

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

MEMORANDUM

TO: The Plan Commission
FROM: John Strange, Assistant City Attorney
DATE: April 3, 2019
RE: 1630 Adams Street Demolition (Legistar # 54016)

Question Presented

Whether the Plan Commission may deny an application for demolition approval on the basis that the applicant engaged in a “technical demolition” prior to obtaining a demolition permit.

Facts

By way of brief background, the City issued the applicant a building permit to renovate the building at 1630 Adams Street. During the course of those renovations, the applicant discovered mold and/or rot that resulted in the removal of 50% or more of the area of the building’s exterior walls. Once the City became aware of this, it instructed the applicant to obtain a demolition permit from the Plan Commission pursuant to M.G.O. § 28.185 (2019).

The applicant submitted an application for demolition approval and appeared before the Plan Commission at a public hearing on March 11, 2019. At the hearing, Commissioners expressed concern about granting a demolition permit to someone who violated the law and asked whether the Plan Commission could deny the application on that basis.

The Plan Commission referred the application to its April 8, 2019 meeting pending an opinion from this office.

Law

The City of Madison Zoning Code defines demolition as:

“An act or process that removes, pulls down, tears down, razes, deconstructs, or destroys an existing building wall

facing a public street or, during any ten (10) year period, removes, pulls down, tears down, razes, deconstructs or destroys fifty percent (50%) or more of the area of the exterior walls of a building.”

M.G.O. § 28.211 (2019).

M.G.O. 28.185(2) provides that “[n]o building...shall be demolished or removed without a permit from the Building Inspection Division.” The ordinance also provides that any person who “fails to obtain a demolition or removal permit prior to demolition or removal shall...be subject to a forfeiture of not less than one thousand dollars (\$1,000) and not more than two thousand dollars (\$2,000)” with each day “such violation continues” considered a separate offense. M.G.O. § 28.185(12)(b).

In addition to creating a requirement to obtain a permit and penalty for failing to do so, the ordinance also sets out a clear process for obtaining demolition approval. See M.G.O. § 28.185(2)-(5). All demolition applications (subject to three exceptions that do not apply here) require the Plan Commission to hold a public hearing and issue a decision either approving, approving with conditions, or denying the application. See M.G.O. § 185(5)(a)-(b). When making its decision on the application, the Plan Commission must find that the standards listed in M.G.O. § 28.185(7) have been met.

Importantly, none of the demolition standards pertain to whether an applicant started a demolition without a permit. Instead, that consideration is reserved for the penalty section, which is enforced by the Municipal Court.

Analysis

Sometimes, a building renovation results in the removal of 50% or more of the area of the building’s exterior walls. When that happens, the action becomes a “technical demolition” that requires the person or entity to obtain a demolition permit pursuant to M.G.O. § 28.185.

Ideally, a person would recognize that their continued work will result in a technical demolition, stop work, and obtain a demolition permit before exceeding the 50% threshold. Sometimes, however, a person may not know that their continued work has exceeded the 50% threshold. And, certainly, there are cases where a person may intentionally ignore the 50% threshold, hoping to

complete the work before anyone notices that they have technically demolished the building.

The application and approval provisions of the demolition ordinance do not differentiate between any of the three above scenarios. Accordingly, the role of the Plan Commission under any of these scenarios is to apply the standards in M.G.O. § 28.185(7) and act on the application. In my opinion, the Plan Commission may not deny a demolition application for the sole reason that a person engaged in a technical demolition without a permit because there is no standard under which that fact may be considered.

This does not mean that those who technically demolish a building without a permit cannot be penalized. As noted above, M.G.O. § 28.185(12) provides a \$1,000-\$2,000 penalty for “each day the violation continues.” So, a person who recognizes they will exceed the 50% threshold, stops their work, and obtains a demolition permit before exceeding the 50% threshold would not be subject to a penalty. Meanwhile, a person who exceeds the 50% threshold and then, at some point, obtains a demolition permit, would be subject to penalties from the time they exceeded the 50% threshold to the date they receive the permit. These penalties could be substantial depending on how many days the violation continues.

Arguably, the penalty received under this “violation per day” provision could be commensurate with a person’s motivations. For example, a person who recognizes their technical demolition, stops work, and quickly obtains a demolition permit will likely have fewer days of violations than a person who ignores the requirement altogether and completes the work hoping that no one will notice. In any event, assignment of penalties is within the purview of the Municipal Court, not the Plan Commission.

Conclusion

The role of the Plan Commission under the current demolition ordinance is to apply the standards contained in M.G.O. § 28.185(7). Since those standards do not include a standard regarding whether the individual engaged in a technical demolition without a permit, I do not think the Plan Commission can use this as a basis for denying the demolition application.

The ordinance could be amended to include a standard that would require the Plan Commission to take factors such as these into account. However, any such amendment would not apply to the

Adams Street application. Moreover, if such a standard ever resulted in a denial of an application, it could leave the applicant and the city in a potentially untenable situation where an applicant could never achieve compliance with the ordinance (and thus, obtain a permit) and complete work on a building that, in some cases, may be partially demolished. Any such amendment should be carefully considered as it would potentially shift the role of the Plan Commission from ensuring compliance to assessing penalties, a role that has traditionally been reserved for Municipal Court.