic association, or archeological values” of a landmark or historic district because it was present during the historic period or reflects significant historic character. *Wichita Ord. 2.12.1016.*
- “Demolition by neglect” means lack of maintenance that results in deterioration and threatens the preservation of the structure. *Austin Ord. 25-11-211(6).*
- “Non-Contributing Feature” means “a building, site, structure, or object that does not add to the architectural qualities, character-defining features, historic association, or archeological values” of a landmark or historic district because it was not present during the historic period or no longer reflects significant historic character. *Wichita Ord. 2.12.1016.*
- “Unnecessary hardship” exists where (1) the existing property cannot yield a reasonable return, (2) the plight is due to unique circumstances, and (3) hardship is not the result of any act or omission of the applicant. *Des Moines Ord. 58-63.*

### 3. Approval Standard

The current ordinance contains certain standards the Commission can consider in approving or denying a certificate of appropriateness. The following are examples of approval standards used in other municipalities:

- Factors the commission shall consider include whether (1) architecture is “sensitive to the mass and proportions of existing structures on the site or within the district,” (2) architecture is “clearly differentiated from nearby historic structures, while taking cues from them,” and (3) structure is “not structurally or economically feasible to preserve” (excluding demolition by neglect). *Milwaukee Ord. 320-21-11-g-h.*
- The commission shall issue a certificate if it finds the interest of historic preservation (1) will not be adversely affected by demolition or (2) will be best served by relocation of the structure, considering factors such as the state of repair of the building, the reasonableness of the cost of restoration, existing or potential usefulness, and the character of the neighborhood. *Austin Ord. 25-11-244(C).*
- The commission shall approve a certificate where (1) the historic integrity of the building has been irretrievably lost, (2) the structure lacks historic or architectural significance, (3) preservation of the landmark is not technically or economically feasible, and (4) there is no feasible alternative to demolition. *Akron Ord. 31.395.*

**4. Standard of Review**

- Standard of review is abuse of discretion or procedural error. *Savannah Ord. 8-3030(o)*.
- City council shall consider whether commission acted according to law and whether the commission's action was "patently arbitrary or capricious." *Des Moines Ord. 58-31(f)*.
- Decision is reviewed *de novo* after a hearing within 90 days. *Lexington Ord. 13-8*.

**5. Landmark and Historic District Designation**

- Property owner must consent to landmark designation and all owners of property within proposed historic district must consent to creation of district. *Portland Ord. 33.846.030(C)(3)*.
- Proposed landmark must "be of special significance in terms of its historical, prehistorical, architectural, archaeological, and/or cultural importance, and possess integrity of design, setting, workmanship, materials, feeling and/or association." *Raleigh Ord. 10-1053(a)*.

**6. Commission Membership**

- Nine members, including one real estate professional, one construction professional, one architect, one historian, and one archaeologist. *Stockton Ord. 16.220.040*.