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Act 67 CUP Analysis

There has been confusion in how 2017 Wisconsin Act 67 (the Act) generally impacts the conditional use permit (CUP) process. The Wisconsin Towns Association (WTA) published a broad overview of the Act in a magazine article describing the law changes that were implemented. This memo is intended to supplement that article by providing a more in-depth explanation. It will go into more detail regarding what CUP law was, what the law is now, and what that means for CUP ordinance provisions.

CUPs Prior to Act 67

To put the Act into context, it is important to know what courts required of the conditional use permit process prior to Act 67. Before Act 67 most of the CUP framework came from court made law as no statute directly related to CUPs.

There are three basic types of use designations in a zoning ordinance: permitted, prohibited, and conditional. Permitted uses are allowed by right under a zoning ordinance. For example, a parcel of land zoned for commercial use that complies with the zoning ordinance is entitled by right to obtain a building permit. Conversely, a prohibited use means a person may not use the property for certain purposes (e.g., opening a business in a residential zone where commercial uses are prohibited). Conditional uses are a hybrid between permitted and prohibited. A conditional use requires special permission to use property in a certain manner in a particular zoning district. As part of the process to obtain permission, the local government can apply conditions upon the use of that property because it is not permitted by right. For example, a residential zone may have a daycare center as a conditional use. That means the property owner can operate the daycare center if they get permission from the local government and agree to all of the conditions attached to a permit, which is called a conditional use permit (CUP).

Prior to Act, 67 local governments could create individual CUP requirements based on their broad zoning authority. For example, previously there was not a public hearing requirement for CUPs, even though many municipalities chose to have one. There was also no set procedure on how to handle CUP applications except for local rules. Procedurally, a local government would typically require an application for a CUP, hold a public hearing, then either approve or deny the CUP. Act 67 established procedural requirements in statute, including the need for a public hearing.

Despite broad procedural discretion by the local government prior to Act 67, legal standards and burdens that had to be followed and met by the local government were already created by the courts before the new law. When reviewing local government CUP decisions, courts evaluated: 1) whether the board kept within its jurisdiction; 2) whether the board proceeded on a correct theory of law; 3) whether its action

was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and, 4) whether the evidence was such that the board might reasonably make the decision in question. *Edward Kraemer & Sons v. Sauk County Board of Adjustment*, 183 Wis. 2d 1, 515 N.W. 2d 256 (1994).

The Wisconsin Supreme Court gave local governments broad authority to enact CUP ordinances and establish criteria that guided the decision making process. In one such case, *Edward Kraemer & Sons v. Sauk County Board of Adjustment*, 183 Wis. 2d 1, 515 N.W. 2d 256 (1994), a mining company challenged the denial of a CUP on the theory the county could only use objective and specific criteria in its decision making process. The county had a CUP ordinance that directed its board of adjustment to consider criteria, such as, whether or not the project was a wise use of county resources, or how it impacted the public health, safety and welfare. In this case, the court was tasked to determine if the permit denial satisfied the second element of the aforementioned four part analysis, that being whether the county applied the correct theory of law. The Court ruled in favor of the county, finding broad CUP criteria created by the county board was valid, and the county zoning board had to consider the criteria when evaluating the permit. Therefore the zoning board could properly base its denial on the impact to the public health, safety, and general welfare. For example the board could consider potential health hazards created by the proposed mine, or “the generalized effects on the public welfare...that would result from partial destruction of a natural area that...is of great geological importance.” *Kraemer*, 183 Wis. 2d, 1, 11. The court made clear that generalized standards were acceptable in CUP ordinances.

Historically, one of the most common challenges to a CUP denial has dealt with the fourth element of the court created test, that being whether the evidence was such that the board might reasonably make the decision in question. This became known as the substantial evidence test.

Defining substantial evidence is no simple task. Decades of case-law has formulated some basic tenets of substantial evidence. The Wisconsin Supreme Court recently re-iterated that “[s]ubstantial evidence is 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.” *AllEnergy Corporation v. Trempealeau County Environment & Land Use Committee*, 2017 WI 52, ¶75, 375 Wis. 2d 329, 895 N.W.2d 368. The board may draw reasonable inferences from credible evidence. *Id.* If credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision supports the decision of the local government, the court will uphold that decision. *Id.* A decision is not supported by substantial evidence if it is based on uncorroborated hearsay alone. *Id.* at ¶81.

To put substantial evidence into context, it is less than a preponderance of evidence (a more likely than not standard), but more than a mere scintilla of evidence. Put another way, the evidence cannot be based on conjecture and speculation. *Id.* at ¶76.

In applying the substantial evidence test, the court defers to the decision of the local board, granting it a presumption of correctness. In fact, in cases where evidence could support either a denial or approval of a permit, the court will defer to the local government. Further, the court does not reweigh evidence and try to perform the function of the board. It looks at the record as whole and considers the context of the evidence in determining whether it supports the local government’s decision. *Id.* at ¶89. Importantly, the burden is on the applicant to show it satisfied the criteria for a permit.

The *AllEnergy* case, decided in 2017, provides a useful example of how the courts have applied this test. This case involved a proposed sand mine in Trempealeau County. The land use committee denied AllEnergy's CUP request to open a sand mine in the Town of Arcadia. AllEnergy sued, alleging substantial evidence did not support the permit denial. The county ordinance required the committee to consider the public health, safety, and general welfare; the wise use of natural resources; aesthetics; the market value of land; and, the legitimate interests of properties in the vicinity. The land use committee denied the permit for three primary reasons: 1) the mine raised environmental concerns; 2) the mine would change the landscape and have adverse effects on wildlife and recreational opportunities for residents and tourists; and, 3) the mine raised health concerns and would result in changes in local culture and conditions.

At the public hearing for the CUP, dozens testified opposing the mine. Those testifying raised concerns that the mine would endanger a Class II trout stream. One person explained that a report noted the stream was on the verge of no longer being able to sustain healthy trout populations due to runoff, and drainage from the mine would cause further damage. Another resident testified that building the mine on wetlands next to the stream would increase flooding on the river, which was already prone to flooding. A different resident testified that a neighboring mine had caused numerous water quality problems, such as sand in drinking water, and increased costs for water testing.

Others testifying at the hearing raised concerns regarding the impact to landscape, wildlife, and recreation. One email submitted said the mine would impact the habitability of the wetland area for various species of waterfowl. Residents also testified about the aesthetic degradation caused by other mines in the area. Others stated that residents would see lower property values.

People who lived near existing mines provided anecdotal evidence concerning health issues that arose, and professionals entered evidence about various health risks with air and water quality.

The court ruled in favor of the county's denial of the CUP. It found testimony submitted at the public hearing provided substantial evidence to support the decision. Even though AllEnergy had experts that provided conflicting evidence, the court deferred to the judgment of the local government and would not reweigh the evidence.

There are a few key takeaways from this case. The first is how much deference a court will give to a local decision making body. It is somewhat similar to Board of Review in that the local body is presumed correct. Only if there is no probative evidence rationally related to the decision will courts overturn permit denials. The second key takeaway is the type of evidence that is available to local bodies. Testimony and written letters or emails are valid as long as they rationally relate to the reason for denial. For instance the board in this case could not have denied the permit based on environmental concerns if no one had provided any evidence about environmental impacts. Thus the testimony must relate to an ordinance criteria and the reason for denial.

CUPs After Act 67

CUP law after Act 67 shares many similarities with law prior to this legislation. Indeed in many instances Act 67 codified already existing court made CUP law.

The Act specifically defines what a conditional use means. It is defined as a conditional use permit, special exception, or other special zoning permission issued by a local government, but does not include a variance. This is unchanged from prior law.

The substantial evidence standard now defined in statute as a result of Act 67 is also the same as prior law. The Act specifically defines substantial evidence as “*facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit, and that reasonable persons would accept in support of a conclusion.*” This language codified the substantial evidence standards applied in *AllEnergy*. This means the substantial evidence analysis explained above will continue after Act 67.

Interestingly, the Act also places the substantial evidence burden on the applicant to show it will meet all conditions and requirements of the ordinance. The applicant must provide substantial evidence that every requirement and condition will be satisfied. For the local government, all conditions placed upon a permit must be related to the purpose of the zoning ordinance and based on substantial evidence. Substantial evidence must also support denials of CUPs by local government.

If the local government approves a CUP in may attach conditions to the permit. As stated above, those conditions must be related to the purpose of the ordinance and based upon substantial evidence. Further, the local government can place conditions related to the duration, transfer, or renewal of the permit. If the applicant, with a showing of substantial evidence, meets, or agrees to meet, all requirements and conditions imposed by the local government, the CUP must be approved. But again, the burden is on the applicant to show through substantial evidence that they will meet the conditions. If substantial evidence shows they will not meet the conditions imposed, the permit can be denied.

The conditions imposed by the local body must also be “*reasonable, and, to the extent practicable, measurable*”. Generally, zoning ordinances stem from the police power, or the ability to create ordinances in furtherance of the public health, safety, or general welfare. This Act specifies that CUP ordinance provisions and requirements must be “*reasonable, and, to the extent practicable, measurable*”. “Reasonable”, although not defined, is a broad term that is deferential to local governments. Any ordinance requirement generally related to the police power could be considered “reasonable”.

The qualifier, “to the extent practicable”, is important to determining the meaning of this language. By adding this language, the legislature expressed its intent to have subjective requirements in CUP ordinances, when purely objective requirements cannot be crafted. Measurable requirements may not always be possible, which is why the legislature used this language. Standards, such as, preserving the public health, safety, and general welfare are still valid under Act 67. The ordinance can still have these broad, subjective criteria, but certainly more emphasis will be placed on having specific conditions implementing those requirements. Aesthetic requirements can also have both subjective and objective components. Similarly, more emphasis will be put on whether or not a local government created specific requirements that were as objective as possible as measured by the standard “to the extent practicable, measurable”.

Additionally, the Act created a uniform procedure for CUPs. Once a person files a completed application, the local government must hold a public hearing on the application. The local government must publish a class 2 notice under chapter 985 to meet the notice requirements for the public hearing.

Considerations After Act 67

Local governments will need to critically evaluate their CUP ordinances after passage of the Act. The WTA still highly recommends using CUPs. They are a valuable planning tool and are great for managing uses that may have negative externalities. Oftentimes local governments will state that a conditional use exists in every zone that has a specific permitted use. For example a conditional use might exist in all agricultural zones. After Act 67 it may behoove local governments to analyze whether that is the best planning system. Local governments should look at every district and decide if it truly wants conditional uses allowed in those zones. For example, if there is an area that is important to tourism for its scenic beauty, the local government may not want to have a conditional use for mining around that location. This will also require analyzing the comprehensive plan to ensure use designations are consistent.

Ultimately, local governments will have to weigh the advantages and risks of the many zoning options available to them. The WTA believes CUPs are still a valuable zoning tool that should not be abandoned because Act 67 mirrors prior law in many respects. Some local governments may decide to reduce the number of conditional uses permitted within their jurisdiction and shift to conducting rezones. This is another strategy that also carries with it some advantages and disadvantages. Conducting rezones will lead to more procedural requirements that must be fulfilled. Comprehensive plans may need to be updated with rezoning of properties. Utilizing this strategy could also reduce the control local governments have over the property since it is illegal to “contract zone”. In other words the local government cannot contract away its legislative function, or sign an agreement based on a rezoning. On the other hand, rezonings are legislative decisions, which means these types of decisions receive even more deference from courts. Local governments will have to weigh these risks when choosing how to implement their community/development plans.