

2020 Town Law Conference

**Just Dropping in to See What Condition
Conditional Uses Are In
(a review of the state's experience with
conditional uses since 2017 Wisconsin Act 67)**

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What is there to see?

- Start from the beginning
 - Review the origin of what motivated 2017 Act 67 - *AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee*, 2017 WI 52, 375 Wis.2d 329895 N.W.2d 368.
 - Walk through the Statute to highlight some of the questions raised by the language.
 - How far did Act 67 go in overruling *AllEnergy*?
- Review the cases that have been heard regarding conditional uses since Act 67.
- Make some observations regarding what direction those cases might give and what issues we should address.

2017 Act 67 Birth in Case Law

- *AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee.*
 - 550 acre silica sand mining and processing project
 - County has an extensive ordinance addressing non-metallic mining as a conditional use
 - Public hearing
 - 13 people testify at hearing
 - Over 368 written comments in favor over 50 from people out of state
- 37 conditions imposed-
 - AllEnergy agrees to comply with all of them
 - AllEnergy has the where-with-all to comply

AllEnergy Decision

- The theory that a conditional use designation makes the use presumably valid is contrary to Wisconsin Case law – In Wisconsin conditional uses may be authorized pursuant to the ordinance, but they are not uses as of right now.
- The presumption that the conditional use serves the public interest does not exist in Wisconsin.
- No Wisconsin case has concluded that the proper inquiry for a local government entity in considering an application for a conditional use permit is whether the conditional use carries adverse impacts greater than the adverse impacts ordinarily associated with that use.
- “Substantial 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.
- Public expressions of support or opposition establish a valid basis—that is, substantial evidence—for a decision on a conditional use.
- On certiorari review, we accord the decision of the Trempealeau County Environment & Land Use Committee a presumption of validity and correctness.

The Legislative Response to AllEnergy

- Sen. Tiffany- a statutory framework for the CUPs to protect property owners from being subjected to subjective decision making and uncertainty during the CUP process
- Rep Jarchow-create and establish a more fair and reasonable approval process for property owners who would no longer be subject to the uncertainty that currently exists with these conditional use processes.
- Legislative Council Notes
 - an applicant for a conditional use permit to demonstrate, with substantial evidence, that an application and all requirements and conditions relating to the conditional use are, or will be, satisfied.
 - the local government to demonstrate its decision is supported by substantial evidence.
 - substantial evidence “does not include public comment based solely on personal opinion, uncorroborated hearsay, or speculation”.

Act 67 in review (the definition)

1. “Conditional use” means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a town, but does not include a variance.
 - Other special zoning permission
 - Special relief districts
 - If you permit it would be wise to put it through conditional use process
 - Note:
 - No direct statement that conditional uses are presumed to be valid or even presumed to be in the public interest by their designation
 - No attempt to effect the municipal presumption of validity
 - Seems there is no right to a conditional use or even a presumption that a conditional use is in the public interest
 - The presumption of validity is likewise intact

Act 67 in review (the evidence)

2. “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 evidence has to be:
 - Directly related to the conditions
 - Acceptable to reasonable people
 - This requirement is very similar to the reasonable person test of *AllEnergy*
- Other than merely personal preferences or speculations,
 - Does “merely” allow for some speculation or personal preferences
 - Is a widely held opinion something more than a personal preference?
 - Does this effectively attack the notion that support (at least without other evidence) can be substantial evidence?
 - Is it significant that the law does not address the public interest at all?
- As this refers to evidence does there have to be sworn testimony?
- Does this change the burden of persuasion?

Act 67 in review (the obligations)

- If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the town ordinance or those imposed by the town zoning board, the town shall grant the conditional use permit.
- The applicant must demonstrate that the application and all requirements and conditions established by the town relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence.
 - What does the “meets or agrees to meet” provision mean if they still have to demonstrate their compliance with the requirements by substantial evidence?
 - Does substantial evidence include financial viability where the applicant agrees to meet the conditions?
 - Has this law created a new requirement on the applicant?

Act 67 in review (the nature of the conditions)

- Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.
- The requirements and conditions must be:
 - reasonable and, to the extent practicable, measurable and
 - may include conditions such as the permit's duration, transfer, or renewal.
- Related to the purpose of the ordinance- beef up the purpose and intent provisions
- It seems “reasonable” is the key
 - Things like aesthetics are not practically measurable- but can they be such that reasonable persons would accept them in support of a conclusion- would that qualify them as evidence?
 - Does a consensus of opinion slide in here?

Act 67 in review (the nature of the conditions)

- Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the town 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 town zoning board.
- What is this with duration, transfer or renewal?
 - Use what the law gives to you
 - Renewal, in particular, is a good enforcement tool
 - Transfer suggests the ability to prohibit without approval
 - Duration is confusing in context and may be troublesome

Act 67 in review (the procedure)

- Upon receipt of a conditional use permit application, and following publication in the town of a class 2 notice under Wis. Stat. ch. 985, the town shall hold a public hearing on the application.
 - Does the public hearing have to be immediate?
 - No limit on time to set hearing
 - No limit on time to make decision (don't impose one on yourself)
 - Can there be more than one public hearing?
 - Do you have to notice each hearing?
 - Who holds the hearing(s)?
 - Not specified who the hearing is to be before
 - Reference to Town zoning board

Act 67 in review (the decision)

- The town's decision to approve or deny the permit must be supported by substantial evidence.
 - Double edged sword
 - Who makes the decision?
- If a town denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures described in Wis. Stat. §§59.694 (10) or 61.35.
 - The appeal for those denied is by Certiorari
 - Consider the limited cert review standards
 - No clear directive on what happens if someone wants to challenge the grant of a CUP
 - Board of Appeals?
 - Wis. Stat. ch. 68?
 - Case law allows the local government to determine the process.
Magnolia Township v. Town of Magnolia, 2005 WI App 119, 284 Wis. 2d 361, 701 NW.2d 60.

Opinion as Substantial Evidence

- *Stop the Ongoing Mine Permit v. Town of Ashford Bd. of Appeals*, No. 2018AP1843, 2019 WI App 39, 388 Wis.2d 258, 932 N.W.2d 193(STOMP case)
 - Unpublished *per curiam* decision- A per curiam opinion is not an authored opinion for purposes of Wis. Stat. § 809.23(3) which states unpublished **authored** decisions are not precedent but may be cited for their persuasive value
- Facts:
 - In April 2016, Batzler Trucking Co. applied for a conditional use permit to allow the operation of a nonmetallic mine (sand pit) on two parcels of land
 - The extracted agricultural sand is used by dairy farmers
 - Location predominantly agricultural use as well as some single family residential
 - After a hearing in June of 2016 the Town Board of Appeals (BOA) granted the permit subject to several conditions such as operating hours, limiting the proximity to residential areas, a restoration plan, limiting truck traffic, truck routing restrictions to limit back up alarms going off

STOMP case facts and procedural history

- Facts (cont.)
 - STOMP (a citizen group) sought certiorari review in the Circuit Court which remanded the case for further deliberations finding that the BOA “did not undertake any deliberation nor make any findings as to what the facts were and whether [it] satisfied the legal standard in the ordinance.”
 - A new hearing was held on August 14, 2017 and the BOA discussed at length the reasons for granting the permit
 - Again STOMP appealed by certiorari. This time the Circuit Court denied the cert review and dismissed the action with prejudice

STOMP review of Cert. and other Review Principles

- Scope of Review:
 - (1) whether the Board kept within its jurisdiction;
 - (2) whether it acted according to 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 it might reasonably make the order or determination in question.
- There is a presumption of correctness and validity to a municipality's decision on certiorari review
- "The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion the committee reached." (citing a pre-*AllEnergy* case)
- Courts will "sustain a municipality's findings of fact if any reasonable view of the evidence supports them."

STOMP on Conditional Uses

- Zoning ordinances generally provide landowners with permitted uses for property, but these ordinances may also provide for conditional uses, which are uses not permitted by right through zoning regulations, but may be authorized by a zoning authority.
- “Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner.”
- The decision to grant a conditional use permit is discretionary, and we hesitate to interfere with such local decisions.

STOMP on Opinions as Substantial Evidence

- “We disagree with STOMP that personal knowledge or opinion is an inappropriate consideration.”
- STOMP points to the amendments to Wis. Stat. § 60.61(4e)(a)2., which define substantial evidence as “facts and information, other than merely personal preferences or speculation.” The term “merely” is defined in the dictionary as “only as specified and nothing more” or “simply.” *Merely*, The Random House Dictionary of the English Language (2d ed. 1987). Based on the legislature’s use of that term in conjunction with the phrase “other than,” we believe it did not intend to prohibit the use of personal preference, speculation, or personal knowledge completely; it meant to curb the use of that information as the only support for the conditional use permit. Because there was testimony in support of the board’s decision based on more than just personal knowledge, we find no error.

Due Process Liability

- *Sullivan v. Town of Stockholm*, 402 F.Supp.3d 534 (W.D. Wis. 2019)
 - Sullivan's build a vacation home in Stockholm, WI, intending to use it on weekends and rent it out during the week
 - Town says they need a CUP- they filed an application
 - Whiteside, the chair of the Plan Commission who lived in the development where the Sullivan's built, actively opposes the application circulating a petition against the CUP
 - At the hearing, with Whiteside presiding, the Sullivan's were only given 3 minutes to present their arguments
 - Plan Commission unanimously denies the CUP- as grounds:
 - the perceived adverse impact on neighbors in the Pepin Pava development;
 - the fact that the Sullivans' property was a business, despite their building permit which authorized only a single-family home; and
 - concerns that approving the permit would set a "significant precedent" in favor of allowing commercial business.
 - Town board, held a public hearing, after limiting the Sullivan's 3 minutes to address the issue and unanimously denied the CUP

Sullivan (cont.)

- Sullivans sought Wis. Stat. §68.11 review that was denied without a hearing. They brought an action in Circuit Court. That Court held:
 - Due to the Plan Commission Chair, Jane Whiteside's, participation in the March 16, 2017 Plan Commission meeting, the Town of Stockholm did not afford the plaintiffs due process in its decision to deny their conditional use permit application
 - The decision of the town of Stockholm is reversed and remanded for new proceedings without Jane Whiteside's participation as the Plan Commission Chair
- Shortly after the appeal, Wis. Stat. §66.1014 was enacted limiting the Town's authority to regulate short-term rentals
- Sullivan's, believing they were denied due process and suffered the loss of the rental funds during the appeals process sued under U.S.C. § 1983.

Sullivan rulings

- Due Process claim:
 - To state a due process claim under the Fourteenth Amendment, the Sullivans must allege that:
 - they were deprived of a property or liberty interest; and
 - they were entitled to more process than they received.
 - Plausibility
 - the Sullivan's don't have to prove any harm other than the denial of due process itself
 - Exhaustion of state remedies
 - There is no general duty to exhaust state judicial or administrative remedies before pursuing an action under U.S.C. § 1983.

Illegal conditions

- *Enbridge Energy Co. v. Dane County*, 2019 WI 78, 387 Wis.2d 687, 929 N.W.2d 572.
- Enbridge applied for a conditional use to expand a pumping station
 - The Town sought to impose 16 conditions including:
 - Enbridge was to provide environmental impairment liability insurance
 - That insurance was to meet the technical insurance specifications the County's expert had set out
 - Enbridge appealed the CUP
 - While that appeal was pending the law changed specifically prohibiting interstate hazardous liquid insurance where the company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability
 - Enbridge had more than the requisite amount of general liability insurance but never offered proof that it included sudden and accidental coverage

Enbridge

- The zoning administrator, on the advice of the corp counsel, told Enbridge that the conditions were removed- the zoning committee objected and the County Board left the conditions in the CUP with a note that the 2 conditions were unenforceable.
- Enbridge appealed and some neighboring land owners brought an action to enforce the 2 conditions claiming that Enbridge had never proved it had the general liability coverage required by the new law and that it did not prove that it had sudden and accidental insurance as required by the conditions.
- The Appeals court found the conditions unenforceable and held “that the appropriate judicial remedy, when a court holds permit conditions invalid and the conditions were integral to approval of the permit, is to reverse permit approval and not to sever the invalid conditions.”
- The Supreme Court held that the County proceeded under an improper theory of law when it adopted the conditions because the record contained ample evidence that Enbridge had the requisite insurance.

Enbridge

- As to remedy the Court held:
 - By affirming the issuance of the CUP, rather than remanding it to the Zoning Committee for reconsideration in light of Act 55, the County Board issued the CUP with two unenforceable insurance requirements
 - it would be absurd to force the permit applicant to repeat the permitting process due to the Town's mistake
 - The circuit court properly remedied Dane County's imposition of unlawful insurance conditions by striking them from the CUP. A remand would be inappropriate given that Dane County knew when it approved the CUP that Act 55 rendered the insurance conditions invalid.

Get it right the first time

- *Hartland Sportsmen's Club, Inc. v. City of Delafield*, 2020 WI App 44, 947 N.W.2d 214.
- Mandamus action to force issuance of a CUP
 - In 2013 the City had denied a CUP for HSC
 - Circuit court found the denial arbitrary and capricious without support in the record
 - The City ... changed its analysis and standards, creating new standards and requirements
 - The City had not set forth its decision, either in writing or orally. The City simply made no findings
 - The Appeals court confirmed in 2017
 - The City's denial was based on safety concerns, but it never articulated what exactly in HSC's application it found did not satisfy its concerns
 - It modified the standards it referred to
 - Neither the circuit or appeals court remanded the case
 - Rather than issuing the CUP based on the 2011 application, the City reconsidered, holding new hearings, taking new evidence, issuing new findings, and denying the CUP

HSC Holdings

- In Certiorari Review the Court has 3 options
 - affirm the final determination,
 - reverse the final determination, or
 - remand to the decision maker for further proceedings consistent with the Court's decision
- Remand for further hearings is appropriate where:
 - the defect in the proceedings is one that can be cured, but
 - supplementation of the record by the government decision maker with new evidence or to assert new grounds is not permitted
- The City provides no authority for a re-do with new evidence and new grounds when the Circuit Court invalidates a municipality's decision due to the absence of a factual basis for the denial

Aesthetic Concerns/Substantial Evidence

- *Eco-Site, LLC v. Town of Cedarburg*, 2019 WI App 42, 388 Wis.2d 375, 933 N.W.2d 179.
- In 2015 T-Mobile sought to move their equipment to another site- about 1500 feet from its current location on a water tower
- Eco-Site applied to the Town for a CUP to erect a 120-foot metal monopole wireless communication tower and supporting 5600 square foot structure
- The new location was zoned as an A-1 Agricultural District, the land was surrounded by property zoned as residential
- Eco-Site filed 2 incomplete applications (and withdrew the application at one point due to public objection) but eventually re-filed the CUP application in 2016

Eco-Site

- In May of 2017 the Town Board denied the application
 - the considerable and foreseeable loss in value to the surrounding properties particularly given the rural and rustic nature of the property, and the loss of property sales in the area as a result of the prospect of the tower;
 - the incompatibility of the 120-foot monopole with the adjacent land, which the Town is struggling to keep rural and rustic;
 - the "dropping a metal tower in the middle of" a "beautiful and scenic area" would be detrimental to the public health, safety, and general welfare; and
 - Eco-Site's failure to explain why its "search ring" for other locations was so small, therefore failing to provide an application that was complete under WIS. STAT. § 66.0404(2)(b)6. (2017-18).

Eco-site (cont.)

- Analysis revolves around the interpretation of Wis. Stat. § 66.0404, particularly the prohibitions that municipalities cannot :
 - Enact an ordinance prohibiting the placement of a mobile service support structure in particular locations within the political subdivision.
 - Disapprove an application to conduct an activity described under [Wis. Stat. § 66.0404(2)(a)] based solely on aesthetic concerns.
- The case never cites or references the new conditional use procedure but held:
 - On aesthetics- the court notes that incompatibility was a valid basis of denial and that, “The statute regarding aesthetics is in accord: it states that an application must not be disapproved ‘based *solely* on aesthetic concerns.’”

Eco-Site

- On Substantial evidence
 - Quoting AllEnergy there is no presumption that a "conditional use is ipso facto consistent with the public interest or that a conditional use is a use as of right at a particular site within an area zoned to permit that conditional use."
 - Substantial evidence is less than a preponderance of the evidence, but it is more than a mere scintilla of evidence and more than conjecture and speculation. *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶43, 362 Wis.2d 290, 865 N.W.2d 162.

Appeal procedure

- *Zelman v. Town of Erin, 2018 WI App 50, 383 Wis.2d 679,917 N.W.2d 222.*
 - On May 2, 2016, the Plan Commission approved a conditional use permit (CUP) for Zelman's neighbor to open a wine business.
 - Zelman appealed that decision to the Town Board. During a September 19, 2016 hearing on the appeal, at which Zelman was present, two members of the board voted in favor of a motion to deny the CUP and two members voted against the motion, resulting in a failure of the motion.

Zelman

- Zelman, proceeding under Wis. Stat. ch. 68, made several attempts to procure a copy of the executed CUP, believing that would be the “final determination” for Wis. Stat. §68.13 purposes.
- The clerk responded that Zelman could have a copy of the CUP after it is recorded with the register of deeds.
- Zelman went to the ROD and retrieved a copy of the filed CUP on Oct. 11
- On Oct 12 Zelman filed her Certiorari action naming the Town of Erin as the sole defendant
- The Town moved to dismiss alleging that Zelman had named the wrong party
- Zelman amended her complaint to include adding the Plan Commission and Town Board as defendants
- The respondents moved to dismiss arguing the amendment was untimely.

Zelman

- On proper parties the Court finds:
 - Zelman's amended complaint fails to state a claim upon which relief may be granted as to the Town because the Town was not a proper party in that it "issued no decisions or determinations in the instant case."
 - certiorari must go to the board or body whose acts are to be reviewed, otherwise the court cannot obtain jurisdiction either of the subject matter or the persons composing the board.
 - The Plan Commission and Town Board—not the "Town"—made the actual decisions from which Zelman seeks judicial review by certiorari.

Zelman

- On the timeliness issue the Court found:
 - the thirty-day limitation period for certiorari review begins to run when a party to a proceeding that results in a “final determination” is in “receipt of the final determination.”
 - the thirty-day limitation period of Wis. Stat. § 68.13(1) begins when the relevant person “recei[ves]” the “mail[ed] or deliver[ed]” written determination or copy of the decision on review, not when the CUP is recorded with the register of deeds.
 - the earliest date at which Zelman possibly could be considered to have been in receipt of a final determination related to the CUP was when she procured the CUP from the register of deeds office on October 11, 2016.

Concluding thoughts

- Regarding conditions:
 - Conditional uses are not presumed to be valid or presumed to be in the public interest.
 - Conditional uses include special exceptions and “other special zoning permission”
 - The heart of the conditions are their reasonableness whether “reasonable persons would accept in support of a conclusion”
 - There is express authority to condition duration, transfer and renewal

Concluding Thoughts

- Regarding Substantial Evidence
 - Substantial evidence appears to go to the nature of the evidence not the amount
 - “Merely” means merely- some consideration of speculation and personal preference is allowed- this observation is further supported by the notion that Substantial Evidence is to be “to the extent practicable” quantifiable.
 - There are two considerations:
 - Directly related to the purpose of the law
 - Reasonable people would accept in support of the conclusion

Concluding Thoughts

● Regarding Procedures

- Due process considerations like impartial decision makers and ex parte communication need to be addressed
- No case has directly addressed how substantial evidence should be obtained. Probably a good idea to take the evidence formally- in a quazi-judicial manner- formal evidence more likely to meet the substantial evidence quality standard
- Who should hold the hearing is not settled by precedent
- Setting out an appeals process for those who object to the grant of a CUP may avoid some legal questions in the future
- Certiorari is our friend, the presumption of validity and correctness and deference is alive and well

Questions/Comments?

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