

MEMORANDUM IN SUPPORT OF APPEAL OF ERRONEOUS DECISION OF HPC

I. INTRODUCTION

This is an appeal of a decision by the Historic Preservation District (HPC) denying a COA for a skylight-type sola tube project (Project)¹ in the North Point North District of Milwaukee (District). The appellant applicant is Susan LaBudde (Applicant), the new owner of a modest 1971 condo located at 2581 N. Terrace Ave. (Subject Property). The unit is just one of four in the “Bellevue-Terrace Condominium Association (Association), consisting of two 2-story square buildings separated by just a driveway. The Subject Property is in the southern of the two buildings. (See, neighborhood diagram in exhibits).

The guidelines promulgated by the District explicitly allow skylights, dormers and solar-powered devices on roofs. These guidelines explicitly employ a balancing-of-interests test and:

are not intended to restrict an owner’s use of his/her property, but to serve as a guide for making changes that will be sensitive to the architectural integrity of the structure **and** the appropriate overall character of the district. [Emphasis added]. (*Historic Designation Study Report, North Point North Historic District*, page 8, Sec. IX. A.; emphasis added)

The guidelines applicable to roofs are:

Retain the original roof shape. Dormers, skylights and solar collector panels may be added to roof surfaces if they do not visually intrude upon those elevations visible from the public right of way. Avoid making changes to the roof shape that would alter the building height, roofline, pitch or gable orientation. (*Historic Designation Study Report, North Point North Historic District*, page 6, Sec. IX. A.1.a; emphasis added). (Hereafter referred to as Guidelines).

II. OVERVIEW

A summary of the primary grounds for this appeal are:

1. **The Sola Tubes Do Not Materially “intrude” and Do Not Otherwise Contravene the Guidelines.** The Project does not “intrude” nor do they change the building “height, roofline, pitch or gable orientation.” Even a long-time member of the HPC, a professionally trained architect and professor of architecture at UWM, opined that the Project was “minor”, did not contravene the Guidelines, and would very likely

¹ For a discussion of the many technical advantages of a Sole Tube over a skylight, see Appendix: Why a Sola Tube.

pass muster at the HPC hearing—unless “personalit[y]” issues prevailed. (See, *Mathew Jarosz email dated 8/31/18, attached with exhibits; also quoted in Section B, about page 8 below*).

Moreover, their modest height² is in line with other common above-the-roof protrusions — old and new—ubiquitous on virtually every roof, such as duct vents and pipes, pan vents, chimneys, satellite dishes, and even substantial roof-mounted air conditioner units, all of which are also on the same block as the Subject Property.

When objective metrics are applied, the sola tubes (which are partly translucent) compare very favorably in terms of “visibility” to three (3) larger skylight projects, and two (2) front-facing A/C appliances mounted on roofs — each of which the HPC has allowed — in the immediate neighborhood. (The HPC relied only subjective opinion).

2. The Project Suits the Historical Style and “Architectural Integrity” of the Residence. The Project is consistent with the historic and architectural period of the residence, which is Mid Century Modern—a highly unusual, if not unique, housing style in the District, 90% of which are classical mansions built 1900-1930 (Guidelines at Section V.B). Permitting the Project on the basis of its specific “sensitivity to” the “integrity” of its own specific MCM idiom (which often incorporated skylights and sola tubes, as discussed below) would significantly limit this precedent in the District, given the rarity of the MCM architectural style in the District.

3. The Guidelines Must Be Applied in the Larger Context of Balancing and Weighing the Public Interest with the Owner’s Right to Use His/Her Property and on Appeal the **ZDN May Take “Special Conditions Concerning the Specific Piece of Property” into Account.** (Milwaukee Municipal Code Sec. 320-21-12 at L. *Appeal*, page 353; hereafter Code.) The three (3) surrounding neighbors owning adjacent properties all offered letters in support of the Project, including a more accurate description of the relative building heights of adjacent houses and the very limited visibility of the Project. (See *footnote 5 below and attached exhibits, and particularly that of Attorney David Reicher*).

The HPC did not engage in any balancing analysis whatsoever. The Guidelines exhibit an overt, understandable pride, but perhaps also a subtle snobbery, about the grandeur and exclusivity of the District and the ornate mansions that overwhelmingly predominate. (See *Section C, quoting the Guidelines Preamble*).

The anomaly of the Subject Property— being a modest 1,500 square foot Mid Century Modern with minimal adornment, in a District whose average house is over 4,000 square feet —may have prompted the HPC to dispense with any weighing and

² A sola tube consists of an opaque cylinder topped by a translucent cover. The tube is from about 4 to 5 inches tall (based on if is up slope or down slope on the roof) and the translucent cover is another 3-4 inches, so it protrudes anywhere from roughly 7 to 9 inches above the roof surface.

balancing, despite their being mandatory under the Guidelines. However, the uniqueness of the architectural and historical style of the Subject Property—designed by prominent local architect Thomas Van Alyea—should not deprive Applicant of this balancing test nor minor upgrades consistent with its special MCM roots. It is mandatory that the Guidelines be applied in a larger context and take into account the “special conditions” of this “specific piece of property.” (Mun. Code at 320-21-12, page 353). *(As to average size, see email of Jeff Osterman, Legislative Reference Supervisor, dated 9/19/19 and included with the attached Exhibits.*

4. **Allowing the Project is Both in Line with Existing Longstanding Precedent and Consistent with the MCM Style, and Doing So Will Not Open the Floodgates Because There are Virtually No Other MCM Style Residences in the District. The HPC Often Re-Interprets the Guidelines to Expand or Set New Precedent.** The Guidelines are not set in stone and the HPC often adjusts its interpretations to create new or expanded precedents, in keeping with changing styles and evolving technologies. It has done so both as to solar panels and to exterior lighting, to name a few, as discussed below.

5. **Economic hardship.** To modify the Project would involve substantial economic hardship and impracticalities. To tear out or modify the Project would, per Applicant’s contractor, cost “thousands of dollars”, though less than 10% of the assessed value of the Subject Property, unless significant re-roofing is involved.

6. **Reasonable Mistake & Inadvertence.** While the retroactive nature of this appeal is technically a mistake of Applicant’s own making, Applicant as the recent purchaser of the Subject Property reasonably relied on the statements and experience of other persons, and other factors, including the **Seller’s written (mis)representation in the Real Estate Condition Report (RECR) that the building was NOT in a historic district.** *(See, the RECR attached as an exhibit).* The HPC does not, by any means, have an absolute prohibition on retroactive COAs. Given the particular context and circumstances of Appellant’s case, the HPC improperly relied on its pejorative characterization of the COA’s retroactive posture, and other misleading disparaging characterizations, as among the grounds for its denial of a COA.

7. **The HPC and Staff Applied the Guidelines Inconsistent with Similar Projects and Roof Structures. It Also Insistently Misrepresented and Obscured on Facts Directly Relating to Consistency and Precedence, and Sought to Suppress Relevant Evidence.** The HPC relied on deliberately erroneous, inaccurate, and incomplete information in making its determination. The HPC also relied on misleading subjective conjecture, rather than objective metrics, and committed reversible error in applying inconsistent and varied standards. It appeared, from the conduct and demeanor of the Chair, that skylights are an emotional, hot-button, and deeply personal issue; and that he had already made up his mind prior to the hearing (also declining to consider Applicant’s additional submissions except to scoff at them) and

had cowed the other members into line. This essentially made the hearing a charade and denied Applicant fair process.

III. PROPOSED COMPROMISE

At the outset, Applicant readily acknowledges this is a dispute relating to a small sola tube project and does not implicate world peace, social justice, the opioid epidemic, or any of the other serious challenges facing larger cities such as Milwaukee.

She doesn't want to make a 'federal case' out of it.

Even so, she's entitled to a fair and balanced consideration by impartial arbiters, on the merits.

Applicant also prefers pragmatic compromise to controversy.

However, at the HPC hearing, the Chair rebuffed offers to discuss changes, modifications, and compromise (twice telling her to go sue).

Subsequent attempts to explore compromise with city personnel have been dissuaded.

Nevertheless, Applicant has a proposed compromise she'd like to discuss with the ZND, if amenable.

IV. DISCUSSION

A. Background Facts & Why The COA Application is Retroactive

This matter comes based on a retroactive application for a Certificate of Appropriateness (COA) that was essentially denied at a HPC hearing on September 4, 2018. Three of four sola tubes were denied.

However, Applicant's oversight of the COA requirement is wholly inadvertent and Applicant relied on the statements and experience of others with substantially more experience and knowledge of the area, including:

1. Seller's written ***misrepresentations*** on this very issue.
2. Applicant's reliance on a reputable local contractor with substantial business and personal ties to the East Side and the District, as well as other persons.
3. The existence of five (5) much larger, highly visible skylights all around the Subject Property, each a few houses away in three (3) different directions.

4. The age and style of Applicant's house as a modest 1971 Mid-Century Style, a distinct anomaly in the District, as well as the particularly un-cohesive, down-market aspect of Applicant's section of the north west side of the 2500 block of Terrace Avenue. (See footnote 2 on page 7).

1. **Seller Misrepresentations.** In April of 2018, Applicant purchased the Subject Property. The seller of the condo, Sherry Johnston, provided a standard Real Estate Condition Report (RECR), a 3 page single-spaced document containing enumerated disclosures. Seller was represented by a licensed professional real estate broker, Peggy Coffey. The RECR was made out by hand, signed, and dated.

In the RECR, Seller represented that the Subject Property was **not in a historic district**. Seller checked the box "**NO**", meaning that the property was not designated as a "historic building" or that "the property is in a historic district," at page 3, line item 28. (*A copy of the RECR is attached*)³.

2. & 3. **Reputable Contractor and Others.** Prior to moving in on June 7, 2018, Applicant performed work on the condo such as painting and floor renovation (including 2 types of acoustic insulation, one of greater benefit to the downstairs neighbor than herself, trying to be the 'good neighbor').

Applicant also contracted with **Brighter Concepts Ltd** for the installation of the 4 sola-tubes.

As Keith Johnson, the owner of Brighter Concepts, testified at the HPC hearing on September 4, 2018:

- A. He has been in business for over 30 years installing sola tubes and related projects, including on the East Side of Milwaukee.
- B. He has installed some "30,000" sola tube type products in Southeast Wisconsin. He is currently working on a large condo project on the 2400 block of Lake Drive.
- C. He also stated that he is a life-long East-Side resident and has resided in the District for several years. He stated that he was unaware this area was part of a historic district.

³ The Seller lived in the property for 19 years and for much of that time was the Association President, including when the Association successfully applied for a COA to replace the roofs in 2011. In filling out the RECR, Seller inserted one hand-written disclosure and took the time to discern and distinguish between whether some items were NO or N/A (she checked off 5 N/A boxes). All told, the RECR gives the appearance of having been made out with diligent care and attention to detail and Applicant reasonably relied on its disclosures. Nothing in any other dealings related to the sale raised any flags about the existence of a historic district.

- D. He made an informal survey of the 2 block radius around the Subject Property using a common satellite image mapping application and counted approximately 30 skylights.
- E. The City of Milwaukee has not required building permits for sola tubes and similar projects because they do not involve any cutting into, or alteration of, roof structures (instead, the sola tubes are made of a flexible casing material that simply slide in between the existing joists and rafters).
- F. He told Applicant a building permit was not required for her Project.

Prior to having the sola tubes installed, Applicant received unanimous approval from the other Association members to install them. No member of the Association made any mention of the existence of a historic district (although most had moved in after the roof COA was obtained in 2011).

4. Existence of Three (3) Nearby Houses with Large Skylights & Special Character of Subject Property as Mid Century Modern. For the above reasons, Applicant, did not realize the Subject Property was in a historic district, given both the 1971 age and modest nature of her residence and the extremely disparate, and somewhat inherently ‘down market’ nature, of the housing on her side of the block.⁴ This small pocket of oddities shines little glory on the District.

Applicant also noted that there are five (5) large, highly visible skylights on three (3) houses in the immediate neighborhood:

(1) Two (2) front and side facing skylights at 2604 N. Lake, that are **visible from three (3) public ways:** Lake Drive, Bellevue and Terrace. (“**2604 N. Lake Drive Skylights**”). This corner house is just around the corner from the Subject Property (see neighborhood diagram map attached).

(2) Two (2) side facing skylights at 2604 N. Terrace, that are **visible from two (2) public ways,** Bellevue and Wahl. (“**2604 N. Terrace Pair of Skylights**”).

⁴ Moving southward: (2571) a square, vaguely colonial 1950’s house lacking even a front door or front entrance; then (2565-2567) a dilapidated “painted lady” Victorian that has been chopped into 3 units and whose woodwork is rotting and peeling inside and out (personal tour provided by owner; assessor website lists as only 2 units; the attic is also rented out but has upside down electrical outlets and no thermostat); then (2557) a squat, dreary, flat-roofed, quasi-Italianate small apartment building, and so forth. Immediately behind, to the West, is a 4-story Katz-owned apartment building with aluminum storm windows and rear porches in some disrepair (visible from the Subject Property). In fact, the house next door, at 2571 N. Terrace, was deemed to “add nothing” the historic character of the neighborhood, and thus was denied state tax credits to help offset the higher cost of materials the HPC required during a recent remodel addition.

This is also a corner house and is located kitty corner from the North Building of Applicant's Association.

(3) One (1) large front-facing skylight on the house at 2457 E. Terrace. This is also a corner house and the skylight is **visible from two (2) public ways**, Terrace and Terrace ("**2457 Terrace Skylight**").

The status of the skylights on these three (3) houses —all of which have essentially been granted approval—will be discussed in Section E below.

5. **Applicant is Not a "Scofflaw"**. At the risk of "protesting too much," Applicant submits she is not the "scofflaw" that the HPC implied at the hearing. The "permit" link at the Milwaukee Assessor website for a prior residence discloses 21 permits over a 19-year period, all initiated by the homeowner or her contractor, none obtained retroactively. See, <https://aca3.accela.com/Milwaukee/Cap/GlobalSearchResults.aspx?QueryText=3170327000>, accessed 9/19/18). The database appears to go back only to 1997; Applicant lived in that house from 1991-2016, and also had permitted work performed prior to 1997). In contrast, the "permit" link for **2604 N. Lake** discloses seven (7) violations and a "dimensional variance."⁵

6. **The City Has at Times Considered Providing Notice to Residential Purchasers of the Existence of a Historic District But Has Declined to Do So, Even Though the Cost is Likely Minimal.** The City of Milwaukee Assessor sends out a Notice of Inspection to the purchasers of residential real estate. Here, Applicant met with the assessor for an hour. Neither the assessor nor his letter refers to a historic district. In an informal conversation with Senior City Clerk Jim Owczarski on September 18, 2018, Applicant discussed the suggestion that the City include historic district information along with the standard assessor inspection letter. Mr. Owczarski stated that this idea had been discussed from time to time but a decision was made not to. **The cost of such a Notice would be minuscule, probably less than \$20/year.**⁶

B. The Project Does Not Contravene the Guidelines.

(i) In the Opinion of an Architecture Expert and HPC Member.

⁵ Now finished, the remodeled **2604 N. Lake** is, arguably, a real jewel in the neighborhood. All of the departures from what was there before (and from the Guidelines) resulted in a harmonious improvement and enhancement of this residence's aesthetic rather than a mere replica; it is also meticulously maintained.

⁶ There are approximately just 227 residences/ improved structures in the District. Assuming an annual turnover rate of about 20% (or 50 properties) and a cost of 25 cents a page for a Notice insert, the cost to the City of such a Notice would be just \$12.50 a year (50 times \$0.25). (See, email dated 9/19/18 from Jeff Osterman, City of Milwaukee Legislative Reference Supervisor).

First, a long-time member of the HPC gave his opinion that the Project does not violate the Guidelines and that all of the sola tubes would be approved.

Professor Matthew Jarosz, a professor of Architecture & Urban Planning at UWM, was consulted informally a few days before the hearing, after Applicant received a belated emailed copy of the HPC staff recommendation, 2 business days before the hearing, giving its first indication that the HPC had an issue with the COA application.

After reviewing Applicant's submission, Professor Jarosz in his reply email dated 8/31/01 (*copy included with exhibits*) thought the Sola Tubes would pass muster:

Susan,

Seems pretty minor to me. I don't have a problem with it and I don't think you will have a problem with the board. However, it is a board, several different people and personalities. So, I can't say definitively that it will be accepted on Tuesday, however, I'd be very surprised if wouldn't.

Matt

[Bolding and underline emphasis added].

Professor Jarosz's email gave comfort that the sola tubes would be allowed.

However, as the bland allusion to "personalities" foretold, subjective and domineering personality factors appeared to predominate, displacing objective consideration of the facts and precedents, as further discussed below. (See, particularly Section F).

(ii) And When Viewed Under Objective, Comparative Metrics.

Second, consistent with Professor Jarosz's assessment of the protrusions as "**minor**", the opaque portion of the sola tube extending above the roof does so by just a few inches. This is just slightly more the same pan roof vents and smaller vent pipes on other parts of the roof of the Subject Property (*see attached photos in exhibits*). The rest of the sola tube structure, which is clear, extends another few inches; for the sake of comparison and calculation, rounding up, assume a total height of about 12 inches (1 foot) above the roofline at the taller side.

They certainly are less intrusive than the several large, entirely opaque, roof-mounted air conditioning units on the same and next blocks that appear to stand some 2 and 3 feet, respectively, above the roofline. (*See photos attached in exhibits*).

When objective, measurable analyses are applied, the extent of "visibility" is far less than the nearby skylights by every metric other than height. And as to height, the sola tubes are just one-half to one-third the height of the entirely opaque rooftop A/C appliances nearby and a fraction of their visual mass.

(a) **Materiality & Proportionality of “Visibility”.** The sola tubes occupy an exceedingly small portion of the roof planes they are located on. The two side ones (North slope) together occupy a total of about 2.12 sf on a roof slope that is about 547.25 square feet, or a ratio of about 0.4% — less than one percent (1%)—hardly material⁷.

Moreover, they are especially “minor” when compared to the skylight pairs on the three houses nearby, all of which have much larger skylights on much smaller square footage of roof planes, thus occupying a much more dramatic percentage of roof surface (*see chart below*).

(b) **50% Less Visible From Front/ Head On.** The Project is at least 50% less visible, from a head on/direct view, than any of the three skylight projects cited by Applicant. This is because of the extremely shallow pitch of the roof and the 2-foot wide roof overhang— which renders them invisible from the same side of the street and visible only from the opposite sidewalk. The same cannot be said of any other skylight, all located on steeply pitched roofs, all visible from both sides of the street, its entire width.

(c) **Narrower Angle of View and Shorter Length of View** All three skylight projects are on corner lots and thus more widely viewable from a wider range of angles. The Subject Property is not on a corner lot but on a lot sandwiched between two houses (a narrow side yard to the South and just a shared driveway to the North), severely limiting their view to a much narrower angle, comparatively. Here, neighbor Attorney Reicher’s description provides more detail, balance, and clarity than the HPC Staff’s skewed and selective report and presentation⁸. Not being on a corner also means the length of view — the distance from which they can be seen from down the street—of the Project is far less than the three corner skylight houses, which can be seen from much further away, especially 2604 N. Lake. (*Applicant can supply these measurements on request*).

⁷ See diagram and calculations included in Exhibits.

⁸ As across-the-street neighbor Atty. David Reicher notes in his letter of support: “I did walk around the corner block for other views from the street level and noticed that the Sola-tubes are blocked from numerous views by the North condo building and certain trees on the property. With respect to my direct views at night, I note that they are hardly noticeable when lit up, particularly when contrasted to the multiple larger lighted windows from the 4-story apartment building directly West of the La Budde Condo that towers over the condos and dominate our Western view far more than the small Sola-tubes.” Atty. Reicher has lived directly across from the Subject Property for over 28 years, “spends most of [his] time at home in the West rooms facing the La Budde Condo” and it is a “safe bet” he’s “spent more time viewing” the Subject Property “than anyone else in Milwaukee.” The new Project does not bother him at all and he has no objection to it.

(d) **Other Screening Impediments.** They are also further obscured by large mature trees⁹.

They are, as Professor Jarosz commented, truly “minor.”

(e) **Minimal effect on Roofline.** At times, the HPC indicated that “alteration of the roof line” was the “primary issue with the installation” rather than visibility. (Video at 26:30 run time). When viewed in context and proportion, however, the Project — occupying less than one percent (1%) of the roof surface—no more alters the roof line than other minor common roof protrusions such as chimneys, vent pipes, pan vents, roof-located A/C and the like.

At the hearing the Chair refused to consider any objective metrics (and scoffed at Applicant’s points as too “creative”. (See, e.g., video starting at runtime 33:02). One wonders if a male applicant would have been subjected to equally dismissive treatment.

The following chart compares the relative size and proportionality of the Subject Property compared to the 3 skylight houses and 2 rooftop A/C appliances in the immediately surrounding neighborhood.

COMPARATIVE FOOTPRINT AND PERCENTAGE OF ROOF COVERED			
	Footprint of Sola Tube/ Skylight, in square feet	Approximate percentage of roof slope occupied	HPC Disposition (See Section E below for detail on HPC dispositions)
Subject Property -the 2 ST on the North slope (side)	2.12 sf	less than 1% (2.12 divided by 547.25)	Denied
2604 N. Terrace East slope (side)	4 sf (about 2 by 2')	30% ~ estimate	Installed after District created. Allowed, no order for removal pending.
2457 N Terrace East slope (front)	6 sf (about 2 by 3')	10% ~ estimate	A 2016 COA issued by HPC made removal optional (see Exhibits); owner has subsequently expanded scope of remodel, replacing with a dormer window (that will “alter the ... roofline”).

⁹ Reicher letter at p. 1.

2604 N. Lake West slope (front)	4 sf (about 2 by 2')	25% ~ estimate	Allowed, no order of removal pending, even after a re-roof project that slated the removal of the front, but not side, sky light.
COMPARATIVE HEIGHTS AND VOLUME			
	Approximate Height and Width	Approximate volume and footprint	
Subject Property per sola tube	14" diameter by 12"high or 1.167 foot by 1 foot	1.06 sq. ft ~ footprint 1.07 cubic ft ~ volume	
Rooftop Air Conditioner on 2506 N. Terrace visible from the street	2 feet by 2 feet	4 sq. ft ~ footprint 8 cubic ft ~ volume	
Rooftop Air Conditioner at 2370 N. Terrace visible from the street	3 feet by 3 feet	9 sq. ft ~ footprint 27 cubic ft ~ volume	

C. The Project is Consistent with the Subject Property’s Modern Movement Style Architecture.

The Subject Property is many respects an outlier and anomaly in the District in terms of age, size and housing style.

The District is not just a “prestigious” district but “one of the most prestigious” “upper middle class” residential districts in Milwaukee. The District’s residences are “considerably larger than houses in most Milwaukee neighborhoods.” Many homes have “commanding views of Lake Michigan.” See, *Historic Designation Study Report, North Point North Historic District (District Guidelines) at pages 2, 6 and 1.*

In fact, they average 4,034 square feet with an average assessed value of almost \$600,000.¹⁰ At 1526 sf, the Subject Property is more than 2500 sf smaller, barely a third of the average in size. The average assessed values of the 4 Belleview-Terrace condos is \$310,250, around half the average assessed value.¹¹

The vast majority of the District’s mansions—some 90%—were built between 1900-1930 and part of the “cohesiveness” of the neighborhood is enhanced by most

¹⁰ See, Assessment information from City Clerk’s office, and email dated 9/19/18 included with Exhibits.

¹¹ City of Milwaukee Assessor website data for 2579, 2581, 2587 & 2589 N. Terrace.

buildings having “masonry” exteriors, although the number of architectural styles contributes to its “eclecticism”. *Id at 3*. Tudor, Georgian, and Colonial styles predominate, among others, and the architectural pedigrees include Alexander Eschweiler, Cornelious Leenhouts, Frank Lloyd Wright, and Thomas Van Alyea. *Ibid*.

Although the Subject Property contains a masonry brick exterior, and was deigned by renowned architect Thomas Van Alyea, it is built in the minimalist “Modern Movement” or “Mid Century Modern” style, making it highly discordant with the ornate aesthetic of the neighborhood, a fact explicitly acknowledged back when historic designation was sought for the District.¹²

Mid Century Modern describes an esthetic that includes architecture built between 1945-1975 characterized by minimalism and “ample windows and open floor plans” designed “with the intention of opening up interior spaces and bringing the outdoors in.” (See, *Wikipedia, Mid Century Modern, accessed 9/14/2018.*) They are designed to be flooded with natural light and some MCM architects were “pioneers in the incorporation of passive solar features in their houses.” In function and form, MCM housing was “targeted to the needs of the average American family.” *Id.* [Emphasis added].

This describes the Subject Property in a nutshell: its large, tall banks of windows, a modest scale, and open floor plan. It would be far more in character in Fox Point, a neighborhood predominated by MCM houses, where skylights and sola tubes abound, both original and as later improvements¹³. The sola tube Project is entirely “sympathetic” and coherent with the integrity of the MCM of this residence.

As such, it would be wholly appropriate for the HPC to grant Applicant’s COA, as in keeping with the MCM style of the Subject Property, while rationally limiting them tube elsewhere, since there are likely no other MCM properties in the District. Arguably, it could do so consistent with its actual application of the Guidelines, regardless of exercise of the “Chairman’s discretion” (see Section F below), without any variance or exception.

On appeal, the ZDN may also grant relief in light of the “special conditions concerning the specific piece of property”. This case presents particularly attractive facts for the

¹² The 1970-1971 condo built properties were described as “two-story brick-veered Modern Movement duplexes with very-low pitched roofs [that] are out of scale with the rest of the district and unsympathetic in character.” See, Letter of Attorney David Reicher dated 9/3/2018 and provided to the HPC on 9/4/2018 at page 2, quoting the February 2000 National Register of Historic Places Registration Form. (Emphasis added).

¹³ The HPC’s overly stringent Guidelines, freezing Mennonite-like one moment in history, contrast with historic districts in Northern Europe and the UK (climates also with long, dark winters) that permit retrofitting similar age and older buildings with evolving technological innovations. See, Applicant’s submissions from 7/30/18.

ZDN to do so. And the relief Applicant seeks includes such a grant within its scope of review, however denominated (e.g., as an exemption, variance, etc.)

D. The HPC Often Adapts the Guidelines and Sets New Precedent to Adapt to Changing Technology and Tastes.

Moreover, the Guidelines are just that, guidelines: a “guide for making changes....” (Id. at 8), not replicas. Nor are the Guidelines themselves set in stone.

While one concern is to protect the “cohesive streetscapes” that are mostly—but not entirely—characteristic of the district, that concern must be balanced with a homeowner’s right to make “changes that will be sensitive to the architectural integrity of the structure and appropriate to the overall character of the district.” (*Guidelines at page 6, Sec. IX.A, emphasis added*).

The HPC has also evolved and varied its application of the Guidelines, including to allow discretionary, non-essential design and functional upgrades, in keeping with changing tastes and technology.

One example is residential solar panels, a fairly recent invention.

Applicant will note just two other of many examples¹⁴.

(1). **Although Forced-Air Style Air Conditioning was Not Original to Any 1900-1930 Style of House—and is a Discretionary Rather Than Essential Residential Improvement—The HPC Allows Highly Visible Roof-Mounted Air Conditioners in the District.**

Merely a casual visual survey from the public ways and streets reveals that the HPC permits large air conditioning units to be mounted prominently on roof-tops of Tudor and Colonial style housing, directly visible from the front. There are two in the immediate neighborhood of the Subject Property—one on the same block and another a block away.

¹⁴ As another example, one need only review the HPC files and Assessor website “Permits” tab for **2604 N. Lake**, where, after protracted dealings that apparently included 7 “violations” and 1 “dimensional variance”, the owner was ultimately permitted to make and keep numerous departures from the Guidelines and the original features of the house, including, *inter alia*, substituting a series of right angle approaches, tiers, and patio for the straight front walk, building an 8’ wall next to the street, adding a large coach house with living space, etc. (See, *HPC own files and the summary of violations page of the Milwaukee Property Tax Assessor website relating to that property & conversation with owner*.) Additionally, while the standards for new construction differ somewhat, the newer modernist house at **2131 N. Terrace** represents a significant departure from the architectural styles of the area: it is a severe, three-story, unadorned, cream and black stucco with vaguely Dutch gables, deeply inset windows, a metal roof, and Art Deco signage & railings—tucked between two red brick colonials. Alike only in scale and no other respects, it is a beautiful—even grand—addition to its neighborhood.

The roof-mounted A/C unit at **2370 N. Terrace** appears to be a full-size appliance, approximately three (3) feet tall by three (3) feet wide—a foot print of nine (9) square feet and a vertical intrusion of some 27 cubic feet in volume. (See attached photos of the **large A/A unit on roof of Tudor mansion at 2370 N. Terrace**). As noted above, Applicant's modest Project (at about one (1) cubic foot each) are a fraction of the visual intrusion represented by these front-facing appliances.

Moreover, on Applicant's own block, the brick and stucco mansion at **2506 N. Terrace** also has roof-mounted A/C unit facing the front street. This unit appears to be approximately at least two (2) feet by two (2) feet, for a foot print of four (4) square feet and a vertical visual intrusion of some 8 cubic feet in volume. (See attached photos of the **large A/C unit on roof of Colonial mansion at 2506 N. Terrace.**)

2. Making New Precedent to Allow Both Landscape Uplighting and Front Path Lighting in the District.

One of the most recent examples of the HPC changing its interpretation of its rules and precedents has to do with exterior lighting in both the Concordia and North Point North neighborhoods.

By chance, the agenda item immediately prior to the Applicant's at the September 4, 2018 hearing involved "uplighting" and "path lighting", which is being introduced in Concordia and the District, which hitherto had not been allowed¹⁵. (COA # 180667). Changes the HPC acknowledged departed from "consistency." (Video at 6:40 to 22:41).

Staff member Tim Askin recommended that a number of proposed "up-lights" be "allowed to stay... **under the Commissioner's discretion.**" (*Id. emphasis added*).

Many of these up-lights were permitted to highlight trees and bushes rather than, as the HPC initially preferred, just the ornate architectural features of the house. The HPC also noted that "unapproved" up-lights were elsewhere in the District, including on the same block.

The HPC Chair had no issue with making an exception to the rules for the special situation of the property:

"[This is a] precedent-setting issue. Once you allow path light from these folks that's pretty much the ball game. They'll become widespread and we'll have little ability to deny them unless [we] rely on the disability aspect as a reason."

¹⁵ The HPC staff characterized uplighting as new in the District; 2604 N. Terrace has an existing COA for three stories of up-lighting covering the entire house. Telephone call with Tim Askin 9/25/18.

A short while later Jarosz also acknowledged this might open up an “illumination free for all” in North Point North, but that he was also okay with setting precedent, so long as lumens could be limited.

Ultimately, the HPC permitted not just the front path-lighting—arguably related to disability—but also a variety of “up-lighting” illuminations of the applicant’s new landscaping, with the only limitation being on lumens.

It is hard to determine how landscape up-lighting, hitherto prohibited, is related to “disability”; nevertheless, the HPC allowed it.¹⁶

E. The HPC Departed from Precedent and Applied the Guidelines Inconsistently in this Case.

The HPC has allowed both front-facing and side-facing skylights in the District, including as to the three (3) properties noted by Applicant.

(1) ***Permitted at 2604 N. Lake.*** When the owner of 2604 N. Lake undertook extensive renovations to his property, both with and without permits and COAs, at that time the HPC only sought removal of the front-facing skylight, not the side facing one.

(See, email dated 9/18/2007 from Paul Jakubovich (HPC staff) to Dave Rinka (architect for the current owner), detailing scope of changes and COA submissions:

“A COA application needs to be filled out for the addition and must include the following work: Removal of the skylight on the roof slope facing N. Lake Drive; Restoration of the second story window lengthened for a door....”. [*Emphasis added; email attached as exhibit*].

Further, although the front-facing skylight was to have been removed when the remodeling and re-roofing were performed, it was not in fact removed. (In connection with her open records request and subsequent request to personally inspect the records 2604 N. Lake, no pending order for removal was disclosed; also, per discussion with HPC staff on 9/10/2018.)

(2) ***Permitted at 2604 N. Terrace.*** Although the HPC determined the skylights were installed in mid-1987, after the 1983 creation of the District, it chose not to pursue any action. No order for removal is pending. (See HPC file memo).

(3) ***Permitted at 2457 N. Terrace.*** Just two (2) years ago, in 2016, the HPC took the position that the front-facing skylight on the East roof could remain as part of a roof

¹⁶ That homeowner-applicant participated in the hearing. His only offering on disability was his Disabled parking permit for his car, presumably issued in connection with holding a valid drivers license after having satisfied standard DMV vision requirements. He also walked without assistive devices during the hearing. The HPC did not explicitly state how its approval of landscaping lighting alleviated disability.

remodel, with its removal being optional. See, COA issued 2/25/16, PTS ID 110305 COA Re-Roof:

All work will be carried out as described. Four west-facing skylights will be removed. If possible east facing skylights can be removed as well. Any copper gutters/downspouts will be preserved if salvageable.

...

Skylight can be removed from this location is [sic] desired. [Photo caption at page 3 of COA; “is” appears to be a type for “if”].

[Emphasis added; copy of COA’s pages 1 & 3 included with Exhibits].

Subsequently, the owners dramatically increased the scope of their remodeling project and agreed to replace the front-facing skylights with a large dormer.

Nevertheless, this does not alter the fact that the HPC made removal merely optional when it issued its initial COA for the roof remodel just two (2) years ago: The front skylights were permitted to remain, to be removed only if the homeowner “desired.”

In light of this partial history of how the HPC applies the Guidelines, to deny Applicant’s COA for a far smaller, less intrusive Project is arbitrary and capricious, discriminatory, and an illegal inconsistency in, and departure from, its *de facto* application of the Guidelines.

F. The HPC Relied on False Statements, Selective Omissions of Fact, and Suppression of Evidence in Reaching its Decision, and on Additional Improper Grounds. In Doing So it Also Relied on Slanted Subjective Suppositions and Conjectures, Instead of on Neutral, Objective Metrics.

1. False Statements.

The main grounds stated by the HPC for denying the COA was the Project’s “high “visibil[ity]”.

Twice in his oral presentation to the HPC, staff member Tim Askin flat out misrepresented the height of the Subject Property relative to each immediately surrounding structures in an effort to support his stance.

Askin made his own visit to the property and relied on his own photo from one angle, ignoring the many views submitted by Applicant that show the sola tubes were not at all, or only minimally, visible from most views and angles, consistent with attorney Reicher’s observations.

First, Askins said:

The Subject Property was “notable at this property because nearly every surrounding building is substantially taller.” (Video tape of 9/4/18 hearing at approximately 23:59 run time). [Emphasis added].

Then, again, he said there is:

“significant visibility from the heights of adjacent buildings[,] because of their greater heights every one, but this is also an argument for keeping the one in the rear, look down on her roof” so that a “clear rear skylight is not practical on that spot.” (*Id.* starting at approximately 25:30 run time). [Emphasis added].

At a third point it is again implied that “all surrounding” buildings “look down” on the Subject Property. (*Id.* at about 28:04 run time).

Nevertheless, Askin later admitted this was a purely subjective conjecture: in a conversation on September 10, 2018, Askin stated that he “did not measure” any of these structures.

In fact, of the four (4) structures surrounding the Subject Property, only one—the 4 story apartment Katz apartment building to the West—“is substantially taller” and actually “looks down” on the roof.

None of the others do. (See, photos included with exhibits).

Instead, the three other surrounding residences are essentially the same height or have windows such that it is utterly impossible to “look down over” the roof:

- To the East: Only Attorney Reicher’s house is slightly taller, but has no third story windows—or at least any third story windows facing the Subject Property. In his letter in support of the Project, Attorney Reicher stated:

“I view the Sola-tubes as unobtrusive and unobjectionable both during the day and in the evening. Although I do have direct views of the Sola-tubes and the roof from inside and outside our house, I did walk around the corner block for other views from the street level and noticed that the Sola-tubes are blocked from numerous views by the North condo building and certain trees on the property. With respect to my direct views at night, I note that they are hardly noticeable when lit up, particularly when contrasted to the multiple larger lighted windows from the 4-story apartment building directly West of the La Budde Condo that towers over the condos and dominate our Western view far more than the small Sola-tubes.”

Attorney Reicher also quotes from the historic registration materials, noting the anomaly of housing style—characterized as “unsympathetic” to the styles that predominate, “...I certainly believe they are unremarkable additions to this property. ... We do not object to the Sola-tube that have been put in place.” (*Reicher letter at pages 1-2. Emphasis added.*)

- To the North: This is the companion building of the Subject Property and is identical in height. The owners there have no objection to the Project and in their letter in support (submitted to the HPC); they stated:

“We do not find the newly installed sola tubes to be a detriment to our view of the south. They are largely obscured by the overhang of our roofline, and we do not find them out of keeping with the architecture of the two buildings in the association.

- To the South: This house is a few inches taller, as is demonstrated by the photos submitted with the COA application (*and in attached exhibits*), taken from Lake Drive looking East (at the rear portions of both this house and the Subject Property). The owners there have no objection to the Project, cannot see the Sola Tubes, and also submitted their letter in support (previously provided to the HPC on 7/30/18).

When the Applicant sought to correct Akin’s misrepresentations she was interrupted and shut down by the Chair. (*E.g.*, Video at 34:21 run time).

2. Selective Omissions of Relevant Facts Helpful to Applicant, Including HPC’s Longstanding De Facto Policy of Allowing Visible Front- and Side-Facing Skylights.

The HPC staff cherry-picked from the evidence Applicant provided, both in reviewing the COA application and in its presentation at the hearing.

The staff’s exceedingly disparate treatment and investigation (or not) of two pieces of similar, relevant evidence are striking in their shadings and omissions.

Applicant explicitly cited both the **2604 N Lake Drive** house and the **2457 E Terrace** house in her written application materials. The HPC staff had more than five (5) weeks to review them¹⁷.

As to one property, Staff member Tim Askin reviewed the COA application and even took the time to doctor one of Applicant’s own photos of the **2457 Terrace House**,

¹⁷ She filed the materials on July 30, 2018, almost 2 weeks before the August 11th deadline and 5 weeks before the September 4th hearing, and followed up with offers to come in and discuss any aspect of it. Apart from 2 brief telephone calls, the staff declined further input.

inserting electronically on Applicant's submission his own caption and text-frame in purple ink. It describes the disposition of that skylight as being designated for removal as part of a remodel of that property. (See, video at about 26:45 run time). (Askin did not also note the 2016 COA permitting these to remain).

Askin had an equal amount of time to research the other example Applicant cited, 2604 N. Lake.

Nevertheless, he chose not to do so, at the hearing saying he was "not familiar with this one here. Carlen has info." (Video at about 27:37 runtime).

At that point, staff member Carlen Hatala indicated she did not have information either and she would have to look it up. (However, about 2 weeks prior, in a brief phone call with Applicant, Hatala stated that the skylights were subject to an "order for removal." This is, in fact an inaccurate statement, as demonstrated above.)

When it was clear at the hearing the HPC staff would not elucidate the status of **2604 N. Lake**, Applicant sought to offer additional information (e.g., video at 27:37 runtime), as she had interviewed the current owner, who had said that, after much contention with the City, he was allowed to keep them; there is no pending order for removal. (A disposition borne out by a subsequent review of HPC records and the HPC's production of materials pursuant to an Open Records request).

The Chairman immediately interrupted Applicant to prevent any further discussion as "blatant hearsay", raised his voice, became excitable, and waved his arms, half yelling about limiting analysis to the "four corners" of the materials at hand. (See, video starting at about 38:45 run time). He emphatically shut down any factual exploration of **2604 N. Lake**.

3. Disingenuous Invocation of Rules of Civil Procedure

However, the Chair's repeated and insistent limitation to the "four corners" of available material, under the "hearsay" rule, is disingenuous, at best. It comes across as in greater pursuit of a pre-determined disposition rather than a full and complete examination of all relevant facts.

The Chair's vehemence and at times open disdain seem to suggest that skylights are a significant, hot-button issue with him... to the point where a laudable passion for preservation has, perhaps, swung the pendulum too far into blinkered overzealousness.

Shortly after the hearing, Applicant sought clarification from both the Chair and Professor Jarosz via email. Neither responded.

Jarosz has not retracted his initial opinion nor articulated any reason for his turnabout.

Undoubtedly, the dynamics of the HPC are likely nuanced and complex. And it is unwise to ‘poke the bear’ in alluding to the possible influence of a domineering and free-wheeling leadership style. But given the current examples set at the national level, such influence is not completely unthinkable.¹⁸

4. Improper Reliance on Additional Irrelevant Grounds.

In its ruling, the HPC also appeared to rely on the lack of a building permit, and Applicant’s failure to obtain a building permit, as partial grounds for denying the COA.

Applicant and her contractor were quizzed —if not berated— at the hearing on the lack of an unnecessary building permit.

As one member of the HPC committee stated, “this annoys me” that no building permit was sought or issued and that the COA application was retroactive. (Video at about 35:00 -36:00 run time and also 34:21).

Nevertheless, no one from the HPC, Department of Neighborhood Services, nor any other City Department, has indicated a building permit is required.

That’s because it isn’t required:

1. Brighter Concepts owner Keith Johnson testified the City does not require him to get building permits for sola tube and similar products that are designed to slide between existing joists and rafters.
2. When undertaking the project, Brighter Concepts also told applicant she would not need a building permit.

Nevertheless, the HPC appeared to hold this against Applicant in its ruling.

V. CONCLUSION: The HPC Failed to Impartially and Fairly Balance the Interests of the Owner and the District and Committed Reversible Error in Failing to Apply the Guidelines in Good Faith and Consistent with Precedent, on the Merits.

As noted above, the HPC failed to engage in a required balancing of interests of the District and the homeowner and arbitrarily and capriciously denied Applicant minor changes “sensitive to the architectural integrity” of her Modern Movement style condo. (*Historic Designation Study Report, North Point North Historic District, page 8, Sec. IX. A.*; emphasis added)

¹⁸ At the national level, even successful, confident members of the inner circle are often cowed into going along to get along, despite their qualms or better judgment. Sad.

The ZND should reverse the HPC and direct that it issue a COA, or grant such other relief such as a variance or allowance due to the “special circumstances of the specific” aspects of the Subject property’s MCM architectural idiom.

VI. RELIEF REQUESTED

For the above reasons, Applicant respectfully requests as follows:

1. The HPC be directed to issue a COA for the 3 sola tubes it denied.
2. In the alternative, that the ZDN permit the Project to remain through issuance of a variance or any other exercise of its powers of review.
3. In the alternative, if the ZDN upholds the HPC in part or full, that the DNS be directed to suspend its inspections and issuance of fines relating to the Project (its letter to Applicant suggests frequent inspections piling on fees and fines) until Applicant has exhausted all possible avenues of appeal, including:
 - Seeking delisting or exemption of the Subject Property from inclusion in the District or other historic designation;
 - Civil litigation, to every level of appeal, including all available discovery (written production, depositions, interrogatories, etc.) under the Rules of Civil Procedure;
 - Statistical analyses relating to the HPC and its processes;
 - Pursuit of legislative change, including creation of a second tier of less stringent guidelines to apply to just the 10% of houses in the District (just about 20) that fall outside its dominant period of historicity and other supermajority norms.
 - Any other relief obtainable, upon further research of this matter.

Respectfully submitted,

s/ Susan A. La Budde
Susan A. La Budde

Dated this 26th day of September, 2018

Attachments:

- Appendix—Why Sola Tubes
- Exhibits- Photos, Neighborhood Diagram & Roof Calculations
- Exhibits- Documents, including Jarosz email, 2016 COA for 2457 N. Terrace, RECR, etc.

APPENDIX

Why sola-tube over a skylight?

Cost, ease of installation, technical improvement over skylight, solar energy and federal tax credit.

Applicant chose sola-tubes over a skylight for four (4) reasons:

1. They are much more economical and efficient to install with less mess and no structural changes whatsoever. The sola tube is designed to fit between existing joists and rafters and does not involve any cutting of roof structures, interior framing, or drywall.
2. They represent a vast improvement over a flatter skylight, in that the exterior flashing is more weathertight and the shape of the small dome sheds ice, snow, and leaf debris.
3. They passively collect solar energy and provide subtle night-light level illumination in the interior, thus saving energy.
4. As such, they qualify for Federal Tax Credits as an approved solar energy device.

Just as a roof-mounted A/c unit is a vast functional improvement over a box window fan or open window, and are a permissible significant change from the historical periodicity of the 1900-1930s era houses on which they sit, so too the sola tubes used in the project are a significant improvement over the skylights explicitly allowed under the Guidelines. For further information, see materials submitted to HPC on 7/30/18.