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MEMORANDUM

TO: GRANT F. LANGLEY, City Attorney

FROM: STUART S. MUKAMAL, Assistant City Attorney

DATE: June 28, 2016

RE: Effect of 2015 Wis. Act 391 upon “Consistency with Comprehensive Plan” Requirements in Special-Use Permit Proceedings

The Board of Zoning Appeals (“BOZA”) evaluates and determines applications for special-use permits in accordance with four specified criteria set forth in the City’s Zoning Code (“Code”), at §§ 295-311-2-d-1 through d-4. The fourth criterion (§ 295-311-2-d-4, MCO) requires that the special-use permit applied for is consistent with the applicable provisions of the area comprehensive plan governing the location of the proposed special use. It reads as follows: “d-4. Consistency With Comprehensive Plan. The special use will be designed, located and operated in a manner consistent with all applicable elements of the city’s comprehensive plan.”

The focus of this memorandum is on § 17 of 2015 Wis. Act 391, enacted on April 26, 2016 and effective on April 28, 2016. Act 391 (popularly known as the “Property Rights Bill”; see Attachment 1) expanded private property rights in a number of areas and curtailed the regulatory authority of local governments in certain respects. Among these provisions is § 17 of Act 391, which, in my opinion, eliminates the requirement that special-use permits be consistent with a comprehensive plan. That Section reads as follows:

SECTION 17. 66.1001(2m)(b) of the Statutes is created to read:

66.1001(2m)(b) 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.

The terms "conditional use permit" and "special use permit" are used interchangeably and mean the same thing. Section 17 of Act 391, quoted above, fully applies to the special-use permit application process utilized by the City of Milwaukee, including the criteria applicable to determination of such applications by BOZA.

I have read, re-read, and re-read again this provision and conclude that it eliminates any requirement that a special-use permit be consistent with the City's various area comprehensive plans, in effect acting as a repealer of § 295-311-2-d-4, MCO. I further believe that this was intentional on the part of the Legislature, and that the Legislature has precluded the ability of local governments to reinstitute a "consistency with comprehensive plan" requirement by local ordinance. In other words, the State has fully preempted this field. I reached this conclusion based upon the following factors:

1. The language of § 17 of Act 391, quoted above, is clear and unambiguous. If a conditional or special-use permit "does not need to be consistent with the political subdivision's comprehensive plan," consistency with the comprehensive plan cannot be made a mandatory criterion for its approval. This is irrespective of whether a local ordinance states otherwise or whether the applicable local unit of government wishes to impose such a requirement. It simply cannot do so under this legislation.
2. I disagree with the interpretation of § 17 of Act 391 offered by Professor Brian W. Ohm in the attached monograph entitled "2015 Wisconsin Act 391: Consistency Revisited" (Attachment 2). Professor Ohm advances the theory that § 17 merely clarified that State law does not require consistency with the comprehensive plan while leaving open the option for imposing that requirement via local ordinance. That conclusion is debunked not only by the clear and unambiguous language of § 17 itself, but also by the fact that such a clarification would have been unnecessary.

As Professor Ohm himself notes, § 66.1001(3), which sets forth that certain ordinances must be consistent with a comprehensive plan, does not apply to conditional or special use permit applications because such applications are not "ordinances," but rather are adjudications by zoning tribunals. Since

such adjudications were not previously included within the enumeration of enactments that must be consistent with comprehensive plans, State law imposed no such requirement upon them, even prior to the enactment of Act 391. Additional clarification of that fact would not be necessary. I certainly do not believe that the Legislature intended to enact a measure that would have no practical effect and that would allegedly “clarify” something that did not need clarification. Instead, I believe that the Legislature intentionally sought to preclude the option of imposition of a “consistency with comprehensive plan” requirement upon conditional or special use permits by local ordinance or other local enactment.

3. My opinion and conclusions are also consistent with evident intent of the Legislature throughout the remainder of Act 391 to expand private property rights, sometimes at the expense of local regulatory authority. Another example of this intent may be found in §§ 21-23 of Act 391, which impose “supermajority” approval requirements for enactment of so-called “downzoning” ordinances.

Therefore, it is my conclusion that § 295-311-2-d-4, MCO is unenforceable, null and void. I would like to advise BOZA of this, but would not do so without first having received from you leave to do so. I know for a fact that Catey Doyle and Lindsey St. Arnold would welcome this result.

Furthermore, while I am certain that DCD would disagree, I am firmly of the belief that this is a good result. For one, the purpose of comprehensive plans has little or nothing to do with the determinations of zoning tribunals in individual cases and should not control BOZA’s own determinations. A comprehensive plan is a planning document used as a rule of thumb for drafting zoning ordinances and maps; for that reason, Wis. Stat. § 66.1001(3) requires that zoning and mapping ordinances be consistent with applicable comprehensive plans. Determinations of zoning tribunals in special-use permit (and, for that matter, variance) cases have the very different purpose of determining whether a deviation from strict zoning code/map requirements is warranted with respect to particular properties, either by way of imposing particular conditions upon the property’s use or allowing uses and/or dimensional features that a zoning code would otherwise prohibit. In other words, BOZA and other zoning tribunals are tasked with determining whether relief from a zoning code is warranted in particular circumstances. This has nothing to do with the functions of a comprehensive plan, and there is no surprise as to why State law has never imposed a “consistency with comprehensive plan” requirement with respect to those determinations, either before or after the enactment of Act 391.

Finally, many comprehensive plans contain legally problematic statements or directives that could (and have) exposed the City and other local governments to various forms of liability. This was, as you may recall, at the root of the recent *Harvest Covenant Church* case that the City was forced to settle at a cost of \$191,000 as a consequence of denial of a special-use permit to a storefront church and ministry on the basis of inconsistency with the area comprehensive plan. As you may recall, that comprehensive plan contained an explicit statement that “storefront churches” were to be discouraged in commercial districts – a direct violation of the “equal terms” provision of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). The special-use permit in that case was denied precisely because of failure to comply with the requirement of consistency with the area comprehensive plan imposed by § 295-311-2-d-4, MCO.

Under Act 391, that problem may well have been avoided because the requirement of consistency would no longer exist. The same problem could also occur with comprehensive plan provisions that might violate other (mostly federal) laws that impact and sometimes override local zoning determinations including the FHA, FHAA, ADA, and the Telecommunications Act of 1996 (which governs the placement and height of transmission towers). The problem is aggravated by the absence of any requirement or process for regular review and amendment of the City’s area comprehensive plans.

DCD does not agree with my position, but the more I review the applicable enactments in the context of existing statutes, the more convinced I am of my conclusions as set forth in this memorandum. I am scheduled to meet with DCD during the mid to late part of July on this issue, and I would like your advice as to whether I am correct in my conclusions before that occurs. I am grateful for your assistance.

SSM:lmb
attachments
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