

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

To: Richard Wagner, Urban Design Commission Chair  
From: John Strange, Assistant City Attorney  
RE: Request for Reconsideration, ID # 56387  
Date: August 9, 2019

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As you know, I am the attorney in the Office of the City Attorney who provides advice and counsel to the Urban Design Commission (“UDC”). On August 7, 2019, the Zoning Administrator requested that the Urban Design Commission reconsider the action taken at its July 31, 2019 meeting regarding Legistar File # 56387, Appeal of the Zoning Administrator’s Denial for Signage Located at 3737 E. Washington Avenue. I have reviewed the Zoning Administrator’s letter, listened to the hearing, and reviewed the draft minutes from the July 31, 2019 hearing. I have instructed staff to include “Motion to Reconsider” as an item on the August 14, 2019 UDC meeting agenda so that such a motion will be in order if made by one of the commissioners eligible to make such a motion. I am now writing to detail the process for reconsideration and to highlight an error in the proceedings of July 31, 2019 that I believe require the UDC reconsider this item. This error is unrelated to the ones the Zoning Administrator believes merit reconsideration.

By way of brief background, at the beginning of the UDC meeting on July 31, 2019, six (6) of the nine (9) members (Braun-Oddo, Goodhart, Harper, Asad, DeChant, and Wagner) of the Urban Design Commission were in attendance. Three (3) member were absent (Abbas, Klehr, and Bernau). The alternate member (Weisensel) was also absent. Part way through Item 1 under Special Item of Business, Legistar #56387, Appeal of the Zoning Administrator’s Denial for Signage Located at 3737 E. Washington Avenue, two members (Klehr and Bernau) arrived at the meeting. Both were in attendance for the remainder of the hearing and when the UDC voted on the matter. At least one of these members participated briefly in the questioning of the applicant and staff. However, both members abstained from voting on the matter because they were not present for the entire hearing.

At the conclusion of the hearing, the UDC made two motions. The first motion was made by DeChant, seconded by Harper, to uphold the Decision of the Zoning Administrator. The UDC determined that motion failed by a vote of 2-3, with Bernau and Klehr abstaining and Wagner, the chair, not voting. Next, Braun-Oddo, seconded by Asad, moved to reverse the decision of the Zoning Administrator. The UDC determined

that this motion passed 3-2, again with Bernau and Klehr abstaining and Wagner, the chair, not voting.<sup>1</sup> Harber and DeChant voted no. The UDC considered this a final decision and moved on to its next item of business.

For the reasons stated below, I do not believe that either motion received enough votes to pass and, therefore, I recommend that the UDC reconsider the item so that it can make a final decision on the appeal.

### Analysis

MGO 33.01(8) addresses attendance, quorum, and voting for boards, commissions, and committees.

#### 1. Quorum and Number of Votes Needed to Pass a Motion

MGO 33.01(8)(c) states that “[i]n the absence of any statute or ordinance that establishes the quorum for any Sub-unit<sup>2</sup>, quorum is a majority of the number of members fixed by law....” The UDC is a nine (9) member body. Therefore, quorum for the UDC is five (5).

MGO 33.01(8)(d) states that “[i]n the absence of any statute or ordinance to the contrary, motions before any Sub-unit shall be passed by an affirmative vote of not less than a majority of the Sub-unit in attendance so long as such majority vote is not less than a majority of the quorum of Sub-unit.” (emphasis added).<sup>3</sup>

As a rule, a motion can never pass with less than a majority of quorum. Since UDC has a quorum is five (5), a majority of quorum is three (3), and no vote may pass the UDC with less than three (3) votes. However, as provided in MGO 33.01(8)(d), the votes required for a motion to pass changes depending on the number of members in attendance.

This chart details how many votes are needed for a motion to pass based on UDC members in attendance:

| Members in attendance      | Votes needed to pass a motion |
|----------------------------|-------------------------------|
| 5 (min. needed for quorum) | 3                             |
| 6                          | 4                             |
| 7                          | 4                             |
| 8                          | 5                             |
| 9                          | 5                             |

<sup>1</sup> As an aside, it was not necessary for the UDC to make two motions. Either motion would have been dispositive of the issue. However, as explained in the remainder of the memorandum, *neither* motion achieved enough votes to pass under the requirements of M.G.O. Sec. 33.01(8)(d).

<sup>2</sup> MGO 33.01(3)(g) clarifies that the term “sub-unit” includes commissions.

<sup>3</sup> The UDC policy and procedure manual adopts this rule, stating that motions shall pass “with not less than a majority of the Commission in attendance.”

These requirements apply regardless of why members who are in attendance choose not vote.

At the July 31, 2019 hearing, eight (8) members were in attendance when the vote was taken. As explained above, five (5) votes were needed for either of the motions made to pass.<sup>4</sup> Accordingly, I do not believe either vote achieved the require number of affirmative votes to pass and, therefore, the UDC did not make a final decision on the appeal. I recommend that the UDC reconsider the item to correct this procedural defect and make a final decision on the appeal.

## **2. Reconsideration**

MGO 33.01(9)(b) requires that sub-units follow MGO 2.21 on motions for reconsideration. MGO 2.21(1) states:

“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.” (emphasis added).

According to the draft minutes, the motion to reverse the administrator garnered three (3) aye votes (Braun-Oddo; Goodhart; and Asad) and the two (2) no votes (Harper and DeChant). Klehr, Bernau, and Wagner did not vote. Abbas was absent. Therefore, the voting member who was absent (Abbas) or the two members who voted against the motion (Harper or DeChant) would need to make a motion to reconsider. MGO 2.21 is clear that motions to reconsider must happen at the next meeting, so this must be on the agenda and take place at the UDC’s meeting on August 14, 2019.

If the item is on the agenda and Abbas, Harper, or DeChant make a motion to reconsider that receives a second, the members then vote on whether to reconsider the motion. If that motion passes (by a majority of those in attendance according to the above chart), then the matter is back before the body for a decision. The UDC will then rehear the matter, which will need a majority of those in attendance in favor to pass (see chart).

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<sup>4</sup> Even if the two members who arrived late had never arrived at all, the motions still would have needed four (4) votes to pass because there would still have been six (6) members in attendance.

### **3. When the Chair Votes**

MGO 33.01(9)(c) states that ... “the chair of a Sub-unit shall not vote unless the chair's vote would affect the outcome of the matter before the Sub-unit and shall not participate in making motions or discussion thereon.” (emphasis added).

The UDC Policy and Procedure Manual, which was adopted by the UDC in 2018, states that the chair shall only vote when breaking a tie.

While it may seem that the ordinance and the UDC rule are the same because the only way a chair's vote would affect the outcome is if there is a tie, as seen here there are scenarios when a Chair's vote could affect the outcome of the matter even when it is not to break a tie. For example, if there had only been six (6) members in attendance at the time the vote was taken, a vote by the chair, in that scenario, could have resulted in four (4) aye votes instead of three (3). As it was, there were eight (8) members in attendance and so the chair's vote on either motion would not have affected the outcome.

For future votes, the UDC chair should vote if doing so will affect the outcome of the vote, as explained herein, even if not specifically to break a tie. It may be wise to amend the UDC rules and procedures to clarify this ordinance requirement.

### **Conclusion**

A vote at the UDC needs a majority of members in attendance to pass and the Chair should vote if it would affect the outcome of the vote, even if it is not to break a tie. Neither vote at the July 31, 2019 UDC meeting garnered enough affirmative votes to pass. Therefore, no final decision was made. I recommend that the UDC reconsider the Appeal of the Zoning Administrator's Decision to make a final decision on the appeal. To do that, one of the eligible members to make a motion to reconsider (Harper, DeChant, or Abbas) will need to make the motion as described above.