



Dane County Planning and Development Department

Room 116, City-County Building, Madison, Wisconsin 53703-3342

Fax (608) 267-1540

www.countyofdane.com/plandev/

Planning

(608)266-4251, Rm. 116

Records & Support

(608)266-4251, Rm. 116

Zoning

(608)266-4266, Rm. 116

MEMORANDUM

TO: Dane County Zoning & Land Regulation Committee (ZLR)

FROM: Todd A. Violante, AICP, Director

DATE: June 7, 2018

RE: 2017 Wisconsin Act 67 and Conditional Use Permits (CUPs)

INTRODUCTION

Wisconsin Act 67, published on November 28, 2017, amends several chapters of Wisconsin Statutes establishing parameters for local government use of conditional use permits (CUPs). Prior to Act 67, Wisconsin Statutes did not include guidance on CUPs; they were largely governed by case law.

A 2017 Wisconsin Supreme Court decision on *AllEnergy Corp. v. Trempealeau County* was an important precursor to Act 67. This case involved a CUP for a frac sand mine in Trempealeau County where the county ultimately denied the CUP despite *AllEnergy's* agreement with 37 proposed conditions. The county's denial was based partly on a large volume of public hearing testimony in opposition to the mine, alleged by *AllEnergy* to be mostly unsubstantiated. The Wisconsin Supreme Court upheld the county's decision, but the dissenting opinion formed the basis of Act 67.

This staff memo is based on reviews of Act 67 from three different sources: 1) Professor and Attorney Brian Ohm's review on behalf of UW-Madison's Department of Planning and Landscape Architecture; 2) Attorneys Andrew Phillips and Bennett Conard from the law firm of von Briesen & Roper on behalf of the Wisconsin Counties Association; and 3) Attorney Eric Larson with the law firm of Arenz, Molter, Macy, Riffle, & Larson on behalf of the Dane County Towns Association (DCTA). All three reviews were well done, reach similar conclusions, and are included in the Legistar record for this agenda item; ZLR members are encouraged to read each of them.

The general consensus is that Act 67 essentially enacts in statute what has largely been the practice in many communities for years based on prevailing case law. At least for Dane County, the act does not prompt a significant change from how CUPs are already treated.

SUBSTANTIAL EVIDENCE

One of the predominant themes of Act 67 is that of “substantial evidence.” All parties, both applicants and municipalities alike, must adhere to the principle of “substantial evidence” in the processing of CUPs. Parties were previously bound to the principle under common law, and are now explicitly bound to it statutorily following Act 67.

1. A municipality’s decision to approve or deny must be based on “substantial evidence.”
2. Any condition imposed by a municipality must be based on “substantial evidence,” and such conditions must be reasonable, and to the extent practicable, measurable, and consistent with the purpose of the zoning district and ordinance standards for the proposed use.
3. Applicants must present “substantial evidence” that their application will meet the requirements, standards, and conditions imposed by the municipality.

“Substantial evidence” as defined in Act 67 “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.”

Examples of ‘substantial evidence’ may include, but not be limited to the following:

1. A stormwater analysis completed by a Professional Engineer (P.E.) indicating that water runoff from a proposed development will not affect a neighboring property. (Such an analysis is a standard part of Dane County’s development process under Chapter 14, Manure Management, Erosion Control and Stormwater Management, Dane County Code of Ordinances.)
2. A wetland delineation from a certified wetland delineator verifying the location of a wetland on a parcel. (Again, such an analysis is a standard requirement of Dane County’s development process under Chapter 11, Shoreland, Shoreland-Wetland and Inland- Wetland Regulations, when wetlands are present on a subject parcel.)
3. A propagation map of radiofrequency (RF) signals prepared by a professional RF engineer demonstrating the need to address a wireless communication service void in a provider network. (This is a standard requirement for new communication towers under the Dane County Zoning Ordinance.)
4. A lighting plan prepared by an engineer or other credible professional verifying that lighting will be directed downward and limited to a certain number of foot-candles at the property line to avoid adversely impacting surrounding properties.
5. Information by knowledgeable government agency staff (e.g. Dane County Highway Department staff) on traffic volumes and vehicle trips generated by a proposed land use.

Professor Ohm notes that, “Public comment that provides reasonable facts and information related to the conditions of the permit is accepted under Act 67 as evidence.” Attorneys Phillips and Conard further commented on the ‘substantial evidence test’ under the *AllEnergy* case:

“In other words, a zoning agency’s determination must be upheld so long as ‘credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision’ supports the decision of a zoning agency. *Id.* As stated above, there may even be substantial evidence supporting a conclusion contrary to the ultimate decision. However, so long as the evidence relied upon in support of a decision is corroborated and more than mere hearsay, and the determination based on that evidence was reasonable, the decision must be upheld.”

Examples of actions that would NOT be based on substantial evidence and likely be in conflict with Act 67 may include, but not be limited to the following:

1. Denying a CUP solely because a residential neighbor comments at a public hearing that a proposal will adversely impact her property value, without any information substantiating the concern.
2. Denying a CUP because a neighbor of a proposed sand and gravel quarry (no blasting) comments in an email to ZLR members that the proposal will severely impact the structural integrity of their home’s foundation a half-mile from the proposed site, without any information substantiating the concern.
3. Approving a CUP without information on a reasonable concern raised by either staff or neighbors and without conditions addressing said concern. For example, consider a CUP application for a quarry, which is expected to generate a large volume of traffic on a highly traveled roadway. Both staff and neighbors have identified the concern, but the applicant has not provided ‘substantial evidence’ addressing the concern, such as a traffic study, or at least information on the number and turning movements of trucks entering and exiting the site. It would likely be a violation of Act 67 to approve the CUP without the pertinent information and associated condition(s).

WHAT DOES ACT 67 MEAN FOR DANE COUNTY?

As noted above, Act 67 does not prompt a substantial change in how Dane County treats CUPs; our processes will mostly stay the same. There are many standard Dane County CUP practices that may continue under Act 67, and there are several requirements of Act 67 that Dane County has already been doing for many years.

1. According to Ohm, “A local government still has the ability to approve or deny a permit and attach conditions.”
2. Ohm also points out that, “The conditional use permit can be revoked if the applicant does not follow the conditions imposed in the permit.”
3. Local jurisdictions may still identify, define, and regulate which conditional uses are allowed in each zoning district, and define which uses should be permitted, and which should more appropriately be conditional.
4. We may still establish specific standards that must be met for certain conditional uses.
5. We may still require CUPs to be consistent with adopted comprehensive plans.
6. Local governments “may include conditions such as the permit’s duration, transfer, or renewal.”
7. While Dane County’s ordinance and associated process offers an intermediate, lower cost remedy for applicants to appeal ZLR CUP decisions to the Board of Adjustment (BOA), circuit court continues to be an option available to parties aggrieved by ZLR CUP decisions.

- a. Ohm opines that, “It is not clear from the wording of Act 67 if it preempts local ordinances from having an intermediate step of appeal to a zoning board or the governing body before the denied applicant could appeal the decision to circuit court.” But he adds, “An ordinance providing for an intermediate appeal in an ordinance should still be acceptable under an argument that if the applicant succeeds in the appeal it saves the time and expense of having to bring a lawsuit in a court of law.”

All three analyses reviewed for this memo concur that if an applicant meets the proposed conditions and applicable standards, that local jurisdictions *shall* grant the CUP.

COMPREHENSIVE REWRITE & RELATED RECOMMENDATIONS

The draft comprehensive revision of Dane County’s zoning ordinance offers a unique opportunity to evaluate our consistency with Act 67 and propose possible amendments. That being said, there is not a great deal that must be done in response to Act 67, as Dane County practices are already consistent with applicable CUP case law and apparently with the new statutory provisions. Thanks to the proactive staff work on the comprehensive rewrite project, the current draft of the ordinance already incorporates numerous provisions designed explicitly to comply with Act 67.

Attorney Larson’s review offers a number of excellent recommendations for local governments to consider in evaluating their zoning ordinances for consistency with Act 67, which include the following.

1. *Site and operation plans.* Some communities require separate approval of site plans and operation plans, and in these communities such processes could trigger additional public notice and hearing obligations under Act 67. However, Dane County already incorporates site and operation plan approvals directly into our primary CUP process, and we typically reference the specific site and operation plan dates in the conditions of approval.
2. *Public hearing notice.* Act 67 necessitates a Class 2 public notice for CUPs, which Dane County already requires.
3. *Standard CUP conditions.* Jurisdictions should consider adopting standard CUP requirements into the zoning code that would apply to all CUPs. The draft comprehensive revision ordinance incorporates such standard conditions in s. 10.101(7)(d)2.a., *Standard Conditions*.
4. *General conditional use standards.* Local jurisdictions should review their code to ensure that they have appropriate general standards that apply to all CUPs and as a “catch-all to protect municipal interests.” (Larson) Dane County’s code already has the six general standards with which ZLR is familiar. Our draft comprehensive revision carries forward these six standards in s. 10.101(7)(d)1., *Standards for Approval*, and further incorporates two additional standards relating to consistency with the adopted comprehensive plan and farmland preservation zoning district requirements.
5. *Specific conditional use standards.* Specific standards for specific conditional uses should be considered by local jurisdictions. Section 10.103, *Special Requirements for Particular Uses*, of the draft comprehensive revision includes such standards.

6. *Reclassification of uses.* Local jurisdictions should use Act 67 as a prompt to more carefully consider the appropriateness of permitted and conditional use designations by zoning district. Should some conditional uses be considered permitted uses in some districts? Dane County's draft zoning ordinance revision process has been an exceptional opportunity for such a review, and we're confident that the subcommittee, staff, and town work over the past year-and-a-half has fairly and appropriately considered this issue.
7. *Staff testimony on conditions.* Planning staff should be prepared to explain ("testify") as to why any proposed conditions are needed. Larson suggests that there should be a strong record developed for CUPs at the public hearing.

Department staff concur with Attorney Larson's recommendations, and our draft ordinance revision concurrently incorporates and largely addresses these recommendations.

In specific regard to staff testimony on proposed conditions, we could more explicitly call out in staff reports the "substantial evidence" upon which recommended conditions are based, and meeting minutes could cite the evidence on which ZLR decisions are based. While staff already comment at ZLR meetings on recommended conditions, we could make a point to further explain at the public hearing the rationale for each proposed CUP condition as an added measure.

To further strengthen our compliance with Act 67 requirements from an administrative perspective, Zoning Division staff have begun modifying our CUP application material to elaborate on substantial evidence, site plan, and operation plan requirements.

Lastly, Larson reminds us that acting on CUPs puts decision making bodies like ZLR into a "quasi-judicial" role. As such, ZLR members "cannot come to the meeting biased, or if they are they must recuse themselves." Similarly, ZLR members "must avoid ex parte communication, meaning they should not investigate the case or receive information about the case outside of the hearing and the public meetings." This was the case previously, prior to Act 67, and it's a good reminder for ZLR members going forward.

TOWN/COUNTY MATTERS WARRANTING FURTHER DISCUSSION

The following are additional matters on which staff will continue to work with Dane County Corporation Counsel and DCTA in addressing. While they have not yet been entirely resolved, they are noted here for ZLR's awareness.

1. Dane County has granted binding CUP authority to towns: Does this in any way run afoul of Act 67?
2. Towns have two formal decision making bodies – plan commission and town board – acting on CUPs. This issue was raised in Attorney Larson's communication to DCTA members. Does this process in any way conflict with Act 67?
3. Towns proposing CUP conditions of approval must also comply with Act 67 'substantial evidence' requirements. There may be an occasion in the future where a town proposes a condition of approval, for which the necessary substantial evidence may not be evident, so we'll need to establish protocol for how to address such issues. For now, we'll simply plan

to be aware of the potential and stay in communication with town staff and cooperatively resolve issues as they arise, as we do now.

CONCLUSION

In summary, the general consensus of the three legal analyses reviewed for this memo, as well as the assessment of Dane County Corporation Counsel and Planning and Development Department staff, is that Act 67 essentially enacts in statute what has largely been the practice in many communities for years based on prevailing case law. At least for Dane County, the act does not prompt a significant change from how CUPs are already treated. However, we are proactively ensuring compliance with Act 67 in both our comprehensive revision of the Dane County Zoning Ordinance and in administratively revising our CUP application materials. While we will continue to work on addressing the three additional town/county matters listed above, we feel Dane County is positioned well to comply with Act 67.