

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

Date: July 15, 2024

**MEMORANDUM**

TO: City of Madison Common Council

FROM: Kate Smith, Office of the City Attorney

RE: Conditional Use Appeals

In a zoning district, ordinances designate 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 introduce flexibility into the zoning ordinance. 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 in support of their determination.

If the CU permit 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 other non-zoning ordinance requirements – for example, 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.

**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. Not all the CU approval standards apply to all applications (there are specifics for certain proposed uses). Below are standards in MGO Sec. 28.183(6):

(6) Approval Standards.

(a) The City Plan Commission shall not approve a conditional use without due consideration of the recommendations in the City of Madison Comprehensive Plan and any applicable, neighborhood, neighborhood development, or special area plan, including design guidelines adopted as supplements to these plans. No application for a conditional use shall be granted by the Plan Commission unless it finds that all of the following conditions are present:

1. The establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare.
2. The City is able to provide municipal services to the property where the conditional use is proposed, given due consideration of the cost of providing those services.
3. The uses, values and enjoyment of other property in the neighborhood for purposes already established will not be substantially impaired or diminished in any foreseeable manner.
4. The establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
5. Adequate utilities, access roads, drainage, internal circulation improvements for pedestrians, bicyclists, public transit and vehicles, parking supply (in cases with minimum parking requirements) and other necessary site improvements have been or are being provided.
6. The conditional use conforms to all applicable regulations of the district in which it is located.
7. When applying the above standards to an application by a community living arrangement, the Plan Commission shall:
  - a. Bear in mind the City general intent to accommodate community living arrangements.
  - b. Exercise care to avoid an over-concentration of community living arrangements, which could create an institutional setting and seriously strain the existing social structure of a community. Considerations relevant for this determination are the distance between the proposed facility and other such facilities, the capacity of the proposed facility and the percentage by which the facility will increase the population of the community, the total capacity of all community living arrangements in the community, the impact on the community of other community living arrangements, the success or failure of integration into communities of other such facilities operated by the individual or group seeking approval, and the ability of the community to meet the special needs, if any, of the applicant facility.
8. When applying the above standards to any new construction of a building or an addition to an existing building the Plan Commission shall find that 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. In order to find that this standard is met, the Plan Commission may require the applicant to submit plans to the Urban Design Commission for comment and recommendation.

9. When applying the above standards to an application for a reduction in off-street parking requirements, the Plan Commission shall consider and give decisive weight to all relevant facts, including but not limited to, the availability and accessibility of alternative parking; impact on adjacent residential neighborhoods; existing or potential shared parking arrangements; number of residential parking permits issued for the area; proximity to transit routes and/or bicycle paths and provision of bicycle racks; the proportion of the total parking required that is represented by the requested reduction; the proportion of the total parking required that is decreased by Sec. 28.141. The characteristics of the use, including hours of operation and peak parking demand times design and maintenance of off-street parking that will be provided; and whether the proposed use is now or a small addition to an existing use.
10. When applying the above standards to telecommunication facilities, the Plan Commission shall consider the review of the application by a professional engineer required by Sec. 28.143.
11. When applying the above standards to an application for height in excess of that allowed in the district, the Plan Commission shall consider recommendations in adopted plans; the impact on surrounding properties, including height, mass, orientation, shadows and view; architectural quality and amenities; the relationship of the proposed building(s) with adjoining streets, alleys, and public rights of ways; and the public interest in exceeding the district height limits.
12. When applying the above standards to lakefront development under Sec. 28.138, the Plan Commission shall consider the height and bulk of principal buildings on the five (5) developed lots or three hundred (300) feet on either side of the lot with the proposed development.
13. When applying the above standards to an application for height in excess of that allowed by Section 28.071(2)(a) Downtown Height Map for a development located within the Additional Height Areas identified in Section 28.071(2)(b), the Plan Commission shall consider the recommendations in adopted plans, and no application for excess height shall be granted by the Plan Commission unless it finds that all of the following conditions are present:
  - a. The excess height is compatible with the existing or planned (if the recommendations in the Downtown Plan call for changes) character of the surrounding area, including but not limited to the scale, mass, rhythm, and setbacks of buildings and relationships to street frontages and public spaces.
  - b. The excess height allows for a demonstrated higher quality building than could be achieved without the additional stories.
  - c. The scale, massing and design of new buildings complement and positively contribute to the setting of any landmark buildings within or adjacent to the projects and create a pleasing visual relationship with them.

- d. For projects proposed in priority viewsheds and other views and vistas identified on the Views and Vistas Map in the City of Madison Downtown Plan, there are no negative impacts on the viewshed as demonstrated by viewshed studies prepared by the applicant.
14. When applying the above standards to an application to redevelop a site that was occupied on January 1, 2013 by a building taller than the maximum building height allowed by Section 28.071(2)(a) Downtown Height Map, as provided by Section 28.071(2)(a)1., no application for excess height shall be granted by the Plan Commission unless it finds that all the following additional conditions are also present:
- a. The new building is entirely located on the same parcel as the building being replaced.
  - b. The new building is not taller in stories or in feet than the building being replaced.
  - c. The new building is not larger in total volume than the building being replaced.
- d. The new building is consistent with the design standards in Section 28.071(3) and meets all of the dimensional standards of the zoning district other than height.
  - e. The Urban Design Commission shall review the proposed development and make a recommendation to the Plan Commission.
15. When applying the above standards to an application for limited production and processing use, the Plan Commission shall consider the effect of such a use on the surrounding properties, including the effects of odors, noise, vibration, glare, hours of operation, and other potential side effects of a manufacturing process.
16. When applying the above standards to an application for allowable projections into the capitol view height area, the Plan Commission shall only approve the projection if it determines the encroachment is the minimum necessary and does not significantly impact the long views of the State Capitol building.

Per Madison General Ordinance<sup>1</sup> and Wisconsin State Statute<sup>2</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>3</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.

### **Substantial Evidence Standard**

Until 2017, 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. But in response to a 2017 Wisconsin Supreme Court case *AllEnergy Corp. v. Trempealeau County*<sup>4</sup>, the legislature enacted a statute curtailing municipal discretion during the CU process. The *AllEnergy* case involved the denial of a CU for a

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<sup>1</sup> MGO Sec. 28.183(5)(b)9.

<sup>2</sup> Wis. Stat. § 62.23(7)(de)5.

<sup>3</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.

<sup>4</sup> *AllEnergy v. Trempealeau County*, 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368.

proposed frac sand mine in Trempealeau County. The existing County ordinances adopted thirty-seven conditions for a mine, which *AllEnergy* agreed to meet, but the County voted to deny the CU in part relying on public testimony in opposition to the mine.<sup>5</sup>

The *AllEnergy* dissent articulated several concerns that were swiftly addressed by 2017 Wis. Act 67 (“Act 67”). Prior to Act 67, municipalities had wide discretion when evaluating a CU application. The dissent in *AllEnergy* argued that a conditional use should be treated more like a permitted use if the applicant satisfies all ordinance standards.<sup>6</sup> The dissent reasoned that once a government establishes a conditional use in a zoning district, it determines that the use is consistent for that area.<sup>7</sup> The question then becomes what standards and conditions the municipality imposes to protect against potential negative aspects of the specific proposal under consideration.<sup>8</sup>

With Act 67, the legislature overruled the Court’s majority decision and shifted to a presumption of approval.<sup>9</sup> It is clear from the legislative history that the Act was adopted to curtail the discretionary authority of municipalities to deny conditional use permits. 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>10</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>11</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. Act 67 was designed to prevent the type of public outcry seen in *AllEnergy* from influencing the CU approval process. 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>5</sup> *Id.*

<sup>6</sup> *Id.* at ¶ 147

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</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>10</sup> Wis. Stat. § 62.23(7)(de)2.a.

<sup>11</sup> Wis. Stat. § 62.23(7)(de)1.b.