

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

Date: April 3, 2014

MEMORANDUM

TO: Alder Ledell Zellers

FROM: John W. Strange, Assistant City Attorney

RE: 121, 123, and 127 West Gilman Street, Legistar 33472, 33275

You asked me the following questions regarding the proposed project at 121, 123, and 127 West Gilman Street and asked that my answers be placed in a formal written opinion. This Memorandum answers those questions.

Question.1

Ordinance 33.19(10)(g) says “The public policy guidelines in this section derive from a plan entitled “The Mansion Hill Historic Preservation Plan and Development Handbook”, City Planning Department, 1975.”

- a. Does this reference to the 1975 plan give the content of that plan the weight of ordinance?
- b. Some of the content of “The Mansion Hill Historic Preservation Plan and Development Handbook” is reproduced word for word in the ordinance. In the plan there are illustrations showing the intent of the words. What standing would these illustrations have in interpreting how the words of the ordinance should be applied?
- c. There is reference in “The Mansion Hill Historic Preservation Plan and Development Handbook” to a “Core” and “Buffer” area. This concept is not included in the ordinance, unlike the visually related area concept which is included verbatim. What legal weight do the portions of the handbook subsequently included in the ordinance carry versus those not included?

Answer.1

- a. No. The Landmarks Ordinance does not specifically adopt the plan or incorporate it by reference. Therefore, the content of the plan does not carry the weight of an ordinance.
- b. If the language of the ordinance is ambiguous, the plan (including

illustrations) could be used to help interpret the meaning of the ordinance. The same would be true of any other relevant legislative history of the ordinance.

- c. Any part of the plan that has been reproduced as part of the ordinance carries the weight of law; any part of the plan that has not been included in the ordinance does not. It can, as noted, be used to interpret ambiguous language in the ordinance.

Question.2

In Sec. 33.19(5)(f), MGO, what does the “and/or” mean? Must the failure to grant a COA both preclude all reasonable use of the property AND cause a non-self-created serious hardship? Alternatively must the failure to grant a COA preclude all reasonable use of the property OR cause a non-self-created serious hardship?

Answer.2

The and/or is there to provide alternatives. As such, what it really means is a or b, or both So, I think the Council must decide whether the failure to grant the COA would preclude all reasonable use of the property, or cause serious hardship for the owner. Put another way, the Council could vote to reverse or modify the Landmarks Commission decision if the Council finds either of those conditions present.

Question.3

There are several clauses in 33.19(5)(f), second paragraph, third sentence (which is the portion of the subsection which describes the basis on which the Council should make its decision). Is there an order in which each determination should be made to make the best/most legal decision?

Answer.3

I do not think there is an order of determination that would make Council’s decision the “best or most legal.” The Council’s decision will be legally defensible if it considers the factors set out in the ordinance, and ultimately makes the finding required by the ordinance based on those factors. The ordinance reads that the Landmark Commission’s decision may be reversed or modified “if...the Council finds that, owing to special conditions pertaining to the specific piece of property, failure to grant the Certificate of Appropriateness will preclude any and all reasonable use of the property and/or will cause serious hardship for the owner...” This is the ultimate finding that the Council must make.

The rest of the clauses in this section represent what the Council must consider in making its finding. Thus, Council will have to consider “the standards contained in the ordinance”; balance “the interest of the public in preserving the subject property and the interest of the owner in using it for his or her own purposes”; decide what constitutes any and all “reasonable use of the property”; and determine whether “undue hardship” exists and, if so, whether it was “self-created”. Legally, the order and degree to which Council considers these factors is not important. The important thing is that its finding be based

on these factors.

The actual order and degree to which Council considers these factors might be influenced by information provided and arguments made by the applicant or by others providing testimony, or information provided by City staff. In any event, the key is that in order to reverse or modify the Landmarks Commission, the Council must make the finding outline above, and base its finding on the factors listed above.

We are providing a copy of the memorandum to relevant City staff. Please let us know if we should also provide a copy to the attorneys representing the applicant and opponents of the proposed development, and whether you desire to have it distributed to other alders and the Mayor.

CC: Steve Cover
Katherine Cornwell
Amy Scanlon
Michael P. May