

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

MEMORANDUM

TO: Landmarks Commission

FROM: John W. Strange, Assistant City Attorney

RE: Legistar File 55514

Date: June 27, 2019

The Landmarks Commission referred a question to the Office of the City Attorney regarding the “East End” project that is associated with the above Legistar file number. I understand the question to be whether the Landmarks Condition can condition the approval of a Certificate of Appropriateness (“COA”) for a land combination with the approval of a COA for new construction. I do not believe that they can.

M.G.O. § 41.12(5) states that no person may construct a new structure, materially alter the exterior of an existing structure, demolish or relocate an existing structure, install a sign, or divide or consolidate any lot without a certificate of appropriateness.

M.G.O. § 41.17 sets out the procedure for obtaining a COA. Under that procedure, the Landmarks Commission “shall, based on the standards in Sec. 41.18, *approve or deny* the application for certificate of appropriateness.” See M.G.O. § 41.17(5)(emphasis added).

M.G.O. § 41.18(4) then sets out the standards the Landmarks Commission must find have been met before granting a COA. For land combinations and divisions, the standard states that the Landmarks Commission:

“shall *approve* a certificate of appropriateness for land divisions, combinations, and subdivision plats of landmark sites and properties in historic districts, unless it finds that the proposed lot sizes adversely impact the historic character or significance of a landmark, are incompatible with adjacent lot sizes, or fail to maintain the general lot size pattern of the historic district.”

M.G.O. § 41.18(4)(emphasis added).

I do not believe the Landmarks Commission can condition the grant of a COA for a land combination with a COA for new construction because the list of items subject to COA approval is disjunctive. Thus, each stands on its own, requiring separate approval. Accordingly, I believe the Landmarks Commission must approve or deny each COA independently and according to the standards

set out in each. I do not think they can attach a condition linking any two together.

I have reviewed the excellent Staff Report that suggested a possible alternative for placing a condition based on a reading of M.G.O. § 41.12(5). I do not think it is consistent with the rest of the ordinance, which, in my opinion, requires independent findings for each COA. Moreover, I find the language in M.G.O. § 41.12(5) – “if doing so may distract from the historic character of the district” – to not be a standard. None of the other items subject to COA have similar language. M.G.O. § 41.12 was meant to simply list the items subject to COA approval, not provide additional standards or limitations for doing so. Those considerations are found in the section on standards.

Finally, in my opinion, this interpretation is consistent with the purpose of adding land combinations and divisions to the list of items subject to COA approval, which was to prevent the creation of disproportionately large lots that might contain similarly large (and potentially out of character) buildings. While I think a large lot could certainly contain a building that is not out of character, the trouble I see with conditioning the approval of a land combination COA on the approval of a new construction COA is that there is no guarantee that the approved structure will ultimately be built. If that happened, the land will have already been divided or combined, perhaps to the ultimate detriment of the district in a way that is contrary to the purpose of the Landmarks Ordinance.