

Ad Hoc Landmarks Ordinance Review Committee
Legistar 56918, Draft Historic Preservation Ordinance
September 18, 2019

Use of "prohibited"

The draft ordinance uses "prohibited" almost 60 times, plus there are uses of "shall not" that have the same effect as "prohibited" (e.g., doors shall not have a textured fake wood grain).

Does the use of "prohibited" in the draft ordinance mean that only the express prohibitions are prohibited? (Statutory interpretation principles could be used to make such an argument.) For example, under new structures pebble dash is a prohibited finish for exterior walls. Does that mean that a horizontal lace stucco finish can be used on exterior walls? Or, as another example, since certain features are expressly prohibited for new structures (e.g., balconies are generally prohibited) does that mean the Landmarks Commission must approve other features (e.g., colonnades)?

This Committee may wish to seek a legal opinion as to whether using "prohibited" and using it so many times, creates a presumption that other things are not prohibited.

Maintenance

Staff has said that the general maintenance standards are not high enough for historic districts and that maintenance needs to be addressed in the historic ordinance. Yet, on many matters, the draft historic ordinance mimics the minimum housing code (e.g., maintaining drainage away from the building).

At the 8/29/2019 LORC meeting, staff said that maintenance would continue to be complaint driven, that there are not resources to increase compliance.

I do not understand how to reconcile higher standards with a complaint driven enforcement system. If someone complains to Building Inspection, BI will apply its usual standards because the proposed ordinance uses comparable language. Except for a few unique concerns (the treatment of brick regarding cleaning and painting), the proposed maintenance language does not add standards. So why include non-unique items in the ordinance?

Policy Decisions

A consultant was hired for \$70,000 to develop a draft ordinance. The consultant took the Secretary of the Interior's Guidelines and made some modifications and created a draft ordinance. Further modifications have been made, and the 23-page ordinance continues to be filled with detail.

But what has not been decided are the major policy issues. These issues should not be an afterthought – if they are decided, it might be easier to work out the ordinance details.

Those issues, in my opinion, include:

1. What is wrong with the current ordinance?
 - Without a clear understanding as to the goals to be met by the rewrite, it is hard to determine the direction of the rewrite.
 - Some of the earlier districts lack the detail of later districts.
 - Some projects such as Edgewater and Steve Brown Apartments have been used as proof that the system is not working. The other perspective is that these projects reflected a working system: Landmarks made the decision on historic preservation and the Council considered other factors such as economics.

- Supposedly this ordinance would reflect “best practices.” Yet other cities continue to use district specific standards. Few, if any, have implemented the Secretary’s Guidelines as ordinances. Determination of the direction of the ordinance needs to take into account Madison’s needs, not an idealized concept.
2. What should be regulated?
 - What one can see from the street? The entire structure? What can be seen from any public right-of-way?
 - Should the period of significance be changed for any of the districts? For example, matching TLR’s to the National Register application date would significantly reduce the number of buildings outside the period of significance.
 3. How should structures be regulated?
 - Should each structure in a district be treated like a museum? That is, should each structure be treated more strictly than a landmark?
 - Should the goal continue to be to preserve the district’s character? If this is the goal, what are the characteristics worthy of preservation in each district? And who should be answering that question? LORC, staff, the neighbors, or a combination (which is what the consultant had, in part, been hired to do)?
 - How should structure built outside the period of significance be treated?
 - Are the characteristics of commercial properties different than residential properties? (For example, if a full story addition in Marquette Bungalows would not be visually compatible, but in a commercial district adding an additional 12 feet might be okay.)
 4. Should LORC consider policy issues?
 - When deciding the direction of the new ordinance, should LORC take into consideration whether the ordinance will encourage new City historic districts?
 - Should LORC consider whether the proposed ordinance would be so restrictive that residents may choose to decertify?
 - Should LORC consider that there was talk early on of shrinking the historic districts down to match the National Register districts? And that this “best practices” approach may well accomplish that goal? Shrinking historic districts would open up possibilities for development – and although the districts are a miniscule percent of City land, developers yearn to develop those areas.
 5. Should Landmarks approval be required for projects getting tax credits?
 - What is being added by making residents go through both processes?
 6. Should the catch-all CoA approval standard be deleted?
 - “In the case of any exterior alteration or construction for which a certificate of appropriateness is required, the proposed work will not frustrate the public interest expressed in this ordinance for protecting, promoting, conserving, and using the City’s historic resources.” MGO 41.18(1)(d).
 - This phrase, if it remains, is all that is needed – the Preservation Planner and/or Landmarks Commission can exercise judgement as to whether the project will frustrate intent. The actual standards would have no meaning because the decision could always be based upon some other reason.

Respectfully Submitted,
Linda Lehnertz