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Conditional Use Permits After 2017 Wisconsin Act 67

By Brian W. Ohm

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.[1] 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 Responds to the Wisconsin Supreme Court Decision in *AllEnergy Corp. v. Trempealeau County*

The Wisconsin Supreme Court's May 2017 decision in *AllEnergy Corp. v. Trempealeau County*, 2017 WI 52, provides important context for understanding the conditional use requirements inserted in Act 67.

The *AllEnergy* case involved the denial of a conditional use permit for a proposed frac sand mind in Trempealeau County. The County voted to adopt 37 conditions for the mine, which AllEnergy agreed to meet, but then the County voted to deny the conditional use permit in part relying on public testimony in opposition to the mine. A divided Wisconsin Supreme Court upheld the County's denial of the conditional use permit acknowledging the discretionary authority of local governments in reviewing proposed conditional uses.

Act 67 in part reflects the sentiment articulated by the dissent in the *AllEnergy* decision According to the Dissent in *AllEnergy*: "When the Trempealeau County Board writes its zoning code, or considers amendments, . . . is the stage at which the County has the greatest discretion in determining what may, and may not, be allowed on various tracts of property." "Upon adding a conditional use to a zoning district, the municipality rejects, by that very act, the argument that the listed use is incompatible with the district." "An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance."

While local governments did not need to change their ordinances in response to the *AllEnergy* decision, Act 67 should prompt local governments to review their zoning ordinances, practices, and procedures to ensure they meet the new statutory requirements.

The New Statutory Requirements

Act 67 Act 67 limits local government discretion related to the issuance of conditional use permits.

[1] Act 67 creates section 62.23 (7) (de) for cities, villages, and towns exercising zoning under village powers, section 60.61 (4e) for towns exercising zoning without village powers, and section 59.69 (5e) for counties.

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." This new language follows the argument made by the plaintiffs and the dissenting opinion in the *AllEnergy* case. 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.

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.

The New Requirements In A Nutshell:

- The requirements and conditions specified in the ordinance or imposed by the zoning board must be reasonable, and to the extent practicable, measurable.
- Any condition imposed must relate to the purpose of the ordinance and be based on substantial evidence.
- 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 a reasonable person would accept in support of a conclusion.
- If an applicant meets, or agrees to meet, all of the requirements and conditions specified in the ordinance or imposed by the zoning board, the local government must grant the CUP.
- The applicant must provide substantial evidence that the application and all requirements and conditions are, or shall be, satisfied.
- If an applicant does not meet one or more of the requirements (for example the application is incomplete) or conditions specified in the ordinance or imposed by the zoning board, the local government can deny the CUP.
- A local government's decision to approve or deny a conditional use permit must be supported by substantial evidence.

The new conditional use law applies to applications for conditional use permits filed on and after November 28, 2017.

Local governments should review the requirements of their ordinance to consider adding to or revising the conditions listed in the ordinance to ensure that the local government will be able to review specific development proposals against the purpose of the ordinance and be able to support conditions imposed on a specific application with substantial evidence. Act 67 may prompt some local governments to reconsider what might be listed as a conditional use in certain zoning districts and explore creating new districts or other ways to regulate the use. Local governments might also want to a multi-step process that informs applicants of the conditions the zoning board will imposed prior to the board's decision so the applicant can prove that they can comply with the conditions.

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Frequently Asked Questions About Act 67[2]

Does Act 67 Limit Local Discretion to Deny a Conditional Use Permits?

Act 67 attempts to limit the level of discretion implied in the lead opinion of Wisconsin Supreme Court in the *AllEnergy* case.

Clearly under Act 67, if an applicant agrees to meet all the requirements of the ordinance and all the conditions imposed, the local government has no discretion to deny the permit.

However, local governments still have discretion in terms of whether or not something is listed as a conditional use in the zoning ordinance. Local governments also have discretion as to whether or not to impose a condition (for example every permit might not need conditions related to hours of operation). Local governments also have the authority to deny a permit if the applicant cannot meet the requirements of the ordinance or the conditions imposed. The fact that Act 67 talks about denial of a permit and the right challenge a denial in court shows the legislature did not take away all authority to deny an application for a conditional use permit.

A local government still has the ability to approve or deny a permit, and to attach conditions. A local government either approves a CUP because it complies with the requirements of the ordinance and the conditions imposed or they deny it because it does not meet the requirements of the ordinance and the conditions imposed.

Local governments have more discretion when rezoning a property. Act 67 may prompt some local governments to limit what is a conditional use and require a rezoning to a different district for certain uses.

Is a local government obligated to craft conditions that will help the applicant meet the ordinance requirements?

No, but the local government needs to articulate why the proposed use does not meet the ordinance requirements and allow the applicant to suggest conditions that address the deficiencies.

For example, say an ordinance has general standards for CUPS like "protect public health, safety, and welfare." The zoning board uses that standard to say "we should not allow this project because it will lead to traffic congestion leading to unsafe traffic conditions." Under Act 67, the local government can't deny it unless they back it up with substantial evidence. The local government decides to conduct a traffic study. The traffic study concludes that if truck traffic to the site is limited to certain hours, there will be no congestion. The applicant proposes a condition to limit truck traffic based on the findings of the study.

There needs to be an opportunity for some back and forth between the applicant and the local government -- for example, the local government says we're concerned about water quality. They will need to provide specific facts about the water quality impacts. They may use that information to impose a specific condition that will address the water quality issue or it might be that the local government identifies the threat posed by the conditional use and the applicant responds by saying "I've hired a hydrologist, here is their report about the water quality impacts. The hydrologist recommends we do x, y, and z to address those impact. We propose doing that". The applicant develops the alleviating conditions.

What Act 67 changes is that in the past a group of citizens who are opposed to a project would say "deny the CUP because it will have traffic impact" and the local government would deny the CUP. Act 67 changes that.

[2] Thanks to Becky Roberts with the Center for Land Use Education at UW-Stevens Point for compiling these questions.

Local governments can't just say, "We have a standard in or ordinance that a CUP promote public health, safety, and welfare. We think there are traffic impacts so we deny the CUP." Local governments need substantial evidence that there will be traffic impacts. That evidence will provide the basis for more specific conditions imposed by the local government or suggested by the applicant. There are engineering solutions for many impacts so it will be difficult for there to be no condition that could be imposed to meet the ordinance standards. It may be extremely expensive to follow the condition -- that might stop the project. Perhaps the hours of operation end up being so limited the applicant drops the project. That may lead the applicant to argue the condition is unreasonable. Resolution of that issue will take further litigation.

Historically, most CUPs are approved. Denials are very limited. Act 67 may make denials harder.

■*How closely do conditions imposed by the zoning board need to match the "standards" (requirements and conditions) outlined in the zoning ordinance? In other words, do you need to rely on the ordinance purpose or ordinance standards when crafting conditions?*

Yes, Act 67 requires that "any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence." Many ordinances include general statements like protect public health and safety in the purpose statement of the ordinance, as a requirement of the ordinance, or as a standard for granting conditions. *Kraemer & Sons Inc. v. Sauk Cnty. Adjust. Bd.*, 183 Wis. 2d 1, 13, 515 N.W.2d 256 (1994), provides guidance that standards in ordinances can include general standards like the "need to protect public health, safety, and welfare" and more specific standards like "mining operations must not impair water quality." Act 67 does not prohibit the use of general standards so local governments should still include them. They just will need to provide substantial evidence to justify why the condition is necessary to protect public health, safety, and welfare.

■*Act 67 requires applicants to demonstrate that all requirements and conditions are, or shall be, satisfied. This seems like it will be problematic. Do you have any tips that a local government can use to avoid situations where the applicant promises to meet the requirements/conditions and then never follows through?*

A local government could revoke the permit or take other legal action if the requirements and conditions are not met. The body granting a conditional use permit retains jurisdiction over the permit to insure that the applicant complies with the conditions over the life of the permit and the applicant does what they said they would do. Just like the enforcement of any zoning matter, the zoning administrator will need to monitor the activity to insure compliance. Neighboring property owners also can monitor compliance and can file a complaint with the local government --"The permit allows the mine to operate from 8am to 5pm and they have been working until 7 pm this past week." The local government could revoke the permit for noncompliance. They could also impose a monetary penalty for not being in compliance. They should check the enforcement section of their zoning ordinance to see what it currently provides. Now Act 67 requires that the applicant provide substantial evidence that they will comply. It is not clear that applicants have been held to this standard before. This might prove helpful when dealing with, for example, "bad actors" -- "In the past, you had a CUP for a similar use and you didn't do x, y, and z as you were supposed to do. Provide us with substantial evidence that you will do things differently." It might be difficult for the applicant to do.

■*Does Act 67's reference to only the "zoning board" mean that the plan commission and/or governing body cannot grant conditional use permits?*

Under prior Wisconsin law, it was interpreted that the authority to grant conditional use permits could rest with either the zoning board of appeals/adjustment, the plan commission, or the governing body.[3] It is not clear whether the use of "zoning board" was a drafting error or intentional.

It may lead some people to argue that as a result of Act 67 only the zoning board can grant conditional use permits despite the language elsewhere that conditional use permits can be decided by the zoning board, the plan commission, or the governing body. (When there is a conflict in the statutes, the most recently adopted statute controls.)

The language of Act 67 may lead others to argue that Act 67 only applies to conditional use permits issued by the zoning board. The plaintiffs in *AllEnergy* made the argument that the county committee did not have the

[3] See Wis. Stat. §§ 59.694(1), 60.65(3) and 62.23(7)(e)

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legal authority to make the decision it did because the decision to not allow the mine was a legislative decision that could only be made by the county board -- the legislative body. The lead opinion in the Supreme Court's decision determined that the ordinance (the standards in the ordinance, etc.) properly authorized the committee's actions so it was not an improper delegation of legislative authority. Since Act 67 is limited to the zoning board, it does raise the argument that if it is the governing body that issues the conditional use permit, the governing body, as a legislative body, has more discretion to act on conditional use permits because they are not bound by the requirements of Act 67.

Can a local ordinance provide for an appeal of a conditional use permit decision to another local body?

A number of local governments provide for appeal of a plan commission decision on a conditional use permit to the zoning board of appeals or the governing body. It is not clear from the wording of Act 67 if it preempts local ordinances from having an intermediate step of appeal to a zoning board or the governing body before the denied applicant could appeal the decision to circuit court. An ordinance providing for an intermediate appeal in an ordinance should still be acceptable under an argument that if the applicant succeeds in the appeal it saves the time and expense of having to bring a lawsuit in a court of law.

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December 28, 2017

Renee Lauber, DCTA Planner
Dane County Towns Association
1252 Morrison Court
Madison, WI 53703

Re: Conditional Use Authority
New Preemptions
2017 Wisconsin Act 67

Dear Ms. Lauber:

I am sending this general opinion letter as a courtesy. As you may have heard, the State recently adopted a series of laws concerning municipal regulation of land use, known informally as the Landowner's Bill of Rights. I am writing regarding one of the most pressing changes, concerning conditional use authority. I will offer some background regarding the changes, describe the preemptions, and offer several carefully considered recommendations as follows:

I. BACKGROUND

While conditional uses are a routine part of local zoning, this is the first time that conditional use authority has been specifically addressed in the Wisconsin Statutes. The impetus for doing so was a controversial decision of the Wisconsin Supreme Court, in *AllEnergy Corporation v Trempealeau County Environment and Land Use Committee*, 375 Wis. 2nd 329 (May 31, 2017). In that case AllEnergy applied for a conditional use permit for nonmetallic mineral mining. At least 368 people were on record at the public hearing. The first controversial issue in the case was: AllEnergy contended that the opponent's arguments were insufficient, because they were all "uncorroborated hearsay." The second controversial issue was: The Zoning Committee denied the application even though they found that all the requirements for the conditional use permit were met.

On appeal, AllEnergy argued that the court should adopt a new standard that requires decisions to be made based upon substantial evidence, and requires the issuance of the permit if the conditions are met.

> Finally, we address AllEnergy's request that the court "adopt a new doctrine that where a conditional use permit applicant has shown that all conditions and standards, both by ordinance and as devised by the

> zoning committee, have been or will be met, the applicant is entitled to the issuance of the permit."[1]

The Wisconsin Supreme Court rejected that standard and upheld the denial of the permit. This legislation followed, and essentially imposed the standard sought by AllEnergy.

One final background observation: These changes may have no impact on current practices for some municipalities, while having a significant impact on others. Many municipalities have followed most or all of the processes that are now legally required, while others have not. This law sets a uniform standard, that all must follow.

II. NEW PREEMPTIONS

The new law imposes the following limitations on your authority:

1. *Applies to all Special Zoning Permission*. The statute is drafted to apply to "conditional use" authority, but that term is defined very broadly:

> "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a [municipality], but does not include a variance.[2].

2. *Substantial Evidence*. Conditional use decisions must be made on substantial evidence. This term is defined in the new law as follows:

> "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.[3]

3. *Applicant Must Present Substantial Evidence*. The Applicant bears the burden of proving that they meet the standards. Specifically, the law requires the following:

> The applicant must demonstrate that the application and all requirements and conditions established by the [municipality] relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence.[4]

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[1] AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm., 2017 WI 52, ¶ 119, 375 Wis. 2d 329, 381, 895 N.W.2d 368, 394
[2] §§60.62(4e)(a) 1. and 62.23(7)(de) 1.a., Wisconsin Statutes
[3] §§60.62(4e)(a) 2. and 62.23(7)(de) 1. b., Wisconsin Statutes
[4] §§60.62(4e)(b) 2. and 62.23(7)(de) 2.b., Wisconsin Statutes

4. *Reasonable Conditions.* The substantial evidence test also applies to any conditions that the municipality might impose. The new law says the following:

> Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.[5]

This is further described in the immediately following this section:

> The requirements and conditions described under subd. 1. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal.[6]

5. *Can Limit Duration, Transfer or Renewal.* Municipalities are given specific authority to limit conditional use permit duration, transfer or renewal, per the section quoted above, and also by this section:

> Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the [municipality] may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the [municipal] zoning board.[7]

6. *Public Hearing and Notice.* All conditional use permits now are required to have a public hearing, and class 2 notice is required.

> Upon receipt of a conditional use permit application, and following publication in the [municipality] of a class 2 notice under ch. 985, the [municipality] shall hold a public hearing on the application.[8]

7. *Quasi-Judicial Decision to Approve or Deny.* To underscore the obligation for substantial evidence, the statute ultimately requires that the decision must be made on substantial evidence.

> The [municipality's] decision to approve or deny the permit must be supported by substantial evidence.[9]

This is the third reference to the defined term "substantial evidence," in two adjacent paragraphs of the statute. There is no legislative decision being made, it is all determined upon substantial evidence. This is a quasi-judicial role, not a legislative role.

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[5] §§60.62(4e)(b) 1. and 62.23(7)(de) 2.a., Wisconsin Statutes
[6] §§60.62(4e)(b) 2. and 62.23(7)(de) 2.b., Wisconsin Statutes
[7] §§60.62(4e)(d) and 62.23(7)(de) 4., Wisconsin Statutes
[8] §§60.62(4e)(c) and 62.23(7)(de) 3, Wisconsin Statutes
[9] §§60.62(4e)(b) 2. and 62.23(7)(de) 2.b., Wisconsin Statutes

8. *Appeal.* The statute says that denial of a conditional use permit application can be appealed to circuit court.

III. RECOMMENDATIONS

Based upon the foregoing, I recommend the following:

1. *Process.* I recommend that you follow a quasi-judicial procedure concerning conditional use permits.

    - *Testimony on Conditions.* If your Planner intends to make recommendations concerning conditions, your Planner should be prepared to testify as to why those conditions are needed. In some cases, they will be needed because the ordinance requires them, and in other cases it will be because the Planner believes the conditions are necessary to protect the municipality's interests. We want a strong record to be developed at the hearing in support of any such conditions.

    - *Due Process.* In controversial matters, it will be important to consider in advance how the evidence will be received, such that due process is afforded to all interested parties.[10]

2. *Code Amendments.* I recommend that you closely review your Zoning Code with the foregoing preemptions in mind. Changes may be necessary. I note the following:

    - *Potential Conflicts.* Your Code may conflict with the new laws in some respects, and should be amended to remove any such conflict in terms. For example, your Code may create a standard for the issuance of conditional use permits that differs from the new standards described above, so your Code should be amended to comply with the new law in that regard.

    - *Special Exceptions.* Pay particular attention to special exceptions, because wherever your Code refers to a special exception, it is now subject to the foregoing regulations as though it were a conditional use. You need to be sure that your special exception procedures comply with these requirements of the new law, therefore. This does not mean that special exceptions need to be located in the same Code Sections as conditional uses, but it does mean that both types of approvals

[10] The statute does not specify that testimony at the public hearing must be sworn, though swearing the witnesses may be a best practice given the "substantial evidence" test.

need to be based on substantial evidence, include notice and hearing, and include all of the related requirements noted above.

Alternatively, where your code currently refers to special exceptions, different nomenclature may resolve the issue if the intent is not to require special zoning permission, but to provide leniency, like a variance. Words like "waiver" or "modification" or even "variance" may accomplish the intent of providing such leniency, without invoking these new laws.

- *Query: Site Plan and Plan of Operation Approval*? Many Zoning Codes require separate approval of site plans and plans of operation before commencement of a use. An argument could be made that this constitutes an "other special zoning permission" under the statute and therefore invokes the obligations for notice and hearing and decisions based upon substantial evidence. I recommend that this issue be closely considered in your code. In situations where the site plan and plan of operation approval arises out of a conditional use, the notice and hearing can occur in conjunction with the conditional use process. In situations where a site plan and plan of operation is required and there is no companion process involving notice and hearing, we will need to closely consider whether this is a special zoning permission issue in the context of your code, and if so, notice and hearing will be required.

- *Public Hearing Notice*. This new law requires a class 2 public hearing notice for conditional use permits, so your code may need to be amended to add that requirement. Also, note that mailed notice is not required by this statute, but your code might require that for all public hearings. You may want to amend your code to say that mailed notice is not required for public hearings involving conditional uses, only class 2 notice, depending upon your intent.

- *Adopt Standard Conditions*. Many of my clients routinely impose a number of standard conditions for every conditional use order, to ensure that ample authority is preserved and applicable laws are followed. I recommend that you adopt these standard conditional use requirements directly into your Code, and say within the Code that they apply to every conditional use permit. Doing so will avoid or minimize any need to prove by substantial evidence that the standard conditions are required in every case.

- *Specific Conditional Use Standards.* I recommend that the specific standards for issuing each of the individual conditional uses be closely considered and further specified to the extent possible directly in the code. Decisions on whether to grant or deny conditional use permits will be based upon whether these standards are met. If you have inadequate standards specified in your ordinance, the conditional uses may be required to be granted more often than you intend.

- *General Conditional Use Standards.* In the *AllEnergy* case, the Applicant expressed significant frustration with the general standards of the ordinance. General standards are requirements such as protection of the public interest and preservation of property values and the like. AllEnergy contended that such standards are too subjective, and difficult to prove. The Legislature did not remove your ability to have such general standards, however. I recommend that you review your Zoning Code and ensure that you have appropriate general standards that will apply for the issuance of all conditional use permits, as a catch-all to protect the municipal interests.

- *Reclassify Uses?* As you review your conditional uses, consider whether this continues to be the best zoning tool. You may prefer, given this new regulation of conditional uses, to reclassify the uses. Maybe some would now be better classified as permitted uses in some of the districts and prohibited in others, for example.

3. *Quasi-Judicial Role.* The governing bodies that participate in conditional use approvals must ensure that they act like judges, not like legislators. That means:

    - *Unbiased.* The members must be impartial. They cannot come to the hearing biased, or if they are they must recuse themselves.

    - *No ex parte communication.* Decision makers must avoid ex parte communication, meaning that they should not investigate the case or receive information about the case outside of the hearing and the public meetings.

4. *Which Governing Body?* Many municipalities have a two-step process for the issuance of conditional use permits, which begins with a recommendation

from the Plan Commission and ends with a decision of the governing body. You may want to revisit that two-step process in light of this new legislation. There is no legislative decision to be made, it is all a quasi-judicial decision now. This quasi-judicial body will now function more like the Zoning Board of Appeals, or Board of Adjustment, or your Board of Review, each of which hears the evidence and makes the final decision. A one-step process may be more consistent with the type of action contemplated by the new laws.

If you should have any questions or concerns regarding these matters, please do not hesitate to contact me. I would be happy to participate in pursuing the foregoing recommendations with you on request.

Yours very truly,

ARENZ, MOLTER, MACY,
RIFFLE & LARSON, S.C.

Eric J. Larson

Eric J. Larson

EJL/egm

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von Briesen
von Briesen & Roper, s.c. | Attorneys at Law

CONFIDENTIAL LEGAL MEMORDANDUM

ATTORNEY-CLIENT PRIVILEGED

TO: Dan Bahr, Government Affairs Associate
Wisconsin Counties Association

CC: Mark D. O'Connell, Executive Director
Kyle Christianson, Director of Government Affairs

FROM: Andrew T. Phillips and Bennett J. Conard
von Briesen & Roper, s.c.

RE: 2017 Act 67 and Conditional Use Permit Standards

DATE: May 7, 2018

BACKGROUND

On November 27, 2017, the Wisconsin Legislature enacted 2017 Act 67 (the "Act") and codified certain elements of the conditional use permit ("CUP")[1] review process. You have asked us to review the Act and analyze what, if anything, has changed in relation to the CUP review process for counties as a result of the Act.

The Act added statutory requirements for the CUP review process that did not previously exist in the Wisconsin Statutes. However, the Act did not significantly alter the legal requirements already imposed on the CUP review process by caselaw. Prior to the Act, county zoning agencies were already required to (i) operate within the powers granted to them by a county zoning ordinance; (ii) reach conclusions by examining and relying on substantial evidence; and (iii) identify the standards under which a CUP application would be judged.

As set forth in detail below, we believe that the Act, for the most part, merely codifies existing CUP review process requirements already required under Wisconsin law. Our analysis follows.

[1] "Conditional Use" is defined as "a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a county, but does not include a variance." Wis. Stat. § 59.69(5e)(a)1.

ANALYSIS

A. CUP Review Standards Prior to the Act.

Counties possessed general authority under Wis. Stat. § 59.69 to regulate conditional uses within their zoning code, through the county zoning agency, prior to the Act, which included the ability to grant or deny CUPs. The Wisconsin Statutes did not provide a specific set of requirements for counties to follow in the CUP review process. For this reason, the extent of a county zoning agency's authority to grant or deny CUPs was determined in caselaw.

Consequently, it is important to examine *AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee*, as this case provides a detailed explanation of counties' pre-Act CUP authority. 2017 WI 52, 375 Wis.2d 329, 895 N.W. 2d 368. At issue in *AllEnergy* was the Trempealeau County Environment & Land Use Committee's (the "Committee") denial of an application for a CUP for a non-metallic mineral mine. Non-metallic mining was designated as a conditional use within the particular zoning district in the county's zoning code.

The applicant appealed the denial and the Court addressed three main issues raised by the applicant regarding a county zoning agency's CUP authority:

1. The standards and criteria a zoning agency may examine (*i.e.*, a zoning agency's jurisdiction);

2. The sufficiency of evidence required to support a zoning agency's decision; and

3. Whether an applicant is entitled to a CUP as a matter of right when (a) all standards in the ordinance have been met, and (b) additional standards could be adopted that would address potentially-adverse impacts of the proposed use.

Our discussion of the Court's analysis in the *AllEnergy* case follows.

1. Zoning Agency's Permitted Jurisdiction.

A zoning agency has all those powers that are expressly conferred or that are necessarily implied by the ordinances under which it operates as an agency created by a county board. *AllEnergy*, 2017 WI 52, ¶ 37. In *AllEnergy*, the Committee was directed by the county's zoning ordinance to consider numerous objective and subjective factors. Primarily at issue was the requirement directing the zoning committee to "approve a conditional use permit only it if determines that 'the proposed use at the proposed location will not be contrary to the public interest and will not be detrimental or injurious to the public health, public safety, or character of the surrounding area.'" *Id*. at ¶ 39. The applicant asserted that this was an impermissible delegation of legislative power upon the Committee, and, alternatively, was unconstitutionally vague.

First, the Court determined, based on the evidentiary record, that the Committee appropriately made its decision and did not exceed its jurisdiction conferred by the county zoning ordinance. *Id*. at ¶ 48. Specifically, the Committee considered only the factors set forth in the ordinance, which included the impact of the applicant's mine on the public interest factors identified in the ordinance. *Id*.

However, the applicant also argued that even if the Committee only considered the factors directed under the ordinance, the Committee only had authority to consider objective factors, and not subjective factors such as the public interest factors. Essentially, the applicant argued that the public interest factors were unconstitutionally vague. The Court disagreed with AllEnergy and concluded that the public interest factors were not unconstitutionally vague because the discretionary authority granted to the Committee was guided by a set of guidelines and more specific factors. *Id*. at ¶ 71. The Committee did not make a purely discretionary decision. Rather, the Committee had specific factors to guide its examination of the evidence. Ordinances may vest boards and committees with some discretion without being unconstitutionally vague. *Id*. at ¶ 72; see also *Edward Kraemer & Sons, Inc. v. Sauk Cty. Bd. of Adjustment*, 183 Wis. 2d 1, 6, 515 N.W.2d 256, 258 (1994) (concluding that "the mere fact that the 'wise use of the county's resources' and 'public health, safety and welfare' standards are general in nature does not impair the validity of these portions of the ordinance"). The key is that an ordinance may not grant a zoning agency with blanket, unfettered discretion. *AllEnergy* at ¶ 72.

In sum, according to *AllEnergy*, a county zoning agency operates within its jurisdiction so long as it considers all factors and criteria as directed by ordinance, and could permissibly exercise discretion in its decision making process if granted such discretionary authority by ordinance.

2. The Substantial Evidence Test.

AllEnergy also examined the quality and quantity of evidence required to support a zoning agency's determination. The "substantial evidence test" applies to a zoning agency's decision making process. *Id*. at ¶ 75. "Substantial evidence" is defined as:

> evidence of such convincing power that reasonable persons could reach the same decision as the local governmental entity, even if there is also substantial evidence to support the opposite decision. Reasonable inferences may be drawn from credible evidence. *Id*.

In other words, a zoning agency's determination must be upheld so long as "'credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision' supports the decision" of a zoning agency. *Id*. As stated above, there may even be substantial evidence supporting a conclusion contrary to the ultimate decision. However, so long as the evidence relied upon in support of a decision is corroborated and more than mere hearsay, and the determination based on that evidence was reasonable, the decision must be upheld.

The "substantial evidence test" is a long standing rule applied by Wisconsin courts to determinations made by zoning agencies. This is not a new standard that was created by *AllEnergy*. For example, in *Sills v. Walworth County Land Management Committee*, the county

zoning committees decision to grant a CUP was challenged on the basis that the committee's decision was arbitrary and represented the committee's will and not its judgement. 2002 WI App 111, ¶ 11, 254 Wis. 2d 538, 549, 648 N.W.2d 878, 883.

Sills determined that the challenge to the sufficiency of evidence relied upon by the committee "invokes the substantial evidence test-a significant hurdle for the [challengers] to overcome." *Id*. The Court concluded that it must uphold the committee's decision "so long as it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion." *Id*. Substantial evidence means "credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." *Id*.; see also *Delta Biological Res., Inc. v. Bd. of Zoning Appeals of City of Milwaukee*, 160 Wis. 2d 905, 915, 467 N.W.2d 164, 168 (Ct. App. 1991), (holding that "[t]he weight to be accorded the facts is for the board to determine rather than the courts" and that "[i]f there is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion, the finding must be upheld").

3. An Applicant is not Entitled to a CUP.

The applicant in *AllEnergy* further argued that it was entitled to a CUP as a matter of right so long as it satisfied all conditions in the ordinance and any conditions devised by the Committee were met. *Id*. at ¶ 119. However, the Court determined that this cannot be the case because this would eliminate the possibility of subjective conditions, which the Court already concluded were valid exercises of the Committee's authority. *Id*.

The Court concluded that even though conditional uses may be authorized by a zoning ordinance, that they are not uses as of right. *Id*. at ¶ 52. Indeed, zoning ordinances allow certain uses so long as certain conditions are met. However, these conditions are not presumed to be met either by "judicial fiat or by the terms of the ordinance…" *Id*. at ¶ 53; see also *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780 (concluding that "[e]ven though conditional uses may be authorized pursuant to the ordinance, that does not render them uses as of right"), and *Riviera Airport, Inc. v. Pierce Cty. Bd. of Adjustment*, 2001 WI App 1, ¶ 2, 240 Wis. 2d 323, 621 N.W.2d 385 (stating that "[t]here is no guaranteed right to a conditional use permit, which is discretionary in nature").

Even though a conditional use is determined by a legislative body to be compatible in a particular area, the use is not always compatible at a specific site within that area. *Id*. at ¶ 54. Rather, the decision to grant a CUP is discretionary, and is carried out by the zoning agency. *Id*. In other words, the zoning agency must examine whether the applicant's proposed use would satisfy all factors contained in the ordinance at a particular location. Many of standards that must be satisfied to obtain a CUP are subjective and require significant interpretation, and, therefore, an applicant is not entitled to a CUP as a matter of right.

B. Codification of CUP Review Standards

The Act codified CUP review process requirements in Wis. Stat. § 59.69(5e), and provides the following requirements to which counties must adhere during a CUP application review process:

> 1. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the county ordinance or those imposed by the county zoning board, the county shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.
>
> 2. The requirements and conditions described under subd. 1. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal. The applicant must demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The county's decision to approve or deny the permit must be supported by substantial evidence.

Importantly, counties may still enact requirements and conditions within their zoning ordinances, and as part of the permitting process, that must be met in order for a CUP to be approved. See Wis. Stat. § 59.69(5e)(b)1. (requiring that an applicant meet all requirements and conditions of the county ordinance). It is still within a zoning agency's jurisdiction to examine all requirements and factors it is directed to examine by ordinance.

While § 59.69(5e)(b)1. also provides that a county "shall grant" a CUP to an applicant who meets all ordinance requirements and additional conditions imposed by the county zoning board, this is not a reversal of *AllEnergy*. This does not mean that an applicant is entitled to a CUP as a matter of right. The applicant must still satisfy all requirements and conditions of a zoning ordinance and all reasonable conditions imposed by a county zoning agency that are justified by substantial evidence. This includes subjective requirements and criteria that cannot practicably be measured, such as, an evaluation of public health, safety and welfare concerns, that may still be permissibly included in a zoning ordinance under the Act.

The Act codified *AllEnergy*'s evidentiary determination in that any requirements and conditions imposed on a CUP "must be reasonable and, to the extent practicable, measurable." Wis. Stat. § 59.69(52)(b)2. Even though *AllEnergy* concluded that a zoning ordinance may grant discretionary authority to a zoning agency, the discretionary authority also had to be based on a set of guidelines and more specific factors. *Id*. at ¶ 71. In keeping with this standard, the Act does not require that all requirements and conditions be objective and measurable. Rather, the requirements and conditions must be measurable to the extent practicable. This means that the zoning agencies should be guided by objective factors, but also recognizes that not all factors are capable of objective measurement.

If the legislature had intended to prohibit zoning agencies from considering subjective factors, such as the public interest factors, it would have limited requirements and conditions to only objective factors. However, the legislature did not do this. Instead, the Act requires objective measurement only to the extent practicable. The Act also permits zoning agencies to limit a CUP's duration, limit its transferability, or require that it be renewed from time to time. Wis. Stat. § 59.59(5e)(b)2. The legislature's recognition of these elements supports a position that an applicant has no statutory right to a CUP. Rather, a CUP application remains subject to evaluation by the zoning agency.

Moreover, the Act codified the substantial evidence test from *AllEnergy*. Specifically, the Act provides that "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. Wis. Stat. § 59.69(5e)(a)2.

Just as *AllEnergy* concluded, a zoning agency's decision must be based on credible evidence, not mere speculation or preference, and must be such that a reasonable person would be able to base a conclusion upon such evidence. As was the case prior to the Act, there is nothing that indicates there could not be substantial evidence in favor of the opposite conclusion. All that is required is that the decision made is based on credible evidence that a reasonable person would accept in support of such a conclusion.

Finally, the Act places the burden of proof on the applicant to demonstrate that it will satisfy all requirements and conditions of the ordinance and the zoning agency. This codified *AllEnergy*'s conclusion that conditions are not presumed to be met either by "judicial fiat or by the terms of the ordinance…" *Id*. at ¶ 53. Rather, it is the applicant's duty to provide substantial evidence in support of its application.

For the reasons above, the Act codifies the existing standards previously applied to the CUP review process by caselaw.

C. County Boards Should Review Zoning Ordinances in Light of the Act.

Given that the Act codified the standards previously found in caselaw, it may be beneficial for counties to review their zoning ordinances as they pertain to conditional uses and the CUP review process. While the applicable standards already existed, the standards are now explicitly delineated in the Wisconsin Statutes and will be uniformly applied. Counties should ensure that their zoning ordinances conform to these standards in order to avoid legal challenges to the sufficiency of the review process conducted by their zoning agencies.

CONCLUSION

Just as before the enactment of the Act, a zoning agency's CUP review process must follow the standards provided in the zoning ordinance and a zoning agency must base its conclusions and determination on substantial evidence. The Act's codification of the various standards under which a CUP application is adjudicated does not seem to change the substantive legal principles applicable to CUPs.

If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association and its member counties.

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