

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

Date: February 7, 2023

**MEMORANDUM**

TO: President Furman & Alder Heck

FROM: Kate Smith, Assistant City Attorney

RE: Common Council vote on landmark designations

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You requested a memorandum to clarify the following to prepare for the Council vote on a potential landmark designation for 1617 Sherman Avenue, Legistar File number [75226](#). 1617 Sherman Avenue is referred to as the Filene House in the application for landmark designation.

**I. Procedure for Landmark Designation**

[MGO Sec. 41.07](#) provides the procedure. First, a person must 'nominate' the site (here Filene House). After the Preservation Planner finds the application complete, it is advanced to the Landmarks Commission for a recommendation. The Landmarks Commission holds a public hearing, reviews the application and take a vote on whether or not to recommend to Common Council to support or oppose the potential landmark designation. This vote is based on the standards set forth in MGO Sec. 41.07(2):

(2) Standards . A site, improvement, or site with improvements may be designated as a landmark if the proposed landmark meets any of the following:

- (a) It is associated with broad patterns of cultural, political, economic or social history of the nation, state or community.
- (b) It is associated with the lives of important persons or with important event(s) in national, state or local history.
- (c) It has important archaeological or anthropological significance.
- (d) It embodies the distinguishing characteristics of an architectural type inherently valuable as representative of a period, style, or method of construction, or of indigenous materials or craftsmanship.
- (e) It is representative of the work of a master builder, designer or architect.

The Landmarks Commission is advisory. Common Council makes the action to designate, or decline to designate, a landmark. "After considering the Landmarks

Commission's report recommendation under sub. (5), and based on the standards under sub. (2), the Common Council shall vote to designate or decline to designate the property as a landmark." MGO Sec. 41.07(6). The standards are what was set forth above. The Council may or may not designate and are not bound by the Landmark Commissions' recommendation.

## **II. Council vote to designate or decline to designate a landmark**

Following the standards in MGO Sec. 41.07(2) is important should the landmark designation fail and that action be appealed. While there is clear procedure outlined in [MGO Sec. 41.08](#) to rescind a landmark designation, MGO Chapter 41 does not address appeal rights (if they exist) for a vote to decline to designate. Therefore, I believe, it would be by writ of certiorari to Circuit Court.

When reviewing a Council decision, the Circuit Court "may reverse or affirm, wholly or partly, or may modify," the decision.<sup>1</sup> However, the Court should reverse the decision only if the Council failed to keep within its jurisdiction; proceeded on an incorrect theory of law; acted in an arbitrary, oppressive or unreasonable manner, representing its will and not its judgment; or rendered its order without reasonable evidentiary support.<sup>2</sup>

Otherwise, the weight and credibility of the evidence are for the board to determine, and the court should not interfere with the findings of fact unless "a reasonable trier of fact could not have reached them from all the evidence before it."<sup>3</sup> The first two prongs of certiorari review, whether the Common Council "kept within its jurisdiction" and "proceeded according to law", are questions of law that courts review independently from the determinations rendered by the municipality.<sup>4</sup> The second two prongs of certiorari review, whether the municipality acted in an "arbitrary, oppressive, or unreasonable" manner, and whether "the evidence was such that the municipality might reasonably have reached the decision it reached", are reviewed under the well-established principles that the Councils' decision is presumed to be correct, and the burden of rebutting that presumption is on the plaintiff.<sup>5</sup> In other words, a reviewing court does not substitute its own discretion for that of the body to which the legislature has granted decision-making authority<sup>6</sup>.

## **III. Council discussion on landmark designation and pending land use application**

As discussed in the [Planning Division Staff Report](#) dated 1/9/2023, there is a pending land use application for the site. The application includes demolition of Filene House.

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1 Wis. Stat. § 62.23(7)(e)(10).

2 See *Snyder v. Waukesha Cty. Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 475, 247N.W.2d 98 (1976).

3 *Hilton ex rel. Pages Homeowners' Assn. v. Dept. Natural Resources*, 2006 WI 84, ¶¶16, 25, 293 Wis. 2d 1, 717 N.W.2d 166.

4 See *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 54, 332 Wis. 2d 3.

5 See *Id.* at ¶ 48; *State ex rel. Ruthenberg v. Annuity and Pension Board of City of Milwaukee*, 89 Wis. 2d 463, 473, 278 Wis. 2d 835 (1979).

6 See *Snyder v. Waukesha Cty. Bd. of Adjustment*, 74 Wis.2d 468, 476, 247 N.W.2d 98 (1976).

Since the application has now been submitted, it is subject to the regulations on the property at the time of application and not subject to the Historic Preservation Ordinance. Active land use applications are not a standard to be considered in MGO Sec. 41.07(2). Land use applications and the consideration of future use are outside the purview of historic preservation. While municipalities are given authority through zoning and police powers<sup>7</sup> to create a landmarks commission to designate historic landmarks, historic preservation is not in the Zoning Code and has its own standards.

Landmark designation does not remove an individual's property rights to the site. For example, if Filene House had already been designated a landmark, the owner could still file a land use application that included a proposed demolition for the site. However, they would be required under [MGO Sec. 41.16](#) to obtain a Certificate of Appropriateness prior to Plan Commission consideration. Regardless, the land use application and its contents is not a standard on which to vote to designate or decline to designate a landmark nomination.

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<sup>7</sup> Wis. Stat. Sec. 62.23(7)(em).