

## Richardson, Ed

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**Subject:** FW: APA-Wi April 2016 case law update

**From:** Brian Ohm [mailto:[bwohm@wisc.edu](mailto:bwohm@wisc.edu)]  
**Sent:** Thursday, September 01, 2016 2:26 PM  
**To:** Koster, Vanessa <[Vanessa.Koster@milwaukee.gov](mailto:Vanessa.Koster@milwaukee.gov)>  
**Subject:** Re: APA-Wi April 2016 case law update

Hi Vanessa:

Good questions. I can convey what I've been told about the legislative history of the conditional use permit language in Act 391. As for examples of communities interpreting the law to require conditional use permits to be consistent with the comp. plan, the dispute over the proposed Kohler golf course in the Town of Wilson was cited. Neighboring residents in the Town are opposed to the golf course. There is policy language in the Town's comp. plan discussing the need to protect natural resources, etc., that they cite as making the proposed golf course inconsistent with the Town's comp. plan. There is also language in the comp. plan that seems to support the golf course. Under the Town's zoning ordinance, the golf course is a conditional use in the district it is proposed. The concerned neighbors argued that the town must deny the CUP because it is not consistent with the Town's comp. plan as required by state law. This language was inserted to clarify that the consistency language in 66.1001 does not require conditional use permits to be consistent with the comp. plan.

I'm attaching some material from the citizens about thier concerns.

As for the second underlined sentence, I would refer you to the language of the law. Section 66.1001(3) lists the ordinances that must be consistent with a comprehensive plan. State law requires that the enactment or amendment of a zoning ordinance must be consistent with the comp. plan. A conditional use permit does not involve the enactment or amendment of a zoning ordinance. This contrasts with using the comp. plan for guidance as to things that should be listed as conditional uses in a zoning district if the local government is going to be doing a comprehensive revision of its zoning ordinance.

The language used in Act 391 reminds folks that only the enactment or amendment of the ordinance listed there needs to be consistent with the comp. plan: The issuance of a conditional use permit "does not need to be consistent with" the comp. plan.

A similar thing could happen with variances. A variance is not the enactment or amendment of a zoning ordinance. A variance is not required to be consistent with the comp. plan. A variance is by definition inconsistent with the zoning ordinance and probably also inconsistent with the comp. plan. Perhaps some day someone will add language stating "a variance need not be consistent with a comp. plan."

The comp. plan can, however, still be a factor in deciding whether or not to grant a variance or what conditions to add to the granting of a variance. Nothing in state law prohibits this. Likewise, as a matter of local discretion, local governments can use the comp. plan when considering whether to grant a conditional use permit or not. Some communities list consistency with the comp. plan in the standards for reviewing conditional uses. Others do not. Nothing in state law requires it, and nothing in state law prohibits it. The "does not need to be consistent with" preserves this as a matter of local discretion. Unlike many other bills,

Act 391 preserves local control. The language in Act 391 does not read "local governments cannot use their comprehensive plan as guidance when considering whether to issue a conditional use permit."

Similarly, prior to the 1999 law, many local governments had language in their zoning ordinance saying "zoning shall be consistent with the mast plan." Some followed that language. Others did not. Some ordinances did not include language about consistency. The 1999 comp. planning law changed that by making consistency a requirement of state statute. Prior to 1999 consistency was a local decision. After the 1999 law beginning in 2010 consistency was elevated to a statutory requirement.

I hope that clarifies things. Let me know if it does not.

Brian

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**From:** Koster, Vanessa <[Vanessa.Koster@milwaukee.gov](mailto:Vanessa.Koster@milwaukee.gov)>  
**Sent:** Wednesday, August 31, 2016 1:56 PM  
**To:** Brian Ohm  
**Subject:** RE: APA-Wi April 2016 case law update

Brian,

Thank you for your additional briefing related to Act 391. Milwaukee is in the process of amending ordinances to address Act 391 and we are looking for some citation or examples that back up your statement that "some communities were interpreting the law to say that state statutes required the issuance of conditional use permits to be consistent with the comprehensive plan. Act 391, Section 17, clarifies that state law does not require that the issuance of conditional use permits need to be consistent with the local government's comprehensive plan. Local ordinances, however, can still include language (as many often do) that lists consistency with the comprehensive plan as a standard for evaluating applications for conditional uses." The underlined sections of this quote are what we need some verification or legal citation for.

Feel free to call me if you'd like to discuss in further detail.

Thank you in advance for your assistance,  
Vanessa

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