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Ad-Hoc Landmarks Ordinance Review Committee
5385LandmarksSUB 6-23-15.pdf
Comments for meeting of June 25, 2015

I am writing to comment on the current draft of Chapter 41, as reflected in Attorney John Strange's draft dated June 2, 2015.

If this draft ordinance actually reflects the direction the City is choosing to take regarding historical preservation, I am concerned about the future of historic preservation in the City. This draft has so many, and so vague, reasons under which the Landmarks Commission MUST grant a variance, that all developers could finagle a variance.

This comment letters address: (1) variances: (2) state enabling legislation: (3) the inconsistent use of "guidelines" and "standards;" (4) the impermissible restriction of the Third Lake Ridge Historic District: (5) individual historic district standards; and, (6) the definition of a historic resource. My review of the proposed ordinance is by no means a comprehensive review. Rather, I am merely highlighting what I see as some of the more egregious provisions.

Variances

The proposed ordinance claims that "it is in the public interest to preserve and maintain landmarks, landmark sites, and improvements in an historic district, and to vigorously enforce the provisions of this and other ordinances" and that "it is in the public interest to identify, protect, promote, conserve and use historic resources within the City."

Yet proposed 41.19 requires the Landmarks Commission to grant a property owner's request for a variance if at least one of four conditions is met. Sec. 41.19(4)(d) is one of those conditions: "In the case of new construction, alteration of an existing historic resource, or demolition or removal of a historic resource, whether a variance is necessary for the public interest."

The last part, whether a variance is necessary for the public interest requires one to go back to the definition section.

> Necessary for the Public Interest means a project that is necessary to allow the construction of a project of special merit. A project is necessary for the public interest only if there are no reasonable alternatives to the project that would satisfy the standards of this ordinance.
>
> Special Merit A building, object, site or structure having significant benefits to the City of Madison or to the community by virtue of exemplary architecture, specific features of

land use planning, or social or other benefits having high priority for community services. A project has special merit only if the benefits to the City of Madison or to the community substantially outweigh the strong public interest in preserving historic resources expressed in this ordinance.

If there are not "reasonable alternatives," the Landmarks Commission can ignore preservation standards and allow new construction, exterior alterations and/or demolition for projects of "special merit." Since no guidance is provided as to the meaning of "reasonable alternatives," I will address "special merit."

"Special merit" is entirely subjective.

- exemplary architecture
- specific features of land use planning
- social or other benefits having high priority for community services

What is "exemplary architecture" and is the Landmarks Commission the appropriate body to make that determination?

What "specific features of land use planning" merit a variance? Is a top story set-back a "specific feature"? If a developer proposes a public walkway though a massive project, would that be a specific feature of land use planning? If a developer wants to put an employment structure on land zoned residential, is that a specific feature of land use planning?

What are "social or other benefits having high priority for community services"? Is this read as (1) social benefits or (2) other benefits having high priority for community services? Or do the social benefits also have to have a high priority for community services? A look at some past applications and other City materials can give a clue to what counts as social benefits. Examples include: creating a retail presence to serve the local residents; promoting social interaction; increased safety due to increased number of people at all hours of the day; and "green" construction. Is an increase in the tax base a social benefit, since such increase could be used, in part, to pay for trash pickup or other community services?

And it is interesting to note that while "social or other benefits" are a reason to grant a variance, i.e. excuse compliance with the ordinance, there is not a corresponding provision that "social or other benefits" can prevent a project that is otherwise in compliance from going forward. As an example of a project where such language may have been useful, one may look to the meeting minutes of the Holy Redeemer School. Chair Levitan is reported as having asked: "if it is found that this is bad for the City at large to do away with the programming currently there is there no place in City government to evaluate that and use that as a basis for not approving this project?" Alder Verveer replied he did not see such opportunity.

Nor would social detriment be a reason to not approve a project otherwise in compliance. For example, increased noise or traffic is not a reason for denial.

Bottom line: as long as a developer was willing to put a bunch of sedum trays on the roof (yes, the Planning Commission counts this as a "green" roof), the public interest in historic preservation would be overridden.

Language regarding variances for economic hardship is equally problematic. If a developer bought a parcel valued at about $285,000 for about $1,000,000, expecting that his development proposal would be approved, would Landmarks Commission's denial constitute an economic hardship? After all, the developer would suffer a substantial loss if the property could not be developed. But, on the other hand, the economic loss was of the developer's own making. Or, if a property owner wanted to sell such property and had an offer contingent upon City approvals, would the property owner be suffering from economic hardship because he could not realize profits 250% over the property's assessed value?

Conflict with State Statutes

> Wis. Stats. 62.23(7) (em) Historic preservation. A city, as an exercise of its zoning and police powers for the purpose of promoting the health, safety and general welfare of the community and of the state, may regulate by ordinance, or if a city contains any property that is listed on the national register of historic places in Wisconsin or the state register of historic places shall, not later than 1995, enact an ordinance to regulate, any place, structure or object with a special character, historic, archaeological or aesthetic interest, or other significant value, for the purpose of preserving the place, structure or object and its significant characteristics. A city may create a landmarks commission to designate historic or archaeological landmarks and establish historic districts. The city may regulate, or if the city contains any property that is listed on the national register of historic places in Wisconsin or the state register of historic places shall regulate, all historic or archaeological landmarks and all property within each historic district to preserve the historic or archaeological landmarks and property within the district and the character of the district.

State statutes require the City to enact an ordinance "for the purpose of preserving the place, structure or object and its significant characteristics." The City is required to "regulate, all historic or archaeological landmarks and all property within each historic district to preserve the historic or archaeological landmarks and property within the district and the character of the district."

It is worth noting the enabling legislation does not discuss the authority of the City to balance various interests, such as the public interest in historic preservation with the alleged public interest in, for example, special features of land use planning.

Necessary for the Public Interest means a project that is necessary to allow the construction of a project of special merit. A project is necessary for the public interest only if there are no reasonable alternatives to the project that would satisfy the standards of this ordinance.

And let us not forget the importance the legislature has attached to the historic preservation and has defined such preservation to be in the public interest.

> Wis. Stats. 44.30
> Public policy. The legislature finds that the historic, architectural, archaeological and cultural heritage of the state is among the most important assets of the state and furthermore that the social, economic and physical development of contemporary society threatens to destroy the remaining vestiges of this heritage. It is therefore declared to be the public policy and in the public interest of this state to engage in a comprehensive program of historic preservation to promote the use and conservation of such property representative of both the rural and urban heritage of the state for education, inspiration, pleasure and enrichment of the citizens of this state.

This language is in the preamble to the duties of the State Historical Society, and other state agencies. However, the public policy defined in this statute is *not* limited to state agencies. Rather, the legislature has defined this public policy and public interest, and the various requirements for state agencies are how those agencies must help promote this overall public interest and public policy. Or as held by the court in *Sills v. Walworth County*, 2002 WI App 111, ¶ 17: "The foregoing language evinces the legislature's intent to include historic preservation as an aspect of the general welfare." Also, see, for example *Wrase v. City of Neenah*, 220 Wis.2d 166 (1998), in which the court applied this broad legislative goal to a property assessment matter.

<u>"Guidelines" or "Standards"?</u>

The draft ordinance offers these definitions:

> <u>Guideline</u> means a principle put forward to help determine a course of action. Under this ordinance, guidelines adopted in an historic district shall serve as a collective set of principles to promote architectural compatibility of new construction and exterior alterations in an historic district
>
> <u>Standard</u> means a rule that is required. Under this ordinance, all standards adopted in an historic district must be complied with in every instance of development in that district.

Proposed 41.23(3) through (8) refer to "standards for new structures ..." and "standards for exterior alterations …" in the Third Lake Ridge Historic District. Yet 41.23(9) states: "The public policy guidelines in this subsection derive from a plan entitled "Third Lake Ridge Historic District," City Planning Department, January, 1978."

Issue: Are these standards or guidelines? Should 41.23(9) be modified to: "The public policy standards in this subsection derive from a plan entitled "Third Lake Ridge Historic District," City Planning Department, January, 1978."

<u>Effect of Restricting the Third Lake Ridge Historic District (and likely also applicable to the Mansion Hill Historic District)</u>

The proposed ordinance defines the district as:

41.23(3) Historic Resources in the Third Lake Ridge Historic District.
(a) Designated Landmarks.
(b) Designated Landmark Sites.
(c) Properties constructed during the period of significance, 1850-1929.

Subsection (c) is new and excludes structures constructed after 1929. For example, 902 Jenifer, an 18 unit apartment building, was constructed sometime after 1929. Currently, it has the "HIS-TL" designation. However, under the new ordinance, it appears that this designation would no longer be applicable to this property. Although that may seem appropriate since this building is not an historic resource, the wording of subsequent sections make this a significant change.

41.23 (3) through (8) set forth the standards applicable to new construction and exterior alterations. "Any new structure [or exterior alteration] on parcels zoned for employment [or mixed-use and commercial or residential] use that are located within 200 feet of other historic resources shall be …"

The words "of other historic resources" implies that the existing structure must be a historic resource in order for the standards to apply. If the existing structure is not a historic resource, the standards do not apply and there are not limitations as to compatibility.

This problem could be solved by changing the language to "…within 200 feet of a historic resource .."

Further, section 41.16(1) only requires a Certificate of Appropriateness if a structure is within a historic district. By specifying that the historic district only includes properties constructed before 1929, this means that properties built after 1929 do not need a Certificate of Appropriateness to make exterior alterations, demolish, make land divisions and combinations, or to erect a sign.

In addition, the Third Lake Ridge Historic District has always been identified by street parameters, not by the age of a building. See, for example:
https://www.cityofmadison.com/planning/landmark/Landmarks%20Guide.pdf
http://www.cityofmadison.com/planning/landmark/Third_Lake_Ridge.pdf

State statutes provide that "[w]hen adopted, amendments become a part of the official map of the city, and are conclusive with respect to the location and width of … historic districts … shown on the map." 62.23(6)(c), Wis. Stats. Wis. Stats. 62.23(7)(em) requires the City to regulate "all property within each historic district to preserve the historic or archaeological landmarks and property within the district and the character of the district." The statutes does not merely require the City to regulate the historic buildings within a historic district.

Standards Applicable to Individual Historic Districts

It appears that existing ordinances are being transferred to the proposed ordinance. It could be a good time to review the standards. It may be useful to have certain standards apply to all districts, such as height and mass. Some standards are listed in one district, but applied to other

districts. (For example, First Settlement standards prohibit skylights visible from the street. Though the Third Lake standards do not explicitly prohibit skylights, that standard has also been applied to the Third Lake district.)

The Third Lake Ridge standards currently require mass and height to be "visually compatible" with the buildings and environment within the visually related area. Yet, this is not what the "Third Lake Ridge Historic District" plan states. That plan has drawings that reflect, for example, the same mass for commercial structures with a caption that states the gross volume shall be compatible with neighboring properties: the plan does not say "visually compatible."

It also may be time to review whether 200 feet is an appropriate "visually related area." As new structures are increasing in height and mass, and can be seen from further away, it may be prudent, in order to retain historic character, that the taller a building, the larger the visually related area.

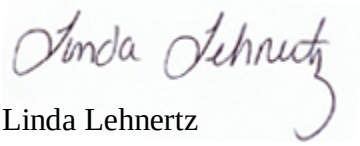
Definition of "Historic Resource"

41.01 defines a historic resource: "buildings, structures, signs, features, improvements, sites, and areas that have significant architectural, archaeological, anthropological, historical, and cultural value (referred hereafter as "historic resources")."

41.02 defines a historic resource: Historic Resource is a landmark, or a property that is designated as a historic resource in an ordinance creating a historic district. "Historic resource" includes the lot on which the historic resource is located."

Although 41.01 includes signs, and could include other items such as the old carriage stepping stones, 41.02 does not appear to include these type of features.

Respectfully Submitted,



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