August 29, 2024

To: Whitewater Plan and Architectural Review Commission

From: Rick Manthe

RE: Conditional Use Permits

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## Introduction

Stafford Rosenbaum has previously represented the City of Whitewater in various matters and currently represents the Whitewater Community Development Authority. City staff requested that my office provide a memo regarding the state of the law in regards to conditional use permits.

## Analysis

### 1. General Conditional Use Concepts.

Conditional uses allow "a property owner 'to put his property to a use which the ordinance expressly permits when certain conditions [or standards] have been met.'" *Town of Rhine*, 2008 WI 76, ¶ 21, (quoting *State ex rel. Skelly Oil Co. v. Common Council, City of Delafield*, 58 Wis. 2d 695, 701, 207 N.W.2d 585, 587 (1973)). Once a zoning ordinance establishes a conditional use in a particular zoning district, those conditional uses are not "inherently inconsistent with the use classification of a particular zone, [but] may well create special problems." *Skelly Oil*, 58 Wis. 2d at 701. To address the special considerations, conditional use permits often contain special approval conditions which the applicant must satisfy in order to proceed with the proposed use. Those conditions address any potential externalities resulting from the project.

**2. Current Conditional Use Law.**

Conditional use permit law underwent a sea change in 2017 with the adoption of Wis. Stat. § 62.23(7)(de). This statute placed greater restrictions on a city's ability to deny conditional use permits ("CUP"). Prior to this statute's enactment, cities had broad discretion to grant or deny a CUP and impose conditions of approval. *See AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Com*m., 2017 WI 52, 375 Wis. 2d 329, 895 N.W.2d 368. The Legislature responded by creating Wis. Stat. § 62.23(7)(de) which severely diminished discretion in acting upon CUPs.

Wisconsin's conditional use statute imposes limitations on CUP approval standards. Any ordinance requirement must be "reasonable and, to the extent practicable, measurable…" Wis. Stat. § 62.23(7)(de)2.b. This limitation is significant because an ordinance requirement or condition that is not measurable will have questionable enforceability. Thus, the City should not rely on immeasurable standards as a basis for denying a CUP. It is also worth noting that some of the City's current CUP standards could be susceptible to a legal challenge because of this statutory restriction. For instance, the City's CUP approval requirements include that "the establishment, maintenance, or operation of the conditional use will not create a nuisance for neighboring uses" and the "conditional use and structures are consistent with sound planning and zoning principles." City of Whitewater Code of Ordinances § 19.66.050-A. and E. A party could argue that neither of these requirements are "to the extent practicable, measurable." Accordingly, the City should carefully consider how it applies these standards because relying on them for a basis of denial is legally uncertain. Additionally, the City should consider amending its CUP ordinance to reduce the risk of future challenges to these standards.

Wisconsin's conditional use statute further limits City discretion to deny a CUP. Under Wis. Stat. § 62.23(7)(de)2.a., "[i]f an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the city [zoning] ordinance or those imposed by the city zoning board, the city *shall* grant the conditional use permit." (emphasis added). Thus, a city *must* approve a CUP application if (1) the applicant satisfies all the measurable requirements in the zoning ordinance or conditions, or (2) the applicant *agrees* to satisfy the requirements or any conditions imposed upon the CUP. In other words, the City has no discretion to deny a CUP once the applicant has put forth substantial evidence (explained below) that the use would comply with all City standards.

While the City has limited discretion to deny a CUP, the applicant is required to provide "substantial evidence" to establish compliance with all City requirements. Wis. Stat. 62.23(7)(de)2.b. However, "substantial evidence" is a minimal threshold. "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." Wis. Stat. § 62.23(7)(de)1.b. Under this standard, as long as the applicant has provided satisfactory evidence in support of each measurable ordinance requirement or CUP condition, then the applicant has likely satisfied the substantial evidence standard and the City must grant the CUP.

While a city is permitted to attach conditions to the approval of a CUP, Wis. Stat. § 62.23(7)(de) does place limitations upon CUP conditions. A condition (whether appearing explicitly in the relevant ordinance or sought to be imposed as a condition on a particular application) must be "related to the purpose of the ordinance and be based on substantial evidence." Wis. Stat. § 62.23(7)(de)2.a. As explained above, the conditions must come from tangible facts and information, rather than mere speculation or personal preferences. Moreover, these conditions must be "reasonable, and to the extent practicable, measurable." Wis. Stat. § 62.23(7)(de)2.b. For example, denying a CUP based on generic findings that the proposed use is "contrary to the public welfare" or "against the public interest" could be challenged on the basis that such a requirement is too vague to be reasonable and measurable.

Importantly, the City cannot deny a CUP solely because the applicant proposes a use conditionally allowed by the zoning district. If a zoning district identifies a use that is conditionally permissible, then that is a legislative determination by the City that the use can occur at that specific location. Thus, if the applicant satisfies all requirements within the ordinance and other reasonable conditions imposed by the City, the CUP cannot be denied because of the proposed use.

## Conclusion

To conclude, Wis. Stat. § 62.23(7)(de) limits the City's discretion to deny a CUP application. If all the requirements in the zoning ordinance and other conditions have been satisfied by the applicant, the City cannot deny the CUP.