Reinhart
Attorneys at Law

Reinhart Boerner Van Deuren s.c.
P.O. Box 2965
Milwaukee, WI 53201-2965

1000 North Water Street
Suite 1700
Milwaukee, WI 53202-3197

Telephone: 414.298.1000
Fax: 414.298.8097
Toll Free: 800.553.6215
reinhartlaw.com

September 1, 2022

Richard W. Donner
Direct Dial: 414-298-8169
rdonner@reinhartlaw.com

DELIVERED BY EMAIL

Mr. Vincent Bobot, Chair
City of Milwaukee,
Administrative Review Board of Appeals
200 E. Wells St., Room 205
Milwaukee, WI 53202
lelmer@milwaukee.gov

Dear Chairman Bobot:

Re: Administrative Review Board of Appeals
File #22141
Petitioner Legal Authority Memorandum

This firm represents Ms. Suzanne C. Spenner-Hupy, the Petitioner in the above-captioned appeal of the determination by the City of Milwaukee Historic Preservation Commission ("HPC") to grant a Certificate of Appropriateness ("COA") to Chris & Jennifer Abele ("Abele") for the construction of a 6,816 square foot accessory building (the "Project") on the property located at 3319 North Lake Drive (the "Property") in violation of applicable Milwaukee Code of Ordinances ("MCO"). This memorandum presents additional legal authority in support of Petitioner's "Request For Review of Historic Preservation Commission's Grant of a Certificate of Appropriateness Pursuant to MCO §320-11 & Wis. Stat. Ch. 68" (the "Appeal") submitted on August 10, 2022. All capitalized terms not defined in this Memorandum shall have the meaning set forth in the Appeal.

1. As the owner of the residential property immediately adjacent to the Property (3340 West Windermere Court), Petitioner is an "aggrieved" person under Wis. Stat. §68.06 and will incur special damages should the Project, which includes an 18 foot, 9 ¼ inch tall, fully-lighted, glass enclosed swimming pool enclosure, be allowed to go forward pursuant to HPC's decision to grant the COA. Petitioner has a right to protect the value of its property and its use and enjoyment thereof and this includes a due process right to require HPC to apply applicable law, including without limitation, the District Study Report. A copy of Wis. Stat. Ch. 68 is attached hereto as **Exhibit A**.

2. Pursuant to MCO §320-11, the "provisions of [Wis. Stat. Ch. 68] relating to administrative review procedure is in full force and effect in this city." A copy of MCO §320-11 is attached hereto as **Exhibit B**.

3. The Administrative Review Board of Appeals ("ARBA") has previously established it has jurisdiction to review a decision by HPC to grant a COA and that an immediately adjacent property owner to the subject development has standing as an "aggrieved" person to appeal HPC's decision. A copy of an ARBA decision establishing its jurisdiction and the standing of an immediately adjacent property owner in an appeal of HPC's decision to grant a COA to a neighboring property is attached hereto as **Exhibit C**.

4. As detailed in Paragraph 4 of the Appeal, MCO § 320-21-11-g-3 provides that when reviewing an application for a COA, HPC "*shall consider*" whether an applicant's proposed new construction "*conforms to the objectives of the preservation plan for the district as duly adopted by the common council*" (the "Study Report"). A copy of MCO § 320-21-11-g is attached hereto as **Exhibit D**.

5. As detailed in Paragraph 5 of the Appeal, the Study Report provides in relevant part:

> "*The **construction of any single** building addition or **accessory building** shall **not increase** the total gross floor area of all structures on the lot **by more than 20%**. The total gross floor area of all additions or accessory buildings constructed after July 27, 1984, shall not exceed 50% of the total gross floor area of all structures on the lot on that date*" (emphasis added). *See* Section IX, Paragraph C, Subsection 2 of the District's Study Report.

On June 16, 1998, the Common Council unanimously passed a resolution amending the Study Report to include the above-captioned language limiting new construction of accessory buildings in the North Lake Drive Estates Historic District (the "Resolution"). A copy of the Resolution is attached hereto as **Exhibit E**.

6. The Resolution creates two limitations on new construction in the North Lake Drive Estates Historic District:

A. "*The **construction of any single** building addition or **accessory building** shall **not increase** the total gross floor area of all structures on the lot **by more than 20%**.*

B. *The total gross floor area of **all** additions or **accessory buildings** constructed after July 27, 1984, shall not exceed 50% of the total gross floor area of all structures on the lot on that date*" (emphasis added). *See* Section IX, Paragraph C, Subsection 2 of the District's Study Report.

Any individual accessory building shall not be larger than 20% of the total square footage of all structures on the Property, and

The total square footage of all accessory structures constructed on the Property after July 27, 1984 shall not exceed 50% of the total square footage of all structures on the Property on that date.

Therefore, if the owner of a property in the District wants to construct 2 accessory structures, then:

(a) Each accessory building can be no larger than 20% of the total square footage of all structures on the Property;

(b) And the total square footage of the 2 accessary structures cannot be greater than 50% of the total square footage of all structures on the Property on July 27, 1984.

Accordingly, the 50% limitation only applies when multiple accessory buildings are being constructed. Any other interpretation renders meaningless the distinction made in the Study Report between the size of a single accessory building and the size of all accessory buildings on the Property. If the 50% limitation for multiple accessory buildings also applied to a single accessory structure, then the 20% limitation would serve absolutely no purpose. It is a well-established principal of statutory interpretation that statutory language is to be read where possible to give reasonable effect to every word.[1] *See*, e.g., *Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110. *See also State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967) ("In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute").

7. As detailed in Paragraphs 6-11 of the Appeal, the construction of a 6,816 square foot accessory building on the Property is in violation of the size limitation required by the District Study Report. The size limitation in the Study Report is not discretionary and HPC is not authorized to simply disregard it. In *Jelinski v. Eggers, 34 Wis.2d 85, 148 N.W.2d 750 (1967)*, the Supreme Court of Wisconsin held that issuance of a building permit which violates an ordinance is not only per se illegal, but is injurious to the interests of property owners and residents of the neighborhood adversely affected by the violation. *Id.* at 93. See also *City of Milwaukee v. Leavitt, 31 Wis.2d 72, 78, 142 N.W.2d 169 (1966)*.

8. As detailed in Paragraphs 16-20 of the Appeal, Petitioner has a due process right to expect that a decision by HPC will be made on the basis of facts obtained during official proceedings and applied to existing legal standards from the City's historic preservation code. If a HPC commissioner prejudges the facts or the application of said legal standards, then Petitioner's due process right to an impartial decision-maker is violated. Under Wisconsin law, "an unbiased tribunal is a constitutional necessity in a quasi-judicial hearing and the denial of such a tribunal is the denial of due process." *State ex rel. DeLuca v. Common Council of Franklin,* 72 Wis.2d 672, 682, 242 N.W.2d 689, 695 (1976). Whether actual bias may be found in the record is not necessarily determinative. Circumstances which show a high probability of bias may be sufficient to give the proceedings an unacceptable constitutional taint. *Id.* at 684, 242 N.W.2d at 695.

Dated: Milwaukee, Wisconsin
September 1, 2022

Respectfully submitted,

REINHART BOERNER VAN DEUREN s.c.

By: _____

Richard W. Donner
WI State Bar ID No. 1049521
Attorney for Petitioner

[1] "We interpret ordinances in the same manner as we interpret statutes because the rules for the construction of statutes and municipal ordinances are the same." *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 6, 260 Wis.2d 633, 66 N.W.2d 656.

CHAPTER 68

MUNICIPAL ADMINISTRATIVE PROCEDURE

68.001 Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

History: 1975 c. 295.

Investigatory and adjudicatory functions in administrative proceedings are discussed. DeLuca v. Common Council, 72 Wis. 2d 672, 242 N.W.2d 689 (1976).

68.01 Review of administrative determinations. Any person having a substantial interest which is adversely affected by an administrative determination of a governing body, board, commission, committee, agency, officer or employee of a municipality or agent acting on behalf of a municipality as set forth in s. 68.02, may have such determination reviewed as provided in this chapter. The remedies under this chapter shall not be exclusive. No department, board, commission, agency, officer or employee of a municipality who is aggrieved may initiate review under this chapter of a determination of any other department, board, commission, agency, officer or employee of the same municipality, but may respond or intervene in a review proceeding under this chapter initiated by another.

History: 1975 c. 295.

68.02 Determinations reviewable. The following determinations are reviewable under this chapter:

(1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.

(2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03 (5).

(3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.

(4) The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court.

History: 1975 c. 295; 1981 c. 79.

68.03 Determinations not subject to review. Except as provided in s. 68.02, the following determinations are not reviewable under this chapter:

(1) A legislative enactment. A legislative enactment is an ordinance, resolution or adopted motion of the governing body of a municipality.

(2) Any action subject to administrative or judicial review procedures under other statutes.

(3) The denial of a tort or contract claim for money, required to be filed with the municipality pursuant to statutory procedures for the filing of such claims.

(4) The suspension, removal or disciplining or nonrenewal of a contract of a municipal employee or officer.

(5) The grant, denial, suspension or revocation of an alcohol beverage license under s. 125.12 (1).

(6) Judgments and orders of a court.

(7) Determinations made during municipal labor negotiations.

(8) Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16.

(9) Notwithstanding any other provision of this chapter, any action or determination of a municipal authority which does not involve the constitutionally protected right of a specific person or persons to due process in connection with the action or determination.

History: 1975 c. 295; 1981 c. 79.

68.04 Municipalities included. In this chapter, "municipality" includes any county, city, village, town, technical college district, special purpose district, or board or commission thereof, and any public or quasi-public corporation or board or commission created pursuant to statute, ordinance, or resolution, but does not include the state, a state agency, a corporation chartered by the state, or a school district as defined in s. 115.01 (3).

History: 1975 c. 295; 1993 a. 399; 2015 a. 196.

68.05 Municipal authority defined. "Municipal authority" includes every municipality and governing body, board, commission, committee, agency, officer, employee, or agent thereof making a determination under s. 68.01, and every person, committee or agency of a municipality appointed to make an independent review under s. 68.09 (2).

History: 1975 c. 295.

68.06 Persons aggrieved. A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination of a municipal authority.

History: 1975 c. 295; 1993 a. 112.

68.07 Reducing determination to writing. If a determination subject to this chapter is made orally or, if in writing, does not state the reasons therefor, the municipal authority making such determination shall, upon written request of any person aggrieved by such determination made within 10 days of notice of such determination, reduce the determination and the reasons therefor to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and shall advise such person of the right to have such determination reviewed, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed.

History: 1975 c. 295, 421.

68.08 Request for review of determination. Any person aggrieved may have a written or oral determination reviewed by written request mailed or delivered to the municipal authority which made such determination within 30 days of notice to such person of such determination. The request for review shall state the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed. A request for review shall be made to the officer, employee, agent, agency,

committee, board, commission or body who made the determination but failure to make such request to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.

History: 1975 c. 295.

68.09 Review of determination.

(1) INITIAL DETERMINATION. If a request for review is made under s. 68.08, the determination to be reviewed shall be termed an initial determination.

(2) WHO SHALL MAKE REVIEW. A review under this section may be made by the officer, employee, agent, agency, committee, board, commission or body who made the initial determination. However, an independent review of such initial determination by another person, committee or agency of the municipality may be provided by the municipality.

(3) WHEN TO MAKE REVIEW. The municipal authority shall review the initial determination within 15 days of receipt of a request for review. The time for review may be extended by agreement with the person aggrieved.

(4) RIGHT TO PRESENT EVIDENCE AND ARGUMENT. The person aggrieved may file with the request for review or within the time agreed with the municipal authority written evidence and argument in support of the person's position with respect to the initial determination.

(5) DECISION ON REVIEW. The municipal authority may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a copy of the municipal authority's decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken and the office or person with whom notice of appeal shall be filed.

History: 1975 c. 295, 421.

The 15-day time limit in sub. (3) is mandatory, not directory. The municipal authority's failure to comply with the 15-day deadline for completing the paper review under sub. (3) violated the plaintiff's right to due process and warranted reversal of the panel's decision. Koenig v. Pierce County Department of Human Services, 2016 WI App 23, 367 Wis. 2d 633, 877 N.W.2d 632, 15-0410.

68.10 Administrative appeal.

(1) FROM INITIAL DETERMINATION OR DECISION ON REVIEW.

(a) If the person aggrieved did not have a hearing substantially in compliance with s. 68.11 when the initial determination was made, the person may appeal under this section from the decision on review and shall follow the procedures set forth in ss. 68.08 and 68.09.

(b) If the person aggrieved had a hearing substantially in compliance with s. 68.11 when the initial determination was made, the person may elect to follow the procedures provided in ss. 68.08 and 68.09, but is not entitled to appeal under this section unless granted by the municipal authority. The person may, however, seek review under s. 68.13.

(2) TIME WITHIN WHICH APPEAL MAY BE TAKEN UNDER THIS SECTION. Appeal from a decision on review under s. 68.09 shall be taken within 30 days of notice of such decision.

(3) HOW APPEAL MAY BE TAKEN. An appeal under this section may be taken by filing with or mailing to the office or person designated in the municipal authority's decision on review, written notice of appeal.

History: 1975 c. 295, 421.

68.11 Hearing on administrative appeal.

(1) TIME OF HEARING. The municipality shall provide the appellant a hearing on an appeal under s. 68.10 within 15 days of receipt of the notice of appeal filed or mailed under s. 68.10 and shall serve the appellant with notice of such hearing by mail or personal service at least 10 days before such hearing.

(2) CONDUCT OF HEARING. At the hearing, the appellant and the municipal authority may be represented by an attorney and may present evidence and call and examine witnesses and cross-examine witnesses of the other party. Such witnesses shall be sworn by the person conducting the hearing. The municipality shall provide an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal. The decision maker may issue subpoenas. An appellant's attorney of record may issue a subpoena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in s. 805.07 (4) and must be served in the manner provided in s. 805.07 (5).

The attorney shall, at the time of issuance, send a copy of the subpoena to the decision maker. The hearing may, however, be conducted by an impartial person, committee, board or commission designated to conduct the hearing and report to the decision maker.

(3) RECORD OF HEARING. The person conducting the hearing or a person employed for that purpose shall take notes of the testimony and shall mark and preserve all exhibits. The person conducting the hearing may, and upon request of the appellant shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the municipality.

History: 1975 c. 295; 1989 a. 139.

The review of a city council decision by an administrative review appeals board that included the mayor did not violate the requirement of an impartial decision maker when the mayor did not participate in making or reviewing the resolution. City News & Novelty, Inc. v. City of Waukesha, 231 Wis. 2d 93, 604 N.W.2d 870 (Ct. App. 1999), 97-1504.

68.12 Final determination.

(1) Within 20 days of completion of the hearing conducted under s. 68.11 and the filing of briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.

(2) A determination following a hearing substantially meeting the requirements of s. 68.11 or a decision on review under s. 68.09 following such hearing shall also be a final determination.

History: 1975 c. 295.

68.125 Refund of fees. If in an administrative appeal under s. 68.10 the municipal authority's order is overturned or the municipal authority withdraws the order that was the subject of the appeal, the municipality and municipal authority shall refund any fee paid to it by the appellant as a condition of filing the appeal.

History: 2017 a. 317; 2021 a. 238 s. 45.

68.13 Judicial review.

(1) Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

68.13(2)

(2) If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript. By stipulation, the court may order a synopsis of the proceedings in lieu of a transcript. The court may otherwise limit the requirement for a transcript.

History: 1975 c. 295, 421; 1981 c. 289.

Judicial Council Note, 1981: Reference in sub. (1) to a "writ" of certiorari has been removed because that remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613-A]

The requirement of procedural due process is met if the state provides adequate post-deprivation remedies. Certiorari under this section is an adequate remedy. Failure to pursue certiorari under this section barred a claim that procedural due process was denied. Thorp v. Town of Lebanon, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59, 98-2358.

A litigant cannot bring a claim for money damages grounded upon 42 U.S.C. 1983 in a certiorari proceeding under ch. 68. Failure to join a section 1983 claim with a ch. 68 certiorari action does not preclude the claimant from bringing a section 1983 claim. Hanlon v. Town of Milton, 2000 WI 61, 235 Wis. 2d 597, 612 N.W.2d 44, 99-1980.

This section unambiguously provides authority for the remand of an agency final order for further proceedings necessary to insure the legislative purpose set forth in s. 68.001. The circuit court had authority to remand a s. 68.12 final determination based upon a reconsideration motion that presented newly discovered recantation evidence. M.H. v. Winnebago County Department of Health & Human Services, 2006 WI App 66, 292 Wis. 2d 417, 714 N.W.2d 241, 05-0871.

A court should not defer to a municipality's interpretation of a statewide standard. Doing so would give one locality disproportionate authority to influence state standards established by the legislature. If the language of the municipality's ordinance appears to be unique and does not parrot a state statute but rather the language was drafted by the municipality in an effort to address a local concern, applying a presumption of correctness, the court will defer to the municipality's interpretation if it is reasonable. Ottman v. Town of Primrose, 2011 WI 18, 332 Wis. 2d 3, 796 N.W.2d 411, 08-3182.

A municipality's interpretation of its own ordinance is unreasonable if it is contrary to law, if it is clearly contrary to the intent, history, or purpose of the ordinance or if it is without a rational basis. An interpretation that directly

contravenes the words of the ordinance is also unreasonable. Ottman v. Town of Primrose, 2011 WI 18, 332 Wis. 2d 3, 796 N.W.2d 411, 08-3182.

A certiorari court cannot order a board to perform a certain act. Thus, a court on certiorari review was without statutory authority to provide the equitable relief requested in this case. Certiorari exists to test the validity of decisions by administrative or quasi-judicial bodies. The scope of certiorari extends to questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of, as well as questions relating to the irregularity of the proceedings. Guerrero v. City of Kenosha Housing Authority, 2011 WI App 138, 337 Wis. 2d 484, 805 N.W.2d 127, 10-2305.

Under sub. (1) and s. 68.12 (2) the decision subject to certiorari review is the final determination made by the administrative panel. However, there are two exceptions to the general rule that a petition for certiorari must go to the body whose acts are being reviewed: 1) when specially provided by statute, or in particular cases of necessity, as when the board or body whose acts are sought to be reviewed is not continuing or has ceased to exist; and 2) when service requirements are ambiguous, and there is an absence of a clear statutory identity of the board or body. Koenig v. Pierce County Department of Human Services, 2016 WI App 23, 367 Wis. 2d 633, 877 N.W.2d 632, 15-0410.

The 30-day period during which certiorari review is available for a town board's highway order to lay out, alter, or discontinue a highway begins to run on the date that the highway order is recorded by the register of deeds. Pulera v. Town of Richmond, 2017 WI 61, 375 Wis. 2d 676, 896 N.W.2d 342, 15-1016. But see Zelman v. Town of Erin, 2018 WI App 50, 383 Wis. 2d 679, 917 N.W.2d 222, 17-1529.

An oral vote of a town board does not constitute a "final determination" under sub. (1) because it does not satisfy the description of "final determination" under s. 68.12, and attendance at a public hearing where the oral vote occurred did not constitute "receipt" of the decision. Zelman v. Town of Erin, 2018 WI App 50, 383 Wis. 2d 679, 917 N.W.2d 222, 17-1529.

Remand to the municipality or administrative tribunal for further hearings is appropriate when the defect in the proceedings is one that can be cured, but, on remand, supplementation of the record by the government decision-maker with new evidence or to assert new grounds is not permitted. Outright reversal is appropriate when the due process violation cannot be cured on remand. This includes reversals in which the factual evidence fails to support the municipality's or administrative tribunal's decision. Because the decision-maker cannot supplement the record with new evidence or new grounds, the defect cannot be cured. Hartland Sportsmen's Club, Inc. v. City of Delafield, 2020 WI App 44, 393 Wis. 2d 496, 947 N.W.2d 214, 19-0740.

68.14 Legislative review.

(1) The seeking of a review pursuant to s. 68.10 or 68.13 does not preclude a person aggrieved from seeking relief from the governing body of the municipality or any of its boards, commissions, committees, or agencies which may have jurisdiction.

(2) If in the course of legislative review under this section, a determination is modified, such modification and any evidence adduced before the governing body, board, commission, committee or agency shall be made part of the record on review under s. 68.13.

(3) The governing body, board, commission, committee or agency conducting a legislative review under this section need not conduct the type of hearing required under s. 68.11.

History: 1975 c. 295.

68.15 Availability of methods of resolving disputes. This chapter does not preclude any municipality and person aggrieved from employing arbitration, mediation or other methods of resolving disputes, and does not supersede contractual provisions for that purpose.

History: 1975 c. 295.

68.16 Election not to be governed by this chapter. The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.

History: 1975 c. 295.

In order for a municipality to elect not to be governed by a particular section of ch. 68, the municipality must enact an ordinance that shows that it chooses to opt out of the particular section. Tee & Bee, Inc. v. City of West Allis, 214 Wis. 2d 194, 571 N.W.2d 438 (Ct. App. 1997), 96-2143.

2019-20 Wisconsin Statutes updated through 2021 Wis. Act 267 and through all Supreme Court and Controlled Substances Board Orders filed before and in effect on July 1, 2022. Published and certified under s. 35.18. Changes effective after July 1, 2022, are designated by NOTES. (Published 7-1-22)

SUBCHAPTER 2
BOARDS

320-11. Administrative Review Board of Appeals.

1. DUE PROCESS. The purpose of this section is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons who are entitled to due process protection under the 14th amendment to the United States constitution. In order to insure that such rights are protected in the administration of the affairs, ordinances, regulations and by-laws of the city it is declared and required that the provisions of ch. 68, Wis. Stats., relating to municipal administrative review procedure shall be in full force and effect in this city, except as provided in subs. 5 and 6.

2. COMPLIANCE. All officers, employees, agents, agencies, committees, boards and commissions of this city shall comply with the requirements of ch. 68, Wis. Stats., and shall conduct initial administrative reviews of their own determinations in accordance with s. 68.09, Wis. Stats., upon filing of a proper written request therefor.

3. BOARD CREATED. a. There is created an administrative review board of appeals consisting of 5 members which shall have the duty and responsibility of hearing appeals from initial administrative determinations or decisions of officers, employees, agents, agencies, committees, boards and commissions of the city filed in accordance with s. 68.10, Wis. Stats., and making a final determination thereon. In conducting administrative review hearings and making final decisions the board shall be governed by ss. 68.11 and 68.12, Wis. Stats. The board shall consist of a duly licensed attorney member of the State Bar of Wisconsin having practiced law within the state for not less than 7 years, to be appointed by the city attorney, one member of the common council, to be appointed by the president of the common council, and 3 citizens, one to be appointed by the president of the common council and 2 to be appointed by the mayor. The members of the board shall be subject to confirmation by the common council. The members of the board shall hold office for a 2-year term. The members of the board shall elect one member of the board to serve as chair. The city attorney shall appoint one alternate citizen member who shall act with full power only when another member of the board is absent, refuses or is unable to serve because of interest in the subject matter of the appeal. A member shall serve until his or her successor has qualified. Members shall receive no compensation for their services as board members unless expressly provided for by ordinance or resolution.

b. Members shall be appointed no later than 60 days after the third Tuesday in April in even-numbered years to 2-year terms expiring on the third Tuesday of April 2 years thereafter. When a vacancy occurs in a board position the appointing authority shall make an appointment within 60 days after the vacancy occurs.

4. RULES. The board may adopt rules for the conduct of its hearings and for its procedures not in conflict or inconsistent with s. 68.11, Wis. Stats.

5. CITY LAW. This section shall not be deemed to repeal or supersede any other ordinance or resolution in conflict herewith which specifically provide other procedures for review of administrative determinations within the city.

6. STATE LAW. a. Pursuant to s. 68.16, Wis. Stats., the governing body of the city elects that the city not be governed by that part of s. 68.11(2), Wis. Stats., which reads as follows: who did not participate in making or reviewing the initial determination.

b. For the purposes of s. 68.10(2), Wis. Stats., notice shall mean the date listed on the document provided to the appellant informing him or her of the action subject to appeal, provided that this document is mailed no later than 2 working days after the date of the document.

c. All appeals to the board shall be received by the city clerk no later than 30 days after the date that appears on the face of a written notice of the determination or decision appealed from, provided the written notice is mailed to the

aggrieved person no later than 2 working days after the date that appears on its face. If the written notice is mailed more than 2 working days after the date that appears on its face, appeals to the board shall be received by the city clerk no later than 30 days after the date it is received by the aggrieved person. Under s. 68.16, Wis. Stats., the city elects not to be governed by any portion of ch. 68, Wis. Stats., that conflicts with this paragraph.

d. After the receipt of a timely appeal, the board shall schedule a hearing on the appeal as soon as is practicable. Under s. 68.16, Wis. Stats., the city elects not to be governed by any portion of ch. 68, Wis. Stats., that conflicts with this paragraph.

7. LOCATION. The office of the administrative review board of appeals shall be in the office of the city clerk, room 205, City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202. The city clerk shall be custodian of all files, records and proceedings of the board and shall provide stenographic service, stationery, postage and such other needs as the board requires. Petitions, notices and all other communications to the board relating to the administrative procedures provided for in this section shall be addressed to the board and mailed or delivered to the board's office. Hearings and meetings of the board shall be held in the city hall at a place designated by the city clerk. Notice of hearings or meetings shall be posted as required by law.

320-12. Arts Board. 1. CREATION. There is created an arts board consisting of 17 members appointed by the mayor for 3-year terms and confirmed by the common council. At least one member shall be selected from among the members of the common council, one member shall be selected from the membership of the Cultural, Artistic and Musical Programming Advisory Council and 2 shall represent the Milwaukee board of school directors. A majority of the members shall be city residents. No member may participate in any decision that would directly assist any organization to which the member belongs, except as a dues-paying member, or from which the member receives any benefit, except as a dues-paying member.

2. DUTIES AND POWERS. The board shall:

a. Promote the development, support and enjoyment of the arts in this city.

b. Promote cultural diversity in the artistic life of this city.

c. Promote the formation and growth of artistic projects or programs that are administered by and responsive to the needs of the city's communities that have been historically underrepresented or underserved based on race, ethnicity, age, religion, disability, sexual orientation, gender, gender identity, socioeconomic status, geography, or citizenship status.

d. Promote the design, construction and landscaping of public projects and private buildings, including public and private improvements, that enhance the beauty of this city.

e. Determine the amounts to be expended from the Milwaukee arts fund in accordance with the guidelines established under sub. 3 and any additional written guidelines adopted by the board.

f. Submit an annual budget request for the Milwaukee arts fund.

g. Review the designs of municipal buildings, bridges, approaches and other structures and projects in accordance with the guidelines established under sub. 4.

h. Administer the municipal art fund established by s. 304-27.

i. Submit annual reports to the common council and the mayor with respect to the board's activities under s. 304-27 and this section.

3. GUIDELINES. a. Projects or programs funded from the Milwaukee arts fund shall be organized and operated by the city, a nonprofit organization, or an individual artist, and shall be accessible to the public.

b. Funding for projects or programs organized and operated by nonprofit organizations shall be limited to a maximum of 5 years, unless the board, pursuant to its written guidelines, determines that additional funding is justified.

c. The board may accept contributions and donations that will augment the Milwaukee arts fund, or that will assist in the administration of the fund, to the extent permitted and in the manner prescribed by law.

d. Revenue and expenditure information shall be provided to the city comptroller for an annual audit.

City of Milwaukee
Decision
Administrative Review Appeals Board
Jennifer Havas, Chair
Donald Fraker, Vice-Chair
Frederick Gordon, Daniel Lee, Christopher Strohbehn, and Ald. Terry Witkowski

Staff Assistant, Terry MacDonald, (414)-286-2233
Fax: 286-3456, E-mail: tmacdo@milwaukee.gov
File Specialist, Joanna Polanco, 286-3936

RE: File 08181, Appeal of Atty. John Fuchs, on behalf of Patrick Dunphy relating to the Administrative Review Appeals Board's jurisdiction to review the Historic Preservation Commission's decision to grant a certificate of appropriateness. (1550 N. Prospect Ave. Goll House) (4th Aldermanic District)

This matter came before the Administrative Review Appeals Board on January 15, 2009, for a determination as to whether or not the appellant, Patrick O. Dunphy, had standing to file this appeal. After having reviewed the written submissions of the parties, and after having heard the argument of the parties, and by a vote of three to one (one member having recused himself), we concluded, on the record at that hearing, that the appellant had standing to file this appeal.

This conclusion was based upon the following reasons articulated at the hearing:

(1) Section 308-81 of the Milwaukee Code of Ordinances and related provisions are ambiguous with respect to who has standing to appeal a decision of the Historic Preservation Commission (HPC) and any ambiguity in this regard ought to be construed against the City, since it drafted the ordinance, and in favor of appellant; and

(2) To the extent that an appellant from a decision of the HPC must have a Constitutionally protected right implicated by the proceedings before the HPC, appellant has such a right.

This determination is not a final determination within the meaning of chapter 68. Rather, this matter is now set for a hearing on the merits of the appeal (on February 27, 2009) and it is anticipated that then or thereafter, the Board will issue a final, appealable, determination.

Jennifer Hawas, Chair

f-2. If the commission defers its decision, the applicant may appeal the deferral action to the common council by filing a written request for an appeal with the city clerk within 20 days after the mailing of the notice of the commission's decision to defer action. The appropriate common council committee shall conduct a public hearing on the appeal no later than its next regularly-scheduled meeting. Following the public hearing, the council shall, by resolution, sustain or reverse the commission's deferral action. If the council reverses the commission's deferral action, the commission shall grant, grant with conditions or deny the certificate of appropriateness at its next regularly-scheduled meeting.

g. Criteria; Certificates to Allow Alteration, Reconstruction, Rehabilitation or New Construction. In determining whether to grant, grant with conditions or deny a certificate of appropriateness to allow alteration, reconstruction, rehabilitation or new construction, the commission shall consider any applicable factors listed in sub. 12 and any of the following:

g-1. Whether the proposed work would destroy or adversely affect any exterior architectural feature of the improvement upon which the work is to be done or adversely affect the external appearance of other improvements on the site or within the district.

g-2 Whether, in the case of construction of a new improvement on a historic site or within a historic district, and with consideration of design review recommendations issued by the department of city development, the new improvement, other than an accessory structure, an addition thereto or reconstructed features thereof, is all of the following:

g-2-a. Architecture sensitive to the mass and proportions of existing structures on the site or within the district in which the subject property is located.

g-2-b. Appropriately-scaled architecture that is clearly differentiated from nearby historic structures, while taking cues from them.

g-2-c. Not an attempt to re-create a historic structure.

g-3. Whether, in the case of any property located in a historic district, the proposed alteration, reconstruction, rehabilitation or new construction conforms to the objectives of the historic preservation plan for the district as duly adopted by the common council.

h. Criteria; Certificates to Allow Demolition. In determining whether to grant, grant with conditions, deny or defer action on a certificate of appropriateness to allow partial or complete demolition, the commission shall consider any of the following:

h-1. Whether the structure is of such architectural or historic significance that its demolition would be detrimental to the public interest and contrary to the general welfare of the people of the city.

h-2. Whether the structure, although not itself an individually-designed historic structure, contributes to the distinctive architectural or historic character of the district as a whole and should be preserved for the benefit of the people of the city.

h-3. Whether demolition of the structure on a historic site or within a historic district would be contrary to the purpose and intent of this section and to the objectives of the historic preservation plan for the applicable district as duly adopted by the common council.

h-4. Whether the structure is of such old and unusual or uncommon design, texture or material that it could not be reproduced without great difficulty or expense.

h-5. Whether retention of the structure would promote the general welfare of the people of the city and state by encouraging the study of American history, architecture and design, or by developing an understanding of American culture and heritage.

h-6. Whether the structure is in such a deteriorated condition that it is not structurally or economically feasible to preserve, restore or use it, provided that any hardship or difficulty claimed by the owner which is self-created or a result of demolition by neglect cannot qualify as a basis for the issuance of a certificate of appropriateness.

h-7. If the structure is located on a historic site or within a historic district, whether, and with consideration of design review recommendations issued by the department of city development, any new structure, other than an accessory structure, addition thereto or reconstructed features thereof, proposed to be constructed, or change ins character proposed to be made, is all of the following:

h-7-a. Architecture sensitive to the mass and proportions of existing structures on the site or within the district in which the subject properly is located.

h-7-b. Appropriately-scaled architecture that is clearly differentiated from nearby historic structures, while taking subtle cues from them.

h-7-c. Not an attempt to re-create a historic structure.

i. Additional Provisions; Certificate to Allow New Construction. In the case of an application for a certificate of appropriateness for

Legislation Details (With Text)

File #:	980106 **Version:** 1		
Type:	Resolution	**Status:**	Passed
File created:	5/5/1998	**In control:**	ZONING, NEIGHBORHOODS & DEVELOPMENT COMMITTEE
On agenda:		**Final action:**	6/16/1998
Effective date:			
Title:	Substitute resolution amending the preservation guidelines for the North Lake Drive Estates Historic District.		
Sponsors:	THE CHAIR		
Indexes:	HISTORIC PRESERVATION, HISTORIC STRUCTURE		
Attachments:			

Date	Ver.	Action By	Action	Result	Tally
5/5/1998	0	COMMON COUNCIL	ASSIGNED TO		
5/19/1998	1	CITY CLERK	DRAFT SUBMITTED		
6/1/1998	1	ZONING, NEIGHBORHOODS & DEVELOPMENT COMMITTEE	HEARING NOTICES SENT		
6/9/1998	1	ZONING, NEIGHBORHOODS & DEVELOPMENT COMMITTEE	RECOMMENDED FOR ADOPTION	Pass	5:0
6/16/1998	1	COMMON COUNCIL	ADOPTED	Pass	17:0
6/25/1998	1	MAYOR	SIGNED		

980106
SUBSTITUTE 1
84-71
THE CHAIR
Substitute resolution amending the preservation guidelines for the North Lake Drive Estates Historic District.
- Analysis -

This resolution amends the preservation guidelines for the North Lake Drive Estates Historic District to include the following provision:

"The construction of any single building addition or accessory building shall not increase the total gross floor area of all structures on the lot by more than 20%. The total gross floor area of all additions or accessory buildings constructed after July 27, 1984, shall not exceed 50% of the total gross floor area of all structures on the lot on that date."

Whereas, On July 27, 1984, the Common Council adopted File Number 84-71, a resolution designating North Lake Drive Estates as a City historic district; and

Whereas, The North Lake Drive Estates Historic District is significant in that it contains an intact collection of early 20th century mansions built with high-quality craftsmanship and materials by prominent Milwaukeeans of that era; and

Whereas, The structures in the North Lake Drive Estates Historic District were built for residential use and remain residential in appearance, if not use; and

Whereas, The construction of large additions or accessory buildings on parcels in the North Lake Drive Estates Historic District would have a significant, negative and irreparable impact on the residential character of the District; and

Whereas, In adopting File Number 84-71, the Common Council adopted, by reference, preservation guidelines for the North Lake Drive Estates Historic District, including guidelines for new construction in the district; and

Whereas, While these guidelines require that the scale of new construction be in harmony with the character of the district, they do not

establish specific limits on the size of new additions and accessory buildings; now, therefore, be it

Resolved, By the Common Council of the City of Milwaukee, that part (C)(2) of the preservation guidelines for the North Lake Drive Estates Historic District is amended to read:

C. Guidelines for New Construction

2. Scale

Overall building height and bulk; the expression of major building divisions including foundation, body and roof; and individual building components such as porches, overhangs and fenestration must be compatible with the surrounding structures. >>The construction of any single building addition or accessory building shall not increase the total gross floor area of all structures on the lot by more than 20%. The total gross floor area of all additions or accessory buildings constructed after July 27, 1984, shall not exceed 50% of the total gross floor area of all structures on the lot on that date.<<
Department of City Development
LRB98143.2
JDO
5/19/98