STATE OF WISCONSIN CIRCUIT COURT Branch 10 DANE COUNTY

Frederic Mohs, et al.

Plaintiffs,

Case No. 10CV3244

City of Madison,
Defendant

and

Landmark X, L.L.C.
Intervening Defendant

DECISION AND ORDER DISMISSING COMPLAINT

The plaintiffs seek reversal of the May 19, 2010 decision of the City of Madison Common Council to grant a Certificate of Appropriateness under Madison's Landmark Commission Ordinance to a project known as the Edgewater Project. The certified record of the proceedings was filed on August 12, 2010 and briefing was completed on November 19, 2010. As explained below, because the Council applied the correct legal standards and its decision can be supported by a reasonable view of the evidence before it, the action of the Council is affirmed and the complaint is dismissed.

FACTUAL SUMMARY

The plaintiffs own property in an area of Madison designated by Madison General Ordinances (MGO) §33.19(10) as the Mansion Hill Historic District ("the District"). The Edgewater Project is a plan for construction and reconstruction on a property ("the Edgewater Property") the general street address of which is 666 Wisconsin Avenue. At least portions of the Edgewater Property are within the Mansion Hill Historic District, subjecting the Edgewater to MGO §33.19, the Landmarks Ordinance ("the Ordinance"). Plaintiffs allege that they own properties adjacent to the Edgewater Property, an allegation denied by the intervening defendant.

Construction projects in the District must receive a Certificate of Appropriateness ("Certificate") from the City of Madison Landmarks Commission ("the Commission"). MGO §33.19(5)(b)2. The denial of a Certificate is appealable to the City of Madison Common Council ("the Council"). MGO §33.19(5)(f).

On May 10, 2010 the Landmarks Commission denied the Edgewater Project a Certificate. R390. On May 11, 2010 the Hammes Corporation, which had applied for the certificate on behalf of Landmark X, L.L.C., appealed the denial to the City Council. R53. On May 19, 2010, following a hearing that had begun on May 18, 2010 and continued through the night, the Council granted the Certificate, reversing the Commission.

I. STANDING

The City argues that the plaintiffs lack standing because the interests they allege to be affected by the Council's decision are relevant to land use decisions, not to those criteria relevant to a Certificate of Appropriateness. In their complaint the plaintiffs do not explicitly allege an injury, but allege that "the Edgewater Project will affect various neighborhood factors, including traffic flows, traffic volumes, sight lines, views, and general property values near the Edgewater Property" and therefore affect the properties they own.

To have standing a party must have (1) an actual injury to its interests as a result of the challenged action and (2) the injured interest must be one that is legally protected, i.e. within the "zone of interests" intended to be protected by the legislation at issue. *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1067, 236 N.W.2d 240, 245 (1975), *Milwaukee Brewers Baseball Club v. Wisconsin Dept. of Health & Soc. Services*, 130 Wis. 2d 56, 65-66, 387 N.W.2d 245, 248-49 (1986).

The purposes of the Ordinance are to protect, enhance and perpetuate improvements and districts "which represent or reflect elements of the City's cultural, social, economic, political and architectural history," "stabilize and improve property values," "[f]oster civic pride in the beauty and noble accomplishments of the past," "[p]rotect and enhance the City's attractions to residents, tourists and visitors, and serve as a support and stimulus to business and industry," "[s]trengthen the economy of the City" and "[p]romote the use of historic districts and landmarks for the education, pleasure and welfare of the people of the City. MGO 33.19(1). The purposes

of the Mansion Hill Historic District, gleaned from the criteria for its creation, are to protect features in the area of the district that have historical significance with respect to important events or persons or that are architecturally significant because of their architectural characteristics or the significance of their builder, designer or architect. MGO §33.19(10(c).

Interests of property owners in the District in sight lines, views and property values are clearly within the "zone of interests" intended to be protected by the Landmarks Ordinance and the creation of the District. Controlling traffic volumes and flows, if not squarely within the protected interests certainly impinge on those protected interests.

Standing is to be liberally construed, and though the allegations of injury are general, they are enough to give the plaintiffs standing.

II. STANDARD OF REVIEW

The parties agree that the court should apply common-law certiorari standards to its review of the Council's decision. The review is limited to 1) whether the 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. *State ex rel. Ruthenberg v. Annuity & Pension Bd. of City of Milwaukee*, 89 Wis. 2d 463, 472-473, 278 N.W.2d 835, 840 (1979).

The Council, is presumed to have acted correctly according to law. *Id.* The first question asks whether the Council acted within the lawful scope of its powers. *Id.* The second question requires the court to consider whether the Council followed applicable law. *Id.* On the third standard, an agency's action is arbitrary only if it is without any rational basis. *Id.* In reviewing the fourth standard, the court defers to the weight and credibility the Council gave to the evidence before it. *Id.*. The test is whether given the evidence in the record a reasonable person could reach the same conclusion as the Council, even if a different decision could also be reasonable. *State ex rel. Palleon v. Musolf*, 120 Wis. 2d 545, 549, 356 N.W.2d 487, 489 (1984). The court may not substitute its discretion or judgment for the Council's. *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 247 N.W.2d 98, 103 (1976).

III. THE COUNCIL FOLLOWED APPLICABLE LAW.

The plaintiffs do not argue that the Council acted beyond the scope of its powers or jurisdiction, the first prong of certiorari review. They do argue that the Council incorrectly interpreted and applied MGO 33.19(5)(f) and therefore made an error of law, the second prong of certiorari review.

The argument is that the Council erred because:

1) it concluded that different standards applied to its decision than to the Commission's original decision,

2) it did not give required deference to the Commission's decision.

Whether MGO 33.19(5)(f) requires the council to give deference to the Commission and whether it requires the Council to apply the same standards as the Commission are questions of law, reviewable by this court.

Section 33.19(5)(f) provides that "An appeal from the decision of the Landmarks Commission to grant or deny a Certificate of Appropriateness...may be taken to the Common Council by the applicant for the permit." The ordinance requires the Council to conduct a public hearing. It authorizes the Council to "reverse or modify" the Commission's decision. The ordinance constrains the Council's power to do so:

- The Council's action must be "based on the standards" in the ordinance.
- The Council must balance the public interest in preservation and the owner's interest in using the property.
- The Council must find that "owing to special conditions pertaining to the specific piece of property" not granting the Certificate "will preclude any and all reasonable use of the property" or cause the owner "serious hardship" not created by the owner.
- The Council's action must be approved by two-thirds of its members.

Nothing in the plain language of the appeal ordinance limits the Council to a review of the record of proceedings before the Commission nor requires the Council to consider or give any weight to the decision of the Commission. The Council must conduct a public hearing, clearly authorizing the Council to hear and consider evidence in addition to that presented to the Commission. The Council is to apply an interest-balancing test, something the Commission does

not do. The Council must also make a hardship finding to grant *any* Certificate, something the Commission is required to do only to grant a variance under MGO §33.19(15)( ).

These provisions make clear that the proceedings before the Council are *de novo*, not a review of the record of Commission proceedings for error. Because the decisions are made by different bodies, considering potentially different evidence and applying differing tests, the Council's alleged failure to explain why its decision differed from the Commission's is of no legal consequence. All that is required of the Council is that it consider and apply the standards and tests required by MGO 33.19(5)(f), make the findings it was required to make and reach a decision that a reasonable person could reach on the evidence in the record (even if a different decision might also have been reasonable).

IV. THE COUNCIL APPLIED THE REQUIRED STANDARDS AND TESTS AND ITS FINDINGS AND DECISION ARE SUPPORTED BY EVIDENCE IN THE RECORD.

Apart from arguing that the Council was bound by the Commission's decision unless it found error in it, plaintiffs do not argue that the council had insufficient evidence to find that the application met the standards prescribed by MGO 33.19(10)(e) for granting a Certificate for a project in the District. Plaintiffs also do not argue that the council did not apply the balancing test or that its findings in that regard were unsupported by evidence. Instead, the plaintiffs arguments are (1) that the Council's findings of serious hardship are not supported by the evidence and (2) that any hardship that does exist is self-created or arises from the condition of the property and (3) that any hardship is solely with respect to the renovation of the existing building and cannot be the grounds to grant a Certificate encompassing the construction of a new, additional, building.

Plaintiffs argue that the record does not show that any special conditions exist with respect to this specific property. Plaintiffs' argument is that the condition of the existing building on the property is not a special condition, but one in common with any building nearing the end of its economic life. This argument ignores evidence in the record before the council that the problems with the condition of the existing building arise from design and construction flaws, not from the ordinary obsolescence of a building of this age. R. 278. It also ignores evidence in

the record of the special conditions of the particular piece of property: its location, its topography, the location of existing structures and the various easements affecting it. There is sufficient evidence in the record on which a reasonable person could conclude that there are special conditions specific to this property. The question is whether there is evidence that owing to those special conditions, not granting the Certificate will cause serious and not self-created hardship for the owner.

In its brief the City identifies the "serious hardship" as the inability of the Hammes Corporation to proceed with the Project. The plaintiffs argue that the Council may not grant a Certificate based on hardship to a prospective owner, only upon a showing of hardship to the owner of record. [1] The plain language of MGO §33.19(5)(f) allows the Council to grant a Certificate only after weighing the interest of the "owner" and the hardship for the "owner."

The City contends that in the Landmarks ordinance the terms "owner" "person in charge" "operator" and "applicant" are used interchangeably and that "owner" in MGO §33.19(5)(f) should be construed to mean "applicant" or "person with a sufficient property interest." None of the terms are defined in the ordinance.

The problem with the City's argument is that the ordinance is not ambiguous and does not need to be construed. A statute (or ordinance) is ambiguous "if it is capable of being understood by reasonably well-informed persons in two or more senses." *Teschendorf v. State Farm Ins. Companies*, 2006 WI 89, ¶19, 293 Wis. 2d 123. This ordinance plainly says "hardship for the owner." A plain reading is supported by the principle that when a legislative body chooses "similar but different terms," particularly within the same section, it is presumed that different meanings were intended. *Graziano v. Town of Long Lake*, 191 Wis. 2d 812, 530 N.W.2d 55, 59, 1995 WL 77930 (Wis. Ct. App. 1995). The presumption is that the use of "applicant" and "owner" were intentional and that the words have different meanings.

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[1] The parties are casually indifferent to establishing who owns the Edgewater Property. In a footnote in their brief-in-chief the plaintiffs assert that the owners are the Edgewater Hotel and National Guardian Life Insurance Co. Later in the same brief they refer to "Scott Faulkner, a member of the family owning and operating the Edgewater Hotel." In their reply brief they refer to the owners as "Midwest Realty/Faulkner." In its answer to the complaint, Landmark X claims to own the property. Its representative and development partner, the Hammes Corporation, testified at the Council hearing that the Hammes Corporation did not own the building. The City's brief implies that Scott Faulkner is the owner. Scott Faulkner's ownership is supported by his statement to the City Council, "I am the current owner." R. 151. The court takes judicial notice that 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, L.L.C. as the owner of any property in the city.

The City argues that "owner" in MGO 33.19(5)(f) cannot mean only "owner" because if it did, then "there was never anything properly before the Landmarks Commission and the application of the Hammes Co. should simply have been dismissed," a result it argues would be absurd. However, nothing in the Landmarks ordinance compels that conclusion, because nothing in it expressly states or implies that only "owners" may be "applicants." It is not inconsistent or absurd for the Ordinance to allow a prospective owner to be an applicant for a Certificate, but to allow only hardship for the current owner to be grounds to grant that Certificate on appeal.

The City's position is also that the distinction between applicant/prospective owner and owner doesn't matter in this case, since both will suffer serious hardship if the Certificate is not granted. The alleged hardship to the current owner is the inability to sell the property to Hammes and the need to continue maintaining a deteriorating and obsolete building. The record contains evidence, which the Council was entitled to accept, that due to the special conditions of the site and of the existing hotel building, the existing building financially cannot support the reconstruction that must be done to preserve it, resulting in serious hardship to the owner unless a Certificate is granted permitting the construction of a new building and substantial reconstruction. See R71,72,81, 151.

Plaintiffs make another argument of legal error by the Council related to the hardship test. They contend that the Ordinance does not allow alleged hardship caused by the special conditions of one building to justify a Certificate for construction of a different building. Plaintiffs rely on the language in MGO 33.19(5)(f) requiring a finding of special conditions "pertaining to the *specific piece of property* [emphasis in plaintiffs' brief]" which they interpret as meaning one building or parcel. The phrase "specific piece of property" is not defined, but in the context clearly refers to the property for which the Certificate is sought. In this case the application was for a Certificate for a site described as comprising four different parcels, one of which includes the original 1940's hotel building. R2369, R2387. Nothing in the ordinance precludes the Commission or the Council from granting a Certificate for a site that combines multiple parcels, or that combines in one application the reconstruction of an existing building with construction of a new building. Whether it is wise that the Ordinance permits this is not a question before the court; as a matter of law the Ordinance does not prohibit it and the Council did not err by considering the site for which the Certificate was sought as a whole in applying the

hardship test.

Reasonable persons might reach a different conclusion than the Council. But the question before the court is not whether a different conclusion would also be reasonable, or which decision among several is wisest, but only whether the Council's conclusion is one that reasonable persons might reach, on the basis of evidence the weight and credibility of which the Council is entitled to determine. The Council's decision meets that standard and is upheld.

ORDER

THEREFORE, IT IS ORDERED, the complaint for certiorari relief is dismissed. This is a final order as defined by Wis. Stat. §808.03(1).

Dated December 30, 2010.

BY THE COURT:

Juan B. Colás
Circuit Court Judge

Copy: Counsel