RECEIVED
04-15-2011
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

FREDERIC E. MOHS,

EUGENE S. DEVITT,

122 EAST GILMAN LLP,

Appeal No. 2011-AP-000340

WISCONSIN AVE. HOUSE LLC,

Plaintiffs-Appellants,

v.

CITY OF MADISON,

Defendant-Respondent,

and

LANDMARK X, LLC,

Intervenor-Respondent

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

BRIEF OF APPELLANT

Dean B. Richards
WI State Bar ID No. 1003996
Reinhart Boerner Van Deuren s.c.
P.O. Box 2265
Waukesha, WI 53187-2265

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

MADISON GENERAL ORDINANCES

STATEMENT OF THE ISSUE

Did the Common Council of the City of Madison commit error in reversing the Landmarks Commission decision to deny a Certificate of Authenticity for the Edgewater Hotel project?

Answered by the circuit court in the negative.

STATEMENT ON ORAL ARGUMENT

This case presents numerous legal issues arising from a voluminous record of Common Council proceedings. Oral argument would be useful to clarify the positions of the parties with respect to the factual and legal issues.

STATEMENT ON PUBLICATION

Although landmark preservation and historic district ordinances exist in many communities, Wisconsin courts have not addressed legal issues arising from the application of these ordinances. Publication of the decision in this case would enunciate new rules of law or clarify the application of existing rules of law to cases of this type.

STATEMENT OF THE CASE

The plaintiffs in this case (collectively referred to as "Mohs") request certiorari review of a decision of the Common Council of the City of Madison ("Common Council") made on May 18, 2010.[1] This review is limited to the Common Council's decision to reverse the May 10, 2010 decision of the City of Madison Landmarks Commission ("Landmarks Commission") and to grant a Certificate of Appropriateness ("COA") for the Edgewater Hotel project (collectively, the "Decision"). Mohs requests a reversal of the Decision so as to reinstate the Landmarks Commission denial of a COA for the Edgewater Hotel project. The circuit court, by a written decision dated December 30, 2010, denied Mohs' request for relief.

The Edgewater Hotel Project

Landmark X, LLC has applied for various city approvals required to pursue a proposed major construction

[1] The Common Council proceedings subject to certiorari review lasted in excess of 13 hours. Although the Common Council meeting began on May 18 at about 6:30 p.m., the decision being reviewed was rendered the next day on May 19 at about 6:00 a.m. in a meeting that ended at about 7:45 a.m.. All references to the meeting and decision will use the May 18 date.

and renovation project for the Edgewater Hotel in the City of Madison (the "Project"). Landmark X is substantially affiliated with the Hammes Company ("Hammes") and most testimony for Landmark X was provided by Robert Dunn, president of Hammes.[2] In order to avoid confusion between the applicant, Landmark X, and the reviewing authority, Landmarks Commission, the applicant for the city approvals (Intervenor-Respondent) will be referred to as "Hammes." Hammes does not own the Edgewater Hotel, but has allegedly entered into some sort of a contract to purchase the hotel from its current owners. (R. 14 Pg. 85 – L. 36-43.)

The current Edgewater Hotel has 107 sleeping rooms, several meeting facilities, two restaurants and 155 underground parking spaces on Lake Mendota at the foot of Wisconsin Avenue. (R. 14 Pg. 1147-1151.) The hotel's current facilities were constructed in two phases. The initial phase was completed in 1948. A second phase added

[2] For example, *see* R. 14 Pg. 53 and 357. Although applications for various city approvals were submitted as Landmark X, LLC, many items of correspondence and submitted materials refer to the Hammes Company.

additional sleeping rooms and meeting and banquet facilities in 1973. (R. 14 Pg. 1149.)

The Project contemplates alterations and renovations to both the 1948 and 1973 improvements, as well as construction of a substantial, new hotel and condominium tower having a 9-story profile at Wisconsin Avenue and a 15-story profile at Lake Mendota. (R. 14 Pg. 970-971.) The Project proposes a significant increase in the number of sleeping rooms, added capacity to the meeting and banquet facilities, two floors of residential condominiums, and the construction of exterior terrace, deck, stairway and small pier areas. (R. 14 Pg. 1145-1165 & R. 14 Pg. 2424-2446.)

Jurisdiction of the Landmarks Commission

The Project lies within the area designated by the City of Madison as the Mansion Hill Historic District. (R. 14 Pg. 1149.) As such, the construction, reconstruction, or alteration of improvements on the property, as proposed for the Project, are subject to the provisions of section 33.19, Madison General Ordinances ("MGO"). (R. 14 Pg. 346. App. 2.) MGO section 33.19 (the "Ordinance") is entitled

"Landmarks Commission" and provides for the regulation of property and improvements within Madison's numerous historic districts.[3]

Before the construction activities contemplated for the Project may begin, the owner must obtain many municipal approvals and permits. Among these, the Landmarks Commission must first grant a Certificate of Appropriateness ("COA") authorizing the proposed work. MGO §§33.19(5)(b) & (c). (R. 14 Pg. 346-348.) A COA is subject to both generic provisions found at MGO sections 33.19(5)(b)&(c), (R. 14 Pg. 346-348 App. 2.) and standards specific to the Mansion Hill Historic District at MGO section 33.19(10)(e) (R. 14 Pg. 355 App. 2.).

Proceedings Before the Landmarks Commission

In November, 2009, Hammes made its first application to the Landmarks Commission for a COA. (R. 14 Pg. 2177 & 875-964.) The application also requested a variance from guideline criteria for development in the Mansion Hill Historic District. (R. 14 Pg. 2177.) Following

[3] Historic preservation ordinances are authorized by Wisconsin Statutes (footnote continued)

a public hearing conducted on November 30, 2009, the Landmarks Commission denied both the COA and variance requested by Hammes. (R. 14 Pg. 1979-1985.) Hammes appealed the 2009 denial by the Landmarks Commission to the Common Council. (R. 14 Pg. 1877.) This appeal has been held over and no substantive action has been taken on it. (R. 14 Pg. 393 & 394.)

In the spring of 2010, Hammes again applied for a COA and variance from the Landmarks Commission. (R. 14 Pg. 1143 & 1225.) The size of the project proposed in this second submittal was larger than that originally proposed to the Landmarks Commission in 2009. (R. 14 Pg. 968.) The Landmarks Commission conducted a public hearing on May 10, 2010. (R. 14 Pg. 305-313.) The Landmarks Commission again denied the Hammes request for a COA and a variance. (R. 14 Pg. 314-316.) At the conclusion of these proceedings, however, the Landmarks Commission passed an advisory resolution indicating that a project of reduced

section 62.23(7)(em).

volume could be viewed favorably by the Landmarks Commission. (R. 14 Pg. 315.)

Hammes again appealed the decision of the Landmarks Commission to the Common Council. (R. 14 Pg. 53.) The Hammes appeal to the Common Council of the 2010 COA denial by the Landmarks Commission leads to this certiorari review.

Jurisdiction of the Common Council

An appeal of a Landmarks Commission decision to the Common Council is authorized by MGO section 33.19(5)(f) (App. 2). The Common Council does not have unrestricted power to grant relief from a Landmarks Commission decision. Instead, the MGO set forth very specific requirements and elements for such an appeal.

> 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, owing 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 Landmark Commission's decision.

MGO §33.19(5)(f) App. 2.

Proceedings Before the Common Council

The Common Council conducted a marathon 13-hour meeting on May 18, 2010 (*see supra* note 1.) during which it considered numerous agenda items, several of which involved quasi-judicial decisions or legislative action related to the Project. (R. 14 Pg. 1-22.) Among its many decisions on the Project, the Common Council reversed the Landmarks Commission and issued a COA for the Project. (R. 14 Pg. 5-6.) Although the overall Common Council meeting spanned more than 13 hours, all of the deliberations of the Common Council related to the appeal of the Landmarks Commission decision took place in the early morning hours of May 19, 2010, and can be found in the transcript at R. 14 Pg. 242-252 and App. 3.

Certiorari Appeal

The plaintiffs in this case are the owners of various properties that either abut or are adjacent to the proposed Project. By the commencement of this action, the plaintiffs have requested certiorari review of the Common Council decision which reversed the Landmarks Commission and authorized a COA for the Project.

ARGUMENT

I. Standard of Review

On certiorari review, this court reviews the decision of the Common Council. "When we review an application for a writ of certiorari, we review the agency's decision, not the decision of the circuit court. *Bratcher v. Housing Authority of the City of Milwaukee*, 2010 WI App 97, ¶10, 327 Wis. 2d 183, 787 N.W.2d 418 (citation omitted).

The review of the Common Council's decision is limited to: "(1) [w]hether the [Common Council] kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not

its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." *Arndorfer v. Sauk Cnty. Bd. of Adjustment,* 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991) (first alteration in original)(citation omitted).

"Whether the [Common Council] acted in excess of its powers, applied an incorrect theory of law, or made an arbitrary, oppressive or unreasonable decision are each questions of law that this court reviews de novo." *Driehaus v. Walworth Cnty.*, 2009 WI App 63, ¶ 13, 317 Wis. 2d 734, 767 N.W.2d 343 (citing *State ex rel. Ziervogel v. Wash. Cnty. Bd. of Adjustment*, 2004 WI 23, ¶ 14, 269 Wis. 2d 549, 676 N.W.2d 401.)

"The interpretation and reconciliation of statutes and ordinances involve questions of law that reviewing courts decide independently." *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78, ¶ 22, 244 Wis. 2d 613, 628 N.W.2d 376. The court construes an ordinance independent of the Common Council's interpretation. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 32, 498 N.W.2d 842 (1993).

II. The Common Council committed error by considering the hardship of an a*pplicant,* rather than the o*wner* of the property.

A. All evidence of hardship pertained to Hammes and Hammes is not the owner of the property.

The Common Council failed to follow the Ordinance directive to analyze the "serious hardship" as it applies to the "owner" of the property, rather than the "applicant." MGO §33.19(5)(f). This is a threshold issue. The terms "owner" and "applicant" are not interchangeable terms under the Ordinance. *Id.* The Common Council's analysis of serious hardship was made by simply substituting Hammes, the *prospective* owner and current "applicant" for the actual owner.[4] Treating the "applicant" as the "owner" violates basic principles of statutory construction.

[4] The record establishes that Landmark X is <u>not</u> the owner of the property (and neither is Hammes nor any Hammes affiliate). R. 14 Pg. 85 – L. 35-43 and R. 14 Pg. 126 – L. 1-4. In fact, Scott Faulkner testified unequivocally that "I am the current owner of the property, but I have an agreement for [Landmark X/Bob Dunn/Hammes] to purchase the hotel." R. 14 Pg. 151 – L. 38-41. Moreover, Judge Colás took "judicial notice" that the "City of Madison online property records show the name of the owner of 666 Wisconsin Avenue is 'Edgewater Hotel' and that City of Madison online property records do not show Landmark X, LLC as the owner of any property in the city." Colás Op. at Pg. 6, n.1. R. 20 and App. 1

Pawlowski v. Am. Family Mut. Ins. Co., 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67.

Simply put, Hammes (or Landmark X or any other Hammes affiliate) is not the "owner" of the property as that term is used in the Ordinance and analyzing Hammes' supposed "serious hardship" is not relevant to the analysis. Hammes, the applicant and developer, desires to construct a new hotel tower as part of the Project. Hammes then asserts that the renovations desired for the 1940s building could not be funded without the revenue stream anticipated from that new hotel tower. (R. 14 Pg. 81 – L. 21-31.) This is the view from the prospective developer, not the current owner.

Testimony from the actual owner of the property paints a less severe picture. Scott Faulkner, a member of the family owning and operating the Edgewater Hotel, described the impending sale of the property to Hammes as allowing the Faulkner family to carry on the legacy of the Edgewater Hotel. (R. 14 Pg. 126 - L. 7-10 & 19-20 App. 4.) Faulkner described being solicited by developers to sell the Edgewater at the rate of "ten or so a year" over the 20 or 25

years that Faulkner has operated the property. (R. 14 Pg. 126 - L. 4-5.) He also described having turned down Hammes' overtures to sell the Edgewater "three or four times" before deciding that Hammes "was in the right place at the right time and had the right credentials". (R. 14 Pg. 151 – L. 26-31.)

In considering the Hammes offer, Faulkner indicated he was guided by a desire to improve the facility. (R. 14 Pg. 126 – L. 12-13 & 18-19.) He admitted to having no cost estimates for remediating the problems cited by Hammes as hardship. (R. 14 Pg. 151 – L. 9-10.) Instead, he recited the current maintenance efforts that have been used to manage the moisture issues. (R. 14 Pg. 151 – L. 3-13.) Conspicuously absent is any testimony by Faulkner establishing any hardship, serious or otherwise. Faulkner makes no mention that the application of the Ordinance to his property is creating any hardship, much less a serious hardship.

Faulkner describes ongoing maintenance of a persistent problem at one of his buildings. (*Id.*) He

describes an opportunity to sell his property to preserve a family legacy occurring at a time when his age is influencing an exit strategy. (R. 14 Pg. 151 – L. 29-30.) The physical conditions and financial expenditures described by Hammes as a hardship emerge only when Hammes applies their development plan against the property. If any hardship exists, it has not been demonstrated to be a serious hardship for the owner. Instead, the alleged "hardship" applies to a prospective developer seeking to alter the site to maximize profit.

B. The hardship of the *applicant* should not be considered as the hardship of the *owner.*

The fact that the Ordinance allows a potential future owner (an "applicant") to apply for a certificate of appropriateness does not mean that the serious hardship test applies to the "applicant" rather than the "owner," as the plain language of the ordinance requires. MGO §33.19(5)(f). The serious hardship provision in the Ordinance provides that:

> An appeal from the decision of the Landmarks Commission to grant or deny a Certificate of Appropriateness

> under Subsection (5)(b) and (c) may be taken to the Common Council *by the applicant* . . . . the Council may ... 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, owing 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 Landmark Commission's decision.

MGO §33.19(5)(f) (emphasis added).

The plain language of the ordinance allows an "applicant" (such as Hammes) to apply for a COA and allows an "applicant" (such as Hammes) to appeal any Landmarks Commission decision to the Common Council. MGO §33.19(5)(b)1,3 ("[a]ny application for a permit ... shall be filed" and "[n]otice ... shall also be sent by the City Clerk to the applicant" and "[t]he applicant shall immediately post a copy of such notice . . . ."); MGO

§33.19(5)(b)5 ("the applicant may appeal such decision to the Common Council."); MGO §33.19(5)(f) ("[a]n appeal from the decision of the Landmarks Commission ... may be taken …by the applicant ...").

Although an "applicant" can file for a COA and appeal a Landmarks Commission decision, the plain language of the ordinance requires that the serious hardship test apply to the "owner." MGO §33.19(5)(f) ("serious hardship for the owner"). Such a plain language reading of these two distinct terms ("applicant" and "owner") makes sense and comports with the purpose of the ordinance as well as the City's own practice of allowing potential future owners to apply for such certificates.

As is well-established, "[w]hen the legislature chooses to use two different words, [the courts] generally consider each separately and presume that different words have different meanings." *Pawlowski,* 2009 WI 105, ¶ 22; *Schill v. Wisc. Rapids Sch. Dist.*, 2010 WI 86, ¶ 62, 327 Wis. 2d 572, 786 N.W.2d 177 ("The words 'notes,' 'drafts,' and 'like materials' should each be given distinct meanings,

to avoid redundancy or 'surplusage.'"). "We endeavor to give each statutory word independent meaning so that no word is redundant or superfluous." *Pawlowski*, 2009 WI 105, ¶ 22.

In *Noffke v. Bakke*, the Wisconsin Supreme Court reiterates that "[i]f the meaning of the statute is plain, we ordinarily stop the inquiry and give the language its 'common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.'" *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 10, 315 Wis. 2d 350, 760 N.W.2d 156 (quoting *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110). "A dictionary may be utilized to guide the common, ordinary meaning of words." *Noffke*, 2009 WI 10, ¶ 10. Statutory construction is a question of law subject to de novo review. *State v. Cole*, 2000 WI App 52, ¶ 3, 233 Wis. 2d 577, 608 N.W.2d 432; *Cadott Educ. Ass'n v. Wis. Emp't Relations Comm'n*, 197 Wis. 2d 46, 52, 540 N.W.2d

21 (Ct. App. 1995) (reviewing court not bound by agency's conclusion of law).

Given that the Ordinance uses two distinct words ("applicant" and "owner"), the Court must start with the presumption that these two words have different meanings. *Pawlowski*, 2009 WI 105, ¶ 22 (presumption that different words have different meanings); *Grobarchik v. State*, 102 Wis. 2d 461, 467-68, 307 N.W.2d 170 (1981) (same).

Under the plain meaning of the word, "owner" means "owner" and it does not mean "potential future owner" or "owner if a certificate of appropriateness is granted" or even "applicant." *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* 887 (11th ed. 2003) ("own" means "to have or hold as property; possesses"); *Black's Law Dictionary* 1105 (6th ed. 1990) ("own" means "to have good legal title; to hold as property; to have a legal or rightful title to; to have; to possess"; "owner" means "person in whom is vested the ownership, dominion or title of property"); *Merriam-Webster's* 60 ("applicant" means "one who applies").

The fact that the Ordinance allows a potential future owner to apply for a certificate does not mean that the serious hardship test applies to the "applicant" rather than the "owner," as the plain language mandates. MGO §33.19(5)(f). Obviously, an "applicant" does not have to be the "owner" and in many instances the "applicant" will not be the "owner."

As to ownership, it is undisputed that Hammes does not own the property at issue and any future ownership is supposedly contingent on a COA (and presumably a number of other things). *See supra* note 4. Although Hammes may have a "sufficient property interest" to be an "applicant" and apply for a COA, Hammes is not the "owner" and the serious hardship test explicitly and unambiguously applies to the "owner" under the plain language of the ordinance. MGO §33.19(5)(f).

The fact that the serious hardship test applies only to the "owner" (rather than to a potential future owner) makes sense and comports with the purpose of the ordinance. The serious hardship test provides that "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 Landmark Commission's decision." MGO §33.19(5)(f) (emphasis added). If a potential future owner were considered the "owner" for purposes of the serious hardship test, then *every* "applicant" could pass the serious hardship test by arguing that not being able to buy the property and build the proposed development constitutes a serious hardship.

Because Hammes does not own the property, it cannot suffer any injury (i.e., has no hardship) by not receiving a certificate to do what it wants to do with property that it does not own. Moreover, to the extent this could even be considered a "hardship," Hammes has self-created it by voluntarily seeking to buy property that is subject to the Ordinance. *See Petersen v. Dane County*, 136 Wis.2d 501, 402 N.W.2d 376 (Ct. App 1987). In the *Peterson* case, a landowner was viewed as having a self-

created hardship based on the actions of his predecessor in interest. "We conclude that Peterson may not base a claim his land has been taken by virtue of the zoning ordinance to his lot when the condition which renders the lot valueless to him was created by his predecessor in title and was known to Peterson when he bought the lot. *Id.* at 506.

If a potential future owner were able to assert a hardship under these conditions, the self-created clause would lose all meaning. *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 21, 325 Wis. 2d 135, 785 N.W.2d 302 ("Interpreting a statute so that portions of it have no application is an absurd result."). In any event, because the Common Council failed to apply the serious hardship test to the "owner," as the Ordinance explicitly and unambiguously requires, the Common Council's decision is based on an erroneous application of the law.

In sum, because the serious hardship test was not applied to the "owner," as the Ordinance explicitly and unambiguously requires, the Common Council's decision violates the plain language of the law and must be reversed.

This is a threshold issue that the Common Council and Hammes have failed to surmount.

III. The Common Council failed to make an adequate record of its consideration of the balancing test.

A. Mohs is entitled to a comprehensive record explaining why and how the Common Council reached its conclusions.

When conducting certiorari review, courts accord a presumption of correctness and validity to the underlying decision. *Ziervogel*, 2004 WI 23, ¶ 13. However, certiorari review cannot be meaningful unless the body appealed from has given a court something to review. *State v. Trudeau,* 139 Wis. 2d 91, 110, 408 N.W.2d 337 (1987).

In *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee*, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87, the Wisconsin Supreme Court described the requisite elements of a proper record produced by a board of adjustment. In hearing the appeal of the Landmarks Commission decision, the Common Council, like a Board of Adjustment, sits in a quasi-judicial role. The standards enunciated in *Lamar* for a zoning board are equally

applicable to the Common Council hearing an appeal from the Landmarks Commission.

The *Lamar* court held that the zoning board could not grant or deny a request simply with conclusory statements that the situation did or did not satisfy the statutory criteria, but instead the board had to explain why it found that the criteria were or were not met. *Id.* ¶ 32. If the record does not include *why* an application does or does not meet the statutory criteria, it was impossible for the circuit court "to meaningfully review a board's decision, and the value of certiorari review becomes worthless." *Id.* ¶ 32. This failure to provide a meaningful explanation violates the "third prong" of certiorari review, the requirement that a board must not act in an arbitrary, oppressive or unreasonable manner. *Id*. ¶ 26.

Mohs has a right to know not only the ordinance criteria by which the Common Council granted the Hammes appeal, "but also the *reasons* ('grounds') why" the Common Council decided as it did. *Id.* ¶ 27. Here, the Common Council rendered its decision to grant the Hammes appeal

with conclusory statements that fail to provide a record which allows meaningful review of the thought process and reasons for the ultimate conclusion of the Common Council.

B. The record is inadequate to evaluate the Common Council's consideration of the balancing test.

When considering an appeal of a Landmarks Commission decision, the Common Council must engage in a comparative analysis of public and private rights – a balancing test. In pertinent part, the ordinance governing the Common Council's review of the Landmarks Commission decision reads as follows:

> (T)he Council may ... 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, owing 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 will not be a basis for reversal or modification of the Landmark Commission's decision.

MGO §33.19(5)(f). (emphasis added)

By definition, a balancing test requires an identification of the interests to be compared and a comparative evaluation of those interests. Presumably, the comparison would include some quantitative or qualitative measure of the competing interests and a measured opinion as to how the public and private interests compare.

> Discretion is more than a choice between alternatives without giving the rationale or reason behind the choice. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning . . . . [T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.

Daniels v. Wisc. Chiropractic Examining Bd., 2008 WI App 59, ¶ 6, 309 Wis. 2d 485, 750 N.W.2d 951(alterations in original) (citation omitted).

If the record of such deliberation is adequate, a party and a reviewing court could examine the Common Council's thought process and evaluate the validity of the reasoning involved. When a record states the conclusion, but does not include the thought process by which the conclusion was

reached, it is impossible to determine if a proper evaluation was undertaken.

The Common Council's record of deliberations with respect to the balancing test is long on conclusion, but without analysis or reasoning. The only substantive reference to the balancing test in the deliberation portion of the Common Council's proceedings came from Alder Bidar-Sielaff, whose explanation of her position included the following:

> The appeal language also talks about balancing the interests of the public in preserving the subject property and the interests 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 this property.
>
> 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. And obviously, there is an interest by the owner in doing so.

R. 14 Pg. 243-244 App. 3.

Alder Bidar-Sielaff does nothing other than to recap statements made during the proceedings. Indeed, her comments with respect to the owner's interest in preservation simply restate the owner's position without making a conclusion as to the credibility, weight, or significance of that position. Most significantly, the alder does nothing to consider or document her consideration of a "balancing test". There is no weighing of conflicting positions. There is no evaluation of the relative merit of conflicting interests. There is no reasoning included in the record by which the parties and this court can determine whether the Common Council reached a defensible conclusion by engaging in proper decision making. Alder Bidar-Sielaff's comments are sufficient only to acknowledge the most rudimentary statements of interest in this case. Her comments do nothing to demonstrate that the conclusion of granting the COA was the result of engaging in a balancing test.

Interestingly, the Alder's comments further demonstrate the limited basis upon which the interests of the

public were considered. Alder Bidar-Sielaff stated: "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 this property." (R. 14 Pg. 243-244.) However, neither Alder Bidar-Sielaff, nor any of her colleagues ever considered, as part of a balancing test, the public interest in the Edgewater Hotel site being preserved without construction of the newly proposed building. No party offering testimony at the Common Council proceedings expressed any opposition to rehabilitating or preserving the current Edgewater buildings. Instead, objection to the project exists as to the construction of a massive, new building on the Edgewater site. (*see e.g.* R. 14 Pg. 243 – L. 29-33). At no point in the Common Council deliberations is there any record by which an Alder balances the public interest in preserving the undeveloped portions of the site with the owner's interest in constructing a new hotel building that would otherwise be prohibited without a COA.

In the course of 13 hours of meeting, an extensive record of testimony and documents can be produced. Within that record, numerous factual items can be found to support almost any conclusion. Indeed, this record may well contain some pieces of evidence that might support the ultimate decision of the Common Council. But the question before this court is not simply whether a piece of supporting evidence exists, but rather whether there is proper evidence, which was given appropriate weight, *and used in a meaningful analysis* of competing interests as required by the Ordinance.

If the record does not include this analysis, this "balancing test", the court cannot review the exercise of discretion by the Common Council. Unless the record allows the parties and the court to examine and evaluate the *reasoning* of the Common Council in reaching its decision, then the record evinces an "absence of discretion" and it cannot be said that the Common Council did not proceed in an arbitrary, oppressive or unreasonable manner. Without an adequate record with which to evaluate the Common

Council's reasoning, it appears that the Common Council exercised its will and not its judgment.

There are two possible conclusions. On one hand, the Common Council simply failed to conduct the balancing test required by the Ordinance and neglected to consider all of the interests of the public in preserving the undeveloped portions of the site. If this is the case, the Common Council failed to apply a proper rule of law. On the other hand, the Common Council may have simply failed to articulate the reasoning or grounds upon which it based its conclusion to override the Landmarks Commission and grant a COA. If this is the case, there is an absence of discretion and the Common Council's decision is arbitrary, oppressive or unreasonable. In either case, the decision of the Common Council is infirm and must be reversed.

IV. The Common Council failed to properly make all findings required by the Ordinance to overturn the Landmarks Commission denial.

Before it may overturn the Landmarks Commission's denial of the COA, the Common Council is required by the Ordinance to make a number of findings. The Common

Council may grant the requested relief only if it finds that: (A) "owing to special conditions"; (B) "pertaining to the specific piece of property"; (C) the "failure to grant the Certificate of Appropriateness", (D) "will cause serious hardship for the owner[5]; and (E) "provided that any self-created hardship shall not be a basis for reversal . . . ." MGO §33.19(5)(f).

In the absence of these findings, the Common Council has no legal basis upon which to overturn the Landmarks Commission denial of the COA. If the record of the Common Council deliberation does not include these findings, there is no opportunity for meaningful judicial review. *See Trudeau,* 139 Wis. 2d, 110.

A. *Special conditions* do not exist.

The Common Council has the authority, on appeal, to authorize a COA and relieve a landowner from the strict application of the Ordinance if certain serious hardships are

[5] An alternate standard requires that the special conditions will preclude any and all reasonable use of the property. However, the City Attorney conceded in a memo dated December 4, 2009 that Hammes had not put forth any argument that failure to grant the COA would preclude any or all reasonable use. (R. 14 Pg. 320)

present. MGO §33.19(5)(f). But not every hardship may be used as the basis for a COA. Instead, the Ordinance requires the Common Council to find that the serious hardship arises from "special conditions pertaining to the specific piece of property". MGO §33.19(5)(f). This qualification serves to restrict exceptional relief to only those cases in which unique conditions exist that could not otherwise be contemplated or specifically addressed when the Ordinance was adopted.

The transcript of proceedings before the Common Council demonstrates that special conditions do not exist on this specific property. The deliberations of the Common Council are silent as to what conditions, if any, were found to be "special conditions" that pertain only to the Edgewater Hotel. Testimony by Bob Dunn, the chief representative of Hammes in these proceedings, identifies the original architecture and engineering of the 1940s building as the basis for this serious hardship. (R. 14 Pg. 71 - L. 25-27.) Hammes emphasizes a flawed wall system (R. 14 Pg. 71 - L. 30-31.) and a structural grid that is outdated for modern

hotels. (R. 14 Pg. 72 - L. 13-18.) But neither of these conditions qualifies as a *special* condition pertaining to this *specific* property. Instead, these conditions are symptomatic of any building reaching the end of its economic life, whether because of outdated design and engineering or changes in the marketplace and consumer preferences. As Dunn testified, "But no matter how hard you fight that problem, there is an end date where eventually you have to fix the problem. And there's many buildings like this that go through this kind of evolution". (R. 14 Pg. 82 – L. 3-5.)

In his testimony, Dunn used another developer's experience with the Quisling Clinic (also located in the Mansion Hill Historic District and subject to the Ordinance) as an example of the design flaw shared by the 1940s building of the Edgewater Hotel. "The Quisling Clinic building suffered from this same condition by its design". (R. 14 Pg. 71 – L. 35, *see also* R. 14 Pg. 71 – L. 30-45.)

Testimony offered by hotel operators competing with the Edgewater Hotel challenged the Project as generating unfair competition. (R. 14 Pg. 171 - L. 23 through R. 14 Pg.

174 - L. 15.) In doing so, the hoteliers related their own stories of significant financial expenditures to improve their own properties. The testimony of Tom Ziarnik, general manager of the Doubletree Hotel (located in Madison near the Kohl Center), demonstrates the ubiquitous nature of building conditions requiring massive capital expenditures.

> Financial hardship was a question brought up. *We all have it in our hotels.* In 1998, we expanded our guestrooms in our hotel. By code, the city required us to add two additional dedicated circuits to each guest room. It cost us over $200,000 in 1998. We paid for it ourselves. In 2005, we put $5 million into our hotel. We paid for that ourselves. In 2006, we replaced our boiler system. It was $200,000. We replaced that ourselves. In 2009, we had some structural repair to do to our parking lot. That was $125,000, and we also had to upgrade our fire system to bring it up to code, and that was $75,000. All that, we did out of our own cash flow. Financial hardship, yes, but we didn't go to the city looking for money.

R. 14 Pg. 172 - L. 8-19 (emphasis added).

A finding of hardship is insufficient to support reversal of the Landmarks Commission. The Common Council must find "special conditions pertaining to the

specific piece of property". MGO §33.19(5)(f). As the cited testimony reveals, Hammes presented nothing more than standard maintenance and upkeep issues. Following that testimony, the record of the Common Council deliberations contains no finding that a hardship exists arising from *special conditions* on the *specific piece of property*. Again, we are faced with the circumstance that the Common Council either did not consider an essential element of the appeal and proceeded on an incorrect theory of law, or the Common Council failed to produce a record adequate to evaluate the reasoning used to reach its conclusion and therefore acted in an arbitrary, oppressive or unreasonable manner.

B. The claimed hardship has insufficient nexus to the new hotel tower to qualify as *pertaining to the specific piece of property*.

Testimony as to hardship principally refers to the 1940s building on the Edgewater property, specifically the absence of a vapor barrier and the disfavored structural layout, as well as general upgrades required by current codes or regulations. However, the Landmarks Commission

was not presented with a COA application solely to reconstruct or alter the exterior of the 1940s building. Rather, the point of contention between Hammes and the Landmarks Commission (and later the Common Council) was the construction of the new hotel tower on an undeveloped site, specifically the so-called "massing" (or overall height and size) of the building. (R. 14 Pg. 243 – L. 30-32, R. 14 Pg. 246-L. 34-35 & 40-43.)

How does the design of a building in the 1940s create a hardship requiring the construction of a new hotel tower otherwise prohibited by the Ordinance? Under the reasoning of the applicant, the renovation of the 1940s building is itself cost prohibitive. The only way to finance the renovation of the 1940s building is through the cash flow provided by a completely new and separate hotel tower development. (R. 14 Pg. 81 – L. 21-31 and R. 14 Pg. 244 – L. 3-4 & L. 9-11.) This argument presents a fundamentally flawed extension of the Ordinance.

The language of the Ordinance contains multiple qualifiers limiting its application. The Common Council

must find special conditions "pertaining to the *specific piece of property*", such that the failure to grant a COA would "preclude any and all reasonable use *of the property* and/or will cause serious hardship for the owner" that is not self-created. MGO §33.19(5)(f) (emphasis added). The plain language of the ordinance requires that the serious hardship arise from the building or site for which the COA has been denied.

Although the Project is presented as an integrated development proposal, it is inescapable that the new hotel tower and the 1940s building are being linked to avoid the consequence of the Ordinance. Without the hardship alleged in the 1940s building, Hammes has no basis for obtaining a COA for the new hotel tower. Neither Hammes, nor the owner have applied for a COA solely to remediate the alleged ills of the 1940s building upon which their claim of serious hardship is based. The denial of the COA to build a new hotel tower does not cause the serious hardship already existing in the 1940s building.

The court must require a strict link between the alleged hardship and the activities for which the COA is requested. Otherwise, any hardship can be used to justify any project. Developers could expand the size of a property to join a dilapidated, but landmark protected building, with a new development that would otherwise be prohibited. Likewise, landowners could allow a building to deteriorate to the point at which repair is no longer economically feasible. Then, the landowner could use this condition as the justification for constructing a new, additional building that would not be permitted unless linked to the old.

The Common Council's decision uses the claim of hardship at one building to justify the construction of another building at another location on the same general site. The new building eliminates, rather than preserves, the open area of the site protected by the Ordinance. The only nexus between the building experiencing a hardship and the building proposed under the COA is the cash expected to flow from one to the other.

This bootstrapping of the hardship is inconsistent with the language of the Ordinance. The claimed hardship does not exist as to the specific piece of property for which the COA is requested. By viewing the 1940s building as the hardship justifying a COA for a new hotel tower, the Common Council adopted an incorrect theory of law.

C. The alleged hardship arises only from the current condition of the property, not *from the denial of the COA*.

The deliberations of the Common Council include many references to hardship. Several alders stated that they believe a hardship exists. However, the alders failed to determine whether the hardship was caused by the failure to grant a COA as required by the Ordinance. MGO §33.19(5)(f). The testimony before the Common Council described a wide range of physical and economic conditions at the Edgewater Hotel. But all of those conditions exist as a consequence of the building, not the failure to issue a COA.

A clear purpose of the appeal procedure is to provide relief when the operation of the Ordinance (the failure to

grant a COA) causes a hardship to the property owner. This relief is based upon the effect of the Ordinance, not the effect of age, the marketplace, or changing consumer demands. There is no testimony that the owner of the property was denied a COA to undertake repairs on or rehabilitation of the property. Nonetheless, to grant the relief requested of it on appeal, the Common Council must make an affirmative finding that serious hardship is caused to the owner of the property by the failure to grant a COA. Absent this finding, the decision of the Common Council is based on an incorrect theory of law.

D. Denial of a COA does not cause *serious* hardship to the property owner.

Before authorizing a COA on appeal, the Common Council is required to find that the failure to issue a COA "will cause serious hardship for the owner". Although the initial motion made by Alder Clear includes a perfunctory reference to "serious hardship", the transcript of the Common Council deliberations following that motion contains no reference to a "serious" hardship. The language of the ordinance must be given its full effect. *Pawlowski,*

2009 WI 105, ¶ 22 (“As a basic rule of statutory construction, we endeavor to give each statutory word independent meaning so that no word is redundant or superfluous.”).

The Common Council's deliberations do not contain any consideration of the financial aspects of the owner's hardship. This may well be because the record contains no such evidence. Although the circuit court decision claims there is evidence that "...the existing building financially cannot support the reconstruction that must be done to preserve it..." (Colás Decision R. 20 Pg. 7 App. 1.), the record contains no evidence of a financial analysis as to the costs of repair or renovation by the owner. Instead, the record includes testimony by the owner's representative, Scott Faulkner, that he has no cost estimates for such repair. (R. 14 Pg. 151 – L. 9-10.) Although the Common Council is required to find that serious hardship exists as to the owner of the property, the owner of the property cannot provide financial evidence as to the effect of the conditions on his property.

A simple hardship is insufficient to justify the Common Council authorizing a COA. Without evidence of the financial impact of the conditions to the owner of the property, there is no evidence upon which to consider whether a serious hardship exists. The failure of the Common Council to make a finding as to the degree of hardship evinces the application of an incorrect rule of law.

E. The conditions causing hardship are *self-created*.

The Ordinance prevents the Common Council from reversing the Landmarks Commission if the serious hardship is "self-created". The self-created hardship element complements the requirement that a hardship be caused by the failure to issue a COA. All ordinances and regulations cause some degree of hardship. An orderly society views such hardships as a necessary element of that order. However, ordinances and statutes often permit exceptions or variances if the burden of regulation imposed on a particular property owner is unreasonable or unjustified. But the hardship must derive from application of the Ordinance, not from the acts, errors or omissions of the owner.

The conditions described by Hammes as hardship include design characteristics incorporated by the original owner of the property which, given the benefit of time and hindsight, have allegedly proven to be unwise. The size and configuration of hotel floors may be different than those preferred in today's marketplace, but they were constructed by the original owner of the property. If these conditions qualify as a serious hardship, the hardship exists only because of a design that was adopted by the owner of the property. By this reasoning, *all* outmoded designs or uses would trigger a serious hardship.

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. Alder Rummel's testimony underscores this fact.

> The hardship is self-created. And I think the whole point about the testimony about the quisling clinic (sic) and John Marten's testimony should've made that clear. Where in 1999, the same architect that built this building, they were repairing or remodeling it, restoring it, doing the whole thing they did, and the issues about mold and water and everything

> were right there, and nothing changed as far as the owners of the Edgewater.
>
> They, you know, you heard the other hoteliers say how they spent hundreds of thousands of dollars over years improving their, reinvesting in their property. And, you know, it's not just that you have to reinvest, there's things like new rugs or something. I mean, you have to, if there's structural soundness of your building, you have to maintain that. I mean, that's part of your due diligence as an owner.
>
> So, I mean, with all due respect, I just don't believe that they've reinvested, so I think it's a self-created hardship.

R. 14 Pg. 249 – L. 4-16.

If natural aging, progressive deterioration, or economic obsolescence of a building can lead to the grant of a COA, then the Ordinance motivates inattention to building maintenance and guarantees the issuance of a COA at some time in the building's life. The Ordinance does not permit the grant of COAs on appeal to any building whose age or condition, coupled with neglect, require renovation. Granting a COA on appeal must be reserved for circumstances when the application of the *Ordinance*

created a hardship, rather than the acts or omissions of the property owner.

To grant a COA based on the natural and purposeful condition of a building constitutes erroneous application of a rule of law and an arbitrary and unreasonable decision.

V. Conclusion

Mohs requests a reversal of the Common Council's grant of a COA in order to preserve the integrity of Madison's Landmarks Ordinance and the historic districts which the Ordinance protects. Before the Common Council can override the Landmarks Commission's denial of a COA, the Common Council must make proper findings which satisfy the elements of the appeal ordinance. In several respects, the Common Council's decision fails to address the requisite elements.

As a threshold issue, Mohs notes that the Common Council is required to consider whether the *owner* of a property sustains a serious hardship by the denial of a COA. However, in this case the Common Council was presented evidence only of a hardship experienced by the applicant for

a COA wishing to build a new hotel tower. The deliberations and decision of the Common Council failed to focus on the hardship experienced by the *owner*, rather than the future owner of the proposed development site. By failing to properly evaluate hardship only as to the owner of the property, the Common Council proceeded on an incorrect theory of law.

Before it may overturn the Landmarks Commission's denial of a COA, the Common Council must conduct a balancing test, evaluating the interests of the public in preservation and the interest of the owner in using its property as it wishes. The deliberations of the Common Council include only conclusory statements with regard to a balancing test. The record does not contain the reasoning or grounds by which the Common Council reached its decision, specifically with respect to the balancing test. The proceedings of the Common Council lead to one or both of two conclusions: (1) the Common Council failed to conduct a proper balancing test and therefore based its decision on an incorrect application of the law; or, (2) the Common

Council failed to make an adequate record explaining its findings under the balancing test and accordingly rendered its decision with an absence of discretion, proceeding in an arbitrary, oppressive or unreasonable manner.

After first vesting the authority to grant a COA in its Landmarks Commission, the City of Madison further provided that the Common Council could provide extraordinary relief by issuing a COA on appeal of a Landmarks Commission denial. This authority was not without limitation. It can only be exercised when specific findings are made by the Common Council. The decision to grant a COA in this case is not supported by essential findings.

The Common Council must find that a hardship is caused by special conditions on the specific piece of property for which relief is requested. Although the record contains many references to various conditions, the Common Council made no finding that the alleged conditions were special or unique to this property. Indeed, the record contains substantial references to the alleged

conditions being common and shared by other properties. Unless it found that special or unique conditions exist on the specific property for which relief is requested, the Common Council cannot grant a COA. The Common Council's decision is based on an incorrect application of the law.

The Ordinance contemplates that a COA will be issued only when a serious hardship is caused by "special conditions pertaining to the specific piece of property". MGO §33.19(5)(f). This provision requires a substantial nexus between the special condition which constitutes a serious hardship and the specific piece of property for which a COA is requested. In this case, the nexus exists only if the Edgewater property and its multiple buildings, existing and proposed, are artificially viewed as a single unit. A hardship is alleged to exist in one building, but a COA is requested to build a completely new building on otherwise protected open space. It is illogical to allow the constraining language of the Ordinance to be twisted to allow two separate buildings to be linked for COA purposes only by the cash

that will flow from one to another. Such an interpretation constitutes application of an incorrect rule of law.

Not all serious hardships may justify a COA. The Ordinance requires that the serious hardship arise from the denial of the COA. The Common Council failed to adequately address this element. All claims of hardship arise from the 1940s building at the Edgewater site. The COA principally applies to the construction of a new hotel tower, separate from the 1940s building. There is no allegation that a COA, intending to ameliorate only the conditions in the 1940s building upon which hardship is based, was denied. The hardship was not caused by the denial of a COA.

If the Common Council is to grant a COA, the Ordinance requires that a serious hardship exist. The deliberations and decision of the Common Council fail to recognize the necessity of finding *serious* hardship and refer only to *a* hardship. The Common Council ignored this element and proceeded on an incorrect theory of the law.

Hardships that are self-created may not be the basis for a COA. Yet the conditions presented by Hammes all derive from the original design and construction of the building or the failure to address ongoing maintenance and upkeep requirements. The condition of a building occasioned by its original design, construction, or lack of ongoing maintenance is a hardship that is self-created. The Ordinance specifically provides that such a condition cannot be the hardship upon which a COA is based.

Mohs respectfully requests that this court protect the integrity of the City of Madison's Landmarks Ordinance. A decision of the Landmarks Commission should not be overturned on appeal unless the Common Council demonstrates strict compliance with a proper reading and interpretation of the Ordinance. Because the Common Council proceeded on incorrect theories of law and failed to produce a record adequate to establish the exercise of the Common Council's judgment and not its will, Mohs requests a reversal of the Common Council decision granting a Certificate of Appropriateness.

Dated this 15th day of April, 2011.

s/Dean B. Richards
Dean B. Richards
WI State Bar ID No. 1003996
drichards@reinhartlaw.com
Attorney for the Plaintiffs-Appellants

Reinhart Boerner Van Deuren s.c.
P.O. Box 2265
Waukesha, WI 53187-2265
Telephone: 262-951-4500

CERTIFICATIONS

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

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Wis. Stats., for a brief produced using a proportional serif font: The length of this brief is 8,563 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.

3. Certificate of Service

I certify that on the 15th day of April, 2011, I supervised and confirmed that three copies of this Brief of Plaintiffs-Appellants were served upon opposing counsel by messenger at the following addresses:

Katherine C. Noonan, Esq.
Madison City Attorney's Office
Room 401
210 Martin Luther King Jr. Boulevard
Madison, WI 53703-3345

Allen A. Arntsen, Esq.
Foley & Lardner LLP
Verex Plaza 150 East Gilman Street
P.O. Box 1497
Madison, WI 53701-1497

Dated this 15th day of April, 2011.

s/Dean B. Richards
Dean B. Richards
WI State Bar ID No. 1003996
Attorney for Plaintiffs-Appellants

Reinhart Boerner Van Deuren s.c.
Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

REINHART\6472496_5