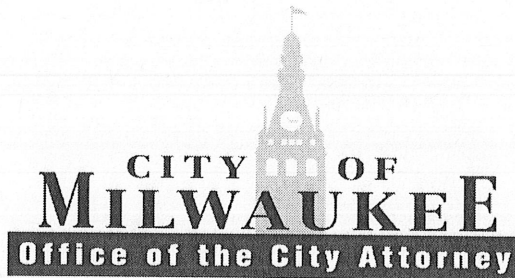


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October 22, 2024

Clifton Crump
Policy and Administration Director
Office of Common Council President
200 E. Wells Street
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Re: Adding Qualifications for RACM, CPC, and BOZA Board Members

Dear Mr. Crump:

By email dated August 28, 2024, you asked whether the Common Council could establish, by ordinance, additional requirements for membership on the board of the Redevelopment Authority of the City of Milwaukee ("RACM"), City Plan Commission ("CPC"), and Board of Zoning Appeals ("BOZA"). Your inquiry is a follow up to our July 25, 2024 opinion in which we concluded that the Common Council does not have authority to enact an ordinance establishing additional qualifications for board members of the Housing Authority of the City of Milwaukee ("HACM"), which is an independent corporate body, separate and distinct from the City municipal corporation.

On September 3, 2024, Common Council President Perez introduced a proposed ordinance (CCFN 240721) that would amend Milwaukee Code of Ordinances ("MCO") § 295-311-1-b to require that (1) at least one BOZA member shall be an architect licensed in the state of Wisconsin; (2) at least one BOZA member shall be an individual with a background in public safety; and (3) at least one BOZA member shall be an individual with a demonstrated interest in social welfare or housing issues. These are the same qualifications addressed in the HACM opinion. We apply these three qualifications ("Additional Qualifications") to RACM, CPC, and BOZA.

RACM, CPC, and BOZA are all statutory bodies, created by the state legislature rather than the City. A September 25, 1984 City Attorney opinion seemed to imply that, under



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Wis. Const. art. XIII, § 9,¹ the City may adopt additional qualifications for statutory board and commission members only by adopting a charter ordinance through its constitutional home rule power. We conducted considerable research on this point and conclude that that is not the case and that the 1984 opinion did not ultimately stand for that proposition. Accordingly, the answers to your questions derive from a state preemption analysis and will vary based upon the enabling statute that created the particular board or commission.

As with HACM, we conclude that the RACM enabling statute preempts the City's ability to establish additional requirements for RACM board membership. With regard to CPC, we conclude that the City may adopt the Additional Qualifications by simple ordinance and may alternatively use its constitutional home rule authority to adopt a charter ordinance providing that CPC member qualifications shall be as provided by ordinance. Finally, the City may enact the Additional Qualifications for BOZA members through simple ordinance.

A. RACM

The City has no authority to establish the Additional Qualifications for membership on the RACM Board without a change in state law. RACM's enabling statute preempts any authority the City may have to modify the qualifications of RACM commissioners.

The enabling statute states that RACM is "an independent, separate and distinct public body and a body corporate and politic, exercising public powers determined to be necessary by the state to protect and promote the health, safety and morals of its residents . . ." Wis. Stat. § 66.1333(3)(f). Based on the enabling statute, this office has issued several opinions concluding that RACM, like HACM, exists independently of the City. *See, e.g.,* City Att'y Op., Oct. 8, 1982 and Sept. 11, 1984 (available on request).

Given the amount of control that a city has over its redevelopment authority under the enabling statute, however, there is some reason to question the extent of RACM's

¹ Wis. Const. art. XIII, § 9, titled "Election or appointment of statutory officers," provides, in pertinent part:

All city . . . officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities . . . or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct.

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independence.² Nonetheless, the nature of RACM's independence exceeds the scope of this opinion because the statute clearly preempts the City's ability to modify the qualifications for RACM board membership.

Assuming, for the sake of argument, that the City has any authority to adopt additional RACM board member qualifications under its statutory police powers,³ a proposition that is not at all clear, "the state has the authority to withdraw the power of the municipality to act." *Anchor Savings & Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). The test for whether the state has preempted the matter, was set forth in *Anchor Savings*: (1) whether the legislature has expressly withdrawn the power of municipalities to act; (2) whether the ordinance logically conflicts with the state legislation; (3) whether the ordinance defeats the purpose of the state legislation; or (4) whether the ordinance goes against the spirit of the state legislation. 120 Wis. 2d at 397. "Should any one of these tests be met, the municipal ordinance [or resolution] is void." *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 652, 547 N.W.2d 770 (1996).

It is our opinion that the enabling statute would preempt an ordinance requiring the Additional Qualifications, regardless of the degree to which RACM is truly independent of the City. The enabling statute governs the method of appointment and qualifications of RACM commissioners. The mayor shall appoint seven City residents to serve as RACM commissioners. Wis. Stat. § 66.1333(3)(a)3. The appointments are subject to confirmation by a four-fifths vote of the Common Council. *Id.* The enabling statute specifies the following qualifications:

In making appointments of commissioners, the appointing power shall give due consideration to the general interest of the appointee in a redevelopment, slum clearance or urban renewal program and shall, insofar

² See *Redevelopment Authority of the City of Madison v. Canepa*, 7 Wis. 2d 643, 655-56, 97 N.W.2d 695 (1959) (holding that while the statute provides numerous indicia of independence, the city's statutory power to, among other things, control the authority's budget regarding salaries, office operation, and facilities, makes it "appear that the city has power to control the activities of the authority to so great a degree as to deprive the authority of independence"); see also 63 Op. Att'y Gen. 421, 422-23 (1974) (Wisconsin Attorney General relied on *Canepa* to opine that redevelopment authority commissioners are "city officers" within the meaning of Wis. Stat. § 895.35 for purposes of eligibility for city reimbursement of commissioner's legal expenses).

³ Under section 62.11(5) of the Wisconsin Statutes, the legislature has provided a broad grant of authority to cities to act "for the health, safety, and welfare of the public . . ." This is also referred to as the *statutory* home rule power. Pursuant to section 62.03(2) of the Wisconsin Statutes and Charter Ord. File No. 50790 (Feb. 6, 1933), the City made section 62.11(5) applicable to the City.

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as is possible, designate representatives from the general public, labor, industry, finance or business group, and civic organizations. Appointees shall have sufficient ability and experience in related fields, especially in the fields of finance and management, to assure efficiency in the redevelopment program, its planning and direction. One of the 7 commissioners shall be a member of the local legislative body. No more than 2 of the commissioners may be officers of the city in which the authority is created.

Wis. Stat. § 66.1333(3)(a)5.

The enabling statute comprehensively governs the method of appointment and the required qualifications. Therefore, an ordinance requiring the Additional Qualifications would logically conflict with state law, defeat the purpose of the state statute, and go against the spirit of the state law. As we advised with regard to HACM appointments, the Common Council has the confirmation power. Should the Common Council determine that the Additional Qualifications are important to its consideration of the mayor's RACM appointees, the council could communicate that position to the mayor through resolution or other means.

B. CPC

As referenced in MCO § 320-15, the enabling statute for the City of Milwaukee CPC is section 27.11 of the Wisconsin Statutes, which is the enabling statute for the board of public land commissioners ("BPLC") in 1st class cities.⁴ Section 27.11(12) governs the appointment of BPLC and CPC members in cities of the 1st class and provides, in pertinent part:

(a) In cities of the 1st class the common council may create by ordinance a board of public land commissioners, consisting of 7 citizen members, the commissioner of public works and the city engineer not to be members, with the same purposes, powers, functions, conditions and terms as board of public land commissioners created otherwise under this section.

⁴ MCO § 320-15-1 provides: "There is created, pursuant to s. 27.11, Wis. Stats., a board of public land commissioners, which for convenience of identification, shall be referred to as the city plan commission, consisting of 7 citizen members, with the same purposes, powers, functions and terms as boards of public land commissioners created under s. 27.11, Wis. Stats. The board shall exercise all the powers conferred on city plan commissioners under s. 62.33 [sic], Wis. Stats." Please note that the reference to "s. 62.33" (added through adoption of Common Council File No. 091312) is incorrect and should instead refer to "s. 62.23."

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(b) Commissioners under this subsection shall be appointed by the mayor, subject to the approval of the common council . . . ***and such commissioners are to be persons of general qualifications rather than specialists or technicians in any particular phase of city planning.*** (emphasis added)

“In cities of the 1st class, said board of public land commissioners shall exercise all the powers conferred on city plan commissions by s. 62.23.” Wis. Stat. § 27.11(13). Similarly, section 62.23(9a) provides: “In cities of the first class, said city plan commission may exercise all of the powers conferred on board of public land commissioners under s. 27.11.” Thus, “within the City of Milwaukee, the Board of Public Land Commissioners and the City Plan Commission are one and the same body.” City Att’y Op., May 10, 2005.⁵

This statutory scheme is unique to Milwaukee as a 1st class city. All other city plan commissions are governed by section 62.23(1)(a), which specifies a different commission composition but also authorizes cities to alter the commission membership through enactment of a simple ordinance—“The council may by ordinance provide that the membership of the commission shall be as provided thereunder.” The League of Wisconsin Municipalities (“League”) has advised municipalities that this sentence, which was added in 1959, was introduced at the request of the League and provides cities with “substantial discretion in determining the size and composition of the plan commission.” League Op., Oct. 3, 1991 (available upon request). The City, of course, cannot use the express authority granted in section 62.23(1)(a) to alter the CPC’s composition and qualifications because section 27.11 is the enabling statute for the City’s CPC.

It is our opinion that the City could, however, use its statutory home rule power to adopt an ordinance requiring the Additional Qualifications for CPC members. Unlike HACM (and, to a lesser extent, RACM), the CPC is not an independent body, separate and distinct from the City. While it is a statutory commission, the CPC is, nonetheless, an arm of municipal government. Accordingly, the City possesses authority to address the CPC’s composition, provided such action is not preempted by the enabling statute: “[e]xcept as elsewhere in the statutes specifically provided,” section 62.11(5) grants the Common Council the “management and control of . . . the public service” *Huhnke v. Wischer*, 271 Wis. 66, 70, 72 N.W.2d 915 (1955). The City’s action must satisfy the *Anchor Savings* preemption test discussed above.

Applying the *Anchor Savings* test, the enabling statute has not expressly withdrawn the City’s power to enact an ordinance requiring the Additional Qualifications. While it is a

⁵ A City Attorney opinion dated March 23, 2006 incorrectly identified Wis. Stat. § 62.23(1)(a) as the enabling statute authorizing creation of the City of Milwaukee City Plan Commission.

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closer question as to whether the Additional Qualifications would logically conflict with the enabling statute, defeat the purpose of the statute, or go against the spirit of the statute, we do not believe that the Additional Qualifications would fail any of these elements of the test.

Section 27.11(12) establishes the following limitations on who may serve as BPLC/CPC commissioners: (1) the commissioner of public works and the city engineer are not to be members; and (2) “commissioners are to be persons of general qualifications rather than specialists or technicians in any particular phase of city planning.” It is not clear who would be considered a “specialist[] or technician[] in any particular phase of city planning” under § 27.11(12)(b).⁶ At most, it would seem intended to preclude the City from allocating slots on the BPLC/CPC for planning experts such as a city planner, a professor of urban planning, or a mapping expert.

The proposed Additional Qualifications⁷ could all plausibly encompass “persons of general qualifications rather than specialists or technicians in any particular phase of city planning.” A licensed architect, for example, is not necessarily a “specialist[] or technician[] in any particular phase of city planning” merely by virtue of holding an architect license. Thus, it is our opinion that the statute would not preempt an ordinance requiring the Additional Qualifications.

Finally, there is a strong argument that the composition of a city plan commission is a matter of local affairs given that the legislature granted authority in 1959 to all other cities to alter the number and composition of their city plan commissions by simple ordinance. Therefore, the City could use its constitutional home rule authority under Wis. Const. art. XI, § 3(1)⁸ to adopt a charter ordinance electing that section 27.11(12)(b) shall not apply to the City and adopting the language of § 62.23(1)(a): “[Commissioners shall be appointed

⁶ For example, one of the core functions of the CPC is to adopt the City's master plan (i.e., comprehensive plan), which addresses a wide scope of community matters, including: demographics and employment forecasting; housing; transportation; utilities and community facilities (e.g., sewers, water supply, recycling, health care and child care facilities, police/fire/rescue, libraries, schools); agricultural, natural and cultural resources (e.g., environmental, historical/cultural resources, community design, parks, recreational resources, etc.); economic development; and land use. *See* Wis. Stat. §§ 62.23(3)(b) and 66.1001(2). It would seem an absurd result to interpret section 27.11(12)(b) to prohibit appointment of a person on the sole basis that he or she holds a certificate or license related to any of these elements of the master plan.

⁷ A licensed architect, “an individual with a background in public safety,” and “an individual with a demonstrated interest in social welfare or housing issues”

⁸ Wis. Const. art. XI, § 3(1) provides: “Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.”

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by the mayor subject to the approval of the common council.] The council may by ordinance provide that the membership of the commission shall be as provided thereunder.” Upon the effective date of the charter ordinance, the City could then enact a simple ordinance providing that the CPC shall be composed of members satisfying the Additional Qualifications.

C. BOZA

It is our opinion that the BOZA enabling statute would not likely preempt an ordinance establishing the Additional Qualifications for BOZA members.

Wisconsin courts recognize BOZA as an independent “body politic” for purposes of section 801.11(4)(a)7 of the Wisconsin Statutes, governing commencement of legal actions to review BOZA decisions. Wisconsin courts have also held that BOZA is the proper defendant for a writ of certiorari challenging a BOZA decision. Unlike HACM (and, to a lesser extent, RACM), however, BOZA is not an independent public body, separate and distinct from the City for any other purposes. *See City Att’y Op.*, July 11, 2023. Accordingly, as with the CPC, the City’s authority to alter the composition of BOZA stems from its power to manage and control the public service under section 62.11(5), provided that the municipal action is not preempted by the enabling statute.

BOZA is a quasi-judicial body established pursuant to section 62.23(7)(e) of the Wisconsin Statutes, which was made applicable to the City by Ordinance File No. 25437a, adopted on October 15, 1923. If a common council enacts a zoning code under section 62.23, then “the council . . . shall by ordinance provide for the appointment of a board of appeals. Wis. Stat. § 62.23(7)(e)1. Section 62.23(7)(e)2. goes on to provide, in pertinent part:

The board of appeals shall consist of 5 members appointed by the mayor subject to confirmation of the common council for terms of 3 years The members of the board shall serve at such compensation to be fixed by ordinance, and shall be removable by the mayor for cause upon written charges and after public hearing. The mayor shall designate one of the members as chairperson. The board may employ a secretary and other employees. Vacancies shall be filled for the unexpired terms of members whose terms become vacant.

The enabling statute is silent regarding BOZA member qualifications. By simple ordinance, the City has adopted three BOZA member qualifications that are not found in the statute: (1) board members shall be City residents; (2) board members “shall hold no

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other public office or employment except that of notary public;" and (3) [a]t least one member shall be licensed to practice law in the state of Wisconsin." MCO § 295-311-1-b.⁹

The enabling statute does not preempt any of the three existing qualifications. The legislature granted the zoning power to cities "[f]or the purpose of promoting, health, safety, morals or the general welfare of the community" Wis. Stat. § 62.23(7)(am). The purpose of the BOZA enabling statute is to provide a quasi-judicial forum in which to hear appeals of municipal zoning decisions, requests for variances, and requests for conditional use permits. BOZA must provide a fair and impartial hearing under concepts of due process and fair play, including the right to have matters decided by an impartial board. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24-25, 498 N.W.2d 842 (1993). A resource for municipalities made available through the Wisconsin Department of Natural Resources identifies the following four "[s]uggested criteria" for appointment of BOZA members: (1) diversity of membership; (2) land use expertise; (3) demonstrated commitment to community service and continuing education; and (4) an understanding and acceptance of the non-partisan, quasi-judicial role of the zoning board.¹⁰

The residency requirement is consistent with the need to have members who have knowledge of the community. The prohibition against holding other public office or employment is consistent with the need to avoid conflicts of interest. The attorney requirement is consistent with the purpose of establishing a quasi-judicial forum for fair and impartial hearings with due process standards.

Applying the *Anchor Savings* test, it is not apparent how an ordinance imposing the Additional Qualifications¹¹ would logically conflict with the enabling statute, defeat the purpose of the statute, or go against the spirit of the statute. Thus, an ordinance establishing the Additional Qualifications for BOZA membership would likely be legal, enforceable, and not preempted by the enabling statute.

⁹ The attorney requirement was added in 1988. We have reviewed a City Attorney letter addressing the legality and enforceability of that proposed ordinance (CCFN 872127). The letter, however, did not address the question of the City's authority to adopt the attorney requirement through simple ordinance.

¹⁰ Lynn Markham & Rebecca Roberts, *Zoning Board Handbook for Wisconsin Zoning Boards of Adjustment and Appeals*, at 16-17 (2d ed. 2006), https://fyi.extension.wisc.edu/landusetraining/files/2020/01/Zoning_Board_Handbook-condensed.pdf.

¹¹ A licensed architect, "an individual with a background in public safety," and "an individual with a demonstrated interest in social welfare or housing issues."

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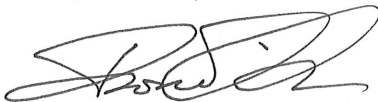
D. Conclusion

In conclusion, it is our opinion that the RACM enabling statute would preempt an ordinance establishing additional RACM board member qualifications. The City could require the Additional Qualifications for CPC and BOZA membership through simple ordinances. The City could also use its constitutional home rule authority to adopt the flexibility that the legislature granted to all other cities to determine CPC member qualifications.

Very truly yours,



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c: José G. Pérez, Common Council President
James R. Owczarski, City Clerk