

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: May 1, 2026

**MEMORANDUM**

TO: City of Madison Common Council

FROM: Kate Smith, Office of the City Attorney

RE: Conditional Use Approvals and Appeals

In each zoning district, the zoning code designates uses that are allowed by right, uses that may be allowed if specified standards are met, and uses that are prohibited. The second type of use is known as a conditional use (“CU”) and is a tool designed to allow consideration of the impacts and any potential mitigations of the use prior to approval. The Plan Commission reviews an application for a conditional use based on the approval standards in MGO Sec. 28.183. During the public hearing, the Plan Commission acts as a quasi-judicial body, which means the Commission makes findings of fact, based on these standards, in support of their determination.

If the CU request is approved, conditions are attached to the use that the applicant must meet. Potential conditions, along with ordinance requirements, are listed in the staff report presented alongside the CU application at the public hearing. Staff coordinate with multiple City departments to provide the applicant with relevant conditions related to their purview, as well as other advisory notices regarding other non-zoning ordinance requirements that may be applicable – for example, about the stormwater management requirements in MGO Sec. 37.09.

The Plan Commission determination is final, unless appealed to the Common Council. Per MGO 28.183(5)(b), the action of the Plan Commission shall be upheld unless it is reversed or modified (i.e. impose different or additional conditions) by a favorable vote of two-thirds of the members of the Common Council.

**Legal Standards for Conditions**

Conditions attached to a conditional use permit should be reasonable and designed to diminish the adverse impacts of the use on the district. There are two principle legal standards guiding what conditions a municipality may attach to a conditional use permit. First, the United States Supreme Court articulated a two-part test to help define permissible land use exactions. Second, Wisconsin statutes established a ‘substantial evidence’ standard on which all conditions must be based.

**I. Nollan/Dolan Test**

In *Nollan v. California Coastal Commission*<sup>1</sup> and *Dolan v. City of Tigard*<sup>2</sup>, the United States Supreme Court created a two-part test governing what is ‘too far’ in the context of the conditions imposed on the right to develop property. Under *Nollan*, there must be an “essential nexus” between the “legitimate state interest” and the permit condition. The limitation must be designed to remedy a harm to public interests or to address a need for public services likely to result from the proposed development. The ‘type’ of condition imposed must be in response to the same ‘type’ of impact caused by the new development.

Second, under *Dolan*, if there is a nexus, there must be a “rough proportionality” between the imposed condition and the burden or impact that is anticipated to be created by the new development. The limitation must be commensurate with the extent of the resulting harm or need for services.

## II. Substantial Evidence Standard

Until the adoption of 2017 Wis. Act 67, Wisconsin state statutes were silent on when municipalities should approve or deny a CU application and case law provided the legal framework for how municipalities analyzed CU applications. Under Act 67, the legislature shifted to a presumption of approval and a curtailing of discretionary authority to deny conditional use permits.<sup>3</sup> Instead, the primary discretion lies in the choices of the municipality to declare a use ‘conditional’ (or permitted or not allowed) through their zoning code. If an applicant agrees to meet all the requirements of the ordinance and all the conditions imposed, the local government has no discretion to deny the permit.<sup>4</sup> However, local governments still have discretion in terms of whether something is listed as a conditional use in the zoning ordinance.

Under Wis. Stat. § 62.23(7)(de)2.a., “if an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the city ordinance or those imposed by the city zoning board, the city shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.” ‘Substantial Evidence’ is defined in the statutes as “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.”<sup>5</sup>

Substantial evidence can be provided through staff materials or public comment, but the fact that large numbers of people may come oppose a project is not by itself grounds for permit denial. This is not to say that all public hearing testimony is irrelevant. Only public hearing testimony classified as personal preference or opinion, or is unrelated to zoning ordinance standards, is irrelevant to the CU decision-making body. The deciding body is responsible for synthesizing materials presented to them from multiple sources and make findings of fact on the record to support their determination.

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<sup>1</sup> 483 U.S. 825 (1987).

<sup>2</sup> 512 U.S. 374 (1994).

<sup>3</sup> See the Wisconsin Legislative Council Memo on 2017 Act 270, found at <https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act067> (last checked 7/12/2024).

<sup>4</sup> Wis. Stat. § 62.23(7)(de)2.a.

<sup>5</sup> Wis. Stat. § 62.23(7)(de)1.b.

### **Common Council Appeal**

Like the Plan Commission, the Common Council acts as a quasi-judicial body when determining whether the CU should be upheld, reversed, or modified. The Council is tasked with making findings of fact as they relate to the approval standards.

Per Madison General Ordinance<sup>6</sup> and Wisconsin State Statute<sup>7</sup>, the Common Council decision on a CU is appealable to Circuit Court via a certiorari action. On certiorari review, a court is limited to determining whether: 1) the governmental body's decision was within its jurisdiction; 2) the body acted according to law; 3) the decision was arbitrary or oppressive; and 4) the evidence of record substantiates the body's decision.<sup>8</sup> A certiorari review by the Court can take several months and involves substantial briefing, and potentially oral arguments, prepared by both parties. The appellant typically hires legal counsel, and the City of Madison is represented by the Office of the City Attorney. If the decision is not adequately supported by the record and following applicable legal standards, the Council decision risks being overturned by the reviewing court and costs may be awarded to the prevailing appellant.

The best practice for Common Council to follow is to ensure their decisions are based on the standards found in ordinance, state statute and case law. Decisions should explain the reason why standards are found to be met or insufficiently supported. In their quasi-judicial capacity, council members should create a record explaining how the evidence supports their decisions. Council members, and Plan Commissioners, must use 'substantial evidence' to support their findings for a CU determination.

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<sup>6</sup> MGO Sec. 28.183(5)(b)9.

<sup>7</sup> Wis. Stat. § 62.23(7)(de)5.

<sup>8</sup> *Grycowski v. Milwaukee Employees' Retirement System/Annuity & Pension Board*, 2021 WI App 7, 395 Wis. 2d 722, 953 N.W.2d 904, 19-2295.