

DATE: April 10, 2015

TO: Madison Common Council – Landmarks Ordinance Review Committee (LORC)

FROM: Ordinance Committee of the Madison Alliance for Historic Preservation

SUBJECT: **Landmarks Ordinance**

The Madison Alliance for Historic Preservation is encouraged by recent progress toward an effective, workable Landmarks Ordinance. We believe that the ordinance should:

- Be clear and understandable to the average citizen.
- Provide a systematic process for identifying and protecting Madison’s important historic resources.
- Provide a transparent decision-making process that is based on *clearly articulated ordinance standards*.
- Provide *clear, consistent, effective and reliable protection* for those historic resources that the City plans to preserve.

Property owners, neighborhood residents, developers and investors should not be at the mercy of vague standards or changing administrative whims. They should know what to expect, so they can plan and invest with reasonable confidence. Without that confidence, historic preservation cannot succeed.

Madison deserves an effective Landmarks Ordinance, and we believe that a top-notch ordinance is within our reach. The following steps will keep us moving on the right track:

### **1. Clarify the appeal process**

We agree with the position taken by several LORC members at the last meeting: When Landmarks Commission decisions are appealed to the Common Council, the Council should *apply* (not just “consider”) the same ordinance standards that the Landmarks Commission is required to apply. The vague and gratuitous “balancing of interests” language should be deleted because it makes no legal or administrative sense, and will:

- Undermine the credibility of ordinance standards.
- Open the door to favoritism and special treatment.
- Undermine the principles of clarity, consistency, transparency and certainty.
- Undermine the authority of the Landmarks Commission.
- Virtually guarantee an appeal to the Council in every significant case, while leaving the Council without any clear decision-making standard. That is a recipe for an endless series of contentious “train wrecks.”

The Council may still reverse the Commission if it finds that the Commission erred in its interpretation or application of ordinance standards. But the Council should *not act contrary to its own ordinance standards*. If the Council believes that a standard is unworkable, it may modify that standard prospectively by ordinance. But it should not “change the rules in the middle of the game” in individual contested cases.

## 2. Clarify standards for granting “waivers”

The proposed ordinance will, for the first time, give the Landmarks Commission explicit authority to grant administrative “waivers” from historic preservation standards. The Commission will be authorized (or directed) to grant “waivers” for certain reasons stated in the ordinance (including “hardship” or justified alternative design).

We agree that a carefully defined “waiver” or “variance” provision is needed (we prefer the term “variance,” which is the term normally used in historic preservation ordinances). But we worry that overly broad “waivers” could undermine ordinance standards, and destroy the very foundation of the historic preservation program. We applaud LORC’s recent steps to clarify the “hardship” waiver provision. But some potential “loopholes” remain. For example:

1. Could a property owner (who is already making a reasonable investment return) qualify for a “hardship” waiver merely because an ordinance standard prevents a *higher* return?
2. Could a waiver (even for a bona fide “hardship”) authorize a doubling or tripling of a building’s size, beyond what the ordinance standard allows?
3. Must the Landmarks Commission accept, at face value, a property owner’s purported evidence of “hardship?”

We urge LORC to add the following clarifications (commonly found in other ordinances):

1. Clarify that a property owner (who is already making a reasonable return on investment) does not qualify for a “hardship” waiver merely because an ordinance standard prevents a higher return on investment.
2. Clarify that a waiver may not violate the general purpose or intent of the standard to which it pertains, even though it waives the strict literal application of that standard. This limitation should apply to “design” waivers, as well as “hardship” waivers.
3. Clarify that the Commission may:
  - Require supplementary documentation as needed.
  - Adopt evidentiary protocols to assist applicants and ensure adequate documentation for “waiver” findings.

## 3. Clarify the use of standards vs. “guidelines”

The current draft ordinance refers to historic preservation standards and “guidelines.” But the use of “guidelines” will only lead to confusion and uncertainty. Are “guidelines” enforceable or not? Who decides? May “guidelines” be used *in lieu of* enforceable standards? The ordinance should be clear about what is *required* of property owners (as opposed to merely *suggested*), so they can plan and invest accordingly. An ordinance should deal in *standards*, not “guidelines.” We suggest the following:

### *Landmark Standards*

The U.S. Department of Interior’s *Rehabilitation Standards* (see attached *Appendix A*) are clear, concise and workable. We believe that the ordinance should incorporate them as *enforceable standards for landmarks and landmark sites*. The ordinance should incorporate them directly (not just by reference), for the convenience of readers. The Commission may grant limited waivers or variances (see above) if special circumstances warrant.

### *Historic District Standards*

*Historic districts* are more complex, because every district is different, and not every property in a historic district is a landmark. But clarity and certainty are fundamentally important for historic districts, just as for landmarks.

The ordinance should avoid “once-size-fits-all” standards for historic districts, because conditions vary within and between districts. However, the ordinance creating each district should create clear, enforceable standards for *that* district. All references to “guidelines” should be deleted. The Commission may publish supplementary “best practice” suggestions for owners of historic properties, but those suggestions should not substitute for (or be confused with) enforceable district standards.

Under our proposal, the ordinance creating a historic district could include standards related to any of the following:

- Compatibility with nearby historic properties.
- Architectural features.
- Height, scale and gross volume.
- Width and height proportions of publicly visible facades.
- Proportions and relationships between doors and windows in publicly visible facades.
- The rhythm of solids to voids, created by openings in and between publicly visible facades.
- Textures and materials used on publicly visible facades.
- Roof configurations.
- Landscape treatments.
- The amounts, shapes, and patterns of open spaces and setbacks.
- The directional expression of publicly visible facades.
- The demolition, movement or removal of structures.
- Other matters that the Commission and Common Council deem appropriate to protect the character and assets of the historic district, consistent with this general ordinance.

The ordinance should:

- Clarify that district standards (such as building size limitations) may vary within and between historic districts, based on differing local conditions and planning goals. That will allow greater clarity, and more practical and locally relevant specificity.
- Authorize the use of graphics, where appropriate, to portray the standards in an easily understood way.
- Define key technical terms such as “height” and “gross volume,” to avoid unnecessary confusion and conflict (graphics can help).
- Establish a clear process for neighborhood input into proposed district ordinance standards.

#### **4. Add definitions where needed**

The Landmarks Ordinance must be clear and internally consistent, so that readers can readily understand it. Good definitions can help. We think it is especially important to define key technical terms like “height” and “gross volume,” to eliminate unnecessary confusion and conflict (graphics might be useful).

Although judicious use of definitions can improve clarity, poor use of definitions can make the ordinance *more confusing* and *less readable*. Here are some basic questions to consider:

- Is the defined term actually used in the ordinance text? Eliminate definitions of terms that are not actually used.
- How is the defined term actually used in the ordinance text? Make sure that the definition fits consistently, wherever the defined term is used.
- Does the definition add clarity, or not? Eliminate unnecessary definitions.
- Does the definition contain substantive material that more properly belongs in the ordinance text? Move substantive material to the ordinance text, where readers can see it without going “back and forth” to definitions.
- Does the definition duplicate, or conflict with, substantive text material? Eliminate duplication and conflicts. Keep definitions as concise as possible.
- Which terms in the ordinance text require further definition? Add definitions as needed, but *only* as needed.

We understand that LORC has given the city attorney some latitude to add and modify definitions as needed, subject to LORC review. We think that makes sense. It is hard, as a committee, to “wordsmith” technical ordinance definitions and related text.

We have done considerable research and analysis related to definitions. Based on that work, we believe that we can provide useful information and drafting assistance. We welcome the chance to contribute in any way possible. Among other things, we can help identify key terms, provide an analysis of how (and to what extent) those terms are actually used in the ordinance text, and offer wording options based on models from other jurisdictions, AIA and the National Trust for Historic Preservation. Our goal is not to manipulate policy via definitions, but to communicate ordinance standards in a *clear, concise and internally consistent* way.

#### **5. Take a more systematic approach to managing Madison’s historic resources**

We believe that Madison should manage its historic resources in a more systematic way. Historic preservation should be an integral part of the City’s planning, economic development and program operations, not just an *ad hoc* exercise. A more systematic approach will help minimize conflict, reconcile strategic goals, and get the maximum value from the City’s outstanding historic resources.

We are submitting a separate document, entitled “Management of Historic Resources,” which provides a more detailed discussion of this issue. Among other things, the Landmarks Ordinance should direct the City Department of Planning, Community and Economic Development to do the following, with the advice and approval of the Landmarks Commission:

- Conduct periodic surveys to identify and document the City’s historic resources. The department should complete a comprehensive citywide survey at least once every 10 years.
- Develop and recommend historic preservation plans to the Common Council. The department should complete a comprehensive historic preservation plan at least once every 10 years. The plan should include:
  - A detailed analysis of the City’s preservation history.
  - A community conversation about preservation goals and values.
  - A master plan including priorities, strategies, actions, schedules and costs.
  - Policies to integrate preservation planning with overall city management.
  - Plans, programs, and policies that use historic resources to attract visitors, improve property values, and stimulate the economy.
- Promote heritage tourism as part of the City’s economic development strategy.
- Provide information and technical assistance, including information related to available funding for historic preservation.
- Promote public awareness of landmarks and historic districts (including signage for historic districts).
- Facilitate cooperation between City agencies related to historic preservation, and the management of historic resources.

**6. Simplify the ordinance statement of “Policy and Intent”**

We understand that considerable time and effort has already been invested in the statement of “Policy and Intent.” But we fear that this statement, as currently proposed, will confuse rather than clarify ordinance administration. Advocates on one side or the other will cite listed “purposes” to argue for strained interpretations of text provisions that should be clear on their face.

The “Policy” statement can stand on its own, without the subsequent listing of “purposes.” We believe that the list of “purposes” should be deleted, and replaced by the following simple sentence: “The purpose of this ordinance is to carry out this policy in a fair and effective manner.” The ordinance text should speak for itself.

**7. Authorize the City Attorney to redraft the ordinance, subject to LORC policy.**

The Landmarks Ordinance should be clear and understandable, and should be drafted to modern standards. Much drafting work remains to be done. LORC should direct the city attorney to undertake a complete ordinance redraft, to modernize ordinance text and organization consistent with LORC’s policy decisions.

LORC should not try to “wordsmith” the ordinance text, but should authorize the city attorney to develop draft language for later review and approval by LORC. The city attorney should be authorized to add or modify definitions and other material as needed, provided that the changes are consistent with LORC’s policy decisions. LORC naturally retains its authority to review and modify the final product.

Thank you for your consideration. We look forward to continued progress.

Copies to: Natalie Erdman  
Stuart Levitan  
Ledell Zellers  
Amy Scanlon  
John Strange

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### ***Appendix A***

#### ***U.S. Department of Interior - Rehabilitation Standards (for Landmarks and Landmark Sites)***

1. A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
2. The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
3. Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.
4. Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.
5. Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.
6. Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.
7. Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.
8. Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.
9. New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.
10. New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.