

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

MEMORANDUM

TO: City of Madison Plan Commission

FROM: John Strange, Assistant City Attorney

RE: Overview of Legal Framework Pertaining to Sustainable Development Regulations.

DATE: February 5, 2020

The purpose of this Memorandum is to provide a brief overview of the regulatory framework for creating and imposing requirements to implement sustainable development initiatives, such as bird-friendly glass, green roofs, solar panels, and electric vehicle charging stations. This memo will briefly address the constraints of requiring such initiatives through the conditional use, rezoning, demolition, and variance procedures in the Zoning Code. The balance of the Memorandum will discuss opportunities for creating incentives and setting requirement for sustainable development. This is not meant to be an exhaustive Memorandum; rather, it is a framework for discussing these topics at and after the upcoming Plan Commission work plan meeting.

I. State law places some limits on the ability of the Plan Commission to condition land use approvals on the implementation of sustainable development initiatives.

The City conditions land use approvals in four different ways in the Zoning Code: conditional use approval; rezoning ordinance; demolition approval; and variance approval.¹ The City most commonly attaches conditions to conditional use approvals.

¹ I do not believe the City can impose the Environmental Initiatives as conditions on the approval of rezoning ordinances, demolition approvals, and variance requests because conditions related to those approvals have generally and historically been limited to conditions related to the applicant's history of "overdue taxes and/or fees; the applicant's history of compliance with relevant ordinances and approvals...and alcohol license provisions and approvals." See, e.g., M.G.O. § 28.182(5)2 (2019). Thus, this memorandum will focus primarily on the ability of the City to impose these conditions on a conditional use approval and the possibility of requiring the initiatives instead of requiring them as conditions.

The Zoning Code recognizes that some uses have such unique density, bulk, and building locations that they cannot be allowed as permitted uses but may be appropriate if properly considered and restricted on a case-by-case basis. See M.G.O. § 28.183(1) (2019). The purpose of the conditional use ordinance, therefore, is to require “consideration, in each case, of the impact [of the proposed use] on neighboring land or public facilities.” See *id.* The Plan Commission carries out this purpose by ensuring each individual proposal satisfies the standards contained in M.G.O. § 28.183(6)(a)1.-16. and, when necessary, imposing conditions under M.G.O. § 28.183(6)(b) to ensure those standards are or will be met.

Of the 16 conditional use standards contained in the ordinance, three are most relevant to the potential environmental harms posed by a proposed development:

- 1) M.G.O. § 28.183(6)(a)1. requires that the proposed use will not be “detrimental to or endanger the public health, safety, or general welfare”;
- 2) M.G.O. § 28.183(6)(a)3. provides that the proposed use will not diminish the “uses, values and enjoyment of other property in the neighborhood”; and
- 3) M.G.O. § 28.183(6)(a) requires that adequate “drainage...has been or are being provided.”

When considering these conditions, the Plan Commission could, theoretically, determine that the impact of a proposed development on local air quality (perhaps a consequence of not using solar panels), stormwater runoff (perhaps a consequence of not having a green roof), transportation facilities (perhaps a consequence of not having shared car availability or the ability to charge electric vehicles) or local bird populations (perhaps a consequence of building large glass buildings without bird-friendly glass) requires the imposition of the Environmental Initiatives to offset this impact.

However, in 2017, the state legislature passed 2017 WI Act 67, which set new parameters for conditional use approvals and the imposition of conditions on those approvals. The new law provides:

“If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the city ordinance or those imposed by the city zoning board, the city shall grant the conditional use permit. *Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.*”

Wis. Stat. § 62.23(de)2.a. (2019). The statute then defines “substantial evidence” as:

“...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.”

Wis. Stat. § 62.23(de)1.b. (2019). The statute then speaks to the conditions themselves, stating that conditions must “be reasonable and, *to the extent practicable, measurable...and supported by substantial evidence.*” Wis. Stat. § 62.23(de)2.b. (2019).

As noted above, the purpose of the City of Madison’s conditional use ordinance is to allow the Plan Commission to evaluate and address the individual impact of a proposed development on neighboring land or public facilities. See M.G.O. § 28.183(1) (2019). Further, the new state law requires that conditions related to potential impact must be reasonable and supported by evidence that is measurable and not based merely on preference or speculation. Thus, as a general rule, the Plan Commission should only require sustainable environmental initiatives as a condition to conditional use approvals if it can show that the condition:

- 1) directly pertains to the impact of the development on neighboring land or public facilities;
- 2) is reasonable; and
- 3) is supported by evidence that is measurable and not based on personal preference or speculation. See Wis. Stat. § 62.23(7)(de)1-2. (2019).

This analytical framework would need to be applied on a case-by-case basis depending on the potential impact of the development and its connection to the environmental initiatives proposed. Accordingly, the outcome (whether the Plan Commission could conditional an approval with a requirement that the developer implement an environmental initiative) in each case will be different and dependent upon the commission’s ability to point to substantial evidence of impact from the specific development proposed.

II. The City can provide incentives or establish requirements related to sustainable building practices.

While “conditioning” development on the inclusion of sustainable building practices will depend on the City’s ability to tie the condition directly to the impact of a single development, the City can provide incentives or establish requirements for such building practices. Other cities that have done this appear to focus on three key strategies: removing obstacles; creating incentives; and setting reasonable requirements.

In a 2008 article titled *Saving the World Through Zoning*, Chris Duerksen argued that modern zoning codes do little to address issues like climate change, energy conservation and production, community health, and food supply.² Further, he pointed out

² <https://www.law.du.edu/documents/rmlui/saving-the-world-through-zoning.pdf>

that most traditional styles of zoning regulations – “Euclidean, form-based, performance, hybrid – all have their strengths, but all have serious blind spots when it comes to sustainable development and sustainable communities.” Thus, he argues for the development of a kind of sustainable community development code organizes around key concepts like climate change and community health instead of, among other things, nonconforming uses and the like.

While this is just one person’s take on the tools needed for communities to implement sustainable development practices, other cities have attempted, to varying degrees, to follow this advice. For example, when Buffalo, New York updated its zoning code the result was a unified development code now referred to as the Green Code.³ Buffalo’s code focuses on encouraging mixed-use development and transitioning away from auto-centric development, many of the things that Madison’s zoning code already does. Nevertheless, it signals an attempt to move toward a development code that calls out the importance of sustainable building practices.

In his article, Duerksen also suggests that three keys to encouraging sustainable development are to remove impediments to sustainability, create incentives to encourage the use of new technologies such as solar and green roofs, and establish mandatory regulations that require certain actions or prevent certain harms. A 2009 article published by the Kennedy School of Government further explores the concept of green zoning and, in particular, the role incentives play in encouraging sustainable building practices.⁴ Of particular interest to the authors of this paper was providing density bonuses in exchange for sustainable building practices, as seen in the density bonus case studies included in the paper.

In the last 10-15 years, various cities have attempted to incorporate sustainable building practices in a variety of ways. It is beyond the scope of this memorandum to explore all of those ordinances. A brief review of two of those cities, however, illustrates the attempt to utilize these three key strategies.

A. Denver’s cool roof requirement.

The residents of the City of Denver recently passed a referendum (with 53% of the vote) enacting an ordinance that required “green roofs” as a way to combat heat island effects in the City. Under that law, every new building with a gross floor area of 25,000 square feet (or any addition resulting in a building with a gross floor area of 25,000 square feet or greater) would have been required to have a green roof with roof coverage ranging from 20%-60%. The law further allowed some of the green roof requirements to be satisfied by the addition of solar panels.

³ <https://www.buffalony.gov/DocumentCenter/View/1785/Buffalo-Green-Code---Unified-Development-Ordinance-PDF?bidId=>

⁴ https://www.hks.harvard.edu/sites/default/files/centers/rappaport/files/schaffner_waxman.pdf

The green roof law was opposed by some developers because of cost. For example, Denver's research found that the green roof law could have added \$193,000, or about 2.8%, to the cost of an average five-story office building. After much debate, the Denver City Council voted to repeal the voter initiative and replace it with a new ordinance requiring "cool roofs" -- a light colored roof option that also addressed the "heat island" effect addressed by green roofs. Known as the Green Building Ordinance, the new law addresses cool roofs and other sustainable building initiatives, including creating a green building advisory committee.⁵ Denver City staff estimated the cool roof law would cut construction costs in half or more as compared to the green roof requirement. Under the "cool roof" law, Denver requires cool roofs on new and re-roofed buildings of 25,000 square feet or greater. Interestingly, the new law also gives developers additional options to satisfy the cool-roof requirement, including the use of installing green space, funding green space in other parts of the city, meeting other green building standards, or installing other renewable energy options. The new law was developed in large part by a task force made up of two city council members, city staff, several green roof proponents, members of the real estate community, and additional experts.

Denver's example highlights several key policy points. First, rather than conditioning individual development approvals on the inclusion of sustainable building practices, Madison can, like Denver, require them either in the Zoning Code or, perhaps, in other City Ordinances. Second, when considering imposing such requirements, issues such as feasibility and cost will play a role in how to impose those requirements. Third, when considering imposing such requirements, including them as part of the same law or series of laws that inter-relate with each other may give developers options to meet overall sustainability requirements. Finally, involving outside stakeholders in the discussion may provide insight to the best path for implementation.

B. Portland's lengthy transition from green roof incentives to green roof requirements.

From the late 1990s through 2018, the City of Portland worked closely with residents and developers to install green roofs. From at least 2008 through 2012, Portland provided direct financial incentives to individuals installing green roofs. Citing its lengthy experience working with developers and residents on installing green roofs (they cite over 600 installed green roofs under their incentives program), in July 2018 Portland enacted an eco-roof requirement in its Central City Zoning Code. Also included in this district are requirements related to bird-friendly glass and low carbon buildings.⁶

Under the new law, all new buildings in the central city of 20,000 square feet or more will be required to install eco-roofs on 100% of the roof top, some of which can be waived for installation of other equipment, such as mechanicals, solar panels, and wind turbines.

5 <https://www.denvergov.org/content/denvergov/en/denver-development-services/commercial-projects/green-roof-initiative.html>

6 <https://www.portlandoregon.gov/bps/article/53363>

Like Denver's ordinances, Portland's ordinance could serve as an example of how Madison could create its own requirements, either city-wide or in distinct sustainability overlay districts. Portland's ordinance also reinforces some of the same policy considerations highlighted by the Denver ordinance, including presenting the initiatives together and allowing them to work together to reach an overall sustainability goal. Finally, it illustrates how starting out with incentives, either financial or procedural, may ease the transition to requirements.

C. Madison's options for implementing sustainable building practices.

When looking at cities from other states, it is always worth noting that state laws often differ and that Madison may not always be able to do exactly what cities in other states have done simply because Wisconsin state laws prevent it from doing so. For example, Wisconsin's state building code is known as a Max/Min code. For the purposes of this memorandum, that simply means that the City cannot establish requirements that are more stringent than the minimum requirements in the state building code. If the City pursues implementation of sustainable building practices through incentives, this is less of a concern because developers would be voluntarily implementing sustainable building practices in exchange for whatever incentive is being provided. On the other hand, if the City establishes requirements, we will need to determine if that requirement is preempted either by the state building code or some other state law.⁷

Nevertheless, these other state programs are instructive to understanding how Madison can implement sustainable building practices through a regulatory framework that focuses on removing obstacles, creating incentives and setting requirements. Any regulatory approach under this framework will likely involve the following key considerations:

1. Are there obstacles to sustainable building initiatives that could be removed from current city ordinances, policies, or procedures?
2. Should the City implement sustainable building practices by providing incentives, establishing requirements, or a mix of both?
3. Should implementation be done with multiple stand-alone ordinances or one omnibus sustainable development ordinance with requirements that inter-relate?
4. Should implementation be through the Zoning Code or some other part of the Madison General Ordinances?

⁷ An example of this might be that requiring grey water pipes would likely be preempted by the state building code, while requiring bird friendly glass likely would not. We will need to evaluate each proposed requirement on a case-by-case basis.

5. Should implementation apply to the entire City, to distinct areas or districts where development to which the requirements would apply is most likely to occur, or to developments greater than a certain minimum size?
6. Should implementation allow developers the opportunity to choose from a menu of sustainable building practices in order to meet an overall sustainable development goal?
7. Are any proposed requirements preempted by the State building code or any other state law?

In considering these questions, policy makers will discover a range of options for removing obstacles, creating incentives, and setting requirements. For example, as it relates to obstacles, last year the Common Council amended the Zoning Code to exempt solar energy systems from the conditional use and planned development alteration requirement (Legistar File # 56690). Now, a developer operating under conditional use or planned development zoning can install a solar energy without seeking an alteration of their previous approvals. While that is a very specific obstacle that has now been removed, other obstacles could be larger and more systemic, like exempting certain developments from Plan Commission or Urban Design Commission review if they meet a previously approved and prescribed sustainability commitment. In this way, removing obstacles can become part of a program for offering incentives, perhaps providing developers with more certainty for development in exchange for a commitment to build green.

While discussions regarding the most effective ways to support sustainable building outcomes in City ordinances may take more time, there are some opportunities to move forward in the near future with “low-hanging fruit”. On February 20, the Plan Commission will first learn more about the draft changes to the City’s stormwater ordinance (MGO Ch. 37). While the Plan Commission is not leading this effort, it is important to understand its impact on both greenfield and redevelopment sites, and eventually align the City’s zoning and subdivision ordinances with it. Second, Planning staff will present an overview of the Urban Forestry Task Force report, and focus on a few key changes to the zoning ordinance that could support a healthier urban tree canopy. Finally, staff will share information about what has been done elsewhere to promote or require bird-friendly glass. The Plan Commission may decide to move forward with an ordinance initiative on this issue, or wait to “bundle” it with other items related to sustainable buildings.