

GRANT F. LANGLEY
City Attorney

MIRIAM R. HORWITZ
ADAM B. STEPHENS
MARY L. SCHANNING
JAN A. SMOKOWICZ
Deputy City Attorneys



Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551
Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

December 1, 2017

Jim Owczarski, City Clerk's Office
200 East Wells Street, Room 205
Milwaukee, WI 53202

Alderman James Bohl
Chair, Zoning, Neighborhoods &
Development Committee
Common Council
200 East Wells Street, Room 205
Milwaukee, WI 53202

Re: Effect of 2015 Wis. Act 391, § 17, on MCO § 295-311-2-d
("Consistency with Comprehensive Plan")

This opinion addresses the effect of a recently enacted state statute on the City of Milwaukee ("City") process for approving special-use permits under the Milwaukee Code of Ordinances ("MCO"). Specifically, it analyzes Wis. Stat. § 66.1001(2m)(b) and opines on whether that statute preempts § 295-311-2-d-4 MCO and thus renders it unenforceable. We conclude that it does.

The City's ability to enforce its ordinances is preempted if any of the following four circumstances are present: "(1)...the legislature has expressly withdrawn the power of [the City] to act; (2)...the ordinance logically conflicts with state legislation; (3)...the ordinance defeats the purpose of the state legislation; or (4)...the ordinance goes against the spirit of the state legislation." *Anchor Savings & Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 397, 355 N.W.2d 234, 238 (1984). Stated more generally, "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, or required, or authorize what the legislature has expressly forbidden." *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W.2d 513, 514 (1937).

STUART S. MUKAMAL
JOHN J. HEINEN
SUSAN E. LAPPEN
PATRICIA A. FRICKER
HEIDI WICK SPOERL
GREGG C. HAGOPIAN
ELLEN H. TANGEN
JAY A. UNORA
KATHRYN Z. BLOCK
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THOMAS D. MILLER
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PATRICK J. MCCLAIN
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CALVIN V. FERMIN
BENJAMIN J. ROOVERS
ELLEN B. CHRISTOPOULOS
RACHEL S. KENNEDY
TYRONE M. ST. JUNIOR
HANNAH R. JAHN
SAVEON D. GRENELL
ROSE SIMON-SILVA
Assistant City Attorneys



The Board of Zoning Appeals (“BOZA”) evaluates and determines applications for special-use permits in accordance with four specified criteria set forth in §§ 295-311-2-d-1 through d-4 MCO. The fourth criterion 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. § 295-311-2-d-4 MCO reads as follows:

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 question presented is whether a provision of 2015 Wis. Act 391, enacted on April 26, 2016 and effective on April 28, 2016 (“Act 391”) preempts the enforceability of MCO § 295-311-2-d-4. Act 391 expanded private property rights in a number of areas and curtailed the regulatory authority of local governments in certain respects. Section 17 of Act 391 created Wis. Stat. § 66.1001(2m)(b), which states:

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.

Several phrases used in Wis. Stat. § 66.1001(2m)(b) are defined in Wis. Stat. § 66.1001, including “comprehensive plan,”¹ “consistent with,”² and “political subdivision.”³ In addition, the statute uses the term: “conditional use permit,” which is synonymous with the phrase “special use permit,” used in the City’s Zoning Code and defined in § 295-201-619, MCO. We will utilize that phrase in this opinion.

Wisconsin Stat. § 66.1001 governs comprehensive planning by municipalities and other local units of government. It sets forth, among other matters, what must be included in the contents of a comprehensive plan, procedures for adopting a comprehensive plan, and what must, and what need not be, consistent with a comprehensive plan. Wisconsin Stat. §§ 66.1001(2m) and (3) describe,

¹ “[A] guide to the physical, social, and economic development of a local governmental unit that is, [f]or a city, village, or town, a master plan that is adopted or amended under s. 62.23 (2) or (3). Wis. Stat. § 66.1001(1)(a)

² “[F]urther[s] or does not contradict the objectives, goals, and policies contained in the comprehensive plan.” Wis. Stat. § 66.1001(1)(am)

³ “[A] city, village, town, or county that may adopt, prepare, or amend a comprehensive plan.” Wis. Stat. § 66.1001(1)(c)

respectively, what does not need to be consistent with, and what needs to be consistent with, a comprehensive plan. Therefore, sub. (2m) provides limitations on local authority and sub. (3) imposes duties upon local authorities.

The Wisconsin Supreme Court set forth several pertinent standards for statutory interpretation in *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 (“*Kalal*”). First, courts will look to the plain meaning of the language of a statute “given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* at ¶ 45. They will consider the following when determining if a state law has a “plain, clear statutory meaning”:

- The context in which it is used, including it as part of a whole (not in isolation)
- Seeking harmony with the language of surrounding or closely-related statutes
- Seeking to avoid absurd or unreasonable results
- Giving reasonable effect to every word, in order to avoid surplusage

Id.

Given these parameters, it is our opinion that Wis. Stat. § 66.1001(2m)(b), eliminates any requirement that a special-use permit be consistent with the City’s various area comprehensive plans, thus rendering § 295-311-2-d-4 MCO void and unenforceable. This result was intentional, indicating that the Legislature deliberately precluded the ability of local governments to impose a “consistency with comprehensive plan” requirement by ordinance or other enactment. It is the only result consistent with the language and plain meaning of the statute.

The language of Wis. Stat. § 66.1001(2m)(b) is clear and unambiguous. If a special-use permit “does not need to be consistent with the political subdivision’s “comprehensive plan,” it follows that consistency with the comprehensive plan cannot be made a mandatory criterion for its approval. Since this statutory language is clear and unambiguous, courts will apply it according to its plain meaning and will not resort to further interpretation. *Benson v. City of Madison*, 2017 WI 65 ¶ 25, 376 Wis. 2d 35, 51-52, 897 N.W.2d 16, 24; *Kalal, supra* at ¶ 45, 271 Wis. 2d at 663, 681 N.W.2d at 124.

We are aware that a monograph by Professor Brian W. Ohm of the University of Wisconsin-Extension, Department of Urban & Regional Planning, entitled “2015 Wisconsin Act 391: Consistency Revisited” (Attachment 1) has been cited for the

proposition that a local ordinance can require consistency with a comprehensive plan in require to the issuance of a special-use permit. However, that is not a conclusion that is supported by the monograph. At the outset, Professor Ohm states that, “local ordinances....can still include language...that lists consistency with the comprehensive plan as a standard for evaluating applications for conditional uses.” This falls significantly short of requiring such consistency as a requisite for approval of applications for special use permits as does Sec. 295-311-2-d-4 MCO. In fact, Professor Ohm specifically states “the comprehensive plan is intended to be ‘a guide to the physical, social and economic development of a local governmental unit,’ and not a regulation.” Thus, consideration of the comprehensive plan in the context of a special-use permit must be permissive rather than mandatory to avoid its characterization as a regulation. Section 295-311-2-d-4 MCO, by requiring consistency in all cases, amounts to a regulation and thus conflicts with Wis. Stat. § 66.1001(2m)(b).

Furthermore, a requirement of consistency with a comprehensive plan as a standard for approval of a special-use permit is not only contrary to the plain meaning of Wis. Stat. § 66.1001(2m)(b), but would also render it superfluous. As Professor Ohm himself notes, § 66.1001(3), which sets forth that certain ordinances must be consistent with comprehensive plans, does not (and never did) 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 never previously included within the enumeration in Wis. Stat. § 66.1001(3) of ordinances 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, as described by Professor Ohm, would not be necessary.

It would not be a plausible method of statutory analysis to conclude 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. Courts will avoid a construction of a statute that will render its language meaningless or superfluous. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9 ¶¶ 135-136, 307 Wis. 2d 1, 64-65, 745 N.W.2d 1, 32; *State v. Wisconsin Tel. Co.*, 91 Wis. 2d 702, 714, 284 N.W.2d 41, 46 (1979).

Therefore, it is the opinion of this office that § 295-311-2-d-4 MCO is unenforceable and should be repealed because it is preempted by state law. There is a pending file (CCFN 160994) containing a proposed ordinance (Attachment 2) which our office has prepared. That ordinance would remedy this situation by

James Owczarski and Alderman James Bohl

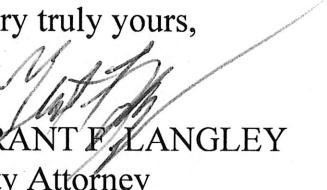
December 1, 2017

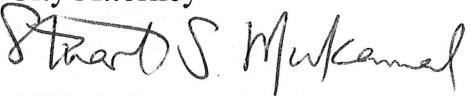
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repealing § 295-311-2-d-4 MCO and providing instead that BOZA may, in its discretion, consider applicable elements of the City's area comprehensive plans in making its determinations on applications for special-use permits, but would not be required to do so. That proposed ordinance was recommended for approval by the Zoning Code Technical Committee on December 7, 2016 but has not yet come before the City Plan Commission or the Common Council's Zoning, Neighborhoods & Development Committee. Alternatively, the City might simply elect to repeal § 295-311-2-4 MCO.

Should you have any further questions or concerns, please do not hesitate to contact the undersigned.

Very truly yours,


GRANT F. LANGLEY
City Attorney

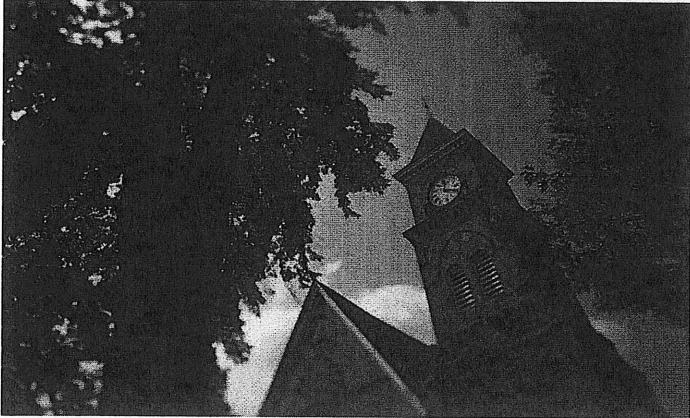

STUART S. MUKAMAL
Assistant City Attorney


KAIL J. DECKER
Assistant City Attorney

c: Department of City Development
Jeffrey Thomas, Secretary, Board of Zoning Appeals
Catherine Doyle, Chair, Board of Zoning Appeals

Enclosures

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Department of Urban & Regional Planning
University of Wisconsin-Madison/Extension
925 Bascom Mall
Madison, Wisconsin 53706-1317

www.urpl.wisc.edu

2015 Wisconsin Act 391: Consistency Revisited

By Brian W. Ohm

2015 Wisconsin Act 391, signed into law by Governor Walker on April 26, 2016, has raised questions by planners and others about its impact on the consistency requirement in Wisconsin's comprehensive planning law. Section 17 of Act 391 created a new section of the *Wisconsin Statutes* that reads: "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." This addition will be codified at Section 66.1001(2m)(b) of the *Wisconsin Statutes*. To understand the meaning of this language added by Act 391, it is important to revisit the consistency requirement in the comprehensive planning law.

Consistency and the Comprehensive Plan

Section 66.1001(3) of the Wisconsin Statutes states that if a local government "enacts or amends" any of the following ordinances, the ordinance shall be consistent with that local government's comprehensive plan:

- "(g) Official mapping ordinances enacted or amended under s. 62.23 (6).
- (h) Local subdivision ordinances enacted or amended under s. 236.45 or 236.46.
- (j) County zoning ordinances enacted or amended under s. 59.69.
- (k) City or village zoning ordinances enacted or amended under s. 62.23 (7).

- (l) Town zoning ordinances enacted or amended under s. 60.61 or 60.62.
- (q) Shorelands or wetlands in shorelands zoning ordinances enacted or amended under s. 59.692, 61.351, 61.353, 62.231, or 62.233."

The *Wisconsin Statutes* also include some helpful definitions. Section 66.1001(1) (am) defines "consistent with" to mean: "furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan." In addition, Section 66.1001(1)(a) defines a "comprehensive plan" as "a guide to the physical, social, and economic development of a local governmental unit." Finally, Section 66.1001(2m)(a) states that "[t]he enactment of a comprehensive plan by ordinance does not make the comprehensive plan by itself a regulation."

The Meaning of Act 391

The affect of the consistency language added by Act 391 does not change the consistency requirement. As noted above, Section 66.1001(3) states that if a local government "enacts or amends" certain ordinances, those ordinances need to be consistent with the local governmental unit's comprehensive plan. The issuance of a conditional use permit is not the enactment or amendment of an ordinance. Section 66.1001(3) does not require that the issuance of a conditional use permit needs to be consistent with the comprehensive plan.

Nevertheless, some local 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. This is a local option. It is not a state mandate. As noted above, the comprehensive plan is intended to be "a guide to the physical, social, and economic development of a local governmental unit," and not a regulation.

Likewise, when enacting a new zoning ordinance, local governments can still look to the comprehensive plan for guidance on what should be allowed as permitted uses and what should be allowed as conditional uses.

Other Consistency Requirements

While the discussion of consistency often focuses on the above statutes, it is important to remember that the *Wisconsin Statutes* also require that tax increment financing districts must be in "conformity" with the comprehensive plan of the city, village, or town;¹ construction site erosion control and storm water management ordinances must "accord and be consistent with any comprehensive zoning plan;"² architectural conservancy districts, business improvement districts, and neighborhood improvement districts must have a "relationship" to the comprehensive plan;³ urban redevelopment plans must be "in accord" with the comprehensive plan;⁴ and public school facilities funded by bonds issued by redevelopment authorities in first class cities must be "consistent" with the city's comprehensive plan.⁵ Comprehensive plans can also help establish the basis to include non-housing facilities for certain programs funded by the Wisconsin Housing and Economic

¹Wis. Stat. §§ 66.1105(4)(g) for cities and villages and 60.85(3)(g) for towns.

²Wis. Stat. § 59.693(6) for counties, Wis. Stat. § 60.627(5) for towns, Wis. Stat. § 61.354(5) for villages, Wis. Stat. § 62.234(5) for cities.

³Wis. Stat. §§ 66.1007(1)(f)4; 66.1109(1)(f)4; and 66.1110(2)(d).

⁴Wis. Stat. § 66.1303(3)(b).

⁵Wis. Stat. § 66.1333(5r)(b)2.

Development Authority;⁶ establish street widths in cities and villages;⁷ help determine the appropriate location for medical waste incinerators;⁸ or authorize the rezoning of registered lands for nonmetallic mineral extraction operations.⁹

In addition cooperative boundary agreement plans "shall describe how it is consistent with each participating municipalities' comprehensive plan;"¹⁰ water supply plans must include "[a]n analysis of how the plan supports and is consistent with any applicable comprehensive plan;" farmland preservation zoning ordinances must be "substantially consistent with a certified farmland preservation plan"¹¹ and the farmland preservation plan must be "consistent with the comprehensive plan."¹² Finally, cities, villages, towns and counties "may deny an application for approval of a wind energy facility if the proposed site of the facility "is in an area primarily designated for future residential or commercial development, as shown in a map that is adopted, as part of a comprehensive plan . . . before June 2, 2009, or as shown in such maps after December 31, 2015, as part of a comprehensive plan that is updated"¹³

Brian W. Ohm, an attorney, is a professor in the UW-Madison Department of Urban & Regional Planning and state specialist in planning law for UW-Extension.



⁶Wis. Stat. § 234.01(7).

⁷Wis. Stat. § 236.16(2).

⁸Wis. Stat. § 285.63(10)(d)(6).

⁹Wis. Stat. § 295.20(2)(b)1.

¹⁰Wis. Stat. § 66.0307(3)(c). In addition, counties and regional planning commissions are allowed to comment on the effect that cooperative boundary agreements between cities or villages and towns may have on the county development plan or the regional master plan. Wis. Stat. § 66.0307(4)(c).

¹¹Wis. Stat. § 91.38(1)(f).

¹²Wis. Stat. § 91.10(1)(f).

¹³Wis. Stat. § 66.0401(4)(f)2.

..Number

160994

..Version

PROPOSED SUBSTITUTE

..Reference

..Sponsor

THE CHAIR

..Title

A substitute ordinance relating to board of zoning appeals findings with respect to special use permit applications.

..Sections

295-311-2-d-1 am

295-311-2-d-2 am

295-311-2-d-4 rp

..Analysis

This ordinance 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 provisions 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, particularly with respect to the following required "findings":**

1. The use will be designed, located and operated in a manner so that the public health, safety and welfare is protected.
2. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use.

..Body

The Mayor and Common Council of the City of Milwaukee do ordain as follows:

Part 1. Section 295-311-2-d-1 and 2 of the code is amended to read:

295-311. Appeals.

2. SPECIAL USE PERMITS.

d. Findings.

d-1. Protection of Public Health, Safety and Welfare. The use will be designed, located and operated in a manner so that the public health, safety and welfare is protected. A geographic concentration of establishments of this type may be evidence, in certain circumstances, that the public health, safety and welfare will not be protected. >>**In addition, the board may, in its sole discretion, consider the applicable elements of the**

city's comprehensive plan in making its determination as to whether the public health, safety and welfare will be protected.<<

d-2. Protection of Property. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use. A geographic concentration of establishments of this type may be evidence, in certain circumstances, that the proposed use will substantially impair or diminish property values. >>In addition, the board may, in its sole discretion, consider the applicable elements of the city's comprehensive plan in making its determination as to whether the use, value and enjoyment of other property in the neighborhood will be substantially impaired or diminished by the establishment, maintenance or operation of the special use.<<

Part 2. Section 295-311-2-d-4 of the code is repealed.

(Note: The provision being repealed 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.)

..LRB
APPROVED AS TO FORM

Legislative Reference Bureau
Date: _____
..Attorney
IT IS OUR OPINION THAT THE ORDINANCE
IS LEGAL AND ENFORCEABLE

Office of the City Attorney
Date: _____
..Requestor
City Attorney
..Drafter
LRB166301-2
Jeff Osterman
12/16/2016