WISCONSIN
UNIVERSITY OF WISCONSIN-MADISON

January 30, 2018

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

RE: FN 160994, proposed amendment to the Milwaukee Code of Ordinances (MCO)

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

I am writing in response to the testimony presented at the hearing before the City of Milwaukee Plan Commission on January 22, 2018, regarding the ordinance amendment to remove the language that special use permits must be consistent with the City's comprehensive plan. While I was not able to be present at the hearing, I viewed the video of hearing. Much of the testimony presented at the hearing by the City Attorney's Office related to the Legislative intent of section 17 in 2015 Wis. Act 391, 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." (The City uses the term "special use" rather than "conditional use.")

As a rule of statutory construction, a court will first look to the language of the statute. The City Attorney's Office contends there is "no ambiguity," "no dispute," that the language of Act 391 preempts the City's ability to require that special use permits be consistent with the City's comprehensive plan. However, this is not what the plain language of section 17 states. In other sections of Act 391, the legislature is very explicit in stating that local governments are prohibited from taking certain actions -- the preemption is clearly stated. I have attached a memo prepared by an attorney for the Wisconsin Legislative Council (Exhibit A) that summarizes Act 391. The Legislative Council prepares memos for each Act to help people understand the Act. As you will note, the memo summarizing Act 391 clearly states what Act 391 prohibits and the new requirements for local governments and courts imposed by Act 391. These references are underlined in Exhibit A. As for the conditional use language, the section of the memo highlighted simply states: "Specifies that conditional use permits issued by a political subdivision need not be consistent with the political subdivision's comprehensive plan." Neither the language of Act 391 nor the memo state that local governments are prohibited from requiring

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that conditional use permits be consistent with the local government's comprehensive plan. As a matter of legislative interpretation, if an Act contains a given provision, the omission of that provision from another section concerning a related subject is significant in showing that a different intention existed.

Despite the language of the Act, the City Attorney's Office claims that it was "absolutely" the intent of the Legislature in section 17 is to take away local control. To support this conclusion, the City Attorney's Office isolates a statement made by a woman testifying at a legislative hearing on the bill that would become Act 391 about an incident in the Town of Saratoga in Wood County. The issue in the Town of Saratoga, however, deals with a rezoning, not a conditional use permit. **The woman is testifying about another provision in the bill, not the conditional use permit language.** This is evident from her statement at the beginning of her testimony: "SB464/AB582 includes a provision that would retroactively apply an extended concept of vested rights . . . ." SB464/AB582 included language prohibiting the downzoning of property. Her testimony relates to that issue. It is not appropriate to take her remarks out of context and use them to try to interpret the conditional use permit language that appears in section 17 of Act 391.

Attached as Exhibit B is a copy of an email I recently received from Mike Koles, the Executive Director of the Wisconsin Towns Association. As noted in the email, Mr. Koles was involved in every aspect of the decision making process related to the conditional use language inserted in Act 391. His summary is relevant to understanding the Legislative intent of section 17 of Act 391. He states that the interpretation taken by the Milwaukee City Attorney's office is inaccurate according to both the plain language of the statute as well as the intent of the law. Section 17 was added to address an ongoing dispute related to the construction of a golf course along Lake Michigan in a Town in Sheboygan County. At the time, the golf course was a conditional use under the Town's zoning ordinance. Concerned citizens argued the Town could not approve the conditional use permit for the golf course because state law mandated that the permit must be consistent with the Town's comprehensive plan. The citizens argued the golf course was inconsistent with the Town's comprehensive plan. As stated by Mr. Koles, the Legislature added section 17 to clarify that state law did not require that conditional use permits must be consistent with the local comprehensive plan but local governments still had the discretion to require consistency as a standard in their zoning ordinance.

The City Attorney's Office makes the statement that it is not 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." As indicated by Mr. Koles, this issue needed clarification. I was involved in the drafting of the comprehensive planning law in 1999 and I have been involved with helping draft several of the amendments to the original law that were similarly passed to help **clarify** the law.

Finally, the City Attorney's Office seem to emphasize the distinction between "zoning tribunals" versus "planning tribunals" to justify the Office's interpretation of the law. Under Wisconsin law, however, special use permits can be issued by the zoning agency, the plan commission, or the governing body. In many cities, special use permits are issued by the plan commission. State law governing special use permits is the same whether it is the governing body, the plan

commission, or the zoning agency that issues special use permits. At least under state law, there is no reason to interpret Act 391 differently because the City of Milwaukee Common Council delegates the authority to grant special use permits to a zoning tribunal. The City Attorney's office also makes the statement that adjudications by zoning tribunals were "never" included in the list of actions that must be consistent with a comprehensive plan. Actually 1999 Wis. Act 9 included a long list of actions that needed to be consistent with a comprehensive plan (impact fees, annexations, land acquisitions, etc.) as well as "[a]ny other ordinance, plan, or regulation of a local government that relates to land use." Some attorneys were interpreting this language to include actions like variances and conditional use permits. This was never the intent of the law and a subsequent amendment to the law helped clarify this issue by removing these requirements.

Sincerely,

Brian W. Ohm

Brian W. Ohm, J.D.
Professor

RE: 2015 Wis. Sct 391

EXHIBIT B

Mike Koles <mike.koles@wisctowns.com>

Sat 1/27/2018 7:38 AM

To:Brian Ohm <bwohm@wisc.edu>;

Brian:

Thanks for the email. I don't have drafter's notes, but I was involved in every aspect of the decision making process on this particular item. Not only is the interpretation by the Milwaukee attorney innaccurate as the law currently reads in my opinion, this was certainly not the intent. This particular changed stemmed from several situations, one in particular in Sheboygan County, where towns were reading the comprehensive planning law as requiring that CUPS "must" be consistent with the comprehensive plan. They were using this interpretation to "blame" the comprehensive plan for not allowing them to issue a CUP for a particular proposed use, in the Sheboygan case – a golf course. In many of these instances, the municipality indicated they would gladly issue the permit but their hands were tied due to the consistency requirement.

The change last session was intended to clarify that CUPs do not need to be consistent with the comprehensive plan, but they may be consistent with the comprehensive plan. Legislators didn't want the interpretation by the aforementioned towns being used as an excuse; however, they also wanted to preserve the right to require consistency with the CUP at the local level.

Politically it's real simple. If you at the local level want to say no to a proposal, fine, but don't blame the law that we adopted as state legislators.

Mike

From: Brian Ohm [mailto:bwohm@wisc.edu]
Sent: Thursday, January 25, 2018 3:49 PM
To: Mike Koles
Subject: 2015 Wis. Sct 391
Importance: High

Hi Mike:

I need your input on an issue and hope you can spare a few minutes from your busy schedule to respond.

An issue has come up with the City of Milwaukee interpreting the language included in 2015 Wis. Act 391 stating 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." Even before the passage of the comp. planning law the City's ordinance required that conditional use permits "must be consistent" with the City's comp. plan. After the enactment of Act 391, the City Attorney's office took the interpretation that the local requirement that

conditional use permits must be consistent with the City's comp. plan is preempted by Act 391 and must be removed as a requirement in the City's ordinance --the City has no legal authority to require consistency after Act 391.

I know we talked about this years ago after the passage of Act 391, but do you have information on the intent of this language? We know state law does not require that conditional use permits must be consistent with a comp. plan but do local governments still have the discretion to require if they want that conditional use permits must be consistent with the local comp. plan?

Thanks for your input!

Brian

EXHIBIT A

WISCONSIN LEGISLATIVE COUNCIL
ACT MEMO

2015 Wisconsin Act 391 [2015 Assembly Bill 582]	**Property Rights, Shoreland Zoning, Contested Case Hearings, Administrative Rule Promulgation Process, and Deference Afforded Agency Legal Interpretations**

2015 Wisconsin Act 391 does all of the following:

- Generally prohibits a local governmental unit from requiring a person to take certain actions with respect to real property, or pay a related fee, before purchasing, taking title to, or occupying the property.
- Prohibits a county from enacting a "development moratorium" as defined under current law.
- Prohibits a city, village, town, or county from prohibiting or unreasonably restricting the sale or transfer of title to any interest in real property.
- Requires a political subdivision to provide a method for landowners to receive written notice of potential action by the political subdivision that may affect the allowable use of the landowner's property.
- Provides that a setback line from the ordinary high-water mark established by a professional land surveyor may be legally relied upon for purposes of development near a water body, in certain circumstances.
- Generally prohibits local regulation of the maintenance, repair, replacement, restoration, rebuilding, or remodeling of all or any part of a structure wholly or partially located in the shoreland setback area that is legally located there by operation of a variance granted before July 13, 2015.

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: http://www.legis.wisconsin.gov.

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- Requires an authority issuing building permits to send a copy of certain building permits related to shoreland projects to the county clerk.
- Allows the use of a flat roof on a boathouse as a deck if specified conditions are met.
- Makes other changes to shoreland zoning laws related to runoff control structures and utility equipment.
- Specifies that conditional use permits issued by a political subdivision need not be consistent with the political subdivision's comprehensive plan.
- Requires a court to resolve any ambiguity in the meaning of a word or phrase in a zoning ordinance or shoreland zoning ordinance in favor of the free use of private property.
- Prohibits a political subdivision from enacting a "down zoning ordinance" unless the ordinance is approved by at least two-thirds of the members of its governing body or is approved by the landowner (a down zoning ordinance decreases allowable development density or reduces permitted uses).
- Requires an economic impact analysis of a proposed administrative rule to include an analysis of the ways in which and the extent to which the proposed rule would place any limitations on the free use of private property, including a discussion of alternatives to the proposed rule that would minimize any such limitations.
- Allows the applicant one substitution of an administrative law judge overseeing a contested case hearing involving a contract, permit, or other approval issued or denied by the Department of Natural Resources or Department of Agriculture, Trade, and Consumer Protection.
- Directs courts to give agency decisions of law restricting a property owner's free use of the owner's property no deference when reviewing such a decision.

Effective date: April 28, 2016

Prepared by: Larry Konopacki, Principal Attorney May 3, 2016

LAK:mcm;ty