LEGAL UPDATE & PROCEDURAL HISTORY FOR THIS COA
Dated 10/5/19

This memo provides (1) a legal update since the filing of my CoA application, (2) a brief summary of the procedural history, and (3) a review of the only Wisconsin case on point, which held Chapter 66 supersedes, and protects a homeowner against, conflicting local restrictions. The technical aspects of my Solar Energy System (SES) are covered in the application and not repeated here.

(1) **the City Attorney Has Recently Determined Each of my Sola Tubes Qualifies as a "Solar Energy System" That Are Protected Under Sec. 66.0401 and Are Therefore Essentially Exempt From Local Regulation**.

A sola tube is a form of "solar energy system" that is, under state law, essentially exempt from regulation by a local government or historic district, because Wisconsin has determined renewable energy goals trump and utterly supplant subjective aesthetic values. The City Attorney has recently agreed my sola tubes are governed by Sec. 66.0401.

Solar energy systems are broadly defined by function and operation, not by the brand name or particular configuration of a SES[1].

> 66.0401 Regulation relating to solar and wind energy systems.
> …
> "(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" [except for limited exceptions such as protecting "public health or safety."][2] [Emphasis added].

Moreover, local authorities are specifically prohibited from imposing any restrictions that would significantly increase the "cost" or "efficiency" of a solar system. Id. at (1m) (a) and (b).

This should conclude the matter decisively…. But for, perhaps, the contentious and convoluted facts and personalities regrettably and unfortunately involved in this case.

(2) **My Prior Dealings with HPC re My Solar Energy System Were Based on a Mutually Incorrect Understanding of the Applicable Law.**

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[1] "Solar energy system" means equipment which directly converts and then transfers or stores solar energy into usable forms of thermal or electrical energy. See, Wis. Stat. Sec. 13.48(2)(h)1.f.

[2] See full text in Appendix A.

Upon notice from the City in July 2018 of a possible violation of historic district guidelines relating to my sola tubes, I filed a retroactive COA application for the SES.

At that time, neither I nor the real estate attorney I had hired was aware of the existence of Wis. Stat. Sec 66.0401[3].

The HPC staff were aware of this statue but were apparently construing it too narrowly, to apply to just one example of a SES, large flat solar panels, and not to small, one-square-foot sola tubes with mini-solar panels.

At the September 2018 hearing, the HPC ruled the rear ST could remain but ordered the removal of the other three. The DNS started issuing fines.[4]

In the meantime, I sought to negotiate with the HPC, given its wide variability in enforcement[5] of its Guidelines. In July 2019, I had the front ST removed as a gesture of compromise and then sought a meeting with the HPC staff about retaining the two side ones, on the north slope of my condo. I met with City Clerk Jim Owczarski in September, 2019, who took the position that the matter was closed and adamantly not open for discussion or negotiation.

I was not surprised at this stance, as the dealings among the parties on this matter over the last almost 18 months have been contentious at times.

Shortly thereafter, I determined the actual scope of Sec. 66.0401 and I filed a new COA. After HPC referred the matter to the City Attorney's Office, City Attorney Rachel Kennedy agreed sola tubes are protected under 66.0401.

Because the law is so clearcut and grants virtually no discretion to a local government, I had expected the CoA to have been granted as a staff action.

After all, the DNS merely requires a homeowner to check off "Yes" to three statements on its form (*Historic Preservation Certificate of Appropriateness Solar Checklist*) that appear geared to 66.0401. (Mine appears at page 10 of 15 of my COA application).

Once the homeowner has responded "Yes" on these three questions, there is no further investigation, evaluation , or second-guessing by DNS of the homeowner's

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[3] The HPC Guidelines for NPN have not been updated and also now contravene 66.0401 at page 6, Sec. IX. A.1.a; the City Clerk is aware of this (misleading) discrepancy but has told me there are no current plans to amend them.

[4] Per Archie Blunt of the DNS, these are already on my property tax bill for 2019. Per City Clerk Jim Owczarski: (1) the City has in the past seized properties where the only arrears are unpaid DNS fines, (2) in such circumstances the homeowner has no recourse nor right to recompense, i.e. the City can take a $300,000 house to satisfy $300 in fines. According to Linda Elmer, the DNS has discretion to impose fines "as often as it likes".

[5] As documented in the brief and affidavit on file with the City Attorney.

SES. As it must, DNS takes the homeowner's word on matters of location, efficiency and choice of system.[6]

However, the City Clerk responded as follows in an email:

> "...it is not clear that the requirements placed on the CoA previously granted for this installation significantly decrease the efficiency of this system (cf. s. 66.0401(1m)(b)) and therefore your request for a CoA with requirements different from that first granted cannot be issued by staff."

Although I have repeatedly sought an explanation on what was meant by reference to "efficiency" and "requirements different" from the first CoA, I have not received any meaningful clarification. The "requirements" of the first CoA resulted in an order to remove three of four—an illegal result under 66.0401 because the City cannot place virtually "any restriction" on "installation or use." Any removal obviously results in not just a significant decrease but total decrease in efficiency, so this cannot be what is meant.

(However, my pending CoA refers to removal and re-installation of my sola tubes, perhaps a millimeter different from the current installation. It was drafted thus in reaction to the City Clerk's vehemence in tone during our September meeting, and his rejection of any discussion about the first CoA.)

Likewise, each sola tube serves a different room and, unlike solar electric panels, the location of the sola tube directly affects the room it serves. Just as it is the case with every SES previously installed in any Milwaukee historic district, it is up to me and my installer exclusively to determine the most efficient location of them within each room as well as the overall number of SESs to install[7].

It might very well be that the City Clerk's email quibbles about comparison with the prior CoA and "efficiency" are simply very human, very understandable officious posturing. During my September 2019 meeting with the City Clerk, he stated that his personal

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[6] As drafted, the DNS form is overly restrictive, compared to the statute; for example, it requires the 'most efficient' system; however, Sec. 66.0401 merely provides that a local government cannot impose restrictions rendering a SES less efficient. Nevertheless, my SES satisfies the DNS form.

[7] Pursuant to an open records request, the City has responded that it has no documents or policy on "efficiency" or limitation on number or type of solar panel

feelings of animosity over my advocacy in this case made it difficult for him to remain objective[8].

After the City Attorney rendered her opinion in my favor, the City Clerk promised only to put this on the agenda "for a future hearing," not the next one, even though the City agreed it had all the information needed and my CoA was complete. When I respectfully sought to have the CoA put on the next meeting, my first five email requests (and phone call) were ignored by every single recipient.[9]

Given how thoroughly and completely 66.0401 exempts SESs from local regulation—and but for the contentious history of this matter—I respectfully view the calendaring of my COA as a mere formality. After all, the DNS requires merely a Yes/No check box answer relating to location and efficiency, all of which I have checked off "Yes", satisfying DNS's requirements. ().

(3) the Highest Wisconsin Court to Construe Wis. Stat. 66.0401 Has Held That the Renewable Energy Statutes Supersede any Conflicting Local Regulation. Unlike a Typical Local Regulation Involving Property Rights, Sec. 66.0401 Evinces a Clear Primacy of Interests in Favor of the Renewable Energy Systems Homeowner Vis-A-Vis Other Neighbors or the Municipality.

Pursuant to pending Public Records requests, I sought information on whether the City has any policy relating to "efficiency" and whether: (1) the HPC has ever intervened to usurp the homeowner or installer's determination of "efficiency" in placement of a SES; (2) the HPC has ever, legally, since the enactment of 66.0401, dictated location or re-location in any way of a SES; or (3) the HPC has overridden a resident's determination what system to install.

The City's Public Records response on "efficiency" did not contain any responsive documentation except for sections of the Guidelines—which by operation of law are superseded by 66.00401. The City also did not cite any other ordinance or regulation, other than the HPC guidelines. As to individual records for every solar energy system installed in a historic district, the City is in the process of compiling a list.

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[8] We also talked about "mirror neurons"—brain cells that can trigger in us the same emotional state as persons around us (a phenomenon often credited as the source of empathy… and perhaps bellicosity). I readily admit any sore feelings are mutual. In the face of the City's recent recalcitrance and complete non-responsiveness re my project after the City Attorney blessed them, I have had to resort to reminding the City Clerk of the City's Ethics & Best Practices rules relating to diligence, fairness, and neutral application of the law. Anyone would find that insulting. I apologize; but when unfairly treated with apparent bias and needless delay, my own hurt feelings and reactions—in pursuit of valid, common legal rights— can come across as 'poking the bear'. … See footnote 9, below.

[9] Sordid as it is, I only received a response and the November agenda assignment after I queried, via reply to all on Jim's list of recipients, whether Carlen was being influenced not to respond. My dealings with her have otherwise been uniformly characterized by professionalism, promptness and thoroughness. Because of the City's hitherto complete ghosting by all personnel involved, I was concerned the City's response to City Attorney Kennedy's opinion would next be to table this indefinitely, leaving me in an unacceptable limbo, all the while accruing more fines—and clouding my title.

Given the City is still in the process of responding to my Public Records request, I recommend that at the hearing Carlen and Tim be polled on their working recollection as to these questions, given their long tenures with the HPC.

In any event, Wisconsin Courts have upheld a resident's rights under 66.0401 over application of any local restriction. In *State ex rel. Numrich v. City of Mequon Board of Zoning Appeals,* 2001 WI App 88, 242 Wis. 2d 677, 626 N.W.2d 366, for example, two Mequon residents sought to install wind energy systems on their respective one-acre properties. Among things, Mequon invoked conditional use permit regulations to prohibit them.

The Court of Appeals reversed, citing the legislative history's emphasis on the importance of alternative energy sources and also noting 66.0401's primacy in the face of conflicting local laws:

> WIS. STAT. § 66.031[10] represents a legislative restriction on the ability of local governments to regulate solar and wind energy systems. Local restrictions are permitted only if they serve the public health or safety, do not significantly increase the cost or decrease the efficiency of the system, or allow for an alternative system of comparable cost and efficiency. Beyond those, no other restrictions are allowed. The statute is not trumped, qualified or limited by § 66.032 or by a municipality's zoning and conditional use powers. *State ex rel. Numrich,* 242 Wis 2d at 688.

Just as a chapter 66 wind energy system was not "trumped" or restricted by Mequon's zoning or conditional use powers, here a chapter 66.0401 solar energy system cannot be restricted or denied under Milwaukee's local historic preservation guidelines.

The court noted in *Numrich* that 66.0401's scheme is the *reversal* of the usual emphasis of land use regulations, which generally constrains a homeowner to the benefit of the surrounding neighbors. Instead, the homeowner's rights to install and use a reenable energy system are primary. (In fact, a homeowner with an SES has statutory remedies against neighbors who obstruct his access to sun or wind).

It may be that the state's reversal of the ordinary balancing of interests contributed to the parties' confusion in my case, as it did in *Numrich*, where the court noted the Mequon Zoning Board was proceeding on an "incorrect theory of the law." Id. at 691. As noted above, for the first year my SES project was in dispute, the parties were likewise operating under incorrect interpretation of the law.

In rejecting some of the various objections lodged against the energy system (the "threat" of a "component falling or noise"), the *Numrich* court held that Mequon's reliance on "its traditional zoning and conditional use powers was misplaced. Instead,

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[10] Since renumbered as Sec. 66.041.

the Board was duty bound to confine its consideration of the conditional use applications *in light of the restrictions placed on local regulations pursuant*" to sec. 66.0401. Ibid. [Emphasis in the original].

In sec. 66.0401, it must be noted, the Wisconsin legislature **primarily protects the homeowner from interference with her renewable energy system** by neighboring property owners and even grants municipalities the authority to pass regulations preventing surrounding property owners from placing structures or foliage that interfere with the renewable energy system. The *Numrich* court observed:

> ¶ 16. Second, unlike most land use regulations that require a permit and which are designed to protect the public and nearby property owners by placing restrictions on the permitee, WIS. STAT. § 66.032 operates largely in the reverse. It serves to benefit and protect the owner of a solar or wind energy system permit by restricting users or owners of nearby property from creating an "impermissible interference" with the energy system. If a permit is granted and the notice against nearby restricted property is recorded, the owner of the energy system has legal remedies. Id. at 687. [Emphasis added].

On the DNS form for "Historic Preservation Certificate of Appropriateness Solar Checklist", I have provided all relevant requested information and have checked off "Yes" to its three questions relating to consideration of solar options, efficiency and placement of system.

Accordingly, I have satisfied all local requirements relating to my Solar Energy System.

In *Numich*, the municipality clearly disliked the homeowner's wind energy system and apparently threw up every possible roadblock and objection. There, the wind tower at issue topped out at 95 feet tall, and sported three fifteen-foot long rotating blades, all on a one acre parcel. Id. at 681-2.

Regardless how subjectively ugly or objectionable one found it, however, the court held such concerns were clearly overridden and supplanted by the extraordinary rights 66.0401 accords to users of renewable energy systems.

Similarly, regardless of the HPC's dislike or other feelings for my disputed SES—which currently consists of 2 slight projections that are set low on my north, side roof-slope, merely stand from 4 to 7 inches above the roof slope (and nowhere near the roof peak), and are barely visible except from across the street (given the flatness of the roof on our Modern Movement style condos), and at about 1 square foot each on a 550 square foot roof slope occupy less than a fraction of 1% of my roof slope; and regardless of HPC's personal dislike (or worse) or other feelings about me and my dogged style of advocacy—it is bound to allow them, by 66.0401 and the Court in *Nimrich.*

As the Nimrich Court noted, in enacting Chapter 66.0401 and its predecessors, the Legislature evinced an overriding concern about protecting and expanding renewable energy everywhere, in every neighborhood, throughout the State. The Court observed:

> "The statutory scheme we have described is reflected in the legislative history of these statutes. When enacting the original versions of WIS. STAT. §§ 66.031 and 66.032, the legislature expressed concern about the diminishing supplies of nonrenewable energy resources, and it observed that renewable energy systems could address this concern. Laws of 1981, ch. 354, § 1.3 To encourage the use of renewable sources of energy, the legislature resolved to remove legal impediments to such systems by:
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> > codifying the right of individuals to negotiate and establish renewable energy resource easements, by clarifying the authority of, and encouraging, local governments to employ existing land use powers for protecting access rights to the wind and sun, by creating a procedure for issuance of solar access permits to owners and builders of active and passive solar energy systems and by encouraging local governments to grant special exceptions and variances for renewable energy resource systems. Id. at para. (2)(b)". [Emphasis added]; id at 688.

Given the increasing concern over climate change—which has resulted in decimation by one-third of the bird population since 1970, rising sea levels threatening coastal communities worldwide, and global warming contributing to severe weather patterns, floods, storms, and widespread disruption of agricultural operations (including in the Midwest), I respectfully suggest it's time to set aside subjective, personal considerations and follow the law.

A little over a year ago, just prior to the first COA's hearing—and before any of the parties understood the scope and application of 66.0401—I sought the input of committee member and architectural expert Matt Jarosz, who after reviewing my materials stated in an email:

> Susan,
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> Seems pretty minor to me. I don't have a problem with it and I don't think you will have a problem with the board. However, it is a board, several different people and personalities. So, I can't say definitively that it will be accepted on Tuesday, however, I'd be very surprised if wouldn't. [Emphasis added; email dated 8/31/18].
>
> Matt.

For this COA, I respectfully request the hearing be conducted openly, fairly, reasonably and objectively, regardless of local politics, neighbor-versus-neighbor discord,

personalities (no matter how flamboyantly overbearing or wrongheadedly well-meaning), or other personal feelings.

The City Attorney's determination that my Solar Energy System falls within the protection of 66.0401 necessarily prohibits the HPC from placing any restrictions on it once I have checked all the Yes boxes on the DNS form.

CONCLUSION

Accordingly, I respectfully request that the Committee grant the pending COA; and reverse its determination of the prior COA; and order the DNS to refund, abate, reverse etc. any fines it has imposed to date and cease further imposition of them.

APPENDIX A ~ TEXT OF 66.0401

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 of 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 before the installation of the solar or wind energy system. [Emphasis added],

History: 1981 c. 354; 1981 c. 391 s. 210; 1993 a. 414; 1999 a. 150 ss. 78, 79, 84; Stats. 1999 s. 66.0401; 2001 a. 30.

This section represents a legislative restriction on the ability of municipalities to regulate solar and wind energy systems. The statute is not superceded by s. 66.0403 or municipal zoning or conditional use powers. A municipality's consideration of an application for a conditional use permit for a system under this section must be in light of the restrictions placed on local regulation by this section. State ex rel. Numrich v. City of Mequon Board of Zoning Appeals, 2001 WI App 88, 242 Wis. 2d 677, 626 N.W.2d 366.