TEARMAN SPENCER
City Attorney

ODALO J. OHIKU
ROBIN A. PEDERSON
S. TODD FARRIS
JENNIFER L. WILLIAMS
Deputy City Attorneys

CITY OF MILWAUKEE
Office of the City Attorney

Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551
Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

HEIDI WICK SPOERL
KATHRYN Z. BLOCK
THOMAS D. MILLER
PETER J. BLOCK
PATRICK J. MCCLAIN
HANNAH R. JAHN
JULIE P. WILSON
MEIGHAN M. ANGER
ALEXANDER R. CARSON
ALEXANDER T. MUELLER
ALEXANDER D. COSSI
LISA A. GILMORE
KATHERINE A. HEADLEY
L. ANTHONY JACKSON
STACY J. MILLER
MICHAEL C. RADAVICH
JORDAN M. SCHETTLE
THERESA A. MONTAG
ALEXANDER E. FOUNDOS
TRAVIS J. GRESHAM
KYLE W. BAILEY
JOSEPH M. DOBBS
WILLIAM K. HOTCHKISS
CLINT B. MUCHE
JOANNA FRACZEK
ZACHARY A. HATFIELD
MEGHAN C. MCCABE
MARIA E. MESOLORAS
Assistant City Attorneys

January 31, 2024

Alderman Robert Bauman
Common Council of the City of Milwaukee
c/o Historic Preservation Commission
200 East Wells Street
Milwaukee, WI 53202

Re: Legal Exposure Of The Historic Preservation Commission Denying In Whole Or In Part An Application For Installation Of A Solar Energy System And The Applicant's Potential Remedies

Dear Alderman Bauman,

By way of an email from Tim Askin on January 11, 2024, you have requested a City Attorney opinion, on behalf of the City of Milwaukee Historic Preservation Commission ("HPC"), regarding the potential legal exposure of the HPC denying in whole or in part an application for installation of a solar energy system on a historically designated property and analysis of what potential remedies the applicant may have following an in whole or in part denial.

As background, the City Attorney's Office previously issued an opinion on the subject of solar systems on historically designated properties. The opinion, dated March 8, 2013, analyzed the HPC's authority to reject an application for a certificate of appropriateness ("COA") to install a solar system on a property in the Concordia Historic District. The opinion analyzed the issue in light of Wis. Stat. § 66.0401(1m), which prohibits a political subdivision, such as the City, from restricting the installation or use of a solar energy system unless the restriction serves to preserve or protect the public health or safety, does not significantly increase the cost of the system or significantly decrease its efficiency, or allows for an alternative system of comparable cost and efficiency. Wis. Stat. § 66.0401(1m)(a)-(c). The opinion concluded that an HPC denial of a COA for a solar energy system must satisfy one of the three conditions listed in the statute.

As of the date of this opinion, Wis. Stat. § 66.0401(1m) remains binding law and there is no additional case law governing its applicability or interpretation. Accordingly, this Office's opinion is unchanged, and any denial of a COA for a solar energy system must be based on one of the provisions identified in the statute, under a case-by-case analysis as directed by the court

in *Ecker Bros. v. Calumet County*, cited in the original opinion. 2009 WI App 112, 321 Wis. 2d 51.

The new questions posed in the email from Mr. Askin are as follows: 1. Is there a difference in exposure between denying a portion or the entirety [of the solar energy system]?; 2. How is "significantly decrease" to be interpreted?; 3. What are the consequences of denying it?; 4. What is the City's legal exposure with regard to legal fees?; and 5. What rights does the owner have in court?

For convenience, these questions will be addressed out of order, as many are interconnected. This opinion will first address the question regarding statutory interpretation.

Because the term "significantly decrease" is not defined in the statute and has not been interpreted by the courts, we cannot provide precise guidance as to how it should be interpreted in a particular matter. Our recommendation is that the term be interpreted on a case-by-case basis depending on the evidence introduced as to the reduction in the efficiency of the system if HPC were to deny approval of a part of the system. The smaller the reduction in efficiency, the more likely a partial denial would be upheld. In this regard, it should be noted that by enacting Wis. Stat. § 66.0401(1m), the Legislature intended to limit local control over the installation of solar systems.

As an example of how the issue may present itself, if HPC staff were to recommend disapproval of a COA to install a solar energy system on the roof of a historic home because of the availability of the garage rooftop, the applicant, depending on the facts of the situation, may be able to establish that the sun exposure to the detached garage is quantifiably less than the exposure on the home's roof and that as a result, the system will be 20% less effective. Without guidance from the statute or case law, in the above example, it would be within the HPC's reasonable discretion to determine whether 20% diminished effectiveness is significant, such that the COA as requested must be granted, pursuant to the statute.

The differences between the possible legal consequences of a whole or partial denial will of course depend on the facts of the specific case. Generally speaking, a complete denial is likely to be harder to defend in court.

While an applicant for a COA may appeal the HPC's decision, which is discussed below, and such appeal may internally cost the City legal funds to defend, in terms of actual liability or liability for an applicant's legal fees, the City likely has no exposure.

The City, and specifically here the HPC, is entitled to discretionary immunity, which is provided within Wis. Stat. § 893.80(4). The statute provides, in relevant part, that "[n]o suit may be brought against any… governmental subdivision or any agency thereof for the intentional torts of its officers, officials agents or employees *nor may any suit be brought against* such corporation, subdivision or agency… for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. Wis. Stat. § 893.80(4)[1]. The statute immunizes against liability for "legislative, quasi-legislative, judicial, and quasi-judicial" acts, government functions for which courts have found synonymous with "discretionary acts." *Lifer v. Raymond*, 80 Wis. 2d 503, 511-512, 259 N.W.2d 537 (1997).

The HPC is granted authority to regulate historically designated properties within the City through Wis. Stat. § 62.23(em). The statute provides, in relevant part, "a city, as an exercise of its zoning and police powers for the purpose of promoting the health, safety and general welfare of the community and of the state, *may* regulate by ordinance… any place, structure or object with a special character, historic, archaeological or aesthetic interest, or other significant value, for the purpose of preserving the place, structure or object and its significant characteristics." Wis. Stat. § 62.23(em)(1) (emphasis added). The City has elected to regulate historic properties by ordinance through its passage of MCO § 320-21. The HPC's role under the ordinance, among other things, is to review applications for COAs. When reviewing an application, the HPC must consider any applicable factors provided in MCO § 320-21-12 as well as any public comment provided on the matter at the mandatory public hearing.

Given the source of its authority, and the broad and subjective considerations the HPC must consider when making its decisions, decisions of the HPC would generally be considered *discretionary acts*, which would entitle it to discretionary immunity under the statute. The HPC's authority under the statute and ordinance can reasonably be defined as both quasi-legislative and quasi-judicial, which would be afforded the statute's protections. Accordingly, there is likely no legal exposure as to liability for money damages or legal fees.

However, even though the City and HPC are likely afforded discretionary immunity with regard to the decisions of the HPC, that does not mean an applicant lacks legal recourse or is unable to file a lawsuit against the City in response to a rejected application.

[1] The courts have identified four exceptions to governmental immunity under the statute, none of which apply here. *See Willow Creek Ranch LLC v. Town of Shelby*, 2000 WI 56, ¶ 26.

An applicant's initial review rights are to appeal the HPC's whole or partial denial of a COA to the City Common Council for review. *See* MCO § 320-21-11e.[2] If the Common Council were to uphold the partial or whole denial of the COA, the applicant would be entitled to file a writ of certiorari action, pursuant to Wisconsin Statute Chapter 68, in circuit court. Chapter 68, entitled Municipal Administrative Procedure, enables a person to appeal certain administrative determinations of a municipality if the state statutes are silent as to a more specific appellate procedure. Neither the statute, Wis. Stat. § 62.23(7)(em), nor the ordinances (other than appeal to the Common Council), explicitly establish appellate rights from HPC determinations. Accordingly, Chapter 68 likely provides an avenue under which an applicant whose COA was denied in whole or in part could seek judicial review, pursuant to Wis. Stat. § 68.13, after appeal is made to the Common Council.

Very truly yours,

TEARMAN SPENCER
City Attorney

TODD FARRIS
Deputy City Attorney

ALEX CARSON
Assistant City Attorney

c: James R. Owczarski, City Clerk

1033-2024-57:289541

[2] Pursuant to a recent City Attorney Opinion dated November 22, 2022, a COA applicant *may* have a right to appeal the HPC's decision to the Administrative Review Board of Appeals, but the analysis is highly case specific. Conversely, the ordinance is explicit that an applicant may appeal any partial or whole denial to the Common Council.