

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

Date: April 17, 2015

**MEMORANDUM**

TO: Landmarks Ordinance Review Committee  
Stuart Levitan, Chairman of the Landmarks Commission  
Amy Scanlon, Preservation Planner

FROM: John W. Strange, Assistant City Attorney

RE: Requested draft changes to balancing test language.

At its April 14, 2015 meeting, the Landmarks Ordinance Review Committee (LORC) voted to remove subsection 41.22(4)(b) relating to the balancing test language in the appeal section. LORC then asked me to draft language for consideration in either section 41.20 (standards) or section 41.21 (variances) that might still give the City an escape valve to approve a project of important public interest, even if that project does not comply with the standards of the Landmarks Ordinance.

The LORC discussion of this request centered around two basic concerns. On the one hand, committee members expressed concern about doing anything that would weaken, or undermine, the standards of the ordinance or the public interest in preserving historic resources. On the other hand, committee members expressed concern about eliminating the possibility of approving a project of great public interest where that project does not satisfy all of the standards of the ordinance.

Thus, the challenge is to provide the City with an escape valve, without creating a loophole that will be abused to undermine the ordinance.

From my review, few preservation ordinances contain a specific escape valve. The most notable ordinance containing such an exception is from Washington D.C. In Washington, D.C., this is known as the special merit exception. Much has been written about the pros and cons of the special merit exception. A number of decisions granting or denying an application for special merit have been litigated. Thus, in considering similar language, Madison has the advantage of seeing what has worked (and not worked) under the D.C. law.

The draft language below borrow, in part, from Washington D.C.'s ordinance. I have expanded on the definitions of what is "necessary in the public interest" and what constitutes "special merit" to try and provide additional safeguards so that, if adopted, these provisions are not abused. As requested, I've included this language in both the standards and variance sections so that LORC can consider which section, if any, is most appropriate for such a provision.

Here is a footnotes guide to the changes:

1. The elimination of 41.22(4)(b) (the balancing test) left 41.22(4)(a) all alone and without a clear standard of review. Thus, I combined 41.22(4)(a) with 41.22(3) and provided a standard for the Council to use when reviewing a LC decision. Under this standard, the Common Council can reverse or modify the LC decision if it finds LC

decision to be contrary to the applicable standards contained in the ordinance.

2. I added a public interest standard to the demolition and removal standards, and a public interest component to the variance provision.
3. I added a definition for “necessary for the public interest” and “special merit”. These definitions are key to the incorporation of the balancing test concept previously contained in the appeal language. These definitions borrow. In part, from definitions in the D.C. ordinance.
4. Key changes and additions are in bold red type face below for ease of reference.

## **SUBCHAPTER F: CERTIFICATE OF APPROPRIATENESS – PROJECTS ON LANDMARKS, LANDMARK SITES AND IN HISTORIC DISTRICTS**

### **41.18 CERTIFICATE OF APPROPRIATENESS REQUIRED.**

A Certificate of Appropriateness, approved by the Landmarks Commission, is required for the following:

- (1) Exterior alteration of a designated landmark or structure within an historic district;
- (2) Construction of new structure on a landmark site or in an historic district;
- (3) Demolition or removal of all or part of a landmark or structure in an historic district;
- (4) Erecting or affixing a sign on a landmark site or in an historic district;
- (5) Alteration of part of a landmark designated as an Additional Preservation Restriction;  
or
- (6) Land divisions and combinations involving a landmark site or in an historic district.

### **41.19 PROCESS.**

- (1) Application. The owner of a property may apply for a Certificate of Appropriateness. An application for a Certificate of Appropriateness shall be filed with the Planning Department, c/o the Preservation Planner. The application shall be considered filed when it is stamped “accepted” by the Preservation Planner. The timelines applicable in subsection (g) below shall not begin until an application is filed. Every application shall include at least the following information unless otherwise indicated by the Preservation Planner:
  - (a) Completed Application document.
  - (b) Narrative Description of the project.
  - (c) Scalable drawing set reduced to 11” x 17” which includes floor plans, elevations and details to convey relevant information.
  - (d) Any other information requested by the Preservation Planner to convey the aspects of the project.
  - (e) Signature of the property owner.
- (2) Public Hearings. The Commission shall hold a Public Hearing and provide Class 2 Notice according to subsection (6) of this ordinance for applications involving the following:
  - (a) Demolition or removal of all or part of a landmark;
  - (b) Demolition or removal of a structure in an historic district;
  - (c) Construction of a new principal structure in an historic district;
  - (d) Construction of an accessory structure with a footprint larger than one

- hundred (100) square feet, not including decks and open porches, in an historic district;
- (e) Land divisions and combinations; and
  - (f) Exterior alteration of a structure in an historic district that increases the footprint of the structure more than one hundred (100) square feet, not including decks and open porches.
- (3) Administrative Approval. The Landmarks Commission may authorize the Preservation Planner, or other designee(s) to approve certain projects, provided that the Commission shall first adopt written policies establishing which projects can be administratively approved, and the process to be followed.
- (4) Issuance of Certificate of Appropriateness. The Landmarks Commission shall approve or deny a Certificate of Appropriateness, based upon the applicable standards in subsection (12) of this ordinance, within sixty (60) days of the filing of an accepted application. Failure to approve a Certificate of Appropriateness within sixty (60) days shall be deemed a denial, effective on the last day of the determination period. The determination period may be extended an additional sixty (60) days by written agreement of the applicant. Upon approval of the Certificate by the Commission, the Preservation Planner or designee shall issue a Certificate of Appropriateness. A Certificate of Appropriateness shall expire two (2) years from the date of issuance unless a building permit is obtained within such period.

#### **41.20 STANDARDS.**

- (1) For Exterior Alteration or Construction. The Landmarks Commission shall approve a Certificate of Appropriateness for exterior alteration or construction only if:
- (a) In the case of exterior alteration to a designated landmark, the proposed work would meet the Secretary of the Interior's Standards for Rehabilitation.
  - (b) In the case of exterior alteration or construction of a structure on a landmark site, the proposed work would meet the Secretary of the Interior's Standards for Rehabilitation.
  - (c) In the case of exterior alteration or construction on any property located in an historic district, the proposed exterior alteration or construction meets the adopted standards and guidelines for that district.
  - (d) In the case of any exterior alteration or construction for which a Certificate of Appropriateness is required, the proposed work will not frustrate the public interest expressed in this ordinance for protecting, promoting, conserving, and using the City's historic resources.
- (2) For Demolition or Removal. In determining whether to approve a Certificate of Appropriateness for any demolition or removal of any landmark or structure within an historic district, the Landmarks Commission shall consider and may give decisive weight to any or all of the following:
- (a) Whether the structure is of such architectural or historic significance that its demolition or removal would be detrimental to the public interest and contrary to the general welfare of the people of the City and the State;
  - (b) Whether the structure, although not itself a landmark structure, contributes to the distinctive architectural or historic character of the historic district as a whole and therefore should be preserved for the benefit of the people of the City and the State;
  - (c) Whether demolition or removal of the subject property would be contrary to

- the purpose and intent of this chapter as set forth in Sec. 33.19 and/or to the objectives of the historic preservation plan for the applicable historic district as duly adopted by the Common Council;
- (d) Whether the structure is of such old and unusual or uncommon design, method of construction, or material that it could not be reproduced or be reproduced only with great difficulty and/or expense;
  - (e) Whether retention of the structure would promote the general welfare of the people of the City and the State by encouraging study of American history, architecture and design or by developing an understanding of American culture and heritage;
  - (f) Whether demolition or removal is necessary for the public interest.**
  - (g) The condition of the property, provided that any deterioration of the property which is self-created or which is the result of demolition by neglect under sub. 10(e) of this ordinance cannot qualify as a basis for the issuance of a Certificate of Appropriateness for demolition or removal;
  - (h) Whether any new structure proposed to be constructed or change in use proposed to be made is compatible with the structures and environment of the historic district in which the subject property is located, or if outside a historic district, compatible with the mass and scale of buildings within two hundred (200) feet of the boundary of the landmark site; and,
  - (i) Prior to approving a Certificate of Appropriateness for demolition, the Landmarks Commission may require the applicant to provide documentation of the structure. Documentation shall be in the form required by the Commission.
- (3) For Signs. The commission shall approve a Certificate of Appropriateness for signs, unless it finds that the size or design of the sign(s) would adversely affect the historic fabric of the structure or the district; that the sign(s) fails to comply with Chapter 31 of the Madison General Ordinances; or that the sign(s) fails to comply with specific Standards or Guidelines for signs adopted in each historic district under this ordinance.
  - (4) For Alterations under Additional Preservation Restriction. The commission shall approve a Certificate of Appropriateness for an alteration under an additional historic preservation restriction unless it finds the alteration would adversely affect a significant architectural feature of the structure.
  - (5) For Land Divisions and Combinations. The commission shall approve a Certificate of Appropriateness for a land divisions, combinations, and subdivision plats of landmarks sites and properties in historic districts, unless it finds that the proposed lot sizes adversely impact the historic character or significance of a landmark, are incompatible with adjacent lot sizes, or fail to maintain the general lot size pattern of the historic district.

#### 41.21 VARIANCE.

- (1) When Allowed. The Landmarks Commission may vary one or more standards for review for a Certificate of Appropriateness under Section (12) above.
- (2) Request for Variance. Upon the filing of an Application for Certificate of Appropriateness under Sec. (11)(b) above, a property owner may also submit a variance request on a separate form approved by the Commission. The form shall accompany the property owner's Application for Certificate of Appropriateness and

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 specific standard or standards under Sec. (12) from which the property owner requests a variance.
  - (d) The conditions and supporting evidence that justify the Variance.
- (3) Hearing. The request for variance shall be heard at the same time as the proposed Certificate of Appropriateness, and shall be separately listed on the notice of hearing and meeting agenda.
- (4) Standards for Variance. The Landmarks Commission shall approve a variance only if one or more of the following conditions is met:
- (a) The strict application of the standards in this ordinance would result in economic hardship upon the owner of the property, provided that the alleged economic hardship was not created by the failure to maintain the property as required by this ordinance. To prove the existence of economic hardship, the applicant shall demonstrate to the commission that: (1) the applicant cannot realize a reasonable return if compliance with the commission's decision is required, provided, however, that the lack of reasonable return is proven by the applicant to be substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the historic district or historic resources within the visually related area of the subject property; and (3) that the requested relief, if granted, will not alter the historic character of the historic district or historic resources within the visually related area of the subject property.
  - (b) In the case of the alteration of an existing building, the proposed design would incorporate elements not permitted by the ordinance but which can be documented by photographs, architectural or archaeological research or other suitable evidence to have been used on other buildings of a similar vintage and style in the Historic District in which the building is located, provided that the project will not destroy significant architectural features on the building.
  - (c) In the case of new construction, the proposed design incorporates elements that are not permitted by the ordinance but which would enhance the quality of the design for the new building or structure, provided that said new building or structure otherwise complies with the criteria for new construction in the Historic District in which the building or structure is proposed to be located and provided further that it would also have a beneficial effect on the historic character of the visually related area.
  - (d) 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.**
- (5) Commission Decision. The Commission shall grant or deny a Variance Request in conjunction with its decision to grant or deny the Certificate of Appropriateness. If the Commission denies a Variance Request, it shall also deny the accompanying request for Certificate of Appropriateness, unless the requesting property owner indicates a desire to proceed with the proposed project in full compliance with the standards and guidelines of this ordinance, and waives any right to appeal.
- (6) Appeal to Common Council. Unless waived under Subsection (13)(e), appeal of the

approval or denial of a Variance request shall be taken as provided in Section (14) of this Ordinance.

#### **41.22 APPEAL.**

- (1) An appeal from the decision of the Landmarks Commission to approve or deny a Certificate of Appropriateness or Variance Request may be taken to the Common Council by the applicant, the Alderperson of the district in which the subject property is located, or by the owners of twenty percent (20%) of the number of parcels of property within two hundred (200) feet of the subject property.
- (2) Such appeal shall be initiated by filing a petition to appeal, which shall include the identity and address of the petitioners, specify the grounds for appeal, and be filed with the City Clerk within ten (10) days of the date the final decision of the Landmarks Commission is made. The City Clerk shall file the petition to appeal with the Common Council. The Council shall hold a public hearing with Class 1 public notice.
- (3) **The Council may, by favorable vote of two-thirds (2/3) of its members, reverse or modify the decision of the Landmarks Commission, with or without conditions, or refer the matter back to the Commission with or without instructions, if it finds that the Commission's decision is contrary to the applicable standards under s. 41.18, 41.19, 41.20, 41.22, or any district-specific standards contained in Subchapter G.**

#### **New definitions:**

**Necessary for the Public Interest:** A project that is necessary to allow the construction of a project of special merit. A project is necessary only if there are no reasonable alternatives to the project that would preserve the historic resource in question.

**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.