COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP340 **Cir. Ct. No. 2010CV3244**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FREDERIC E. MOHS, EUGENE S. DEVITT, 122 EAST GILMAN LLP AND WISCONSIN AVE. HOUSE LLC,

PLAINTIFFS-APPELLANTS,

V.

CITY OF MADISON,

DEFENDANT-RESPONDENT,

LANDMARK X LLC,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 LUNDSTEN, P.J. This case involves the proposed redevelopment of the Edgewater Hotel in Madison. Nearby landowners, Frederic Mohs and Eugene Devitt, and two limited liability entities, Wisconsin Ave. House LLC and 122 East Gilman LLP (collectively the appellants), challenge the Madison Common Council's decision to grant a Certificate of Appropriateness. The developer, Landmark X LLC, needs this Certificate to proceed with redevelopment because the Edgewater Hotel is located in a historic district. The appellants sought certiorari review of the Council's decision in circuit court. The circuit court affirmed the Council. We now affirm the circuit court.

¶2 At the outset, we note that our review, like that of the circuit court, is a limited one. It is readily apparent that the appellants do not believe that the Council should have accepted as credible assertions made by a Landmark X representative regarding the economic viability of the existing Edgewater and the need for the proposed redevelopment. Similarly, it is apparent that the appellants believe the Council made an unwise decision. But the appellants also understand that certiorari review in the courts is limited to specific issues. Courts do not second guess credibility determinations made by local government entities like the Council, and courts are not empowered to question the wisdom of decisions like the one made by the Council here.

Background

¶3 Landmark X has plans to redevelop and renovate the Edgewater Hotel, which currently includes a hotel, restaurant, and parking facilities that were

constructed in two phases, in the 1940s and the 1970s.[1] The proposed redevelopment would include both renovations to the existing facilities and additions, most notably a "new hotel tower." The parties agree, at least for purposes of this appeal, that Landmark X does not own the Edgewater property, but has agreed to purchase it from the current owner, the Faulkner family.

¶4 Landmark X sought a Certificate of Appropriateness from the City's Landmarks Commission. The Commission denied the Certificate. Pursuant to a city ordinance, Landmark X sought review of the Landmarks Commission's decision before the City's Common Council. The Council heard testimony, received written submissions, and voted to reverse the Landmarks Commission and grant the Certificate.

¶5 The appellants sought certiorari review of the Council's decision in circuit court. The circuit court affirmed the Council. The appellants appeal.

Discussion

¶6 The following principles are applicable to certiorari review of the Council's decision:

> On certiorari review, we are limited to determining whether: (1) the governmental body's decision was within its jurisdiction, (2) the body acted according to law, (3) the decision was arbitrary or oppressive, and (4) the evidence of record substantiates its decision. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). We apply these standards de novo to the

[1] The parties explain that Landmark X is affiliated with another entity, the Hammes Company, and the record reveals that Hammes has acted on behalf of Landmark X in the approval proceedings at issue here. Consistent with the parties' briefing, we do not distinguish between Landmark X and the Hammes Company. We refer to Landmark X and the Hammes Company collectively as Landmark X.

> Common Council's decision, reviewing that decision and not the decision of the circuit court. ***Kapischke v. County of Walworth***, 226 Wis. 2d 320, 327, 595 N.W.2d 42 (Ct. App. 1999).

State ex rel. Bruskewitz v. City of Madison, 2001 WI App 233, ¶11, 248 Wis. 2d 297, 635 N.W.2d 797. "Wisconsin courts have repeatedly stated that on certiorari review, there is a presumption of correctness and validity to a municipality's decision." ***Ottman v. Town of Primrose***, 2011 WI 18, ¶48, 332 Wis. 2d 3, 796 N.W.2d 411. The challenger of the municipality's decision bears the burden on review. *See* ***id.***, ¶50 ("On certiorari review, the petitioner bears the burden to overcome the presumption of correctness.").

¶7 The above legal standards mean that the appellants here have the burden of overcoming the presumption that the Council acted within its jurisdiction and according to law, that the Council's decision was not arbitrary or oppressive, and that the evidence supports the Council's decision. As we explain below, the appellants have not met this burden.

¶8 The appellants' arguments are rooted in the language of CITY OF MADISON, WIS., CODE OF ORDINANCES § 33.19(5)(f) (2008). That ordinance states, in pertinent part:

> [T]he Council may, by favorable vote of two-thirds (2/3) of its members, based on the standards contained in this ordinance, reverse … 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 cause serious hardship for the owner, provided that any self-created hardship shall not be a basis for reversal ....

Id. We address and reject each of the appellants' arguments.

A. The Relevant "Owner"

¶9 The appellants contend that we must resolve a threshold issue regarding the meaning of the word "owner" in ORDINANCE § 33.19(5)(f). Under the ordinance, the Council was required to determine that there was "serious hardship for the *owner*."[2] *See* ***id.*** (emphasis added). The appellants argue that "owner" means the current holder of title—the Faulkner family—and not a prospective purchaser, such as Landmark X. The appellants assert that this distinction matters because the Council based its serious hardship determination solely or primarily on hardship evidence provided by and relating to Landmark X.

¶10 We need not resolve this issue. Assuming, without deciding, that "owner" covers only the current owner, the Faulkner family, the result in this case is not affected because the pertinent evidence and the Council's decision were not owner specific. That is, the evidence of serious hardship presented to the Council applies to whoever owns the property and, therefore, it applies equally to the current owner and the prospective owner, Landmark X.

¶11 For example, the pertinent Landmark X testimony asserted that, due to the original building design that omitted a vapor barrier, and without correcting for that omission, the 1940s Edgewater facility "will fail" because "bleeding moisture" is eroding the walls. The testimony went on to relate a host of other issues, including the building's outdated and unworkable structural grid that requires "disassembl[ing] the entire building" and many code violations that

[2] As an alternative to finding "serious hardship," the ordinance also permits the Council to base its decision on a finding that denial of the Certificate "will preclude any and all reasonable use of the property." CITY OF MADISON, WIS., CODE OF ORDINANCES § 33.19(5)(f). That alternative is not at issue here.

require a major reworking of the existing premises. Landmark X opined that the necessary renovations and their "ripple effect" mean that, absent the proposed redevelopment, the Edgewater is not "sustainable economically." Additional testimony asserted that these issues "are existing conditions," that they are "not a function of current ownership or future ownership," and that this "has to be dealt with no matter who owns the property." Consistent with this testimony, the Council stated that the findings applied "regardless of who the owner of [the] building is."[3] In sum, the testimony that the Council was entitled to accept as credible explains that the existing conditions present the same serious hardship, regardless of who owns the Edgewater.

B. The Council's Reasoning On Public-Private Balancing

¶12 The appellants argue that the Council failed to adequately express its reasoning with respect to the ordinance's public-private balancing requirement. The appellants point to the following ordinance language: "the Council may … reverse … 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 [makes the required findings concerning serious hardship]." CITY OF MADISON, WIS., CODE OF ORDINANCES § 33.19(5)(f) (emphasis added). The appellants cite ***Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee***, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87, for the proposition that a municipal decision maker, such as the Council, may not grant or deny a request

[3] The City argues that Landmark X's contract to purchase the property makes Landmark X an "owner" for purposes of ORDINANCE § 33.19(5)(f). We do not address that argument for the same reason we do not address the appellants' argument that the word "owner" is properly read as a reference to the current owner. That is, regardless whether the City or the appellants are correct, the circuit court correctly affirmed the Council.

with conclusory statements, but must instead explain why criteria are or are not met. The appellants assert that the Council's decision here was "without analysis or reasoning" that explains the Council's decision with respect to the required balancing of interests. We reject this argument.

¶13 The appellants' ***Lamar*** challenge has been forfeited because it was not preserved before the circuit court. The circuit court's decision does not address public-private balancing in light of ***Lamar***, and justly so. In briefing before the circuit court, the appellants' ***Lamar*** argument first appears in a reply brief. It is a well-established rule in the appellate courts that "arguments advanced for the first time in a reply brief are waived," ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286, and we have effectively applied the same rule in the circuit court context, *see* ***State v. Lynch***, 2006 WI App 231, ¶27, 297 Wis. 2d 51, 724 N.W.2d 656 ("Lynch's reference to this issue for the first time in his [circuit court] reply brief ... did not sufficiently alert the circuit court to the fact that he wanted to present testimony on this issue.").[4]

¶14 Because the ***Lamar*** issue was not raised until the appellants' reply brief in the circuit court, it is, in effect, raised for the first time on appeal. Because the issue is raised for the first time on appeal, we deem it forfeited. *See* ***Williams v. Housing Auth. of Milwaukee***, 2010 WI App 14, ¶24, 323 Wis. 2d 179, 779 N.W.2d 185 (Ct. App. 2009) (on certiorari review, court declined to address an argument for the first time on appeal).

[4] The appellants' brief-in-chief before the circuit court raised a different argument based on ***Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee***, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87, but they do not renew that argument on appeal.

¶15 Furthermore, even if we did not reject the appellants' ***Lamar*** argument based on forfeiture, and assuming without deciding that ***Lamar***'s principles apply to the Council's decision here,[5] we would reject the ***Lamar*** argument on its merits.

¶16 In ***Lamar***, our supreme court reversed and remanded because a zoning board's variance decision did not "provide enough reasoning to allow a court to meaningfully review its decision." *See* ***Lamar***, 284 Wis. 2d 1, ¶3. In reversing, the ***Lamar*** court explained:

> A board may not simply grant or deny an application with conclusory statements that the application does or does not satisfy the statutory criteria. Rather, we expect a board to express, on the record, its reasoning *why* an application does or does not meet the statutory criteria. Without such statement of reasoning, it is impossible for the circuit court to meaningfully review a board's decision, and the value of certiorari review becomes worthless.

Id., ¶32 (citations omitted). The ***Lamar*** court, however, further explained:

> We realize that most board members are not attorneys and recognize that many boards in this state operate without issuing written opinions. We do not expect boards of zoning appeal to produce judicial opinions. We agree, in fact, that a written decision is not required as long as a board's reasoning is clear from the transcript of its proceedings.

Id., ¶31 (footnote omitted).

¶17 The appellants contend that ***Lamar*** requires a "comparative analysis," or at least a detailed analysis. We disagree. Rather, the ***Lamar***

[5] Landmark X and the City contend that ***Lamar*** is inapplicable to the Council's decision here because of a difference in the statutory context of ***Lamar***.

requirement is that the record contain sufficient reasoning to permit meaningful review. We conclude that the record discloses the basic reasoning of the Council regarding the balancing of public and private interests, namely, that the Council accepted as true evidence that renovating the existing structure is necessary to prevent the current Edgewater's decline; that, without the income produced by the new hotel tower and related development, necessary renovations are not economically feasible; and that the public's interest in preservation is best served by a viable Edgewater, even if that means the addition of a large new hotel tower.

¶18 The primary remarks relevant to public-private balancing came from Alder Bidar-Sielaff, speaking in favor of granting the Certificate. She stated:

> 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.

The information about "significant investment" and "preserv[ation]" that the alder references is the testimony from Landmark X explaining why redevelopment was the only feasible option to prevent the Edgewater's decline.

¶19 Thus, the alder's remarks are more than a mere recitation of the ordinance's public-private balancing language. The alder's comments plainly express the view that public preservation interests and private interests are *both* served by the proposed redevelopment, and that this was true because, without

redevelopment, the existing structures would not be preserved, but instead would continue to deteriorate.

¶20 The appellants complain that the alder's comments that we have quoted above are inadequate because the comments "simply restate the owner's position without making a conclusion as to the credibility, weight, or significance of that position." However, when citing and relying on the testimony, the alder was obviously giving it credit, weight, and significance.

C. Required Findings And Other Arguments

¶21 Under a heading asserting that the Council failed to make required findings, the appellants make several additional arguments. We address and reject each argument.

1. Special Conditions

¶22 The appellants challenge the Council's "special conditions" finding. They point to the ordinance language requiring a finding that "owing to *special conditions* pertaining to the specific piece of property, failure to grant the Certificate of Appropriateness … will cause serious hardship for the owner." *See* CITY OF MADISON, WIS., CODE OF ORDINANCES § 33.19(5)(f) (emphasis added). The appellants assert that "special conditions" means "unique conditions ... that could not otherwise be contemplated or specifically addressed when the Ordinance was adopted." The appellants contend that the conditions creating a serious hardship for the owner here were not "unique" because they did not "pertain only to the Edgewater," but rather, according to the appellants, are similar to conditions faced by other building and hotel owners.

¶23 To the extent the appellants contend that "special" means "unique," we disagree. Although the words are sometimes used as synonyms, "special" is a more general term that broadly means "distinguished by some unusual quality," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2186 (unabr. ed. 1993), whereas "unique" generally means "being the only one," ***id.*** at 2500. Thus, we reject the bald assertion that "special" means "unique."

¶24 Turning to the appellants' assertion that "special conditions" means conditions "that could not otherwise be contemplated or specifically addressed when the Ordinance was adopted," we observe that the appellants provide no supporting analysis. They do not, for example, attempt to demonstrate that in similar circumstances the Madison City Ordinances comprehensively cover all situations that can be reasonably anticipated and, in such situations, the ordinances use the word "special" as part of a back-up catch-all provision.

¶25 As for the appellants' argument that the conditions are not "special" because the record reveals the conditions are similar to conditions faced by other building and hotel owners, we are not persuaded. The appellants, for example, point to testimony from the manager of the Doubletree Hotel that the Doubletree "put $5 million into" the hotel in 2005 and also spent over $600,000 on electrical, a new boiler system, parking lot repairs, and a fire system upgrade. This and similar testimony does not undercut the Council's decision because it does not address whether renovating the existing Edgewater, without an addition, is economically feasible. Obviously, the decision makers at the Doubletree determined that renovations and upgrades were cost effective. In contrast, the testimony before the Council was that renovating the existing Edgewater without the proposed redevelopment is not economically feasible.

¶26 Moreover, the appellants do not persuade us that their interpretation is workable. The obvious intent of the appeal provision and its serious hardship clause is to give the Council the authority to override a decision by the Landmarks Commission to deny a Certificate when denying the Certificate creates a serious hardship, meaning the Council is empowered to weigh the circumstances in ways that differ from the Landmarks Commission.[6] Under the appellants' view, it is difficult to imagine a qualifying condition. If the conditions at issue here are not sufficiently "special," what sort of condition would be? The appellants do not provide an answer—they provide us with no authority or analysis that translates into a workable interpretation of the term "special conditions."

¶27 Finally, we agree with the City that the Council itself has implicitly rejected the appellants' interpretation. The Council's decision that the conditions here satisfy the ordinance necessarily means that the Council does not read "special conditions" as requiring conditions that are unique, that cannot be addressed by other ordinance provisions, or that do not exist with respect to other properties. The appellants do not meaningfully refute the City's assertion that this is an implicit interpretation entitled to deference. *See* ***Ottman***, 332 Wis. 2d 3, ¶¶57-61 (when the language of an ordinance is drafted by a municipality to address a local concern, we generally defer to the municipality's interpretation of its own ordinance).

[6] We note that the record contains comments by a member of the Landmarks Commission seemingly explaining that the Commission did not believe it had the authority to grant the Certificate. For example, the Commission member stated that the Commission found the "gross volume" of the proposed redevelopment did not meet a standard the Commission was required to apply. He explained: "If the gross volume is not compatible, the law simply does not allow [the Commission] to issue the certificate [of] appropriateness." In contrast, on its face, the ordinance language pertaining to the Council's decision does not contain a similar limit on the Council's power to grant a Certificate.

2. The "Separate" Hotel Tower

¶28 The appellants appear to argue that the Council's action violates the ordinance because the Certificate allows the construction of a "completely new and separate hotel tower." Beyond this basic premise, we are uncertain what the appellants mean to argue. The appellants state:

> 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, [Landmark X] has no basis for obtaining a [Certificate] for the new hotel tower. Neither [Landmark X], nor the owner have applied for a [Certificate] solely to remediate the alleged ills of the 1940s building upon which their claim of serious hardship is based. The denial of the [Certificate] to build a new hotel tower does not cause the serious hardship already existing in the 1940s building.

The appellants go on to assert that courts "must require a strict link between the alleged hardship and the activities for which the [Certificate] is requested."

¶29 We understand the appellants to be explaining why they believe the Council's action is unwise, but we do not discern a developed legal argument. The appellants do not identify any language in the ordinance requiring a "strict link" or prohibiting the construction of a new separate building as a means of addressing an identified serious hardship.

3. The Appellants' Remaining Arguments

¶30 The appellants contend it is significant that the Council's deliberations "do not contain any consideration of the financial aspects of the owner's hardship." According to the appellants, no specific financial evidence was presented and, "[w]ithout 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." We disagree.

¶31 Regardless whether more financial information would have been desirable, the legal issue is whether detailed financial evidence was a prerequisite to the issuance of a Certificate by the Council. The appellants do not explain what level of financial detail was required or the textual source of that requirement. We discern no reason why the Council may not simply find credible, and rely on, generalized assertions by witnesses with relevant expertise regarding the financial viability of various options.[7]

¶32 The appellants assert that the serious hardship was, as a matter of law, "self-created." The ordinance specifies that "any self-created hardship shall not be a basis for reversal." *See* CITY OF MADISON, WIS., CODE OF ORDINANCES § 33.19(5)(f). According to the appellants, the granting of a Certificate "must be reserved for circumstances when the application of the *Ordinance* created a hardship, rather than the acts or omissions of the property owner." More specifically, the appellants contend that the serious hardship here was self-created by the original owner who chose "design characteristics" that, with the benefit of time and hindsight, proved to be "unwise."

[7] In the course of this argument, the appellants also make another assertion—that the Council failed to make the necessary "degree of hardship" finding because it only found "hardship" but did not specify that it was "serious hardship." The appellants' view appears to stem from the fact that, when the alders made remarks, they spoke in terms of "hardship," not "serious hardship." However, it is readily apparent that the alders were not referring to some other lower standard, but instead used the term "hardship" as shorthand for "serious hardship."

¶33 Beyond citing general ordinance language, the appellants once again make no serious attempt to provide a legally cognizable interpretation argument. Rather, we are left only with assertions about what the general language means.[8]

¶34 Further, we are uncertain about the logical extension of the appellants' proposed interpretation. The appellants seemingly contend that the special conditions requirement can never be met when a problematic condition is attributable to a building's original design. We question the implications of such an interpretation. This is a problem for the appellants because they have the burden of overcoming the presumption of correctness.

¶35 The appellants may also be asserting that the hardship was "self-created" because of neglect by the owners. The appellants assert that a Certificate may not be granted "to any building whose age or condition, *coupled with neglect*, require[s] renovation" (emphasis added). The appellants, however, neither point to evidence of neglect nor explain why we must assume there was neglect here.

¶36 Finally, the appellants present a short argument complaining that the alleged serious hardship arises only from the condition of the property and not from the denial of the Certificate. The appellants assert that the serious hardship must be caused by the failure to grant the Certificate, not by the condition of the property. We do not understand the logic of the appellants' argument. The appellants are correct, of course, that the ordinance requires that the serious hardship be caused by the failure to grant a Certificate. *See* CITY OF MADISON,

[8] The rules governing the interpretation of ordinances are the same as those governing statutes. ***Murr v. St. Croix Cnty. Bd. of Adjustment***, 2011 WI App 29, ¶9, 332 Wis. 2d 172, 796 N.W.2d 837.

WIS., CODE OF ORDINANCES § 33.19(5)(f) (referring to serious hardship in the context of "failure to grant the Certificate of Appropriateness"). However, so far as we can tell, the question for the Council is whether a condition of a property creates a serious hardship that can be averted if a Certificate is granted. The appellants do not explain how it is possible to focus on the consequences of failing to grant a Certificate without considering the alleged special conditions. We discuss the argument no further.

Conclusion

¶37 For the reasons discussed, we affirm the circuit court's order affirming the Council's decision.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.