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

Date: March 24, 2010

OPINION 10-001

TO: Brad Murphy, Planning Division Director

FROM: Michael P. May, City Attorney

RE: Edgewater Project and Landmarks Commission

You have asked for my legal opinion on whether the current proposal for redevelopment of the Edgewater Hotel must be resubmitted to the Landmarks Commission for approval.

The Hammes Co. (Developer) has proposed major changes to the Edgewater Hotel. The proposal has been in the review process by a number of City boards, committees and commissions for some time. Because the hotel is located in an historic district, one reviewing body is the City Landmarks Commission.

The Landmarks Commission considered the proposal on November 30, 2009, and voted against granting the certificate of appropriateness (COA) required under sec. 33.19(5)(b), MGO. Pursuant to sub. (5)(f) of that ordinance, an appeal was taken to the Common Council. The Council considered the appeal on December 15, 2009, and failed to reach the 2/3 vote required to grant the COA. The matter was reconsidered by the Council on January 5, 2010, bringing the appeal back before it. No action has been taken by the Council on the appeal since the reconsideration, so it is still pending before the Council. See Legislative files No. 16786 and 15483.

Since that time, the Developer has made some changes in the Edgewater proposal. The location of the new hotel tower and the parking structure have changed, and additional land is now included in the proposed PUD-SIP, resulting in a substitute ordinance being considered by the Plan Commission. You indicated that other changes include substantive changes to the architecture of the project, tower location, additional detail on renovation work and changes to the 1946 building, changes to the proposed plaza and access arrangements, and a new parking structure with retaining walls and a elevator/stair access structure. The expanded geography of the project makes it likely that the area defined as the “visually related area” under the Landmarks ordinance will change, which in turn would change the analysis and evaluation of the project under the ordinance.

It is this unique posture – an appeal from a Landmarks decision pending before the Council while the Developer makes some changes in the project – that presents difficulties in interpreting the relevant provisions of sec. 33.19, MGO. As I indicate below, the answer to your question depends in part on what the Council may do with the pending appeal.

Relevant Ordinances

Sec. 33.19(5)(b)2., MGO, provides in part:

> No owner or person in charge of a … structure within an Historic District shall reconstruct or alter all or any part of the exterior of such property or construct any improvement upon such designated property or properties within an Historic District or cause or permit any such work to be performed upon such property unless a Certificate of Appropriateness has been granted by the Landmarks Commission or its designee(s) as hereinafter provided. The Landmarks Commission may appoint a designee or designees to approve certain projects that will have little effect on the appearance of the exterior of such properties, provided that the Landmarks Commission shall first adopt a written policy on the types of projects which can be approved by its designee(s). Unless such certificate has been granted by the commission or its designee(s), the Director of the Building Inspection Division shall not issue a permit for any such work.

The ordinance contains a number of standards for granting or denying the COA.

Sec. 33.19(5)(f), MGO, provides for an appeal of a decision of the Landmarks Commission denying a COA to the Common Council, and provides in part:

> After a public hearing, the Council may, by favorable vote of two-thirds (2/3) of its members . . . reverse or modify the decision of the Landmarks Commission ….

This section also contains guidelines for the Council in determining the appeal.

Issues Presented

1. If the Council fails to reverse or modify the Landmarks Commission action, must the Developer return to Landmarks to obtain the COA?

2. If the Council modifies the decision of the Landmarks Commission and grants the COA based on the project as presented to the Landmarks Commission, must the developer return to Landmarks to obtain the COA?

3. If the Council modifies the decision of the Landmarks Commission and grants the COA based on the project as modified since the original Landmarks action, is such action valid, or must the Developer return to Landmarks to obtain the COA?

Brief Answers

1. Yes, because the Developer would have no Certificate and the Certificate is required for construction.

2. Yes, because there would be no Certificate on the portion of the project which has changed, and the proposed changes are significant enough that the Planning staff cannot approve them administratively.

3. Although the ordinance is not clear on this situation, the better reading of the ordinance and the more consistent application of its intent would require the Developer to return to the Landmarks Commission because of the significant changes in the project.

Discussion

Before addressing the three situations presented above, I wanted to emphasize the portion of the ordinance that requires significant changes in a project to come back to the Landmarks Commission, but allows minor alterations to be approved the Commission's designees, City Planning staff. Sec. 33.19(5)(b)2., MGO, provides in part:

> The Landmarks Commission may appoint a designee or designees to approve certain projects that will have little effect on the appearance of the exterior of such properties, provided that the Landmarks Commission shall first adopt a written policy on the types of projects which can be approved by its designee(s).

Pursuant to this provision, the Landmarks Commission has adopted a written policy to guide staff, a copy of which is attached to this opinion.

This provision in the ordinance is important for two reasons. First, in determining the meaning of an ordinance or statute, the overall purpose is to find the intent of the legislation. *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W. 2d 110 (2004). While the primary focus is on the language itself, intent can also be determined from context and structure, and by reading the statute as a whole and not in isolation. *Id.,* ¶46. Applying these rules, this provision of the ordinance reflects a determination by the Common Council that certain changes to buildings or proposed projects are minor in nature and may be approved administratively, but significant changes require further review by the Landmarks Commission itself.

Second, you informed me that, in reviewing the changes to the Edgewater project in light of the policy adopted by the Landmarks Commission, the Planning Division staff determined that the changes are significant enough that, had a COA already been issued on the prior project plans, the new plans would require further review by the Landmarks Commission.

These factors are important in interpreting the related language in the ordinance regarding the authority of the Common Council to itself grant a COA on appeal of a Landmarks decision.

1. Scenario One: The Council does not reverse or modify the Landmarks decision on appeal.

The answer to this scenario is clear from the language of the ordinance. Since there would be no COA issued under this scenario, by either the Council or the Landmarks Commission, there can be no construction. No permit for such construction is to be issued. Sec. 39.19(5)(b)2., MGO. The project cannot proceed until such a COA is issued. Therefore, the Developer must return to the Landmarks Commission.

2. Scenario Two: The Council reverses or modifies the Landmarks decision and grants a COA based on the Edgewater project plans previously considered by Landmarks and appealed to the Council.

The answer under this scenario is also clear under the ordinance, the policy adopted by Landmarks, and the determination that the changes are significant. Because the COA was granted on one set of plans, and the changes are more significant than can be granted by Planning Division staff administratively, the new proposed project would have to go back before the Landmarks Commission.

This scenario is really no different than if the Commission itself had granted the COA in November, or if the Council had granted the appeal in December, 2009. The Developer would have its COA, but the COA was for a significantly different project than the Developer now wants to build. Under the language cited above,

and the policy developed by the Commission, the Developer would have to return to Landmarks for approval of a new or revised COA.

3. Scenario Three: May the Council "reverse or modify" the Landmarks Commission decision by granting a COA based on the new design that has never been considered by Landmarks?

This is the crux of the legal issue. The ordinance itself does not provide a direct answer to the question; there is no language directing the Council to take a certain action under this scenario. And, while sec. 33.19(5)(f), MGO, contains standards for the Council to apply on appeal, there is no definition of the scope of the Council's jurisdiction when it determines to "reverse or modify the decision of the Landmarks Commission …."

A. The argument that the Council could issue a COA on appeal based on the revised plans.

The argument that the Council could itself grant the COA based on the revised plans is based on a broad reading of the Council's authority to "reverse or modify" the Landmarks decision: Since there is no limitation expressed in the ordinance, the word "modify" may be read to include the ability to modify the decision to apply it to the new project plans. The Council would in essence be saying, "Since we would grant the appeal on these new plans, we will grant it now. And since we delegated the authority to the Landmarks Commission in the first place, there is no problem with us asserting such authority on appeal."

Moreover, the argument would go, since this is an appeal and the jurisdiction of an appellate court may take into account changed facts since the time of the appeal, there is no reason the Common Council may not do the same.

There are a number of difficulties with this argument. First, there is nothing in the standard definition of the word "modify" which guides interpretation here. Words in ordinances are to be given their common and ordinary meanings unless some other meaning is suggested. *Kalal, supra,* ¶ 45. When I check the definition of "modify" in *Webster's New Collegiate Dictionary*, I find the following unhelpful language:

> 1: To make less extreme; 2. a: to limit or restrict the meaning of esp. in a grammatical construction, … 3.a: to make minor changes in, b: to make basic or fundamental changes in often to give a new orientation to or to serve a new end.

This language could support either a broad definition of the Council's power or a limited definition of it.

Second, the delegation of authority by the Council can just as easily be read as a limitation of its powers on appeal. That is, the broad powers given to the Landmarks Commission support an interpretation that the Council's power to "reverse or modify" the decision is limited to the specific plan considered by the Commission. And the analogy to a court of appeals is not necessarily a good one; such courts would often simply reverse a decision and send it back to the lower court for a new ruling on the new facts. This analogy could just as easily support the view that the revised project should go back to the Landmarks Commission.

I conclude that while there is some substance to the argument that the Council has the authority to grant the COA on a revised project, it is not at all clear under the ordinance that it may do so. As I explain in the next section, I also conclude that the better reading of the ordinance is that the Council lacks such authority.

B. The argument that the Council lacks authority to grant a COA on appeal of a project that has revised plans.

The strongest argument that the Council lacks such authority is drawn from the language of the ordinance itself, where the Council told the Landmarks Commission to develop a policy on significant changes as opposed to minor alterations. The former must be approved by Landmarks, the latter may be approved administratively. Because of this rule, if a COA had already been issued, the Landmarks Commission would have to review the new project. There seems no obvious reason that this rule would be different simply because an appeal is pending on the prior project plans.

I take this provision in the ordinance to reflect a legislative intent that the experts on the Landmarks Commission, and the related expert City staff, are to be given the opportunity to review any project that makes the significant alterations described in the policy of the Landmarks Commission. Having expressed that legislative intent, the Common Council is bound by it just as are the Commission, the City staff, and developers wishing to change or build projects subject to the ordinance.

Second, this interpretation provides a consistent application of the City's policies. No matter what stage of approval of a project, if there are significant changes in the project plans, the revised plans must go to the Landmarks Commission. This would happen whether the project has not yet been reviewed by the Commission, whether a COA has been granted by the Commission or by the Council, whether a COA has been denied, and whether the COA is on appeal to the Council. Consistency in the application and interpretation of an ordinance is one consideration in interpreting the ordinance. *See, e.g., State v. Tarrant,* 2009 WI APP 121, ¶8, 321 Wis. 2d 69, 777 N. W. 2d 750 (Ct. App. 2009), *petition for review denied* ___ Wis. 2d ___ (November 3, 2009); *County of Dane v. Labor*

and Industry Review Com'n., 2009 WI 9, ¶ 16, 315 Wis. 2d 293, 759 N.W. 2d 571 (2009).

Third, there is an equally good argument from the analogy to a court appeal that the only matter before the Council is the Landmarks decision based on the old plans. Under this argument, the language of the ordinance give the Council the power to reverse or modify that "decision", but it may not make up a new decision based on new plans.

Finally, there is a very practical reason for this interpretation. If the Council were to "reverse or modify" the Landmarks decision based on the revised plans, the Council's determination would have a legal uncertainty and risk of being challenged. If the matter is first considered by the Landmarks Commission, the uncertainty associated with whether the Council's powers are broad enough to take such action is removed. While this concern does not weigh in the interpretation of the language of the ordinance, and while one could argue that it is up to the Developer to decide if it wants to take this legal risk, the City also has an interest in removing legal uncertainties from the actions it takes in making land use approvals.

Based upon all of these matters, I conclude that when a developer makes changes in a proposed project such that the matter must be presented to the Landmarks Commission under current Landmarks Commission policy adopted pursuant to the ordinance, the better reading of the ordinance is that such a review should take place even if an appeal is pending before the Common Council on a prior version of the project.

Conclusion

The language of the Landmarks ordinance does not clearly state the Common Council's authority when an appeal is before it from the Landmarks Commission and changes have been made in the project since it was considered by the Commission. However, based upon the language in sec. 33.19(5), MGO, which reflects a legislative intent that the Landmarks Commission should review significant changes in any project subject to its approval, I conclude that the Common Council likely does not have the authority to grant a Certificate for any significantly revised project based on an appeal of a Landmarks Commission decision on the old plans for the project. In such an instance, as presented here with the Edgewater project, the better course is for the Landmarks Commission in the first instance to review the revised plans, with any appeal to the Council then being made from such decision.

Michael P. May, City Attorney

Attachment (Policy Guide written by Landmarks Commission)

cc: Mayor Cieslewicz
Alders
Maribeth Witzel-Behl
Bill Fruhling

SYNOPSIS: The authority of the Common Council on appeal of a Landmarks Commission decision under sec. 33.19(5)(f), MGO, probably does not extend to granting a certificate of appropriateness if there have been significant changes in the plans for a project since the original consideration by the Landmarks Commission, such that the new plans would have to be reviewed by the Landmarks Commission in the absence of an appeal. The revised plans should first be considered by the Landmarks Commission.

Policy for designee approval of certain projects for Landmarks and Buildings in Historic Districts

According to Madison General Ordinance Section 33.01(5)(b)2., all projects to reconstruct or alter the exterior of a landmark or building in an historic district or add an improvement to such a property must be reviewed by the Landmarks Commission before a building permit can be issued. The ordinances further provide that for certain projects that will have little effect on the exterior appearance of the property, a designee or designees may approve the project, so that the owner may receive his or her building permit without the need to delay the beginning of the project until after the next meeting of the Landmarks Commission.

The following policy outlines the types of projects that may be approved by the designee(s). Please note that the designee(s) or property owner may ask for a full Commission review for any project, including projects that fall into the categories listed below.

1. Repairs to existing structures that will not change the appearance.

2. Re-roofing projects using three-in-one tab asphalt or fiberglass shingles or other rectangular asphalt or fiberglass shingles of a similar scale or sawn wooden shingles. Re-roofing with tile or slate may be approved if there is historical documentation that the building once had a tile or slate roof. Re-roofing projects on buildings or parts of buildings with flat roofs or shed roofs that are not visible from the street may be approved. If a house is shingled in the French method, new shingles of the same design may be approved. Small attic ventilators that match the roof in color may be approved.

3. Residing with narrow gauge clapboard aluminum or vinyl on the following conditions:

    - The original material must be clapboard.
    - The new siding must approximate the width of the original siding.
    - Any decorative woodwork, such as molding on windows, decorative bargeboards, porch posts, spindles, etc., should be retained or covered with new material in such a way as to duplicate the appearance of the original. All trim should project from the siding. Soffits may be covered with aluminum, provided that they are ventilated.
    - All later layers of siding must be removed before the new siding is applied, or else all trim should be built up to project from the siding approximately the same amount as the original.

4. Gutters and downspouts of enameled or anodized metal (not raw aluminum), provided that any decorative downspout or gutter details are retained. If existing gutters are raw aluminum and only parts are being replaced, then the designee(s) may approve matching the existing gutters.

5. Handrails designed to be compatible with the style of the house.

6. Projects that will result in only a minor change of appearance and that will not destroy significant architectural elements, such as converting a door to a window on the rear of the house, or adding a flat skylight on a roofline not visible from the street.

7. Replacement of windows that have true divided lights with windows of the same size and configuration that have interior or exterior applied grids provided that the windows historically have had exterior storm/screen windows.

8. Projects that will result in a moderate change of appearance provided that there are compelling reasons for beginning work before the next Landmarks Commission meeting (such as emergency structural repairs or the onset of bad weather) provided that there has been precedent set by previous Landmarks Commission decisions to demonstrate that such a project probably would be approved if presented to the full commission. Such projects must also be approved by the chair of the Landmarks Commission or in his/her absence the vice-chair.

9. Replacement of the face of an existing sign with new information and the installation of awnings, provided that the proposed design will not detract from the character of the building or district.

10. The demolition of garages or other accessory buildings that have no historical significance whatsoever.

11. The construction of garden sheds in the rear yard of a property provided that the sheds are of simple design, with gable, hip or shed roofs and provided that the shed design is compatible with the design of the house and the neighborhood.

Projects that should in most circumstances be reviewed by the Landmarks Commission

1. Any project that creates a significant change in appearance, such as altered windows, new porches, alterations to the roofline, enclosing porches, etc.

2. Additions, including decks.

3. New structures **(excluding garden sheds)**.

4. Permanent removal of historic original materials, trim, decorative elements, etc.

Designees

Katherine Rankin is hereby reappointed as the designee to review projects. Mike Van Erem, Robert Turner **and Steven Rewey** are hereby reappointed to review projects that fall into categories #1 (repairs that will not change the appearance) and #2 (re-roofing projects) above. On occasions when Ms. Rankin will be out of the office for several days, she may appoint Mr. Van Erem, Mr. Turner and Mr. Rewey to review other projects, also. **No one else** is permitted to sign permits on behalf of the Landmarks Commission.

Policy adopted by the Madison Landmarks Commission, January 24, 1983, and amended by the Madison Landmarks Commission, May 4, 1992, December 7, 1992 **and May 17, 1999**.