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Conditional Use Permits After 2017 Wisconsin Act 67

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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,* d*o 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)

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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