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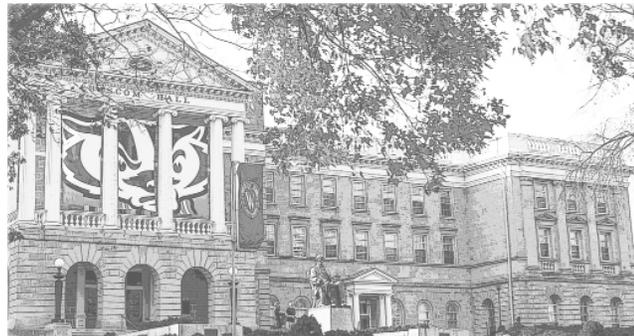
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A QUARTER CENTURY OF CHANGES TO WISCONSIN'S LOCAL LAND USE ENABLING LAWS

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A Quarter Century of Changes to Wisconsin's Local Land Use Enabling Laws

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I. INTRODUCTION

This report summarizes the changes to Wisconsin's enabling laws related to local government land use planning over the past 25 years. While some of the laws that comprise the contemporary framework of local land use law in Wisconsin date back almost a century, significant changes to Wisconsin's land use laws occurred in the last quarter of that century. Keeping up with those changes can be a daunting task for planners, attorneys, local officials and others involved with local land use processes.

The period examined in this report begins with the passage of the laws enabling local governments to enact cooperative plans in 1992 and ends with recent legislation related to the use of conditional use permits. Sometimes the legislation is the result of a deliberative process, such as recommendations from a Legislative Council Study Committee. More often, the legislative changes are the initiative of special interests that change the laws in a seemingly ad hoc manner.

Reflecting on the changes over this period, two themes emerge. One theme is the ongoing need to keep laws current. Laws enacted 50 years ago might not meet present day needs. The second theme is an emphasis on removing local barriers to development, particularly housing development.

The late Jacob Beuscher, Professor of Law at the University of Wisconsin and an international pioneer in the development of the field of land use law, documented the need to update Wisconsin's current planning enabling laws was well over a half-century ago. In a 1966 report entitled *Land Use Controls*, published by the State of Wisconsin Department of Resource Development, Professor Beuscher reviewed the status of land use law in Wisconsin and recommended numerous updates to Wisconsin's laws. The recommended updates included:

- Consolidation of planning, zoning, subdivision control, and official map enabling authority in one chapter of the statutes entitled "Land Use Planning and Implementation;"
- Merger into one set of provisions of the planning and plan implementing powers of counties, towns, villages and cities, thus doing away with confusing and conflicting separate enabling acts for each level of local government;
- Modernization of the legislative description of comprehensive planning (the master plan);
- Inclusion in this merged act of the first clear, comprehensive grant of power to Wisconsin counties to plan land uses;
- Clarification of authority for planned unit development and other flexible, discretionary zoning;
- Inclusion, in fulfillment of the state's trusteeship over its navigable waters, of a grant of authority to the state to impose adequate controls on shorelands and flood plains so as to protect health, improve water quality, spawning grounds, natural cover and water side amenities;
- Inclusion of a grant of authority for the elimination of nonconforming uses under zoning on the basis of fair periods of amortization.

Over the last 50 years, Wisconsin has implemented many, though not all, of these recommendations. Within a few years after publication of the report, Wisconsin had adopted legislation giving counties the power to plan land uses through the preparation of a county development plan, clarified the authority for planned unit developments (called “planned development districts”) and passed the law mandating county shoreland zoning (based on legislation drafted by Professor Beuscher) and local floodplain zoning. Several decades later, the Legislature passed the law modernizing the definition of a comprehensive plan in 1999 and most recently passed the law clarifying the authority of local governments to issue conditional use permits, another flexible, discretionary zoning tool.

The Legislature has not consolidated all the planning and implementation laws into one chapter with uniform provisions for cities, villages, towns and counties, as recommended by Professor Beuscher. Nevertheless an increasing number of land use laws with uniform provisions can be found in Chapter 66 of the *Wisconsin Statutes*. The Legislature has also not authorized the amortization of nonconforming uses. The Legislature actually took the opposite approach and expressly prohibits amortization of nonconforming uses.¹

Concurrent with the theme of keeping local planning laws up to date is the theme emphasizing the need to remove local barriers to housing development. In September 2016 the Obama Administration released a report entitled “Housing Development Toolkit.”² The Report acknowledges, among other things, that local regulations (zoning, etc.) continue to impose a barrier to housing development. The report highlights actions taken by local governments to reduce the barriers and take a more modernized approach to promoting housing development. Some of the legislation over the past 25 years in Wisconsin fits within the theme of reducing local barriers to housing development. Other actions highlighted in the report, such as inclusionary zoning, are expressly prohibited by recent Wisconsin legislation.

The two themes are not mutually exclusive in terms of understanding the context for the numerous changes effecting local land use planning over the past 25 years. Many of the laws impacting local planning are summarized in this report. Some changes, however, are beyond the scope of this report. The State plays a more direct role in local land use regulation today than it did 25 years ago. In assuming that role, the Legislature passed several laws creating state programs governing certain areas of land use activity. Local governments need to be aware of these programs. The programs (and links to further information about the programs) include:

Nonmetallic Mining Reclamation. 1995 Wisconsin Act 227 established the State’s Nonmetallic Mining Reclamation Law administered by the Wisconsin Department of Natural Resources (DNR) Local governments (primarily counties) are required to adopt ordinances implementing the regulations developed by the DNR to regulate the reclamation of nonmetallic mines. Information and a model ordinance is available on the Department’s website at: <https://dnr.wi.gov/topic/mines/nonmetallic.html>. The law provides certain protections to registered nonmetallic mineral deposits.

Large-scale Livestock Facility Siting. Under 2003 Wisconsin Act 235, the Livestock Siting Law, if local governments want to regulate new or expanded livestock operations they need

¹ Wis. Stat. §§ 59.69(10)(e) and 62.23(7)(hg).

²https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf

to follow the rules established by the Wisconsin Department of Agriculture, Trade, and Consumer Protection administers the program. The options available to local governments and model ordinances are available on the Department's website at: https://datcp.wi.gov/Pages/Programs_Services/LSLocalImplementation.aspx. Local governments can have multiple agriculturally-related zoning districts. At least one other agriculturally-zoned district must allow for livestock operations of any size.

Farmland Preservation. Since the late 1970s, Wisconsin has had a farmland preservation program that focuses on planning and zoning for agricultural uses. The program was substantially revised in 2009 following the passage of 2009 Wisconsin Act 28. The Wisconsin Department of Agriculture, Trade, and Consumer Protection administers the program. Information about the planning and zoning requirements is available at the Department's website: https://datcp.wi.gov/Pages/Programs_Services/FarmlandPreservation.aspx.

Wind Facility Siting. Under 2009 Wisconsin Act 40, a city, village, town or county cannot enforce local regulations on the installation or use of a wind energy system that are more restrictive than the requirements established by the Public Service Commission (PSC) to help ensure consistent local procedures for local regulation of wind energy systems. The PSC rules are available on the Commission's website at: <https://psc.wi.gov/Pages/Renewables/WindSitingRules.aspx>.

Mobile Telecommunication Service Facility Siting. 2013 Wisconsin Act 20 established requirements that local governments must follow if they want to regulate mobile telecommunication service facilities (cell phone towers). The regulations can be found in section 66.0404 of the Wisconsin Statutes. A summary of the law is available at: https://docs.legis.wisconsin.gov/misc/lc/information_memos/2013/im_2013_14

In addition to these programs affecting local land use decisions, over the past 25 years the Legislature has amended other important laws related to local planning that are also beyond the scope of this report. Many of these legislative changes are compiled elsewhere. For example, information about statutory changes to **tax increment financing (TIF)** from recent Legislative Sessions is summarized by the Wisconsin Department of Revenue at: <https://www.revenue.wi.gov/Pages/SLF/tif-law-changes.aspxTIF>.

Finally, in addition to these legislative changes, three are also certain recent court decisions that have impacted local planning. For example, local governments need to review their **sign codes** in response to the United States Supreme Court's decision in *Reed v. Town of Gilbert* requiring content neutrality. The Southeastern Wisconsin Regional Planning Commission prepared a model ordinance incorporating the changes required by the *Reed* case. It is available at: <http://www.sewrpc.org/SEWRPCFiles/CommunityAssistance/ModelOrdinances/ModelSignOrdinance.pdf>

II. THE COST OF DEVELOPMENT: Fees and Public Improvements

A. Fees in General

2003 Wisconsin Act 134 added a provision to state statutes that “any fee” imposed by a local government “shall bear a reasonable relationship to the service for which the fee is imposed.”³ 2007 Wisconsin Act 44 added another provision to that section of the statutes that states that if a local government enters into a contract to purchase engineering, legal, or other professional services from a consultant and the local government passes along the cost for the professional services to another person under a separate contract between the local government and that person, the rate charged that other person for the professional services may not exceed the rate customarily paid for similar services by the local government.⁴

2017 Wis. Act 243 amended section 66.0628 (4) (a) of the statutes to provide that any person aggrieved by a fee imposed by a political subdivision because the person does not believe that the fee bears a reasonable relationship to the service for which the fee is imposed may appeal the reasonableness of the fee to the tax appeals commission by filing a petition with the commission within 90 days after the fee is due and payable.

B. Impact fees

Wisconsin’s impact fee law was enacted in 1994.⁵ The law is currently codified at 66.0617 of the Wisconsin Statutes. Since May 1, 1995, a political subdivision seeking to impose and collect impact fees must comply with the requirements of the Wisconsin Statutes.⁶ “Impact fees” are defined as “cash contributions, contributions of land or interests in land or any other items of value that are imposed on a developer by a political subdivision under this section.”⁷ Impact fees may be used by cities, villages, or towns.⁸ While counties originally were authorized under this law to collect impact fees, 2005 Wisconsin Act 477 eliminated that authority.

Impact fees may be used to finance the capital costs of constructing highways and other transportation facilities, sewage treatment facilities, storm and surface water handling facilities, water facilities, parks, playgrounds, and land for athletic fields, solid waste and recycling facilities, fire and police facilities, emergency medical facilities, and libraries.⁹ The law expressly prohibits the use of impact fees to finance facilities owned by a school district.¹⁰ When the law was enacted, it included the general authorization to collect impact fees for parks “and other recreational facilities.” 2005 Wisconsin Act 477 replaced the term “other recreational facilities” with the more limited term “playgrounds, and land for athletic fields.” 2017 Wisconsin Act 243 prohibits charging impact fees for operation or maintenance expenses for public facilities.¹¹

³ Wis. Stat. § 66.0628(2).

⁴ Wis. Stat. § 66.0628(3).

⁵ 1993 Wis. Act 305.

⁶ Wis. Stat. § 66.0617(2)(c).

⁷ Wis. Stat. § 66.0617(1)(c).

⁸ Wis. Stat. § 66.0617(1)(e).

⁹ Wis. Stat. § 66.0617(1)(f).

¹⁰ *Id.*

¹¹ Wis. Stat. § 66.0617 (6) (fm).

“Capital costs” means the costs to construct, expand or improve public facilities, including the cost of land.¹² Up to ten percent of capital costs can be for related legal, engineering, and design costs unless a political subdivision can demonstrate that legal, engineering and design costs exceed ten percent of capital costs.¹³ 2005 Wisconsin Act 477 amended the definition of “capital costs” to clarify that the cost of vehicles is not included. Other noncapital costs and the costs of other equipment to construct, expand or improve public facilities are also excluded from capital costs.

The statute outlines a two-part process that must be followed by a municipality wishing to establish an impact fee program or when a municipality amends an existing impact fee ordinance by revising the amount of the fee or altering the public facilities for which the fee may be imposed.¹⁴

Needs Assessment. A political subdivision must prepare a needs assessment for the public facilities that the political subdivision anticipates imposing impact fees.¹⁵ The needs assessment establishes the rational relationship that the impact fee must bear to the need for new, expanded or improved public facilities required to serve land development.¹⁶

The needs assessment must include an inventory of existing public facilities for which the impact fee may be imposed.¹⁷ The needs assessment must also identify existing deficiencies in the quantity or quality of those public facilities.¹⁸ This is important because the statute prohibits the use of impact fees to address existing deficiencies in public facilities.¹⁹ Impact fees can only be collected to offset the capital costs needed to serve new development. 2017 Wis. Act 243 created Section 66.0617(6)(am) prohibiting municipalities from including the amounts for an increase in service capacity greater than the capacity necessary to serve the development for which the fee is imposed.

The needs assessment must also explicitly identify service areas and service standards. “Service areas” are defined as “a geographic area delineated by a municipality within which there are public facilities.”²⁰ “Service standards” are defined as “a certain quantity or quality of public facilities relative to a certain number of persons, parcels of land or other appropriate measure, as specified by the municipality.”²¹ Based on the identified service areas and service standards, the needs assessment must then identify new public facilities, or improvements or expansions of existing public facilities that will be required because of land development.²²

To figure out the amount of the fee, the needs assessment must include a detailed estimate of the capital costs of providing the new public facilities or improvements or expansions in existing public facilities.²³ Impact fees must be based upon actual capital costs or reasonable

¹² Wis. Stat. § 66.0617(1)(a).

¹³ *Id.*

¹⁴ Wis. Stat. § 66.0617(4)(a).

¹⁵ *Id.*

¹⁶ Wis. Stat. § 66.0617(6)(a).

¹⁷ Wis. Stat. § 66.0617(4)(a)(1).

¹⁸ *Id.*

¹⁹ Wis. Stat. § 66.0617(6)(f).

²⁰ Wis. Stat. § 66.0617(1)(g).

²¹ Wis. Stat. § 66.0617(1)(h).

²² Wis. Stat. § 66.0617(4)(a)(2).

²³ Wis. Stat. § 66.0617(4)(a)(3).

estimates of capital costs for new, expanded or improved public facilities.²⁴ Since such fees can affect the cost of housing, the needs assessment must include an estimate of the cumulative effect of all proposed and existing impact fees on the availability of affordable housing within the municipality.²⁵ The needs assessment must insure that fees do not exceed the proportionate share of the capital costs required to serve land development, as compared to existing uses of land within the political subdivision.²⁶

Impact fees must be reduced to compensate for moneys received from the federal or state government specifically to provide or pay for the public facilities for which the impact fees are imposed²⁷ and for other capital costs imposed by the municipality with respect to land development to provide or pay for public facilities, such as special assessments, special charges, land dedications or fee in lieu of land dedication or other items of value.²⁸ The law does not prohibit or limit the authority of a municipality to finance public facilities by any other means authorized by law.²⁹

Impact Fee Ordinance. Following completion of the needs assessment, the next step in the impact fee process elaborated in the statute is the enactment of an impact fee ordinance following a public hearing on the proposed ordinance.³⁰ Notice of the public hearing must be published as a class 1 notice under Wis. Stat. Ch. 985 and must specify where a copy of the proposed ordinance and the needs assessment may be obtained.³¹ The needs assessment must be available for public inspection and copying in the office of the clerk of the municipality at least 20 days before the hearing.³²

Refund of Impact Fees. Following amendments made by 2017 Wis. Act 243, impact fees that are not used within 8 years after they are collected to pay the capital costs for which they were imposed shall be refunded to the payer of fees, along with any accumulated interest. Impact fees that are collected for capital costs related to lift stations or collecting and treating sewage that are not used within 10 years after they are collected, shall be refunded to the payer of fees, along with any accumulated interest. The 10-year time limit for using impact fees that is specified under this subsection may be extended for 3 years if the municipality adopts a resolution stating that, due to extenuating circumstances or hardship in meeting the 10-year limit, it needs an additional 3 years to use the impact fees that were collected. The resolution shall include detailed written findings that specify the extenuating circumstances or hardship that led to the need to adopt a resolution under this subsection. For purposes of the time limits in this subsection, an impact fee is paid on the date a developer obtains a bond or irrevocable letter of credit in the amount of the unpaid fees executed in the name of the municipality.³³

The original impact fee law stated that fees not used in a “reasonable period of time” after they are collected needed to be refunded to the current property owner. 2005 Wisconsin Act 203 eliminated this language and required that impact fees must be used within 7 years of when they

²⁴ Wis. Stat. § 66.0617(6)(c).

²⁵ Wis. Stat. § 66.0617(4)(a)(3).

²⁶ Wis. Stat. § 66.0617(6)(b).

²⁷ Wis. Stat. § 66.0617(6)(e).

²⁸ Wis. Stat. § 66.0617(6)(d).

²⁹ Wis. Stat. § 66.0617(2)(b).

³⁰ Wis. Stat. § 66.0617(3).

³¹ *Id.*

³² Wis. Stat. § 66.0617(4)(b).

³³ Wis. Stat. § 66.0617(9)(a).

were collected with a possibility of extending the time for 3 additional years under extenuating circumstances or hardship. Act 203 was also intended to apply retroactively, thereby impacting existing fees that had been collected since the original law because effective in 1994. 2007 Wisconsin Act 44 eliminated the retroactive application and extended the 7-year time frame to a 10-year time frame with the 3-year extension option.

Appeal and Other Provisions. The ordinance must also specify a procedure for a developer upon whom an impact fee is imposed has the right to contest the amount, collection or use of the impact fee to the governing body of the municipality.³⁴ An impact fee ordinance may also impose different impact fees on different types of land development³⁵ or delineate geographically defined zones within the municipality and impose impact fees on land development in a zone that differ from impact fees imposed on land development in other zones within the municipality. If a community elects to delineate different zones, the public facilities needs assessment must explicitly identify the differences, such as land development or the need for those public facilities, which justify the differences between zones in the amount of impact fees imposed.³⁶ The ordinance must provide for an exemption from, or a reduction in the amount of impact fees on land development that provides low-cost housing. No amount of an impact fee that is exempted or reduced for low-cost housing, however, may be shifted to any other land development in the municipality.³⁷

Payment. Impact fees shall be payable by the developer or the property owner upon the issuance of a building permit.³⁸ Under the original law, the impact fee could be collected before the issuance of a building permit or other required approval. 2005 Wisconsin Act 477 eliminated this flexibility and provided that impact fees could be collected within 14 days of the issuance of a building permit or within 14 days of the issuance of an occupancy permit by the municipality. 2007 Wisconsin Act 44 eliminated the option of local governments to also collect impact fees within 14 days of the issuance of an occupancy permit. It also eliminated the “within 14 days” provision and simply requires payment upon issuance of the building permit. 2017 Wis. Act 243 added the provision that if the total amount of impact fees due for a development will be more than \$75,000, a developer may defer payment of the impact fees for a period of 4 years from the date of the issuance of the building permit or until 6 months before the municipality incurs the costs to construct, expand, or improve the public facilities related to the development for which the fee was imposed, whichever is earlier. If the developer elects to defer payment, the developer shall maintain in force a bond or irrevocable letter of credit in the amount of the unpaid fees executed in the name of the municipality. A developer may not defer payment of impact fees for projects that have been previously approved.

2017 Wisconsin Act 243 created section 66.0617(7r) of the Statutes that requires that a municipality must provide the developer who paid the fee with an accounting of how the fee will be spent.

Revenues from each impact fee that is imposed must be placed in a separate segregated, interest bearing account and shall be accounted for separately from the other funds of the municipality. The fees may only be expended for the particular capital cost for which the fee was

³⁴ Wis. Stat. § 66.0617(10).

³⁵ Wis. Stat. § 66.0617(5)(a).

³⁶ Wis. Stat. § 66.0617(5)(b).

³⁷ Wis. Stat. § 66.0617(7).

³⁸ Wis. Stat. § 66.0617(6)(g).

imposed.³⁹ 2005 Wisconsin Act 477 changed this section to require that revenue from each impact fee be placed in a separate segregated account.

C. Land Divisions and Public Improvements

2009 Wisconsin Act 376 and 399 and 2013 Wisconsin Acts 272, 280 and 358 made numerous changes to Chapter 236 of the Wisconsin Statutes related to the platting process. The 2009 Wisconsin Acts are summarized by the Plat Review section of the Wisconsin Department of Administration in the document available at: [https://doa.wi.gov/DIR/2009 Wis Act 376 399-Platting Letter No 55.pdf](https://doa.wi.gov/DIR/2009%20Wis%20Act%20376%20399-Platting%20Letter%20No%2055.pdf) and the 2013 Acts are summarized in the document available at: [https://doa.wi.gov/DIR/Plat2014 Spring WI Platting Statute Changes.pdf](https://doa.wi.gov/DIR/Plat2014%20Spring%20WI%20Platting%20Statute%20Changes.pdf). The Acts revised deadlines for local government review and approval or denial of plats and certified survey maps (CSMs), and for recording of approved plats and CSMs and affect local government security requirements for improvements.

Of particular note, 2009 Act 376 required that a professional engineer, planner or other person designated to review plats for a local unit of government shall determine if a final plat “substantially conforms” to the preliminary plat. Act 376 also prohibits local ordinances from having more restrictive time limits, deadlines, notice requirements or being more restrictive in other provisions of ch. 236, Wis. Stats. that provide protections for the subdivider.

2009 Wisconsin Act 399 limited the extraterritorial plat review authority of cities and villages in response to the Wisconsin Supreme Court decision in *Wood v. City of Madison*.⁴⁰ The Act prohibits a city or village from denying a plat or CSM in its extraterritorial area unless the denial is based on an extraterritorial zoning ordinance.

2013 Wisconsin Act 272 authorizes local subdivision ordinances to specify a greater number of parcels into which certified survey maps (as opposed to plats) may subdivide land zoned for commercial, industrial, or mixed-use development. Prior law limited the use of certified survey maps to 4 or fewer parcels. It does not apply to land zoned for residential uses. In addition to adopting an ordinance to allow this (the law also allows the use of a resolution) the law requires that the local government have a planning agency, that the local government receives the recommendation of the planning agency and holds a public hearing before adopting the ordinance or resolution, and the ordinance or resolution must specify the maximum number of parcels into which land may be divided by certified survey map. The law also adds some additional requirements for review of certified survey maps if the local government allows for their use to divide more than four parcels.

2017 Wisconsin Act 243 made various changes relating to the requirements for land division approvals. The Act authorizes the division of more than 4 parcels by certified survey map for land that is zoned for multi-family use (prior law allowed such divisions only for land zoned commercial, industrial, or mixed-use).⁴¹

Act 243 also specifies that the estimated total cost to complete public improvements for a subdivision is to be determined by an initial estimate provided by the city, village, or town, if accepted by the subdivider. If the local government does not provide the estimate or if the

³⁹ Wis. Stat. § 66.0617(8).

⁴⁰ 260 Wis.2d 71, 659 N.W.2d 31 (2003).

⁴¹ Wis. Stat. § 236.34(1)(ar)1.

subdivider rejects the estimate, the subdivider's contractor may provide a bona fide bid. If the local government rejects the subdivider's bid, the local government will provide an estimate of the cost to complete the work in event of default. If that estimate exceeds the subdivider's bid by more than 10%, the estimated cost to complete public improvements will be an amount agreed upon by the subdivider's engineer and the local government's engineer.⁴² Act 243 defines "total cost to complete public improvements" to include the cost to make and install storm water facilities but does not include any fees charged by the city, village or town or any land disturbing activities that are necessary to achieve the desired subgrade for public improvements.⁴³

Act 243 authorizes a subdivider to provide any security required by a city, village, or town in the form of a performance bond, letter of credit, or combination of the two.⁴⁴ The amount of the security may need to be reduced upon substantial completion of the public improvements. Act 243 specifies that a project is considered to be substantially complete upon the installation of the asphalt or concrete binder coat course on roads to be dedicated or, if the required public improvements do not include a road to be dedicated, at the time that 90 percent of the public improvements by cost are completed.⁴⁵

Act 243 provides that local ordinances relating to the substantial completion of public improvements must be consistent with state law.⁴⁶ Upon substantial completion, any outstanding local building permits dependent upon substantial completion must be released.⁴⁷ In addition, upon a subdivider's request, a city, village, or town must issue a permit to commence construction of a foundation or any other noncombustible structure before substantial completion of a public improvement if all public improvements related to public safety are complete and the security requirement has been met. The subdivider may not commence work on a building until the local government issues a permit for the construction of the building.⁴⁸

Finally, Act 243 states that if a city, village, town, or county subdivision ordinance requires as a condition of approval that a subdivider dedicate land for a public park, the local government may offer a subdivider the option of dedicating land for a public park consistent with local park and comprehensive plans or paying a fee-in-lieu of dedicating land.⁴⁹ If the subdivider elects to pay a fee, the fee is payable by the landowner upon the issuance of a building permit. If the subdivider elects to dedicate land, unless the local government agrees otherwise, the subdivider only may dedicate land that is consistent with the local government's park plan and comprehensive plan.⁵⁰ Act 243 also states that if a city, village, town or county imposes a fee or other charge to fund the acquisition or initial improvement of land for public parks the fee must be enacted following the procedures for enacting impact fees.⁵¹

⁴² Wis. Stat. § 236.13 (2)(am)1d.

⁴³ Wis. Stat. § 236.13 (2)(ad)3. The Act defines "land disturbing activity" as "any man-made alteration of the land surface resulting in a change in the topography or existing vegetative or nonvegetative soil cover, that may result in runoff and lead to an increase in soil erosion and movement of sediment into waters of this state." Wis. Stat. § 236.13 (2)(ad)2.

⁴⁴ Wis. Stat. § 236.13 (2)(am)1m.

⁴⁵ Wis. Stat. § 236.13 (2) (a) 2. The Act defines "binder course" as "the non-surface-level course that is attached to the packed-level gravel course." Wis. Stat. § 236.13 (2)(ad)1.

⁴⁶ Wis. Stat. § 236.13 (2) (am) 3.a.

⁴⁷ Wis. Stat. § 236.13 (2) (am) 3.b.

⁴⁸ Wis. Stat. § 236.13 (2) (am) 3.c.

⁴⁹ Wis. Stat. § 236.45 (6) (c).

⁵⁰ Wis. Stat. § 236.45 (6) (c).

⁵¹ Wis. Stat. § 236.45 (6) (am).

A model land division ordinance updated in May 2018 incorporating all the legislative changes prepared by the Southeastern Wisconsin Regional Planning Commission is available at: http://www.sewrpc.org/SEWRPCFiles/CommunityAssistance/ModelOrdinances/land_division_ordinance.pdf.

D. Stormwater Fees

2017 Wis. Act 243 also amended section 66.0821 (4) (c) of the statutes to provide that for services rendered by a storm water and surface water sewerage system to users, the property served may be classified, taking into consideration the volume or peaking of storm water or surface water discharge that is caused by the area of impervious surfaces, topography, impervious surfaces and other surface characteristics, extent and reliability of mitigation or treatment measures available to service the property, apart from measures provided by the storm water and surface water sewerage system, and any other considerations that are reasonably relevant to a use made of the storm water and surface water sewerage system. The charges may also include standby charges to property not yet developed with significant impervious surfaces for which capacity has been made available in the storm water and surface water sewerage system. No additional charges, beyond those charged to similar properties, may be charged to a property for services rendered by a storm and surface water system for a property that continually retains 90 percent of the difference between the post-development and predevelopment runoff on site.

E. New Housing Fee Report

2017 Wisconsin Act 243 created a requirement that cities or villages with a population of 10,000 or more need to prepare a residential development fee report. The requirement is codified at Section 66.10014 of the Wisconsin Statutes. According to the Act 243, the report must be prepared by January 1, 2020.

The report must state if the city/village imposes any of the following fees on residential construction, remodeling, or development and the amount of the fee: (1) Building permit fee; (2) Impact fee; (3) Park fee; (4) Land dedication or fee in lieu of land dedication requirement; (5) Plat approval fee; (6) Storm water management fee; or (7) Water or sewer hook-up fee. The city or village must then add those fees together and report the total amount of those fees and then divide the total amount by the number of new residential dwelling units approved in the municipality in the prior year.

The city or village must then post the report on the local government's website on a web page dedicated solely to the report and titled "New Housing Fee Report." If a local government does not have a website, the county in which the local government is located shall post the report on its website on a web page dedicated solely to development fee information for the local government. If the report is not posted on the website, the local government may not charge the fee.⁵² The local government must also provide a copy of the report to each member of the city council or village board.

⁵² Wis. Stat. § 66.10014(4).

III. CHANGING THE RULES OF THE GAME: Development Moratoria, Vested Rights, Downzoning, and Nonconformities

A. Development Moratoria

In 2012, the Wisconsin Legislature passed a new law giving cities, villages, and towns express authority to adopt development moratoria under certain circumstances.⁵³ The law applies to communities that have adopted a comprehensive plan; are preparing a comprehensive plan; are preparing a “significant amendment” to its comprehensive plan; or are exempt from the consistency requirement. It is also limited to moratoria on rezonings and/ or land divisions.

The law outlines new procedures for adopting development moratoria. The governing body adopts resolution based on a report from a registered engineer or public health professional stating the moratorium is needed due to: a.) inadequate public facilities and/or b.) significant threat to public health/safety. Governing body then adopts an ordinance which: a.) describes justification for the moratorium; b.) describes geographic area of the moratorium; c.) provides exemption for activities not consistent with the reason for adopting the moratorium; d.) specifies length of time moratorium will be in effect and explains why that length of time was selected (it is limited to 12 months and may be extended once for an additional 6 months). The local government must hold a public hearing on the proposed moratorium ordinance providing at least 30 days notice of the hearing following detailed notice requirements outlined in the statute.

Prior to this enabling legislation for development moratoria, the only express enabling legislation for local governments related to development moratoria included “interim zoning” authority to freeze existing uses as a local government without zoning prepared a zoning ordinance and authority for a city to adopt an interim zoning ordinance to preserve existing uses as part of the extraterritorial zoning process.⁵⁴

2015 Wisconsin Act 391 added language to 59.69 (4) (intro.) expressly prohibiting counties from enacting a development moratorium, as defined in s. 66.1002 (1) (b). The prohibition does not apply to moratoria that are not a development moratorium (applies to rezonings and/or land divisions).

B. Vested Rights

“Vested rights” refers to the government's permission to develop property that cannot be taken back by a subsequent governmental act. A right vests time when a proposed development is protected from changes in local regulations, such as zoning, by the local governing body.

Beginning with 2009 Act 376, the Legislature added the requirement that l plats must comply with the local ordinance that was in effect when the plat was submitted. If an ordinance is revised after the plat is submitted, the new requirements can not be applied to the plat.

2013 Wisconsin Act 74 created section 66.10015 of the *Wisconsin Statutes* and is entitled “Limitation on development regulation authority.” Act 74 applies to cities, villages, towns, and

⁵³ Wis. Stat. § 66.1002 (created by 2011 Wis. Act 144). In 2012 the Legislature also passed 2011 Wis. Act 143 creating Wis. Stat. 66.1010 prohibiting local governments from enacting or enforcing an ordinance that places a moratorium on evicting tenants from residential or commercial properties.

⁵⁴ Wis. Stat. § 62.23(7a).

counties. Following Act 74, if a person submits an application for authorization for an activity related to a project⁵⁵ land development (building permit, zoning approval, driveway permit, stormwater permit, etc.), the local government shall approve, deny, or conditionally approve the application based solely on ordinances or other requirements of the local government that are in effect on the date that the local government receives the application, unless the applicant and the local government agree otherwise.

Once the application is received by the local government, the application cannot expire in less than 60 days unless all of the following apply: (1.) The application does not comply with form and content requirements; (2.) Not more than 10 working days after filing, the local government provides the applicant with written notice of the noncompliance (the notice shall specify the nature of the noncompliance and the date on which the application will expire if the noncompliance is not remedied); and (3.) The applicant fails to remedy the noncompliance before the date provided in the notice.

If a project requires more than one approval or approvals from more than one local government and the applicant identifies the full scope of the project at the time of filing the application for the first approval required for the project, the existing requirements applicable in each local government at the time of filing the application for the first approval required for the project shall be applicable to all subsequent approvals required for the project, unless the applicant and the local government agree otherwise.⁵⁶ 2017 Wisconsin Act 68 clarified this language so it applies to projects requiring more than one approval or approvals from one or more local governments.

Expiration dates on approvals. 2013 Wisconsin Act 74 provided that it did not prohibit a local government from establishing an expiration date on an approval. This language was modified by 2017 Wisconsin Act 243. Act 243 created section 66.10015 (5) of the Statutes entitled “Expiration dates.” Under Act 243, a local government may not establish an expiration date for an approval related to a planned development district of less than 5 years after the date of the last approval required for completion of the project. (Planned development districts are flexible zoning devices that often involve multiple approvals by a local government.) Act 243 states that the section does not prohibit a local government from establishing timelines for completion of work related to an approval.

C. Downzoning

2015 Wisconsin Act 391 amended 66.10015 by placing limitation on downzoning. The title of the section was changed to reflect the change: “Limitation on development regulation authority and down zoning.” “Down zoning” deals with vested rights and is defined in Act 391 as “a zoning ordinance that affects an area of land in one of the following ways: (1.) By decreasing the development density of the land to be less dense than was allowed under its previous usage; (2.) By reducing the permitted uses of the land, that are specified in a zoning ordinance or other land use regulation, to fewer uses than were allowed under its previous usage.”⁵⁷

⁵⁵ Act 74 used the term “land development.” 2015 Wisconsin Act 391 replaced this term with “a project.” A “project” was defined in Act 74 as “a specific and identifiable land development that occurs on defined and adjacent parcels of land, which includes lands separated by roads, waterways, and easements.”

⁵⁶ Act 74 also includes an exception for regulations relating to solar and wind energy systems under Wis. Stat. § 66.0401.

⁵⁷ Wis. Stat. § 66.10015 (1) (as).

Under Act 391, a local government may enact a down zoning ordinance only if the ordinance is approved by at least two-thirds of the members of the elected governing body, except that if the down zoning ordinance is requested, or agreed to, by the person who owns the land affected by the proposed ordinance, the ordinance may be enacted by a simple majority of the members of the governing body.

D. Nonconforming Uses and Structures

2011 Wisconsin Act 170 amended the nonconforming use section of the general zoning enabling statutes for counties, cities, villages, and towns. Nonconformities arise when local governments amend the applicable zoning ordinance so existing development no longer conforms to the requirements of the amended zoning ordinance. Wisconsin's general zoning enabling statutes for counties, cities, villages, and towns have always focused on nonconforming *uses* of structures and specified that local zoning ordinances *may not prohibit the use* of buildings existing at the time a new zoning ordinance is adopted even though the use does not conform to the provisions of the new ordinance. While these uses can continue, the statutes have always placed limitations on the expansion, repair, and alteration of these buildings. Act 170 removes these limitations as they apply to nonconforming *structures*.

Act 170 amended the general zoning enabling statutes to introduce statutory definitions for "nonconforming use" and "nonconforming structure." Prior to this, these terms were not defined in the statutes. The Act defines a "nonconforming use" as "a use of land, a dwelling, or a building that existed before the current zoning ordinance was enacted or amended, but does not conform with the use restrictions in the current ordinance." The Act defines "nonconforming structure" as "a dwelling or other building that existed lawfully before the current zoning ordinance was enacted, but does not conform with one or more of the development regulations in the current zoning ordinance." The term "development regulations" means "the parts of a zoning ordinance that applies to elements including setback, height, lot coverage, and side yard."

These definitions build on the historic distinctions between the concepts of nonconforming use and nonconforming structures. While the general zoning enabling statutes only explicitly applied to nonconforming *uses* of buildings, local zoning ordinances expanded the protections to other types of nonconformities such as nonconforming structures and lots. Act 170 impacts how local governments can regulate nonconforming structures.

No Cost-Based Limitations for Nonconforming Structures. Based on these definitions distinguishing between nonconforming uses and structures, Act 170 states that zoning ordinances "may not prohibit, or limit based on cost, the repair, maintenance, renovation, or remodeling of a nonconforming *structure*." The prohibition on cost-based limitations on the repair of nonconforming structures relates to the provision in the Wisconsin Statutes sometimes referred to as the "50 percent rule." Under the Wisconsin zoning enabling statutes followed by *cities, villages, and towns with general zoning ordinances through village powers*, the total structural repairs or alterations of the nonconforming use of a building shall not during the life of the building exceed 50 percent of the assessed value of the building unless it is permanently changed to a conforming use. Act 170 eliminates the application of the 50 percent rule to nonconforming *structures*. However, the 50 percent rule still applies to nonconforming *uses*.

The general zoning enabling authority for *counties* also includes the 50 percent rule though the statutory wording is different. While the language for cities, villages, and towns

exercising zoning through village powers states that repairs or alterations “*shall not*” exceed 50 percent of assessed value, the county zoning enabling statutes state that “the alteration of, or addition to, or repair in excess of 50% of its assessed value of any existing building, premises, structure or fixture for the purpose of carrying on any prohibited trade or new industry within the district where such buildings, premises, structures, or fixtures are located, *may* be prohibited.” (Emphasis added.) A 1997 Opinion of the Wisconsin Attorney General interpreted the use of the term “*may*” as giving counties the discretion as to whether they use the 50 percent rule or not.⁵⁸ As a result, not all counties use the 50 percent rule. The impact of 2011 Wisconsin Act 170 on county zoning will therefore vary depending on whether the county followed the 50 percent rule or not.

2015 Wisconsin Act 223 amended Section 62.23(7)(hc)1. (intro.) of the Statutes to add that cities, villages, and towns zoning under village powers cannot prohibit the replacement of a nonconforming structure if the structure will be replaced at the size, location, and use that it had immediately before the damage or destruction occurred.

2017 Wisconsin Act 67 amended sections 59.69(10e)(b) (for counties) and 60.61(5e)(b) of the Wisconsin Statutes (for towns exercising zoning in counties with no county zoning ordinance) to state that a zoning ordinance cannot require a variance for the repair, maintenance, renovation, rebuilding, or remodeling of a nonconforming structure or any part of a nonconforming structure. The language does not apply to cities, villages, towns exercising zoning with village powers.

E. Nonconforming Structures and Lots Under Shoreland Zoning

2011 Wisconsin Act 170 also amends the statutes related to county shoreland zoning to prohibit counties, cities, and villages from enacting shoreland zoning provisions regulating nonconforming structures that are more restrictive than the provisions adopted by the Wisconsin Department of Natural Resources for nonconforming structures or for the construction of structures on substandard lots contained in Ch. NR 115, Wis. Adm. Code.

2017 Wisconsin Act 68 applies to nonconforming structures in the 75 foot shoreland setback area or if it was placed pursuant to a variance granted before July 13, 2015, a county generally cannot prohibit the landowner from maintaining, repairing, replacing, restoring, rebuilding, or remodeling the structure under its shoreland zoning ordinance, if the activity does not expand the structure’s original footprint. The Act also prohibits state and county regulation of the maintenance, repair, replacement, restoration, rebuilding, or remodeling of structures for which the county and state did not bring an enforcement action for at least 10 years after the structure was constructed.

F. Nonconforming Uses: Manufactured Home Communities

2013 Wisconsin Act 347 added protections for licensed manufactured home communities. Act 347 added section 62.23(7)(ham) to the Wisconsin Statutes which provides that a manufactured home community that is a legal nonconforming use continues to be a legal nonconforming use notwithstanding the repair or replacement of homes or infrastructure within the community. 2015 Wisconsin Act 223 added this same language to the county zoning enabling law found at section 59.69(10) of the Wisconsin Statutes.

⁵⁸ Op. Atty. Gen. 2-97 (1997).

G. Nonconforming Uses: Shooting ranges

2013 Wisconsin Act 35 amends Wis. Stat. 895.527(4) to change the date from June 18, 2010 to July 16, 2013 to allow sport shooting ranges to continue its operation notwithstanding zoning ordinances, if at that time the operation was a legal use or a legal nonconforming use. 2013 Wis. Act 202 relates to liability and immunity of sport shooting ranges.

H. Nonconforming Outdoor Advising Signs

2017 Wisconsin Act 320 specifies that certain types of signs, including directional and other official signs, business area signs, and signs located in urban areas outside the adjacent area, that were lawfully erected but that no longer conform to applicable requirements are declared nonconforming upon notice from the Wisconsin Department of Transportation to the sign owner by registered mail. Such a sign must remain substantially the same as it was on the date it became nonconforming. Nonconforming signs covered by the Act are not subject to removal unless a substantial change is made to the sign or the sign is destroyed,

I. Substandard Lots

2017 Wisconsin Act 67 amended 66.10015 of the *Wisconsin Statutes* to add new sections affecting how state and local regulations affect substandard lots. Act 67 defines a “substandard lot” as “A legally created lot or parcel that met any applicable lot size requirements when it was created, but does not meet current lot size requirements.”⁵⁹ Some local governments refer to substandard lots as “nonconforming lots.”

Act 67 prohibits cities, villages, towns, and counties from enacting or enforcing ordinances or taking any other action that prohibits a property owner from conveying an ownership interest in a substandard lot or from using a substandard lot as a building site if the substandard lot does not have any structures placed partly upon an adjacent lot *and* the substandard lot is developed to comply with all other ordinances of the political subdivision.⁶⁰

Act 67 also prohibits cities, villages, towns, counties, and state agencies from enacting or enforcing any ordinance or administrative rule or taking any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged.⁶¹

A model ordinance addressing the statutory changes for Nonconforming Use, Structures, and Lots prepared by the Southeastern Wisconsin regional Planning Commission is available at: <http://www.sewrpc.org/SEWRPCFiles/CommunityAssistance/ModelOrdinances/ZoningGuideNonconforminguse-structuresection.pdf>.

⁵⁹ Wis. Stat. § 66.10015(1)(e).

⁶⁰ Wis. Stat. § 66.10015(2)(e).

⁶¹ Wis. Stat. § 66.10015(4).

IV. PLANNING

A. Comprehensive Planning

1999 Wisconsin Act 9 established the current framework for comprehensive planning by cities, villages, towns, counties, and regional planning commissions. The law established that if a local government engaged in certain actions, those actions needed to be consistent with a comprehensive plan that included the following elements: Issues and Opportunities; Housing; Transportation; Utilities and Community Facilities; Agricultural, Natural and Cultural Resources; Economic Development; Intergovernmental Cooperation; Land Use; and Implementation. Act 9 also included a requirement that cities and villages with a population of 12,500 needed to have a traditional neighborhood development ordinance based on a model ordinance developed by the University of Wisconsin Extension. The comprehensive planning law has been amended several times since 1999. Several of these amendments are discussed below.

2009 Wisconsin Act 372 attempts to clarify the legal status of the comprehensive plan. It states that a comprehensive plan is “a guide to the physical, social, and economic development of a local governmental unit” and that “[t]he enactment of a comprehensive plan by ordinance does not make the comprehensive plan by itself a regulation.” This new language does not diminish the role of the comprehensive plan. The comprehensive plan is the official statement of local government policy regarding the physical, social, and economic development of that community. However, the comprehensive plan is not a self-implementing document. It is implemented through other decisions made by the community following the guidance provided in the plan.

The requirement to adopt a comprehensive plan by ordinance has been a source of confusion. Some people think that since the comprehensive plan is adopted by ordinance, a local government can directly regulate land use based on the comprehensive plan alone -- that they do not need to adopt a zoning ordinance. Act 372 attempts to clarify that adopting a comprehensive plan is only one step in the process and local communities still need to take additional steps, such as adopting *other* ordinances, to actually carry out the plan. Any “regulatory” effect of the comprehensive plan comes through these other actions.

In some cases, the decision to follow the policy guidance of a local comprehensive plan is exclusively that of the local community. For example, a local government decides that the priority for local road improvement projects will be based on a schedule outlined in their local comprehensive plan. State law does not dictate that local communities do this, but a local community may decide to follow its comprehensive plan for determining roadway improvements.

In other cases, however, state law **requires** that local communities follow the guidance provided in their local comprehensive plan. The requirement in section 66.1001(3) that the adoption and amendment of local zoning, subdivision, and official mapping ordinances must be consistent with a local comprehensive plan is one such requirement. The requirement that the plan for a proposed tax increment financing district be in “conformity” with a local comprehensive plan, is another example.⁶²

As a general policy guide, Act 372 also attempts to clarify that state law does not require that local communities include every detail in their comprehensive plan that will also appear in their local ordinances. Again, as a matter of local discretion, a community might want to include

⁶² See Wis. Stat. § 66.1105(4)(g) for cities and villages and Wis. Stat. § 60.85(3)(g) for towns.

such details in their comprehensive plan. Act 372 attempts to clarify that state law **does not require** that local comprehensive plans include this detail.

Clarifications to the Consistency Requirement. 2009 Wisconsin Act 372 clarified the consistency requirement by stating that “consistent with” means “furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan.” This change incorporates the Wisconsin Supreme Court’s definition of “consistent” from the *Lake City Corp. v. City of Mequon*⁶³ case. While this case predates the 1999 comprehensive planning law, the case discusses the interpretation of an older consistency requirement in the Wisconsin Statutes and provides helpful guidance for the future. According to the Supreme Court in the *Lake City* case, “consistent” means “not contradictory.”

This definition gives discretion to local governments for how they interpret their local comprehensive plans. Local governments need to judge whether a proposed zoning ordinance contradicts the policies of the comprehensive plan. This definition attempts to clarify that state law does not mandate through the consistency requirement that all the detailed standards that are ultimately found in a local zoning ordinance also first need to be detailed in the local comprehensive plan.

While this definition only references the “objectives, goals, and policies” identified in the comprehensive plan, it is not intended to totally ignore other things included in the comprehensive plan like specific programs and the future land use map. Programs in the comprehensive plan are supposed to be action steps that local communities plan to undertake to implement the objectives, goals, and policies of the comprehensive plan. The future land use map is supposed to be a graphic representation of the objectives, goals and policies of the community. The future land use map and programs identified in the comprehensive plan can therefore be helpful in determining whether a proposed ordinance is consistent with a comprehensive plan.

Act 372 also clarified that only ordinances enacted or amended after January 1, 2010, need to be consistent with a local comprehensive plan. Prior to the passage of Act 372, section 66.1001(3) of the Wisconsin Statutes stated that “[b]eginning on January 1, 2010, if a local unit of government engages in any of the following actions, those actions shall be consistent with that local governmental unit’s comprehensive plan.” While the original law included a long list of “programs and actions” that needed to be consistent with a local comprehensive plan, that list was amended by 2003 Wisconsin Act 233 to include only official maps, local subdivision regulations, general zoning ordinances, and shoreland/wetland zoning. However, the statutes did not use the same language for the various “actions” that needed to be consistent with the local comprehensive plan. For example, the statutes referred to official maps “established or amended” under state law and referred to general zoning ordinances “enacted or amended” under the various local zoning enabling laws. The statutes did not include similar qualifying language for “local subdivision regulation” or “zoning of shorelands or wetlands”.

Act 372 removed the term “actions” and adds the “enacted or amended” language originally used for general zoning ordinances to the references for official mapping, local subdivision ordinances, and shoreland/wetland zoning ordinances. This change clarifies that only the enactment or amendment of general zoning ordinances, official mapping ordinances, subdivision ordinances, and shoreland/wetland zoning ordinances need to be consistent with the local comprehensive plan.

⁶³ 207 Wis.2d 155, 558 N.W.2d 144 (1985).

In addition, Act 372 clarified that only zoning, official mapping, and subdivision ordinances enacted or amended *after January 1, 2010*, need to be consistent with the local government's comprehensive plan. The Implementation Element of the comprehensive plan expressly requires that local comprehensive plans include the stated sequence for "proposed changes to any applicable zoning ordinances, official maps, or subdivision ordinances to implement the objectives, policies, plans and programs" identified in the local comprehensive plan. Act 372 confirms that the day after a local government adopts a comprehensive plan, state law does not require that local governments need to change their ordinances so they are immediately consistent with the comprehensive plan. As ordinances are revised, updated, or otherwise amended following the stated sequence articulated in the Implementation Element, communities need to ensure those changes are consistent with their local comprehensive plan. Since planning is oriented to the future, only future ordinance changes need to be evaluated for consistency with the comprehensive plan.

Finally, Act 372 repealed the language in section 236.13(1)(c) of the Wisconsin Statutes that stated that approval of a subdivision plat shall be conditioned upon compliance with a city, village, town, or county comprehensive plan. The intent behind the removal of this other consistency requirement was that it was redundant with the requirement in section 66.1001(3) of the Wisconsin Statutes that subdivision regulations must be consistent with the local comprehensive plan. The repeal of this section is not intended to diminish the role of the comprehensive plan when reviewing proposed subdivisions and local subdivision ordinances should require that proposed plats be consistent with the local comprehensive plan.

2015 Wisconsin Act 391 created Section 66.1001(2m)(b) of the *Wisconsin Statutes* that 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 affect of the 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 state 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. Section 47 of Act 391 confirms the intent of the new language. Section 47 states that the new language first applies to conditional use permits that were in effect on the effective date of the Act. Nothing in the law states that local ordinances requiring consistency with the comprehensive plan are unenforceable as in the case of other recent laws limiting local authority.

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;⁶⁴ construction site erosion control and storm water management ordinances must “accord and be consistent with any comprehensive zoning plan;”⁶⁵ architectural conservancy districts, business improvement districts, and neighborhood improvement districts must have a “relationship” to the comprehensive plan;⁶⁶ urban redevelopment plans must be “in accord” with the comprehensive plan;⁶⁷ and public school facilities funded by bonds issued by redevelopment authorities in first class cities must be “consistent” with the city’s comprehensive plan.⁶⁸ Comprehensive plans also help establish the basis to include non-housing facilities for certain programs funded by the Wisconsin Housing and Economic Development Authority;⁶⁹ establish street widths in cities and villages;⁷⁰ help determine the appropriate location for medical waste incinerators;⁷¹ or authorize the rezoning of registered lands for nonmetallic mineral extraction operations.⁷²

In addition cooperative boundary agreement plans “shall describe how it is consistent with each participating municipalities’ comprehensive plan;”⁷³ 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”⁷⁴ and the farmland preservation plan must be “consistent with the comprehensive plan.”⁷⁵ 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”⁷⁶

B. Housing Affordability Reports.

2017 Wisconsin Act 243 requires that before January 1, 2020, cities and villages with a population of 10,000 or more must prepare a report of the municipality’s implementation of the housing element of the municipality’s comprehensive plan. The municipality shall update the report annually, not later than January 31. The municipality must post the report on the

⁶⁴ Wis. Stat. §§ 66.1105(4)(g) for cities and villages and 60.85(3)(g) for towns.

⁶⁵ Wis. 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.

⁶⁶ Wis. Stat. §§ 66.1007(1)(f)4; 66.1109(1)(f)4; and 66.1110(2)(d).

⁶⁷ Wis. Stat. § 66.1303(3)(b).

⁶⁸ Wis. Stat. § 66.1333(5r)(b)2.

⁶⁹ Wis. Stat. § 234.01(7).

⁷⁰ Wis. Stat. § 236.16(2).

⁷¹ Wis. Stat. § 285.63(10)(d)(6).

⁷² Wis. Stat. § 295.20(2)(b)1.

⁷³ Wis. 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).

⁷⁴ Wis. Stat. § 91.38(1)(f).

⁷⁵ Wis. Stat. § 91.10(1)(f).

⁷⁶ Wis. Stat. § 66.0401(4)(f)2.

municipality's web site on a page dedicated solely to the report titled "Housing Affordability Analysis." Act 243 requires that the report contain the following information:

- (a) The number of subdivision plats, certified survey maps, condominium plats, and building permit applications approved in the prior year;
- (b) The total number of new residential dwelling units proposed in all subdivision plats, certified survey maps, condominium plats, and building permit applications that were approved by the municipality in the prior year;
- (c) A list and map of undeveloped parcels in the municipality that are zoned for residential development;
- (d) A list of all undeveloped parcels in the municipality that are suitable for, but not zoned for, residential development, including vacant sites and sites that have potential for redevelopment, and a description of the zoning requirements and availability of public facilities and services for each property;
- (e) An analysis of the municipality's residential development regulations, such as land use controls, site improvement requirements, fees and land dedication requirements, and permit procedures. The analysis shall calculate the financial impact that each regulation has on the cost of each new subdivision. The analysis shall identify ways in which the municipality can modify its construction and development regulations, lot sizes, approval processes, and related fees to meet existing and forecasted housing demand and reduce the time and cost necessary to approve and develop a new residential subdivision in the municipality by 20 percent.

C. Cooperative Boundary Agreement Plans

In 1991 Wisconsin Act 269, the Wisconsin Legislature created the cooperative boundary agreement law to encourage intergovernmental cooperation regarding annexations of territory that often result in conflict. The law included a planning requirement as part of the agreement. Following the passage of the local comprehensive planning law, the Joint Legislative Council's Special Committee on Municipal Annexation developed a legislative proposal that became 2007 Wisconsin Act 43. Act 43 streamlined and simplified the cooperative boundary agreement process by reducing minimum statutory waiting periods and permitting the current detailed planning requirements to be substituted by a community's comprehensive plan. Act 43 also made other changes to the cooperative boundary agreement process and encouraged alternative dispute resolution for resolving municipal boundary disputes.

2017 Wisconsin Act 59 made some minor changes to the plans required for cooperative boundary agreements. The Act added that the plans must identify all highways within the territory covered by the plan of which each participating municipality has jurisdiction.⁷⁷ In addition, the Act added the need to identify responsibility for road maintenance as one of the binding elements of a cooperative plan.⁷⁸

⁷⁷ Wis. Stat. § 66.0307 (3) (d) 4m.

⁷⁸ Wis. Stat. § 66.0307 (6).

V. DISCRETIONARY APPROVALS: Conditional Use Permits and Variances

A. Conditional Use Permits

2017 Wisconsin Act 67 adds new sections to the *Wisconsin Statutes* governing the issuance of conditional use permits to the general zoning enabling laws for cities, villages, towns, and counties.⁷⁹ Until the addition of these sections, the general zoning enabling statutes did not include the term “conditional use permit” nor provide any guidance for the issuance of conditional use permits. Rather, the law governing conditional use permits was based on court decisions. Act 67 attempts to codify some of the case law related to conditional use permits and limit local government discretion related to the issuance of conditional use permits.

The new law adds the following definition of “conditional use” to the Statutes: “‘Conditional use’ means a use allowed under a conditional use permit, special exception, or other zoning permission issued by a [city, village, town, county] but does not include a variance.”

Act 67 also includes the following definition of “substantial evidence,” a term used in several places in the Act: “‘Substantial evidence’ means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.” This language softens the language of earlier versions of the bill that stated substantial evidence did not include “public comment that is based solely on personal opinion, uncorroborated hearsay, or speculation.” Public comment that provides reasonable facts and information related to the conditions of the permit is accepted under Act 67 as evidence.

Act 67 then provides that “if an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the [city, village, town, county] ordinance or imposed by the [city, village, town, county] zoning board, the [city, village, town, county] shall grant the conditional use permit.” The use of the term “zoning board,” however, is at odds with current Wisconsin law that allows the governing body, the plan commission, or the zoning board of adjustment/appeals to grant conditional uses. This “zoning board” terminology may lead to some confusion.

Act 67 also provides that the conditions imposed “must be related to the purpose of the ordinance and be based on substantial evidence” and “must be reasonable and to the extent practicable, measurable” This new statutory language emphasizes the importance of having clear purpose statements in the zoning ordinance. In addition, since local comprehensive plans can help articulate the purpose of ordinances that implement the plan, local governments should consider including a requirement that the proposed conditional use furthers and does not conflict with the local comprehensive plan.

Act 67 states that permits “may include conditions such as the permit’s duration, transfer, or renewal.” In the past, sometimes there was confusion about whether local governments had the authority to place a time limit on the duration of a conditional use permit. This new statutory language clarifies that local governments have that authority.

⁷⁹ Act 67 creates Wis. Stat. § 62.23(7)(de) for cities, villages, and towns exercising zoning under village powers, Wis. Stat. § 60.61(4e) for towns exercising zoning without village powers, and Wis. Stat. § 59.69(5e) for counties.

Next, Act 67 provides that the applicant must present substantial evidence “that the application and all requirements and conditions established by the [city, village, town, county] relating to the conditional use are or shall be satisfied.” The city, village, town or county’s “decision to approve or deny the permit must be supported by substantial evidence.”

Under the new law, a local government must hold a public hearing on a conditional use permit application, following publication of a class 2 notice. If a local government denies an application for a conditional use, the applicant may appeal the decision to circuit court. The conditional use permit can be revoked if the applicant does not follow the conditions imposed in the permit.

B. Variances

2017 Wisconsin Act 67 amends the zoning enabling law for counties, cities, villages, and towns zoning under village powers to provide a statutory definition for “area variances” and “use variances.” Act 67 defines an “area variance” as “a modification to a dimensional, physical, or locational requirement such as the setback, frontage, height, bulk, or density restriction for a structure that is granted by the board of [adjustment/appeals] under this subsection. The Act defines “use variance” as “an authorization by the board of [adjustment/appeals] under this subsection for the use of land for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance.”⁸⁰

Act 67 then specifies that the property owner bears the burden of proving “unnecessary hardship” for an area variance, by demonstrating that strict compliance with a zoning ordinance would unreasonably prevent the property owner from using the property owner’s property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome or, for a use variance, by demonstrating that strict compliance with the zoning ordinance would leave the property owner with no reasonable use of the property in the absence of a variance. In all circumstances, a property owner bears the burden of proving that the unnecessary hardship is based on conditions unique to the property, rather than considerations personal to the property owner, and that the unnecessary hardship was not created by the property owner.⁸¹

⁸⁰ Wis. Stat. § 59.694(7)(c)1 (counties); Wis. Stat. § 62.23(7)(e)7.a. (cities, villages, town zoning with village powers).

⁸¹ Wis. Stat. § 59.694(7)(c)3; Wis. Stat. § 62.23(7)(e)7.D.

VI. PROPERTY MANAGEMENT

A. Rental Properties

Beginning with 2011 Wisconsin Act 108, the Wisconsin Legislature has enacted several laws that prohibit cities, villages, towns, and counties from enacting or enforcing ordinances that place certain limits or requirements on a landlord. Act 108 created section 66.0104 of the Statutes to prohibit ordinances that prohibit a landlord for obtaining certain information about prospective tenants.⁸² Act 108 also prohibited local ordinances that placed requirements on residential landlords related to security deposits and inspections.⁸³

2013 Wisconsin Act 76 added provisions prohibiting local ordinances that limit a residential landlord's right to recover for damages to a property from a tenant.⁸⁴ Act 76 also prohibits a local government from enacting an ordinance that requires landlords to communicate certain information to tenants.⁸⁵

2015 Wisconsin Act 176 added provisions prohibiting local governments from enacting or enforcing a local ordinance that requires rental inspections except upon a complaint, as part of a program of regularly scheduled inspections conducted in compliance with a warrant, or as required under state or federal law.⁸⁶ Act 176 also limited the fees that could be charged for inspections and reinspections⁸⁷ and prohibits local governments from imposing an occupancy or transfer of tenancy fee on a rental unit.⁸⁸ Finally Act 176 prohibits local ordinances that require a rental property be certified, registered, or licensed.⁸⁹ Act 176, however, does allow a local government to require that a rental unit be registered if the registration consists only of providing the name of the owner and an authorized contact person and an address and telephone number at which the contact person may be contacted.⁹⁰

2017 Wisconsin Act 317 allows a local government to establish a rental property inspection program for limited purposes. Under Act 317, the local governing body may designate districts in which there is evidence of blight, high rates of building code complaints or violations, deteriorating property values, or increases in single-family home conversions to rental units. A local government may require periodic inspection of a rental property located in a designated district. If no habitability violation is discovered during an inspection or if a habitability violation is corrected within a period of not less than 30 days, the local government may not perform an inspection of the property for at least 5 years. If a habitability violation is not corrected within the period established by the local government, the local government may require annual inspections of the rental property. If no habitability violation is discovered during 2 consecutive annual program inspections, the local government may not perform a program inspection of the property for at least 5 years. No rental property or unit that is less than 8 years old may be inspected. No inspection of a rental unit may be conducted if the occupant of the unit does not

⁸² Wis. Stat. § 66.0104(1).

⁸³ Wis. Stat. § 66.0104(2).

⁸⁴ Wis. Stat. § 66.0104(2)(c).

⁸⁵ Wis. Stat. § 66.0104(2)(d).

⁸⁶ Wis. Stat. § 66.0104(2)(e)1.

⁸⁷ Wis. Stat. § 66.0104(2)(e)2.

⁸⁸ Wis. Stat. § 66.0104(2)(f).

⁸⁹ Wis. Stat. § 66.0104(2)(e)4. See also Wis. Stat. § 66.0104(2)(g).

⁹⁰ *Id.*

consent to allow access unless the inspection is under a special inspection warrant.

Finally, Act 317 restricts the regulation of abatement. The Act provides that an ordinance enacted by a city, town, village, or county regulating abatement of rent shall permit abatement only for conditions that materially affect the health or safety of the tenant or substantially affect the use and occupancy of the premises.

B. Inspections

2017 Wisconsin Act 243 also requires that if a local government employs a building inspector to enforce its zoning ordinance or other ordinances related to building, and a developer requests the building inspector to perform an inspection that is part of the inspector's duties, the inspector must complete the inspection not later than 14 business days after the building inspector receives the request for an inspection. If a building inspector does not complete a requested inspection, the developer may request a state building inspector to provide the requested inspection. If a developer provides a local government with a certificate of inspection from a state building inspector which meets the requirements of the inspection that was supposed to be provided by the local building inspector, the local government must accept the certificate provided by the state building inspector as if it had been provided by the local government's building inspector.

2017 Wisconsin Act 317 prohibits cities, villages, and towns from enacting or enforcing an ordinance or imposing any requirement that includes aesthetic considerations for purposes of inspection criteria for the interior of any structure or part of a structure that is used or intended to be used as a home, residence, or sleeping place.⁹¹ The Act defines "aesthetic considerations" as "considerations relating to color and texture and design considerations that do not relate to health or safety."⁹²

C. Property Maintenance Fees

2017 Wisconsin Act 317 prohibits a local government from imposing a fee related to enforcing a local ordinance related to noxious weeds, electronic waste, or other building or property maintenance standards unless the political subdivision first notifies the person against whom the fee or charge is to be imposed that the fee or charge may be imposed. This does not apply to a fee related to the clearing of snow or ice from a sidewalk or to an ordinance violation that creates an immediate danger to public health, safety, or welfare.⁹³

D. Real Estate Transactions

2015 Wisconsin Act 391 prohibits cities, villages, towns and counties from prohibiting or unreasonably restricting a real property owner from alienating any interest in real property.⁹⁴

2015 Wisconsin Act 55 prohibited cities, villages, towns and counties from restricting the ability of an owner of real property to sell or otherwise transfer title to or refinance the property by requiring the owner or an agent of the owner to take certain actions with respect to the

⁹¹ Wis. Stat. § 101.02 (7w)(b).

⁹² Wis. Stat. § 101.02 (7w)(a).

⁹³ Wis. Stat. § 66.0628 (2m).

⁹⁴ Wis. Stat. § 700.28(2).

property or pay a related fee, to show compliance with taking certain actions with respect to the property, or to pay a fee for failing to take certain actions with respect to the property at certain times. 2015 Wisconsin Act 176 and 2015 Wisconsin Act 391 added to the prohibition on local time of sale provisions to prohibit local governments from restricting the ability of a person to purchase or take title to real property by requiring the person or an agent of the person to take certain actions with respect to the property or pay a related fee, to show compliance with taking certain actions with respect to the property, or to pay a fee for failing to take certain actions with respect to the property, at certain times and prohibit local governments from restricting the ability of a purchaser of or transferee of title to residential real property to take occupancy of the property by requiring the purchaser or transferee or an agent of the purchaser or transferee to take certain actions with respect to the property or pay a related fee, to show compliance with taking certain actions with respect to the property, or to pay a fee for failing to take certain actions with respect to the property, at certain times.⁹⁵

A local government, however, is not prohibited from requiring a real property owner or the owner's agent to take certain actions with respect to the property not in connection with the purchase, sale, or refinancing of, or the transfer of title to, the property or from enforcing a federal or state requirement that does any of the things a local governmental unit is prohibited from doing.⁹⁶

E. Building Codes

2013 Wisconsin Act 270 created a state “Building Code Council” and limits municipal authority to enact ordinances that establish minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment unless the ordinance strictly conforms to the State Commercial Building Code unless an exception applies.

2015 Wisconsin Act 176 repealed the exception in section 101.02 (7m) of the Wisconsin Statutes that allowed cities, villages, and towns to enforce preexisting automatic sprinkler ordinances that were more restrictive than required under the state multifamily dwelling code.

2017 Wisconsin Act 243 also prohibits cities, villages, towns, and counties from enacting or enforcing an ordinance that applies to a dwelling and is more restrictive than the state Uniform Dwelling Code or that is contrary to an order of the Department of Safety and Professional Services (DSPS) with respect to the enforcement of the Uniform Dwelling Code.⁹⁷

F. Short-term Rentals

2017 Wisconsin Act 59 created Wis. Stats sec. 66.1014 prohibiting local governments from enacting an ordinance prohibiting the rental of a residential dwelling for 7 consecutive days or longer. A local government may limit the total number of days within any consecutive 365 day period that a dwelling may be rented to no fewer than 180 days, if a residential dwelling is rented for periods of more than six but fewer than 29 consecutive days. A local government cannot specify the period of time during which the residential dwelling may be rented, but it may require that the maximum number of allowable rental days within a 365-day period must run consecutively. Act 59 requires persons who rent their residential dwelling to notify the local

⁹⁵ Wis. Stat. § 706.22 (2) (a) 3m.

⁹⁶ Wis. Stat. § 706.22 (2) (b) (intro.).

⁹⁷ Wis. Stat. § 101.65 (1c)

clerk in writing when the first rental within a 365 day period begins.

Act 59 also requires any person who maintains, manages, or operates a short-term rental for more than 10 nights each year, to: (a) obtain from the Department of Agriculture, Trade and Consumer Protection a license as a tourist rooming house, as defined in s. 97.01(15k), and (b) obtain from a municipality a license for conducting such activities, if the local government has enacted an ordinance requiring such a person to obtain a license. Act 59 specifies that if a local government has in effect an ordinance that is inconsistent with this provision, the ordinance would not apply and could not be enforced.

Finally, Act 59 adds language to the room tax law, Wis. Stats. Sec. 66.0615, making it clear that a municipality may impose the tax on lodging marketplaces (e.g., Airbnb) and owners of short-term rentals. A lodging marketplace must register with the Department of Revenue (DOR) for a license to collect taxes imposed by the state related to a short-term rental and to collect room taxes imposed by a local government. Once licensed, if a short-term rental is rented through the lodging marketplace, the lodging marketplace must: (a) collect sales and use taxes from the occupant and forward such amounts to DOR; (b) if the rental property is located in a local government that imposes a room tax, collect the room tax from the occupant and forward it to the municipality; and (c) notify the owner of the rental property that the lodging marketplace has collected and forwarded the sales and room taxes described in (a) and (b). A local government would not be allowed to impose and collect a room tax from the owner of a short-term rental if the local government collects the room tax on the residential dwelling from a lodging marketplace.

G. Water Meter Stations

2017 Wisconsin Act 243 prohibits a local government or a utility district from requiring a developer to install a water meter that is larger than a utility-type box, or requiring a developer to include heating, air conditioning, or a restroom in the water meter station.⁹⁸

H. Construction Sites

2017 Wisconsin Act 243 prohibits cities, villages, towns, and counties from enacting an ordinance or adopting a resolution that limits the installation of banners over the entire height and length of a fence surrounding a construction site⁹⁹ or prohibiting a private person from working on the job site of a construction project on a Saturday, or imposing more restrictive conditions on such work than apply on weekdays.¹⁰⁰

⁹⁸ Wis. Stat. § 66.10015(6).

⁹⁹ Wis. Stat. § 66.1102 (5).

¹⁰⁰ Wis. Stat. § 66.1108.

VII. PROCESS ISSUES

A. Notice

2015 Wisconsin Act 391 added language requiring that cities, villages, towns, and counties annually inform residents that they may add their name to a list maintained by the local government of persons who submit a written or electronic request to receive notice of any proposed zoning ordinance or amendment or any proposed comprehensive plan or amendment that affects the allowable use of the property owned by the person. The local government may use any of the following means to inform residents of the list: publishing a 1st class notice under ch. 985; publishing on the local government's Internet site; 1st class mail; or including the information in a mailing that is sent to all property owners.

Before a local government votes on a zoning ordinance or comprehensive plan that may affect the allowable use of property owned by someone on the list, the local government must send a notice to the person summarizing the proposed change. 2015 Wisconsin Act 391 also added that towns and counties need to send the notice when the proposed change also may affect size or density requirements of property owned by someone on the list. The notice shall be by mail or in any reasonable form that is agreed to by the person and the local government, including electronic mail, voice mail, or text message. The local government may charge each person on the list who receives a notice by 1st class mail a fee that does not exceed the approximate cost of providing the notice to the person. An ordinance or amendment that is subject to this paragraph may take effect even if the town board fails to send the notice that is required by this paragraph.

2017 Wisconsin Act 353 (prepared for the Joint Legislative Council's Study Committee on Publication of Government Documents and Legal Notices) allows local governments the option to publish a summary, instead of publishing any full-text content that may be required under state law, for the second and third insertions that are required for publication of Class 2 and 3 notices, if the summarized notice also indicates that the full-text content may be viewed at all of the following sources: (1) the newspaper in which the initial insertion of the Class 2 or 3 notice was published; (2) the local government's website; (3) the Wisconsin Newspapers Association legal notices website; and (4) a physical location maintained by the local government.

B. Protest Petitions

Section 8 of 2017 Wisconsin Act 243 repealed Section 62.23(7)(d)2m.a. of the *Wisconsin Statutes* effective January 1, 2019 (applicable to cities, villages, and towns exercising zoning under village powers). This is the section of the *Statutes* that required a three-fourths approval vote of the governing body in the case of neighboring property owners who filed a petition protesting a rezoning. If your zoning ordinance has language that references the protest petition option required by the *Wisconsin Statutes*, you might want to think about amending your ordinance to remove that language. Act 243, however, does not prohibit cities, villages, and towns from enacting an ordinance establishing procedures for a super majority vote for a rezoning if the local community wants to include it as an option as a matter of local law. Act 243 did not repeal the protest petition requirements for county zoning found in section 59.69(5)(e)5g of the *Wisconsin Statutes*.

C. Interpretation of Zoning Ambiguities

2015 Wisconsin Act 391 codifies the following directive to the courts in disputes involving zoning ordinances: “In any matter relating to a zoning ordinance or shoreland zoning ordinance enacted or enforced by a city, village, town, or county, the court shall resolve an 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.”¹⁰¹

D. Eminent Domain

2017 Wisconsin Act 59 prohibits governments with the power of eminent domain from using the power of condemnation to acquire property for the purpose of establishing or extending a recreational trail; a bicycle way; a bicycle lane; or a pedestrian way.¹⁰²

2017 Wisconsin Act 243 created provisions related to compensation for condemnations. The Act requires a court or condemnation commission to consider comparable property sales as a basis for determining fair market value in a condemnation action and requires a court or commission to consider cost- or income-based appraisals if provided by the condemnor or condemnee.

For certain persons displaced from a business or farm operation as a result of a condemnation, Act 243 revises the maximum amount of payments that a condemnor must pay to such persons for the cost of purchasing or renting a replacement business or farm operation. The Act also requires a condemnor to pay those persons certain litigation expenses and “reasonable project costs,” defined to mean the total of specified capital, financing, professional services, imputed administrative, and infrastructure costs that a person must reasonably incur to establish a comparable replacement business or farm operation. Payments are capped at for cities, villages and towns but not for other condemnors.

E. Population Standard for Populous Counties

2017 Wis. Act 207 changed the population threshold for certain authorities that apply to large counties by replacing “500,000” with “750,000”.

F. Town Zoning in Waukesha County

2013 Wisconsin Act 287 was the result of an agreement worked out by the towns in Waukesha County and the County. It allows all towns in the County to have their own zoning ordinance but the County must approve the adoption/amendment of the town zoning ordinance. The intent is to allow county approval in the event county repeals county zoning ordinance in future. It only applies to towns located in a county that has a population exceeding 380,000 located in a county adjacent to a county that has a population exceeding 800,000 (applies only to towns in Waukesha County).

¹⁰¹ Wis. Stat. § 895.463.

¹⁰² Wis. Stat. § 32.015; 59.52(6)(a); 60.782(2)(d); 61.34(3)(b); 62.22 (1) (b); 62.23(17)(am).

G. Town Withdrawal from County Zoning/Land Division in Dane County

2015 Wisconsin Act 178 established a process for towns located in a county with a population on January 1, 2016, of at least 485,000 (Dane County) to withdraw from county zoning and land division controls.

H. Levy Limit Exception For Affordable Housing

2017 Wisconsin Act 243 created an exception to general local levy limits to allow cities, villages, or towns to increase levies by \$1,000 for each new, single-family residential dwelling unit for which the local government has issued an occupancy permit, if it is located on a parcel no more than one quarter of an acre in a city or village, or on a parcel no more than one acre in a town, and it sold for not more than 80% of the median price of a new housing unit in the city, village, or town. Amounts levied under the exception may be used only for police, fire, and emergency medical services, and a municipality may not decrease the amount it spends on those services below the amount spent in the preceding year.¹⁰³

I. Cultural Resources

2015 Wisconsin Act 176 requires cities, villages, towns, and counties hold a public hearing before designating a historic landmark or establishing a new historic district and to notify, by 1st class mail, any affected owner of the proposed designation or establishment.¹⁰⁴ The Act also allows a property owner affected by a decision of a landmarks commission to appeal the decision to the governing body of the local unit of government, and allows that governing body to overturn the landmarks commission's decision by a simple majority vote.¹⁰⁵

2017 Wisconsin Act 222 makes various changes to the burial sites preservation law¹⁰⁶ and the process used by the Wisconsin Historical Society for cataloguing burial sites. The Joint Legislative Council's Study Committee on the Preservation of Burial Sites recommended the legislation for introduction. The Act increases the minimum width of sufficient contiguous land that must be included around a burial site that is recorded in the catalog from 5 feet to at least 10 feet from any part of a burial site, unless the Society's director determines that a shorter distance is sufficient to protect the burial site from disturbance.

2017 Wisconsin Act 317 requires cities, villages, towns, and counties to allow owners of property that is designated as a historic landmark or included within a historic district or neighborhood conservation district, when repairing or replacing such property, to use materials that are similar in design, color, scale, architectural appearance, and other visual qualities.¹⁰⁷

2017 Wisconsin Act 280 increased the maximum tax credits permitted under the Historic Rehabilitation Tax Credit program to \$3.5 million (an increase from the \$500,000 maximum established in the state budget 2017 Wisconsin Act 59).

¹⁰³ Wis. Stat. §66.0602(3)(m)

¹⁰⁴ Wis. Stat. §59.69(4m)(b); 60.64(2); 62.23(7)(em)2.

¹⁰⁵ Wis. Stat. §59.69(4m)(c); 60.64(3); 62.23(7)(em)3.

¹⁰⁶ Wis. Stat. §157.70.

¹⁰⁷ Wis. Stat. § 59.69 (4m)(bm), 60.64(2m), 62.23(7)(em)2m.

I. Inclusionary Zoning Prohibited

2017 Wisconsin Act 243 prohibits cities, villages, towns and counties from enacting, imposing, or enforcing an inclusionary zoning requirement.¹⁰⁸ Act 243 defines “Inclusionary zoning” as a zoning ordinance, regulation, or policy that prescribes that a certain number or percentage of new or existing residential dwelling units in a land development be made available for rent or sale to an individual or family with a family income at or below a certain percentage of the median family income for the area in which the residence is located or the median family income for the state, whichever is greater.

K. No TIF For Milwaukee Trolley

2017 Wisconsin Act 59 prohibits tax increment districts in the City of Milwaukee from directly or indirectly funding expenses related to the operation of the City’s new trolley system.¹⁰⁹

L. Stormwater Regulation

2017 Wisconsin Act 243 specifies that, subject to certain exceptions, a city, village, town, or county may not enact an ordinance relating to stormwater management unless the ordinance strictly conforms to uniform statewide standards. Act 243 revises an exception for ordinances relating to flood control to instead apply to ordinances relating to peak flow to address existing flooding problems or to prevent future flooding problems, except an ordinance may not require more than 90% of the difference between pre-development and post-development annual runoff volume to be retained on the site.¹¹⁰

2015 Act 55 amended Wis. Stat. 281.31(2m) which prohibits county shoreland zoning ordinances, county, city, village, and town construction site erosion control and storm water management zoning ordinances, or city or village wetland zoning ordinances from applying to lands adjacent to farm drainage ditches (if the lands are not adjacent to a natural navigable stream or river and those parts of the drainage ditches adjacent to these lands were non-navigable streams before ditching) and to lands adjacent to artificially constructed drainage ditches, ponds, or storm water retention basins that are not hydrologically connected to a natural navigable water body.

M. Wetlands

2017 Wisconsin Act 183 prohibits a local government from enacting an ordinance or adopting a resolution regulating a matter regulated by the wetland permitting exemptions and mitigation requirements created under the Act.¹¹¹ The Act exempts from state wetland permit requirements discharges into a state wetland that occurs in an urban area (incorporated areas, areas within one-half mile of an incorporated area, or areas in a town served by a sewerage system] if the discharge does not affect more than one acre of wetland per parcel, the discharge does not affect a rare and high quality wetland, and the development related to the discharge is done in compliance with any applicable storm water management zoning ordinance or storm

¹⁰⁸ Wis. Stat. § 66.1015(3).

¹⁰⁹ Wis. Stat. § 66.1105(2)(f)2.e.

¹¹⁰ Wis. Stat. § 281.33 (3m).

¹¹¹ Wis. Stat. § 281.36(12m).

water discharge permit. The Act also exempts from state permitting requirements a discharge into a state wetland that occurs outside an urban area, if the discharge does not affect more than three acres of wetland per parcel; the discharge does not affect a rare and high quality wetland, and the development related to the discharge is a structure, such as a building, driveway, or road, with an agricultural purpose. Finally, the Act exempts artificial wetlands from state permit requirements.

N. Floodplain Zoning

2017 Wisconsin Act 242 generally requires a city, village, town, or county to amend its floodplain determination as necessary to conform with a letter of map amendment (LOMA). The Act requires the Department of Natural Resources to consent to such an amendment. After such an amendment, the Act prohibits a city, village, town, or county from enforcing its floodplain zoning ordinance with respect to the relevant property or area of a city, village, town, or county, to the extent that the ordinance is contrary to the LOMA. The Act provides an exception to the required amendment and nonenforcement provisions if amending a local floodplain determination would conflict with the city, village, town, or county's eligibility to participate in the National Flood Insurance Program.

O. Shooting ranges

2013 Wisconsin Act 202 relates to liability and immunity of sport shooting ranges. The Act expands the provisions relating to nuisance actions and zoning conditions related to noise to provide that a person who owns or operates a sport shooting range is not subject to a nuisance action or to any state or local zoning conditions or rules, including those related to noise or nonconforming use, and that no court may enjoin or restrain the operation or use of a sport shooting range on the basis of noise, nonconforming use, or any state or local zoning condition or rule. The Act creates new provisions for expanded immunity from civil liability for sport shooting range owners, users and others.

VIII. SHORELAND ZONING

A. County Shoreland Zoning Ordinances¹¹²

For over fifty years, Wisconsin law has required that counties adopt county shoreland zoning ordinances to regulate development within the shoreland area of the unincorporated areas of the county (the areas outside the boundaries of cities and villages). 2015 Wisconsin Act 55 changed the status of county shoreland zoning ordinances adopted to comply with the requirements of Wisconsin's shoreland zoning law codified at Wis. Stat. §59.692. Under prior law, the Wisconsin Department of Natural Resources ("DNR") rules governing Wisconsin's Shoreland Protection Program established minimum standards that counties were required to follow for the unincorporated areas of the county. The rules are found in Wisconsin Administrative Code, ch. NR 115. As stated in NR 115.01 "Nothing in this rule shall be construed to limit the authority of a county to enact more restrictive shoreland zoning standards under s. 59.69 or 59.692, Stats. . . ." Many Wisconsin counties used this authority to innovate and adopt shoreland zoning ordinances that were more protective of lakes and rivers than the DNR rules.

2015 Wisconsin Act 55 eliminated the authority of counties to exceed the DNR requirements. Act 55 added language to the Wisconsin Statutes that states a county shoreland zoning ordinance adopted under Wis. Stat. §59.692 "may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard." A "shoreland zoning standard" is defined in the Statutes to mean "a standard for ordinances enacted under [Wis. Stat. §59.692] that is promulgated as a rule by the [DNR]." Act 55 also prohibits county shoreland zoning ordinances from regulating the construction of a structure on a substandard lot in a manner that is more restrictive than the DNR's shoreland zoning standards for substandard lots. NR 115 no longer establishes the minimum requirements for county shoreland zoning ordinances. Now the standards in NR 115 are the only standards that county shoreland zoning ordinances enacted under Wis. Stat. §59.692 can follow.

Nothing in Act 55 directly modifies the above-quoted language in NR 115 that counties can enact more restrictive shoreland zoning standards under county general zoning authority enabled by Wis. Stat. §59.69. Nonetheless, preexisting law stated that county shoreland zoning ordinances shall be consistent with any general zoning ordinance applicable to the county but also stated that a county shoreland zoning ordinance "supersedes all provisions of an ordinance enacted under s. 59.69 that relate to shorelands." While the county or the town general zoning ordinances can apply within the shoreland area, the shoreland zoning ordinance and the statewide shoreland zoning standards would seem to be the controlling ordinance.

While Act 55 prohibits county shoreland zoning ordinances from being more restrictive than the DNR shoreland zoning standards, Act 55 also states that counties are not prohibited from "enacting a shoreland zoning ordinance that regulates a matter that is not regulated by a shoreland zoning standard." This allows counties some flexibility to establish standards for matters not regulated in NR 115 such as setbacks from wetlands and bluffs. NR 115 also does not designate the appropriate uses of property within the shoreland area such as agricultural, residential, commercial, etc. The designation of the appropriate land use is often made in the

¹¹²See also Paul G. Kent, "On the Waterfront: New Shoreland Zoning Laws," 90 Wis. Lawyer (Jan 2017) available at:

<https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx/article.aspx?Volume=90&Issue=1&ArticleID=25319>

county or a town's general zoning ordinance.

In addition to prohibiting counties from exceeding the shoreland zoning standards found in NR 115, Act 55, also states that a county shoreland zoning ordinance may not require the establishment of a vegetative buffer zone on previously developed land nor the expansion of an existing vegetative buffer zone. A county shoreland zoning ordinance can only require the maintenance of a vegetative buffer zone that existed on July 14, 2015, if the ordinance allows the buffer zone to contain a viewing corridor that is at least 35 feet wide for every 100 feet of shoreline frontage that can run contiguously for the entire maximum width (if there is 200 feet of shoreline frontage, the viewing corridor can run 120 feet).

Expanding the impact beyond just county shoreland zoning ordinances, Act 55 also created section 59.692(1k) of the Wisconsin Statutes that prohibits the DNR and counties from establishing shoreland zoning standards/ordinances that do any of the following:

1. Requires the installation or maintenance, imposes a fee or mitigation requirement, or prohibits or regulates outdoor lighting for residential use;
2. Regulates the maintenance, repair, replacement, restoration, rebuilding, or remodeling of all or any part of a nonconforming structure if the activity does not expand the footprint of the nonconforming structure;
3. Requires any inspection or upgrade of a structure before the sale or other transfer of the structure may be made;
4. Regulates the vertical expansion of a nonconforming structure unless the vertical expansion would extend more than 35 feet above grade level;
5. Establishes standards for impervious surfaces unless the standards provide that a surface is considered pervious if the runoff from the surface is treated by a device or system, or is discharged to an internally drained pervious area, that retains the runoff on or off the parcel to allow infiltration into the soil.

2015 Wisconsin Act 167 creates additional restrictions for county shoreland zoning ordinances. The Act established requirements related to impervious surface limits in the DNR shoreland zoning standards that are applicable to "highly developed shorelines." Allows the averaging of the distances that neighboring structures are set back from the ordinary high water mark for purposes of allowing a less restrictive setback requirement for a proposed structure. Authorizes counties to impose a more restrictive setback requirement for a lot based on the location of principal structures on neighboring lots, in certain circumstances. Exempts boathouses, gazebos, fishing rafts, certain telecommunications and utility facilities, and walkways, stairways, and rail systems from the general setback requirements and prohibits DNR rules and county shoreland zoning ordinances from regulating the maintenance, repair, replacement, restoration, rebuilding, or remodeling, of these structures even if they are only partially constructed in the setback area.

2015 Wisconsin Act 391 made additional changes to the Shoreland zoning law providing that a setback line from the ordinary high-water mark established by a licensed land surveyor may be legally relied upon for purposes of development near a water body if the Department of Natural Resources has not identified the ordinary high-water mark.¹¹³ The Act also 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

¹¹³ Wis. Stat. § 59.692 (1h)

legally located there by operation of a variance granted before July 13, 2015.¹¹⁴ Act 391 also requires an authority issuing building permits to send a copy of certain building permits related to shoreland projects to the county clerk.¹¹⁵ Prohibits the Department of Natural Resources or a county from enacting a standard or ordinance that prohibits the owner of a boathouse in the shoreland setback area that has a flat roof from using the roof as a deck if the roof has no side walls or screens or from having or installing a railing around that roof if the railing is not inconsistent with standards promulgated by the Department of Safety and Professional Services.¹¹⁶ Finally, Act 391 allows certain stormwater runoff systems in the shoreland setback area¹¹⁷ and allows the construction and maintenance of public power utilities to construct and maintain facilities if they have the appropriate permits from the Department of Natural Resources. If not permit is required the facility is permitted if it is constructed and maintained in a manner that employs best management practices to infiltrate or otherwise control storm water runoff from the facility.¹¹⁸

B. Town General Zoning Authority in the Shoreland Area

2015 Wisconsin Act 41 expanded the authority of towns to apply general zoning ordinances within the shoreland area. In the 2013 case *Hegwood v. Town of Eagle Zoning Board of Appeals*, the Wisconsin Court of Appeals addressed the issue of whether towns had concurrent zoning authority with the county in the shoreland area in light of state law requiring counties to adopt shoreland zoning ordinances regulating the shoreland area within towns.

The Court in *Hegwood* held that towns did not have any zoning jurisdiction within the shoreland area unless the town had an existing town ordinance relating to shorelands that was more restrictive than the county's subsequently adopted shoreland zoning ordinance as provided in Wis. Stat. 59.692(2)(b). Many town zoning ordinances were adopted after the county shoreland zoning ordinance and therefore those town ordinances no longer applied after the *Hegwood* decision. The sudden absence of town general zoning in the shoreland area created problems in counties that had relied on town zoning to designate districts regulating the use of property and other standards. In these counties, county shoreland zoning was often considered an overlay ordinance that complied with the DNR requirements in NR 115 for the protection of navigable waters and the town general zoning ordinance provided the underlying (or base) zoning that determined the use of the property (residential, commercial, etc.). *Hegwood* eliminated the applicability of these town general zoning ordinances in the shoreland area.

In response to the *Hegwood* case, the Wisconsin Legislature passed 2015 Wis. Act 41. This law attempts to undue the *Hegwood* case. Act 41 reestablishes the ability of towns to have concurrent authority with the county in the shoreland area with certain limitations. Under Act 41, a town can adopt a general zoning ordinance under 60.61 or 60.62 that applies in the shoreland area. However, Act 41 states that the town zoning ordinance "may not impose restrictions or requirements in shorelands with respect to matters regulated by a county shoreland zoning ordinance enacted under 59.692." Act 41 does not affect town zoning ordinances related to the shoreland area that the town had in effect prior to the adoption of the county shoreland zoning ordinance as long as the town's ordinance is more restrictive than the county shoreland zoning

¹¹⁴ Wis. Stat. § 59.692 (1k) (a) 2, 59.692 (1k) (a) 4, 59.692 (1k) (b)

¹¹⁵ Wis. Stat. § 66.1036

¹¹⁶ Wis. Stat. § 59.692 (1p)

¹¹⁷ Wis. Stat. § 59.692(1k)(a)6.

¹¹⁸ Wis. Stat. § 59.692 (7).

ordinance.

As a result of Act 41, towns wanting to make changes to their general zoning ordinances that apply within the shoreland area need to explore whether the county shoreland zoning ordinance includes regulations covering matters the town may want to regulate. At a minimum, the county shoreland zoning ordinance will regulate the shoreland area following the shoreland zoning standards contained in NR 115. While county shoreland zoning ordinances cannot be more restrictive than these state standards and since Act 41 prohibits towns from regulating matters covered in the county's shoreland zoning ordinance, the town general zoning ordinances cannot address the state standards. Act 55 allows the county's shoreland zoning ordinance to regulate matters that are not regulated by state shoreland standards. If the county does have regulations addressing other matters, Act 41 would also prohibit a town from adopting similar regulations in the town's general zoning ordinance for the shoreland area. Act 41 only relates to the application of town general zoning ordinances in the shoreland area. It does not address other authorities towns have to adopt other types of ordinances such as driveway ordinances, nuisance ordinances, subdivision ordinances, and licensing ordinances.

C. City and Village Shoreland Zoning Ordinances

The original shoreland zoning law only applied to the unincorporated areas. Later enactments made shoreland zoning applicable to areas annexed to cities or villages and newly incorporated cities and villages. 2013 Wis. Act 80 modified shoreland zoning law applicable to shoreland that is annexed or that is part of land incorporated as a city or village. Act 80 repealed the requirement that specified that shoreland annexed into a city or village or incorporated in a city or village must continue to enforce county shoreland zoning ordinance at time of annexation or incorporation. Act 80 requires that cities and villages enact shoreland zoning ordinances, by July 1, 2014, that apply to shoreland annexed by a city or village after May 7, 1982, and any shoreland area that was subject to a county shoreland zoning ordinance prior to being incorporated as a city or village

The minimum requirements for city or village shoreland ordinances for shoreland annexed after May 7, 1982 or incorporated after April 30, 1994 include the following: 1.) Shoreland setback to be at least 50 feet from ordinary highwater mark (but may have a setback for principal buildings in shoreland that is the same as immediately adjacent building on each side of the land on which a principal building is being constructed or 35 feet, whichever is greater); 2.) Must require that for shoreland with vegetation that vegetative buffer zone must be maintained 35 feet back from ordinary highwater mark; 3.) May allow a viewing or access corridor in vegetative buffer zone that is no greater than 30 feet wide for every 100 feet of shoreline

As a result of Act 55, these ordinances cannot be more restrictive than DNR's shoreland zoning standards and the other limitations discussed above for county shoreland zoning ordinances.



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