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HISTORIC
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March 26, 2012

Allyson Nemec, Chair
Historic Preservation Commission
City Hall
200 E. Wells St.
Milwaukee, WI 53202

Dear Chairwoman Nemec and Members of the Historic Preservation Commission:

I am writing on behalf of the National Trust for Historic Preservation to express our concerns about the proposed owner consent provision for Milwaukee's preservation ordinance. Section 320-21-9-c of the proposed ordinance amendment provides: "In case of a written objection against the [historic] designation . . . by the owner of a site or structure, or 35% or more of the fee-owner signatories of the real-property parcels included in the proposed district, the designation shall not become effective except by the favorable vote of at least two-thirds of the commission. . . ." This provision amounts to a de facto owner veto provision, because of the fact that even a relatively small minority would be able to invoke an extremely high (and potentially insurmountable) hurdle to adoption.

The National Trust takes very seriously the concerns of individual property owners within proposed historic districts. However, the introduction of an owner veto requirement, which is disfavored nationally, would seriously compromise Milwaukee's preservation program by not only preventing the City from designating and protecting significant structures and districts, but also by opening the door to requests to de-designate already designated properties, many of which have national as well as local significance. Moreover, no other major city with a successful preservation program allows owner consent as part of its historic designation process. Boston, Philadelphia, New York City, Washington, D.C., and San Francisco stand out as examples. To the extent that a minority of cities, such as Chicago, allow owners of religious property to opt out of historic preservation regulation, such laws arguably violate the Establishment Clause of the U.S. Constitution and are, therefore, unconstitutional.

An owner consent or owner veto provision, if passed, would increase Milwaukee's litigation risk, not reduce it. Laws that delegate owner consent or veto authority to individuals are of questionable legal validity. Specifically, they violate federal and state constitutional guarantees of due process because historic designation would be based on self-interests rather than objective standards that serve the broader public interest. For the same reasons, owner consent provisions in zoning laws have been struck down as unconstitutional delegations of authority—delegating governmental regulatory power to unelected individuals. It is widely understood that property owners may not unilaterally "opt out" of zoning requirements or tax laws. The same reasoning applies to historic designations. As the Supreme Court of the United States explained in Eubanks v. City of Redmond, 226 U.S. 137, 144-45 (1912), "[t]he statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standards by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority . . . may do so solely for their own interest, or even capriciously."

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Finally, owner consent provisions undermine the general constitutional principle—equal protection—that regulation of any nature should be uniformly applied. As the Supreme Court has recognized, historic preservation ordinances are enacted to protect the interests of the community as a whole, not just those of a few individuals. Penn Central Transport. Co. v. City of New York, 438 U.S. 104, 132 (1978). For this reason, if private individuals are permitted to veto or create additional hurdles to the application of zoning or other forms of land use law, such as historic preservation regulation, Milwaukee's ability to protect the historic character of its communities would be seriously jeopardized.

If you would like to discuss these issues in greater detail, or if we may assist the Commission with additional research, please feel free to telephone me at (202) 588-6283. My email address is william_cook@nthp.org.

Sincerely,

William J. Cook
Associate General Counsel