LAW OFFICES OF
ARENZ, MOLTER,
MACY, RIFFLE & LARSON, S.C.
720 N. EAST AVENUE
P.O. BOX 1348
WAUKESHA, WISCONSIN 53187-1348
Telephone (262)548-1340
Facsimile (262)548-9211
Email: elarson@ammr.net

DALE W. ARENZ, RETIRED
DONALD S. MOLTER, JR., RETIRED
JOHN P. MACY,
COURT COMMISSIONER
H. STANLEY RIFFLE
COURT COMMISSIONER
ERIC J. LARSON

RICK D. TRINDL
PAUL E. ALEXY
R. VALJON ANDERSON
REMZY D. BITAR
MATTEO REGINATO
LUKE A MARTELL
SAMANTHA R. SCHMID
STEPHEN J. CENTINARIO, JR
TIMOTHY A. SUHA

December 28, 2017

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

Re: Conditional Use Authority
New Preemptions
2017 Wisconsin Act 67

Dear Ms. Lauber:

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

I. BACKGROUND

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

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

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

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

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

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

II. NEW PREEMPTIONS

The new law imposes the following limitations on your authority:

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

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

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

> "Substantial evidence" means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.[3]

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

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

---

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

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

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

This is further described in the immediately following this section:

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

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

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

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

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

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

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

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

---

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

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

III. RECOMMENDATIONS

Based upon the foregoing, I recommend the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours very truly,

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

Eric J. Larson

Eric J. Larson

EJL/egm

C:\MyFiles\EJL\Opinions\Opinion ltr re Conditional Use Authority DCTA.docx