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December 2, 2022

Attorney Vincent J. Bobot, Chair  
Administrative Review Board of Appeals  
524 E. Layton Ave.  
Milwaukee, WI 53209

Dear Attorney Bobot:

The Administrative Review Board of Appeals ("ARBA") requested an opinion regarding whether ARBA can review the Historic Preservation Commission's ("HPC") decision to grant a Certificate of Appropriateness. On April 8, 2022, Chris and Jennifer Abele ("Abele") submitted a Certificate of Appropriateness application to the City of Milwaukee, HPC, for a project to add an accessory building to their property. On May 9, 2022 and July 11, 2022, HPC held hearings on the application for the Certificate of Appropriateness. The Petitioner in this review, Suzanne Spenner-Hupy ("Hupy"), is an adjacent residential property owner. At the July 11, 2022 hearing, HPC granted Abele a Certificate of Appropriateness for their proposed project.

Hupy has requested review of HPC's grant of Abele's Certificate of Appropriateness. She alleges the project will have an adverse impact on her property by creating potential light pollution issues which will cause her special damages. Further, Hupy asserts the decision violates Milwaukee City Ordinance ("MCO") 320-21-11-g-3 and that HPC violated her due process rights when it made its decision based on facts not acquired during official proceedings. Hupy requests review of HPC's decision to ARBA under Chapter 68 of the Wisconsin Statutes ("Chapter 68") and MCO 320-11.

Chapter 68 governs Municipal Administrative Procedure, and MCO 320-11 specifically governs ARBA. ARBA generally hears appeals from administrative orders. Common appeals ARBA hears include nuisance fees relating to police services, waste, and tall grass. ARBA also hears appeals regarding reinspection fees relating to orders issued by the Department of Neighborhood Services. The request before ARBA is uncommon. Hupy claims ARBA has heard HPC appeals before and provided a decision from 2009, where ARBA determined an appellant had standing to appeal an HPC decision to ARBA.



There are several reasons why ARBA should not hear Hupy's request for review. In this opinion, I provide insight into ARBA's procedure and Chapter 68 to clarify what ARBA could generally hear and why ARBA should not hear Hupy's review. ARBA should not hear Hupy's request for review because Hupy's claim is not reviewable under Chapter 68, Hupy did not correctly follow Chapter 68 and MCO 320-11 when requesting review, and ARBA's 2009 decision to hear a review of an HPC decision was based on an ordinance that is no longer in effect.

**I. Hupy's claim is not reviewable under Chapter 68.**

Under Wis. Stat. § 68.01, any person with "a substantial interest which is adversely affected by an administrative determination" of a commission may have the determination reviewed. A commission cannot initiate review under Chapter 68, but it may respond or intervene in a review proceeding under this chapter initiated by another. Applicable here, "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," may be reviewed under Chapter 68. Wis. Stat. § 68.02(1). However, "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 subject to review under Chapter 68. Wis. Stat. § 68.03(9).

Additionally, to request review or file an administrative appeal under Chapter 68, one must be a person aggrieved. "A person aggrieved includes any individual ... whose rights, duties, or privileges are adversely affected by a determination of a municipal authority." Wis. Stat. § 68.06. An aggrieved person may have a determination reviewed as long as it is reviewable under Wis. Stat. § 68.02.

Hupy does not have a right implicated that would allow her to request review under Chapter 68. Hupy's request for review does not fall under one of the four determinations reviewable under Wis. Stat. § 68.02. Further, Hupy cannot be considered an aggrieved person because she failed to demonstrate that HPC's decision adversely affected her "rights, duties, or privileges." While the additional structure on her neighbor's property might be annoying, this does not adversely affect her rights.

**II. Hupy did not correctly follow Chapter 68 and MCO 320-11 when requesting review.**

ARBA applies Chapter 68 when conducting municipal administrative procedure. MCO 320-11-1. Under MCO 320-11-2, "All ... 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. Stat., upon filing of a proper request written therefor.” (emphasis added). Additionally, ARBA has,

the duty and responsibility of hearing appeals from initial administrative determinations or decisions of ... commissions of the city filed in accordance with s. 68.10, Wis. Stats., and making 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.

MCO 320-11-3-a.

MCO 320-21 governs the Historic Preservation Commission. This ordinance allows *applicants* for a Certificate of Appropriateness to appeal the commission’s decision to the common council. MCO 320-21-11-L. This ordinance does not provide insight into how an aggrieved person should appeal an HPC decision if they are not an applicant to the Certificate of Appropriateness.

Under Chapter 68, there are two procedures for reviewing a municipal decision. First, under Wis. Stat. §§ 68.08 and 68.09, a person aggrieved may request a review of a municipal determination. The “*request for review shall be made to the ... commission ... 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.” Wis. Stat. § 68.08 (emphasis added). Second, Wis. Stat. §§ 68.10 and 68.11 allow a person aggrieved to file an administrative appeal. Wis. Stat. § 68.10 requires a person aggrieved to follow the procedures in Wis. Stat. §§ 68.08 and 68.09.

The determination to be reviewed shall be termed an initial determination if a request for review is made. Wis. Stat. § 68.09(1). In this instance, the determination granting Abele a Certificate of Appropriateness is the initial determination. A review under this chapter may be made by the commissioner who made the initial determination. Wis. Stat. § 68.09(2). However, the municipality may provide an independent review of the initial determination. *Id.*

Hupy did not correctly follow Chapter 68 and MCO 320-11 when requesting review. Wis. Stat. §§ 68.08 and 68.09 are clear that requests for review shall be made to the commission which made the initial determination and that a review may be made by the commission that made the initial determination. Further, MCO 320-11-2 clearly states that commissions shall conduct initial administrative reviews of their own determinations per Wis. Stat. § 68.09. Thus, Hupy should have requested a review from HPC, and HPC should have reviewed its determination. Instead, Hupy requested a review from ARBA. Wis. Stat. § 68.09 allows a municipality to provide an independent review of an initial determination. Hupy

argued that ARBA was the proper forum to hear her review. She did not argue that ARBA should hear her review because an independent review was necessary.

**III. ARBA's 2009 decision to hear a review of HPC decision is not persuasive here.**

Hupy provided an ARBA decision from 2009 where the Board determined that an appellant had standing to appeal an HPC decision to ARBA. ARBA found that the appellant had standing because MCO 308-81 was ambiguous with respect to whom has standing to appeal an HPC decision. This ordinance is no longer in effect and as detailed above, Chapter 68 and MCO 320-11 clearly outline the procedure for municipal review, explicitly relating to ARBA. In the 2009 decision, ARBA also determined that the appellant had a constitutionally protected right implicated by the HPC proceedings. Whether an appellant had a constitutionally protected right implicated in proceedings from 2009 has no bearing on whether Hupy has a constitutionally protected right here. This ARBA decision does not clarify whether Hupy has standing in this ongoing matter.

Attached to this opinion is a City Attorney Opinion from October 2008 speaking to this precise issue. In that opinion, the City Attorney's Office informed ARBA that it did not have jurisdiction to hear the appeal of an HPC grant of a Certificate of Appropriateness. The opinion comes to this conclusion because the petitioner was not an aggrieved person under Chapter 68. Of note, the opinion quotes MCO 308-81, which is no longer in effect. This ordinance provided that an aggrieved person may appeal an HPC decision to ARBA. Considering this provision is not in the updated HPC ordinance, we must interpret that as the Common Council did not intend HPC appeals to be heard by ARBA.

**IV. ARBA Jurisdiction Generally.**

MCO 320-11-3-a is not definitive in what exactly ARBA can hear. This ordinance states that ARBA is responsible for hearing appeals from initial administrative determinations of officers, employees, agents, agencies, committees, boards, and commissions filed in accordance with Wis. Stat. § 68.10. If an appeal was filed in compliance with Wis. Stat. § 68.10, ARBA *could* hear the appeal of a commission's decision. Following Chapter 68 and MCO 320-11, the proper procedure is to request a review from the municipal authority that made the initial determination. That municipal authority may review its initial determination, but the municipality may provide an independent review by another person, committee, or agency. Wis. Stat. § 68.09(2) does not explicitly state an instance of when a municipality may provide an independent review. Because this is not specified, there could be a myriad of reasons why an independent review is conducted. In the event that an

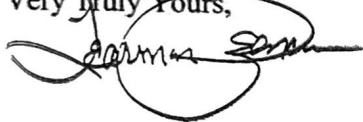
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independent review is requested, ARBA could hear review the decision of another administrative body.

**V. Conclusion.**

ARBA should not hear Hupy's request for review. Hupy's request for review is not reviewable under Chapter 68, Hupy did not correctly follow Chapter 68 and MCO 320-11 when she requested review, and ARBA's 2009 decision was based on an ordinance no longer in effect. MCO 320-11 requires appellants to request review from the municipal authority that made the initial determination. An appellant can request that an independent review be done through this process. If this is the case, and ARBA decides to conduct an independent review, ARBA can hear reviews of other city officers, employees, agents, agencies, committees, boards, and commissions.

Very Truly Yours,



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