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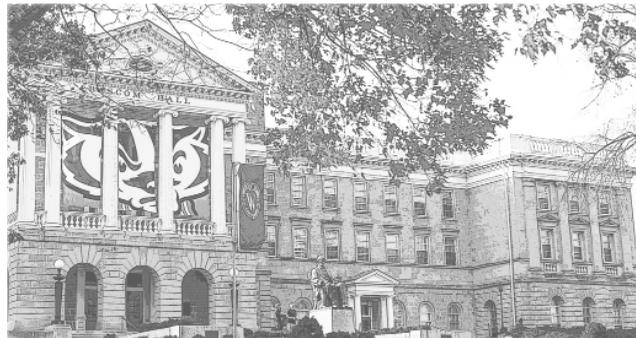
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LOCAL ZONING ORDINANCE OPTIONS FOR CONDITIONAL USE PERMITS AFTER 2017 WISCONSIN ACT 67

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Moving Forward

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Introduction

2017 Wisconsin Act 67, effective since November 2017, established uniform statutory requirements for how cities, villages, towns, and counties review applications for conditional use permits, special exceptions, and other special zoning permissions (hereafter referred to solely as “CUPs”).¹ Act 67 added new sections on CUPs to the three different statutes that enable the various types of local government in Wisconsin to enact zoning ordinances.² Conditional uses and special uses are a common element in local zoning ordinances. Zoning districts in a local zoning ordinance will identify uses that are allowed as a matter of right in the district (permitted uses) and may identify other uses that can be allowed in the zoning district subject to certain conditions being placed on the use (conditional uses or special uses). Uses that are not identified as permitted or conditional uses in a zoning district are not allowed in the district (prohibited uses).

Local government zoning ordinances and practices related to conditional uses, special uses, and special exceptions vary considerably throughout the state. As a result, it is difficult to generalize about the impact of Act 67 on local zoning ordinance and practices. Some existing local ordinances and practices may comply with the new law so no changes are needed. Other communities might find they only need to make minor changes due to Act 67. For some local governments, Act 67 may require more significant changes. Local governments are taking various approaches to understand the implications of Act 67 on applications for CUPs. Several communities, including the Town of Grafton in Ozaukee County and the Town of Delafield in Waukesha County imposed temporary moratoria on the issuance of CUPs as they study the need to make changes to their ordinances in response to Act 67.³

Act 67 should prompt local governments to analyze their existing local zoning ordinance and practices to ensure they comply with the requirements of Act 67. This publication is intended to provide additional guidance for local communities to review their zoning ordinances and practices for compliance with the requirements of Act 67 related to CUPs.

Historical Context

The Standard State Zoning Enabling Act (SSZEA), published by the U.S. Department of Commerce in 1926, provides the basis for Wisconsin’s current zoning enabling laws.

¹ See Brian W. Ohm, *Conditional Use Permits After 2017 Wisconsin Act 67*, PERSPECTIVES ON PLANNING, January 2018, <https://dpla.wisc.edu/sites/dpla.wisc.edu/files/inline-files/pop%20Conditional%20Uses%20After%20Act%2067.pdf> for a summary of the provisions in Act 67 related to CUPs.

² 2017 WIS. ACT 67 created WIS. STAT. § 59.69(5e) for county zoning; WIS. STAT. § 60.61(4e) for town zoning (without village powers) in counties that do not have a county zoning ordinance; and WIS. STAT. § 62.23(7)(de) for city, village, and town (with village powers) zoning ordinances.

³ Town of Grafton Board of Supervisors, RESOLUTION 2018-07, adopted April 11, 2018; Town of Delafield Board of Supervisors, Meeting Minutes, Feb. 13, 2018, <http://www.townofdelafield.org/documents/2-13-18.pdf>.

While Wisconsin's original zoning enabling laws predate the SSZEA, when the Legislature began to "modernize" the zoning enabling laws for cities in the 1940s (the Legislature later allowed villages and towns that have adopted village powers to follow the same law as cities), it borrowed language from the SSZEA. The SSZEA did not use the term "conditional uses" but rather referred to "special exceptions." Section 7 of the SSZEA allowed the local legislative body to create a "board of adjustment" and "provide that the said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards make special exceptions to the terms of the ordinance in harmony with its general purposes and intent and in accordance with general or specific rules therein contained."⁴

Wisconsin's current zoning enabling law for counties requires the creation of a "board of adjustment" while the current zoning enabling law for cities, villages, and towns with village powers, requires the creation of a "board of appeals." Both enabling laws include almost identical language to the above quoted language from the SSZEA: "provide in such regulations that said board of [adjustment/appeals] may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained."⁵

As noted by one early commentator on Wisconsin zoning law:

A zoning ordinance purports to place all land within the community in a "district" in which land may be put to certain designated uses. In theory, the local governing body, with the help of experienced professionals, is able to foresee the best uses to which all land in the community should be put in the future. From the beginning of zoning, the legislature, in its infinite wisdom, recognized that permanent zoning for specific uses was not feasible. Accordingly [state law] provides that the local governing body could (and, impliedly, should) bring flexibility into the zoning ordinance by authorizing the board of zoning appeals . . . to grant "special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules" designated in the ordinance.

The "special exceptions" procedure is frequently used to allow an unusual use in a given zoning district only after a review of the applicable facts establishes that the proposed use would conform, perhaps if subjected to certain special conditions, to the standards or rules spelled out in the ordinance for such a use.⁶

Other language in Section 7 of the SSZEA gives the board of adjustment the authority "[t]o hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance." Likewise, Wisconsin's current zoning enabling laws for counties, cities, villages, and towns with village powers, includes identical language to that found in the SSZEA authorizing the board of appeals "to hear and decide

⁴ U.S. DEPT. OF COMMERCE, STANDARD STATE ZONING ENABLING ACT, § 7, https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf.

⁵ WIS. STAT. 59.694(1) (counties); WIS. STAT. 62.23(7)(e)1 (cities, villages, towns with village powers).

⁶ RICHARD W. CUTLER, ZONING LAW AND PRACTICE IN WISCONSIN. (University of Wisconsin Law School 1967), p. 36.

special exception to the terms of the ordinance upon which such board is required to pass under such ordinance.”⁷

Despite this language in the statutes, by the 1960s, most local governments in Wisconsin authorized the plan commission or the elected governing body, rather than the board of zoning appeals, to approve conditional use permits.⁸ “The reason for this more frequent reliance upon the plan commission or elected body is that they are continuously involved in the process of recommending legislative changes in the zoning ordinance and therefore more apt to be conversant with the ‘purpose and intent’ of the ordinance than the board of zoning appeals whose primary function is the quasi judicial one of granting variances from the express terms of the ordinance because hardship exists, rather than that such a deviation is explicitly authorized in the ordinance if certain standards are determined to have been met.”⁹ The Southeastern Wisconsin Regional Planning Commission (SEWRPC) also concluded that the local planning agency was “the most qualified body” to review CUPs since they often address planning and development matters and usually contain members with experience or professional expertise in dealing with such matters.¹⁰ SEWRPC and other early commentators on Wisconsin zoning practice recommended that if the zoning board of appeals/adjustment or the local governing body granted CUPs, they should be required to await review and recommendation by the local planning agency before taking final action.¹¹

In an acknowledgement of this practice and to clarify any uncertainty about the authorization for the practice, Wisconsin’s zoning enabling laws were amended in 1973 to expressly enable the plan commission of the governing body to grant special exceptions in addition to the board of adjustment/appeals. For cities, villages, and towns exercising zoning under village powers, the language reads: “Nothing in this subdivision shall preclude the granting of special exceptions by the city plan commission or the common council in accordance with the zoning regulations adopted pursuant to this section which were in effect on July 7, 1973 or adopted after that date.”¹² The zoning enabling law for counties was likewise amended to enable a county planning and zoning committee, a county planning and zoning commission, or the county board to grant special exceptions in addition to the board of adjustment.¹³

The enabling language in the Wisconsin Statutes based on the SSZEA resulted in some local governments in Wisconsin using the term “special uses.” Other local governments in Wisconsin began to use the term “conditional uses” following zoning ordinance development in other states. Early commentators on Wisconsin zoning law

⁷ WIS. STAT. § 59.694(7)(b) (counties); WIS. STAT. § 62.23(7)(e)7.b (cities, villages, towns exercising zoning under village powers).

⁸ CUTLER, *supra* note 6, p. 37.

⁹ *Id.*

¹⁰ SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION, ZONING GUIDE (1964), p. 39.

¹¹ *Id.*, DONALD G. HAGMAN, WISCONSIN ZONING PRACTICE: PROCEDURES AND STANDARDS FOR OBTAINING AMENDMENTS, VARIANCES, EXCEPTIONS, AND SPECIAL USE PERMITS (1962), p. 62.

¹² WIS. STAT. § 62.23(7)(e)1 (cities, villages, towns with village powers).

¹³ WIS. STAT. § 59.694(1).

noted that local ordinances used the terms “special use” or “conditional use” and cautioned against the use of the term “special exception” unless the board of adjustment/appeals was authorized to grant the “exception.”¹⁴ Commentators also noted the confusion between variances and “special exceptions.” While a variance is an exception to the ordinance, a “special exception” is not. A special exception permits certain uses specified in the ordinance whenever certain stated conditions are met so a “special exception” ends up following the ordinance.¹⁵ Decisions of the Wisconsin courts, in line with courts throughout the United States, subsequently interpreted the “special exceptions” language in the enabling laws to also mean “conditional uses.”¹⁶

By the mid-1970s, commentators acknowledged that CUPs were “widely employed, with their use expanding into new directions . . . as communities seek greater involvement in land-use decisions and flexibility in the administration of land-use regulations.”¹⁷ An applicant for a CUP “must go through the special permit process which gives the administering agency an opportunity to determine whether that development, in the particular location contemplated, will create special problems that can be ameliorated by specially devised conditions or which call for denial of permission.”¹⁸ The commentators also recognized that the overuse of CUPs for development “is nonzoning and development by arbitrary decision making . . . [which] must be restrained by criteria and standards.”¹⁹ Over the ensuing decades numerous court cases helped to guide the practice of CUPs in Wisconsin. Except for the language quoted earlier, the Wisconsin Statutes provided little guidance for CUPs. That changed with the enactment of Act 67.

The Wisconsin Legislature enacted Act 67 in response to the Wisconsin Supreme Court’s May 2017 decision in *AllEnergy Corp. v. Trempealeau County*, 2017 WI 52. The *AllEnergy* case involved the denial of a CUP for a proposed frac sand mine 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 CUP in part relying on public testimony in opposition to the mine. A divided Wisconsin Supreme Court upheld the County’s denial of the 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,

¹⁴ CUTLER, *supra* note 6, p. 38.

¹⁵ *Id.*, p. 46, n. 5.

¹⁶ *State ex rel. Skelly Oil Co., Inc. v. City of Delafield*, 58 Wis. 2d 695, 702, 207 N.W.2d 585 (1973); *Delta Biological Resources, Inc. v. Board of Zoning Appeals of City of Milwaukee*, 160 Wis.2d 905, fn. 10, 467 N.W.2d 164 (Ct. App. 1991).

¹⁷ MICHAEL J. MESHENBERG, *THE ADMINISTRATION OF FLEXIBLE ZONING TECHNIQUES* (1976) pp. 25-26.

¹⁸ *Id.* at p. 25, quoting Heyman, *Innovative Land Regulation and Comprehensive Planning*, in *THE NEW ZONING*, pp. 33-34.

¹⁹ *Id.*

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.

2017 Wisconsin Act 67 and CUPs

The statutory sections added to the three local government zoning enabling laws by Act 67 state that “[i]f an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the ... ordinance or those imposed by the ... zoning board, the [city/village/town/county] shall grant the conditional use permit.” This language attempts to codify a process where the focus of the decision-making process is on developing requirements and conditions that address the impacts of the proposed use. This is a shift for some communities where the decision-making process focused on whether to approve or deny a conditional use based on whether people liked or did not like a proposed use. If a use is not appropriate for an area, the community should consider not allowing the use as a conditional use in the zoning district for the area. The community should also decide if there are other zoning districts where the use might be appropriate.

The use of the term “zoning board” in Act 67 is confusing. As discussed in the above section on the historical context, under Wisconsin law, CUPs may be granted by the board of adjustment/appeals (the “zoning board”?), the plan commission, a county planning and zoning committee, a county planning and zoning commission, or the governing body (the common council, village/town/county board).²⁰ Also, as noted above, it was common practice in Wisconsin going back over 50 years for local governments to authorize the plan commission to grant CUPs or for the governing body to grant CUPs after considering recommendations from the plan commission. It is not clear why Act 67 only refers to “zoning boards” and whether the Act applies to the other bodies that may issue conditional use permits. For purposes of this publication, only the term “zoning board” is used.

Act 67 further states that the requirements and conditions specified in the ordinance or imposed by the zoning board “*must be reasonable and, to the extent practicable, measurable*” and “[a]ny condition imposed must be related to the purpose of the ordinance” Act 67 requires that the zoning board hold a public hearing on the CUP following the posting of a Class 2 notice. Finally, Act 67 introduces a “*substantial evidence*” standard for local decisions on conditional use permit applications. Act 67 defines “*substantial evidence*” to mean “*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*

²⁰ See *supra* text accompanying notes 12 and 13.

accept in support of a conclusion.” The Act later states that “[a]ny condition imposed must be ... based on substantial evidence.” Act 67 then shifts the burden of proof to the applicant who must provide substantial evidence demonstrating “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 zoning board then makes its decision on the permit. Act 67 requires that a zoning board’s “decision to approve or deny the permit must be supported by substantial evidence.”²¹

A local ordinance sets “the law,” the legal framework for reviewing applications for proposed conditional uses. The requirement that substantial evidence support the actual conditions imposed requires facts to support the application of the law. A decision to deny a conditional use permit means the zoning board has substantial evidence that there is a requirement or condition that the applicant cannot meet. A decision to approve a conditional use permit means the zoning board has substantial evidence that the applicant meets or agrees to meet the requirements and conditions of the ordinance and the conditions imposed in the permit. As support for the substantial evidence standard, the zoning board can rely on the substantial evidence provided by the applicant and independent information presented to the zoning board. Local governments need to build the record to support their decision based on the application, ordinance, and other documentation and testimony presented at the public hearing. The minutes of the meetings reviewing the CUP need to reflect the reasoning supporting the conditions and basis for denying a permit if that is the outcome of the review.

The following is intended to provide guidance for local government to review the conditional use provisions in their zoning ordinances to ensure they comply with the language of Act 67.

Act 67 Applies to More than CUPs

While the focus of Act 67 seems to be on CUPs, it is important to understand the scope of the application of Act 67 in the context of planning practices in Wisconsin. Act 67 defines “conditional use” to mean “a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a [county/city/village/town], but does not include a variance.”²² Some local governments may have separate provisions in their zoning ordinances for conditional use permits, special use permits, and/or special exceptions. The requirements added to the statutes by Act 67 apply to all of these different provisions. Rather than continually referring to all of these, this report will simply refer to these different permits as “conditional use permits” or “CUPs.” Nevertheless, as local governments review their zoning ordinances for compliance with Act 67, it is important to

²¹ See Brian W. Ohm, *Conditional Use Permits and the “Substantial Evidence” Standard*, PERSPECTIVES ON PLANNING, July 2018, <https://dpla.wisc.edu/sites/dpla.wisc.edu/files/inline-files/POP%20Act%2067%20substantial%20evidence.pdf> summarizing the guidance from the Wisconsin courts on the application of “substantial evidence” standard.

²² WIS. STAT. § 59.69(5e)(a)1 (counties); WIS. STAT. § 60.61(4e)(a)a (towns in counties without county zoning); and WIS. STAT § 62.23(7)(de)1.a (cities, villages, and towns with village powers).

remember that the information discussed in this publication applies to CUPs, special use permits, special exceptions, and other special zoning permissions.

Should It Be a Conditional Use?

A typical zoning ordinance will include a section on CUPs that sets forth the procedural requirements for CUPS – application requirements, hearing, standards for decision-making, etc. These elements are discussed in more detail in the next section. The determination of whether or not a particular use is allowed as a conditional use in a specific zoning district is usually made in a different section of the zoning ordinance that specifies the various basic zoning districts for the community. As local governments think about conditional uses post-Act 67, they should think about what conditional uses are allowed in the different zoning districts in the zoning ordinance. The requirements of Act 67 may prompt local governments to reconsider what they include as a conditional use. Uses not treated as conditional uses can follow different approval processes than the process prescribed by Act 67.

For example, some local governments treat the approval of planned development districts (or planned unit developments) as conditional uses. Other local governments treat planned development districts as a separate basic zoning district. If it is treated as conditional use, the approval of the planned development district must follow the requirements of Act 67. If the planned development district is a separate zoning district, the approval process requires a rezoning. A rezoning is considered a legislative decision meaning that the elected governing body (the ultimate approval authority for all rezonings) has considerable discretion in terms of approving the rezoning, denying the rezoning, making modifications to the proposed rezoning, or requiring conditions as part of the rezoning.²³ The requirements of Act 67 reinforce the quasi-judicial nature of conditional use permit decisions whereby the body with authority to approve conditional use permits (the governing body, the plan committee, zoning board of adjustment/appeals, or the county zoning agency) has limited discretion and must apply the standards and requirements of the ordinance to the specific facts of the proposal presented to them.

Act 67 has prompted many local governments to review what they include as conditional uses in their zoning ordinance. The Village of Pewaukee, for example, amended its zoning ordinance to remove certain uses that had been included as conditional uses in certain zoning districts that the Village Board felt might not be appropriate for the district. If someone wants to propose one of those uses, they will need to petition the Village to amend the zoning ordinance to add the use. The Village changed some other uses that were conditional uses to permitted uses.²⁴

²³ Rezoning follow different procedures outlined in the statutes, including the requirement that the rezoning must be consistent with the local comprehensive plan.

²⁴ Jordyn Noenning, *Five Things You Should Know About Pewaukee's New Conditional-Use Rules*, MILWAUKEE JOURNAL SENTINEL, February 13, 2018, <https://www.jsonline.com/story/communities/lake-country/news/pewaukee/2018/02/13/seven-things-you-should-know-pewaukees-new-conditional-use-code-seven-things-you-should-know-pewauke/329971002/>

Finally, some local governments treat certain uses or activities as conditional uses while other local governments have a separate ordinance for those uses/activities. One example is temporary uses. Temporary uses can range from temporary storage units placed on a parcel to temporary retail uses like Christmas tree sales. Some local governments treat temporary uses as a conditional use. Other local governments have a separate ordinance for temporary uses. In light of the changes under Act 67, a local government may want to review the scope of conditional uses included in its zoning ordinance.

Other Zoning Ordinance Considerations: Purpose Statements

As local officials review the language of their zoning ordinance describing the various zoning districts and what is allowed as a conditional use in those respective districts, they should also insure they have meaningful “purpose” and/or “intent” statements that describe the purpose or intent of each district. Act 67 requires that “[a]ny condition imposed must be related to the purpose of the ordinance” Purpose statements in ordinances are important. Reference to the local comprehensive plan can help understand the purpose of the ordinance. Specific statements within the ordinance can also clarify the purpose or intent of the specific zoning districts within which conditional uses may be allowed. Since Act 67 distinguishes between requirements and conditions specified by the ordinance and conditions imposed by the board, it would be possible for the board to develop a unique condition that is not specified in the ordinance but is fashioned to protect the public interest as expressed in the purpose of the ordinance. Purpose statements usually appear in the section of the zoning ordinance describing the different zoning districts. It is helpful to have a purpose and/or intent statement for each of the different districts to guide decision-makers. The courts often rely on such statements when reviewing local actions. An example of a purpose statement from Dane County’s zoning ordinance for one of the zoning districts follows:

1) Purpose.

The HAM-M Hamlet-Mixed-Use District accommodates a variety of commercial activities in conjunction with civic open spaces and buildings. It is a denser, fully-mixed use part of a community. Within the HAM-M district, the predominant land and building use is commercial, but may include residential and workplace uses in deference to the purpose and character of local commercial activities. It is typically located along an important street. Many older traditional downtown or neighborhood commercial districts typify the characteristics of a HAM-M district.

The Anatomy of a Conditional Use Permit Ordinance

The following sections provide sample ordinance language that is intended to follow the language of Act 67 and related commentary that helps introduce the various ordinance provisions to the reader and connect the provisions to the language of Act 67. The basic organization of the sample ordinance and some of the content of the sample ordinance language is based on the *21st Century Land Development Code* written by Robert H. Freilich

and S. Mark White and published by the American Planning Association (2008). The sample ordinance language also includes modified ordinance language from the following zoning ordinances: Dane County (Draft dated March 12, 2018), City of Kenosha, City of Madison, Waukesha County, the City of Sturgeon Bay, Door County, and a Model Zoning Ordinance (based on the Town of Weston Zoning Ordinance) drafted by Russell Knetzger, Max Anderson, and the North Central Wisconsin Regional Planning Commission (1991, updated in 2003).

◆ *Application Process Requirements Specified in an Ordinance*

Act 67 uses the terms “requirements” and “conditions” and acknowledges that requirements and conditions can be specified in the ordinance and the zoning board can also impose requirements and conditions. Presumably this means the zoning board can impose requirements and conditions that are not specified in the zoning ordinance as long as they meet the requirements of Act 67 (relate to the purpose of the ordinance, are measurable to the extent practicable, are supported by substantial evidence). The following sections focus primarily on requirements and conditions specified in a local ordinance.

Local zoning ordinances will typically include requirements that detail the process the local government will follow to review an application for a CUP. These requirements generally identify who can apply for a CUP and what type of information needs to be submitted with an application for a CUP to aid the local government in making a decision about the proposed conditional use. This may include maps and other information about the existing conditions of the area of proposed conditional use and specific information about the proposed conditional use such as a site plan showing ingress and egress, information about trip generation, hours of operation, etc. A zoning administrator can then determine if the application meets the requirements of the ordinance and is complete for review by the decision makers.

Example of Application Process Requirements Specified in an Ordinance:

4.23 CONDITIONAL USE PERMITS

Purpose and findings: This Section provides for certain uses that, because of unique characteristics or potential impacts on adjacent land uses, are not permitted in zoning districts as a matter of right but which may, under appropriate standards and factors set forth in the Zoning Code, be approved. These uses shall be allowed through the issuance of a Conditional Use Permit (CUP) approved by the [zoning board]²⁵ after ensuring that the use can be appropriately accommodated on the specific property; that it will conform to the adopted comprehensive plan; that it can be constructed and operated in a manner that is compatible with the surrounding land uses and overall character of the neighborhood; and that the public interest, health, safety, and general welfare will be promoted.

No inherent right exists to receive a CUP. Such authorization must be approved under a specific set of circumstances and conditions. Each application and situation is unique. Every

²⁵ Bracketed language [] should be replaced by the appropriate terms used by a particular local government.

CUP shall at a minimum be required to comply with all requirements contained in local ordinances and State and Federal law. Mere compliance with the generally applicable requirements however may not be sufficient, and additional measures and conditions may be necessary to mitigate the impact of the proposed development.²⁶

4.23.1 Conditional Applicability

The provisions of this Section apply to any application for approval of a CUP. Conditional uses are those uses that are generally compatible with the land uses permitted by right in a zoning district but that require individual review of their location, design, and configuration, and the imposition of conditions or mitigations in order to ensure the appropriateness of the use at a particular location within a given zoning district. Only those uses that are enumerated as conditional uses in a zoning district, as set forth in the zoning regulations, shall be authorized by the [zoning board]. A CUP is not required for a use permitted by right in a given zoning district.

4.23.2 Initiation of Application

An owner of real property, or that owner's authorized representative, may apply for a CUP for that property by filing an application with the [zoning administrator] on the form available from the [zoning administrator]. Before completing the applications, the applicant is encouraged to meet with the [zoning administrator] to discuss the proposed conditional use and the review process.

The application for a CUP shall include the following information where pertinent and necessary for proper review:

- (a) A map of the subject property showing all lands for which the conditional use is proposed, and all other lands within 300 feet of the boundaries of the subject property, together with the names and addresses of the owners of all lands on said map as the same appear on the current records of the Register of Deeds of the County. The map shall clearly indicate the current zoning of the subject property and its environs. The map shall be submitted in a form that is clearly reproducible with a photocopier, and shall be at a scale that is not less than one inch equals 800 feet. All lot dimensions of the subject property, a graphic scale, and a north arrow shall be provided;
- (b) A written description of the proposed conditional use describing the type of activities, buildings, and structures proposed for the subject property and their general locations;
- (c) A site plan of the subject property as proposed for development.

²⁶ The City of Portland, Oregon, includes the following purpose statement for conditional uses: "Certain uses are conditional uses instead of being allowed outright, although they may have beneficial effects and serve important public interests. They are subject to the conditional use regulations because they may, but do not necessarily, have significant adverse effects on the environment, overburden public services, change the desired character of an area, or create major nuisances. A review of these uses is necessary due to the potential individual or cumulative impacts they may have on the surrounding area or neighborhood. The conditional use review provides an opportunity to allow the use when there are minimal impacts, to allow the use but impose mitigation measures to address identified concerns, or to deny the use if the concerns cannot be resolved." City of Portland, Oregon, Zoning Code, § 33.815.010 (2018).

(d) Written justification for the proposed conditional use consisting of the reasons why the applicant believes the proposed conditional use is appropriate, particularly as evidenced by compliance with the standards set forth in subsections __xx__ .

(e) Applications for proposed new or substantially modified mobile service facilities and supporting structures shall be reviewed for completeness and provide information as specified in Section 66.0404(2)(b) and (c) of the Wisconsin Statutes.

(f) Applications for proposed wind energy systems shall be reviewed for completeness and provide the information specified in Sections PSC 128.30, 128.31, and 128.60 of the Wisconsin Administrative Code, as applicable.

(g) Additional information as may be required by local ordinances.

(h) Payment in full of all application fees established by the governing body.

4.23.3 Completeness Review

The [zoning administrator] shall review the application for the CUP for completeness before review by the [zoning board]. Once the [zoning administrator] notifies the applicant that the application is complete, the applicant shall provide the [zoning board] with [number] copies of the complete application.

4.23.4 Withdrawal of Application

An application for a CUP may be withdrawn by the applicant at any time.

4.23.5 Amendments

Any proposed amendment to a CUP shall be approved in the same manner and under the same procedures as are applicable to the issuance of the original permit.

4.23.6 Effect of Denial

If an application for a CUP is denied, a new application for the same conditional use will not be considered by the [zoning board] for a period of 12 months from the date of denial, except on grounds of new evidence as determined by the [zoning administrator].

◆ *Approval Process Requirements Specified in an Ordinance*

Local zoning ordinances also typically include language outlining the approval process.

Example of Approval Process Requirements Specified in an Ordinance:

4.23.7 Approval

After the [zoning administrator] has certified that the application is complete, the application shall be deemed received and shall be referred to the [zoning board] for its review and decision. The [zoning administrator] will prepare a staff report summarizing the proposed conditional use and including recommended conditions based on the requirements and standards of this Ordinance.

4.23.7.1 Third Party Consultation

If necessary expertise is not available from [city/village/town/county] staff, public academic institutions or from appropriate regional, state or federal agencies, the [zoning board] may consult with a third party to effectively evaluate a conditional use permit application. The [planning director], or his or her designee, will select the consultant. The applicant for the conditional use permit shall bear all reasonable costs and expenses associated with such consultation. Applicants retain the right to withdraw a pending conditional use permit application if they choose not to pay consultant fees.

4.23.7.2 Plan Commission Review²⁷

The [zoning board] shall send a copy of the complete application to the Plan Commission for their review and recommendation as to the effect of the proposed CUP upon the local comprehensive plan.

4.23.7.3 Public Hearing

The [zoning board] shall hold at least one public hearing on the application following publication of a class 2 notice under ch. 985 of the Wisconsin Statutes (2 insertions, one per week with the last insertion one week before the hearing). The public hearing before the [zoning board] shall be conducted as a quasi-judicial hearing.

[Act 67 requires a public hearing and a class 2 notice. This establishes a minimum requirement. Many local governments also provide additional notice to neighboring property owners such as:

Notice of the public hearing shall also be given by first class mail to the owners of all lands within three hundred (300) feet of any part of the land included in such conditional use at least seven (7) days before the public hearing.]

4.23.7.4 Decision

As soon as practical following the close of the public hearing, the [zoning board] shall render its decision in writing. Such decision shall include an accurate and complete description of the approved conditional use, including all applicable conditions, or if disapproved, the reasons for disapproval.

Any condition imposed and any decision to approve or deny a CUP must 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 reasonable persons would accept in support of a conclusion." The applicant must provide substantial evidence that demonstrates the application and all requirements and conditions established by the [city/village/town/county] relating to the conditional use are or shall be satisfied.

²⁷ Suggested language if the plan commission is not the approving body for CUPs

4.23.8 Recording Procedures

A certified copy of the CUP containing the specific requirements of approval pursuant to this section shall be recorded at the expense of the applicant in the office of the County Register of Deeds.

◆ *Requirements and Conditions Specified in the Ordinance: Standards*

“Requirements” can also refer to standards in the ordinance to which the proposed conditional use must conform. These standards provide the basis for conditions that may be imposed on the proposed use. Prior law in Wisconsin required that local government ordinances include “general or specific rules” for reviewing conditional use permits.²⁸ Early commentators on Wisconsin zoning law noted the importance of including standards for conditional uses in the zoning ordinance: “If no standards are provided in the ordinance for the guidance of the body passing on special use permits, the decision of the body will be subject to serious attack in the courts. Of course, the standards must be related to the ordinance health, safety and general welfare provisions and cannot be arbitrary.”²⁹

As stated in Act 67, requirements may be specified in the ordinance or imposed by the zoning board and “*must be reasonable, and to the extent practicable, measurable.*” Most requirements will be measurable. What is reasonable will depend on the specific proposed conditional use. A very large mixed-use project may require a detailed transportation study as part of the application for a conditional use permit to address potential transportation impacts. However, an application to operate an in-home daycare in a residential zoning district as a conditional use may raise some concerns among the neighbors about parking but it is probably not reasonable to require that the applicant prepare a detailed parking study.

Some standards might be of a more general nature to reflect the variety of unique situations that might arise under a proposed conditional use. Examples of general standards that are commonly used in zoning ordinances appear in the box below. They are reasonable in that they set forth the basic considerations that many communities expect conditional uses to meet.

*Example of **General** Requirements and Conditions Specified in the Ordinance:*

4.23.9 Conditions

In approving any CUP, the [zoning board] may:

(A) Impose such conditions or requirements, in addition to or that supersede any standard specified in the Zoning Code, as it may deem necessary to protect the public interest and welfare. Such conditions or requirement must be reasonable and, to the extent practicable, measurable, and may include, but need not be limited to: (1) Financing and availability of

²⁸ WIS. STAT. 59.694(1) (counties); WIS. STAT. 62.23(7)(e)1 (cities, villages, towns exercising zoning under village powers).

²⁹ HAGMAN, *supra* note 11, p. 51.

adequate public facilities or services; (2) Dedication of land; (3) Reservation of land; (4) Creation of restrictive covenants or easements; (5) Special setbacks; (6) Yard requirements; (7) Increased screening or landscaping requirements; (8) Development phasing; (9) Standards pertaining to traffic, circulation, noise, lighting, emissions, hours of operation, and protection of environmentally sensitive areas; (10) Provision of stormwater management and erosion and sedimentation control; (11) Require that a performance guarantee—acceptable in form, content, and amount to the [city/village/town/county] attorney—be posted by the applicant to ensure continued compliance with all conditions and requirements as may be specified; and (12) Require that a development agreement be entered into by the applicant.

4.23.9.1 Approval Criteria - General Standards

A conditional use is permitted only if the applicant provides substantial evidence that:

(A) The proposed conditional use shall comply with all regulations of the applicable zoning district and any applicable regulations set forth in the [Local] Code of Ordinances.

(B) The proposed conditional use shall be compatible with the character of the neighborhood within the immediate area in which it is located. In making such a determination, consideration shall be given to:

(1) The type and extent of landscaping and screening on the site.

(2) Whether the extent, location and intensity of the proposed use furthers and does not conflict with the goals, objectives, and policies of the adopted [City/Village/Town/County] Comprehensive Plan

(C) Adequate measures shall be taken to provide ingress and egress so designed as to minimize traffic hazards and to minimize traffic congestion on the public roads.

(D) The proposed use shall not be noxious or offensive by reason of vibration, noise, odor, dust, smoke, or gas.

(E) The proposed use shall not injure the use and enjoyment of the property in the immediate vicinity for the purposes already permitted nor substantially diminish or impair the property values within the neighborhood.

(F) The proposed use shall not impede the orderly development and improvement of surrounding property for uses allowed in the zoning district.

(G) The establishment, maintenance, or operation of the proposed use shall not be detrimental to or endanger the public health, safety, or general welfare.

(H) The public interest and welfare supporting the proposed use shall be sufficient to outweigh the individual interests that are adversely affected by the establishment of the proposed use.

In addition to the more general standards, an ordinance can include more specific standards for certain uses. These more detailed standards specified in the ordinance can provide guidance for unique issues that might arise for specific proposed conditional uses. Act 67 does not require that all conditions and requirements must be specified in the ordinance but even before the passage of Act 67, many local governments found it useful to provide separate standards for specific uses to provide guidance to property owners and help inform the decision-making process. Because of the number of conceivable land uses that may necessitate more detailed standards, Appendix A includes excerpts of specific standards from the zoning ordinances for the City of Kenosha, and Waukesha County. The following provides one example from the draft Dane County Zoning Ordinance of specific standards for mineral extraction uses.

*Example of **Detailed** Requirements and Conditions Specified in an Ordinance:*

4.23.9.2 Approval Criteria – Additional Standards for Specific Uses

1. Conditions on mineral extraction conditional use permits.

In addition to conditions required for all conditional use permits, the [zoning board] shall impose, at a minimum, the following conditions on any approved conditional use permit for mineral extraction.

(a) Topsoil, or appropriate topsoil substitute as approved in a reclamation plan under Chapter xx, from the area of operation shall be saved and stored on site for reclamation of the area. Topsoil or approved topsoil substitute must be returned to the top layer of fill resulting from reclamation.

(b) The applicant shall submit an erosion control plan under Chapter xx, covering the entire area subject to the conditional use for the duration of operations, and receive approval of an erosion control permit prior to commencing extraction operations.

(c) The [zoning board] will set an expiration date for the conditional use permit based on the quantity of material to be removed and the expected duration of mineral extraction activities. Due to uncertainty in estimating duration for mineral extraction, conditional use permit holders who have operated without violations, may have the duration of their permit extended for a period not to exceed five years, based on an administrative review by the [zoning administrator]. No more than one such extension shall be granted over the lifespan of the conditional use permit, and all conditions shall remain the same as the original permit. Further extensions or any modifications of conditions shall require re-application and approval of a new conditional use permit.

(d) Reclamation shall meet all requirements of the Nonmetallic Mining Reclamation Ordinance. In addition, all reclamation plans must meet the following standards:

1. Final land uses after reclamation must be consistent with the adopted comprehensive plan.
2. Final slopes shall not be graded more than 3:1 except in a quarry operation.
3. The area shall be covered with topsoil and seeded to prevent erosion.
4. The area shall be cleared of all debris and left in a workmanlike condition subject to the approval of the [zoning administrator].
5. Highwalls shall be free from falling debris, be benched at the top, and certified by a civil engineer to be stable.

◆ *Requirements and Conditions Specified in the Ordinance: Duration, Transfer, and Renewal of CUPs*

Act 67 states that the “requirements and conditions . . . may include conditions such as the permit’s duration, transfer, or renewal.” Act 67 also states that “[o]nce granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the [city, village, town, county] 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 . . . zoning board.”

Examples of Ordinance Language Related to the Duration,
Transfer, and Renewal of CUPs:

4.23.10 Duration, Transfer, Renewal and Nonconforming Uses

4.23.10.1. Time limits on the development of conditional use

The start of construction of a conditional use shall begin within 365 days of its approval by the [zoning board]. A conditional use shall be operational within 730 days of its approval by the [zoning board]. Failure to initiate development and/or begin operations within this period shall automatically constitute a revocation of the conditional use. An applicant may request that the [zoning board] approve an extension for justifiable reasons for up to 24 months from the expiration date.

4.23.10.2. Duration

Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued and the requirements of this Ordinance are followed. Unless a specific duration is included in a conditional use permit, a conditional use permit shall automatically expire if the conditional use changes to a permitted use not requiring a conditional use permit or if the conditional use is discontinued or ceases to exist for a continuous period of at least 365 days for any reason. [As an alternative to conditional uses, a local government may also want to explore adopting an ordinance for temporary uses that would have a more limited duration.]

4.23.10.3. Renewal

If a conditional use permit is for a specific duration as included in the conditional use permit or the conditional use permit has expired, the property owner will need to apply for a new conditional use permit following the requirements of this ordinance.

4.23.10.4. Transfer of Ownership.

Unless a limitation on the transfer of ownership is included in the conditional use permit, all requirements of an approved conditional use shall be continued regardless of ownership of the subject property. [The Ordinance could also identify certain conditional uses that would terminate if the property is sold or otherwise transferred to another party.]

4.23.10.5 Nonconforming Uses For an existing and currently valid conditional use that is no longer allowed as a conditional use in the zoning district in which it is located, the provisions of Section __, Nonconforming Uses, of the Zoning Code shall apply.³⁰

◆ *Insuring Compliance After Approving the CUP*

Act 67 also states that “[t]he applicant must demonstrate that the application and all requirements and conditions established by the [city/village/town/county] relating to the

³⁰ See *Hussein v. Village of Germantown Board of Zoning Appeals*, 2011 WI App 96, 334 Wis. 2d 764, 800 N.W.2d 551.

conditional use are or shall be satisfied, both of which must be supported by substantial evidence.” Act 67’s reliance on an applicant’s promise to meet or satisfy conditions in the future, raises the need for long-term monitoring to ensure that the applicant satisfies the conditions that were agreed to in the permit and/or ordinance.

Example of Requirements Specified in an Ordinance to Ensure Compliance:

4.23.11 Compliance

Compliance with all other provisions of this Ordinance shall be required of all conditional uses. Variances shall only be granted as provided in Section ____.

4.23.11.1. Time Limits on the Development of Conditional Use.

The start of construction of a conditional use shall begin within 365 days of its approval by the [zoning board]. A conditional use shall be operational within 730 days of its approval by the [zoning board]. Failure to initiate development and/or begin operations within this period shall automatically constitute a revocation of the conditional use. An applicant may request that the [zoning board] approve an extension for justifiable reasons for up to 24 months from the expiration date.

4.23.11.2. Other Permits, Approvals.

Upon approval by the [zoning board], the applicant must provide substantial evidence that the proposed conditional use meets the conditional use requirements and conditions in the permit required for initiation of development activity on the subject property. No building permit or certificate of occupancy shall be issued for any development that does not comply with the requirements of the conditional use permit or this Ordinance.

4.23.11.3. Continuing Jurisdiction.

1. The [zoning board] retains continuing jurisdiction over all conditional uses for the purpose of ensuring that the applicant for a conditional use permit meets all of the requirements and conditions of the [City/Village/Town/County] ordinances and the conditional use permit.
2. Any person may notify the [zoning board] in writing that one or more requirements or conditions of [City/Village/Town/County] ordinances or conditions of a conditional use permit have not been completed, or are being violated.
3. The [zoning administrator] shall initially determine whether there is a reasonable probability that the subject conditional use is in violation of a condition of approval. If the [zoning administrator] determines there is a reasonable probability of a violation, the [zoning board] shall conduct a hearing following publication of a class 2 notice under ch. 985 of the Wisconsin Statutes.
4. The [zoning board] may, in order to bring the subject conditional use into compliance with the conditions previously imposed by the [zoning board], modify the existing conditions and impose additional reasonable conditions. If no reasonable modification of the conditional use can be made that are consistent with the standards of this ordinance, the [zoning board] may revoke the conditional use permit and direct the [zoning administrator] and the [City/Village/Town/County] Attorney to seek elimination of the conditional use. An

applicant may appeal a decision of the [zoning board] under this paragraph to the [Common Council or Village/Town/County Board].

◆ *Judicial Review*

Act 67 specifies that a person denied a conditional use permit may appeal the decision to the circuit court following the procedures specified in the statutes for judicial review of decisions of the board of adjustment/appeals (appeal is for certiorari review and must be filed within 30 days of the decision). The statutory language for appeal of a board of adjustment/appeals decision is written to include anyone aggrieved by a decision of the board, not just applicants who are denied a permit. Some local governments, where the board of adjustment/appeals is not involved in the conditional use permit process, the local ordinance provides for different appeals processes. For example, in cities where the plan commission has final authority over conditional use permits the ordinances may allow an appeal of the plan commission's decision to the common council. It is not clear under Act 67 if an aggrieved party would need to follow this procedure of whether they could appeal directly to the circuit court.

Example of Right to Judicial Review Language:

4.23.12 Appeal of Decision

A person aggrieved by any decision of the [zoning board], or a taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board, commence an action in circuit court seeking the remedy available by certiorari.

Moving Forward

The language related to conditional use permits used in Act 67 includes some ambiguities. People will interpret the language differently because reasonable minds can differ. Only time will tell how the courts will interpret the language of Act 67. A blog by the attorney who represented the AllEnergy Corporation in the *AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee* lawsuit before the Wisconsin Supreme Court commenting on Act 67 after its enactment, states that Act 67 “codifies matters pertaining to CUPs that are largely recognized in Minnesota, but only in various court decisions and not in state statute.”³¹ In another article he identifies areas where local governments are likely to be vulnerable after Act 67. They are:

- If the record shows that the applicant is able to meet or agrees to meet all requirements and standards, but is denied the CUP, a challenge would likely be successful.
- If a CUP denial is based on public comments in opposition to the permit that express nothing more than the personal opinions or preferences of the opponents or speculation

³¹ Gary Van Cleve, *Wisconsin's Act 67 Could be a Game Changer For Conditional Use Permit Applicants*, Larkin Hoffman Attorneys North Star Land Use Blog, <https://www.northstarlanduse.com/2018/05/wisconsins-act-67-game-changer-conditional-use-permit-applicants/>.

about negative consequences of the proposed use, then a challenge would likely be successful.

- If a CUP is denied based on a general finding that the proposed use is contrary to the public welfare, then the denial would be susceptible to a challenge that the finding is vague and unreasonable, given that the law in Wisconsin now requires “reasonable and ... measurable” conditions and further requires facts and information “directly pertaining to the requirements and conditions an applicant must meet”³²

While Act 67 may be a “game changer” for some local governments requiring major changes to their ordinances and practices, other local governments will only need to make minor changes, if any at all. Act 67 reinforces the need to ensure there is a legal basis and factual basis, supported by substantial evidence, behind the decisions local governments make on applications for conditional use permits.

To the extent that Minnesota law provides any guidance for Wisconsin, the recent Minnesota Supreme Court decision in *RDNT, LLC, v. City of Bloomington*,³³ may provide some insights. The case involved a proposed CUP to add an assisted living facility to a care facility that included a skilled care facility and a different assisted living facility. Access to the facilities is through a residential neighborhood. Neighborhood residents voiced their opposition to the new assisted living facility based on the size of the facility and traffic concerns. The City hired a traffic consultant to conduct a traffic study. The study for the City determined that the proposed facility would result in a 26 percent increase in the number of daily trips. RDNT also hired a traffic consultant to prepare a study. The second study determined that the proposed facility would result in only a 16 percent increase in the number of daily trips. The study for RDNT also included a variety of transportation demand measures to further reduce the number of trips. The City Council heard the testimony from the neighbors and reviewed the studies and voted to deny the CUP based on the size of the facility being incompatible with the scale and character of the surrounding neighborhood and traffic concerns.

RDNT sued the City and eventually the case made its way to the Minnesota Supreme Court. The Court conducted a two-step review. First the Court determined that the reasons for the denial given by the City were legally sufficient. The Court looks to the City's requirement for approval of conditional use permits. The City's ordinance included the general standard that “The proposed use will not be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare.” The Court noted that in prior decisions it had held that local government could rely on general standards to protect public health, safety, or general welfare. The Court also reminded the City of other precedent that the “absence of more express standards makes denial of a special-use permit more, not less, vulnerable to a finding of arbitrariness.” Nevertheless, the Court determined that the City's reliance on the general public health, safety, or welfare standard in the City's ordinance was legally sufficient.

³² Gary Van Cleve, *Wisconsin's Act 67 Could be a Game Changer For Conditional Use Permit Applicants*, <https://larkinhoffman.com/media/wisconsins-act-67-could-be-a-game-changer-for-conditional-use-permit-applicants>.

³³ 861 N.W.2d 71 (Minn. 2015).

Finding the City's ordinance language was legally sufficient, the Court turned to the second step in its analysis: determining if the City had a reasonable factual basis to determine that the proposed use would harm public health, safety, and welfare. The Court held that it did.

The Court noted that it was not the role of the Court to weigh the conflicting traffic impact reports but rather to review the record to ensure the decision had support in the record. The Court noted that both reports showed there would be an increase in traffic. The Court also noted that the neighbors provided concrete testimony about the traffic conditions – vehicles driving through school crosswalks even though crossing guards had their flags out; traffic speeding and making U-turns; etc. The City engineer also provided specific data about traffic concerns.

RDNT argued that since the streets are not near capacity the City had no factual basis to deny the CUP. Paraphrasing one of the City planners the Court stated “this is not a capacity issue, it is a livability issue.” RDNT also argued that City did not adequately consider the transportation demand management measures raised by RDNT's traffic consultant to alleviate the traffic issue. The Court noted that the burden is on RDNT to provide evidence it can satisfy the standards specified in the City's ordinance. Based on prior case law, if the applicant can demonstrate that imposing a reasonable condition will eliminate any conflict with the ordinance's standards, a denial by the City would be arbitrary. The Court noted, however, that even if the proposed measures were effective, the expansion would still add over 100 daily trips. In the end the Minnesota Supreme Court concluded that the City did not act unreasonably, arbitrarily, or capriciously when it denied RDNT's CUP application.

While the Minnesota case presents some interesting insights that might guide practice in Wisconsin, the way the Wisconsin Courts will interpret the CUP language of Act 67 remains to be determined.



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