Plan Commission
Meeting of August 26, 2024
Agenda #1, Legistar #60306

The staff report for Legistar 84038 said: "Now, a conditional use is presumed approvable unless substantial evidence is presented. If conditions are met, Plan Commission has much less discretion to deny a conditional use permit."

The staff report explained this resulted from a 2017 state statute that "raised the bar for denying conditional use permits." Wis. Stats. 62.23(7)(de)2.a., enacted by 2017 Wisconsin Act 67 ("Act 67"), was the legislature's response to a Supreme Court of Wisconsin decision in *AllEnergy v. Trempealeau County,* 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368.

There are differing opinions from the City Attorney's Office as to the purpose of Act 67. Most recently a 2024 memorandum stated: "the legislature overruled the Court's majority decision and shifted to a presumption of approval" and "Act 67 was designed to prevent the type of public outcry seen in *AllEnergy* from influencing the CU approval process."[1]

In contrast, a 2020 memorandum stated: "Prior to Wisconsin Act 67, state law did not define a conditional use permit, set evidentiary standards for considering a conditional use request, or require a city to approve the conditional use if the local standards are met. The broad purpose of Act 67 was to inject objectivity into conditional use reviews."[2]

Clearly, Act 67 injected objectivity: (1) the applicant is required to provide substantial evidence that the standards and conditions have been, or will be, met; (2) the public needs to provide substantial evidence that one or more standards/conditions have not been met, should members of the public wish to successfully contest the conditional use; and, (3) the Plan Commission must base its decision on substantial evidence.

But did Act 67 create a presumption of approval? The dissent in *AllEnergy* seemed to take this position: "[A conditional use] is a determination that the identified use is compatible with the zoning district, and is subject only to appropriate conditions to control for the potentially hazardous aspects of the specific proposal under consideration." *Id*, at ¶147.

A dissent is just that – a dissent from the majority opinion. It creates no precedent and does not overrule the majority opinion. The majority opinion in *AllEnergy* said, ¶54:

> In Wisconsin, and in many states, a conditional use is one that has been legislatively determined to be compatible in a particular area, not a use that is always compatible at a specific site within that area.

The *AllEnergy* court explicitly rejected AllEnergy's "entitlement" approach to conditional use permits. *Id.*, at ¶129. AllEnergy had argued that an applicant is entitled to the permit where

---

[1] This memorandum was issued for Legistar 84132, the appeal of the Old Sauk conditional use. https://madison.legistar.com/View.ashx?M=F&ID=13136830&GUID=ECE674AF-7AB7-4A38-A68F-2066B20EFBEE

[2] This memorandum was issued for Legistar 60646, the appeal of the Edgewood lighting conditional use. https://madison.legistar.com/View.ashx?M=F&ID=8941235&GUID=EBB1840E-4F66-467A-A05A-506D84F53932

(A) all ordinance conditions and standards are met and (B) additional conditions can be adopted that address potentially-adverse impacts from the use.

The Wisconsin Legislative Council Memo on Act 67 does not say Act 67 created a presumption of approval. Further, cases decided subsequent to Act 67 continue to apply the doctrine as set forth in the *ALLEnergy* majority opinion.

> In Wisconsin, a conditional use is "one that has been legislatively determined to be compatible in a particular area, not a use that is always compatible at a specific site within that area." Thus, 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." *Eco-Site, LLC v. Town of Cedarburg*, 2019 WI App 42, ¶19, 388 Wis. 2d 375, 933 N.W.2d 179.
>
> This was also affirmed in *Scenic Ridge of Big Bend v. Village of Vernon.* No. 2021AP1390, unpublished slip op. (WI App Sept. 14, 2022), a case decided well after the implementation of Act 67. The court said if the applicant was trying to argue that it was entitled to build in a certain location, such argument "would be an incorrect legal assumption." *Id*, at ¶18. (Opinions may not be published for a variety of reasons, but a common one is that the case merely repeats a settled rule of law.)

The 2020 Town Law Conference[3] informed participants that: "Conditional uses are not presumed to be valid or presumed to be in the public interest." https://www.wisctowns.com/documents/Just-Dropping-in-to-see-what-Condition-Conditional-Uses.pdf

Nor was Act 67 was designed to prevent the type of public outcry seen in *AllEnergy* from influencing the conditional use ("CU") approval process.[4] Public outcry was not a concern expressed in the *AllEnergy* dissent. In fact, the dissent praised the community members (but went on to say the Committee did not use that information to craft potential conditions).

> Community members offered heartfelt and reasoned input on the proposed mine's impact on nearby Trout Run Creek and associated wetlands, surface water drainage, the health effects of wind-borne dust, the potential consequence of flooding in the vicinity, water quality, and the continued viability of various ecosystems. As the court's opinion demonstrates, each of these topics relates to standards the zoning code requires the Committee to consider in ruling on AllEnergy's application. *AllEnergy*, at ¶175

[3] Per the website, each year, the Wisconsin Towns Association collaborates with the UW-Extension Local Government Center and the UW-Madison Law School to offer high quality, low cost legal educational programming to lawyers and non-lawyer public officials.

[4] The hearing materials for the bills, SB 387 and AB 479, show the sponsors, Sen. Tiffany and Rep. Jarchow, wanted to create a statutory framework and do away with subjective decision making and uncertainty in the conditional use process. In *AllEnergy*, the county had an ordinance which allowed the county to consider "additional factors as are deemed by it to be relevant to its decision making process …" The *AllEnergy* dissent viewed this as the county reserving the right to make up the standards as it goes along. *Id.*, at ¶181.

Substantial Evidence

Wis. Stats. §62.23(7)(de)1.b. defines "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 same definition of "substantial evidence" applies to both the applicant and to the public. If some statement would be regarded as personal preferences or speculation if made by a member of the public, it would also be personal preferences or speculation if made by the applicant (or staff).

As explained in the 2020 memorandum from the City Attorney's Office:

> In the broadest sense, this means that the City cannot approve a conditional use merely because the applicant requests one. Similarly, the City cannot deny a conditional use merely because there is opposition to it. Instead, the City must look at the facts and information relevant to the specific request and decide if the conditional use standards have been met and/or if any conditions can be imposed to ensure that they are met.
>
> In addition, the statute provides that the facts and information considered must "directly pertain to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable person's would accept in support of a conclusion." This means, for example, that not every piece of information the Council hears from a proponent or opponent of a conditional use request is relevant to its consideration of the requirements and conditions related to a specific conditional use request.

The Court of Appeals, District II, addressed the meaning of "merely personal preferences or speculation" in *Stop the Ongoing Mine Permit v. City of Ashford*, No. 2018AP1843, unpublished slip op., ¶12 (WI App June 12, 2019).

> 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.

This District II case is unpublished and thus of no precedential value. However, it the case does provide clear reasoning. As said by the Ephraim Village Attorney in 2022:

> While this cannot be cited as precedent, in my opinion the reasoning is sound. While a decision on a condition on a CUP cannot be based solely on personal preference, it can consider personal knowledge when supported by other substantial evidence; if not, why did the legislature insert the word "merely" into the definition of substantial evidence. https://ephraim.wi.gov/wp-content/uploads/2022/08/22-8-23-Plan-Packet.pdf

The particular site

As discussed above, there is no presumption that a particular CU is appropriate on a particular site. Plan Commission has the ability to deny a CU on a particular site because of incompatibility.

An example might help illustrate this issue. 505 W Olin is a one story warehouse zoned NMX, and is surrounded by low density residential on three sides with medium residential across the street. If a CU applicant wanted to put an auto repair station on that site, Plan Commission could determine that CU would be detrimental to or endanger the public health, safety, or general welfare and deny the CU – Plan Commission is not limited to imposing conditions to mitigate negative repercussions.

The applicant must provide substantial evidence that the CU standards, and any conditions, are met.

"The applicant must demonstrate that the application and all requirements and conditions established by the city relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence." Wis. Stats. 62.23(7)(de)2.b.

It is worth noting that the statute requires the applicant to demonstrate all requirements and conditions are met. Often an applicant makes no attempt to address the CU approval standards. When an applicant does make an attempt, it is often not what reasonable persons would accept in support of a conclusion that standards/conditions are, or will be, met.

For example, the applicant for 126 Langdon (Legistar 83978) claimed standard #8 ("the project creates an environment of sustained aesthetic desirability compatible with the existing or intended character of the area and the statement of purpose for the zoning district") was met and the "substantial evidence" presented was limited to this one sentence:

> "The project concept has been discussed and presented to the Alder, City Staff, and Capital Area Neighborhood Association for feedback and refinement to make sure that the project continues the character and scale of the Langdon Neighborhood and underlying zoning."

Essentially the applicant claims the project continues the character and scale of the Langdon neighborhood. But does that statement constitute facts and information or is it more personal preference/speculation? No information is provided as to what refinements may have been made. No information is provided regarding the scale of other buildings on Langdon, whether in height or building footprint or some other measure. No information is provided about how the building shape or materials create an environment of sustained aesthetic desirability compatible with the existing character of the area. (The staff report for 126 Langdon had one paragraph, 66 words, describing whether the CU standards were met. With respect to standard

#8, the staff report, in relevant part, said: "Staff believes that when considering the … architectural design of the building in the context of the surrounding developments … conditional use standards of approval can be found met.")

The City has officially recognized the need for an applicant to provide substantial evidence. In 2020, Edgewood High School filed a CU application for outdoor lighting so that it could host evening practices and games. The staff report said staff believed the CU standards could be met, subject to recommended conditions of approval. The Plan Commission found that standard #3 (uses, values and enjoyment of other property in the neighborhood) was not met. Edgewood appealed to Council and Council did not support the appeal. Edgewood appealed to federal court. As reported in the court's decision, the City argued, in part, that Edgewood had not submitted evidence that there would not be negative impacts on the lighted use of the field and that the applicant had not proposed mitigation measures. *Edgewood High School v. City of Madison*, 648 F. Supp. 3d 1058, 1066. (While Edgewood appealed to the 7th Circuit, it did not appeal the portion of the decision related to conditional use approval.)

Public Comment

Once the applicant has demonstrated, by substantial evidence, that the application and all requirements and conditions established by the City relating to the CU are or will be satisfied, then it becomes time to look at public comments.

Certainly public testimony is important – Act 67 required public hearings for CUs for the first time under state law. Certainly 100 people testifying with nothing more than "we don't want that CU in our neighborhood" is not substantial evidence. But when residents claim, as they did in the Edgewood CU request for lighting, that they would be disturbed by the light and the noise, that does constitute substantial evidence.

Plan Commission placed the Edgewood CU request on file without prejudice. As reflected in the minutes:

> The Plan Commission could not find standard #3 met, finding that the lights would have a substantial negative impact on the uses, values, and enjoyment of surrounding properties, and that no evidence was submitted by the applicant that there would not be negative impacts on the lighted use of the field, and no mitigating measures proposed to limit those impacts (noise barriers, limit on events, etc.).
> Members indicated that they would be open to considering the request again if some redress of the noise impacts was presented by the applicant, including improved engagement with the neighborhoods and a limit to the number of games with lights.

Edgewood instead chose to appeal to Council. There were 938 registrants at Council (720 in support, 215 opposed, and 3 not taking a position). Council did not support the appeal so Edgewood then went to federal court. The federal court said:

> In making their decision, the Common Council referred to the noise and light disturbances for neighbors and the potential effect on property values. The Council further noted that Edgewood might not comply with suggested limits and had been dishonest with neighbors. (Def.'s Rep. to Pl.'s Opp'n to Def.'s PFOF (dkt. #58) ¶¶ 176-179.) **All of this constitutes substantial evidence sufficient to support the Council's ultimate decision on appeal**. (emphasis added)

Edgewood High School v. City of Madison, 648 F. Supp. 3d 1058, 1075.

The manner in which Plan Commission handled the Edgewood CU is in accord with the *AllEnergy* dissent (not that the dissent has any probative value other than, perhaps, in understanding the Act 67 changes).

> So for example, after identifying that sand mines in general might threaten Trout Run Creek and surrounding wetlands, the Committee should have informed AllEnergy of the nature of the threat it feared and given it an opportunity to develop an alleviating condition. Flooding is apparently a recurrent event in this area, so the Committee could have, and should have, required AllEnergy to develop a condition that would control for such an eventuality. Blowing dust consequent upon sand mining potentially has adverse health effects, so the Committee should have required AllEnergy to quantify the problem and propose a condition to address it. *AllEnergy,* at ¶184.

Legislative history provides some insight into Act 67's intent regarding public comment. In the original draft of AB 479, the bill that became Act 67, public comment did not appear to be very welcomed. (1) The AB 479 definition of "substantial evidence" excluded public comment that was based solely on personal opinion, uncorroborated hearsay, or speculation. Act 67 changed this so that any evidence, whether from the applicant or the public, that is "merely personal preferences or speculation" is excluded. (2) AB 479 provided that public testimony alone is not substantial evidence and cannot be the sole basis for the municipality to deny a conditional use permit. Act 67 deleted this provision, so public testimony has the potential to be substantial evidence and could be the sole basis for denial (or, as in the Edgewood CU, the basis for the Plan Commission to request substantial evidence from the applicant).

Weighing the Evidence

Plan Commission's decision to approve or deny a CU must be supported by substantial evidence. As said by ACA John Strange in 2020: "Finally, Act 67 injects a substantial evidence standard throughout each stage of the process, including that any decision by the City to approve or deny a conditional use permit must be based on substantial evidence."

Plan Commission weighs the evidence that comes before it. The courts acknowledge that the Plan Commission has discretion to decide how much weight to give to any piece of evidence, and courts do not reweigh the evidence should the Plan Commission's/Council's decision be appealed. Courts will uphold the decision if it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion. See, for example:

> And in reviewing a municipal decision, courts are instructed that "the weight to accord the evidence lies within the discretion of the municipality." "Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. As the substantial evidence test is highly deferential to the board's findings, we may not substitute our view of the evidence for that of the board when reviewing the sufficiency of the evidence." *Edgewood*, at 1074. (citations omitted)
>
> In applying the substantial evidence test on certiorari review, a court does not reweigh the evidence; certiorari is not a de novo review. Rather, we consider only whether the Board made a reasonable decision based upon the evidence before it. In making this

determination, we take into account all of the evidence in the record. We must uphold a board's decision as long as it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion.
State Ex.Rel. Lamar v. Town of Greenville, No. 2019AP922, unpublished slip op. (WI App December 8, 2020), ¶30

We are not asked to weigh the evidence, nor may we substitute our view of the evidence for that of the Board. "[I]f there is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion, the finding must be upheld." We must uphold the Board's decision if it is supported by substantial evidence, even if there also is substantial evidence to support the opposite conclusion.
State Ex.Rel Nielsen v. Walworth County Bd. of Adj., No. 2019AP10, unpublished slip op. (WI App January 22, 2020), ¶14-15, citations omitted.

Conclusion

Act 67 did not just raise the bar for denying CU permits – it also raised the bar for approving CU permits. Applicants are required to provide substantial evidence that the approval standards and conditions have been, or can be, met. Public comment can count as substantial evidence and can be the basis for denial or for a request for more information from the applicant. Plan Commission's decision must be based on substantial evidence.

For me, this raises questions.

- The applicant must demonstrate that the application and all requirements and conditions established by the city relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. To what extent can the staff report substitute for this statutory duty that is placed on the applicant?
- To what extent can the staff report be relied upon as substantial evidence? Does it matter is the standards of approval are addressed in 66 words (e.g., 126 Langdon) versus 3 pages (e.g., 6610-6706 Old Sauk)?
- The consent agenda is often used for CU approval (staff believes an application has had sufficient review to warrant approval with the conditions placed on the CU, the applicant accepts those conditions, and no individuals are registered to speak in opposition). Is Plan Commission delegating its responsibility (making a decision based on substantial evidence) to staff? If written comments contain substantial evidence but there are no registrants in opposition, are those comments weighed by Plan Commission?
- The Plan Commission Policies and Procedures Manual (last updated 6/27/23) uses the same CU language on page 21 that was in effect in 2014 (prior to Act 67). Should that language be updated? Is it important to have a transparent process so that all parties have an understanding of how CU requests will be handled? Is it important for the public to understand the need to present substantial evidence?

Respectfully Submitted,
Linda Lehnertz