

DATE: May 31, 2015

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

FROM: Ordinance Committee of the Madison Alliance for Historic Preservation

SUBJECT: **Landmarks Ordinance – “Special Merit” Variance and Other Concerns**

The Madison Alliance for Historic Preservation has the following comments on LORC’s latest draft of the proposed Landmarks Ordinance:

“Special Merit” Variance Provision

At its April 22 meeting, LORC discussed a preliminary draft of a “special merit” variance provision, prepared by the city attorney’s office at LORC’s request. We understand the concerns that prompted LORC’s request, and we acknowledge the city attorney’s good faith effort to honor the request. However, we *strongly oppose* the draft proposal in its current form. In our view, the draft language creates a gaping “loophole” – not a “safety valve.” In its current form, it would allow sweeping waivers of historic preservation ordinance standards for almost any reason. In that respect, it is no less worrisome than the Common Council “balancing of interests” language that LORC recently (and wisely) rejected.

Problems with the “Special Merit” Variance

The “special merit” provision is NOT a limited “variance” authority. It would, in fact, allow nearly unlimited waivers of normal ordinance standards. As currently drafted, it would allow the Landmarks Commission to waive *any and all standards* for (1) the demolition or alteration of a designated landmark, (2) the demolition or alteration of a “historic resource” or other building in a historic district, or (3) the construction of a new building in a historic district.

There is *no requirement* that the so-called “variance” be consistent with the purpose and intent of the ordinance standards from which the “variance” is granted, or that it preserve the character of the historic district. A “variance” could allow the complete demolition of significant historic resources, and radical departures from building height, gross volume, massing, location, and materials standards (not just architectural details).

The Commission could grant a “special merit” variance merely by finding that (1) the proposed project would offer “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,” and that (2) those “benefits,” in the Commission’s opinion, somehow outweigh established ordinance standards. But nearly every significant building project in Madison claims to offer such benefits! A mere increase in tax revenues, or a “pretty” design proposal, could conceivably doom a designated landmark or historic structure to destruction, contrary to existing ordinance standards.

The very existence of such a provision would undermine public confidence in historic preservation standards, and could fatally weaken the historic preservation program. To our knowledge, only two other U.S. jurisdictions have adopted such provisions; and, in those jurisdictions, the provisions have led to uneven administration, litigation and uncertainty.

Current Variance Authority is More Than Adequate

Even without the “special merit” provision, the current LORC draft *already* gives the Landmarks Commission explicit authority to grant (1) “hardship” variances; (2) “design” variances for building alterations, based on historic documentation; and (3) contemporary “design” variances for new buildings. These variance provisions are already quite broad. For example, the contemporary “design” variance in s. 41.21(4)(c) *already* authorizes the Commission to approve new buildings that do not meet established historic district standards (including, potentially, size and massing standards), provided only that the changes will “enhance the quality of the design,” will meet construction standards *other* than those from which a variance is granted, and will have a “beneficial effect on the historic character of the visually related area.”

We think that this variance authority is ample – indeed, it may be *too* ample¹ – and we see no reason to expand it further. We fear that adding a sweeping “special merit” variance provision could gravely undermine historic preservation standards, and the character of historic districts. Such a sweeping “loophole” would destroy the confidence and credibility on which historic preservation depends, and would put preservation standards “up for grabs” in nearly every case. It would also impose on the Landmarks Commission a responsibility for which it is not ideally suited.

Our Recommendation

For all of these reasons, we urge LORC to reject the proposed “special merit” variance provision. If LORC believes that some alternative “public necessity” variance authority is needed, we urge LORC to include the following safeguards:

- A “public necessity” variance should be available only if there is a *clear, compelling and well-documented public need*. A “public necessity” variance should not be justified on the basis of vague “benefits” like “exemplary architecture, specific features of land use planning, or social or other benefits having high priority for community services.”
- A “public necessity” variance should *not* be granted unless it meets all of the following criteria (the applicant should have the initial burden of documentation):
 - There is a clear, compelling and well-documented public need that justifies the variance, and outweighs a presumption *against* granting the variance. A mere increase in property tax revenues or a “pretty” design proposal does *not* constitute a compelling public need.
 - The public need cannot be adequately addressed by a more limited variance, or by siting the project at an alternative location.

¹ We believe that normal “hardship” and design variances for structures in historic districts should honor the purpose and intent of district standards, and especially basic standards such as height, gross volume and massing, even if they grant relief from the literal application of certain requirements. See the approach recommended by two highly regarded documents: *Regulating New Construction in Historic Districts* (Gorski, National Trust for Historic Preservation, 2009), and *Sense of Place: Design Guidelines for New Construction in Historic Districts* (Preservation Alliance of Greater Philadelphia, 2007).

- The variance cannot be issued under any other variance authority (normal “hardship” or “design” variances).
- The proposed project will not require a change in zoning district classification, or the creation of any new zoning district overlay (such as a PD).
- A “public necessity” variance should be granted only by *an affirmative 2/3 vote of the Common Council, based on an affirmative recommendation and report approved by 2/3 of the members of the Landmarks Commission*. This higher procedural standard is justified by the special nature and potentially broad scope of the variance, and would *not* apply to other kinds of variances (which could still be issued by the Landmarks Commission by majority vote).
- The Commission’s report should include:
 - The terms and conditions of the recommended variance.
 - A finding of compliance with required variance criteria (see above), and a summary of the documentation supporting that finding.
- The Commission’s report should also *disclose* the following (these considerations do not necessarily *preclude* a “public necessity” variance, but may weigh against Council approval):
 - Whether the variance will allow the demolition of any landmark or “designated historic structure” (such as a building constructed during the “period of significance” for a historic district).
 - Whether the proposed project will be compatible with all landmarks and “designated historic structures” (if any) located within 200 feet of the project.
 - Whether, and how, the proposed project will affect the character of the historic district (if any) in which it is located.
 - Whether, and to what extent, the proposed variance will allow a structure to exceed building size, massing or location restrictions that would otherwise apply.
 - Whether the proposed variance is consistent with the general purpose and intent of the standards from whose literal application it grants relief.

Certificates of Appropriateness

We are also very concerned by the current lack of clarity in s. 41.20 related to “certificates of appropriateness.” We believe that the following steps would greatly improve clarity, and prevent a great deal of confusion and controversy.

- Clarify that a landmark may not be *demolished* pursuant to a “certificate of appropriateness” while its landmark designation remains in effect. How can the Landmarks Commission issue a certificate saying that it is “appropriate,” from a historic preservation standpoint, to *demolish* an intact historic landmark that the Common Council has specifically ordered to be preserved? LORC can reconcile this contradiction by modifying the current standards for Common Council rescission of landmarks designations, as necessary.

- Spell out separate standards for “certificates of appropriateness” affecting *landmarks* vs. those affecting *properties in historic districts*. The standards are different, but often confused. Projects affecting a *landmark* in a historic district should meet applicable standards for landmarks *and* for that historic district. *Historic district* standards may vary between districts, and should be spelled out in the ordinance creating each district (this general ordinance may simply cross-reference those district-specific standards).
- Spell out separate standards for *demolition, relocation, alteration* and *new construction* (both for landmarks and historic districts), because the standards may be quite different. Spell out demolition *standards*, not just “considerations” such as now appear in s. 41.20(2). Clarify that replacement structures in historic districts must meet all applicable historic district standards (applicants should specify replacement plans before demolition is authorized).
- Require *landmark* alterations to conform to the U.S. Secretary of Interior’s “Standards for Rehabilitation.” For the convenience of readers, incorporate those standards *in the ordinance* as a cross-referenced appendix.
- Create a definition of “designated historic structures” to include (1) landmarks, (2) non-landmark properties in a historic district that were constructed during the specified “period of significance” for that district, and (3) other properties that are individually identified by ordinance as “designated historic structures” within a historic district (not all properties in historic districts are “designated historic structures” in their own right). That would make it easier to:
 - Clarify compatibility requirements in historic districts, especially for projects that are located within 200 feet of a “designated historic structure.”
 - Set different standards for projects that would demolish or alter “designated historic structures” versus other (less historically important) properties in historic districts.
- Clarify “variance” provisions, so they remain faithful to ordinance intent, and are based on adequate documentation. Clarify whether variances may waive *demolition* standards and procedures, and to what extent.

Other Concerns

We have previously registered other concerns related to the current LORC draft, including:

- *Definitions.* Under separate cover, we will be offering some recommendations related to definitions. We understand that LORC has given the city attorney some latitude to add and clarify definitions, as needed.

- *Simplified Statement of Policy and Intent.* We urge LORC to leave the general “policy” statement intact, but eliminate the related laundry list of detailed “purpose” statements (which will only cause controversy and confusion). In their place, substitute a simple sentence that says: “The purpose of this ordinance is to carry out this policy in a fair and effective manner.” Let the ordinance text speak for itself.
- *Standards for Development in Historic Districts.* The ordinance should avoid “once-size-fits-all” standards for historic districts. It should list the *kinds* of standards that should be considered, but should leave the details to *district-specific* ordinances. Eliminate references to “guidelines” (ordinances should deal in *standards*, not “guidelines”).
- *Identifying and Managing Madison’s Historic Resources.* Madison should identify and manage its valuable 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. We understand that some of these goals can be advanced outside the context of the Landmarks Ordinance, but we have offered ordinance language that would create a more systematic, sensible and internally consistent framework. We don’t believe that this would be a controversial step.
- *Organization and drafting.* Authorize the city attorney to reorganize and redraft the proposed ordinance, consistent with LORC policy. The final draft should be clear, concise and readable. We believe that organizational and drafting improvements would make the ordinance easier to read, understand and administer.

Cc: Alder Ledell Zellers
Stuart Levitan
John Strange

Date: June 22, 2015
To: Landmarks Ordinance Review Committee
From: The Ordinance Committee of the Madison Alliance for Historic Preservation
Subject: Remaining concerns about Chapter 41

We continue to have concerns about Chapter 41, but because we have not seen Assistant City Attorney John Strange's update, we are able to offer detailed recommendations. However, we want to express several remaining concerns based on the June 2nd draft:

1. We have provided John Strange and Amy Scanlon with a list of very specific definitions that we hope will be used in the next iteration of Chapter 41. We believe their addition will add substantial clarity and precision to the new ordinance.

2. Our greatest remaining concern is the special merit provision. We have outlined its serious flaws in our last memo to you dated May 31. I am attaching a copy of that document for your convenience.

3. We have also given careful thought to Section 41.19, Variance, and have concluded that it should be rewritten for the following reasons:

A. Each of the four variance categories should be clearly identified at the beginning of this section. They are very unobvious in today's draft.

B. Each of the four variance categories should have clearly defined standards.

C. Today's draft provides no clear provision for using contemporary architecture for in-fill construction, but should. State-of-the-art ordinances routinely allow this and Madison should too.

D. The special merit concept should be replaced with a public facility variance whose standards are clearly stated.

Attached is a preliminary redraft embodying these improvements that we would urge you to consider.

cc: John Strange
Amy Scanlon
Stuart Levitan
Ordinance Committee Members

Substitute Variance Language (sec. 41.19)

41.19 VARIANCES.

(1) General. A property owner who applies for a certificate of appropriateness under sec. 41.17 may, for purposes of that application, request a variance from one or more standards under s. 41.18. The Landmarks Commission may grant any of the following kinds of variances:

- (a) A documented historic design variance under sub. (5).
- (b) A contemporary design variance under sub. (6).
- (c) A public facility variance under sub. (7).
- (d) A hardship variance under sub. (8).

(2) Scope and terms of variance.

(a) The scope of a variance under sub. (1) shall be reasonably related to the circumstances justifying the variance.

(b) A variance that grants relief from the strict literal application of a standard shall be consistent, to the maximum extent practicable, with the general purpose of the standard.

(c) The Landmarks Commission may grant a variance subject to terms and conditions that it considers appropriate.

(3) Variance request. A property owner shall make a variance request under sub. (1) on a form approved by the Landmarks Commission. The request shall include all of the following:

- (a) The name and address of the property owner.
- (b) The location of the property to which the request pertains.
- (c) The certificate of appropriateness application under s. 41.17 to which the variance request pertains.
- (d) The type of variance requested under sub. (1).
- (e) The specific standard or standards under sec. 41.18 from which the property owner requests a variance.
- (f) The circumstances and supporting evidence that justify the requested variance.

(4) Hearing, decision and appeal. (a) The Landmarks Commission shall hold a public hearing on each variance request under sub. (1). The Commission shall give notice of the hearing as provided in sec. 41.06. The Commission may combine the hearing with a hearing on the proposed certificate of appropriateness to which the variance request pertains, provided that the hearing notice identifies both items.

(b) After it holds a public hearing on a variance request, the Commission shall issue a decision granting or denying the request. The Commission shall briefly explain its decision in writing.

(c) The Commission's decision under par. (b) may be appealed to the Common Council, as provided under sec. 41.20.

(5) Documented historic design variance. The Landmarks Commission may grant a variance allowing, as part of the alteration of an existing structure, elements otherwise prohibited under sec. 41.18 if all of the following apply:

(a) The property owner provides photographic or other evidence to show that other local structures, of similar age and style, incorporated similar elements.

(b) The proposed alteration complies with all other applicable standards under s. 41.18.

(c) The variance does not allow material deviations from historic district standards related to building height, gross volume, massing, location, rhythm, proportion, landscaping, or harmony of exterior building materials, that would undermine the character or purpose of the historic district.

(6) Contemporary design variance. The Landmarks Commission may grant a variance allowing, in a new or altered structure, elements that are otherwise prohibited under s. 41.18 if all of the following apply:

(a) The elements will enhance the quality of the design.

(b) The design complies with all other applicable standards under s. 41.18.

(c) The variance does not allow material deviations from historic district standards related to building height, gross volume, massing, location, rhythm, proportion, landscaping, or harmony of exterior building materials, that would undermine the character or purpose of the historic district.

(d) The variance does not authorize the destruction of significant historical elements that are otherwise intact.

(7) Public facility variance. The Landmarks Commission may grant a variance allowing the construction of a new structure, or the alteration, demolition or removal of an existing structure, which would otherwise be prohibited under s. 41.18 if the Commission finds all of the following by affirmative two-thirds vote of its members:

(a) The variance is necessary to allow for the construction or alteration of a needed public facility because the public interest cannot be adequately addressed by a

more limited variance, or by siting the public facility at an alternative location.

[NOTE: "Public facility" means any of the following:

- (a) A structure owned by a governmental body, public entity, or public utility.*
- (b) A privately-owned structure that is designed to provide unique, high-priority benefits to the general public.]*

(8) Hardship variance. The Landmarks Commission may grant a variance from a standard under s. 41.18 if all of the following apply:

(a) Strict literal application of the standard would deny the property owner a reasonable rate of return on investment, or would impose upon the property owner an unreasonable and unnecessary financial hardship.

(b) The circumstances justifying the variance are unique to the property in question, and were not caused by the owner's failure to maintain the property according to sections 41.14 and 41.15.

(c) The variance does not allow material deviations from historic district standards related to building height, gross volume, massing, location, rhythm, proportion, landscaping, or harmony of exterior building materials, that would undermine the character or purpose of the historic district.

(d) The property owner documents, by clear and convincing evidence submitted for the public record, the circumstances justifying the variance. The Landmarks Commission may publish evidentiary guidelines to assist property owners, and to ensure adequate documentation for variances granted under this subsection. Evidence may include documentation related to any of the following:

1. Property purchase costs.
2. Rental income.
3. Real estate listings, disclosure statements, asking prices and purchase offers.
4. Tax assessments and real estate listings for comparable properties.
5. Improvements made, and improvement costs incurred, during ownership.
6. Routine maintenance costs incurred during ownership.
7. Costs to comply with the standard from which a variance is requested.
8. Other documentation reasonably requested by the Landmarks Commission.