

DATE: March 16, 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 appreciates LORC's conscientious effort to craft 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 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. We believe that an effective, workable ordinance is within reach, if LORC takes the following steps:

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

We strongly support Alder Bidar-Sieloff's common sense position on appeals to the Common Council. In individual appeals, the Council should *apply* (not just "consider") the same ordinance standards that the Landmarks Commission is required to apply. The gratuitous "balancing of interests" language should be deleted because it will:

- Undermine the authority of the Commission.
- Destroy the credibility of ordinance standards.
- Open the door to favoritism and special treatment.
- Trample on the principles of clarity, consistency, transparency and certainty.
- Virtually guarantee an appeal to the Council in every case.

The Council may still find that the Commission erred in its interpretation or application of the ordinance standards, or that it erred by granting or failing to grant a "waiver" subject to ordinance standards. But the Council should *not act contrary to its own historic preservation 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 individual cases.

## **2. Provide reasonable criteria for “waivers.”**

The proposed ordinance would, for the first time, give the Landmarks Commission explicit authority to grant administrative “waivers” from historic preservation standards. The Commission would be authorized (or directed) to grant “waivers” for certain reasons. In general, we support the need for an administrative “waiver” provision (although we prefer the term “variance”).

However, we worry that overly broad “waivers” could undermine established historic preservation standards. For example, the proposed ordinance would authorize (or direct) the Commission to grant waivers in “hardship” cases, without defining what is meant by a “hardship.” Could a property owner (who is already making a reasonable investment return) claim a “hardship” merely because ordinance prevents a *higher* return? Or, could a “waiver” authorize a doubling or tripling of building size, over what the ordinance intends?

Historic preservation ordinances in other jurisdictions provide reasonable criteria for the use of “waivers” (they typically use the term “variances”), and we believe that Madison should do the same. We agree that administrative “waivers” are warranted in some cases, but we believe that they should be more carefully circumscribed. We are attaching some examples from other jurisdictions.

## **3. Clarify the use of “guidelines.”**

The proposed ordinance would require standards and “guidelines” for historic districts, but is unclear about the use of “guidelines.” Are “guidelines” enforceable or not? Who decides?

We are not opposed to “guidelines,” *per se*. But we believe the ordinance needs to clarify their intended use. Guidelines should *not* be used *in lieu of* enforceable standards for landmarks or historic districts. However, the Commission could use “guidelines” in other ways. For example, the Commission could:

- Consider published U.S. Department of Interior guidelines when proposing or interpreting ordinance standards, or when considering the details of a “waiver” or “certificate of appropriateness.”
- Incorporate published guidelines by reference in enforceable standards.
- Publish voluntary “best practice” guidelines for maintaining and rehabilitating historic properties.

## **4. Clarify district-specific ordinance elements (including key definitions).**

The ordinance should clarify that the ordinance creating a historic district may include standards related to any of the following (the ordinance should define key technical terms such as “height,” “gross volume,” and “visually related area,” to avoid unnecessary confusion and conflict):

- Compatibility, with historic resources, of new and altered structures located within a designated radius from those historic resources (“visually related area”).
- 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 avoid “one-size-fits-all” standards for historic districts, because every district is different. It should clarify that certain ordinance standards (such as building height) may vary within and between historic districts, to address differing local conditions and planning goals. That will allow greater clarity and practical, locally relevant specificity. Authorize the use of graphics, where appropriate, to portray the standards in an easily understood way. Establish a clear process for neighborhood input into proposed ordinance standards.

**5. Improve historic preservation surveys and planning.**

The proposed ordinance should put greater emphasis on historic preservation surveys and planning. We suggest language along the following lines:

**41. \_\_ HISTORIC PRESERVATION SURVEYS AND PLANNING.**

**(1) Surveys.** The Landmarks Commission shall conduct periodic surveys to identify and document the City’s important historic resources. The Commission shall complete a comprehensive city-wide survey at least once every 10 years, and may conduct other surveys as it deems appropriate

**(2) Plans.** The Landmarks Commission shall develop and recommend the following historic preservation plans to the Common Council:

(a) A comprehensive historic preservation plan, to be completed at least once every 10 years, which shall include:

1. A detailed analysis of the community’s preservation history.
2. A community conversation about preservation goals and values.
3. A master plan including priorities, strategies, actions, schedules and costs.
4. Policies to integrate preservation planning with overall city management.
5. Plans, programs, and policies that use historic resources to attract visitors, improve property values, and stimulate the economy.

(b) Plans for new or revised historic districts as needed.

(c) Plans for further evaluation of historic resources, as needed.

Finally, 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.

Cc: Stuart Levitan, Chair, Landmarks Commission  
Alder Ledell Zellers  
Amy Scanlon, Preservation Planner  
John Strange, Assistant City Attorney

## Why the Madison landmark ordinance requires an economic hardship section

dvm, March 16-,2015

1. "Economic hardship" is one of the most important and essential concepts of a historic preservation ordinance. State-of-the-art and best practices ordinances devote entire sections to this topic. Typically, they describe how property owners can secure COAs for the alteration, relocation, and demolition of a landmark or contributing property in a historic district.
2. The rationale for including an economic hardship section is that there are legitimate instances where a property-owner should be able to secure a COA to alter, move, or demolish a historic resource.
3. Madison's new draft ordinance (Chapter 33, February 26, 2015) contains *two* sections that use the economic hardship *concept*, but both are unnecessarily weak:

### Section 8 (a) Rescission of Landmarks

4. A landmark designation may be rescinded under this subdivision (a) only if the owner demonstrates that he or she is unable to find a buyer willing to preserve such landmark, even though he or she has made reasonable attempts in good faith to find and attract such a buyer. Such attempts must be supported by evidence including but not limited to the following:

- a. Comparable real estate listings showing current market values;
- b. Current real estate listing including disclosure statement;
- c. Dates of real estate agent showings;
- d. Original listing date;
- e. Original listing amount and dates of subsequent changes;
- f. Value of improvements made to the property during ownership;
- g. Current assessed value;
- h. Whether the owner has received a fair and reasonable offer to purchase the structure; and List of routine maintenance and associated costs during ownership.
- i.

(Significantly, the term economic hardship is *not* specifically used, but is inherent in this language.)

### Section 13 Waivers of Standards for Certificate of Appropriateness.

(b) Request for Waiver. Upon the filing of an Application for Certificate of Appropriateness under Sec. (11)(b) above, a property owner may also submit a waiver 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:

1. The name and address of the property owner.
2. The location of the property to which the request a waiver.
3. The specific standard or standards under Sec. (12) from which the property owner requests a waiver.
4. The conditions and supporting evidence that justify the waiver.

4. Section 13 is conspicuously weak and unsatisfactory for the following reasons:

a. Notice how watered down the February 26, 2015 draft of Section 13 is (above) compared to the original draft (June 24, 2014) prepared by the Landmarks Commission (below).

Waiver for Economic Hardship of Income Property. In determining whether to grant a waiver due to undue economic hardship regarding an income property, the commission shall hold a public hearing to consider evidence of:

1. The property's current level of economic return;
  2. The property's marketability;
  3. Options for economically valid alternative uses for the property;
  4. The condition of the property, and the cost for compliance with the standards for review;
  5. Whether the property was subject to neglect or inadequate maintenance;
  6. The availability of economic incentives for full compliance.
- For the purposes of this provision, income property does not include income property that is owner-occupied.

No longer is there even any reference to the time and court-tested concept “economic hardship.” Instead, the ordinance asks owners for the least possible information on which commissioners could not make an informed decision.

b. The ordinance allows the LC to waive ALL standards for granting a COA! This can only be described as a worst practice that should not be allowed. A “waiver” should *only* be issued for very restricted reasons. Nationally, the exception is most commonly made is for economic hardship.

c. The ordinance makes it harder to get a waiver for a landmarks rescission than for an alteration, relocation, or demolition of a contributing building in a historic district. That is not right.

d. The ordinance does not stipulate what types of evidence (13)(b) (4) a property owner must provide to demonstrate economic hardship. This means that the property owner decides what is sufficient.

6. These deficiencies should be remedied by adding a clear and comprehensive economic hardship section. One of the best is New York's new model ordinance (July 2014). I am therefore attaching Sections 19, 20 and 21 from the New York model ordinance. This ordinance would need to be slightly adapted for use in Madison, but the results would be salutary:

- effective historic resource protection
- clarity
- fairness
- consistency
- predictability
- transparency

This is why Madison's ordinance *requires* an economic hardship section!

## **New York model ordinance, Economic Hardship (Sections 19, 20, and 21)**

### **Section 19. Alteration Hardship Process and Criteria.**

(a) An applicant whose certificate of appropriateness for a proposed alteration of a landmark property has been denied may apply for relief on the ground of economic hardship. In order to prove the existence of economic hardship related to a proposed alteration, the applicant shall establish that the denial of a certificate of appropriateness will prevent the property owner from earning a reasonable return on investment, regardless of whether that return represents the most profitable return possible.

(b) As promptly as is practicable after making a preliminary determination of hardship as provided in this local law, the commission, with the aid of such experts as it deems necessary, shall, in consultation with the applicant, endeavor to develop a plan whereby the improvement may be preserved and perpetuated in such manner as to effectuate the purpose of this local law, and also rendered capable of earning a reasonable return.

(c) Consultation; plan development. The applicant shall consult in good faith with the commission, local preservation groups, and other interested parties in a diligent effort to seek an alternative that will result in appropriate preservation of the property. The consulting parties may include interested purchasers, as well as preservation and other interested organizations, public agencies, developers, real estate agents and individuals who may be instrumental in developing an economically feasible solution.

(d) Economic Hardship; criteria. Following the denial of a certificate of appropriateness, the applicant may request a certificate of economic hardship. In all cases other than a proposed demolition, removal or relocation, the applicant shall prove the existence of economic hardship by demonstrating 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 district or neighborhood; (3) that the requested relief, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

(e) The commission, in the granting of a certificate of economic hardship, shall grant the minimum terms deemed necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

(f) Public hearing.

i. The commission may hold a public hearing on the hardship application at which an opportunity will be provided for the applicant and public to present their views on the hardship application.

ii. If no public hearing is held, the commission must render a decision on the hardship application within 62 days following its receipt of a complete application.

1. A complete application includes the conclusion of all activities under (c) initiated to consult with necessary parties to determine

whether the property may be preserved or rehabilitated in a manner that alleviates the hardship that would otherwise result while substantially accomplishing the goals of this local law.

2. A complete application also includes receipt by the commission of all submissions necessary to meet the applicant's burden of proof.

iii. Following the submission of a complete application, the commission may schedule a public hearing within a reasonable time and determine within 62 days following to the close of any public hearing held on the application whether the applicant has met his or her burden of proof.

(g) Commission decision.

i. If the commission finds that the applicant's burden of proof has not been met, the commission shall deny the application for a certificate of economic hardship.

ii. If the commission finds that the applicant's burden of proof has been met, the commission shall issue a preliminary determination of landmarks or economic hardship within 62 days of the close of any public hearing held on the application or within 62 days after the commission has received a complete application.

iii. Within 62 calendar days following the commission's preliminary determination of economic hardship the commission must make a final determination.

iv. A decision of the commission on the hardship application shall be in writing and shall state the reasons for granting or denying it. A copy shall be sent to the applicant by certified mail/return receipt requested or courier service with proof of delivery or personal service with proof of delivery and a copy filed with the Village/Town/City clerk's office for public inspection.

(h) No building permit or other land use approvals shall be issued unless the commission grants the hardship application. If the hardship application is granted, the commission shall approve only such work as is necessary to alleviate the hardship.

## **Section 20. Demolition, Removal, or Relocation of Landmark Buildings.**

(a) Demolition of an individual landmark or of a structure located in and contributing to the significance of a historic district shall be allowed only in case of economic hardship, unless the building department, upon due deliberation has made an express written finding that the structure presents an imminent threat to the public health, safety and welfare.

(b) Any person desiring to demolish a designated historic building shall first file an application for a historic building demolition permit with the building department and an application for such certificate with the commission. An applicant must submit the following items:

i. Current level of economic return;



- ii. Amount paid for the property, date of purchase, party from whom purchased, and relationship between the owner of record, the applicant, and person from whom property was purchased;
- iii. Annual gross and net income from the property for the previous three years; itemized operating and maintenance expenses for the previous three years, and depreciation deduction and annual cash flow before and after debt service, if any, during the same period;
- iv. Remaining balance on the mortgage or other financing secured by the property and annual debt-service, if any, during the prior three years;
- v. Real estate taxes for the previous four years and assessed value of the property according to the two most recent assessed valuations;
- vi. All appraisals obtained within the last two years by the owner or applicant in connection with the purchase, financing, or ownership of the property;
- vii. Form of ownership or operation of the property, whether sole proprietorship, for-profit or not-for-profit corporation, limited partnership, joint venture, or other;
- viii. Any state or federal income tax returns relating to the property for the last two years;
- ix. Any listing of property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents regarding:
  - (a) any real estate broker or firm engaged to sell or lease the property,
  - (b) reasonableness of price or rent sought by the applicant, or
  - (c) any advertisements placed for the sale or rent of the property;
- x. Feasibility of alternative uses for the property that could earn a reasonable economic return;
- xi. Report from a licensed engineer or architect with experience in rehabilitation as to the structural soundness of any buildings on the property and their suitability for rehabilitation;
- xii. Cost estimates for the proposed construction, alteration, demolition, or removal, and an estimate of any additional cost that would be incurred to comply with the requirements for a certificate of appropriateness;
- xiii. Estimated market value of the property: (a) in its current condition; (b) after completion of the proposed alteration or demolition; and (c) after renovation of the existing property for continued use;
- xiv. Expert testimony or opinion on the feasibility of rehabilitation or reuse of the existing structure by an architect, developer, real estate consultant, appraiser, and/or other real estate professional experienced in historic properties and rehabilitation;

xv. Any evidence of self-created hardship through deliberate neglect or inadequate maintenance of the property; and

xvi. Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.

(c) Demolition of any such building may be approved only in connection with approval of a replacement project.

(d) The commission shall hold a public hearing and shall take one of the following actions:

i. Approve the demolition permit in conformance with the provisions of Section 21 of this local law;

ii. Approve the demolition hardship permit subject to a waiting period of up to one hundred twenty days to consider relocation/documentation;

iii. Deny the permit.

(e) During the continuance period, the commission may investigate relocation of the building (on site) or modification of the building for future uses in a way which preserves the architectural and historical integrity of the building.

### **Section 21. Demolition, Removal or Relocation Hardship Criteria**

(a) Certificate of appropriateness for demolition, removal or relocation. An applicant whose certificate of appropriateness for a proposed demolition, removal or relocation of a landmark, resource or property has been denied may apply for relief on the ground of economic hardship. In order to prove the existence of economic hardship sufficient to justify demolition, removal, or relocation, the applicant shall establish that the denial of a certificate of appropriateness will prevent the property owner from earning a reasonable return on investment, regardless of whether that return represents the most profitable return possible.

(b) Certificate of Appropriateness for demolition. The applicant for a certificate of appropriateness for demolition must establish to the commission's satisfaction, an imminent plan of reuse or redevelopment of the affected property. The applicant for an income-producing property shall establish that:

i. the property is incapable of earning a reasonable return, regardless of whether that return represents the most profitable return possible; and,

ii. the property cannot be adapted for any other use, whether by the current owner or by a purchaser, which would result in a reasonable return; and,

iii. efforts to find a purchaser interested in acquiring the property and preserving it have failed.

iv. In deciding upon such application for removal, relocation or demolition, the commission may consider whether the owner has created his own hardship through waste and neglect, thereby permitting the property to fall into a serious state of disrepair.

(c) Before approving the removal, relocation or demolition of an individual landmark or

structure within a historic district, the commission may suspend the application for up to one hundred and eighty (180) days to allow the applicant to consult in good faith with the commission, local preservation groups, and the public in a diligent effort to seek a less intrusive alternative to demolition.