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2015 Wisconsin Act 391: Consistency Revisited

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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

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

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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.

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.