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August 21, 2018

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

**Re: 2017 Wisconsin Act 67
Conditional Use Authority
State Representative Correspondence**

Dear Ms. Lauber:

Enclosed please find correspondence that my office received from one of the authors of 2017 Wisconsin Act 67 as it relates to conditional use authority. The intent, as expressed by the legislators who worked on the bill, included the following goals:

- “Act 67 was passed with the intention of protecting property rights and specifically to address the lack of statutory language related to Conditional Use Permits (CUP).”
- “Act 67 aimed to create certainty for property owners...”
- “The public hearing process created in Act 67 is an important aspect of due process for the property owner.”

I agree that the legislation has the foregoing objectives, which is clear from the text and the context. I also agree that the State by adopting this law created statutory language which previously did not exist, but it also should be noted that this area of law was previously regulated locally. As for the hearing procedures, I agree that the Act adds procedural requirements to the CUP due process, again statutorily, instead of deferring to local governments to establish the same.

I am writing today not to disagree with any of these policy changes, but only to underscore the need to address these changes in the zoning codes of your members. The State now regulates in an area previously subject to local control, and this may therefore conflict with local regulation. Some local regulations may be preempted. Some local regulations may no longer provide the protection for the community that they were intended to provide. Some current requirements and conditions may no longer be enforceable. It is important that your members review their zoning ordinances to ensure that community development objectives are met in this new legal framework.

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Prior to this legislation, many municipalities regulated uses that could have a significant adverse effect upon neighboring property and the community, as conditional uses. Airports, for example, are not a permitted use in most zoning codes, but they are a conditional use. The reason for this, is that such uses have such a high risk of adverse impact on the neighborhood and the community, that they were intended to be considered case-by-case. Section 3.08(1) of the Waukesha County Zoning Code, for example, states the intent of a conditional use this way:

“Certain uses and situations which are of such a special nature, or are so dependent upon actual contemporary circumstances, as to make impractical the predetermination of permissibility, or the detailing in this Ordinance of specific standards, regulation, or conditions which would permit such determination in each individual situation, may be permitted as conditional.”

This concept has existed in zoning throughout the country for decades. An almost identical statement to the foregoing was shown in the SEWRPC model zoning code in 1965. Most municipalities have a similar statement of intent, to allow the permissibility of these categories of uses to be considered case-by-case. One commentator describes the issue this way:

“*Special permits* entered zoning practice after World War II to provide municipalities with greater discretion in dealing development proposals than amendments or variances could afford. The special permit (sometimes called a conditional use permit or special exception) is essentially a “maybe”. (Rutherford H. Platt, *Land Use and Society*, Island Press, 1996, page 245). (See also, Daniel R. Mandelker and John M. Payne, *Planning and Control of Land Development: Cases and Materials*, 5th Edition, 2001, at 448).”

The State of Wisconsin’s goal of providing certainty to property owners regarding conditional uses simply means that the conditional use tool now is not what it once was. It is not a “maybe” issue, anymore. It is now a use that is permitted if the standards are met. Whether the use is an airport, or a quarry, or a multifamily apartment building, or a heavy industry, or a commercial use in a residential district, or whatever else your code designates as a conditional use; if a property owner applies and meet the standards, they get to proceed. You have no discretion to just say “no” anymore. Unfortunately, the legislation took effect immediately, with no time for municipalities to react. Substantial unintended consequences can follow if your members’ codes are not amended in this regard, and we have already seen this throughout the State. Many municipalities have faced conditional use applications that they previously would not have approved, but now are forced to approve because of this new State law.

Despite the goal of providing certainty for property owners, moreover, there are many aspects of this legislation that are open questions for interpretation and are likely to be ultimately decided by our courts. For example:

- Must a CUP be denied if there is no substantial evidence presented at the hearing showing that the requirements and conditions of the Code have been or will be satisfied?
- Can the governing body impose reasonable conditions on the CUP after the hearing is closed, if the conditions were not discussed and evidence presented concerning the conditions at the hearing?
- Must “substantial evidence” be provided by sworn testimony?

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- The statute says the requirements and conditions must be “to the extent practicable, measurable,” which leaves significant room for dispute about what is practicable; e.g. does this require noise meter and light meter measurements, or is it sufficient and “practicable” to require that it not create a nuisance?
- Can we continue to have general conditional use standards, such as “will the proposed use be contrary to the public health, safety and welfare?”
- What if your zoning code has no requirements and conditions for particular conditional uses?
- By specifying a method by which an applicant that is denied a CUP can appeal, does that prevent the applicant from using the avenues of appeal that were previously available?
- Is the applicant’s ability to appeal limited to denials, with no ability to appeal the conditions imposed?
- Can a property owner appeal, who believes they are adversely impacted by the grant of a CUP?

My opinions in this matter, and my recommendations to my clients, have not changed. A copy of my letter of December 27, 2017 is attached. Many of your members have contacted me and we have begun the process of amending codes to respond to this new legal framework to best suit your members’ intent. If your members have not yet done so, I recommend that they consider these issues carefully to ensure that the health, safety, welfare and property values of their community are adequately protected in accordance with their intent.

Let me underscore, finally, that this is legal advice to my municipal clients, only, and it is not policy advice and is not a political argument. Again, I do not disagree with the policy statements made by our legislators. The State had every right to adopt the legislation that they did, and I understand why they did so. I am also aware of commentary from other sources that downplays the significance of this legislation. In some communities it may be true that this legislation will have little impact on the way things have been done, if this legislation matches current local procedures and practices and your members’ current applicable local ordinances include sufficient requirements and conditions. My advice to my municipal clients is to observe that the ground has shifted, and to react if necessary. If your members’ local regulation intends for conditional uses to be a privilege, conditional uses are now a right, and local ordinance changes are needed.

If you should have any questions or concerns regarding this matter, please do not hesitate to contact me.

Yours very truly,
MUNICIPAL LAW & LITIGATION GROUP, S.C.

Eric J. Larson

Eric J. Larson

EJL/egm
Enclosures

cc: Representative Adam Jarchow
Senator Tom Tiffany, 12th Senate District
Curt Witynski, League of Wisconsin Municipalities
Mike Koles, Wisconsin Towns Association