



January 22, 2018

Zoning, Neighborhoods and Development Committee
City of Milwaukee
City Hall
200 E. Wells Street
Room 205
Milwaukee, WI 53202

To the Honorable Members of the Zoning, Neighborhoods and Development Committee:

The proposed amendment to the Milwaukee Code of Ordinances (MCO) would repeal the requirement that special use permits will be designed, located and operated in a manner consistent with all applicable elements of the city's comprehensive plan and make the City's consideration of it's comprehensive plan discretionary. In theory, this would allow the Board of Zoning Appeals to deny a special use permit if a property owner proposed a special use that is designed, located and operated in a manner consistent with all the applicable elements. The City's actions are supported by 2015 Wis. Act 391, Section 17, in which the Legislature clarified that a special use permit "does not need to be consistent with the political subdivision's comprehensive plan."

The reason for the proposed amendment is articulated in a letter from the City Attorney's office dated December 1, 2017. That letter concludes that 2015 Wis. Act 391, Section 17, preempts the enforceability of the current language in the MCO. According to the letter, a local requirement that special uses shall be consistent with the comprehensive plan is "regulatory" (and therefore preempted by 2015 Wis. Act 391, Section 17) but a city ordinance allowing the BOZA to consider the City's comprehensive plan only when the Board wants to is somehow not "regulatory." When the BOZA elects to consider the City's comprehensive plan and require a condition based on the comprehensive plan, the property owner who applied for the special use permit will view the condition as "regulatory."

The requirements in Wisconsin law that certain local government actions must be "consistent with" a local government's comprehensive plan has been a source of confusion. The Wisconsin Statutes define "consistent with" to mean "furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan." Decisions of the Wisconsin Supreme Court follow a similar definition. To the extent that a role of government is to act in the public interest,

this definition of “consistent with” allows the local comprehensive plan to help articulate the public interest to aid in local decision-making. It helps decision-makers understand the purpose of local ordinances that are required by law to help implement the local comprehensive plan.

Understanding what is meant by “consistent with” is also a game of semantics. The City of Madison’s current zoning ordinance uses the following language: “The City Plan Commission shall not approve a conditional use without due consideration of the recommendations in the City of Madison Comprehensive Plan and any applicable, neighborhood, neighborhood development, or special area plan, including design guidelines adopted as supplements to these plans.”

The Madison ordinance then includes a laundry list of standards that need to be considered when reviewing an application for a conditional use permit. Those standards include general standards like “The establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.” Hypothetically the City could say when reviewing an conditional use permit: “The proposed conditional use should be approved because it will not impede the normal and orderly development and improvement of the surrounding property based on the recommendations for permitted uses in the City’s comprehensive plan.”

While the City of Madison’s ordinance does not use the terms “consistent with,” under the above hypothetical, the City of Madison is approving a conditional use permit because it is consistent with the City’s comprehensive plan.

The City of Milwaukee should rethink the need for the proposed amendment.

Sincerely,

Brian W. Ohm

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