

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

Date: November 15, 2012

**MEMORANDUM**

TO: Brad Murphy

FROM: Maureen O'Brien, Assistant City Attorney

RE: Nob Hill Conditional Use Permit: Appeal from Action by City Plan Commission (Legistar Item No. 28020)

You asked how an appeal from a decision of the Plan Commission on a Conditional Use Permit (CUP) should be conducted by the Common Council. The ordinance outlining an appeal is found at MGO 28.12(11)(i), which is copied in full at the end of this memorandum and is discussed in detail as follows.

**1. How an appeal is filed**

An appeal may be filed by any of the following: (1) the applicant for the conditional use, (2) the Alderperson of the district in which the use is located, or (3) twenty percent or more of the property owners notified objecting to the establishment of such conditional use. The appeal should be filed with the Secretary of the Plan Commission, who will transmit the appeal to the City Clerk. The Clerk will file the appeal with the Common Council. An appeal has been properly filed in this matter by the Alderperson for the district.

**2. What must be alleged**

The appeal must "specify the grounds thereof in respect to the findings of the City Plan Commission." In other words, the appellant must indicate which findings of the City Plan Commission he or she believes are incorrect. These allegations will frame the question that the Common Council will address when hearing the appeal. In this instance, the appeal specified the following grounds:

"[T]he application did not meet all of the standards set out in sec. 28.12(11)(g) and 28.12(11)(k) of the Madison General Ordinances:

**CONDITIONAL USE STANDARDS- 28.12(11)(g)1.**

1. That the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare.

CONDITIONAL USE STANDARDS- 28.12(11)(g)2.

2. That the City be able to provide municipal services to the property where the conditional use is proposed, given due consideration of the cost of providing such services.

PLANNED RESIDENTIAL DEVELOPMENTS (PRD) STANDARDS

28.12(11)(k)1.iii.

- iii. That such development shall constitute environment of sustained desirability and stability..”

### 3. Timing and notice

The Common Council must schedule a hearing on the appeal within a reasonable time from filing. The Council must give public notice of the appeal and due notice to the parties in interest. Although not specified by the ordinance, we suggest that the public notice be provided in the same manner as the initial hearing on the conditional use. Parties in interest should be notified in a manner that is reasonably likely to provide them actual notice of the hearing. In this instance, the public hearing is scheduled for November 27, 2012, and the required notices are being given.

### 4. Hearing the appeal

In hearing the appeal, the Council should not hold an entirely new hearing to decide whether the conditional use should be approved. Instead, the Common Council’s role is to evaluate the Plan Commission’s decision. The ordinance declares that “[t]he action of the City Plan Commission shall be deemed just and equitable unless the Common Council, by a favorable vote of two-thirds (2/3) of the members of the Common Council, reverses or modifies the action of the City Plan Commission.” (Emphasis supplied). In other words, the Common Council will review the Plan Commission’s decision to determine whether it was “just and equitable.” If two-thirds of the members believe that it was not, then the Council may “reverse or modify” the decision. In so doing, the Council will be required to examine the standards for granting a Conditional Use Permit as set out in Sec. 28.12(11)(g), MGO, and the standards for approving Planned Residential Developments as set out in Sec. 28.12(11)(k)1., MGO. As noted above, however, the Council should only consider those standards raised in the appeal.

### 5. Evidence

The ordinance does not specify what evidence may be heard on appeal. Because the ordinance specifies that the appeal will be set for a public hearing, it contemplates the right of the applicant, the appellant, and other interested parties to appear before the Common Council to make presentations. Since the question for the Council to determine is whether the Plan Commission’s decision was “just and equitable,” any argument, information or other evidence that would be informative to this issue would be appropriate, so long as it is limited to the grounds raised in the appeal.

In order to evaluate the findings of the Plan Commission, the Council must be presented with a transcript of the hearing at issue.

## **6. Action – uphold, reverse or modify**

The Common Council may determine that the decision was “just and equitable;” in which case it is upheld. The Council also may reverse the decision, or it may modify the decision.

### Full Text of MGO 28.12(11)(i)

Appeal From Action By City Plan Commission. An appeal from the decision of the City Plan Commission may be taken to the Common Council by the applicant of the conditional use, by the Alderman of the district in which the use is located or by twenty percent (20%) or more of the property owners notified objecting to the establishment of such conditional use. Such appeal must specify the grounds thereof in respect to the findings of the City Plan Commission and must be filed with the Secretary of the Plan Commission within ten (10) days of the final action of the City Plan Commission. Final action may be either initial action on a conditional use or action following reconsideration of the said initial action under the Commission’s rules of procedure. However, reconsideration shall only occur following written notification of intent to reconsider by a Commission member to the Commission Secretary no later than ten (10) days after said initial action. Thereupon, the notice requirements of Section 28.12(11)(f) shall be complied with before the Commission reconsiders such initial action, except that the notice by publication shall be a Class 1 Notice. The taking of an appeal prior to the third day after said initial action shall not preclude or invalidate reconsideration by the Commission as herein provided.

The Secretary of the Plan Commission or his/her designee shall transmit such appeal to the City Clerk who shall file such appeal with the Common Council. The Common Council shall fix a reasonable time for the hearing of the appeal, and give public notice thereof as well as due notice to the parties in interest, and decide the same within a reasonable time. The action of the City Plan Commission shall be deemed just and equitable unless the Common Council, by a favorable vote of two-thirds (2/3) of the members of the Common Council, reverses or modifies the action of the City Plan Commission. Any person aggrieved by the decision of the Common Council or any alderperson, officer, department, board or bureau of the City, may, within thirty (30) days after the filing of the decision in the office of the City Clerk, commence an action seeking the remedy available by certiorari.

cc: Michael May