

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
LINDA ULISS BURKE
VINCENT D. MOSCHELLA
Deputy City Attorneys

**CITY OF
MILWAUKEE**
Office of the City Attorney

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ELDISA DE LEÓN
ADAM B. STEPHENS
KEVIN P. SULLIVAN
Assistant City Attorneys

October 4, 2006

Alderman T. Anthony Zielinski
14th Aldermanic District
Room 205 – City Hall

Re: Common Council File No. 060635
A Substitute Ordinance Relating to Solar Access Protection

Dear Alderman Zielinski:

On September 29, 2006, you inquired of this office as to the legality and enforceability of the above-referenced proposed ordinance, which establishes a procedure by which the City, through the Department of City Development, would grant permits for protecting solar collectors included as components of solar energy systems. We are pleased to respond to this request.

Our examination of the text of the proposed ordinance reveals that it tracks Wis. Stat. § 66.0403, a provision that extends enabling authority to municipalities with respect to the establishment of procedures for granting permits of this type. This statute has not been challenged since its original passage in 1982 as L. 1981 ch. 354 § 5. Given that the text of the proposed ordinance is virtually identical to the text of this statute, we believe that the proposed ordinance would be legal and enforceable. We would, however, make the following observations:

1. The proposed ordinance addresses only solar collectors and access to solar energy. Wisconsin Stat. § 66.0403 also includes wind energy systems within its scope. We will thus assume that the intent of the proposed ordinance is to address only solar energy systems, and not wind energy systems.
2. The proposed ordinance assigns responsibility for the administration of the solar access permit system to the Department of City Development. This is consistent with the text and intent of Wis. Stat. § 66.0403, which envisions assignment of this responsibility to an "agency" of the permit-issuing municipality. See, Wis. Stat. §§ 66.0403(1)(a), (2), and (3).

3. Wisconsin Stat. § 66.0403 must be read in conjunction with another statutory provision, Wis. Stat. § 66.0401, which limits the authority of municipalities and other units of local government to restrict solar and wind energy systems, stating as follows:

66.0401 Regulation relating to solar and wind energy systems.

(1) Authority to restrict systems limited. No county, city, town, or village may place any restriction, either directly or in effect, on the installation or use of a solar energy system, as defined in s. 13.48(2)(h)1.g., or a wind energy system, as defined in s. 66.0403(1)(m), unless the restriction satisfies one of the following conditions:

- (a) Serves to preserve or protect the public health or safety.
- (b) Does not significantly increase the cost of the system or significantly decrease its efficiency.
- (c) Allows for an alternative system of comparable cost and efficiency.

(2) Authority to require trimming or blocking vegetation. A county, city, village, or town may provide by ordinance for the trimming of vegetation that blocks solar energy, as defined in s. 66.0403(1)(k), from a collector surface, as defined under s. 700.41(2)(b), or that blocks wind from a wind energy system, as defined in s. 66.0403(1)(m). The ordinance may include, but is not limited to, a designation of responsibility for the costs of the trimming. The ordinance may not require the trimming of vegetation that was planted by the owner or occupant of the property on which the vegetation is located for the installation of the solar or wind energy system.

These restrictions apply to the permitting process established by the proposed ordinance. Of greatest significance are the three conditions set forth in Wis. Stat. §§ 66.0401(1)(a) through (c). Particular attention must be paid to the condition set forth in Wis. Stat. § 66.0401(1)(a), which, in our opinion, applies the standards and limitations upon the permitting process as are generally applicable to the exercise of the City's police powers. This includes the necessity of satisfying the overall test of "reasonableness." *State ex rel. Baer v. City of Milwaukee*, 33 Wis. 2d 624, 148 N.W.2d 21 (1967); *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1955); *see also, State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 313 N.W.2d 805 (1982).

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This requirement does not affect the underlying validity of the proposed ordinance, but rather the manner by which the Department of City Development exercises the authority granted to it thereunder.

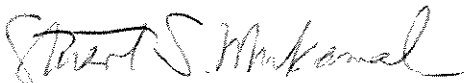
4. As confirmed by Wis. Stat. § 66.0403(12) and § 12 of the proposed ordinance, obtaining a permit from the Department of City Development may not be deemed a precondition for the installation of a solar collector or solar energy system. The purpose of obtaining such a permit is to provide protection to the owner of a system by restricting users or owners of nearby property from creating an "impermissible interference." *State ex rel. Numrich v. City of Mequon Board of Zoning Appeals*, 2001 WI App 88 ¶ 16, 242 Wis. 2d 677, 687-688, 626 N.W.2d 366, 371. Procurement of a permit and provision of requisite notice to property owners affected by the permit entitles the permit holder to pursue those remedies for "impermissible interference" specified by Wis. Stat. § 66.0403(7) and § 7 of the proposed ordinance.

If you have any further questions concerning this matter, please contact this office for guidance.

Very truly yours,



GRANT E. LANGLEY
City Attorney



STUART S. MUKAMAL
Assistant City Attorney

SSM:lmb
c: Ronald Leonhardt, City Clerk
1033-2006-2746:110466