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March 8, 2013

Mr. Patrick Curley, Chief of Staff
Office of the Mayor
City of Milwaukee
200 East Wells Street, Room 201
Milwaukee, WI 53202

Re: Effect of Sec. 66.0401(1m), Wis. Stats., on the Historic Preservation
Commission's consideration of certificates of appropriateness for solar panels.

Dear Mr. Curley:

By way of an email from Leslie Silletti dated March 8, 2013, you requested a written opinion from our office regarding whether the authority of the City's Historic Preservation Commission ("HPC") is subject to Section 66.0401 of the Wisconsin Statutes relative to File No. 121399. File No. 121399, currently pending before the HPC and scheduled for hearing on March 11, 2013, is a request for a certificate of appropriateness ("COA") for installation of solar panels on the roof of a home in the Concordia Historic District by property owners, Tom and Amy Fritz.

The installation of solar panels on a home within a historic district is an exterior alteration requiring a COA from the HPC pursuant to MCO §320-21-11. However, Section 66.0401(1m) of the Wisconsin Statutes places limitations on a municipality's ability to restrict the installation of solar or wind energy systems. The statute states in relevant part:

(1m) AUTHORITY TO RESTRICT SYSTEMS LIMITED . . . No political subdivision 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, 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.

Mr. Patrick Curley
March 8, 2013
Page 2

The Court of Appeals interpreted this statute, and the above subpart (a) through (c) provisions, in *Ecker Brothers v. Calumet County*, 2009 WI App. 112. Per the Court: "We read the Wisconsin statutes to say that our legislature favors alternative energy systems...We also read the statutes to disfavor wholesale local control which circumvents this policy." Municipalities may restrict alternative energy systems "only where necessary to preserve or protect the public health or safety, or where the restriction does not significantly decrease its efficiency, or where the locality allows for an alternative system of comparable cost and efficiency." 2009 WI App. 112, ¶1.

The Court rejected the argument that a locality could interpret Section 66.0401 in a way that, as a matter of *local policy*, disfavored alternative energy systems. *Id.* at ¶¶ 17-18. The Court said that "the legislature already made the policy decision" favoring those systems and "it restricted the political subdivisions' ability to contravene this policy." *Id.* at ¶19. The Court said, about the subpart (a) through (c) provisions of the statute that those "are the standards circumscribing the power of political subdivisions, not openings for them to make policy that is contrary to the State's expressed policy." *Id.* at ¶21.

The Court of Appeals also interpreted this statute to mean that municipalities must take a case-by-case approach rather than use an arbitrary "one size fits all" approach to approving solar panel installations. *Id.* at ¶1. Basically, this means that HPC and its staff cannot take the stance that no solar panels are permitted on historic buildings or in historic districts. However, the statute does not strip the HPC of all jurisdiction over these matters.

HPC has jurisdiction and authority to review the COA application pursuant to the requirements of the HPC ordinance (MCO §320-21) to determine whether the installation of solar panels is consistent with the requirements of that ordinance. However, any denial of or restriction on the COA must satisfy one of the three conditions listed in Section 66.0401(1m).

Very truly yours,


GRANT F. LANGLEY
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c: James R. Owczarski, City Clerk
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