AGENDA
CITY OF STURGEON BAY
CITY PLAN COMMISSION
Wednesday, March 21, 2018
6:00 p.m.
Council Chambers, City Hall
421 Michigan Street

1. Roll call.
2. Adoption of agenda.
3. Approval of minutes from February 21, 2018.
4. Consideration of: Requirements for Electronic Variable Message Signs.
5. Consideration of: Minimum yards for accessory buildings.
6. Consideration of: Conditional uses within Sturgeon Bay Zoning Code.
7. Public comment on non-agenda Plan Commission related items.
8. Adjourn.

NOTE: DEVIATION FROM THE AGENDA ORDER SHOWN MAY OCCUR.

Notice is hereby given that a majority of the Common Council may be present at this meeting to gather information about a subject over which they have decision-making responsibility. If a quorum of the Common Council does attend, this may constitute a meeting of the Common Council and is noticed as such, although the Common Council will not take any formal action at this meeting.

Plan Commission Members:
Rick Wiesner – Chair
Ron Vandertie
Mike Gilson
Steven Hurley
Jeff Norland
Robert Starr
Dennis Statz

3/16/18
2:00 p.m.
CN

CITY PLAN COMMISSION
Wednesday, February 21, 2018

A meeting of the City Plan Commission was called to order at 6:00 p.m. by Chairperson Rick Wiesner in the Council Chambers, City Hall, 421 Michigan Street.

Roll Call: Members Dennis Statz, Mike Gilson, Steven Hurley, Rick Wiesner, Robert Starr, and Ron Vandertie were present. Absent: Member Jeff Norland. Also present were Alderpersons Barb Allmann, Stewart Fett, and Laurel Hauser, City Engineer Chad Shefchik, Community Development Director Marty Olejniczak, Planner/Zoning Administrator Chris Sullivan-Robinson, and Community Development Secretary Cheryl Nault.

Adoption of the Agenda: Moved by Mr. Statz, seconded by Mr. Hurley to adopt the following agenda:

1. Roll call.
2. Adoption of agenda.
3. Approval of minutes from December 20, 2017.
4. Combined Preliminary/Final Planned Unit Development for Bonovich Properties, LLC, for a 64-unit multiple-family residential development, located on Egg Harbor Road, a portion of parcel #281-62-10000105.
   Presentation
   Public Hearing
   Consideration of
5. Presentation of: Conceptual Planned Unit Development for Phillips Development LLC, for a 34-unit multiple-family development, located in the 700 blocks of Erie and Florida Streets, parcel #281-23-0527260006 (aka Amity Field).
6. Presentation of: Conceptual Planned Unit Development for Duquaine Development (Mau & Associates, LLP, Agent), for a 162-unit multiple-family development, located on the Southeast corner of Tacoma Beach Road and Clay Banks Road/ CTH U, parcel #281-68-17000301A.
7. Public comment on non-agenda Plan Commission related items.
8. Adjourn.

Carried.

Approval of minutes from December 20, 2017: Ms. Nault noted two corrections on the December 20, 2017 minutes. The last paragraph on page 1, first sentence, should read 12th Place, not Avenue. Page 2, second paragraph, second sentence should end at Alabama Place and the rest of the sentence should be deleted. Moved by Mr. Starr, seconded by Mr. Vandertie to approve the minutes from December 20, 2017, with the corrections. All ayes. Carried.

Combined Preliminary/Final Planned Unit Development for Bonovich Properties, LLC, for a 64-unit multiple-family residential development, located on Egg Harbor Road, a portion of parcel #281-62-10000105.

Presentation: Mr. Sullivan-Robinson stated that Bonovich Properties, LLC, is petitioning for a 64-unit apartment complex to be located off of Egg Harbor Rd. There will be four 16-unit buildings and two 32-unit garage buildings. Proposed are 8 one-bedroom apartments and 56

two-bedroom apartments. There will be 137 parking spaces, with three trees required for each of the four parking areas. The western property line contains a hedge. The southern half of the property is currently well screened for the parking area, but the northern part of the property is sparse. As far as pedestrian access, currently there are only walkways leading from the doorway to the parking areas and from the office building to the parking areas. There are no other walkways proposed. The proposed development is consistent with the Comprehensive Plan. According to the City Engineer, no traffic analysis is needed. The utilities will come off of Egg Harbor Road. Impervious surface requirement is well met. They are also planning on installing a monument sign near the entrance. Due to the narrowness of the lot and the required setback, a variance would be needed via the PUD. The construction is expected to occur in two phases.

Mr. Olejniczak added that staff is okay with the two deviations from the standards of the municipal code. These include the reduction in the setback from the side lot line for the entrance sign and the reduction of the lot width, both of which are due to the "flag lot" configuration of the development.

In regard to the pedestrian access to Egg Harbor Road, it would be a nice amenity to have some type of path due to the long driveway, but staff is not recommending it to be a condition of approval.

Developers Brian and Sarah Bonovich, 3329 Wooded Lane, Baileys Harbor, mentioned that she and her brother own and manage Big Hill Regency House in Sturgeon Bay. The first phase would include two buildings and one garage building. The square footage of the units would range from 916 to 1,107 square feet. Rents would range from $750 to $1100 per month including utilities. They will provide a picnic pavilion with a grill and table and chairs for the residents. The apartments will have a farmhouse design with a combination of white horizontal and vertical siding with natural stone veneer around the doors. The entrances will have metal shed roofs. The lighting will include wallpacks with LED lighting. They are looking at a monument sign at the entrance by Egg Harbor Road that will guide the residents to Tall Pines Estates. This meets the community need for rental housing. There will be a mix of two-bedroom one bath and two-bedroom two baths.

Mr. Starr questioned if there would be room in the rear of the property with the location of the detention pond for another entrance/exit driveway. Ms. Bonovich will check with Baudhuin, Inc. Mr. Olejniczak added they could loop a driveway from the west side of the last building.

A path was also discussed including potential surfacing such as blacktop, concrete, or quarry wash. An option such as wood chips for a pedestrian path would not work well with wheel chairs or strollers. Mr. Wiesner suggested an option of widening the driveway and striping it for a pedestrian walkway.

Mr. Gilson wondered where sidewalks would go if it is unknown where a street would be located. He suggested the City putting a partial street in and no driveway. Maybe the developer could share some of the cost. If you want development the City needs to put in infrastructure.

Public Hearing: Chairperson Wiesner opened the public hearing at 6:36 p.m.

Barbara Allmann, 717 Prairie Lane, stated that she was in favor of the development, but it needs a road and sidewalks. She wondered how the driveway approached Egg Harbor Road.

Chris Kellems, 120 Alabama Street, stated that she was also in favor of the development. She suggested the developers should plan to install solar heat on the roof, as well as Water Sense plumbing fixtures. Additional insulation should be added to protect pipes and also for sound between apartments.

David Hayes, 111 S. 7th Avenue, was also in favor of the project. He wondered where the garbage receptacles would be located. There should be some type of vegetation plan around the catch basins and around the bushes and trees.

Lynn (Peil) Zawojski, 4704 Martin Road and representing the Peil property at 1116 Egg Harbor Road, wanted to know how this development will affect her property. People will be crossing through her property instead of walking on Egg Harbor Road and wanted to know what can be done to prevent it.

Paul Anschutz, 221 N. 6th Avenue, read a letter that he submitted regarding a multi-modal path. He was concerned for children walking down a driveway with no sidewalks. He also thinks the detention pond is an issue.

Laurel Hauser, 746 Kentucky Street, stated that she was in favor of the development, but wondered how kids would get to Sunset Park. She would like to see numbers on street costs. There should be as much landscaping done as possible.

No one spoke against the proposed development. There was no other written correspondence.

The public hearing was declared closed at 6:50 p.m.

Consideration of: Mr. Olejniczak addressed the public's questions. The driveway does swing and uses an existing curb cut. Vehicles approaching Egg Harbor Road will be facing at 90 degrees. The garbage receptacles will be located at the southern end of the property well off the street. Screening around trash receptacles is sometimes required as a condition of approval by the Plan Commission or Aesthetic Board. The PUD will not impact the Peil property. They could also find a developer and do the same thing as the Bonovich development. As far as preventing trespassers on the Peil parcel, more screening on the west end or fencing could be placed on the property.

Mr. Wiesner would like to see a sidewalk connecting the parking lot to the existing sidewalk on Egg Harbor Road.

Mr. Starr questioned when the construction was intended to start. Ms. Bonovich responded that they would like to break ground as soon as possible.

After further discussion, it was moved by Mr. Gilson, seconded by Mr. Starr to act on this item at this meeting. Roll call vote. All ayes. Carried.

Moved by Mr. Gilson, seconded by Mr. Starr to recommend to Council approval of the PUD based upon the submitted plans, including the municipal code deviations for lot width and side yard setback for the sign, with the following conditions:

1. Compliance with the off-street parking landscaping requirements, which includes adding additional canopy trees and screening at the ends of the northerly two parking areas.
2. Provide additional recreation facilities, such as a play apparatus, in addition to the pavilion shown.
3. Provide a 30-foot utility easement for sanitary sewer and water mains, including extending the easement to the north property line.
4. Provide a 10-foot drainage easement along the east property line from the north lot line to 20 feet past the northwest corner of the Simon parcel.
5. Maintain the ability to connect the driveway to the future Alabama Street, such as over the utility easement, with the actual construction to occur at the property owner's discretion.
6. Aesthetic Design and Site Plan Review Board approval.
7. Final approval of the stormwater management plan by the City Engineer.
8. Work with staff to develop some type of multi-modal path with access to Egg Harbor Road.

All ayes. Carried.

Presentation of: Conceptual Planned Unit Development for Phillips Development LLC, for a 34-unit multiple-family development, located in the 700 blocks of Erie and Florida Streets, parcel #281-23-0527260006 (aka Amity Field): Mr. Olejniczak stated that this is another multi-family development proposed on property known as Amity Field. Sunset School had used this property for a number of years for outdoor activities. The school district has now vacated their lease. Any request over 25 units requires a PUD. This is a chance for the Plan Commission to ask questions and give feedback. There are 34 units proposed by Doreen Phillips. Ms. Phillips is requesting a combined Preliminary/Final PUD.

Jeff Halbrook, 2680 Humboldt Road, Green Bay, and Doreen Phillips, 1634 Rustic Oaks, Green Bay, presented the plans for 26 two-bedroom and 8 three-bedroom townhomes, including 40 garage units, with affordable housing. They are in the process of developing some type of outdoor amenities for the residents.

Mr. Olejniczak added that the developer would be responsible for the addition of a sidewalk on Florida Street, which is a condition on the sale of the property.

Chairperson Wiesner allowed comments from the public.

Chris Kellems, 120 Alabama Street, stated that according to the floor plans, the first floor had no bathrooms. That would be hard for seniors and wheelchairs to get to the second floor. She encouraged first floor bathrooms.

Laurel Hauser, 746 Kentucky Street, questioned the rent range. Ms. Phillips responded $700 - $900 per month.

Mr. Starr commented that he was glad to see that they are incorporating three-bedroom units.

Mr. Gilson thought it was a good project, a good location, but needs some curb appeal.

Mr. Hurley asked if the project would include a community area. Ms. Phillips said they are considering that.

After further discussion, it was moved by Mr. Starr, seconded by Mr. Hurley to approve the request for a Preliminary/Final PUD review. All ayes. Carried.

Presentation of: Conceptual Planned Unit Development for Duquaine Development (Mau & Associates, LLP, Agent), for a 162-unit multiple-family development, located on the Southeast corner of Tacoma Beach Road and Clay Banks Road/ CTH U, parcel #281-68-17000301A: Mr. Olejniczak stated that this, again, is another multi-family development that is proposed on the West side of town. It is a larger development and unlike the other two developments, the underlying zoning is R-3. If approved, the City may do some type of Comprehensive Plan revision.

Steve Bieda, Mau & Associates, presented the nine 18-unit multiple-family apartment buildings, with a mixture of attached and detached garages. There are 108 connected garage stalls and 63 detached garage stalls for a total of 171 stalls on site. Included are 170 surface parking stalls. There are also connections to the Ahnapee Trail on three sides. A gathering space, which will include a gazebo and community playset, will be centrally located. The refuse containers will be screened with a 6 foot high berm and centrally located as well. The buildings will be built in three phases, with three buildings per phase. Rents will range from $650 for a one bedroom and $1250 for a 2 bedroom apartment.

Developer Keith Duquaine, 4329 Nicolet Drive, Green Bay, stated that he has been building and managing multi-family developments since 1986. He has built apartments in Algoma and Kewaunee.

Chairperson Wiesner allowed comments from the public.

Chris Kellems, 120 Alabama Street, suggested to the developers that solar be used, as well as Water Sense fixtures. She thought the need was for two and three bedrooms, not one bedroom apartments. The $1200 per month rent was too high for this area. She was still in favor of it.

Moved by Mr. Gilson, seconded by Mr. Starr to approve the request for a Preliminary/Final PUD review. All ayes. Carried.

Mr. Olejniczak said he liked the way the development was laid out and how they have incorporated the Ahnapee Trail into the project. It does need some curb appeal along Clay Banks Road.

Mr. Statz had some traffic concerns. Mr. Olejniczak added that when Deer Run was proposed across the street, there was a question if a traffic impact analysis should be required. At that time the DOT had recently completed their highway improvements plan. The only thing they had in their plan, at the City's expense, was a dedicated right turn lane from Clay Banks Road onto the highway. At that time, Deer Run had agreed to contribute to the cost. The City could ask the developer to do the same thing. This could be done now or wait until the property across Clay Banks Road is developed.

Mr. Starr mentioned that if there were three bedroom units, they would rent quickly. Mr. Bieda responded that it has already been thought about. Mr. Duquaine added that they are flexible as they continue with their plans.

Public comment on non-agenda Plan Commission related items: No one spoke during public comment.

Adjourn: Moved by Mr. Statz, seconded by Mr. Hurley to adjourn. All ayes. Carried. Meeting adjourned at 7:44 p.m.

Respectfully Submitted,

Cheryl Nault

Cheryl Nault
Community Development/Building Inspection Secretary

Christopher Sullivan-Robinson
Planner/Zoning Administrator
421 Michigan Street
Sturgeon Bay, WI 54235

Phone: 920-746-2907
Fax: 920-746-2905
E-mail: csullivan-robinson@sturgeonbaywi.org
Website: www.sturgeonbaywi.org

MEMO

To: Plan Commission
From: Christopher Sullivan-Robinson
Date: March 15, 2018
Subject: Requirements for Electronic Variable Message Signs

An electronic variable message sign (EVMS) is a sign which may be electronic or mechanically controlled and capable of showing a series of different messages in sequence. In the City, these types of signs are categorized as a special sign within the Chapter 27 of municipal code. EVMS are permitted only within the commercial and industrial districts. Listed below are the zoning dimensional and operation standards:

a) Dimensional standards.
   1) EVMS shall meet the sign setback regulations for the appropriate zoning district.
   2) EVMS shall not be permitted where they attempt or appear to attempt to direct the movement of traffic or which interfere with, imitate or resemble any official traffic sign, signal, or device. EVMS shall not be permitted where they prevent the driver of a vehicle from having clear and unobstructed view of official signs and approaching or merging traffic.
   3) The illuminated or message display area of the EVMS shall be included within the area to be regulated as the maximum area of a sign for a site. The message display area shall not exceed 32 square feet.

b) Operational standards.
   1) The EVMS shall only display static messages and such displays shall not have movement, animation or scrolling, or the appearance or illusion movement.
   2) EVMS shall not be used as flashing signs or lights.
   3) Each message displayed by the EVMS shall remain for a minimum of 6 seconds.
   4) Each change of message must be accomplished within one second.
   5) All EVMS must be equipped with photosensitive equipment which automatically adjusts the brightness and contrast of the sign in direct relation to the ambient outdoor illuminations.

The sign code originally had minimum distances that such signs had to be from other EVMS and from certain traffic spots, such as controlled intersections. But, the code originally did not restrict scrolling messages or how often a message could change. The Council later amended the code to eliminate the setbacks, but added the requirement for a 6-second static message. Existing EVMS were grandfathered from that rule.

This type of sign was adopted with operation standards to protect drivers and residential areas. An overstimulating sign can distract a driver, which is why there are restrictions on

message display time, placement, lighting, and graphics. To prevent any issues from the residential community there were restrictions placed on illumination and types of lighting.

Over the last few months, I have gone through most of the EVMS boards for compliance. There are at least 30 functioning EVMS and there are only seven signs not regulated under the grandfathering code. The rest were contacted via letters, phone calls, and in person, because their sign didn't meet operational standards. There is conflict with this ordinance for these reasons:

- Most of the EVMS do not meet operational standards.
- Regulating the minority is difficult when most EVMS don't meet the standards.
- Some believe the standards are too restrictive.

Bob Schlicht, one of the operators of an EVMS, and believes that the code may be too strict. There was belief that this should be discussed by the Plan Commission. Staff seeks guidance from the Plan Commission on whether there is a need to review the code for possible changes.

Christopher Sullivan-Robinson
Planner/Zoning Administrator
421 Michigan Street
Sturgeon Bay, WI 54235

Phone: 920-746-2907
Fax: 920-746-2905
nail:csullivan-robinson@sturgeonbaywi.org
www.sturgeonbaywi.org

MEMO

To: Plan Commission
From: Christopher Sullivan-Robinson
Date: March 12, 2018
Subject: Consideration of Accessory Building Setback Requirements

In November, staff was advised by the Plan Commission to review options for changing accessory building height code. The Zoning Administrator and the Community Development Director researched other community zoning codes in relation and presented it to the Plan Commission at the December meeting. The Commission approved the recommendations made by staff which would essentially increase the overall height to 16 feet for accessory buildings and adjust the roof pitch requirements. During the discussion, it was communicated that if an accessory building is as large as or larger than the square footage requirement of a dwelling then it might be appropriate to revise the setback requirements in accordance.

Same as the accessory building height process, staff reviewed other municipalities zoning requirements. Staff researched several communities and found that there were no examples of setbacks based on building size for an accessory building. In fact, most communities had zoning code similar to City's (i.e. a maximum size, a minimum setback,).

Most of the communities listed have a less restrictive accessory building area requirements and the setbacks are similar to the City's with the exception of Sister Bay. If the City wishes to see option please review the handout in the packet.

The potential ordinance change would increase the minimum side and rear yards to 10 feet for accessory buildings larger than 800 square feet. These numbers were chosen because 800 square feet is the minimum floor area for a dwelling in the R-2/R-3 districts and 10 feet is the minimum side yard for a house. But the Commission could instead use higher or lower numbers for the cut-off and setback distances or could create a sliding scale.

The Plan Commission should consider the proposal. It can recommend adoption of the proposal, it can request changes to the proposal, or it can decide to make no changes and drop the issue altogether. Staff sees no compelling reason to make changes to the zoning code.

Option 1- Status Quo (5-foot side setback and 6-foot rear setback)

Option 2- Increase for larger buildings

Accessory Building Setbacks		
Square Footage	Side	Rear
≤800**	5	6
>800**	10*	10*

*the distance could be adjusted up or down
**this floor area could be adjusted up or down

Martin Olejniczak, AICP
Community Development Director
421 Michigan Street
Sturgeon Bay, WI 54235

Phone: 920-746-2910
Fax: 920-746-2905
E-mail: molejniczak@sturgeonbaywi.org
Website: www.sturgeonbaywi.org

MEMO

To: City Plan Commission
From: Marty Olejniczak, Community Development Director
Date: March 16, 2018
Subject: Wisconsin Act 67 and Its Impact on Conditional Uses

Wisconsin Act 67 was enacted on November 27, 2017. It amended the statutes pertaining for municipal zoning. Most notably, it changes the way conditional uses are regulated. These changes were in response to a denial of a conditional use application in Trempealeau County that was upheld by the Wisconsin Supreme Court.

Previously, cities had broad authority to review conditional uses and determine whether to issue a permit. The new law provides that "if an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the zoning ordinance or imposed by the zoning board (Plan Commission), the city shall grant the conditional use permit."

The law also requires that any conditions imposed must be related to the purpose of the ordinance and be based upon substantial evidence, which is defined in the law. Requirements and conditions must be reasonable and to the extent practical measurable.

Based upon the law's language, the City still has the authority to deny a conditional use application but it can no longer rely simply on public opposition or general standards to do so. It can still create specific conditions for a proposed use, but there it must relate to the purposes of the code and must be supported by substantial evidence.

Some information about this change in the statues is included in the packet that you should examine. In particular, the article in The Municipality is an excellent synopsis of the situation.

The Plan Commission should review Sturgeon Bay's provisions relating to conditional uses and determine if amendments are warranted. Such amendments could be revising or adding specific conditions that all conditional uses must meet, eliminating certain uses from the list of conditional uses, or other actions. If consensus is achieved, staff can submit potential amendments at a future meeting.

It is noted that Act 67 also added language restricting the ability of municipalities to require or enforce nonconforming lot mergers, added language clarifying variances, and added provisions that limit the ability to restrict the rebuilding of nonconforming structures. The City's zoning code is already in conformance with those parts of the new law.

Legislature Curtails Municipal Conditional Use Permit Authority

Daniel M. Olson, Assistant Legal Counsel, League of Wisconsin Municipalities

The Wisconsin legislature enacted major changes to local zoning authority laws in 2017 that were urged and promoted by developers but described by its legislative supporters as a "homeowners" bill of rights. Nonetheless, the laws passed and the governor signed them. Significantly, the most important change to municipal land use powers included in the legislation, 2017 Wisconsin Act 67, impacts the conditional use permit ("CUP") authority of all local governments, including cities and villages.

Conditional Use Background

Zoning is a regulatory system designed to proactively improve the quality of land use patterns in communities and supplant the inefficient, expensive, and reactive nuisance litigation morass of the 19th century. These goals are typically accomplished by grouping compatible land use activities into zoning districts, which diminishes the negative impacts from incompatible uses.

Within the districts, certain land uses are deemed unlikely to adversely affect other uses in the district and are permitted without review. Other land use activities are only allowed as conditional uses in zoning districts even though they may be beneficial because they carry a high risk of negative external impacts on adjoining properties, neighborhoods or the whole community. These less compatible and less desirable land uses are commonly allowed only after individualized review by a zoning authority and subject to conditions designed to decrease the potential adverse impacts.

The traditional CUP system of the last 75-plus years provided cities and villages with critical flexibility to accommodate risky land uses but protect the property values and investments of adjoining property owners, neighborhoods, and the whole community. The legislative changes to city and village CUP authority attacks that balance of interests by making the CUP decision process rigid and less able to protect other property owners and communities from the negative impacts of land uses traditionally categorized as conditional uses. A CUP system is now a much less desirable land use planning and regulation tool that cities and villages might reasonably abandon altogether.

CUP Authority Changes

The Municipality published an article exploring the scope of CUP authority in 2008. See Zoning 495. Much of that article is still relevant and important to a full understanding of CUP authority in Wisconsin. However, the 2017 CUP law changes, a reaction to the Wisconsin Supreme Court's 2017 decision in *AllEnergy v. Trempealeau County*, 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368, substantially altered CUP authority in several critical areas.

First, the law amends the zoning enabling statute to specify that any CUP "condition imposed must be related to the purpose of the ordinance and be based on substantial evidence." Wis. Stat. §62.23(7)(de)2.a. It also mandates that CUP requirements and conditions "must be reasonable and, to the extent practicable, measurable …." Wis. Stat. §62.23(7)(de)2.b. These new obligations are problematic.

Prior to the change, general non-specific CUP requirements in zoning ordinances were reasonable and, thus legally permissible. Now, they must be based on substantial evidence and, where practicable, they must be measurable to be reasonable.

One challenge will be creating reasonable CUP requirements that are meaningful. Drafting an ordinance with reasonable requirements to govern the likely as well as all possible contingencies relating to a conditional use will be a very difficult task. A meaningful requirement that is legally reasonable in one circumstance may likely be unreasonable in another. That is due to the nature of conditional uses; their impacts vary based on location, which is why they were not classified as permitted uses in the first instance.

And, what should zoning officials make of the "substantial evidence" and "measurable" requirements? Must adoption or amendment of CUP ordinances be accompanied by a record that satisfies the substantial evidence threshold? Assuming we can figure out what "to the extent practicable" also means, how measurable does a CUP requirement have to be to comply with the new law? There are no answers to these questions in the statute and, the courts, through costly litigation, will likely be the only authority that might satisfy a disgruntled developer.

Second, what qualifies as substantial evidence – the information an administrative body is allowed to rely on in reaching its decision – is now defined by statute instead of case law. "Substantial evidence means facts and information,

▸ p.22

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." Wis. Stat. §62.23(7)(de)1.b.

While similar to what the substantial evidence test was, *see AllEnergy*, 2017 WI 52 at ¶ 76, it is clear that the change was enacted to try and limit the type of information a zoning authority can rely on in deciding whether to grant a CUP. It must not only be facts and information instead of personal preferences or speculation, but those facts and information must "directly pertain" to the requirements and conditions in the zoning ordinance or established by the zoning board.

It will be impossible to confine public hearing testimony from citizens to only facts and information that directly pertains to CUP requirements and conditions. Most people do not have the kind of legal training or experience to provide wholly objective testimony at an informal zoning hearing. When this happens, are members of the zoning board legally permitted to redirect the testimony of the citizen without being challenged by the applicant as impermissibly biased? That is just one impact of the substantial evidence requirement.

The language prohibiting reliance on speculation for substantial evidence is another problem area. CUPs are inherently uses with higher risks of negative impacts on other uses. But, the negative impact varies from location to location. Therefore, is evidence about decreased property values or other negative impacts associated with a similar use at a different location speculation or non-speculation about probable impacts at the proposed location?

Third, the city and village zoning enabling statute was amended to specify that "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." Wis. Stat. §62.23(7)(de)2.a. (emphasis added). This language embraces a minority zoning legal theory the Wisconsin Supreme Court rejected in *AllEnergy* that "where a [CUP] applicant has shown that all conditions and standards, both by ordinance and as devised by the zoning committee, have been or will be met, the applicant is entitled to the issuance of a permit." *AllEnergy*, 2017 WI 52 at ¶119.

Adding this legal principle to Wisconsin zoning law shifts the legal burden from

▸ p.23

a CUP applicant to the municipal governmental body responsible for making the CUP decision. The municipality must establish a permit requirement or condition by ordinance or develop conditions that are based on substantial evidence provided at the hearing. The burden shifting limits the effectiveness of the entire CUP review process and moves CUPs much closer to permitted use status than might be desirable in most circumstances.

As already noted, the pre-hearing ordinance requirements are likely to be watered down and less meaningful in order to survive a reasonableness challenge since they will apply to all proposed CUPs that have highly variable impacts based on location. This will make CUP applications much harder to deny.

Public officials do not welcome zoning litigation. It is inefficient and costly. So, even assuming that they will have a solid understanding of substantial evidence, zoning board members will be very cautious with their authority to impose CUP conditions based on substantial evidence introduced at the zoning hearing. Again, the burden shifting will make CUP applications much more difficult to deny.

Could a CUP applicant preempt the entire CUP process by simply promising full compliance when he files the CUP application? Probably not because a public hearing is mandated and the zoning board is vested with some authority to impose conditions that are based on substantial evidence after the public hearing and before granting a permit. However, as long as the CUP applicant agrees to abide by all the requirements and conditions, zoning board discretion is nullified and it must grant the CUP.

Responding to the Changes

The legislative changes did not reduce the adverse impact risks associated with conditional uses for adjoining properties, neighborhoods, or communities. The risks are still present and, absent a municipal response, are now even greater given the reduced ability to address those negative externalities. So, cities and villages should consider their options given the new legislative restrictions on their CUP authority.

▸ p.24

Cities and villages can start with the knowledge that they are not legally required to have conditional uses in their zoning codes. Moreover, in most cases, the legislative decision by a city council or village board to include or not include a particular land use in a zoning district is essentially immune from legal challenge. The legislature may have severely curtailed city and village authority to deny a CUP request but it did not have any impact on city council or village board legislative discretion to classify land uses as conditional or permitted or determine how many, if any, conditional uses a city or village should have in a particular zoning district. So, one legally permissible response to the new laws might be elimination of all existing conditional uses in zoning districts or limiting them to a very select group of low-risk uses.

With the new laws, the legislature eliminated much of the prior legal authority cities and villages used to accommodate conditional uses while protecting property interests of adjoining landowners, the stability of neighborhoods, and the well-being of the whole community. Unless a city or village is willing to accept a conditional use in a zoning district – with much less ability to guide when and where it exists – then eliminating them altogether or greatly reducing their availability is a reasonable and legally permissible response.

In addition, cities and villages will need to closely examine their existing conditional use permit requirements set by ordinance. As noted above, they must be reasonable, related to the purpose of the ordinance and, to the extent practicable, measurable. Thus, general requirements for CUPs commonly found in existing zoning ordinances are now suspect and subject to legal challenge. Instead, revised requirements should be information-based. In addition, a city or village will need to show that revised requirements are measurable, unless impracticable. And, if impracticable, they will need to be able demonstrate why.

Conclusion

Conditional use zoning permits have been commonly used by cities and villages to allow riskier land use activities in zoning districts subject to review and conditions. 2017 Wisconsin Act 67 substantially altered the CUP review and condition authority cities and villages have used for the last 75 years. The status quo for conditional uses in Wisconsin has changed dramatically. Cities and villages must now decide how they will respond to these changes. Revisions to CUP requirements in zoning ordinances will be necessary. A thorough review of conditional use designation and inclusion in zoning districts is also warranted.

Zoning 523

About the author:

Daniel Olson is the Assistant Legal Counsel for the League. He provides legal assistance to municipal attorneys and officials through telephone inquiries, written opinions and briefs, workshop presentations, and published articles. He also assists in writing League handbooks and planning the Municipal Attorney's Institute. Daniel joined the League staff in 2001. Contact Daniel at danolson@lwm-info.org

American Planning Association
Wisconsin Chapter
Making Great Communities Happen

For more questions or comments about these cases, please contact:
Brian W. Ohm, JD
Dept. of Urban & Regional Planning, UW-Madison/Extension
925 Bascom Mall
Madison, WI 53706
bwohm@wisc.edu

November Case Law Update
November 30, 2017

A summary of Wisconsin court opinions decided during the month of November related to planning

For previous Case Law Updates, please go to: www.wisconsinplanners.org/learn/law-and-legislation

There are no planning-related decisions to report for the month of November from the United States Supreme Court, the Wisconsin Supreme Court, or the Wisconsin Court of Appeals. **However, there was legislation enacted in Wisconsin during the month of November that changes the law related to recent U.S. Supreme Court and Wisconsin Supreme Court decisions reported in previous APA-WI case law updates over the past few months. This case law update summarizes the legislative changes to insure that members have the most current updates on the law in these areas.**

New Legislation Affecting Substandard Lots: Responding to *Murr v. Wisconsin*

In November, the Wisconsin Legislature passed legislation in response to the United States Supreme Court decision last June in ***Murr v. Wisconsin***. The *Murr* decision, summarized in the **June 2017 APA-WI Case Law Update**, involved a provision in the St. Croix County Zoning Ordinance that merged two substandard lots (referred to as "nonconforming lots" in many local ordinances) under common ownership for purposes of the application of the zoning ordinance and prohibited the owner from selling one of the substandard lots. The County's ordinance followed rules promulgated by the Wisconsin Department of Natural Resources for protecting the Lower St. Croix River after its designation by Congress as a National Wild and Scenic River. The U.S. Supreme Court decision articulated a new test for determining the relevant parcel for regulatory takings analysis and concluded St. Croix County's lot merger provision did not constitute a regulatory taking requiring the payment of just compensation. The new legislation, signed into law by Governor Walker as **2017 Wisconsin Act 67**, places new limitations on the authority of local governments and state agencies to enact or enforce lot merger provisions similar to the one found in the St. Croix County Zoning Ordinance. In addition, Act 67 includes provisions affecting substandard lots in general.

The new substandard lot/lot merger limitations are found in Sections 23 through 26 of Act 67. Those sections create several additions to the existing section of the Wisconsin Statutes entitled "Limitation on Development Regulation Authority and Downzoning" found at section 66.10015 of the Wisconsin Statutes. Act 67 adds the following definition of a "substandard lot": "A legally created lot or parcel that met any applicable lot size requirements when it was created, but does not meet current lot size requirements." **Wis. Stat. § 66.10015(1)(e)**.

Act 67 then prohibits cities, villages, towns, and counties from enacting or enforcing ordinances or taking any other action that prohibits a property owner from conveying an ownership interest in a substandard lot or from using a substandard lot as a building site if the substandard lot does not have any structures placed partly upon an adjacent lot ***and*** the substandard lot is developed to comply with all other ordinances of the political subdivision. Wis. Stat. § 66.10015(2(e).

Finally, Act 67 prohibits cities, villages, towns, counties, and state agencies from enacting or enforcing any ordinance or administrative rule or taking any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged. Wis. Stat. § 66.10015(4).

While local governments did not need to make changes their ordinances in response to the *Murr* decision, Act 67, effective November 28th, should prompt local governments and state agencies to review their ordinances and rules as follows:

■Cities, villages, towns, counties, and state agencies need to review their ordinances and rules to insure they do not require the merger of lots (both substandard lots and lots that conform to current ordinances and rules) without the consent of the owners of the lots that are to be merged.

■Cities, villages, towns and counties need to review their ordinances and practices related to substandard lots to ensure that they do not prohibit a property owner from selling or otherwise conveying an ownership interest in a substandard lot to another person or entity.

■In addition, cities, villages, towns and counties need to review their ordinances and practices to ensure they allow the use of a substandard lot as a building site if the substandard lot has never had a structure straddling the substandard lot and an adjacent lot. Any development on the substandard lot must conform to all other applicable ordinances. The application of other ordinances may limit what can be built on a substandard lot.

New Legislation Affecting Conditional Use Permits: Responding to *AllEnergy Corp. v. Trempealeau County*

2017 Wisconsin Act 67 also includes changes to Wisconsin law governing conditional use permits following the recent decision of the Wisconsin Supreme Court in ***AllEnergy Corp. v. Trempealeau County*** reported in the **May 2017 APA-WI Case Law Update**. The *AllEnergy* case involved the denial of a conditional use permit for a proposed frac sand mind in Trempealeau County. The County voted to adopt 37 conditions for the mine, which AllEnergy agreed to meet, but then the County voted to deny the conditional use permit in part relying on public testimony in opposition to the mine. A divided Wisconsin Supreme Court upheld the County's denial of the conditional use permit acknowledging the discretionary authority of local governments in reviewing proposed conditional uses.

Act 67 follows the line of reasoning articulated by the dissent in the *AllEnergy* decision and limits local government discretion related to the issuance of conditional use permits. According to the Dissent in *AllEnergy*: "When the Trempealeau County Board writes its zoning code, or considers amendments, . . . is the stage at which the County has the greatest discretion in determining what may, and may not, be allowed on various tracts of property." "Upon adding a conditional use to a zoning district, the municipality rejects, by that very act, the argument that the listed use is incompatible with the district." "An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance."

Act 67 adds new sections governing the issuance of conditional use permits to the various general zoning enabling laws for cities, villages, towns, and counties. Until the addition of these sections, the law governing conditional use permits was based on court decisions. The various local general zoning enabling laws did not include any references to the term "conditional use."

The new law adds the following definition of "conditional use" to the Statutes: "'Conditional use' means a use allowed under a conditional use permit, special exception, or other zoning permission issued by a [city, village, town, county] but does not include a variance."

Act 67 also includes the following definition of "substantial evidence," a term used in several places in the Act: "'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." This language softens the language of earlier versions of the bill that stated substantial evidence did not include "public comment that is based solely on personal opinion, uncorroborated hearsay, or speculation." Public comment that provides reasonable facts and information related to the conditions of the permit is accepted under Act 67 as evidence.

Act 67 then provides that "if an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the [city, village, town, county] ordinance or imposed by the [city, village, town, county] zoning board, the [city, village, town, county] shall grant the conditional use permit." This new language follows the argument made by the plaintiffs and the dissenting opinion in the *AllEnergy* case. The use of the term "zoning board," however, is at odds with current Wisconsin law that allows the governing body, the plan commission, or the zoning board of adjustment/appeals to grant conditional uses. This "zoning board" terminology may lead to some confusion.

Act 67 also provides that the conditions imposed "must be related to the purpose of the ordinance and be based on substantial evidence" and "must be reasonable and to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal." In the past, sometimes there was confusion about whether local governments had the authority to place a time limit on the duration of a conditional use permit. This new

statutory language clarifies that local government have that authority. Since local comprehensive plans can help articulate the purpose of ordinances that implement the plan, the requirement in Act 67 that the conditions relate to the purpose of the ordinance emphasize the importance of having a condition in the zoning ordinance that the proposed conditional use furthers and does not conflict with the local comprehensive plan.

Next, Act 67 provides that the applicant must present substantial evidence "that the application and all requirements and conditions established by the [city, village, town, county] relating to the conditional use are or shall be satisfied." The city, village, town or county's "decision to approve or deny the permit must be supported by substantial evidence."

Under the new law, a local government must hold a public hearing on a conditional use permit application, following publication of a class 2 notice. If a local government denies an application for a conditional use, the applicant may appeal the decision to circuit court. The conditional use permit can be revoked if the applicant does not follow the conditions imposed in the permit.

The new conditional use law applies to applications for conditional use permits filed on and after November 28, 2017.

While local governments did not need to change their ordinances in response to the *AllEnergy* decision, Act 67 should prompt local governments to review their zoning ordinance to ensure they meet the new statutory requirements. Local governments should review the requirements of their ordinance to consider adding to or revising the conditions listed in the ordinance to ensure that the local government will be able to review specific development proposals against the purpose of the ordinance and be able to support conditions imposed on a specific application with substantial evidence. Act 67 may prompt some local governments to reconsider what might be listed as a conditional use in certain zoning districts and explore creating new districts or other ways to regulate the use.

U.S. Court of Appeals for the 7th Circuit Opinions

[No planning-related cases to report.]

State of Wisconsin

2017 Assembly Bill 479

Date of enactment: **November 27, 2017**
Date of publication*: **November 28, 2017**

2017 WISCONSIN ACT 67

AN ACT *to renumber and amend* 59.694 (7) (c) and 62.23 (7) (e) 7.; *to amend* 59.69 (10e) (title), 59.69 (10e) (a) 1., 59.69 (10e) (b), 60.61 (5e) (title), 60.61 (5e) (a) 1., 60.61 (5e) (b), 62.23 (7) (hb) (title), 62.23 (7) (hb) 1. a. and 62.23 (7) (hb) 2.; and *to create* 59.69 (5e), 59.694 (7) (c) 1., 59.694 (7) (c) 3., 60.61 (4e), 60.62 (4e), 62.23 (7) (de), 62.23 (7) (e) 7. a., 62.23 (7) (e) 7. d., 66.10015 (1) (e), 66.10015 (2) (e), 66.10015 (4), 227.10 (2p) and 710.17 of the statutes; **relating to:** limiting the authority of local governments to regulate development on substandard lots and require the merging of lots; requiring a political subdivision to issue a conditional use permit under certain circumstances; standards for granting certain zoning variances; local ordinances related to repair, rebuilding, and maintenance of certain nonconforming structures; and the right to display the flag of the United States.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 2. 59.69 (5e) of the statutes is created to read:

59.69 **(5e)** CONDITIONAL USE PERMITS. (a) In this subsection:

1. "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a county, but does not include a variance.

2. "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.

(b) 1. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the county ordinance or those imposed by the county zoning board, the county shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.

2. The requirements and conditions described under subd. 1. 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 that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The county's decision to approve or deny the permit must be supported by substantial evidence.

(c) Upon receipt of a conditional use permit application, and following publication in the county of a class 2 notice under ch. 985, the county shall hold a public hearing on the application.

(d) Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the county may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the county zoning board.

Counties

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

(e) If a county denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures contained in s. 59.694 (10).

SECTION 3. 59.69 (10e) (title) of the statutes is amended to read:

59.69 **(10e)** (title) REPAIR, REBUILDING, AND MAINTENANCE OF CERTAIN NONCONFORMING STRUCTURES.

SECTION 4. 59.69 (10e) (a) 1. of the statutes is amended to read:

59.69 **(10e)** (a) 1. "Development regulations" means the part of a zoning ordinance ~~enacted under this section~~ that applies to elements including setback, height, lot coverage, and side yard.

SECTION 5. 59.69 (10e) (b) of the statutes is amended to read:

59.69 **(10e)** (b) An ordinance ~~enacted under this section~~ may not prohibit, ~~or~~ limit based on cost, or require a variance for the repair, maintenance, renovation, rebuilding, or remodeling of a nonconforming structure or any part of a nonconforming structure.

SECTION 8. 59.694 (7) (c) of the statutes is renumbered 59.694 (7) (c) 2. and amended to read:

59.694 **(7)** (c) 2. To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

4. A county board may enact an ordinance specifying an expiration date for a variance granted under this paragraph if that date relates to a specific date by which the action authorized by the variance must be commenced or completed. If no such ordinance is in effect at the time a variance is granted, or if the board of adjustment does not specify an expiration date for the variance, a variance granted under this paragraph does not expire unless, at the time it is granted, the board of adjustment specifies in the variance a specific date by which the action authorized by the variance must be commenced or completed. An ordinance enacted after April 5, 2012, may not specify an expiration date for a variance that was granted before April 5, 2012.

5. A variance granted under this paragraph runs with the land.

SECTION 9. 59.694 (7) (c) 1. of the statutes is created to read:

59.694 **(7)** (c) 1. In this paragraph:

a. "Area variance" means a modification to a dimensional, physical, or locational requirement such as the setback, frontage, height, bulk, or density restriction for a structure that is granted by the board of adjustment under this subsection.

b. "Use variance" means an authorization by the board of adjustment under this subsection for the use of land for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance.

SECTION 10. 59.694 (7) (c) 3. of the statutes is created to read:

59.694 **(7)** (c) 3. A property owner bears the burden of proving "unnecessary hardship," as that term is used in this paragraph, for an area variance, by demonstrating that strict compliance with a zoning ordinance would unreasonably prevent the property owner from using the property owner's property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome or, for a use variance, by demonstrating that strict compliance with the zoning ordinance would leave the property owner with no reasonable use of the property in the absence of a variance. In all circumstances, a property owner bears the burden of proving that the unnecessary hardship is based on conditions unique to the property, rather than considerations personal to the property owner, and that the unnecessary hardship was not created by the property owner.

SECTION 11. 60.61 (4e) of the statutes is created to read:

60.61 **(4e)** CONDITIONAL USE PERMITS. (a) In this subsection:

1. "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a town, but does not include a variance.

2. "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.

(b) 1. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the town ordinance or those imposed by the town zoning board, the town shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.

2. The requirements and conditions described under subd. 1. 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 that the application and all requirements and conditions established by the town relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The town's decision to approve or deny the permit must be supported by substantial evidence.

(c) Upon receipt of a conditional use permit application, and following publication in the town of a class 2 notice under ch. 985, the town shall hold a public hearing on the application.

Counties

Towns

(d) Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the town may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the town zoning board.

(e) If a town denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures described in s. 59.694 (10).

SECTION 12. 60.61 (5e) (title) of the statutes is amended to read:

60.61 **(5e)** (title) REPAIR, REBUILDING, AND MAINTENANCE OF CERTAIN NONCONFORMING STRUCTURES.

SECTION 13. 60.61 (5e) (a) 1. of the statutes is amended to read:

60.61 **(5e)** (a) 1. "Development regulations" means the part of a zoning ordinance ~~enacted under this section~~ that applies to elements including setback, height, lot coverage, and side yard.

SECTION 14. 60.61 (5e) (b) of the statutes is amended to read:

60.61 **(5e)** (b) An ordinance ~~enacted under this section~~ may not prohibit, ~~or~~ limit based on cost, or require a variance for the repair, maintenance, renovation, rebuilding, or remodeling of a nonconforming structure or any part of a nonconforming structure.

SECTION 15. 60.62 (4e) of the statutes is created to read:

60.62 **(4e)** (a) In this subsection:

1. "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a town, but does not include a variance.

2. "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.

(b) 1. If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the town ordinance or those imposed by the town zoning board, the town shall grant the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.

2. The requirements and conditions described under subd. 1. 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 that the application and all requirements and conditions established by the town relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The town's decision to approve or deny the permit must be supported by substantial evidence.

(c) Upon receipt of a conditional use permit application, and following publication in the town of a class 2 notice under ch. 985, the town shall hold a public hearing on the application.

(d) Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the town may impose conditions such as the permit's duration, transfer, or renewal, in addition to any other conditions specified in the zoning ordinance or by the town zoning board.

(e) If a town denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures described in s. 61.35.

SECTION 16. 62.23 (7) (de) of the statutes is created to read:

62.23 **(7)** (de) *Conditional use permits.* 1. In this paragraph:

a. "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a city, but does not include a variance.

b. "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.

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.

b. The requirements and conditions described under subd. 2. a. 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 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. The city's decision to approve or deny the permit must be supported by substantial evidence.

3. Upon receipt of a conditional use permit application, and following publication in the city of a class 2 notice under ch. 985, the city shall hold a public hearing on the application.

4. Once granted, a conditional use permit shall remain in effect as long as the conditions upon which the permit was issued are followed, but the city may impose conditions such as the permit's duration, transfer, or

Cities

renewal, in addition to any other conditions specified in the zoning ordinance or by the city zoning board.

5. If a city denies a person's conditional use permit application, the person may appeal the decision to the circuit court under the procedures contained in par. (e) 10.

SECTION 17. 62.23 (7) (e) 7. of the statutes is renumbered 62.23 (7) (e) 7. b. and amended to read:

62.23 **(7)** (e) 7. b. The board of appeals shall have the following powers: To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto; to hear and decide special exception to the terms of the ordinance upon which such board is required to pass under such ordinance; to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

e. The council of a city may enact an ordinance specifying an expiration date for a variance granted under this subdivision if that date relates to a specific date by which the action authorized by the variance must be commenced or completed. If no such ordinance is in effect at the time a variance is granted, or if the board of appeals does not specify an expiration date for the variance, a variance granted under this subdivision does not expire unless, at the time it is granted, the board of appeals specifies in the variance a specific date by which the action authorized by the variance must be commenced or completed. An ordinance enacted after April 5, 2012, may not specify an expiration date for a variance that was granted before April 5, 2012.

f. A variance granted under this subdivision runs with the land.

c. The board may permit in appropriate cases, and subject to appropriate conditions and safeguards in harmony with the general purpose and intent of the ordinance, a building or premises to be erected or used for such public utility purposes in any location which is reasonably necessary for the public convenience and welfare.

SECTION 18. 62.23 (7) (e) 7. a. of the statutes is created to read:

62.23 **(7)** (e) 7. a. In this subdivision, "area variance" means a modification to a dimensional, physical, or locational requirement such as a setback, frontage, height, bulk, or density restriction for a structure that is granted by the board of appeals under this paragraph. In this subdivision, "use variance" means an authorization by the board of appeals under this paragraph for the use of land for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance.

SECTION 19. 62.23 (7) (e) 7. d. of the statutes is created to read:

62.23 **(7)** (e) 7. d. A property owner bears the burden of proving "unnecessary hardship," as that term is used in this subdivision, for an area variance, by demonstrating that strict compliance with a zoning ordinance would unreasonably prevent the property owner from using the property owner's property for a permitted purpose or would render conformity with the zoning ordinance unnecessarily burdensome or, for a use variance, by demonstrating that strict compliance with a zoning ordinance would leave the property owner with no reasonable use of the property in the absence of a variance. In all circumstances, a property owner bears the burden of proving that the unnecessary hardship is based on conditions unique to the property, rather than considerations personal to the property owner, and that the unnecessary hardship was not created by the property owner.

SECTION 20. 62.23 (7) (hb) (title) of the statutes is amended to read:

62.23 **(7)** (hb) (title) *Repair, rebuilding, and maintenance of certain nonconforming structures.*

SECTION 21. 62.23 (7) (hb) 1. a. of the statutes is amended to read:

62.23 **(7)** (hb) 1. a. "Development regulations" means the part of a zoning ordinance ~~enacted under this subsection~~ that applies to elements including setback, height, lot coverage, and side yard.

SECTION 22. 62.23 (7) (hb) 2. of the statutes is amended to read:

62.23 **(7)** (hb) 2. An ordinance ~~enacted under this subsection~~ may not prohibit, or limit based on cost, the repair, maintenance, renovation, or remodeling of a nonconforming structure.

SECTION 23. 66.10015 (1) (e) of the statutes is created to read:

66.10015 **(1)** (e) "Substandard lot" means a legally created lot or parcel that met any applicable lot size requirements when it was created, but does not meet current lot size requirements.

SECTION 24. 66.10015 (2) (e) of the statutes is created to read:

66.10015 **(2)** (e) Notwithstanding any other law or rule, or any action or proceeding under the common law, no political subdivision may enact or enforce an ordinance or take any other action that prohibits a property owner from doing any of the following:

1. Conveying an ownership interest in a substandard lot.

2. Using a substandard lot as a building site if all of the following apply:

a. The substandard lot or parcel has never been developed with one or more of its structures placed partly upon an adjacent lot or parcel.

b. The substandard lot or parcel is developed to comply with all other ordinances of the political subdivision.

All governments

SECTION 25. 66.10015 (4) of the statutes is created to read:

66.10015 **(4)** Notwithstanding the authority granted under ss. 59.69, 60.61, 60.62, 61.35, and 62.23, no political subdivision may enact or enforce an ordinance or take any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged.

SECTION 26. 227.10 (2p) of the statutes is created to read:

227.10 **(2p)** No agency may promulgate a rule or take any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged.

SECTION 27. 710.17 of the statutes is created to read:

710.17 Right to display the flag of the United States. (1) DEFINITIONS. In this section:

(a) "Housing cooperative" means a cooperative incorporated under ch. 185 or organized under ch. 193 that owns residential property that is used or intended to be used, in whole or in part, by the members of the housing cooperative as their homes or residences.

(b) "Member of a homeowners' association" means a person that owns residential property within a subdivision, development, or other similar area that is subject to any policy or restriction adopted by a homeowners' association.

(c) "Member of a housing cooperative" means a member, as defined in s. 185.01 (5) or 193.005 (15), of a housing cooperative if the member uses or intends to use part of the property of the housing cooperative as the member's home or residence.

(2) RIGHT TO DISPLAY THE FLAG OF THE UNITED STATES. (a) Except as provided in sub. (3), a homeowners' association may not adopt or enforce a covenant, condition, or restriction, or enter into an agreement, that restricts or prevents a member of the homeowners' association from displaying the flag of the United States on property in which the member has an ownership interest and that is subject to any policy or restriction adopted by the homeowners' association.

(b) Except as provided in sub. (3), a housing cooperative may not adopt or enforce a covenant, condition, or restriction, or enter into an agreement, that restricts or prevents a member of the housing cooperative from displaying the flag of the United States on property of the housing cooperative to which the member has a right to exclusive possession or use.

(3) EXCEPTIONS. A homeowners' association or housing cooperative may adopt and enforce a covenant, condition, or restriction, or enter into an agreement, that does any of the following:

(a) Requires that any display of the flag of the United States must conform with a rule or custom for proper display and use of the flag set forth in 4 USC 5 to 10.

(b) Provides a reasonable restriction on the time, place, or manner of displaying the flag of the United States that is necessary to protect a substantial interest of the homeowners' association or housing cooperative.

SECTION 28. Initial applicability.

(1) RIGHT TO DISPLAY THE FLAG OF THE UNITED STATES. The treatment of section 710.17 of the statutes first applies to a covenant, condition, or restriction that is adopted, renewed, or modified, or to an agreement that is entered into, renewed, or modified, on the effective date of this subsection.

(2) CONDITIONAL USE PERMITS. The treatment of sections 59.69 (5e), 60.61 (4e), 60.62 (4e), and 62.23 (7) (de) of the statutes first applies to an application for a conditional use permit that is filed on the effective date of this subsection.

American Planning Association
Wisconsin Chapter
Making Great Communities Happen

For more questions or comments about these cases, please contact:
Brian W. Ohm, JD
Dept. of Urban & Regional Planning, UW-Madison/Extension
925 Bascom Mall
Madison, WI 53706
bwohm@wisc.edu

May Case Law Update
May 31, 2017

A summary of Wisconsin court opinions decided during the month of May related to planning

For previous Case Law Updates, please go to: www.wisconsinplanners.org/learn/law-and-legislation

United States Supreme Court Opinions

[The April Case Law Update summarized the May 1st Bank of America v. City of Miami decision allowing cities to sue banks under the Federal Fair Housing Act for predatory lending practices. Please refer to last month's Update in case you missed it.]

Wisconsin Supreme Court Opinions

This is the court case that spurred the state to enact the new law. *

Local Discretion Upheld in Granting Conditional Use Permits

The case, AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee, 2017 WI 52, involved a proposed 265-acre silica sand mine in the Town of Arcadia in Trempealeau County. Land use in the Town falls under the County's zoning ordinance. The proposed mine would be located in an agricultural zoning district. Non-metallic mining is a conditional use within the district. AllEnergy applied for a conditional use permit shortly before the County imposed a temporary moratorium on new non-metallic mining activities. Following a public hearing on the permit, the County Environment & Land Use Committee voted seven-to-one to adopt 37 conditions for the mine but then immediately voted five-to-three to deny the permit based largely on the concerns raised at the public hearing about the potential negative impacts of the proposed mine on public health, public safety, and the aesthetics of the area.

All Energy appealed the Committee's decision to the circuit court. The circuit court upheld the Committee's decisions. AllEnergy then appealed the circuit court decision to the Wisconsin Court of Appeals. In an unpublished decision, the Wisconsin Court of Appeals affirmed a circuit court order upholding Trempealeau County's action. AllEnergy then petitioned the Wisconsin Supreme Court to review the decision. The Wisconsin Supreme Court accepted the case for review.

A divided Wisconsin Supreme Court voted 4-3 to affirm the decision of the Court of Appeals upholding the County's denial of the conditional use permit. Justice Shirley Abrahamson wrote the "lead opinion" affirming the County's action. (A "lead opinion" is an opinion that states the decision of a majority of justices but represents the reasoning of less than a majority of the participating justices). Justice Ann Walsh Bradley joined Justice Abrahamson in her opinion.

Justice Annette Ziegler wrote a concurring opinion agreeing with the outcome but not agreeing with the reasoning of Justice Abrahamson. Chief Justice Patience Roggensack joined with Justice Ziegler in her concurring opinion. Justice Daniel Kelly wrote a dissenting opinion and was joined by Justices Michael Gableman and Rebecca Bradley. *The absence of a majority opinion, however, makes the reasoning articulated in the three opinions very insightful, as discussed below.*

AllEnergy appeal presented the Supreme Court with three issues:

> I. Did the Trempealeau County Environment & Land Use Committee, an appointed body without the power to legislate, exceed its jurisdiction by denying a conditional use permit based on broad legislative concerns over the public health, safety, and welfare?
>
> II. Did substantial evidence in the administrative record support the denial of a conditional use permit for non-metallic mining?
>
> III. Should the court adopt a new doctrine that a conditional use permit applicant is entitled to the permit where (A) all ordinance conditions and standards are met and (B) additional conditions can be adopted that address potentially-adverse impacts from the use?

The lead opinion and the dissenting opinion present two different ways of looking at conditional uses. The lead opinion presents the first issue, regarding the jurisdiction of the Committee, as a delegation of authority issue. The lead opinion states that the Court needs to consider whether the applicable ordinance granted the County's Environment & Land Use Committee with the authority to take the action it took. The lead opinion cites the language in the county ordinance listing numerous factors to guide the Committee's action including directing the Committee to determine that the proposed use "will not be contrary to the public interest and will not be detrimental or injurious to the public health, public safety, or character of the surrounding area." The lead opinion cites prior Wisconsin case law declaring that generalized standards in zoning ordinances for conditional uses are acceptable. The lead opinion cites other Wisconsin case law upholding the authority of local ordinances to delegate discretionary authority to various boards, commissions, and committees. The lead opinion then quotes from the record the reasons the five Committee members articulated for denying the permit based on the factors listed in the ordinance and concludes that the Committee kept within its jurisdiction.

According to the lead opinion, "[i]n 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. In these states, the decision whether to grant a conditional use permit is discretionary. The relevant entity determines whether a particular site will accommodate a proposed particular use. In other states, decision makers have less discretion on requests for a conditional use permit."

The dissenting opinion takes the view that local governments have less discretion and concludes that the Committee exceeded its jurisdiction. According to the dissent, the jurisdiction of the Committee is limited to determining the appropriate conditions to control for the potentially hazardous aspects of the proposed mine. The dissent states that the "Committee exceeded its jurisdiction when it took upon itself the task of determining whether a sand mine, as a general proposition, is an appropriate use of the AllEnergy property."

The dissent cites several land use law treatises and several Wisconsin cases that discuss the distinctions between permitted uses and conditional uses in zoning. While conditional uses are not uses allowed as a matter of right, as in the case of permitted uses, conditional uses provide site-specific discretionary review of proposed uses that are generally deemed compatible or desirable in a particular zoning district. A conditional use designation did not give the Committee "free rein to deny an application."

According to the dissent, "[w]hen the Trempealeau County Board writes its zoning code, or considers amendments, the testimony it needs, and is appropriate to consider, is whether a type of use is compatible with a designated zoning district. This is the stage at which the County has the greatest discretion in determining what may, and may not, be allowed on various tracts of property."

Examining the language of the County's zoning ordinance the dissent concludes that the Trempealeau County Board had legislatively determined that sand mining is not inherently inconsistent with the agricultural zoning district for the property. "An application for a conditional use permit is not an invitation to re-open that debate. A permit application is, instead, an opportunity to determine whether the specific instantiation of the conditional use can be accomplished within the standards identified by the zoning ordinance."

The dissenting opinion illustrates its point with the following scenario: "if an ice-cream shop is a conditional use, a land-use committee may not deny a permit because the committee's members object to the owner selling ice-cream on his property. Such objections are in order when the municipality adopts (or amends) its zoning ordinance and considers which conditional uses (if any) to include in each of its zoning districts. Upon adding a conditional use to a zoning district, the municipality rejects, by that very act, the argument that the listed use is incompatible with the district."

As to the second issue, regarding the sufficiency of the evidence, the lead opinion notes that local decisions are entitled to a presumption of correctness and validity. The Court only considers whether the Committee made a reasonable decision based on the evidence before it. According to the lead opinion, public expression of support or opposition can establish the substantial evidence needed to support decisions on conditional use permits. The lead opinion cites the pubic testimony presented to the Committee related to environmental impacts, health concerns, and aesthetics. AllEnergy contended that it presented expert testimony responding to these concerns but the lead opinion stated that it was not the role of the Court to re-weigh the evidence.

The dissent acknowledges that the testimony and concerns expressed at the public hearing were valid, but the dissent opines that these concerns should have been raised at the time the County developed its zoning ordinance. "Once the County adopts its zoning code, however, testimony about a proposed use has a narrower function." According to the dissenting opinion, the testimony should be used by the Committee to help "determine what specific standards AllEnergy would be required to satisfy before obtaining a sand mining permit." Here the dissent concluded the testimony was used to address a question already answered by the County Board – whether it would be advisable to operate a sand mine in the district.

On the final issue, AllEnergy argues that the Court should adopt a new doctrine followed in other states whereby if an applicant satisfies all the conditions in the ordinance (and those conditions cannot be based on subjective generalized standards), then the applicant has a right to the conditional use permit. The lead opinion, however, found that AllEnergy failed to provide a compelling reason for the Court to depart from long-standing precedent that allows local governments to determine whether a proposed conditional use is compatible for a specific site.

The dissent is more receptive to the new doctrine advocated by AllEnergy. The dissent would require more specific standards than found in the County's ordinance. According to the dissent, vague "public interest" standards force "permit applicants to play the 'guess what's in my head' game with the Committee." The dissent would have remanded the case to have the Committee to engage with the specifics of AllEnergy's proposal and determine whether appropriate conditions would protect against the hazards of the proposed mine.

While the concurring opinion agrees with the validity of the County's action, the concurring opinion is not able to join the lead opinion, because the lead opinion examines issues that are not necessary to the case. The concurring opinion believes that the lead opinion and the dissent make the case "much more complicated and potentially more far-reaching in effect than it should be." The concurring opinion agrees that the County's decision is entitled to a presumption of correctness and validity. According to the concurring opinion, the Committee kept within its jurisdiction and the legitimate environmental and health concerns, among others, supported the Committee's decision to deny the permit. For the concurring justices, these type of decisions involve "local concerns" best handled at the local level.

The approach advocated by AllEnergy and accepted by the dissenting opinion would force many communities to reexamine the specificity of the standards for conditional uses and would likely result in many communities limiting what they consider a conditional use. If communities wanted to allow large scale sand mining, they might be prompted to develop standards for an industrial zoning classification in which frac sand mines would be a permitted use. Under the facts of this case, that would push the debate about the appropriateness of frac sand mines to the rezoning process rather than the conditional use permit process.

None of the three Supreme Court opinions in the case discuss the role of the local comprehensive plan in helping to provide guidance for whether a proposed conditional use

might be contrary to the "public interest." Many local government zoning ordinances use compatibility with the local comprehensive plan as a standard for reviewing applications for conditional use permits. While this is still an acceptable standard that local governments can use, 2015 Wis. Act 391 clarified that state law does not mandate that local governments must use it as a standard.

Wisconsin Court of Appeals Opinions

Certiorari is Appropriate Standard for Reviewing TIF Challenge

Voters With Facts v. City of Eau Claire involved a lawsuit brought by a group of concerned citizens and others challenging the use of tax increment financing (TIF) for the "Confluence Project," a new performing arts center and residential development on a riverfront site in downtown Eau Claire. In particular, the citizens challenged the "blight" and "but for" determinations made by the various bodies involved with approving two tax increment districts (TIDs) for the project. These are two prerequisites to the use of tax increment financing under Wisconsin state statutes.

The challengers to the City's actions sought a declaratory judgement by the court that the City failed to follow the statutory requirements in approving the TIDs and a common law certiorari action that the City's actions were arbitrary, capricious, and outside the scope of the City's legal authority. The City moved to dismiss the action and the circuit court granted the dismissal. The challengers then appealed the circuit court decision to the Wisconsin Court of Appeals. The Court of Appeals upheld the circuit court's dismissal of the declaratory judgment action but reversed the circuit court's decision dismissing the common law certiorari action.

According to the Court of Appeals, under the TIF statutes, the "blight" determination and "but for" requirement are procedural requirements, not substantive rules. In other words, state statutes only require that a city or village assert that an area is blighted. They do not require that the city or village prove that the area is in fact blighted. As a result, the "blight" determination and "but for" are matters of legislative discretion and therefore not subject to judicial review as a matter of declaratory judgment (a court declaring that the city/village did not follow the statutes).

Nevertheless, the Court of Appeals determined that a court may review the City's actions by way of common law certiorari review. Common law certiorari review is "on the record review" in which a court reviews the record compiled by the municipality and does not take any additional evidence on the merits of the decision. Based on this record, a court's review is limited to four inquiries: (1) whether the municipality kept within its jurisdiction; (2) whether the municipality proceeded on a correct theory of law; (3) whether the municipality's decision was arbitrary, oppressive, or unreasonable and represented the municipality's will and not its judgment; and (4) whether the evidence was such that the municipality might reasonably make the determination in question.

An issue for the challengers was whether the project costs for the TIDs included the costs for the demolition of several buildings that were listed on the National Register of Historic Places -- a project cost that is forbidden under Wisconsin's TIF statutes.

The Court of Appeals remanded the case to the circuit court for further proceedings under certiorari review of the challengers' allegations that the City lacked substantial evidence to make the "blight" and

20.25 - Conditional uses.

(1) The city plan commission may, after a review and public hearing, authorize the issuance of a conditional use permit for conditional uses specified for each district, provided such uses are in accordance with the purpose and intent of this chapter. Whenever a conditional use permit is requested and the required public hearing is scheduled and noticed by city as a class 2 notice, the city shall give notice, by regular mail, of the proposed conditional use to all property owners whose property lies within 300 feet measured in a straight line from the exterior boundary of the property subject to the proposed conditional use permit. Said notice shall be mailed at least ten days prior to the hearing, however failure of a neighboring property owner to receive such mailed notice shall not invalidate a public hearing. If action is delayed more than 120 days from the date of public hearing, a new public hearing shall take place. The common council may grant up to a 60-day extension if warranted by extenuating circumstances. In addition to the notification requirements listed above, applicant shall post signage visible to every facing street at least ten days prior to the hearing. The signage shall identify the property as being the subject of a public hearing and identify the appropriate city office that may be contacted for information.

(2) Applications for a conditional use permit shall be filled out at the zoning department on a form provided by the inspector and reviewed by staff. Application shall contain a full legal description, property map, and shall be accompanied by a plan showing the location, size and shape of the lot(s) involved and of any proposed structures, and the existing and proposed use of each structure and lot. After review by staff, application shall be placed on the appropriate city plan commission agenda for review, and request shall be posted by city on public access television.

(3) The city plan commission shall review, as appropriate, the proposed site and operation, existing and proposed structures, architectural plans, neighboring uses, parking areas, driveway locations, highway access, traffic generation and circulation, drainage, sewerage and water systems and whether the proposed project will adversely affect property values in the neighboring area.

(4) A conditional use permit may only be issued by the plan commission upon making a finding that:

(a) The establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, comfort or general welfare.

(b) The conditional use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted nor substantially diminish and impair property values within the surrounding area.

(c) The establishment of the conditional use will not impede the normal and orderly development and improvement of surrounding property for uses permitted in the district.

(d) Adequate utilities, access roads, drainage, and/or other necessary facilities will be provided.

(e) Adequate measures will be taken to provide ingress and egress so designed as to minimize traffic congestion on the public streets.

(f) The conditional use shall in all other respects conform to the applicable regulations of the district in which it is located and the plan commission shall find that there is a public necessity for the conditional use.

(5) Conditions related to landscaping, architectural design, type of construction, construction commencement and completion dates, sureties, lighting, fencing, operational control, hours of operation, traffic circulation, deed restrictions, access restrictions, increased yards, and parking requirements may be required by the city plan commission upon its finding that such conditions are necessary to fulfill the purposes and intent of this chapter.

(6) Conditional uses shall comply with all other provisions of this chapter such as lot width and area, yards, height, parking and loading.

(7) Any conditional use granted by the city plan commission shall terminate unless initiated within 365 days of date of decision by the city plan commission.

Sturgeon Bay Zoning Code

List of Conditional Uses by District

R-1 district

(a) Home occupations, subject to the following:

1. The home occupation shall be conducted only by residents of the dwelling unit and shall be conducted entirely within the dwelling unit.
2. There shall be no outdoor storage or display of equipment, materials, or articles offered for sale.
3. There shall be no articles offered for sale on the premises except such as is directly produced by the home occupation.
4. There shall be no mechanical equipment used other than such as is permissible for purely domestic purposes.
5. There shall be no signage associated with the home occupation, except for one wall sign not to exceed four square feet and not illuminated.
6. A home occupation which meets the criteria listed in subsections 1 through 5, and, in addition, contains no signage, has no retail sales, and has no stock in trade kept or sold, and in which the clients do not generally visit the premises, shall be permitted and shall not require a permit.
7. Only vehicles of a type ordinarily used for conventional passenger transportation, i.e. passenger automobile or vans and pickup trucks not exceeding a payload capacity of one ton, shall be used in conjunction with a home occupation, except that not more than one commercial vehicle may be authorized by the city plan commission as part of the conditional use permit. The use of any public right-of-way for the parking or storage of any commercial vehicles or trailers associated with a home occupation is prohibited.

(b) Reserved.

(c) Public museums and libraries.

(d) Art galleries.

(e) Public utilities.

(f) Bed and breakfast establishments, provided the facilities are licensed by the department of health and social services.

(g) Community living arrangements, except as regulated in § 62.23(7)(i), Wis. Stats., and provided, however that the 2,500-foot distance described in § 62.23(7)(i)2r.a., Wis. Stats., shall not apply.

R-2 district

(a) All uses listed as conditional uses in the R-1 district.

(b) Two-family dwellings.

R-3 district

(a) All uses listed as conditional uses in the R-1 district.

(b) Multiple-family dwellings, provided there shall be no more than four dwelling units per building.

(c) Colleges and vocational schools.

R-4 district

(a) Any use listed as a conditional use in the R-1 district.

(b) Hospitals.

(c) Medical and dental clinics.

(d) Professional offices.

(e) Parking lots.

(f) Colleges and vocational schools.

(g) Two-family dwellings.

(h) Single-family dwellings.

(i) Multiple-family dwellings greater than eight units per lot or which do not meet the design requirements under subsection (1)(b).

(j) Barber/beauty shops, provided such use shall be located on a parcel that abuts a collector or arterial street as shown in the Sturgeon Bay Comprehensive Plan.

(k) Commercial housing facilities.

R-M district

(a) Home occupations, subject to the criteria listed in section 20.09(2)(a).

(b) Reserved.

(c) Public utilities.

(d) Community living arrangements, except as regulated in § 62.23(7)(i), Wis. Stats., and provided, however that the 2,500-foot distance described in § 62.23(7)(i)2r.a., Wis. Stats., shall not apply.

C-1 district

(a) Communication towers.

(b) Colleges and vocational schools.

(c) Public utilities.

(d) Multiple-family dwellings.

(e) Community living arrangements, except as regulated in § 62.23(7)(i), Wis. Stats., and provided, however, that the 2,500-foot distance described in § 62.23(7)(i)2r.a., Wis. Stats., shall not apply.

(f) Hospitals.

(g) Water related uses such as marinas, launch ramps, charter boating or fishing and ferry terminals.

(h) Commercial establishments with drive-through facilities.

(i) Public garages, shops or storage yards.

(j) Outdoor recreation facilities such as golf courses, shooting ranges, and outdoor theaters.

(k) Animal shelters and pounds.

(l) Commercial housing facilities.

(m) Residential use, when incorporated into a multiuse building and using not more than 50 percent of the available floor area.

C-2 district

(a) Communication towers.

(b) Colleges and vocational schools.

(c) Public utilities.

(d) Multiple-family dwellings.

(e) Community living arrangements, except as regulated in § 62.23(7)(i), Wis. Stats., and provided, however, that the 2,500-foot distance described in § 62.23(7)(i)2r.a., Wis. Stats., shall not apply.

(f) Hospitals.

(g) Water-related uses such as marinas, launch ramps, charter boating or fishing and ferry terminals.

(h) Gasoline service stations.

(i) Automobile repair establishments.

(j) Automobile or recreational vehicle sales lots.

(k) Commercial establishments with drive-through facilities.

(l) Bed and breakfast establishments, provided the facility is licensed by the Wisconsin Department of Health and Social Services.

(m) Commercial housing facilities.

C-3 district

(a) Any use listed as a conditional use in the C-1 district.

(b) Light manufacturing/high technology manufacturing, general warehousing, or wholesale distribution activities, subject to the following:

1. Such uses shall be entirely contained inside the building used for such activity.
2. There shall be no outside storage of any raw material, finished product, or waste material other than in a dumpster receptacle that is routinely used and regularly serviced in the normal course of business.
3. There shall be no prolonged noise above 85 decibels at any point further than 100 feet from any part of the building.
4. There shall be no release of smoke, fumes, or odors that may create a public or private nuisance, nor shall there be other activity conducted on the premises that may constitute a public or private nuisance.
5. The use shall be specifically limited to the particular manufacturing and/or storage activity indicated in the petition to the board of appeals and may not be changed to a different activity.
6. In the event that a particular activity approved by the zoning board of appeals is discontinued for any reason, voluntary or involuntary, with no immediate intent to resume, the conditional use permit shall also be deemed automatically terminated with no further notice or hearing.
7. In the event that there is an existing building with an existing fire protection system installed at the time of the approval of the conditional use permit, that fire protection system must remain intact and must be maintained in an operating condition at all times, unless a special exemption is approved by the fire chief.
8. New building projects that involve new exterior building walls, fences, signs, or other exterior improvements requiring a building or sign permit shall be subject to the development standards and procedures prescribed in section 20.32 of this chapter.
9. The zoning board of appeals may also require other conditions regulating the handling, storage, and disposal of chemicals and hazardous materials.

C-4 district

(a) Communication towers.

(b) Colleges and vocational schools.

(c) Public utilities.

(d) Hospitals.

(e) Post offices.

(f) Child day care facilities, provided the facility is licensed by the department of health and social services.

(g) Establishments with drive-through facilities.

C-5 district

(a) New single-family dwellings.

(b) New two-family dwellings.

(c) Additions to existing dwellings that exceed 50 percent of the original floor area.

(d) Multiple-family dwellings.

(e) Uses listed under subsection (1)(c) that are located within a new building with a building footprint that is 3,000 square feet or larger.

(f) Restaurants and taverns.

(g) Hotels and motels.

(h) Parking lots.

(i) Rest homes.

(j) Community living arrangements, except as regulated in § 62.23(7)(i), Wis. Stats., and provided, however that the 2,500-foot distance described in § 62.23(7)(i)2r.a., Wis. Stats., shall not apply.

(k) Public utilities.

(l) Massage parlors.

(m) Liquor stores.

(n) Payday lending institutions.

(o) Pawn shops.

I-1 district

(a) Charter fishing boat service.

(b) Commercial fishing facilities.

(c) Industrial uses not specifically permitted nor specifically prohibited.

(d) Communication towers.

(e) Commercial housing facilities.

(f) Retail establishments, subject to the following requirements:

1. The retail establishment shall be located within a building that contains at least 4,000 square feet of floor area.

2. The retail establishment shall be located within 600 feet of the right-of-way of State Highway 42/57.
3. The retail use shall be limited to appliance dealers, carpet and floor covering dealers, electrical showrooms and shops, furniture stores, lawn and garden equipment and supply stores, lighting showrooms and shops, lumber and building materials sales centers, paint stores, plumbing showrooms and shops, stationary and office equipment/supply stores, retail sales associated with not for profit vocational rehabilitation programs, boat sales/showrooms, and similar types of retail that support the building and manufacturing industries.

(g) Banks and other financial institutions.

(h) Travel agencies.

(i) Health clubs.

(j) Quick-printing/copy shops.

(k) Indoor boat storage and repair facilities.

1A district

Conditional uses shall be the same as those listed for the I-1 district, but shall be subject to the development standards contained in section 20.32. Appeals to the limitation on outdoor storage shall be to the development review team.

I-2 district

Conditional uses shall be all uses listed as conditional uses in the I-1 district.

I-2A district

Conditional uses shall be the same as those listed for the I-2 district, but shall be subject to the development standards contained in section 20.32.

A district

(a) Airports, including terminal facilities and necessary concessions.

(b) Two-family dwellings.

(c) Outdoor amusement and recreation facilities such as golf courses, driving ranges and outdoor theaters.

(d) Communication towers.

(e) Public utilities.

(f) Solid waste facilities.

(g) Travel trailer parks.

(h) Home occupations, subject to the criteria listed in section 20.09(2)(a).

(i) Bed and breakfast establishments, provided the facility is licensed by the Wisconsin Department of Health and Social Services.

(j) Sand and gravel operations.

(k) Kennels.

(l) Indoor ice arenas.

CON district

(a) Water pumping or water storage facilities.

(b) Golf courses.

(c) Offices and educational facilities for nonprofit conservation-related organizations.