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November 28, 2011

To the Honorable
Common Council of the
City of Milwaukee
Room 205 – City Hall

Re: CCFN 110692 – a substitute ordinance relating to the
establishment of the East Side architectural review board

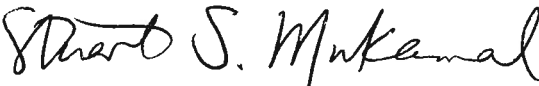
Dear Council Members:

We are signing and returning this file to you, as requested. We caution, however, that the powers of the proposed East Side Architectural Review Board are subject to those of the Board of Zoning Appeals, and any design guidelines or other regulations issued by the proposed new Board would be subordinate to the provisions of the Zoning Code, ch. 295, Milwaukee Code of Ordinances. These matters are more fully set forth in our opinion of March 28, 2011, which accompanies this letter.

Please contact this office if you wish any further assistance.

Very truly yours,


GRANT F. LANGLEY
City Attorney

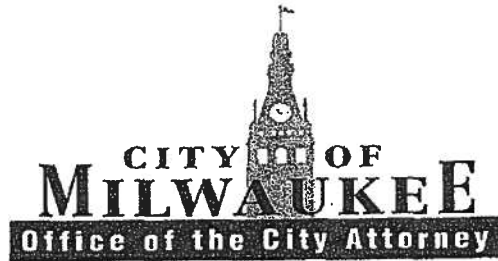


STUART S. MUKAMAL
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SSM:lmb
enclosure
c: Ronald D. Leonhardt, City Clerk
1033-2011-2954:175869

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March 28, 2011

Martha L. Brown
Deputy Commissioner
Department of City Development
809 Building – 2nd Floor

Re: Powers of the Architectural Review Board (Third Ward)

Dear Ms. Brown:

This letter will respond to your request for the opinion of this office, dated March 11, 2011, addressing three issues pertaining to the extent of the powers of the Architectural Review Board for the Third Ward (the "Board"), established pursuant to § 200-61 (formerly § 308-71), Milwaukee Code of Ordinances ("MCO"). We are pleased to respond to your request, and will address the three questions posed by your letter in turn.

QUESTION 1: What jurisdiction, if any, do architectural review boards have with respect to approval or denial of demolition permits, per Sec. 200.61?

RESPONSE: The Board has no jurisdiction with respect to approval or denial of demolition permits. Its authority extends only to the alteration, rehabilitation or construction of building or site exteriors located within the boundaries of its geographical area (*i.e.*, the Third Ward), § 200-61-5 (introductory paragraph), MCO. Its project review authority is similarly strictly limited to "alteration, rehabilitation or construction" projects, with respect to which it is authorized to issue certificates of appropriateness. § 200-61-5-b-3, MCO. Thus, the Board's jurisdiction extends only to construction or renovation projects; no reference or suggestion that this jurisdiction extends to razing or demolition projects exists. Authority for permitting the razing and demolition of buildings within the City is accorded to the Department of Neighborhood Services in accordance with ch. 218, MCO, and in special cases, to the Historic Preservation Commission in accordance with §§ 320-21-2 and 320-21-11, MCO.

QUESTION 2: When reviewing proposed alteration, rehabilitation or construction, architectural review boards apply design guidelines that have been adopted by the Common Council. When projects reviewed by an ARB also are subject to review by the Board of Zoning Appeals, does BOZA have an obligation for its approval to conform to

Martha L. Brown, Deputy Commissioner

March 28, 2011

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the ARB design guidelines? When there is inconsistency between the plan approved by BOZA and the plan approved by the ARB, which approval takes precedence?

RESPONSE: There is no statutory or ordinance provision that provides a direct answer to this question. Nonetheless, we believe that an appropriate response may be derived from an examination of pertinent statutory and ordinance provisions.

As earlier noted, the Board is a creature of its enabling ordinance, § 200-61, MCO. Architectural review boards have no statutory basis or enabling authority and are thus entirely a creature of local enactments. By contrast, the City of Milwaukee Board of Zoning Appeals (“BOZA”) and other zoning tribunals located throughout the State find their enabling authority in the State’s zoning-enabling law, Wis. Stat. § 62.23(7). Thus, BOZA occupies a higher place in the administrative hierarchy than does the Board.¹

BOZA exercises its statutory authority via proceedings pertaining to the evaluation and determination of applications for permits relating to land use, primarily special-use permits and variances. This authority is expressly granted to BOZA by statute, Wis. Stat. §§ 62.23(7)(e)1., 7. and 8.; *see also* §§ 295-311-2 and 311-3, MCO. BOZA is similarly granted the authority to hear and decide appeals from orders issued by City administrative officials pertaining to zoning and land use matters. *See* Wis. Stat. §§ 62.23(7)(e)7. and 8., §§ 295-311-5 and 311-6, MCO. These powers are plenary and exclusive to BOZA and other zoning tribunals, subject to judicial review by way of *certiorari* per Wis. Stat. § 62.23(7)(e)10., and are not shared with any other tribunal or official.

In exercising these responsibilities, the duty of BOZA is to interpret and apply the City of Milwaukee’s Zoning Code (“Code”), § 295-311-1-a-1, MCO. The Code itself, ch. 295, MCO, incorporates extensive and detailed design guidelines of city-wide applicability, which are contained in Code provisions pertaining to all regular zoning districts and many special-purpose districts and overlay zones. *See* §§ 295-505 (residential zoning districts), 295-605 (commercial zoning districts), 295-705 (downtown districts), 295-805 (industrial districts), 295-903-3 (parks districts), 295-905-3 (institutional districts), 295-907-3-b (planned development districts), 295-909-3 (redevelopment districts), 295-1005-3-d (neighborhood conservation overlay zones), 295-1007-3-a (development incentive overlay zones), 295-1009-3-a (site plan review overlay zones), and 295-1015-3-c and c-2 through c-5 (lakefront overlay zones), MCO. Sign regulations are addressed in detail by other provisions of the Code. *See* § 295-407, MCO for city-wide regulations and the

¹ It is instructive that certain other special-purpose commissions are statutory and derive their jurisdiction and powers from the State as well. *See, e.g.*, Wis. Stat. §§ 62.23(1)-(5) (city plan commissions), Wis. Stat. § 62.23(7)(em) (historic-preservation and landmarks commissions).

design-standard Code provisions referenced above for sign regulations applicable to particular zoning districts. In considering permit applications and other matters that raise issues associated with architectural or other design standards, BOZA's duty is to interpret and apply these Code provisions. It is not subject to or bound by design guidelines emanating from other sources, including (but not limited to) those adopted with respect to the Board. While BOZA may certainly consult those design guidelines, or deem them of persuasive weight, it is not required to do so.

We conclude, therefore, that while determinations of BOZA and those of the Board should be harmonized where possible, that in the event of a direct conflict between the two, BOZA's interpretations and determinations must take precedence over those of the Board.

QUESTION 3: The design guidelines approved for the Historic Third Ward ARB include language regarding off-street parking. (Copy attached) These guidelines state that off-street lots should have a capacity of no more than 24 vehicles. The guidelines further state that "High volume parking requirements *shall* be accommodated in multilevel mixed-use structures whose predominant street level use is not parking." (Emphasis added)

RESPONSE: The Board cannot exercise any jurisdiction over off-street parking regulations. Off-street parking regulations are land use regulations, and as such, must be regulated by ordinance. See Wis. Stat. § 62.23(7)(a) ("For the purpose of promoting health, safety, morals or the general welfare of the community, the council may regulate and restrict by ordinance...the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, mining, residence or other purposes if there is no discrimination against temporary structures"). Wisconsin Stat § 62.23(7)(a) is a zoning statute and is titled and expressed as such.

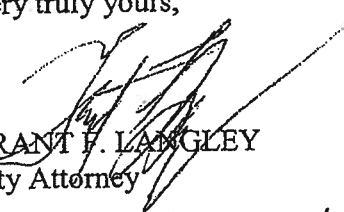
Once the Common Council has approved an ordinance regulating such land use matters, jurisdiction over such matters is then reserved exclusively to BOZA in accordance with the statutory and ordinance enabling authority referenced in our answer to Question 2, above. This conclusion applies specifically with respect to parking, in further accordance with § 295-403, MCO (the Code's parking provisions of city-wide applicability), and other Code provisions regulating parking with respect to particular zoning districts and land uses. Furthermore, regulation of off-street parking is a matter neither referenced or suggested in § 200-61, MCO, nor within the scope of the Board's authority to review and approve alteration, rehabilitation, and reconstruction projects affecting building exteriors

Martha L. Brown, Deputy Commissioner
March 28, 2011
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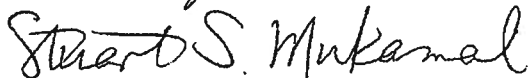
located within the Third Ward. Therefore, it is our opinion that the language cited in your question and contained within the Third Ward design guidelines cannot be enforced in a mandatory fashion by the Board.

Please contact this office if you have any further questions concerning these or related matters.

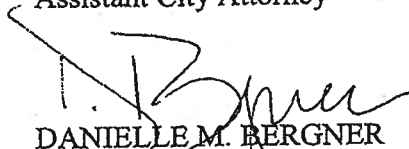
Very truly yours,



GRANT F. LANGLEY
City Attorney



STUART S. MUKAMAL
Assistant City Attorney



DANIELLE M. BERGNER
Assistant City Attorney

SSM:lmb

c: Mayor Tom Barrett
Ronald D. Leonhardt, City Clerk
Architectural Review Board
1050-2011-867:167448