

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

**MEMORANDUM**

TO: The Madison Common Council

FROM: John Strange, Assistant City Attorney

DATE: November 24, 2020

RE: Legislative File 60646 – Conditional Use Appeal of the Plan Commission's decision to place on file without prejudice Edgewood High School's request to install field lights at the Goodman Athletic Complex.

---

**I. Introduction.**

On May 11, 2020, the Plan Commission placed on file without prejudice Edgewood High School's ("Edgewood") application requesting conditional use approval to install field lights at its Goodman Athletic Complex.<sup>1</sup> On May 21, 2020, Edgewood appealed the Plan Commission decision to the Common Council.<sup>2</sup> Since filing its Notice of Appeal, Edgewood has requested several referrals of the Appeal. Due to the length of time that has passed since the Plan Commission hearing, the purpose of this Memorandum is to orient Common Council members to information related to their consideration of the Appeal, which is set for December 1, 2020.

**II. Common Council's Role in a Conditional Use Appeal.**

M.G.O. § 28.183(5)(b)8. provides that the action of the Plan Commission shall be upheld unless it is reversed or modified by a favorable vote of two-thirds (2/3) of the members of the Common Council (14 members).

Like the Plan Commission, the Common Council will have an opportunity to hear from City Staff, the applicant, and members of the public during the hearing. Alders will

---

<sup>1</sup> Edgewood's Conditional Use request, including Edgewood's application, the Staff Report, comments from the public and district alder, and the Plan Commission Disposition Letter, is located in Legislative File 60001, found here: <https://madison.legistar.com/LegislationDetail.aspx?ID=4394445&GUID=48C312B2-F734-46EB-9B58-D9DA005C66B1&Options=ID|Text|&Search=Edgewood>

<sup>2</sup> Edgewood's Appeal is located in Legislative File 60646, found here: <https://madison.legistar.com/LegislationDetail.aspx?ID=4542871&GUID=B9777AC0-F2AF-4C4B-9E33-00C55C92776A&Options=ID|Text|&Search=60646>

also be able to ask questions related to the application and testimony provided at the hearing. The Common Council will then determine if the standards for conditional use approval have been met. In doing so, the Common Council may consider conditions of approval that would mitigate any identified impacts of the requested use, including, but not limited, those conditions proposed by Staff and considered by the Plan Commission.

As noted above, under M.G.O. § 28.183(5)(b)8., the deference given to the Plan Commission decision is built into the extra-majority vote required by the ordinance to reverse it. There is no separate or specific standard of review on appeal.

### **III. Madison's Conditional Use Standards.**

A complete list of the City's conditional use standards can be found in M.G.O. § 28.183(6).<sup>3</sup> As discussed more fully below, after reviewing Edgewood's request and public comments opposed to the project, Staff noted in its Report to the Plan Commission that the most relevant standards of approval for this request were likely standards 1, 3, and 4, which most directly address the impact that a conditional use may have on surrounding properties:

1. The establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare.
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.

The Plan Commission found that standard three (3) had not been met.

### **IV. State Law Requirements when Considering Conditional Use Standards.**

In considering the conditional use standards related to a request, the Common Council, like the Plan Commission, must follow Wis. Stat. § 62.23(7)(de), which provides:

"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

---

<sup>3</sup>[https://library.municode.com/wi/madison/codes/code\\_of\\_ordinances?nodeId=CD\\_ORD\\_MADISON\\_WISCONSIN\\_VOLUME\\_III\\_CHAPTERS\\_20--31\\_CH28ZOCOOR\\_SUBCHAPTER\\_28LPR\\_28.183COUS](https://library.municode.com/wi/madison/codes/code_of_ordinances?nodeId=CD_ORD_MADISON_WISCONSIN_VOLUME_III_CHAPTERS_20--31_CH28ZOCOOR_SUBCHAPTER_28LPR_28.183COUS)

imposed must be related to the purpose of the ordinance and be based on substantial evidence.”<sup>4</sup>

The statute further provides:

“The requirements and conditions...must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit’s duration, transfer, or renewal. The applicant must demonstrate the application and all requirements and conditions established by the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The city’s decision to approve or deny the permit must be supported by substantial evidence”<sup>5</sup>

Finally, the statute defines substantial evidence as:

“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>6</sup>

These statutory requirements were enacted in 2017 by Wisconsin Act 67.<sup>7</sup> 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. For example, after Act 67, state law requires an applicant to do more than just apply for conditional use approval; they must demonstrate that the requirements of the conditional use are or will be met. Once the applicant successfully demonstrates that they “meet or agree to meet” the local standards, the statute requires a city to approve the applicant’s request. State law further requires that any conditions imposed by the city in approving a request must be reasonable and, to the extent practicable, measurable. 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.

So far, there have been no cases interpreting the Act 67 provisions, including the provision related to the meaning of “substantial evidence” in conditional use law. Nevertheless, the definition itself provides some clear and basic guideposts for the Common Council to keep in mind as they consider this appeal. Under the statute, substantial evidence is “facts and information, other than merely personal preferences or speculation.” 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

---

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

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

<sup>6</sup> Wis. Stat. § 62.23(7)(de)1.b.

<sup>7</sup> <https://docs.legis.wisconsin.gov/2017/related/acts/67.pdf>

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.

To my knowledge, this is the first Common Council conditional use appeal since these new state law requirements were enacted. Like the Plan Commission, the Common Council should keep these parameters in mind when considering information at the Appeal. Our office will be available at the hearing to answer any further questions related to this request.

## **V. Information Related to Edgewood’s Conditional Use Request and the Plan Commission Hearing.**

With an understanding of the Common Council’s role, the conditional use standards, and the state law requirements regarding how the city must consider those standards, this section provides a brief overview and orientation to Edgewood’s conditional use application and the Plan Commission hearing.

M.G.O. § 28.097(2)(d) requires that:

“[i]n a Campus-Institutional District without a Campus Master Plan, the establishment, improvement, or modification of any primary or secondary use occurring outside of an enclosed building shall require conditional use approval. However, the Zoning Administrator may issue permits to repair or replace any existing facility related to a primary or secondary use provided that the proposed facility is of a similar bulk condition and at a similar location on the zoning lot as the existing facility.”

Pursuant to this ordinance requirement, Edgewood filed a conditional use application on March 11, 2020 to install lights (an improvement or modification) at its athletic field (a secondary use).<sup>8</sup> Edgewood’s application seeks to install 68 feet or 80 feet in height (based on the grade of the field) poles at the four corners of the complex to be outfitted with LED light fixtures. Edgewood’s application includes photometric and glare

---

<sup>8</sup>Edgewood’s Application can be found here:  
<https://madison.legistar.com/View.ashx?M=F&ID=8201289&GUID=F564CFC0-C6AC-42AD-9538-52CBD52B4828>

studies for both height alternatives.<sup>9</sup> In addition to containing Edgewood's application and the City Staff Report, the legislative file also contains Edgewood's letter of intent and project plans. Finally, the legislative file contains public comments, neighborhood association comments, and comments of the District Alder.<sup>10</sup>

The Plan Commission held a public hearing regarding Edgewood's application on May 11, 2020. In its Staff Report, the Planning Division explained to the Plan Commission that, based on a review of the application and public comments opposing the proposal, it believed the two primary impacts of Edgewood's lighting request related to the light and noise associated with activities taking place on the field after dark. The Staff Report opined that both of these impacts could be addressed by focusing on conditions related to the number of events that could occur after dark. Accordingly, Staff recommended that the Plan Commission could find the conditional use standards met and approve the application with seven (7) specific conditions enumerated in the Staff Report, including a condition limiting the "number non-practice events (athletic competitions/games, school activities) using the stadium lighting after 7:00 PM ... per school year (August 1 to July 31) to be determined by the Plan Commission following input at the public hearing." For a full list of the conditions proposed by staff, see the Staff Report.<sup>11</sup>

At the Plan Commission hearing, Edgewood agreed to the conditions proposed by Staff and, with respect to a limit on the number of games, proposed that games be naturally limited to the total number required for Edgewood related teams. However, Plan Commissioners pointed out that this was not actually a defined limit as suggested by the Staff Report.

The District Alder opposed Edgewood's request, as detailed in his comments attached to the Legislative File and those made at the hearing. Members of the public submitted comments to the Plan Commission in writing and via testimony at the hearing, some supporting and others opposing the proposal. Those comments are also attached to the Legislative file. Public testimony during the Plan Commission hearing can be heard during the first approximately four (4) hours of the hearing.

The Plan Commission engaged in an extensive discussion regarding the proposal in general and Staff's proposed conditions in particular. Ultimately, the Plan Commission found that conditional use standard number three (3) had not been met. Accordingly, the Plan Commission voted to place the application on file without prejudice. Common Council members are encouraged to listen to Plan Commission discussion and deliberation in preparation for the appeal.<sup>12</sup>

---

<sup>9</sup> <https://madison.legistar.com/View.ashx?M=F&ID=8328556&GUID=DB9A74BF-ED89-49CB-B343-BEF4D8A85429>

<sup>10</sup> <https://madison.legistar.com/LegislationDetail.aspx?ID=4394445&GUID=48C312B2-F734-46EB-9B58-D9DA005C66B1&Options=ID|Text|&Search=Edgewood>

<sup>11</sup> <https://madison.legistar.com/View.ashx?M=F&ID=8328556&GUID=DB9A74BF-ED89-49CB-B343-BEF4D8A85429>

<sup>12</sup> <https://media.cityofmadison.com/Mediasite/Showcase/madison-city-channel/Presentation/95ac2fc624f04a65b8ea74ac63ffcda31d>

As noted above, Edgewood requested several referrals of the Appeal in order to further discuss the proposal with concerned neighbors. Staff has not been involved in any of these discussions, but this week received documentation regarding proposals that have apparently been exchanged. These items have been added to Legistar File 60646.

## **VI. Conclusion**

Reversing or modifying the Plan Commission decision will require a 2/3 majority vote of the members of the Council (14). In considering the appeal, the Common Council should review and apply the conditional use standards, keep in mind the state law requirements outlined above, and articulate the reasons for whatever decision it makes. As noted, it may be helpful for Common Council members to review the referenced information in preparation for the Appeal, including the Staff Report, Public Comment, Comments of the District Alder, and recording of the Plan Commission public hearing.

---

The hearing begins at approximately 02:33 of the meeting. After a brief introduction by City Staff, the Plan Commission heard public comment. After public comment, at approximately 06:05, the Plan Commission asked questions of staff, engaged in discussion, and made its decision.