

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

Date: July 21, 2015

MEMORANDUM

TO: City of Madison Common Council

FROM: John W. Strange, Assistant City Attorney

RE: Drafter's analysis for substitute ordinance creating Chapter 41, Historic Preservation, and repealing and recreating Sec. 33.19, Landmarks Commission. (Legistar #34577)

In 1971, the City of Madison passed the landmarks ordinance, which created the Landmarks Commission and set out the policies and procedures to designate landmarks and create historic districts. The City currently has 182 designated landmarks and landmark sites. The City also has five historic districts: Mansion Hill (created in 1976), Third Lake Ridge (created in 1979), University Heights (created in 1985), Marquette Bungalows (created in 1993) and First Settlement (created in 2002).

Over the years, the Common Council amended certain provisions of the landmarks ordinance, but never considered a comprehensive revision. Approximately four years ago, the Landmarks Commission started work on a comprehensive revision. In May 2014, the Commission forwarded its draft of the ordinance to the Landmarks Ordinance Review Committee (LORC), an ad hoc committee consisting of 5 Alders (Shiva Bidar-Sielaff, Mark Clear, Steve King, Marsha Rummel, and Chris Schmidt) created by the Common Council for the sole purpose of reviewing and further revising the Commission's draft ordinance.

The work of the LORC is happening in two stages. The ordinance before the Council tonight represents Phase I of the revision process and primarily affects proposed subchapters A-F. Phase II will address each of the historic district ordinances contained in subchapter G. The transition rule explaining both phases can be found in Sec. 41.03(6) of the proposed ordinance.

Led by Alder Schmidt as chair, the LORC met 20 times between May 2014 and July 2015 to address revisions pertaining to Phase I. At each meeting, members of the public, organized groups representing the preservation and development communities, interested Alders, members of the Commission and others provided insight to the LORC and city staff. The ordinance before the Council tonight represents the culmination of the work of the Landmarks Commission and LORC to completely revise the landmarks ordinance.

The proposed ordinance contains massive structural, grammatical and organizational revisions. It would be difficult to highlight each of those changes. Thus, the purpose of this memorandum is to walk the Common Council through each new

subchapter and section of the Historic Preservation ordinance, explaining and highlighting key textual and policy changes along the way.

I. Organization

The current ordinance is contained entirely in Sec. 33.19 of the Madison general ordinances. The LORC recommended splitting the ordinance. LORC moved the substantive provisions of the ordinance into a stand-alone Chapter 41, Historic Preservation. LORC left the authority for creating and empowering the Landmarks Commission in Sec. 33.19. The purpose of this change is to give the Historic Preservation ordinance its own chapter so that affected property owners can easily find and access regulations that are pertinent to their property.

To further ease access to the ordinance, LORC broke Chapter 41 into subchapters that will be accompanied by a table of contents. Furthermore, within each section, the Commission and LORC made extensive structural and grammatical edits in an attempt to more clearly state the regulations and processes that apply in each case. The goal of these revisions is to provide, for example, a person who owns a landmark or building in a historic district, or is considering purchasing such a building, easy access to and understanding of the regulations that might pertain to the property in question.

II. Specific Sections

a. Policy and Purpose (Sec. 41.01)

While the proposed ordinance contains many of the same basic policies contained in Sec. 33.19, LORC revised this section to emphasize three key policy points.

First, that preservation and maintenance of the City's historic resources is of great public interest and importance, not just to the City's citizens, but to its economy and visitors.

Second, that the City should vigorously enforce the historic preservation ordinance in order to further that public interest.

Finally, that the intent of the historic preservation ordinance is not to prevent new construction in the City's historic districts, but to ensure that when new construction happens it complies with the standards of the ordinance and compliments the city's historic resources.

Throughout LORC's deliberations, these key policy points served as the basis for many of the changes it recommended.

b. Definitions (Sec. 41.02)

The current ordinance contains 12 definitions. The proposed ordinance contains 38. LORC added definitions for the purpose of providing clarity and certainty to the ordinance, especially for words or phrases that led to confusion in the past. Additionally, where the ordinance introduces new concepts, new words and phrases have been added and defined.

Examples of new or revised definitions added to the proposed ordinance include:

- Building
- Bulk
- Demolition by Neglect
- Guideline
- Gross Volume
- Height
- Historic Resource
- Improvement
- Landmark site
- Landscape
- Owner
- Preservation
- Site
- Standard
- Structure

c. *General Administrative Provisions (Sec. 41.03)*

The proposed ordinance groups important administrative provisions that apply throughout the ordinance.

One particularly important general administrative provision added to the proposed ordinance explains how to measure 200 feet around the boundaries of properties. In the current ordinance, measuring around properties is described through the definitions for “visually related area.” At times, that concept was confusing and difficult to administer. For example, VRA actually has two separate definitions, depending on where the measurement is being taken (e.g., from a corner lot, or non-corner lot).

The proposed ordinance removes VRA from the entire ordinance. Instead, it incorporates the 200 foot requirement into the text of each section where it is relevant. Examples of how this was done can be found in Sec. 44.11 and throughout the historic district specific ordinances (e.g., Mansion Hill, Sec. 44.22). Sec. 41.03 then provides a single clear method for measuring around the boundaries of a property, no matter what type of property is being considered.

d. Landmarks Commission (Subchapter B)

Secs. 41.04, 41.05 and 41.06 provide for the basic structure and operation of the Landmarks Commission. These sections provide information regarding the duties of the commission (as a supplement to what will remain in Sec. 33.19) and the preservation planner. This subchapter also provides a section pertaining to public hearings and hearing notices that is referred to throughout the ordinance whenever a hearing is required.

e. Landmarks (Subchapter C)

Secs. 41.07 and 41.08 outline the process for the Common Council to designate landmarks and rescind landmark designations. Sec. 41.09 clearly sets out when a certificate of appropriateness is required for a project on a designated landmark. LORC revised each of these sections to more clearly state the process and requirement for each action with the hope of making it easier for property owners to understand what regulations pertained to their property.

f. Historic Districts (Subchapter D)

Like Secs. 41.07 and 41.08 do for landmarks, Secs. 41.10, 41.11, and 41.12 outline the process and regulations that apply to structures in historic districts. The most significant change to this subchapter occurred in Sec. 41.11.

By way of background, under both the current ordinance and proposed Sec. 41.11, any time the Common Council designates a historic district it must also adopt a historic district ordinance implementing that designation. These historic ordinances are found in subchapter G.

Sec. 41.11 provides guidance for what historic district ordinances must contain, including a list of possible standards or guidelines the Commission should consider when creating each ordinance. This list is neither mandatory nor exclusive. LORC recognized that just as each historic district is different, district-specific standards might also be different.

The proposed ordinance makes key changes to the visual compatibility standard contained in Sec. 42.11(2)(a). LORC recognized that a shortcoming of the current ordinance is that it suggests using gross volume (an objective measure) and height (also an objective measure) within the context of visual compatibility (a subjective measure). LORC believed this, and the lack of definitions for both gross volume and height, were a possible source of confusion surrounding the standard.

Thus, LORC decided to remove gross volume and height from the visual compatibility standard. Instead of removing them from the ordinance altogether, LORC defined both terms using strict mathematical definitions and created a separate standard (found in Sec. 41.11(2)(g)) that allows those and other similar objective measurements to be compared to the same objective measurements of neighboring buildings. LORC believes this will allow a more apples to apples comparison (comparing two objective measurements) than did the previous standard. In doing so, however, LORC signaled that the Commission should not apply a strict cubic foot to cubic foot comparison when reviewing a proposed project. In other words, a building that is, for example, 10 cubic feet larger than its neighbors should not automatically be rejected just because it is mathematically larger. Instead, the Commission must make the decision whether the measurements being compared are sensitive to one another. This provides another tool for the Commission to exercise its judgment, discretion and expertise to determine whether a proposed building compliments its surroundings.

g. Maintaining landmarks, landmark sites, and structures in historic districts (Subchapter E)

The current ordinance includes maintenance obligations for landmarks and structures in historic districts. However, the provisions are not very clear and do not spell out the consequences for failing to maintain a historic resource. Moreover, penalties resulting from failing to maintain a historic resource have been described as weak and ineffective.

Subchapter E creates a clear and affirmative obligation on property owners to maintain the city's historic resources. It also defines and prohibits demolition by neglect and provides enhanced penalties for those who violate the ordinance.

One significant addition to this part of ordinance is the introduction of the concept of demolition by neglect. Sec. 41.02 defines demolition by neglect as the process whereby a property owner lets a property fall into such disrepair that it requires demolition. Sec. 41.15 prohibits demolition by neglect, sets out a formal process for determining when demolition by neglect is occurring and provides remedies when a demolition by neglect finding is made, including the possibility of increased fines in municipal court, summary abatement and condemnation.

LORC believes these more clearly defined and enhanced penalties, coupled with its intention found in Sec. 41.13 that they be vigorously enforced, provide the city with greater means to address decaying historic resources.

h. Certificates of Appropriateness (Subchapter F)

Certificates of Appropriateness (“COAs”) are the official form issued by the Landmarks Commission to allow work on a landmark or building in a historic district may occur. Subchapter F describes when COAs are required and outlines the process and standards for obtaining them. The proposed ordinance does not measurably change the types of projects that require a certificate of appropriateness. Nor does it measurably change the standards used by the Commission in evaluating requests for COAs. Under the proposed ordinance, the only new action requiring a COA is the installation of signs.

The most significant change in this section relates to the availability of variances. Under the proposed ordinance, property owners may apply for variances on the basis of economic hardship, historic design, alternative design, and projects which are necessary in the public interest. Of these, variances based on economic hardship and projects that are necessary in the public interest are new to the Landmarks Commission and Common Council.

The economic hardship variance is found in Secs. 41.19(1)(a) and (4). This variance may apply if the strict application of the ordinance would result in an economic hardship on the owner, provided that the hardship was not caused by the owner’s failure to maintain their property. Furthermore, this section outlines what an owner must show in order to establish economic hardship.

The public interest variance is found on Secs. 41.19(1)(d) and (7). After extensive discussion, the LORC decided it wanted to consider for a variance that could allow for projects providing unique benefits to the public. LORC discussion centered around two basic concerns. On the one hand, committee members expressed concern about doing anything that would weaken or undermine 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 and value where that project does not satisfy all of the standards of the ordinance. Thus, the challenge was to provide the City with a relief valve for projects providing unique, high priority benefits to the public without creating a loophole that could be abused to undermine the ordinance. Moreover, LORC did not want this to be something only the Common Council could consider. Instead, they wanted it to be a variance that the Landmarks Commission could also consider.

Sec. 41.19(7) thus provides that the Commission or Common Council may grant a variance for projects with unique, high priority benefits to receive a variance as long as (1) the public benefits substantially outweigh the public interest expressed in the ordinance for preserving historic

resources, and (2) there were no reasonable alternatives to constructing the project in the city that did not require a variance from the ordinance.

In reviewing public interest variances in other preservation ordinances around the country, Madison's, if adopted, would be the only such provision containing the additional safeguards listed above. Furthermore, by including this in the variance section, and not a separate component of the appeal, the LORC ensured that the Commission and Council would always be considering the same standards.

i. Appeal (Sec. 41.20)

The appeal language in the current ordinance, contained in Sec. 33.19(5)(f), has long been considered confusing. Moreover, as pointed out above, its language contains several words and phrases that do not appear in the standards considered by the Landmarks Commission, such as the interest of the public, special conditions pertaining to the property, reasonable use of the property and self-created hardship.

LORC sought to simplify the appeal standard by first, as described above, ensuring that the Commission and Council were considering the same standards. With that as a basis, LORC then greatly simplified the appeal language to simply state that the Common Council may reverse or modify the Landmarks Commission decision if it finds the Commission's decision contrary to the applicable standards. The proposed appeal language maintains the 2/3 favorable vote standard.

j. Designated Historic Districts (Subchapter G)

As pointed out above, subchapter G addresses each specific historic district ordinance. This ordinance does not substantively change the historic district standards. It does, however, add sections to each Historic District identifying historic resources and incorporates the 200 foot visually related area concept into the text of the standards, as well as makes other technical edits to make sure internal references remained consistent. A comprehensive revision of each historic district ordinance will take place during Phase II of LORC's work.

III. Sec. 33.19, Landmarks Commission

As pointed out above, Sec. 33.19, now only includes the authority to create and empower the Landmarks Commission. The only significant substantive change to this provision is to slightly alter the composition of the Landmarks Commission by requiring that, of the three citizen members, at least one must have expertise in construction. LORC felt that this requirement was important to make sure the Commission included members who can further assist the Commission in grappling with complicated construction related issues.