



Department of City Development
City Plan Commission
Redevelopment Authority of the City of Milwaukee
Neighborhood Improvement Development Corporation

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To the Honorable Members of the
Zoning, Neighborhoods and Development Committee
City of Milwaukee
City Hall, Room 205

Dear Committee Members:

File No. 160994 (ATTACHMENT A) relates to board of zoning appeals findings with respect to special use permit applications. This file repeals the requirement that the board of zoning appeals, prior to the granting of a special use permit, make a finding that the special use will be designed, located and operated in a manner consistent with all applicable elements of the city's comprehensive plan. This ordinance also creates a provision stating that the board may, in its sole discretion, consider the applicable elements of the city's comprehensive plan in making its determination with respect to a special use permit application, but is not required to do so.

The Board of Zoning Appeals (BOZA) is a quasi-judicial body that is authorized to hear appeals in matters related to the zoning ordinance. A special use is defined by the Milwaukee Code of Ordinances as "a use which is generally acceptable in a particular zoning district but which, because of its characteristics and the characteristics of the zoning district in which it would be located, requires review on a case by case basis to determine whether it should be permitted, conditionally permitted, or denied". Consistent with the City Code of Ordinances, BOZA cannot approve a special use request unless they determine all of the following four special use criteria have been met:

1. Protection of Public Health, Safety and Welfare.
2. Protection of Property.
3. Traffic and Pedestrian Safety.
4. Consistency with the Comprehensive Plan.

The proposed ordinance would repeal "Consistency with the Comprehensive Plan" as a mandatory requirement.

Proposed Substitute A (ATTACHMENT B), sponsored by Ald. Bohl, was added to the file on December 11, 2017, for consideration, which states the following: in deciding if a special use permit shall be granted, consider whether the special use will be designed, located and operated in a manner consistent with any applicable element of the city's comprehensive plan, to the extent that this consistency relates to the board's consideration of the three findings it is required to make when reviewing and granting a special use permit.

Proposed Substitute A would allow BOZA to consider the comprehensive plan when evaluating the other special use criteria, but would not allow BOZA to deny a special use solely because of lack of consistency with the comprehensive plan.

The BOZA criteria that requires a special use be consistent with the City's Comprehensive plan has been a requirement for many years and predates Wisconsin Comprehensive Planning law which was adopted



in 1999. In 2016, the State legislature adopted Act 391 with language saying that “A conditional use permit that may be issued by a political subdivision *does not need to be consistent with the political subdivision’s comprehensive plan.*” [emphasis added]

Assistant City Attorney Stu Mukamal interprets the italicized phrase to mean that municipalities *may not require* that special use permits be consistent with a comprehensive plan. He laid out his reasoning in the attached memo to City Attorney Grant Langley (ATTACHMENT C). The letter from City Attorney Langley to Ald. Bohl repeats this interpretation and indicates that the Milwaukee ordinance requiring consistency with the comp plan is now “unenforceable” (ATTACHMENT D). That’s the advice that BOZA has been following for the past year. Attorney Mukamal’s memo cites a case in which the City denied a special use permit to a religious institution because it was inconsistent with the comp plan, and argues that the change in State statute (as he interprets it) protects the City from liability. To note, Federal law provides special, additional protections to religious organizations with respect to land use. The City Attorney has subsequently issued a formal written opinion (ATTACHMENT E) that Act 391 preempts Milwaukee’s current ordinance, requiring a change to the ordinance.

As Attorney Mukamal’s memo to City Attorney Langley indicates, DCD does not agree with this interpretation. DCD’s thinking aligns with that of Prof. Brian W. Ohm who interprets the Statute language to mean only that State law does not require special use permits to be consistent with a local comprehensive plan per his memo (ATTACHMENT F). He argues that local jurisdictions still have the option to require plan consistency. City ordinance directs BOZA to consider consistency with the comprehensive plan in all special use cases.

Attorney Brian W. Ohm, is a professor in the UW-Madison Department of Urban & Regional Planning and state specialist in planning law for UW-Extension. Professor Ohm is arguably the foremost expert on statutes pertaining to land use law in the State of Wisconsin. He follows state legislation on a regular basis and has helped write numerous state statutes. He has written numerous publications, He prepares reports and updates on planning-related case law and changes in state statutes for the Wisconsin Section of the American Planning Association and also conducts seminars and webinars on land use law. For years he has provided balanced and independent advice to municipalities throughout the state.

Professor Ohm has noted in correspondence with DCD that “Prior to the enactment of the comprehensive planning law in 1999 numerous local governments had requirements in their zoning ordinances that certain actions (rezoning, etc.) needed to be consistent with the local master plan. That was something they did as a matter of local discretion, not something they were required to do as a matter of state law. The 1999 comprehensive planning law attempted to change that by requiring, as a matter of state law (not local discretion), that changes to zoning, subdivision, and official mapping ordinances needed to be consistent with the local master plan (now a comprehensive plan). The 1999 law still leaves a lot of room for local discretion.”

Professor Ohm notes that the 1999 Comprehensive Planning law created some confusion as to how far the state mandate on consistency extended and that there have been several amendments to clarify this. He notes that “Prior to the passage of Act 391 the legislature removed the broad language of the 1999 law that was interpreted to require that a conditional use permit needed to be consistent as a matter of state law. The Legislature did not, however, remove local discretion to include a requirement that they follow the guidance provided in the local comp. plan when they consider what conditions to place in a conditional use permit”.

Furthermore, Professor Ohm notes that many Wisconsin municipalities use the comprehensive plan as a mandatory criteria for approval of special uses. DCD staff conducted a random check of approximately 20 municipal zoning ordinances throughout Wisconsin and found 8 municipalities that use the comprehensive plan as a mandatory criteria for approval of a special use (ATTACHMENT G). Of those, Eau Claire and La Crosse indicated that they will not be changing their requirement as a result of Act 391 Section 17.

The Zoning Code Technical Committee (ZCTC) reviewed the original ordinance over one year ago (December 7, 2016) and determined on a 2-1 vote (DCD dissenting) that that this file is legal and enforceable, administratively efficient, and consistent with the format of the zoning code. DCD recommended against the file because as noted by Professor Ohm Act 391 did not take away the ability of a municipality to use the consistency with comprehensive plan criteria in evaluating special use permits and because the ordinance as written did not meet the ZCTC criteria of administrative efficiency and consistency with the format of the zoning code. First, the location of the proposed amendment is several pages after the section on BOZA's general review criteria. It would be difficult to locate or know the discretionary provision, as proposed, for anyone not familiar with the zoning code. Second, the proposed amendment does nothing to indicate how and to what extent comprehensive plans come into consideration by BOZA. The ZCTC did not consider Proposed Substitute A but the City Attorney has determined that it is also legal and enforceable.

On January 22, 2018, a public hearing was held. At that time, DCD staff, Commissioner Marcoux, Alderman Bohl, and representatives from the City Attorney's Office spoke regarding this file. The City Attorney's Office stated that it is their interpretation that the proposed text change is consistent with the intent of the state law change, and have subsequently drafted memos to the Board of Zoning Appeals stating as such. Alderman Bohl stated that there is support by the Common Council to keep all four Board of Zoning Appeals criteria in the code, but offered Proposed Substitute A as an option, should the file pass, to allow the Board of Zoning Appeals to consider the criteria, though not as a standalone reason to deny an application, since this is how BOZA currently considers special use cases. DCD stated that the City of Milwaukee has invested a considerable amount of resources to create the city's thirteen Area Plans that comprise the Comprehensive Plan. These neighborhood plans were crafted with extensive input from citizens, stakeholders, community groups, businesses, elected officials and other stakeholders. One major goal of the Comprehensive Planning process was to ensure that future development in city neighborhoods was consistent with residents and other stakeholder visions' for their neighborhoods. The comprehensive plans are used extensively by BOZA in approving or denying special use requests, as currently required in the Milwaukee Code of Ordinances. The proposed ordinance would weaken the current requirement that proposed special uses are designed and operated in a manner consistent with the Comprehensive Plan.

State of Wisconsin Act 391 has resulted in differing interpretations on whether municipalities retain the local control and ability to require consistency with the Comprehensive Plan as a condition of approval for Special Use Permits. The City Attorney has issued an opinion that Act 391 preempts Milwaukee's current ordinance, requiring a change to the ordinance. A conflicting opinion has been issued by Attorney Ohm that suggests Milwaukee's current ordinance is not in conflict with State Statutes as amended by Act 391. Multiple other municipalities have concluded that Act 391 does not preempt the ability of a municipality to require consistency with the Comprehensive Plan as a condition of approval for Special Use Permits and have communicated to DCD that they have reviewed the issue and do not intend to change their ordinances.

While DCD would make a recommendation in conflict with the advice of the City Attorney in only the rarest of scenarios, this is such a case. At present, there are conflicting legal conclusions about the impact of Act 391 on local municipalities. A compelling legal opinion has been issued by a highly qualified expert on Wisconsin land use law and comprehensive planning that supports the City's current ordinances. This is an interpretation shared by many Wisconsin municipalities. As the stewards of the City's Comprehensive Plan, DCD does not support any change to the existing City ordinance until there is additional clarity on the impacts of Act 391.

The City Plan Commission at its regular meeting on January 22, 2018 voted to refer the file to the Zoning, Neighborhoods and Development Committee without a recommendation.

Sincerely,

Rocky Marcoux
Executive Secretary
City Plan Commission of Milwaukee

Attachments