BEFORE THE CITY OF MADISON COMMON COUNCIL

PETITION OF APPEAL OF LANDMARKS COMMISSION DECISION APPROVING A LAND DIVISION AT 113 ELY PL IN UNIVERSITY HEIGHTS (Legistar File # 93071)

This is an appeal under MGO 41.20 of the June 8, 2026 Landmarks Commission's approval of a land division at 113 Ely Pl in the University Heights Historic District. The Landmarks Commission erred as a matter of law in several respects, including its failure to apply the governing legal definition of "lot" in determining whether the Applicant's proposed new lot is compatible in size with adjacent lots, and therefore its decision must be reversed.

The June 8 public hearing on the application for land division included eleven separate written submissions opposing the land division, testimony of six neighbors in opposition to the land division and of the applicant in favor, and an additional 23 people registered in opposition and one registered in support.[1] Although the written submissions and testimony highlighted the devastating impact of developing the proposed new lot - including decimation of the steep hillside that gives the historic district its character, clearcutting essential and scarce green space, and likely flooding of historic neighboring properties[2] - the issue in this appeal is narrow: is the proposed new lot compatible in size with the adjacent lots, as required under MGO 41.18 (4)?

There are only three lots adjacent to the proposed new lot, and they are all substantially larger. In fact, the proposed new lot - 4,001 square feet - is less than half (41%) of the average size – 9,700 square feet - of the adjacent lots. As discussed below, the Landmarks Commission's vote of 4-1 to approve the land division was marked by widespread confusion and ultimately relied on an incorrect legal standard advocated by staff. The Common Council should reverse the Landmark Commission's approval of the land division because the Commission's decision was contrary to law and, without application of the proper legal standard, was also arbitrary and unreasonable. The Common Council enacts ordinances with great deliberation and deserves to have its laws fairly and neutrally applied, not rewritten by an administering agency. The Common Council should reverse the Landmarks Commission's decision and find under MGO 41.20 (4) that a fair and neutral application of MGO 41.18 (4) leads to the conclusion that a lot 41% of the size of adjacent lots is incompatible in size, requiring denial of the land division.

This petition for appeal is submitted by the property owners whose identity and addresses are listed at the end of the petition, which exceeds the standards for appeal under MGO 41.20 (1).

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[1] The materials relevant to the Landmarks Commission proceedings are available on Legistar (file 93071) at https://madison.legistar.com/LegislationDetail.aspx?ID=8008214&GUID=71EDACCF-D97E-4478-96F4-84962B80FCF6&Options=&Search= . Note that "Public Comment 6-5-26 to 6-8-26" contains numerous statements of opposition submitted by different parties. The number of people who registered for or against the application is the number stated by the Landmarks Commission chair during the proceeding. See June 8, 2026 Landmarks Commission hearing video, https://media.cityofmadison.com/mediasite/Showcase/madison-city-channel/Presentation/f9c54a2dda4544869f996e0198a195131d?Mode2=Video , at 1:02:55.

[2] Many photos and a description of the property characteristics are included in "Public Comment 5-18-26" at the Legistar website identified in fn. 1.

Facts

The Applicant submitted his application for approval of land division of 113 Ely Pl to divide the existing property into two lots. These lots are identified as lots 1 and 2 in the Certified Survey Map (CSM) included with the application.[3] The proposed new lot 2, which is in the center of the applicable block in University Heights, is identified in the CSM as 4,001 square feet in size. (Lot 1 in the CSM - the remaining portion of the Applicant's existing lot - is identified in the CSM as 7,347 square feet.) One of the Petitioners here submitted the following map of the applicable block of University Heights.[4] (For ease of reference, this map will be referred to as "petitioners' map.") The map shows by street address all of the properties on the block, the size of each lot according to the city assessor's website, and the date each home was built on that lot:

[3] The application materials, including the CSM, are available under "113 Ely Submittal," at the Legistar website identified in fn. 1.

[4] This map appears as Attachment I in "Public Comment 5-18-26" at the Legistar website identified in fn. 1.

At the June 8 hearing before the Landmarks Commission, the staff presented the Commission members with the following map, which is very similar to the petitioners' map above except that it does not include street addresses, it is rotated approximately 90 degrees clockwise, and there are very minor variations in lot sizes.[5]

Proposed new lot line shown in red with square footage of all parcels on the block

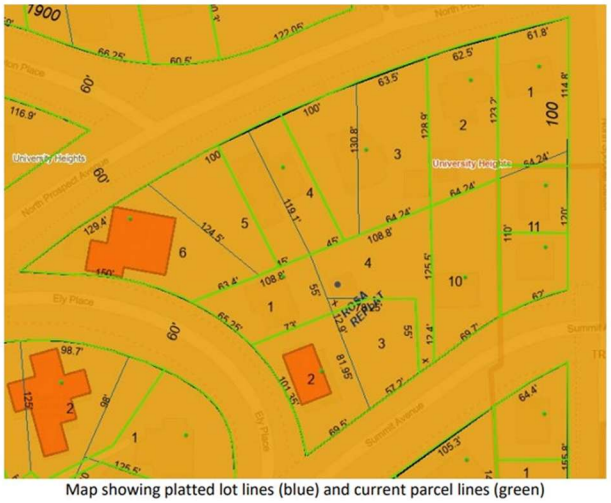
The "4001 SF" in the middle of the map depicts the proposed new lot 2. The green lines and numbers represent the property boundaries and sizes of all lots on the block. This map should have been the basis for the Commission's decision, but it was not.

As discussed further below, the staff convinced the majority of Commission members to rely on the map on the right below,[6] instead of the map above, in making their decision:

[5] The map is a screenshot from "113 Ely Staff Report 6-8-26" at the Legistar website identified in fn. 1. The same map was presented in the Staff Presentation at the hearing. See hearing video website identified in fn. 1., at 1:06:20. The map is oriented north-to-south, while the petitioners' map is oriented with the upper part of the map aligned with the top of hill and the lower part of the map corresponding to the bottom of the hill.

[6] These side-by-side maps are a screenshot from "Staff Presentation 6-8-26"at the Legistar website identified in fn. 1. See also hearing video website identified in fn. 1., at 1:06:30.

Proposed new lot line shown in red with square footage of all parcels on the block


Map showing platted lot lines (blue) and current parcel lines (green)

For ease of reference, the map on the left above will be referred to as "staff's green line map" and the map on the right will be referred to as "staff's plat line map."

Legal Standard and Analysis

The application for land division must be denied if the size of the new proposed lot is "incompatible with adjacent lot sizes." MGO 41.18 (4).

In the 2024 appeal to the Common Council of a land division at 1908 Arlington Pl, a central issue was the meaning of "adjacent" in MGO 41.18 (4). The staff report dated March 14, 2024 advised the Common Council as follows: "While not specifically defined in the zoning code, the City consistently uses "adjacent lot" to mean adjoining. In other words, lots that directly abut one another in a 360 degree view. This method of review and interpretation of adjacency has been used in every land combination/division approval from the Landmarks Commission since that process was implemented in 2015."[7] (Emphasis added.) With input from the city attorney,[8] the Common Council agreed with this interpretation and denied the appeal.[9] In other words, a lot is "adjacent" within the meaning of MGO 41.18 (4) only if it shares a property line with the

[7] See March 14, 2024 staff report to the Common Council in the 1908 Arlington Pl appeal, at p. 3, available on Legistar (2024 File 82175) at https://madison.legistar.com/View.ashx?M=F&ID=12757149&GUID=04F9F8E8-06DE-46C2-80EC-FD18A2817D3F .

[8] See City Attorney Memorandum dated March 19, 2024 in the 1908 Arlington Pl appeal, available on Legistar (2024 File 82175) at https://madison.legistar.com/View.ashx?M=F&ID=12771386&GUID=497D0C74-6500-4106-91FA-47854340698B .

[9] See Legistar (2024 File 82175) at https://madison.legistar.com/LegislationDetail.aspx?ID=6549490&GUID=93BDD8EC-E0A3-4FDF-A4E1-C65249B94D28&Options=&Search= .

proposed new lot. In the 1908 Arlington Pl appeal, the staff emphasized that it can look only at adjacent lots in addressing MGO 41.18 (4)'s requirement of compatible lot sizes.[10]

MGO 41.02 defines the term "lot" for all purposes under MGO ch. 41. The term "lot" is defined as "a tract of land, designated by metes and bounds, land survey, minor land division or plat recorded with the Dane County Register of Deeds." MGO 41.02 (emphasis added). As staff described to the Common Council in the 1908 Arlington Pl appeal: "A 'lot' is a documented subdivision of land with a legal description."[11] That legal description is the description recorded with the Dane County Register of Deeds. For example, the legal description of the Applicant's property at 113 Ely Pl, as stated in the warranty deed recorded with the Dane County Register of Deeds, is:

> the following described real estate in Dane County, State of Wisconsin:
>
> Lots One (1) and Four (4), Rosa Replat of Lots 7, 8, and 9, Block 14, University Heights, in the City of Madison, Dane County, Wisconsin.
>
> That part of Lot Three (3), Rosa Replat of Lots 7, 8, and 9, Block 14, University Heights, in the City of Madison, Dane County, Wisconsin, lying North of the line between Lots 1 and 2 of said Rosa Replat extended in a straight line Easterly until it meets the lot line between Lots 3 and 4 of said Rosa Replat.[12]

The word "lot" in the warranty deed's property description refers to the historic plat sections and should not be confused with the defined term "lot" in MGO 41.02. All of the property described in the warranty deed for 113 Ely Pl (i.e., lots 1 and 4 and part of lot 3) is currently one "lot" as defined in MGO 41.02, with a size corresponding to the entire described area. Like 113 Ely Pl, many properties in University Heights consist of multiple historic plat sections.[13] For example, the property description for the adjacent property at 167 N Prospect Ave is "lot 3 and all of lot 4, exc …." For purposes of MGO ch. 41, a "lot" is defined to mean the property boundaries specified in the property description recorded with the Dane County Register of Deeds, even if that property description also uses the word "lot" to describe multiple historic plat sections comprising the lot.

As shown in both the petitioners' map and staff's green line map above, there are only three lots that are adjacent to (i.e., share a lot line with) the Applicant's proposed new lot 2:

101 Ely Pl:	9,531 sq. ft.
1806 Summit Ave:	7,000 sq. ft.
167 N Prospect Ave:	12,737 sq. ft.

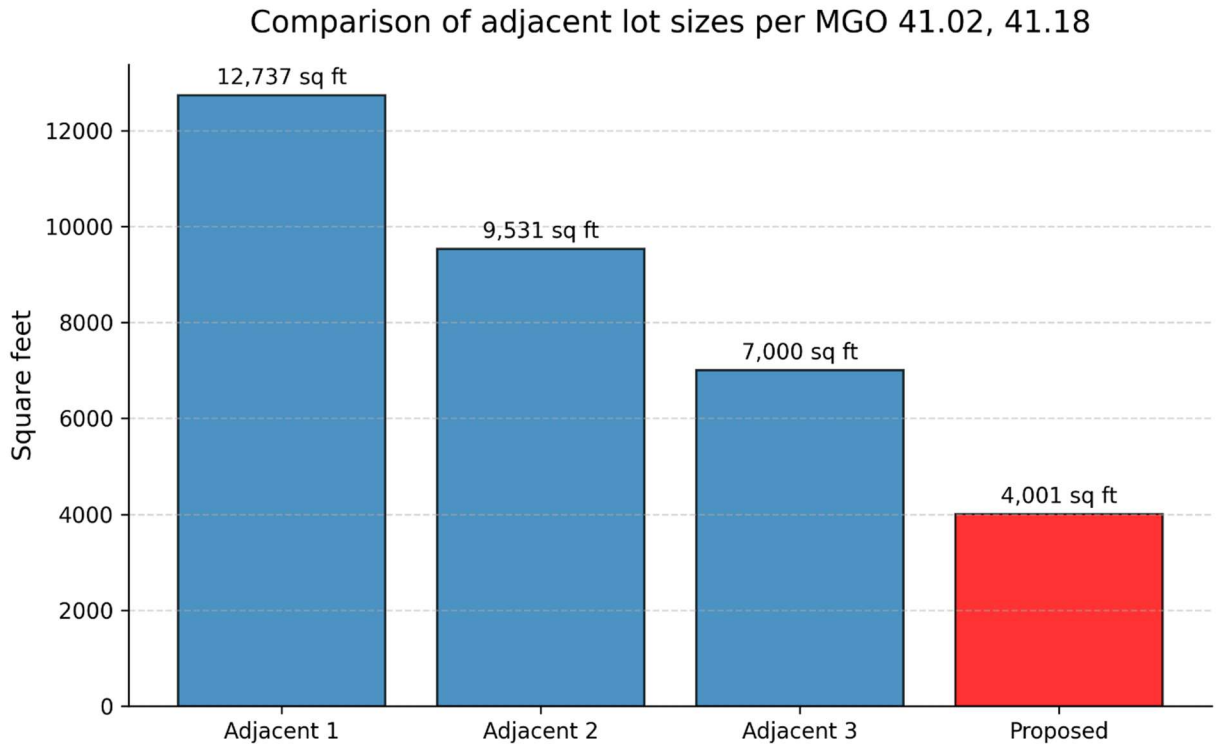
[10] See staff report identified in fn. 6.

[11] See staff report identified in fn. 6, at p. 2.

[12] This description is from the warranty deed recorded with the Dane County Register of Deeds, which can be found at the Legistar website identified in fn. 1, under "Public Comment 6-5-26 to 6-8-26."

[13] A map of historic plat sections for the applicable block of University Heights can be found at the Legistar website identified in fn. 1, as Attachment J under "Public Comment 5-18-26."

These three lots are the only lots that share a lot line. Under MGO 41.18 (4), as staff emphasized in the 1908 Arlington Pl appeal, these adjacent lots are the only lots the Landmarks Commission may consider in determining whether the proposed new lot is compatible with "adjacent lot sizes."



The proposed new lot is substantially smaller than all three adjacent lots. In fact, the average size of the adjacent lots is 9,756 sq. ft. The proposed new lot is only 41 percent of the average size of adjacent lots.

An ordinance is law that must be followed. When the Common Council enacts an ordinance, it must be respected – an administering agency is not free to disregard the ordinance as inconvenient. This is not a close call. The Common Council should find that the proposed new lot size of 4,001 square feet, in comparison with an average adjacent lot size of 9,756 square feet, is not compatible and, under MGO 41.20 (4), deny the application for land division.

The Landmarks Commission Relied on Incorrect Legal Standards

The Landmarks Commission's decision relied on staff guidance that was contrary to law and, without application of a proper legal standard, the decision was arbitrary and unreasonable.

The staff report in this matter failed to apply the correct legal standard. As stated above, in the 1908 Arlington Pl land division, the staff emphasized that it can look only at adjacent lots in addressing MGO 41.18 (4)'s requirement of compatible lot sizes, and the Common Council agreed. But in its staff report in this matter, the staff failed to look at adjacent lots. In its cursory analysis, the staff merely referred to a "mix" of lot sizes "on the block" and referred to a lot size

of 3288 square feet, which is 202 N Spooner St., a lot that is not adjacent to the Applicant's proposed new lot.[14]

The staff presentation at the public hearing, along with Commission members' questioning of staff, was marked by general confusion as to the meaning of the word "lot" in MGO 41.18 (4). During the entire hearing, staff never referred to the definition of "lot" in MGO 41.02. Instead of applying the definition of "lot" under MGO 41.02, staff distinguished between the word "parcel" (giving it the same meaning as "lot" as defined in MGO 41.02) and the word "lot" (defining it as a historic plat section). This resulted in widespread confusion and legal error.[15]

A defined term must be given its definitional meaning. *See State ex rel Kalal v. Circuit Court*, 2004 WI 58, ¶45, 271 Wis. 2d. 633. *See also FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶21, 301 Wis. 2d 321 (the same rules of interpretation apply to ordinances and statutes). The definition of "lot" in MGO 41.02 is controlling even if, in common usage, there could be other meanings for the term. *See Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶¶21-22, 270 Wis. 2d 318. The term "lot," as defined in MGO 41.02, has the same meaning throughout MGO ch. 41. Other uses of the defined term "lot" in MGO ch. 41 also suggest that the term is intended to cover the entire property included in the property description recorded with the Dane County Register of Deeds. For example, MGO 41.03 is titled "General Administrative Provisions" and MGO 41.03 (5) states, "Measuring 200 Feet Around Properties. Certain provisions of this chapter reference properties that are within two hundred (200) feet of a subject property. Under this chapter, measurements around properties shall be taken from the lot lines of the subject property two hundred (200) feet in all directions." (Emphasis added under "lot.") Clearly a "lot line" in this provision is the boundary of the property, not a historic plat section line. Moreover, it is important to consider that historic plat sections are not visible to the public. The purpose of the requirement that a new "lot" be compatible in size with adjacent lots is a visual compatibility requirement, to make sure there is consistency in appearance. It makes no sense to apply the requirement to invisible historic plat sections as opposed to the property boundaries that are generally apparent in a view from the sidewalk due to fences, landscaping, and other indicators of a separation between one's property and a neighbor's property.

At the public hearing, staff claimed that the areas depicted in staff's green line map above are called "parcels" and are merely tax descriptions – that they are not "lots" as the term is used in MGO 41.18 (4). Staff advised that the grand total of "lots" make up a "parcel."[16] Staff directed

[14] See staff report at the Legistar website identified in fn. 1.

[15] The public hearing began with public testimony, followed by the staff presentation and a discussion between Commission members and staff. After the public testimony, members of the public were shut out from the rest of the proceeding. Two members of the public who live adjacent to 113 Ely Pl activated the "raise hand" function on Zoom but were never given an opportunity to speak. After it became clear her raised hand would not be acknowledged, one submitted a written comment during the proceeding correcting an inaccurate statement of historical fact related to the property at issue. I (Aaron Gary) was the other public member with a raised hand. I wanted to point out that there is a definition of "lot" in MGO 41.02, but the public was given no opportunity for input beyond the beginning of the hearing.

[16] See public hearing video, at 1:04:00 to 1:08:00 and 1:17:30, available at the hearing video website identified in fn. 1.

the Commission members' focus away from staff's green line map above (which staff said depicts "parcels" and not "lots") and advised Commission members to rely on staff's plat line map above (which shows by blue lines the historic plat sections that staff claimed to be "lots" but which does not identify the size of either "parcels" or "lots"). This caused great confusion. When asked what to look at to decide if adjacent lots were compatible, staff responded, "For compatible with adjacent, it is a mix of the lot and the parcel."[17] In other words, Commission members were advised to look at both the green lines and the blue lines in staff's plat line map above. Yet, this map does not contain size data and, as a matter of law, only the green lines in the map show a "lot" as the term is defined in MGO 41.02.

In an effort to clear up the confusion, one Commission member asked, in effect, are we comparing lot sizes or parcel sizes and "should we be looking at the map on the right" (i.e., staff's plat line map) and comparing the numbered historic plat sections?[18] The same Commissioner continued, "If we are looking at the righthand map …, do we look at light green lines or the dark green [blue] lines as far as what this is adjacent to?" Staff's response: "The answer to that is yes. You are looking at both."[19] Other Commission members revealed that they were focusing on the numbered historical plat sections – the blue lines that staff indicated showed "lots" rather than "parcels"– in assessing what is an adjacent lot.[20] The problem is that these numbered historical plat sections are not "lots" as the term "lot" is defined in MGO 41.02.

There were other problems at the public hearing as well. At one point, staff reverted to the misapplication of law found in the staff report, relying on lot sizes that are <u>not adjacent</u> as a basis for comparison: "We're looking at what is compatible. This 4,001 square feet …, is it grossly out of scale with the 7,000, 8,000, 12,000. I mean, yah. What we're looking at, though, is we have a mix of sizes. … In this portion where we have a mix of property sizes, this would also be a mix of property sizes. Will either of these[21] be the smallest <u>on the block</u>? They won't. Will they be the largest? They won't. Is it currently the largest? No. So, for the compatibility, we are looking at something comparable. This is coming in as comparable."[22] (Emphasis added.) One Commission member followed this line of reasoning, first referring to a 6,000 square-foot lot that is <u>not adjacent</u> and then stating: "To me, the mere square footage is not at issue here since there are lots within the historic district that are approximately this size."[23] Again, these statements reflect a failure to apply the correct legal standard that requires comparison only of adjacent lots.

This failure to apply the proper legal standards was compounded by staff's repetition to the Commission members that their inquiry was whether the proposed new lot is "grossly out of

[17] See public hearing video, at 1:14:45 and 1:16:40. See also staff meeting report under "LC Report 6-8-26" at the Legistar website identified in fn. 1.
[18] See public hearing video, at 1:25:55.
[19] See public hearing video, at 1:29:20.
[20] See public hearing video, at 1:27:10 and 1:32:25.
[21] Referring to Applicant's proposed new lot 2 and the remainder of the property, Applicant's proposed lot 1.
[22] See public hearing video, at 1:19:00 to 1:20: 10.
[23] See public hearing video, at 1:23:15.

scale."[24] Staff repeated this phrase several times, but this is not the legal standard for compatibility. Instead, the phrase suggests a higher threshold for denial of an application. The Common Council deserves to have its laws applied as written, not rewritten by an administering agency. The Common Council used the term "incompatible" in MGO 41.18 (4), not the phrase "grossly out of scale." The repeated use of the phrase shows legal error in the proceeding.

The motion adopted by the Landmarks Commission was "to approve with staff recommendations,"[25] so clearly the Commission members (with one exception – the dissenter) relied heavily on staff's incorrect legal reasoning. Staff encouraged the Commission members – upon prompting of the city attorney - to make sure they made specific findings of fact,[26] but the Commission failed to do so. The Commission did not identify the adjacent lots and sizes that formed the basis of the Commission's decision. The Commission made only a sweeping general conclusion of law that gave no insight into the Commission's reasoning.[27] This too indicates a decision that was made arbitrarily and as an exercise of will and not judgment.

Conclusion

As discussed above, there were myriad errors in the Landmarks Commission proceeding leading to approval of the land division at 113 Ely Pl in University Heights. The Common Council should reverse the Landmarks Commission's approval that was contrary to law, arbitrary and unreasonable, and an exercise of will not judgment. The Common Council should give effect to the language of the ordinance and deny the application for land division as provided in MGO 41.20 (4) because a lot of 4,000 square feet is incompatible with an average adjacent lot size of 9,700 square feet.

DATED: June 22, 2026

Aaron Gary
167 N Prospect Ave

[24] See public hearing video, at 1:14:55, 1:19:10, and 1:19:35. See also staff meeting report under "LC Report 6-8-26" at the Legistar website identified in fn. 1.
[25] See public hearing video, at 1:33:20.
[26] See public hearing video, at 1:33:30.
[27] See public hearing video, at 1:33:15 to 1:35:00. See also staff meeting report under "LC Report 6-8-26" at the Legistar website identified in fn. 1, as well as meeting minutes available at https://madison.legistar.com/MeetingDetail.aspx?ID=1346264&GUID=CE228429-41FE-4B11-99E5-B325A8AD2EA9&Options=ID|Text|&Search=93071 .

List of Petitioners

This appeal is submitted by the following property owners who reside at the indicated addresses:

167 N Prospect Ave -- Aaron Gary
168 N Prospect Ave -- Hildegard Neujahr
173 N Prospect Ave -- Timothy Smeeding and Marcy Carlson
177 N Prospect Ave -- Lara Collier and Paul Marker
1727 Summit Ave -- Tal Herbson and Rachel Herbsman
1806 Summit Ave -- Heinrich Schnoes
1809 Summit Ave -- Susan Thibeault and David Yang
1815 Summit Ave -- Nicole Hemkes
1819 Summit Ave -- Ronnie Hess and Ron Rosner
101 Ely Pl -- Diane Bless
110 Ely Pl -- Ruby Heffernan and Skip Heffernan
115 Ely Pl -- Cary Forest
120 Ely Pl -- Annette Beyer-Mears
202 N Spooner St -- Chamond Liu and Ruth Kearley
206 N Spooner St -- Raphael Kadushin and Thomas McGhee
207 N Spooner St – Bonnie and Willis Tompkins
209 N Spooner St – Jonathan Knisley and Suzelle Knisley

Submitted June 22, 2026, via email and hand-delivery