

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RECEIVED

06-03-2011

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

**REPLY BRIEF OF APPELLANT
WITH SUPPLEMENTAL APPENDIX**

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

	Page
ARGUMENT	
I. Overview	1
II. Standard of Review	2
III. The Council committed error by considering the hardship of an <i>applicant</i> , rather than the <i>owner</i> of the property. ..	4
A. Proper construction of the Ordinance requires the hardship analysis to focus on the owner, not the applicant.	5
B. The Council should not consider alternate meanings of <i>owner</i>	7
C. This court need not defer to the City Attorney's suggested interpretation of the Ordinance.	9
IV. The Council failed to make an adequate record of its consideration of the balancing test.	11
V. The Council failed to find that denial of the COA would cause serious hardship, owing to special conditions pertaining to the specific piece of property.	13
A. Special conditions.	13
B. The hardship has insufficient nexus to the new hotel tower.	15
VI. Conclusion	17
CERTIFICATIONS	19

TABLE OF AUTHORITIES

CASES

<i>American Motors v. City of Kenosha</i> 274 Wis. 315, 80 N.W.2d 363 (1957)	8
<i>City of Milwaukee v. Greenberg</i> 163 Wis. 2d 28, 471 N.W.2d 33 (1991)	7, 8
<i>Driehaus v. Walworth Cnty.</i> 2009 WI App 63, 317 Wis. 2d 734, 767 N.W.2d 343.....	3
<i>Keen v. Dane County Bd. of Supervisors</i> 2004 WI App 26, 269 Wis. 2d 488, 676 N.W.2d 154.....	3, 15
<i>Mueller v. Novelty Dye Works</i> 273 Wis. 501, 78 N.W.2d 881 (1956)	7
<i>Ottman v. Town of Primrose</i> 2011 WI 18	3, 9
<i>Scheer v. Weis</i> 13 Wis. 2d 408, 108 N.W.2d 523 (1961)	8

OTHER AUTHORITIES

<i>Wisconsin Real Estate Law and Practice</i>	7
---	---

MADISON GENERAL ORDINANCES

§33.19(5)(f)	1, 4, 5, 6, 14
--------------------	----------------

ARGUMENT

I. Overview

The City of Madison's Landmarks Ordinance ("Ordinance")¹ provides a simple checklist of what must be considered by the City's Common Council ("Council") before it may overturn a Landmarks Commission denial of a Certificate of Appropriateness ("COA"). The Council must: (1) base its decision on the standards contained in the Ordinance; (2) balance the interest of the public in preserving the subject property and the interest of the owner in using the property for his or her own purposes; (3) find that the failure to grant the COA will cause serious hardship to the owner; (4) find that the hardship is owing to special conditions pertaining to the specific piece of property; and, (5) find that the hardship is not self-created. MGO §33.19(5)(f) (App. 2). Plaintiffs-Appellants ("Mohs") submit that the Council failed with respect to items 2 through 5, all of which are discussed in Mohs primary brief.

¹ MGO §33.19 (App. 2)

In this reply brief, Mohs emphasizes that the Council failed to properly consider the third element as to serious hardship being caused to the *owner* of the property; the second element as to the use of a balancing test; and, the fourth element as to a serious hardship arising from special conditions pertaining to the specific piece of property.

II. Standard of Review

The Council asserts that Mohs' challenge is based on the sufficiency of evidence, for which this court should not substitute its view of the evidence. Although Mohs argues the absence of evidence establishing a hardship suffered by the current property owner, Mohs primarily asserts errors of law, caused by the Council's failure to apply proper rules of law and because the absence of an adequate record evinces an arbitrary and unreasonable decision. On both points, this court is considering questions of law for which its review is independent of the determinations made by the Council or the circuit court. *Driehaus v. Walworth Cnty.*, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343.

Affording the Council's decision a presumption of correctness should not eliminate meaningful review. Acknowledging a presumption "does not mean that the presumption will never be overcome." *Ottman v. Town of Primrose*, 2011 WI 18, ¶51. When considering the Council's interpretation of the Ordinance, this court need not "accept the [City's] interpretation without a critical eye." *Id.* ¶61.

When the Council fails to make a required finding, the presumption of correctness should not cure this defect. "We decline to expand the presumption of validity doctrine such that we presume a basic fact. Affording [the Council] such deference would render judicial review meaningless." *Keen v. Dane County Bd. of Supervisors*, 2004 WI App 26, ¶6, 269 Wis. 2d 488, 676 N.W.2d 154.

III. The Council committed error by considering the hardship of an *applicant*, rather than the *owner* of the property.

The threshold issue in this case is whether the Council applied a proper rule of law when it considered the hardship alleged by the prospective project developer,

Landmarks X, LLC ("Hammes"). Under the Ordinance, the Council is compelled to consider whether denial of the COA "will cause serious hardship for the owner." MGO §33.19(5)(f) (App. 2). The Council failed to differentiate between the owner of the property, Scott Faulkner, and the applicant for the COA, Hammes.²

This focus is essential because the owner, Faulkner, testified solely of a desire to sell the Edgewater. The only allegations of hardship are those asserted by prospective purchaser, Hammes, who claims insufficient cash flow to repair the current buildings unless a new hotel and condominium tower is built on unimproved land.³ In an effort to justify its decision, the Council seeks to expand the definition of owner to include Hammes.

A. Proper construction of the Ordinance requires the hardship analysis to focus on the owner, not the applicant.

² The status of ownership and the relationship between Hammes and the Edgewater are discussed in footnote 4 of Mohs' brief and at page 8 of Hammes' (Landmark X) brief. Generally, the parties agree that Hammes is a prospective purchaser of the Edgewater who has not closed the purchase transaction.

³ A full review of the difference between the evidence presented by Faulkner and that offered by Hammes is set forth in Mohs brief at pages 15 through 17.

The Council argues that the term *owner* should be construed in the context in which it is used. Mohs agrees. The appeal portion of the Ordinance is comprised of two paragraphs. MGO §33.19(5)(f) (App. 2). The first paragraph delineates the parties that may file an appeal of a Landmarks Commission decision with the Council. This paragraph recognizes that an applicant for a permit might not be an owner of the property.

In its second paragraph, the Ordinance sets forth the standard to be applied by the Council in considering an appeal. Although the first paragraph of the Ordinance is written in broad terms, the second paragraph of the Ordinance is very specific in establishing the property owner as the focus of the hardship analysis. The clear context of the Ordinance is to differentiate between the owner of the property and all others.

Further support for the context can be gleaned from the Ordinance provision that a self-created hardship shall not be the basis for reversal of a Landmarks Commission decision. MGO §33.19(5)(f) (App. 2). An applicant for a

permit, even if a prospective purchaser, cannot suffer a hardship from the enforcement of the Ordinance. Indeed, if a prospective purchaser saw hardship in a property it intended to purchase, then the hardship to be suffered by that prospective purchaser would be self-created by the purchase.

Hammes was entitled to apply for a COA and appeal the denial of the COA. But Hammes cannot change the words of the Ordinance and become the focus of the argument. Hardship must be evaluated as to the owner.

B. The Council should not consider alternate meanings of *owner*.

The Council's suggestion that *owner* should be construed to include parties not in title is flawed and draws from circumstances dissimilar to this case. The specific relationship between Hammes and the property owner is first described as an option, then later as a contract. (R. 14 Pg. 85 – L. 35-43 Resp. App. 1.) At best, Hammes has an accepted offer to purchase the Edgewater.

Although Hammes is only a prospective purchaser of the Edgewater, the Council argues that Hammes is the

owner of the property by equitable conversion. (Resp. Brief Pg. 11-14.) Under the authority cited by the Council, this concept applies to purchases of property by land contract. The Council seeks to equate an accepted offer to purchase with a land contract, by characterizing both as a "purchase contract". The Council's reliance on *City of Milwaukee v. Greenberg*, 163 Wis. 2d 28, 471 N.W.2d 33 (1991), *Mueller v. Novelty Dye Works*, 273 Wis. 501, 78 N.W.2d 881 (1956), and the treatise *Wisconsin Real Estate Law and Practice* is misguided and unjustified. Hammes is not a land contract vendee to whom equitable title has been transferred.

A land contract is the contractual mechanism by which a property is purchased and *equitable* title is conveyed to the buyer. Because a seller does not deliver a deed until the completion of payments under the land contract, *legal* title is not conveyed until the end of the land contract. A similar conveyance of property interests does not exist in this case. Hammes has not received any of the "sticks" from the metaphorical "bundle of property rights". See *City of Milwaukee*, 163 Wis. 2d 28.

Similarly, the Council uses personal property tax exemption, *American Motors v. City of Kenosha*, 274 Wis. 315, 80 N.W.2d 363 (1957), and eligibility to apply for a building permit, *Scheer v. Weis*, 13 Wis.2d 408, 108 N.W.2d 523 (1961), in its attempt to broaden the scope of hardship review. All of these cases, as well as the equitable conversion principles inherent in a land contract, address the nature of property rights and real property interests of one party as against another. That is not the issue in this case.

The true issue is one of perspective: hardship should be evaluated from the viewpoint of the owner. Drawing on unrelated cases does not change the text of the Ordinance or the definition of owner.

C. This court need not defer to the City Attorney's suggested interpretation of the Ordinance.

The Council cites *Ottman*, 2011 WI 18, to urge this court to defer to the City Attorney's interpretation of the Ordinance set forth in his December 15, 2009 memorandum. (R. 14 Pg. 325-326, Reply App. 1.) In *Ottman*, the question of how to interpret an ordinance was a part of the proceedings and the town decided, in accord with historical

interpretation, which standard to apply. In this case of first impression of the application of hardship under the Ordinance, the Council never considered alternate interpretations of the Ordinance. It simply examined the hardship issue from the perspective of Hammes, without explicitly deciding that the Ordinance allowed it to do so.

Further, the City Attorney's memorandum evinces an attempt to justify proceeding on Hammes' appeal, even though Hammes is not the owner of the property. It does not address the standard for hardship review.

To justify allowing Hammes' COA appeal to be heard, the City Attorney's memorandum suggested that not allowing Hammes' appeal would cause an absurd result.

If the applicant is Hammes Co. and the owner is the current Edgewater owner that has an agreement to sell to the Hammes Co., then there is no development proposal from the current Edgewater owners that relates to the piece of property. The Council is to make its decision on appeal in part "owing to special conditions pertaining to the specific piece of property." This means the Council has to look at the property and the specific development proposal. But if you focus on the current Edgewater owner, they have no proposal

for that piece of property. They could argue a “hardship” because they may not be able to sell the property if the approval is not granted, but such an analysis focuses on the terms and conditions of the agreement between the current Edgewater owner and Hammes Co. – and not on the standards for development in the Landmarks ordinance. R. 14 Pg. 326, Reply App. 1.

What is presented as *reductio ad absurdum* is actually a proper conclusion. Because Hammes does not own the property, Hammes cannot present a hardship. Any hardship analysis for the current Edgewater owner would require the Council to look at the property and the specific development proposal. However, the Council never could have performed this hardship analysis because the terms and conditions of the purchase agreement between the owner and Hammes were never disclosed or discussed with the Council and, in fact, are not in the record.

The City Attorney presents what he considered to be an absurd result to justify broadening the definition of owner. The better conclusion, the correct conclusion, would have been to recognize that Hammes could not meet the

Ordinance standard that a serious hardship is suffered by the owner of the property.

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

Mohs and other interested parties are entitled to a record which is sufficient to demonstrate that the Council properly considered the appropriate rule of law, exercised its judgment and not its will, and had sufficient evidence to support its findings. The Ordinance requires that before the Council makes a finding as to serious hardship, it must first engage in balancing the interest of the public in preserving the property and the interest of the owner in using the property for their own purposes. The record provides no evidence that this balancing test was properly conducted.

For example, the Project is comprised of several components, including renovation of the 1940's and 1970's buildings currently comprising the Edgewater. The Project also includes the construction of a new and massive hotel and condominium tower on currently undeveloped portions of the Edgewater site. The COA applies not only to the renovation, but also to the new construction. The public

interest in preserving the subject property is multi-faceted. It includes preserving and maintaining the current buildings, as well as requiring that new construction on the unimproved portions of the Edgewater site comply with the design requirements of the Mansion Hill Historic District.

Alder Bidar-Sielaff's comments (and the decision in general) address only the preservation of the current buildings. "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 App. 4.) This text of the Council's decision shows that only one aspect of the public's interest in preservation was considered, preservation of the current buildings. There was no evaluation of the public's interest in preserving the unimproved portions of the parcel.

It is not sufficient that evidence supporting the Council's decision might exist somewhere in the 13 hours of proceedings. The question is not whether evidence exists,

but rather whether the decision maker actually applied the evidence to satisfy the requisite elements of the Ordinance.

V. The Council failed to find that denial of the COA would cause serious hardship, owing to special conditions pertaining to the specific piece of property.

A. Special conditions

Under the Ordinance, it is insufficient to find that the Edgewater simply faces a hardship. The Ordinance requires that the serious hardship is "...owing to special conditions pertaining to the specific piece of property." MGO §33.19(5)(f) (App. 2). Since "conditions" is qualified by "special" and "pertaining to the specific piece of property", the conditions upon which the hardship is based are not general, but rather unique conditions.

In its brief the Council rolls out a litany of hardships including steep slopes, multiple easements, and waterfront setbacks, all pertaining to other approvals and aspects of this case. The hardship alleged to support the appeal relates to the construction and design of the 1940s building and the alleged need to construct a new hotel and condominium

tower to provide the cash necessary to ameliorate these conditions.

As to these conditions, the record contains numerous examples of similar conditions suffered and addressed by other property owners. The claim that a sales transaction might be lost does not constitute a condition of the property. The conditions upon which Hammes bases his claim of hardship are not "special" and do not "pertain to the specific piece of property." More significantly, the Council failed to make specific findings that the conditions leading to a hardship met these qualifying requirements.

Under a different record, this might be a question as to the sufficiency of evidence. But in this case, the Council simply failed to address this element in its decision and neglected to consider or find that special conditions did exist as to the specific piece of property. The Council has ignored an essential element of the appeal or has failed to produce a record that demonstrates the consideration of this element. In either event, the decision is in error as a matter of law.

The Council must give full consideration to the special conditions, balancing test, and all other elements set forth in the Ordinance. The presumption of validity cannot overcome the failure to properly consider an explicit requirement of the Ordinance. *Keen*, 2004 WI App 26, ¶6.

B. The hardship has insufficient nexus to the new hotel tower.

The hardship existing in the 1940s building should not serve as the basis for a COA authorizing new construction elsewhere on the property. The owner's hardship should have sufficient nexus to the construction for which the COA is requested. This nexus is implicit in the wording of the Ordinance and common sense. The Ordinance language has not been the subject of Wisconsin appellate court review. In almost all respects, the interpretation of the Ordinance is a case of first impression.

The Ordinance does not provide explicit geographic limitations on the scope of either a COA or a hardship. But the language implies a nexus between the hardship and the property for which the COA is requested. The phrase "pertaining to the specific piece of property" is given full

effect only if there is a specific link between the hardship and the property. Without the link, these words have no effect.

Here, the hardship exists in one building on one portion of the land, but the new construction is on undisturbed and protected land elsewhere on the property. The owner has not been denied a COA to ameliorate the conditions in the 1940s original building.

An integrated development project should not provide an umbrella under which unrelated hardships and developments are joined. The Project is comprised of many allegations of hardship, combined with renovations of existing buildings and the construction of a new building.

The spirit of the Ordinance may be circumvented when significant development projects, like the new hotel and condominium tower, are lumped with other projects, such as the 1940s renovation, for combined analysis under the Ordinance. The protections afforded by the Ordinance may be jeopardized when one aspect of a development lacking in hardship is bootstrapped to another aspect of the

development that evinces a hardship. This court must ensure that the protections of the Ordinance are provided to each aspect of the Project by requiring that there be a significant nexus between the hardship claimed and the building for which a COA is sought.

VI. Conclusion

The decision of the Council to overturn the Landmarks Commission denial of a COA for the Edgewater Hotel project contains errors of law. The decision cannot survive the test of comparing its text to the requisite elements of the Ordinance.

The record of a quasi-judicial proceeding must demonstrate that the deliberative body exercised its judgment and not its will. This record is insufficient to determine if a proper rule of law was applied by making all requisite findings and whether the findings were the product of deliberation or arbitrary predetermination.

Because the decision of the Council contains these errors of law, Mohs respectfully requests a reversal of the Council's grant of a Certificate of Appropriateness.

Dated this 2nd day of June, 2011.

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

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

CERTIFICATIONS

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

I certify that this reply 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 2,973 words.

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

I hereby certify that:

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

I further certify that:

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

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

3. Certificate of Service

I certify that on the 2nd day of June, 2011, I supervised and confirmed that three copies of this Reply Brief of Plaintiffs-Appellants were served upon opposing counsel by first class mail 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 2nd day of June, 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\6996768_5