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Local Governments Need to Plan for Covid Relief Funds Under the American Rescue Plan Act

The American Rescue Plan Act, P.L. 117-2, (ARPA or Act) includes $130 billion dollars to be distributed to counties, cities, villages, and towns for economic relief from the COVID-19 pandemic. These funds are available under Subtitle M, the State and Local Fiscal Recovery Funds. Other parts of the Act may make additional funds available for mass transit or other purposes. This article focuses on the Local Fiscal Recovery Funds.

Local governments should begin planning now for use of these funds. Counties and larger "metropolitan" cities will receive direct funding from the federal government and should receive their first payments by May 10, 2021 and a second payment by one year after the first. All other local governments will receive funding through the state and can expect to receive their first payments by either June 9 or July 9, depending on whether their state has been granted an extension. Funds must be used by December 31, 2024.

ARPA spells out how local governments may use the funds, and in each area, planning is essential. Local governments must submit periodic reports to the Secretary of the Treasury detailing how they have used the funds and may be forced to repay any improperly used funds.

USES AND LIMITATIONS ON THE FUNDING

A. Responding to the pandemic or its economic effects on households, small businesses, non-profit entities, or industries impacted by the pandemic, such as tourism, travel or hospitality.

Comment: Local governments should begin to catalogue which families, businesses and non-profits were most impacted by the pandemic and determine what portion of your funding will go to them. Is it your restaurant and tavern industry? Tourist attractions? Or individual families? You should be thinking about which parts of your local community have suffered the most and whether they have access to other funding under the Act in deciding what portion of your ARPA funding will be allocated to them.

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In developing allocation policies, you may need to survey local business groups and social service agencies to gather necessary information to support your decisions. Local governments also should review any plans through an equity lens to be certain they are not inadvertently discriminating against protected classes in allocating funding. Evidence suggests that certain groups have suffered greater harm from the pandemic, and local governments should take such matters into account in allocating their ARPA funds.

B. Premium pay for essential workers, or grants to employers who have essential workers.

Comment: To be eligible for premium pay, the worker must be essential to maintaining continuity of operations of critical infrastructure or perform other essential duties as determined by the local executive. Premium pay is limited to $13 per hour, above the wages already paid, with a cap of $25,000 for any individual. Local governments should identify who qualifies under these definitions and determine how much of any ARPA funds will be used for premium pay. How will you differentiate among various essential workers? Will this be an administrative task or will elected officials make the determination?

See the note on "Process" in the Additional Considerations section, below.

C. Reimbursement of lost local government revenue.

Comment: Determining what revenue the local government has lost due to the pandemic may be difficult to determine. You may need to engage your local government's finance experts to assist in identifying reductions in revenue due to the pandemic.

Many local governments have not had a significant loss of property tax revenue. However, if you have a room tax and if the lack of travelers has meant a loss of room tax revenue collected by your local government, showing the relationship to the pandemic will be much easier. The same may be true of any local sales tax collections. Importantly, the Act speaks of a "reduction in revenue," not limited to tax revenues. Some local governments may have lost significant revenues due to lack of citations for traffic offenses or building code violations. In some instances, revenues from building permits may have been impacted.

See the note on "Budget Amendments" in the Additional Considerations section.

D. To make necessary investments in water, sewer, or broadband infrastructure.

Comment: Planning for these capital investments is critical. Now is the time for your local government to identify any projects in these areas. What are your local government's critical needs with respect to your water and sewer services? The pandemic has made us much more aware of the crucial role that high-speed internet access plays in our lives. Is it time for your local government to undertake a broadband project to increase access in your community? If so, you may need to understand the steps that a local government must take before undertaking certain broadband projects. Your local government may also wish to explore whether ARPA funds can be combined with broadband grants administered by the Public Service Commission of Wisconsin in order to undertake a more robust broadband project.

If a project was planned for the future, how realistic is it to advance that project and build it now? Is engineering assistance available to prepare plans and specifications for a project? What regulatory approvals are necessary and how long will it take to obtain those approvals? The Department of Natural Resources and Public Service Commission may take longer to issue regulatory approvals if the number of applications submitted increases.

Are your public bidding forms and rules up to date? How will the increased number of projects affect contractors, material suppliers, and bid prices? Prompt action will increase the chances that you can obtain the necessary expertise and resources to complete your project at a reasonable cost.

E. Additional rules and limitations.

Comment: ARPA explicitly states that funds may not be paid into pension plans for government employees. The interaction between this provision and the provision allowing for premium pay is not clear.

The Rescue Act allows local governments to carry out these provisions through contracting with third

parties, including non-profits, and through joint action with other governmental bodies, or even by transferring funds to another local government or the state to carry out a joint project.

ARPA contains other rules and limitations that local governments will need to consider. The Act provides that the Treasury Department will issue regulations to clarify the broad terms of the Act. It is unknown when such regulations may be issued.

ADDITIONAL CONSIDERATIONS

Process Issues: How will you go about establishing the policies for determining how to allocate the funds? Will this initially be an administrative function? A special committee?

Nondiscrimination Policies: As noted above, evidence suggests that certain individuals have been much more impacted by the pandemic due to their race, ethnicity, or age. How will your local government account for this in allocating funds?

Budget Amendments: The ARPA funds will not be reflected in your current budget. Eventually, your governing body will have to approve the necessary budget amendments to effectuate how your local government spends these funds. Be sure to review the procedures for amendment of a budget, including the general rule that a two-thirds vote is needed for such amendments, Wis. Stat. § 65.90.

Standards for Payments: Once your local government has determined where funds will be spent, what standards will be used for determining the amounts allocated to each qualifying person, household, non-profit, or business? Will the allocation be based on amount lost? Size of the entity? Some measure of impact on the local government and its residents?

Evaluation: Since a local government must report to the Treasury Department on how the ARPA funds are spent, you should develop an evaluation process to be sure the recipients used the funds as required.

Data: The local government should determine what data is already available to assist in making the allocation decisions required by the Act. If

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Court of Appeals Upholds Rezoning as Consistent with Comprehensive Plan

A recent case from the Wisconsin Court of Appeals, *Lakeland Area Property Owners Association, U.A. v. Oneida County*, 2020AP858, sheds some light on the consistency requirement in Wisconsin's Comprehensive Planning law while leaving some important questions unanswered. Wisconsin's Comprehensive Planning law, Wis. Stat. § 66.1001, requires that certain ordinances, including zoning code amendments, be "consistent with" the local comprehensive plan. To date, there have been relatively few reported cases decided under the comprehensive planning law.

This case involved an application to rezone property in the Town of Hazelhurst from the Business district to the Manufacturing and Industrial district to allow the landowner to seek a conditional use permit for a gravel mining operation. Oneida County's zoning ordinance applies within the Town. A nearly identical rezoning application had been denied for the same property in 2014 because a rezoning to the Industrial District was inconsistent with the Town's 1999 comprehensive plan (which was incorporated by reference into the County's comprehensive plan). However, the Town had begun the process of amending its comprehensive plan when the new rezoning petition was submitted in December of 2017 and it formally adopted the amended plan in January of 2018. In August of 2018, the County Board voted to approve rezoning the property from Business to Manufacturing and Industrial, after having received a positive recommendation from both the Town Board and the County Planning and Zoning Committee.

A group of local property owners, the Lakeland Area Property Owners Association, sued the county to overturn the rezoning ordinance and argued, among other things, that it violated the consistency requirement in Wisconsin's Comprehensive Planning law. The Court of Appeals rejected this challenge and upheld the rezoning ordinance.

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First, Lakeland argued that the County should have analyzed the application for consistency with the 1999 comprehensive plan, which was in effect at the time the rezoning application was submitted, rather than the 2018 comprehensive plan, which was in effect at the time the rezoning ordinance was adopted by the County Board. Wis. Stat. § 66.10015(2)(a) provides that "if a person has submitted an application for an approval, the political subdivision shall approve, deny, or conditionally approve the application solely based on existing requirements, *unless the applicant and the political subdivision agree otherwise*" (emphasis added). Existing requirements are defined as "regulations, ordinances, rules, or other properly adopted requirements of a political subdivision that are in effect at the time the application for an approval is submitted to the political subdivision."

Lakeland argued that there was no evidence of any formal agreement between the landowner and the County to apply the 2018 comprehensive plan to the rezoning application, so the 1999 plan, which was in effect at the time the application was submitted, is the plan that should apply. The Court of Appeals rejected that argument, stating "[n]othing in the statute's text indicates that such agreement must be formal, in writing, or memorialized in meeting minutes. . . . 'The statutory language does not dictate *how* or *when* the parties must agree, only *that* they agree.'" Because the County approved this rezoning application when a nearly identical application had been previously denied for inconsistency with the 1999 comprehensive plan, the Court concluded that the only reasonable inference was that the parties had agreed to evaluate the application under the 2018 comprehensive plan.

Second, Lakeland argued that, even if the 2018 comprehensive plan did apply, rezoning the property to Industrial was not consistent with that plan. For the purposes of the Comprehensive Planning law, "consistent with" means "furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan." Wis. Stat. § 66.1001(1)(am).

The future land use map in the 2018 plan designated the future land use for this property as Industrial. The County argued that a rezoning to Industrial was consistent with this designation, but Lakeland took the position that only the narrative portion of the plan could be considered in a consistency analysis and not the future land use map. The Court sided with the County, observing that "[g]iven that the statute requires a comprehensive plan to include land use maps, it would be unreasonable to conclude that a decision maker may not consider those maps when determining whether a proposed change is consistent with the plan."

Lakeland also argued that, regardless of the designation on the future land use map, the rezoning was inconsistent with the narrative portion of the 2018 plan, which stated that "[a]dditional industrial development will be welcomed in the Town in places away from [U.S. Highway] 51." Because the subject property directly abuts Highway 51, Lakeland argued that rezoning the property to Industrial would be inconsistent with this language in the plan. The Court of Appeals disagreed, concluding that the narrative portion of the plan must be read in the context of the remainder of the plan, including the future land use map that designated this property as Industrial. In context, the Court concluded that "the only reasonable interpretation of the plan's statement that the Town welcomes 'additional' industrial development away from U.S. Highway 51 is that it refers to industrial development beyond that which already exists or has already been contemplated by the Town on the future land use map."

Finally, Lakeland argued that the rezoning should be overturned because there was no evidence that the County performed a formal consistency analysis before approving the rezoning application. The Court disagreed, explaining nothing in Wis. Stat. § 66.1001(3) requires that the County perform a consistency analysis before enacting a zoning ordinance—it merely states that the ordinance "shall be consistent" with the applicable comprehensive plan.

While the Court ultimately upheld the County's rezoning ordinance on the merits, determining that the ordinance was consistent with the applicable comprehensive plan, it is notable that the Court declined to resolve one issue of significance to local governments—whether Lakeland had the right to sue the County under Wis. Stat. § 66.1001(3) in the first place. The County had argued that the lawsuit should

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be dismissed because the consistency requirement in the comprehensive planning law does not give right to a private right of action. The Court did not reach a conclusion on that issue because the parties did not present the Court with well-developed legal arguments on the subject. Instead, the Court assumed, without deciding, that there is a private right of action under § 66.1001(3) but concluded that Lakeland's consistency claim nevertheless failed on its merits.

Although this case leaves that important issue unresolved, it does provide some practical guidance to municipalities in applying the consistency requirements of Wis. Stat. § 66.1001(3). When reviewing an ordinance for consistency with a comprehensive plan, the future land use map and narrative portions of the plan should not be reviewed in isolation, but instead should be understood in relation to each other and in the context of the remainder of the plan. And, while it is often beneficial to memorialize in writing an agreement to apply standards other than the "existing requirements" under Wis. Stat. § 66.10015(2), the courts will not require it, nor will they require evidence that a municipality undertook a formal "consistency analysis" before enacting a rezoning ordinance, so long as the ordinance is, in fact, consistent with the comprehensive plan.

— Julia K. Potter

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certain data is not already available, what process will you use to collect it?

Assistance: Does your local government need outside expert help in deciding how the ARPA funds should be allocated? If so, what type of assistance?

CONCLUSION

Local governments who wish to take advantage of ARPA funds should waste no time in adopting policies that will guide their allocation decisions, gathering the information necessary to support those decisions, and developing the procedures needed to undertake and implement those decisions.

— Michael P. May and Anita T. Gallucci

Wisconsin Supreme Court Affirms Subdivision Authority as Separate and Distinct from Zoning Authority, Even Within Areas Subject to Shoreland Zoning

In *State ex rel. Anderson v. Town of Newbold*, 2021 WI 6, the Wisconsin Supreme Court once again waded into the murky waters of distinguishing between a town's separate subdivision and zoning powers; this time related to a town's regulation of shoreland minimum frontage.

The facts were straightforward: The Town of Newbold denied a property owner's request to subdivide his waterfront property into two properties, each with less than the minimum 225 feet of shoreline frontage required by the Town's subdivision ordinance. The property owner sought certiorari review, contending that Wis. Stat. § 59.692 prohibits municipalities from enacting local shoreland zoning standards that are more restrictive than those enacted on a state level. The circuit court affirmed the Town's decision, concluding that the Town's ordinance was a Wis. Stat. § 236.45 subdivision ordinance and not a zoning ordinance falling under Wis. Stat. § 59.692. The court of appeals affirmed.

On certiorari review, the Wisconsin Supreme Court recognized the tension between the two statutes, but held (5-2) that the Town's ordinance was a permissible exercise of its subdivision authority. In so upholding the Town's subdivision authority, the majority relied heavily on precedent from two prior Supreme Court cases.

First, the Court cited *Town of Sun Prairie v. Storms*, 110 Wis. 2d 58 (1983) for the proposition that zoning ordinances and subdivision ordinances, while sometimes overlapping, are distinctly separate means of regulating the development of land. In *Storms* the Supreme Court recognized a town's authority to regulate minimum lot size by subdivision ordinance under Wis. Stat. § 236.45 and distinguished that authority from a town's limited zoning authority under Wis. Stat. ch. 60. While both zoning and subdivision ordinances are aimed at the "orderly development of a community" and both may establish minimum lot sizes, the Court distinguished the two

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underlying purposes: zoning regulations control the "uses of land and existing resources" while subdivision regulations control the "division of land" for the benefits of its occupants.

Zoning, therefore, provides more of an "overall comprehensive plan" for land use, while subdivision regulations "govern[s] the planning of new streets, standards for plotting new neighborhoods, and the protection of the community from financial loss due to poor development." Consequently, because zoning and subdivision regulations are "complementary land planning devices" the majority held that if a town's subdivision regulations are authorized by and within the purposes of Wis. Stat. ch. 236, those regulations will be valid even if they also fall within the town's or county's zoning power.

Having affirmed the Town of Newbold's separate subdivision authority, the Court used the process it developed in *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, to answer the "essential question" of whether the Town's ordinance was a zoning or subdivision ordinance.

In *Zwiefelhofer*, the Court was asked to declare a town's nonmetallic mining ordinance as an invalid zoning ordinance. In upholding the town's ordinance as a non-zoning police power ordinance, the *Zwiefelhofer* Court offered "guidance and a framework for analysis" to determine whether an ordinance is a zoning ordinance. First, the Court catalogued a nonexclusive list of the characteristics and commonly accepted purposes of traditional zoning ordinances:

- zoning ordinances typically divide a geographic area into multiple zones or districts, and within the established districts or zones, certain uses are typically allowed as of right and certain uses are prohibited;
- zoning ordinances are traditionally aimed at directly controlling where a use takes place as opposed to how it takes place;
- zoning ordinances traditionally classify uses in general terms and attempt to comprehensively address all possible uses in the geographic area;
- zoning ordinances traditionally make a fixed, forward-looking determination regarding what uses will be permitted as opposed to case-by-case determinations; and
- zoning ordinances traditionally allow certain landowners whose land use was legal prior to the adoption of the zoning ordinance to maintain their land use despite its failure to conform to the ordinance.

Next, a reviewing court compares these traditional zoning characteristics and purposes to the characteristics and purposes of the challenged ordinance. But this is not a bright line test—no single characteristic or consideration is dispositive, and a court does not simply tally the numbers for and against. Rather, the analysis must be specific to the ordinance at issue, and under the specific circumstances of the case, some characteristics may be given more weight than others. The only certainty is that these factors are to be liberally construed in a town's favor. (*Citing* Wis. Stat. § 236.45(2)(b).)

Using this *Zwiefelhofer* framework, the majority determined that the Town of Newbold's ordinance was clearly not a zoning ordinance. Focusing on the first characteristic, the majority found that the Town's ordinance has nothing to do with the use of land or the division of land into zones or districts, rather it just established a minimum lot size. This was dispositive since a "hallmark of a zoning ordinance is some type of use restriction." Consequently, the majority ended its analysis here since the remaining *Zwiefelhofer* factors presuppose that the ordinance regulates land use in some way.

In their dissent, Justices Hagedorn and Rebecca Grassl Bradley agreed that the ordinance was a subdivision ordinance not prohibited by Wis. Stat. § 59.692(1d)(a), but argued that Wis. Stat. § 59.692(2)(b) prohibits any town ordinance related to shorelands more restrictive than, and enacted after, a county ordinance regulating the same topic.

While the majority began its analysis recognizing that shoreland zoning is given unique treatment under Wisconsin law, the majority held that nothing in Wis. Stat. ch. 236 prohibits subdivision regulation for shoreland areas. Consequently, since the majority held that the Town's ordinance was a subdivision ordinance and not a zoning ordinance, the unique restrictions of shoreland zoning played little role in the majority's opinion other than to refute the dissent's argument.

— Jared Walker Smith

Is the Unites States Supreme Court Signaling a Change in Its Treatment of Qualified Immunity?

Trent Taylor was a Texas prisoner who entered a psychiatric unit for medical attention following a suicide attempt. Instead of providing treatment, prison officials stripped Mr. Taylor of his clothing, including his underwear, and placed him in a cell where almost every surface—including the floor, ceiling, windows, and walls—was covered in "massive amounts" of human feces belonging to previous occupants. Mr. Taylor was unable to eat because he feared that any food in the cell would become contaminated, and feces "packed inside the water faucet" prevented him from drinking water for days. The prison officials were well aware of these conditions, and at one point laughed that Mr. Taylor was "going to have a long weekend."

Mr. Taylor was then moved to another cell, which was cold and had no toilet, water fountain, or furniture. It had only a drain on the floor, which was clogged, leaving a standing pool of raw sewage in the cell. Because the cell lacked a bunk, Mr. Taylor had to sleep on the floor, naked and soaked in sewage, with only a suicide blanket for warmth. He was kept in this cell for three days and never allowed to use a restroom. He attempted to avoid urinating on himself, but he eventually involuntarily did so. As a result of holding his urine for an extended period, Mr. Taylor developed a distended bladder requiring catheterization.

Mr. Taylor sued multiple correction officers, alleging violations of the Eighth Amendment's prohibition against cruel and unusual punishment. *Taylor v. Riojas*, 141 S. Ct. 52 (2020). Both the district court and the United States Court of Appeals for the 5th Circuit held in favor of the correction officers based on qualified immunity, finding that they could not be liable because they did not violate a clearly established law that every reasonable officer should know.

By way of background, all governmental officers who are sued for monetary damages for alleged Constitutional violations have an immunity defense. Judges, legislators and prosecutors, for example, are protected by absolute immunity for conduct performed within the scope of their employment. Other governmental officials, such as corrections officers, police officers and teachers, are generally shielded from civil liability by qualified immunity when performing discretionary functions, unless their conduct violates a clearly established constitutional right such that every reasonable official would have known that his or her conduct was unlawful.

The Supreme Court has given broad protection to law enforcement personnel under qualified immunity. It has emphasized the need for plaintiffs to show a case on point in order to overcome this immunity. While cases need not be directly on point, existing case law must put the constitutional questions "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In the last decade, the Supreme Court has repeatedly overturned lower court refusals to grant police officers qualified immunity. It has been criticized for doing this. Indeed, between 1982 and 2020, the Supreme Court found that officers were protected by qualified immunity in 28 of the 30 cases where the issue was raised.

It was against this background that Mr. Taylor appealed his case to the United States Supreme Court. In a 7-1 decision with Justice Thomas dissenting, the Supreme Court rejected the officers' claim of qualified immunity. In doing so, it ignored past precedent, holding that no case on point is required in order to hold a government officer liable. Rather, it held that the officers were not protected by qualified immunity because "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." The Court said "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."

Whether the Court's decision was fueled by the political climate or is limited to the egregious facts of the *Taylor* case remains to be seen.

— Kathryn A. Harrell

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