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October 29, 2008

Ronald Leonhardt  
City Clerk  
City Hall, Room 205

Attn: James R.S. Owczarski, Deputy City Clerk

Re: Patrick O. Dunphy v. City of Milwaukee Historic Preservation Commission,  
Jurisdiction of the ARAB to hear appeal of HPC decision

Dear Mr. Leonhardt:

On October 17, 2008, Deputy City Clerk James R.S. Owczarski inquired whether the Administrative Review Appeals Board, ("ARAB"), had jurisdiction to hear an appeal filed by Partick O. Dunphy of the grant of a certificate of appropriateness by the Historic Preservation Commission to New Land Development for the property at 1550 North Prospect Avenue. For the reasons stated below, we conclude that the ARAB does not have jurisdiction to hear this appeal.

As you are aware, the ARAB is the entity created by § 320-11 of the Milwaukee Code of Ordinances in accordance with Chapter 68 of the Wisconsin Statutes to provide a constitutionally sufficient procedure for review of various municipal decisions. Wis. Stat. § 68.001; MCO § 320-11. MCO § 308-81 governs the Historic Preservation Commission, and provides, in part:

Any person or any city officer, department or board aggrieved by any decision of the commission made under the provisions of this section may appeal said decision to the administrative review appeals board pursuant to s. 320-11.

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MCO § 380-81-14. At first blush, this section appears to grant the ARAB jurisdiction to hear this appeal. However, Wis. Stat. § 68.06 provides:

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.

It does not appear that Mr. Dunphy can point to a right, duty, or privilege which has been adversely affected by the decision of the HPC to grant a certificate of appropriateness. In other words, it does not appear the Mr. Dunphy is "aggrieved" within the meaning of MCO § 380-81-14.

Moreover, even if Mr. Dunphy were "aggrieved," Wis. Stat. § 68.03, which outlines certain determinations that are not reviewable, provides:

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 [is not reviewable].

Wis. Stat. § 68.03(9). We are of the opinion that Mr. Dunphy does not have a right to due process in these proceedings. In other words, even if Mr. Dunphy were "aggrieved," Chapter 68 governs the jurisdiction of the ARAB in the first instance, and this jurisdiction cannot be expanded by ordinance. In fact, our ordinance specifies that it is governed by the restrictions in Chapter 68. Without a right to due process, Mr. Dunphy is not entitled to have the grant of the certificate of appropriateness heard pursuant to Wis. Stat. § 68.03(9). This conclusion is consistent with an earlier opinion of this office dated May 31, 1996 and attached for your convenience.

We therefore conclude that the ARAB does not have jurisdiction to hear this appeal, and suggest that you inform Mr. Dunphy's attorney of the contents of this

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letter, as well as the attached opinion, and return Mr. Dunphy's filing fee. We are returning the appeal documents along with this letter. Please feel free to contact us if you have further questions.

Very truly yours,



GRANT F. LANGLEY  
City Attorney



KATHRYN Z. BLOCK  
Assistant City Attorney

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1168-2008-3351:138987  
Enclosures

# CITY OF MILWAUKEE

Form CA-43

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May 31, 1996

Mr. Herbert Sonnenberg, Chair  
Administrative Review Appeals Board  
Room 205, City Hall  
200 East Wells Street  
Milwaukee, Wisconsin 53202

Re: Appeal of April 22, 1996 Historic Preservation  
Commission's Decision Granting a Certificate  
of Appropriateness to the Wisconsin Institute  
of Torah Study, Inc. ("WITS")

Dear Mr. Sonnenberg:

Your May 24, 1996 correspondence to this office requested that we comment on the jurisdiction of your Board, the Administrative Review Appeals Board ("ARAB"), with respect to the above-referenced appeal. Attached to your correspondence is a May 22, 1996 letter ("Notice of Appeal") from the attorneys representing the "Citizens for North Point Historic Preservation" ("Appellants") and a "Memorandum in Support of Appeal of the Decision of a Milwaukee Historic Preservation Commission, Granting a Certificate of Appropriateness to the Wisconsin Institute for Torah Study to Expand its Property Located at 3288 North Lake Drive" ("Supporting Memorandum").

In responding to your request, we first turn to 320-11-1, Milwaukee Code of Ordinances ("MCO"), for a statement of the jurisdiction of your Board. That section reads in part as follows:

"Due process. 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 consti-

May 31, 1996

tutionally protected rights of specific persons who are entitled to due process protection under the 14th Amendment of the United States Constitution." (Emphasis Added)

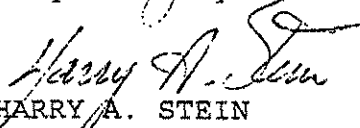
The Appellants indicate that the appeal is being taken to your Board pursuant to 308-81-14 MCO which provides that "any person or any City officer, department or board aggrieved by any decision of the Commission made under the provisions under this section may appeal said decision to the Administrative Review Appeals Board pursuant to s. 320-11." However, 308-81-14 does not expand the jurisdiction of your Board. Therefore, an individual allegedly aggrieved by an HPC decision must still articulate a constitutional underpinning to his or her appeal before being in a position to invoke ARAB's jurisdiction.

In examining both the Notice of Appeal and Supporting Memorandum, we find no allegations involving abridgment of constitutionally protected rights. In the Notice of Appeal, the statement is made that "these neighboring property owners are aggrieved by this decision [of the HPC] because the proposed expansion by WITS disrupts the very purpose of the formation of the North Lake Drive Historic District which was formed to protect and preserve the residents in this district". Further, the Notice of Appeal states that "the decision [of the HPC] directly contravenes the purpose of the Commission, which is to protect and preserve such historically significant properties." Then too, in the Supporting Memorandum, all of the references are to subsections under 308-81 dealing with the HPC and its duties and responsibilities under such ordinance. In short, the thrust of the entire Notice of Appeal and Supporting Memorandum is an argument for a hearing to review the HPC decision to issue the certificate of appropriateness to WITS.

Section 320-11-1 does not contemplate such a hearing to be conducted by your Board. It is therefore our opinion that the Notice of Appeal and its Supporting Memorandum are facially insufficient to invoke your jurisdiction.

Very truly yours,

  
GRANT F. LANGLEY  
City Attorney

  
HARRY A. STEIN  
Assistant City Attorney

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