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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Frederich E. Mohs, Eugene S. Devitt,
122 East Gilman, LLP
And Wisconsin Ave. House, LLC,

Plaintiffs, Appellant

v.

Appeal No. 2011AP00340

City of Madison,

Defendant-Respondent

Landmark X LLC,

Intervenor, Respondent.

BRIEF OF RESPONDENT

Appeal from a Judgment of the Circuit Court
of Dane County, Wisconsin
Case No. 2010-CV-003244
Honorable Juan B. Colás, Presiding

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STATEMENT ON ORAL ARGUMENT

This case can be resolved without oral argument. The briefs fully develop the legal issues, relying on established legal authority.

STATEMENT ON PUBLICATION

This case presents the application of well-settled law, controlling precedent is clear, and the issues are not unique to historic preservation concerns. Publication is not warranted.

STATEMENT OF THE CASE

The Edgewater Hotel Project (the "Project") is one of the most comprehensively reviewed development projects in the history of the City of Madison. The proposed construction and restoration project for the Edgewater Hotel (hereinafter "Project") includes approximately 2.23 acres of land, divided among five (5) separate parcels, R.14 at1147. The existing improvement, including the

1940's building and the 1970's addition are located on three (3) of the five (5) parcels. R.14 at 1148.

Over the course of almost a year, the applicant, Hammes Company, appeared no fewer than twelve times before City bodies, including the Common Council, the Plan Commission, the Urban Design Committee, the Board of Public Works, the Board of Estimates, and the Landmarks Commission. Four of these appearances were before the Landmarks Commission. R.14 at 370-389. Hammes has a contract to purchase the Edgewater Hotel property. RA1:43[1], R.14 at 85; RA2:40, R.14 at 151. Scott Faulkner (Faulkner) is the president and general manager of the Edgewater Hotel, which holds title to the Edgewater Hotel. Faulkner refers to himself as the owner of the hotel. RA2:40, R.14 at 151; RA3:1-5, R.14 at 126; R.20 at 6(note).

Required approvals for the Project included a map amendment (rezoning), a conditional use for waterfront development,

[1] RA1:43 refers to Respondent's Supplemental Appendix at Line 43.

a Certificate of Appropriateness for development in an historic district, an amendment to a street vacation ordinance, and a Tax Incremental Financing Loan Agreement. R.14 at 2; R.14 at 346; R.14 at 9; R.14 at 16.

Of the many required approvals for the Project, Mohs brought a court challenge only to the Common Council decision to grant the Certificate of Appropriateness.

The Historic District regulations in Ch. 33 of the Madison General Ordinances (MGO) are not part of the City's Zoning Code, which is found in Ch. 28.

On November 30, 2009, the Landmarks Commission denied Hammes' request for a Certificate of Appropriateness and subsequently denied its variance request. R.14 at 375; R.14 at 379. Hammes appealed the denial to the Common Council, which referred it to a later date. R.14 at 393-394. Following changes to the Project, Hammes again requested a Certificate of Appropriateness from the Landmarks Commission, which denied it

on May 10, 2010. At the same meeting, the Landmarks Commission considered and rejected Hammes' variance request. R.14 at 315-316. Hammes again appealed the denial to the Common Council. R.14 at 53.

On May 18, 2010, the Common Council considered Hammes' appeal of the Landmarks Commission's May 10, 2010 denial of the Certificate of Appropriateness. It reversed the Landmarks Commission and granted the Certificate of Appropriateness. R.14 at 5-6. The Common Council did not consider an appeal of the variance denial. R. 14 at 115, L1-2. The Common Council also placed on file the first Certificate of Appropriateness appeal. R.14 at 5.

ARGUMENT

I. SCOPE AND STANDARD OF REVIEW

Under certiorari review, the scope of the Court's review of the record of the Common Council's decision is

limited to the following four issues: 1) whether the Common Council acted within its jurisdiction and authority; 2) whether the Common Council proceeded on a correct theory of law; 3) whether the Common Council's action was arbitrary, oppressive or unreasonable; and 4) whether the evidence was such that the Common Council might reasonably make the decision it did. *Sills v. Walworth County Land Management Committee,* 2002 WI App 111, ¶6, 254 Wis.2d 538, 648 N.W.2d 878.

Review is limited because the Common Council's decision is presumed to be correct and valid. *Ottman v. Town of Primrose,* 2011 WI 18, ¶48, *Doneff v. City of Two Rivers Board of Review,* 184 Wis.2d 203, 218, 516 N.W.2d 383 (1994); *State ex rel. Ruthenberg v. Annuity and Pension Board of City of Milwaukee*, 89 Wis.2d 463, 473, 278 Wis.2d 835 (1979). In other words, a reviewing court does not substitute its own discretion for that of the body to which the

legislature has granted decision-making authority. *Snyder v. Waukesha Cty. Board of Adjustment,* 74 Wis.2d 468, 476, 247 N.W.2d 98 (1976).

When reviewing evidence in the record, the substantial evidence test applies, the weight of the evidence is for the Common Council to determine, and the Court should "… sustain a municipality's findings of fact if any reasonable view of the evidence supports them." *Delta Biological Resources v. Board of Zoning Appeals of the City of Milwaukee,* 160 Wis.2d 905, 915,467 N.W.2d 164 (1991); *Ottman*, 2011 WI 18 at ¶53 (citing *Kapischke v. County of Walworth,* 226 Wis.2d 320, 595 N.W.2d 42 (Ct. App. 1999).

II. INTRODUCTION

Mohs' challenge to the Common Council's decision to grant a Certificate of Appropriateness for the Project centers around his contention that Hammes is not the owner of the

Edgewater Hotel Property for purpose of the appeal under Sec. 33.19(5)(f), MGO (language follows) Mohs' brief at 14.

> … After a public hearing, the Council may, by favorable vote of two-thirds (2/3) of its members, based on the standards contained in this ordinance, reverse or modify the decision of the Landmarks Commission if, after balancing 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, the Council finds that, owning 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, provided that any self-created hardship shall not be a basis for reversal or modification of the Landmarks Commission's decision. RA4; R.14 at 350.

For support, Mohs offers nothing more than a dictionary definition of "owner", which is wholly insufficient to overcome the presumption of correctness accorded the Common Council's decision. Mohs' brief at 20; *Ottman v. Town of Primrose,* 2011 WI 18 ¶48.

Wisconsin has long recognized that context matters when interpreting the word "owner" and that "…ownership should not be equated with possession of legal title". *City of Milwaukee v. Greenberg*, 163 Wis.2d 28, 35, 471 N.W.2d 33 (1991). Hammes has a contract to purchase the Edgewater Hotel property, which gives him equitable title to the property – "…the buyer becomes the owner." RA1:43; Lawrence Sager, Wisconsin Real Estate Law and Practice (11th Ed., 2004). See also generally, W. Lawrence Church, "Equitable Conversion in Wisconsin", 1970 Wis. L. Rev. 40488.

The Common Council reasonably treated Hammes as the owner when applying the balancing and hardship analysis required by Sec. 33.19(5)(f), MGO, and its interpretation of its own ordinances is entitled to deference. RA4, R.14 at 350; *Ottman*, 2011 WI 18 at ¶60.

Mohs also alleges that the Common Council's decision failed to provide a record adequate for the Court's review

under the standard of *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee,* 2005 WI 117, 284 Wis.2d 1, 700 N.W.2d 87. Mohs' brief at 26-27. The Common Council's decision, however, did not rest on conclusory statements like those the *Lamar* court found unacceptable. *Id.* at ¶34. What Mohs characterizes as an issue of law under *Lamar* actually is an issue of substantial evidence, which receives a more deferential review by the Court. *Delta Biological Resources,* 160 Wis.2d at 915. In any case, as will be discussed below, the record is replete with evidence to support the Common Council's decision to grant the Certificate of Appropriateness.

Mohs' last line of challenge is an allegation that the Common Council's made improper findings regarding the special conditions pertaining to the Project site, the degree of hardship the owner would suffer from a denial of the Certificate of Appropriateness, and whether the hardship is

self-created. Mohs' brief, 34, 43, and 45. Although Mohs once again tries to cast his arguments as questions of law, he really is challenging the sufficiency of the evidence to support the Common Council's finding. As will become clear to the Court, the record evidence more than meets the substantial evidence standard.

Showing appropriate deference to the Common Council's interpretation of its own ordinances and reviewing the evidence in the record, the Court should conclude that the Common Council's decision was reasonable and uphold it.

III. THE COMMON COUNCIL CORRECTLY FOUND THAT THE OWNER, HAMMES, WOULD SUFFER SERIOUS HARDSHIP IF THE CERTIFICATE OF APPROPRIATENESS WERE DENIED.

A. Hammes' contract to purchase qualifies as ownership in the context of Sec. 33.19(5)(b)2. and Sec. 33.19(5)(f), MGO.

The Common Council correctly treated Hammes, who has a contract to purchase the Edgewater Hotel site, as the owner for purposes of applying for a Certificate of Appropriateness and appealing the denial of a Certificate of Appropriateness. Statutory language should be construed in the context in which it is used. *State ex re.* K*alal v. Circuit Court of Dane County*, 2004 WI 58, ¶46, 271 Wis2d 633, 681 N.W.2d 110. *Ottman*, 2011 WI 18, at ¶71. Mohs', however, relies only on a dictionary definition of the word "owner" to determine its meaning in Sec. 33.19(5)(f), MGO. Mohs' brief at 21. His analysis is insufficient because it ignores accepted alternative meanings of the word "owner" that apply in the context of the Ordinance.

In *City of Milwaukee v. Greenberg*, 163 Wis.2d 28, 38, 471 N.W.2d 33 (1991), the court considered whether the holder of title to a building or the purchase contract owner

was liable for costs to raze the building. *Greenberg,* 163 Wis.2d at 33-34. Recognizing that each has a unique property interest, the court noted that:

> "…[t]his court has long recognized that the term "own" is a general expression used by the legislature to describe a great variety of interests and may vary in significance according to context and subject matter….*it is equally well established, however, that ownership should not be equated with possession of legal title*." (emphasis added). *Greenberg,* 163 Wis.2d at 35.

The *Greenberg* court ultimately found that the owner of the purchase contract, not the holder of title, was the "owner" and liable for the cost of razing. *Id.* at 50.

Greenberg followed the holding of *Scheer v. Weis,* 13 Wis.2d 408, 413, 108 N.W.2d 523 (1961), where the court found an owner of a contract to purchase a building to be the "owner" for the purpose of obtaining a building permit. *Id.* at 526. Similarly, owners of a purchase contract for property were owners but not liable for a money judgment docketed

against the owner of title to the property after the date the purchase contract was executed. *Mueller v. Novelty Dye Works*, 273 Wis. 501, 507, 78 N.W.2d 881 (1956).

Wisconsin courts also recognize that title and ownership are not necessarily the same in the context of personal property taxation, where tax exemption is based "…not upon the legal title but on the status of the owner of the beneficial interest in the property". *American Motors Corp. v. City of Kenosha*, 274 Wis. 315, 320 80 N.W.2d 363 (1957).

The City Attorney advised the Common Council that in the context of land use and historic preservation ordinances, the City has consistently treated those with interests short of title ownership as property owners for the purposes of obtaining approvals under City ordinances. RA5-6, R.14 at 325-326. The Court should give deference to this

long-standing interpretation.[2] The Common Council's treatment of Hammes as the owner for the appeal is consistent with the long-accepted doctrine of equitable conversion, whereby:

> "In Wisconsin, after a contract is accepted, *the doctrine of equitable conversion* takes effect. Under this doctrine, *the buyer becomes the owner, subject to his or her liability to pay the rest of the purchase price.*...The buyer, then, holds equitable *title* to the real estate…" Lawrence Sager, Wisconsin Real Estate Law and Practice (11th Ed., 2004) (Emphasis in original). See also, generally, W. Lawrence Church, "Equitable Conversion in Wisconsin", 1970 Wis. L. Rev. 404.

Treating Hammes as an owner is consistent with both Wisconsin law and long-time City practice. The Court should defer to the Common Council's interpretation of its own historic preservation ordinances. Mohs cites *Marris v.*

[2] In *Schill v. Wisconsin Rapids School District, 2010 WI 86, ¶¶115-118, 139, 327 Wis.2d 572, 786 N.W.2d 572*, the Wisconsin Supreme Court, when considering whether personal emails of School District employees were public records under Wis. Stat. §19.32, noted the long-time interpretation of the Milwaukee and Madison City Attorneys that such person emails were not public records.

City of Cedarburg, 176 Wis.2d 14, 32, 498 N.W.2d (1993) for the premise that questions of law are reviewed under a *de novo* standard. In *Ottman,* however, the court specifically distinguished *Marris. Ottman,* 2011 18 at ¶¶58-60. The ordinance at issue in *Marris* "parroted" the state law on nonconforming uses, implicating a statewide standard, whereas the driveway permitting ordinance in *Ottman* was not related to any state law. *Id.* at ¶67. Like the *Ottman* ordinance, the ordinance in this case does not parrot any state statute and is precisely what the *Ottman* court meant by:

> "In other circumstances, however, the language of the municipality's ordinance appears to be unique and does not parrot a state statute but rather the language was drafted by the municipality in an effort to address a local concern. In such a case, the municipality may be uniquely poised to determine what the ordinance means. Then, applying the presumption of correctness, we will defer to the municipality's interpretation. *Ottman,* 2011 WI 18 at ¶60.

Mohs' reliance only on a dictionary definition for the meaning of owner is not reasonable under accepted Wisconsin law and he fails to overcome the presumption of correctness accorded the Common Council's interpretation.

B. Hammes is Both an Owner and Applicant.

Mohs misses the point by focusing on the difference between being an owner and an applicant under Sec. 33.19(5)(b)2. and Sec. 33.19(5)(f), MGO. Mohs' brief at 19-22; RA4, R.14 at 350; RA7, R.14 at 346. The Ordinance does not define "owner" or "applicant". See App.2. Mohs cites numerous cases to support the obvious - that "owner" and "applicant" are different words, all the while missing the important fact that the difference is irrelevant because Hammes is both an applicant and owner.

Sec. 33.19(5)(b)2. identifies applicants as "owners" and "persons in charge of a landmark, landmark site or structure within an Historic District" who may not construct

or alter buildings in an historic district without obtaining a Certificate of Appropriateness.

> No owner or person in charge of a landmark, landmark site or 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 with 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 hereby provided. RA7, R.14 at 346.

Mohs acknowledges that Hammes is a valid applicant. Mohs' brief at 17-18, and 22. Since Hammes is not the person in charge of the Edgewater property, it is an owner for the purpose of applying for a Certificate of Appropriateness. RA3:1-4, R.14 at 126; RA7, R.14 at 346. Because closely related provisions should be read together, it follows that Hammes also is an owner under the appeal provision, Sec. 33.19(5)(f), MGO, and the Common Council was correct in applying the hardship analysis to Hammes.

State ex re. Kalal v. Circuit Court of Dane County, 2004 WI 58, ¶46, 271 Wis.2d 663, 681 N.W.2d 110.

Mohs' ignores this established doctrine for construing ordinances. Instead he violates another canon of construction by adding words to reach a particular meaning. *State Department of Corrections v. Schwartz*, 2005 WI 34 ¶20, 279 Wis.2d 223, 693 N.W.2d 703. To deal with an owner like Hammes, he creates two types of owners, "actual" and "prospective", even though no such distinction is made in the Ordinance. Mohs' brief at 14; RA4, R.14 at 350. Section 33.19(5)(f), MGO requires serious hardship for the *owner*, not serious hardship for the *prospective owner*. (emphasis added). RA4, R.14 at 350.

C. The Common Council's interpretation of Hammes as the owner is consistent with the purpose of the Ordinance.

An interpretation that is consistent with the purpose of the ordinance is reasonable and entitled to deference. *Ottman*, 2011 WI at ¶75. The standards for the appeal in §33.19(5)(f), MGO require the Common Council to apply to same standards for granting a Certificate of Appropriateness as the Landmarks Commission, to balance public and private interests and to make a determination of hardship. RA4, R.14 at 350. This three-part appeal standard reflects the purpose of the Ordinance as expressed in §33.19(1), MGO, which is to protect the City's historic heritage, improve property values, strengthen the economy of the City and promote the use of historic districts for the welfare of the people of the City. RA8, R.14 at 343.

1. Hammes is the owner because the serious hardship suffered by the owner should, be analyzed in the context of the proposed Project.

The first two parts of the appeal standard, application of the Certificate of Appropriateness standards and the balancing test, require specific consideration of the Project, including its size, design, and the interest in the owner in pursuing the Project. RA9, R.14 at 347; RA10, R.14 at 355. Nevertheless, Mohs claims that the serious hardship test should have nothing to do with the Project because Hammes has a contract to purchase to purchase the property but does not hold title. Mohs' brief at 22-23. If Hammes held title, presumably the evaluation would be different. Given that the special conditions of the property are the same regardless of who holds title, it makes no sense to base the hardship evaluation only on title ownership. Like the Certificate of Appropriateness standards and the balancing test, the

hardship analysis should be made in the context of the project that has been proposed.

Applying the hardship evaluation to Hammes allows consideration of the impact of the special conditions on the Project itself. The serious hardship for Hammes resulting from a denial of the Certificate of Appropriateness would be the loss of the Project as the evidence shows it is not financially viable in any other configuration. RA11, R.14 at 303. Losing the ability to restore the iconic 1940's hotel clearly would not further the purpose of the Ordinance.

2. The Common Council was correct even if Hammes is not treated as the owner for the purpose of the serious hardship test.

Faulkner also would suffer serious hardship if the Certificate of Appropriateness were denied, due to the loss of the sale and the necessity to maintain a deteriorating building. The Circuit Court noted that evidence in the record supported

a finding that Faulkner would suffer serious hardship from denial of the Certificate of Appropriateness because the existing buildings cannot support the restoration necessary for preservation. See App. 1, p.9; RA11, R.14 at 303; RA14:21-26, R.14 at 81.

The unreasonableness of applying the hardship test only to one who holds title is even clearer for other types of development. For projects where multiple parcels are assembled, the applicant for the Certificate of Appropriateness may have contracts to purchase with multiple owners. Under Mohs' scenario, a hardship test would be necessary for each separate owner of title, creating difficulties in analyzing serious hardship. Would the hardship for each different owner be additive? Would lack of hardship for one negate the hardship of all other owners? Far more reasonable is the Common Council's treatment of Hammes as

the owner as it appropriately put the focus of the serious hardship test on the Project.

As is shown above, the perils of ignoring all but a dictionary definition of the word "owner" are clear. In no way does Mohs' limited argument overcome the presumption of correctness accorded the Common Council's interpretation.

IV. THE RECORD OF THE COMMON COUNCIL DECISION SATISFIES *LAMAR*.

A. Mohs Improperly Broadens the Holding of *Lamar,* which Does Not Require the Common Council to Memorialize its Thought Process.

The Common Council met the *Lamar* standard of providing sufficient reasoning for this Court to review its decision. *Lamar,* 2005 WI 117 at ¶3. Contrary to Mohs' assertion, *Lamar* does not require memorialization of the Common Council's thought process. Mohs' brief at 28. In fact, *Lamar* simply restates a long-held doctrine regarding a

record on review. In *Old Tuckaway Associates Limited v. City of Greenfield,* 180 Wis.2d 254, 277, 509 N.W.2d 323 (Ct. App.1993) the court cited a 1979 Wisconsin Supreme Court case: "There is no requirement that the administrative agency indulge in the elaborate opinion procedure of an appellate court. It is sufficient if the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision." *Id.* at 277, (citing *State ex rel. Harris v. Annuity & Pension Bd.,* 87 Wis.2d 646, 675, 275 N.W.2d (1979)).

The case on which Mohs relies, *Daniels v. Wisconsin Chiropractic Examining Board,* 2008 WI App 59, 309 Wis.2d 485, 750 N.W.2d 951, says nothing about thought processes. In fact, in this ch. 227 appeal, the Court of Appeals reversed the circuit court's determination that the Board's decision was insufficient and found that the Board's "…explanation is logical and based on the evidence in the record." *Id.* at ¶9.

The Common Council's consideration of the balancing test was similarly logical and based on evidence in an extensive record, completely unlike the conclusory statements that concerned the court in *Lamar*. Mohs' brief at 27-28.

The Common Council addressed the necessary factors in the balancing test, identifying the considerable and oft-repeated public interest in preserving the iconic 1940's building, as well as the private financial constraints precluding a smaller building. RA12:44-46, R.14 at 243; R13:1-13, R.14 at 244.

The Court also should note that the context of *Lamar* was a variance request under Wis. Stat. §62.23(7)(e)9., which required that "the grounds for every such determination shall be stated" by a Board of Appeals.[3] There is no comparable language in §33.19(5)(f), MGO. RA4, R.14 at 350. Nevertheless, in providing an extensive record in this case,

[3] Wis. Stat. §62.23(7)(e)9. was repealed by 2005 Wis Act 34, §6.

the Common Council recognizes the premise underlying *Lamar* that a reviewing Court needs an adequate record to review, including both statements by those making the decision and the evidence of their reasoning. *Lamar,* 2005 WI 117 at ¶¶34-35; *Block v. Waupaca County Board of Zoning Adjustment,* 2007 WI App 199, ¶7, 305 Wis.2d 325, 738 N.W.2d 132. The record before the Court provides both.

B. The Common Council Correctly Carried out the Balancing Test to Consider Public and Private Interests.

1. Mohs attempts to turn an issue of substantial evidence into an issue of law.

Mohs did not challenge the record for balancing test in his original brief to the circuit court, likely because the evidence in the record strongly supported the Common Council's decision. R15 at 1-33. The substantial evidence test used in certiorari review is highly deferential to the Common Council's findings, and neither the circuit court nor

this Court should substitute its view if any reasonable view of the evidence would sustain the Common Council decision. *Clark v. Waupaca County Board of Adjustment,* 186 Wis.2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994).

In attacking the Common Council's balancing test analysis for failing to meet the *Lamar* standard, Mohs tries to recast an issue of sufficiency of evidence to one of incorrect law or arbitrary action in order to get the more favorable *de novo* standard of review for questions of law. Mohs' brief at 33. He does not identify any legal standard for a balancing test but claims that it must includes a comparative evaluation of interests with quantitative or qualitative measures or stated evaluation of the "credibility, weight, or significance" of the public testimony that influenced the Common Council's decision, Mohs' brief at 28 and 30. In fact, what he identifies are classic evidentiary considerations that, on certiorari review, are entitled to the highly deferential

substantial evidence standard of review.[4] *Delta Biological Resources, Inc.*, 160 Wis.2d at 915.

a. Private and public interests overlap in the balancing test.

What Mohs alleges is a lack of balancing by the Common Council is simply the outcome of an analysis of this unique project that has public and private interests coinciding rather than opposing each other. RA14:22-27, R.14 at 81; RA15:20-21, and 26-27, R.14 at 133; RA16:31-35, R.14 at 134; RA17, R.14 at 926; RA18:2-5, R.14 at 162. Dissatisfied with the lack of conflicting interests, Mohs creates one. He decries the lack of consideration for preserving the 1940's building without any new construction. Mohs' brief at 31.

[4] Notwithstanding the fact that credibility determinations by the Common Council are not reviewed as issues of law, Ald. Bidar-Sielaff's determination that Mr. Dunn's testimony regarding the special conditions of the 1940's hotel was credible is clear from her statement that, "I certainly don't doubt the condition in which that building is and the need for a lot of work and investment to renovate that building…" RA19:41-42, R.14 at 80.

This interest, however, is irrelevant because there was no proposal before the Common Council to renovate only the older buildings and preserve the unused portions of the Project site. The funds to renovate were dependent on the income from the new construction. RA14:21-27, R.14 at 81; RA11, R.14 at 303. To weigh the public interest against a different proposal would have been an improper. Mohs admits that no one spoke in opposition to the restoration and preservation of the original hotel. Mohs' brief at 31. Whether some of those who spoke might have preferred a different project is not an issue before this Court.

b. There is substantial evidence in the record that the balancing test favored the Common Council granting the Certificate of Appropriateness.

The Court's inquiry is not limited to the statements of the decision makers and the record as a whole is a source for supporting evidence. *Lamar*, 2005 WI 117 at ¶35. The

Common Council heard extensive testimony regarding the importance of preserving the Edgewater Hotel. Members of the public expressed two of the very purposes of the Landmarks Ordinance – to "…effect and accomplish the protection, enhancement and perpetuation of such improvements and of districts which represent or reflect elements of the City's cultural, social, economic, political, and architectural history" and to "…promote the use of historic districts and landmarks for the education, pleasure, and welfare of the people of the City." RA8, R.14 at 343 (Sec. 33.19(1)(a), MGO).

> "The Edgewater is a landmark that we see all the time." RA20:19, R.14 at 58.
>
> "The Edgewater is also a historic area. It's got a long tradition and the Hammes' project would bring the Edgewater to life. I really believe that a revitalized Edgewater is a positive for the Mansion Hill District." RA21:45-46, R. 14 at 106; RA22:1, R.14 at 107.

"And I believe that the Edgewater is almost an institution in Madison, which has become very, very tired." RA23:35-36, R.14 at 127.

"The Edgewater project will renew a tired but important property." RA24:39-40, R.14 at 129.

"This project improves and enhances a historic property that is starting to deteriorate." RA15:20-21, R.14 at 133.

"The new Edgewater will reenergize the downtown and will continue to be a beloved landmark of our city." RA25:25-26, R.14 at 137.

"The Edgewater is a landmark. However, as we've heard, through functional obsolescence, the time has come to renovate, expand, and adapt so the Edgewater will remain a destination where people want to go for the next 100 years. . . assure the Edgewater remains one of Madison's best-known destinations, a landmark and part of our City's history for years to come." RA26:37-40, R.14 at 153; RA27:5-6, R.14 at 154.

"Every time I passed the Edgewater, I would say to myself 'what a shame. Wouldn't it be nice if someone would renovate this dump to its former glory." RA28:17-18, R.14 at 157.

> "Let's protect and enhance this district with an improvement, not a death sentence, to an historic piece of Madison called the Edgewater Hotel." RA29:1-2, R.14 at 164.

> "It should add to the tax base, support our important meetings, tourism industry, which is important to our downtown and, last but not least, reinforce the viability of the historic district adjacent to the hotel." RA24:41-44, R.14 at 129.

> "This project will not ruin Madison as opponents would have us believe, but instead, it will stimulate restoration of some old and deteriorating housing stock in Mansion Hill." RA30:9-11, R.14 at 156.

Even several opponents of the Project acknowledged the importance of jobs created by the Project.

> "Jobs and economic development should be near or at the top of our list right now." RA31:13-14, R14 at 60.

> "Those things [jobs and economic development] are really super important." RA27:41, R.14 at 154.

Because the Project includes the restoration of an important existing building in the Mansion Hill Historic

District, as well as new construction, the owner's plans for the property support the public's interest in preserving the property. The balance tilts overwhelmingly toward the Common Council granting a Certificate of Appropriateness. Evidence of this unique outcome is throughout the record.

> "And the program that is created with the expansion of the hotel and the development of the terrace, it is the economics from that side of the project that is supporting preservation of the 1940's building, and I think that's the true irony inside of this ordinance, is, in my own personal read of that ordinance, it reads like an ordinance that is treating these preservation and reasonable use serious hardship as mutually exclusive. In this case, they are one and the same. It is the redevelopment that supports preservation." RA14:22-27, R.14 at 81.
>
> "This project improves and enhances a historic property that is starting to deteriorate. . . The public's interest in preservation is better served through the redevelopment rather than maintaining the status quo." RA15:20-21 and 26-27, R.14 at 133.
>
> "Secondly, your other two criteria regarding the balancing test, this is a case that has been brought up before, that you don't have a lot to

> balance. Granting the appeal accomplishes both the interest of the public in rehabilitating the historic property as well as the developer's interest in the entire project, which advances our civic interests as well as meets the intent of the Landmarks ordinance." RA16:31-35, R.14 at 134.

A similar sentiment was expressed by Richard Wagner, Chair of the Urban Design Commission at the meeting where the design received preliminary approval.

> "Any project has plusses and a minus; in this case solving that 70's mistake is a big thing for the rest of the city I think because it gives us lakes access and views. The other thing that is a city wide issue is the restoration of the 40's building and I think that is a big advance for preservation … so there are a lot of goods with this project and perhaps some drawbacks in the views of other folks. I come down on the side that it is approvable and as a design I think it is a masterpiece of a design". RA17, R.14 at 926.

One speaker believed that the public and private interests so overlapped that there really was nothing to balance.

> "It is a very simple analysis, the balancing. And why? Because there is no balancing. The applicant is trying to do both. He's trying to

> preserve a building, while at the same time, use it for its traditional use. So they come together. There's harmony. There isn't a balancing, a difficult balancing test." RA18:2-5, R.14 at 162.

c. The Common Council provided reasoning for its decision.

Contrary to Mohs' claim, Alder Bidar-Sielaffs's comments clearly reflect her reasoning.

> " I will now, want to just spend a couple minutes, and again, I ask you to be a little patient with me, to talk through my decision on how to vote on this issue….
> The appeal language also talks about balancing the interests of the public in preserving the subject property and the interest of the owner in using it for his or her own purposes. I think that nobody in this debate has contended anything but that Edgewater, current Edgewater building, needs to be renovated, needs a lot of help and needs to be restored. And I think there is certainly an interest for the public there in preserving the property. I think we have heard information how this property is not going to be able to be preserved if there is not a significant investment in doing so... and obviously, there is an interest by the owner in doing so. And I do believe that the information that was shared with us about the economics of the need for an

> additional building to be able to make that investment into the 1940's building is an important piece of the equation. *I do not arrive to this conclusion without having thought about it long and hard and listened fully to the testimony that was provided to us today*." (emphasis added) RA12:25-28 and 44-46, R.14 at 243; RA13:1-13, R.14 at 244.

The above statement illustrates careful consideration. Ald. Bidar-Sielaff heard all the public testimony, which favored the Project by a margin of 3 to 1. RA at 14 at 397-822. She heard testimony regarding the necessity of the new hotel tower to make the old hotel restoration possible. RA149:27-31, R.14 at 81; She also identified the public and private interests, and stated why she arrived at her decision. *Id.* *Lamar* does not require that Alder Bidar-Sielaff state for the record why she found particular speakers credible or what specific weight she gave to individual testimony.

Other Common Council echoed Alder Bidar-Sielaff's reasoning. RA32:9-21 and 38-45, R.14 at 245. The record

provides this Court not only with substantial evidence to support the Common Council's decision but with clearly expressed reasoning for its decision. RA12:44-46, R.14 at 243; RA13:1-11, R.14 at 244; RA32:9-21, R.14 at 245.

V. MANY SPECIAL CONDITIONS EXIST ON THE PROJECT SITE.

A. Mohs Mischaracterizes "Special Conditions" by Treating them like a Zoning Variance Standard.

This appeal is not a zoning variance, even though Mohs uses zoning variance language when describing it as a process that provides "exceptional" relief from the "strict application of the Ordinance" when "unique conditions exist that could not otherwise be contemplate or specifically addressed when the Ordinance was adopted". Mohs' brief at 34-35. He provides no evidence of such legislative intent for this Ordinance. His likely goal is to clothe this appeal process in the "exceptional relief" nature of zoning variances

rather than what it is - simply an appeal of a Landmarks Commission Certificate of Appropriateness denial.

The term "special conditions" is not defined in the ordinance and this Court should defer to the interpretation of the Common Council if it is reasonable. *Ottman*, 2011 WI 18 at ¶60. Contrary to Mohs' contention, the phrase "special conditions pertaining to the specific piece of property" does not require the special conditions nowhere else but on the Project site. Mohs' brief at 35. The fact that other properties may have buildings designed and constructed by the same architect or have similar topographic or built environments does not mean that the there are no special conditions on the Project site. Once again, Mohs provides only his opinion, rather than supported legal argument, as to the existence of special conditions or the reasonableness of the Common Council's interpretation.

B. Special Conditions of the Project Site Include a Steep Lakeshore Slope, Multiple Public Easements, and Existing Improvements, One with Flawed Construction.

The Common Council heard very detailed testimony from Hammes regarding special conditions of the Project site determined the specific size and design of the proposal before them. The special conditions include characteristics of both the existing buildings as well as the site.

The original Edgewater Hotel construction used impervious mortar that, with no exterior cavity in the walls, caused severe deterioration of the building. RA33:30-34, R.14 at 71; RA34, R.14 at 865. In fact, another building in the City designed by the same architect suffered from similar structural issues. A redevelopment of that property ultimately required that 90% of the structure be demolished and rebuilt. RA33:35-40, R.14 at 71; RA35, R.14 at 278; RA34, R.14 at 865.

Addressing this problem in the 1940's Edgewater Hotel structure requires demolition of all floor plates, partitions, ceilings, and flooring in order to install insulation and a vapor barrier. RA33:42-45, R.14 at 71; RA36, R.14 at 277. "It has nothing to do with maintenance." R33:45, R.14 at 71. Furthermore, necessary updates to comply with current heating, plumbing, electrical, HVAC, fire, and accessibility codes are not possible without complete internal reconfiguration. RA37-61, R.14 at 279-304; RA62:27-36. Any reconfiguration must deal with a precast structural grid that "is almost impossible to take apart". RA62:16-18, R.14 at 72.

Mohs acknowledges the design flaws of the building, but claims that they represent "nothing more than standard maintenance and upkeep issues." Mohs" brief at 36 and 38. This conclusion is contradicted by the testimony of Faulkner, who stated that "[w]e've worked with Findorff over the years

on it, and they've explained to me that really, I don't have a cost on it, but they've explained to me that the true fix to the building is to get that vapor barrier." RA2:8-10, R.14 at 151 .

Other special conditions of the Project include site constraints due to required waterfront setbacks, the topography with a steep slope toward the lakeshore, the location of the existing structures on the site, a public pedestrian easement along the lakeshore, a view preservation easement in the vacated Wisconsin Avenue right of way, and a public access easement along the eastern side of the hotel. RA63, R.14 at 276; RA48, R.14 at 290; RA64, R.14 at 1219. These site constraints severely affect the amount and location of redevelopment on the Project site. RA63, R.14 at 276.

Even Mohs' counsel acknowledged to the Common Council that "[t]here's no doubt that there was some display of hardship tonight, hardship that exists as to two preexisting buildings…" RA65:31-32, R.14 at 76. The Mansion Hill

District of Capitol Neighborhoods Steering Committee, fervently opposed to the Project, also acknowledged the site and building constraints, including the view preservation corridor in the 1965 street vacation ordinance, and physical, site, land use, public use, and economic constraints. RA66, R.14 at 835. Other properties do not share the multitude of special conditions existing at the Project site. Yes, other properties have old buildings, or are on the lakeshore, etc. Sharing these characteristics with other properties is irrelevant and in any case, it is the number and interplay of special conditions on this site that uniquely restrict its redevelopment.

C. Comparisons with other Hotels Do Not Negate the Special Conditions of the Project Site.

The fact that other hotels in the City have invested in upgrades to their properties does not negate the special conditions of the Project. Mohs tries to diminish the severe

difficulties faced in redeveloping the Project site by referring to them as "conditions symptomatic of any building reaching the end of its economic life", when in fact, they are far more problematic. Mohs brief at 19.

None of the hoteliers who testified described any special conditions due to building age and flawed construction practices that are similar or as consequential as those on the Project site. RA67:23-46, R.14 at 171; RA68:1-46, R.14 at 172; RA69:1-46, R.14 at 173; RA70:1-15, R.14 at 174. The one hotelier who spoke about the upgrades he made identified changes such as expanded guestrooms, dedicated circuits, a new boiler system, and parking lot repairs, all of which could be accomplished within the existing internal and external structure of the building, which is not the case with the 1940's hotel. RA68:8-19, R.14 at 172; RA51, R.14 at 293.

As is clear from their testimony, the hoteliers' real concerns related not to the characterization of any special conditions on the Project site, but to an economic advantage they fear Hammes would receive if the TIF loan were approved. RA67-70, R.14 at 171-174. The Common Council, listening to this testimony, was in the best position to recognize that the hoteliers concerns were not related to special conditions of the Project site that they shared, but derived from economic competition and were best addressed in the context of the TIF loan discussion.

The Common Council's interpretation of special conditions is presumed to be correct. Mohs has not met his burden to show it is unreasonable or incorrect to find that a seriously deteriorating building of historic importance, multiple easements that restrict buildable area, and steep lakeshore topography are special conditions pertaining to the

Project property. The Court should uphold the Common Council's determination.

D. There is Substantial Evidence in the Record that Special Conditions Exist on the Project Site.

Mohs incorrectly alleges that "the record of the Common council deliberations contains no findings that a hardship exists arising from special conditions…." Mohs' brief at 38. Multiple members of Common Council spoke to this point after hearing the evidence.

> **Ald. Cnare:** ". . . [y]our description of hardship is pretty compelling, and as someone who voted not to support the Landmarks Commission overturn many, many months ago, because quite frankly, I didn't have as in depth a sense of what the hardship was, and while I'm not an historic preservationist, and I probably don't value that old building as much as everyone else does, I acknowledge the fact that this is part and parcel of this project and it's going to be difficult and costly, which adds up to hardship in some way." RA71:20-25, R.14 at 83.

> **Ald. Bidar-Sielaff:** "I do think that the physical issues with the building regardless of who the owner of that building is, do create hardships that is not self-created and I do believe that the information that was shared with us about the economics of the need for an additional building to be able to make that investment into the 1904's building is an important piece of the equation. I do not arrive to this conclusion without having thought about it long and hard and having listened fully to the testimony that was provided to us today". RA13:8-13, R.14 at 244.

> **Ald. Maniaci:** "I really think, given the environment that this is situated in, that there is a possibility here. The developer has talked quite a bit about hardship and about the building conditions. Some of the testimony that we had at Landmarks was that Gary Gorman came, and he talked about his project . . . and I do think that there is hardship with this site on a couple different levels, I think, with the era of the buildings and the characteristics to the building, and then also with the site itself. ." RA72:17-22, R.14 at 248.

Even an alderperson who voted "no" for the Project acknowledged that "I completely understand where the

developer is coming from on the special conditions and the financial hardship." RA13:41-42, R.14 at 244.

The Common Council correctly determined that the unique problems relating to the age and construction of the building, as well as the many site constraints, are special conditions of this specified property – the Project site. Although Mohs again tries to recast the issue as wholly an issue of law, he is, in fact, alleging that there is insufficient evidence of special conditions. As shown above, the record contains the evidentiary basis to support the Common Council. There simply is no basis for the Court to substitute its own discretion for that of the Common Council and it should sustain the Common Council's decision if any reasonable view of the evidence supports it. *Ottman,* 2011 WI 18 at ¶53.

Furthermore, as the statements of Common Council members above show, the rationale for their decision is not a

"perfunctory recitation" of criteria that caused the *Lamar* court to reverse the Board of Appeals. *Lamar*, 2005 WI 117 at ¶14. Common Council members questioned those giving testimony and made clear statements explaining their decision. RA71:19-25, R.14 at 83; RA12:44-46, R.14 at 243; RA13:8-13, R.14 at 244; RA72:17-31, R.14 at 248. The Court has a proper record to review.

VI. THE ENTIRE PROJECT REQUIRES A CERTIFICATE OF APPROPRIATENESS.

With absolutely no legal or other type of support, Mohs claims that the ordinance language "pertaining to the specific piece of property" cannot mean the Project Site but only the part of the site where the existing buildings are located. Mohs' brief at 38-42. This argument is nonsensical because all parts of the Project require a Certificate of Appropriateness - the restoration of the 1940's and 1970's

buildings as well as the proposed addition. RA7, R14 at 347. (Sec. 33.19(5)(b)2).

There are special conditions on the entire Project site property, even though Mohs refers only to those related to the 1940's building, "the absence of a vapor barrier and the disfavored structural layout as well a general upgrades requires by current codes or regulations." Mohs' brief at 38. He completely ignores the evidence in the record of other special conditions on the property, including the steep lakeshore topography, multiple easements, and the large amount of the property covered by existing buildings, all of which together severely restrict development potential. RA48, R.14 at 290; RA61, R.14 at 304; RA62:12-23, R.14 at 72; RA64, R.14 at 1219. The special conditions cannot be neatly divided into those affecting one part of the property or another.

There is nothing in the Ordinance that prohibits granting one Certificate of Appropriateness for the Project as a whole. RA7, R.14 at 346 (Sec. 33.19(5)(b)2, MGO.) Mohs opines that considering the Project as a whole is "bootstrapping" that is "inconsistent with the language of the ordinance." Mohs' brief at 42. Of course, he gives no legal support for why the words "specified property" cannot mean the whole Project site. Even though there is no ordinance requirement that there be more than one Certificate of Appropriateness for the Project, and the appeal provision says nothing about requiring multiple Certificates of Appropriateness, Mohs asks this Court to add such language to the Ordinance because otherwise developers will plan projects based on special conditions, hardship, and the possibility of a Certificate of Appropriateness being denied and subsequently appealed to the Common Council. Mohs' brief at 41. Statutory construction doctrine suggests

otherwise: "Courts should not add words to a statute to give it a certain meaning." *State Department of Corrections v. Schwartz*, 2005 WI 34 at ¶20.

Finally, there is no evidence that any City staff , Landmarks Commission member, or Common Council member, shared Mohs' opinion on granting a Certificate of Appropriateness for the entire Project. In fact, Planning staff specifically noted in its report to the Landmarks Commission that "… the proposal is a single integrated project and the Landmarks Commission is being asked to grant a single Certificate of Appropriateness for the project in its entirety." RA73, R.14 at 977. The Common Council properly treated the whole Project site as one property for finding "special conditions pertaining to the specific piece of property". RA4, R.14 at 350. (Sec. 33.19(5)(f), MGO).

A. Hammes would suffer a serious hardship if the Common Council failed to grant a Certificate of Appropriateness because the

Project could not go forward without such approval.

Mohs does not address the serious hardship Hammes will suffer from a Certificate of Appropriateness denial. As the owner under the Ordinance, however, the Common Council reasonably determined that the loss of the Project would be a serious hardship for Hammes. The Common Council understood that the Project, as proposed, needed the Certificate of Appropriateness or it could not proceed. In other words, there was no possibility of lessening the hardship by approving some other version of the Project.

> **Ald. Maniaci:** "And in terms of the hardship, if there was a way to do a smaller building, we would've done that." RA72:30-31, R.14 at 248.
>
> **Ald. Bidar-Sielaff:** "I think we have heard information about how this property is not going to be able to be preserved if there is not a significant investment in doing so." RA13:3-4, R.14 at 244.

> "It is the redevelopment that supports preservation. Absent the redevelopment, we have an asset here that is not sustainable because of its serious hardship, and it's not sustainable economically." RA14:27-29, R.14 at 81.

After hearing all the testimony and considering the evidence, the Common Council made a reasonable determination that denial of the Certificate of Appropriateness would be a serious hardship for Hammes. In fact, it is hard to imagine a more serious hardship than not being able to go forward with the Project.

Mohs discussed hardship only as it relates to Faulkner. His claim that the Common Council cannot make a finding of serious hardship without financial information has no support in any Ordinance language. Not only does the Ordinance does not require any specific materials, but it also makes no mention of a concept Mohs creates, "simple" hardship. Mohs' brief at 44-45; RA4, R.14 at 350. (Sec. 33.19(5)(f),

MGO**Error! Bookmark not defined.**). Furthermore, the Common Council had before them financial estimates from Hammes showing a negative yield over 20-30 years from investing only in the restoration of the existing Edgewater Hotel. RA11, R.14 at 303.

Even if one considers serious hardship from the perspective of Faulkner, the result is the same. Denial of the Certificate of Appropriateness results in a serious hardship - losing a chance to sell the property, as well as having to continue maintaining a deteriorating building. Alternatively, Faulkner could make a losing investment in restoring the existing hotel with no additional construction. A reasonable conclusion is that losing the sale would be a serious hardship for Faulker, one shared by the Circuit Court. App. 1 at 9.

In a side argument, Mohs' alleges error because the Common Council did not preface the word "hardship" with "serious" in its discussion and deliberation. Mohs' brief at

43-44. Mohs has provided no evidence that the Common Council was misled by references to "hardship" as opposed to "serious hardship" or that the Council improperly made a finding of a lesser degree of hardship than is required. The motion to reverse the Landmarks Commission and approve the Certificate of Appropriateness references serious hardship, and the Common Council had sufficient evidence before them to determine that Hammes' hardship was indeed serious. RA72:30-31, R.14 at 248; RA13:3-4, R.14 at 244; RA14:27-29, R.14 at 81; RA11, R.14 at 303.

Mohs' final claim relating to serious hardship is that the Common Council's testimony showed hardship being discussed in the context of the physical and economic conditions rather than in the context of failing to obtain the Certificate of Appropriateness. Mohs' brief at 42. He does not cite to testimony in the record supporting his claim, and oversimplifies the issue. The hardship of losing the Project

ultimately derives from the special conditions of the property because it is these very conditions that dictate the Project's size, design, and location on the lot. The Common Council reasonably discussed the serious hardship in the context of the special conditions that determined so many details of the Project.

1. The serious hardship of not being able to proceed with the Project was not self-created.

Just prior to voting on the Certificate of Appropriateness appeal, Ald. Bidar-Sielaff stated that:

> "Based on the information provided today by Mr. Dunn I do believe that they have defined hardship that is not self-created … I do think that the physical issues with the building is, do create hardship that is not self-created". RA13:6-11. R.14 at 244.

The potential serious hardship of losing the Project is not due to the actions of Hammes but rather to the fact that the special conditions of the Project site necessitate significant

construction to support the restoration of the existing 1940's hotel. RA13:3-4, R.14 at 244; RA11, R.14 at 303.

The ordinance does not define "self-created hardship". The concept of self-created hardship from zoning law on variances is not applicable in this non-zoning context of a Certificate of Appropriateness. Even if it were, its premise is that, "No one should be allowed to take advantage of his own wrongdoing … courts have uniformly held that where the hardship was created by the applicant's own acts, he is not entitled to relief". *State ex rel. Markdale Corp. v. Board of Appeals of the City of Milwaukee*, 27 Wis.2d 154, 159, 133 N.W.2d 795 (1965). *Petersen v. Dane County*, 136 Wis.2d 501, 402 N.W.2d 376 (Ct. App. 1987) is inapplicable because the owner purchased land knowing it was illegally divided and then requested relief.

Neither Hammes nor Faulkner has committed wrongdoing. There is no evidence in the record that the

condition of the existing buildings, or the other special conditions of the property are due to Hammes or Faulkner. In fact, Faulkner testified that he continually makes repairs to the exterior wall of the 1940's building to deal with the moisture and cracking and there is a wealth of evidence indicating that the method of construction is the problem with the 1940's hotel, not lack of maintenance. RA2:7-13, R.14 at 151; RA33:25-45, R.14 at 71.

It is ludicrous to suggest that simply purchasing property in an historic district leads to a self-created hardship. Mohs' brief at 23-24. And it is misleading to suggest wrongdoing because the Project requires a Certificate of Appropriateness. Mohs' brief at 31. All new construction in an historic district requires a Certificate of Appropriateness. RA4, R.14 at 350 (Sec. 33.19(5)(b)2.) If simply contracting to purchase property in an historic district results in a self-created hardship, it would be impossible to prevail on appeal

if a Certificate of Appropriateness were denied. Such an absurd result cannot be supported.

Mohs' arguments really are based on nothing more than his own opinions and the opinion of an alderperson opposing the Project.

> "The condition of a building, occasioned by its original design, construction or lack of ongoing maintenance is a hardship that is self-created" Mohs' brief at 53.
>
> "Even if a condition were not self-created in the first instance, a condition is self-created when it results from the failure to act in the face of known conditions." Id. at 46.
>
> **Alder Rummel:** "So, I mean, with all due respect, I just don't believe they've reinvested, so I think it's a self-created hardship". Mohs' brief at 46; RA74:15-16, R.14 at 249.

The serious hardship of losing the Project if the Certificate of Appropriateness is denied is not self-created under any reading of the evidence in the record. The failure is not due to any actions, or lack thereof, of Hammes or Faulkner. It is underpinned by a deteriorating and

obsolescent, yet architecturally significant building, and a property with topological constraints and numerous encumbrances that severely restrict the development potential. The Court should find that the Common Council reasonably determined that Hammes' serious hardship is not self-created based on the evidence in the record.

CONCLUSION

For all of the reasons stated, Respondent, City of Madison, asks the Court to uphold the decision of the Common Council to grant the Certificate of Appropriateness.

Respectfully submitted this _____ day of May, 2011.

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CERTIFICATIONS

1. **§809.19(8)(d), Wis. Stats. Form & Length**

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of this brief is 10,258 words.

2. §809.19(12)(f), Wis. Stats. Electronic Copy

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of §809.19(12), Wis. Stats.

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on opposing counsel.

Dated this 16th day of May, 2011.

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