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CONDITIONAL USE LAW:

CHANGES AND RESPONSES

Part I: History Lesson: Your Grandfathers Zoning Code. Made Flexible.

General principles of Euclidean zoning contemplated strict districting of uses, and very little flexibility. That general principle had a brief history, though:

> Euclidean zoning, in theory, attempts to predetermine the use of all vacant private land according to a comprehensive plan. This of course is a quixotic venture that continually encounters the windmills of reality. One of the claims made on behalf of zoning from its inception was that it would provide stability and predictability for the benefit of property owners and investors. While it has done this to some extent, there is a contradictory trend in the evolution of zoning — toward greater flexibility to cope with the unexpected and the unfair. (Rutherford H. Platt, Land Use and Society, Island Press, 1996, page 240)

Over time, it became necessary to develop flexibility within zoning, to address the particular circumstances affecting property, and to better plan for particular uses. One commentator describes this historical phenomenon:

> *Special permits* entered zoning practice after World War II to provide municipalities with greater discretion in dealing development proposals than amendments or variances could afford. The special permit (sometimes called a conditional use permit or special exception) is essentially a "maybe". (Id., at 245).

In effect, this flexibility gave municipalities the authority to say that certain uses are allowed, while other uses are "maybe" allowed in particular districts. In the words of another commentator:

It is clear that the zoning pioneers did not intend the "special exception" to be anything more than a supplement to the basic technique of "pre-zoning" a municipality into a number of different use and density districts. (Daniel R. Mandelker and John M. Payne, Planning and Control of Land Development: Cases and Materials, 5th Edition, 2001, at 448).

Part II: History Lesson, Cont'd: Other Species of "Maybe" Zoning Approvals.

A. *Conditional Uses v. Special Exceptions*. Conditional uses are related to special exceptions, and indeed historically they were considered to be different names for the same thing. As they have developed over time, the main difference between a conditional use and a special exception, is that zoning codes ordinarily assign different approval processes to each. Many codes routinely assign conditional use authority to plan commissions or zoning committees, while zoning codes might give special exception authority to the zoning board of appeals. The important point is that in both cases, conditional uses and special exceptions are uses that are specifically allowed by the zoning code under particular circumstances, and those circumstances are described in the code.

B. *Conditional Uses v. Variances*. Variances, of course, are different. Variances allow a use that is specifically prohibited by the zoning code. The difference has been described this way

> The decisive difference between these forms of relief is that a variance is "authority extended to a property owner to use his property in a manner forbidden by the zoning enactment," while an exception "allows him to put his property to use which enactment expressly permits." (Fabyan v. Waukesha County Bd. of Adjustment, 246 Wis.2d 851, 632 N.W.2d 1 16 (Ct App 2001).

In the case of a variance, of course the hardship standard has been much litigated and discussed. It is intended to be difficult to receive a variance, because it is something that the code expressly prohibits, but which may be allowed if the ZBA finds that the relief should be granted in accordance with the applicable variance standards.

C. *Other Mechanisms*. The movement towards expanded flexibility with zoning matters does not end with conditional uses, special exceptions and variances. Some zoning ordinances use terms like "waive?' and "modification" as other mechanisms to allow special permission to be granted in particular circumstances. Regardless of their name, these are likely to be viewed the same as conditional uses and special exceptions under our law, provided the same reasonable mechanisms are incorporated into the code.

Part III: That Was Then, This is Now: 2017 Wisconsin Act 67 - Wisconsin Statutes §62.23(7)(de).

A. BACKGROUND

Zoning for "maybe" is no longer permitted in Wisconsin. That flexibility was extinguished by 2017 Wis. Act 67.

This law is a reaction to the Wisconsin Supreme Court decision in *AllEnergy Corporation v Trempealeau County Environment and Land Use Committee*, 375 Wis. 2nd 329 (May 31, 2017). In that case AllEnergy applied for a conditional use permit for nonmetallic mineral mining. At least 368 people were on record at the public hearing.

Two issues formed the heart of the case before the Supreme Court:

- AllEnergy contended that the opponent's arguments were insufficient, because they were all "uncorroborated hearsay."

- The Zoning Committee denied the application even though they found that all the requirements for the conditional use permit were met.

On appeal, AllEnergy argued that the court should adopt a new standard that (1) requires decisions to be made based upon substantial evidence, and (2) requires the issuance of the permit if the conditions are met.

The Wisconsin Supreme Court rejected that standard and upheld the denial of the permit.[1] The Court held, consistent with the precedent and the history of conditional use permits, that the zoning committee could deny the permit even if the standards had been met. It is zoning for "maybe we'll allow it," and the substantial opposition was adequate reason for denial.

This legislation followed. The legislation reversed the Supreme Court's conclusions on the two key points and imposed the standard sought by AllEnergy.

One final background observation: These changes may have no impact on current practices for some municipalities, while having a significant impact on others. Many municipalities have followed most or all of the processes that are now legally required, while others have not. This law sets a uniform standard, that all must follow.

[1] AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm., 2017 WI 52, ¶ 119, 375 Wis. 2d 329, 381, 895 N.W.2d 368, 394

B. NEW PREEMPTIONS

The new law (attached as Exhibit A) imposes the following limitations on municipal authority:

1. *Applies to all Special Zoning Permission*. The statute is drafted to apply to "conditional use" authority, but that term is defined very broadly:

   > "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a [municipality], but does not include a variance.[2].

2. *Substantial Evidence*. Conditional use decisions must be made on substantial evidence. This term is defined in the new law as follows:

   > "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.[3]

3. *Applicant Must Present Substantial Evidence.* The Applicant bears the burden of proving that they meet the standards. Specifically, the law requires the following:

   > 'The applicant must demonstrate that the application and all requirements and conditions established by the [municipality] relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence."[4]

4. *Reasonable Conditions*. The substantial evidence test also applies to any conditions that the municipality might impose. The new law says the following:

   > "Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence."[5]

   This is further described in the immediately following this section:

   > "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."[6]

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[2] §§60.62(4e)(a) 1. and 62.23(7)(de) 1.a., Wisconsin Statutes
[3] §§60.62(4e)(a) 2. and 62.23(7)(de) 1. b., Wisconsin Statutes
[4] §§60.62(4e)(b) 2. and 62.23(7)(de) 2.b., Wisconsin Statutes
[5] §§60.62(4e)(b) 1. and 62.23(7)(de) 2.a., Wisconsin Statutes
[6] §§60.62(4e)(b) 2. and 62.23(7)(de) 2.b., Wisconsin Statutes

5. *Can Limit Duration, Transfer or Renewal.*

   There once was a longstanding debate among the municipal bar about whether a conditional use runs with the land, just like a zoning district designation. I have heard arguments to that effect at the cracker barrel at this conference, and in the list-serve discussions. It has been my view that the terms of the conditional use and the zoning ordinance can say otherwise, by describing a termination date and a termination process. The Rainbow Springs case offers an example. In that case, a property owner claimed that the termination of its conditional use permit was a taking for which compensation was required, and the court rejected this claim:

   > We affirm. Rainbow Springs' complaint does not state a claim for relief because it does not demonstrate that rezoning the CUP deprived Rainbow Springs of a property interest. A CUP is merely a type of zoning designation, not a piece of property. (Rainbow Springs Golf Club, Inc. v. Town of Mukwonago, 284 Wis.2d 519, 702 N.W.2d 40, 111 8 (Ct App, 2005)).

   This legislation clearly answers this question, in line with the Rainbow Springs case. Municipalities are given specific authority to limit conditional use permit duration, transfer or renewal, per the section of the statute quoted in (4) above, and also by this section:

   > "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 [municipality] 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 [municipal] zoning board."[7]

6. *Public Hearing and Notice.* All conditional use permits now are required to have a public hearing, and class 2 notice is required.

   > "Upon receipt of a conditional use permit application, and following publication in the [municipality] of a class 2 notice under ch. 985, the [municipality] shall hold a public hearing on the application."[8]

7. *Quasi-Judicial Decision to Approve or Deny*. To underscore the obligation for substantial evidence, the statute ultimately requires that the decision must be made on substantial evidence.

[7] §§60.62(4e)(d) and 62.23(7)(de) 4., Wisconsin Statutes
[8] §§60.62(4e)(c) and 62.23(7)(de) 3, Wisconsin Statutes

"The [municipality's] decision to approve or deny the permit must be supported by substantial evidence."[9]

This is the third reference to the defined term "substantial evidence," in two adjacent paragraphs of the statute. There is no "maybe" we'll allow it. No legislative decision is being made, it is all determined upon substantial evidence. This is a quasi-judicial role, not a legislative role.

8. *Appeal*. The statute says that denial of a conditional use permit application can be appealed to circuit court.

C. RECOMMENDATIONS

Based upon the foregoing, I recommend the following:

1. *Process*. I recommend that you follow a quasi-judicial procedure concerning conditional use permits.

   - *Testimony on Conditions.* If your Planner intends to make recommendations concerning conditions, your Planner should be prepared to testify as to why those conditions are needed. In some cases, conditions will be needed because the ordinance requires them, and in other cases it will be because the Planner believes the conditions are necessary to protect the municipality's interests. We want a strong record to be developed at the hearing in support of any such conditions, in light of the "substantial evidence" test.

   - *Due Process.* In controversial matters, it will be important to consider in advance how the evidence will be received, such that due process is afforded to all interested parties.[10]

   - *Focus on the Issues*. I have included a decision sheet, attached as Exhibit B, as an example of how to keep the focus on the relevant questions.

2. *Code Amendments.* I recommend that you closely review your Zoning Code with the foregoing preemptions in mind. Changes may be necessary. I note the following:

   - *Potential Conflicts.* Your Code may conflict with the new laws in some respects, and should be amended to remove any such conflict in terms. For example, your Code may create a standard for the issuance of conditional use permits that differs from the new standards described above, so your Code should be amended to comply with the new law in that regard.

[9] §§60.62(4e)(b) 2. and 62.23(7)(de) 2.b., Wisconsin Statutes
[10] The statute does not specify that testimony at the public hearing must be sworn, though swearing the witnesses may be a best practice given the "substantial evidence" test.

- *Repeal Conditional Uses?* You may find that many conditional uses in your code are so hypothetical that they can simply be repealed. Take airports as an example. In many municipalities, airports are shown as a conditional use even though the use is very unlikely to arise, because the drafters plugged it in from a model document or thought "maybe we would allow it" if it ever would arise. In many communities, no airport has ever been built and no airport is likely to be built. There may be no standards in the code for the grant of an airport conditional use permit. In such situations, I recommend that you repeal the conditional use. If that use would ever arise, the proponent would have the option of seeking a code amendment to add back the conditional use; or could seek a variance; and the municipality retains authority over those zoning approvals or denials. For municipalities that have a long list of rarely used conditional uses, now is the time to eliminate them.

  The one caveat is this: You do not want to zone out constitutionally or statutorily protected uses. Repealing a conditional use in many cases will result in making that use prohibited. (Airports, for example, if they are not a permitted use anywhere in the municipality, will be prohibited in the municipality if you repeal the conditional use.). Zoning out a use is not a problem, unless it violates applicable laws. Telecommunications facilities, for example, cannot be zoned out.[11] Adult oriented establishments cannot be zoned out.[12] Repeal conditional uses carefully, with this in mind.

- *Reclassify Uses?* As you review your conditional uses, consider whether this continues to be the best zoning tool. You may prefer, given this new regulation of conditional uses, to reclassify the uses. Maybe some would now be better classified as permitted uses in some of the districts and prohibited in others, for example.

- *Specific Conditional Use Standards.* After decisions have been made about repealing or reclassifying existing conditional uses, the conditional uses that remain should be carefully considered to ensure that there are clear and sufficient standards for issuing each one. If an applicant proves by substantial evidence that they satisfy every standard, they are entitled to receive the conditional use approval. If you have inadequate standards specified in your ordinance, the conditional uses may be required to be granted more often than you intend, so review and revise the standards carefully.

- *Special Exceptions.* Pay particular attention to special exceptions, because wherever your Code refers to a special exception, it is now subject to the

[11] 66.0404(4)(c), Wis Stats.
[12] § 24:137.Regulation of adult businesses—Location of adult businesses, 6A McQuillin Mun. Corp. § 24:137 (3d ed.)

foregoing regulations as though it were a conditional use. You need to be sure that your special exception procedures comply with these requirements of the new law, therefore. This does not mean that special exceptions need to be located in the same Code Sections as conditional uses, but it does mean that both types of approvals need to be based on substantial evidence, include notice and hearing, and include all of the related requirements noted above.

3. *Public Hearing Notice*. This new law requires a class 2 public hearing notice for conditional use permits, so your code may need to be amended to add that requirement. Also, note that mailed notice is not required by this statute, but your code might require that for all public hearings. You may want to amend your code to say that mailed notice is not required for public hearings involving conditional uses, only class 2 notice, depending upon your intent.

4. *Adopt Standard Conditions*. Many of my clients routinely impose a number of standard conditions for every conditional use order, to ensure that ample authority is preserved and applicable laws are followed. I recommend that you adopt these standard conditional use requirements directly into your Code, and say within the Code that they apply to every conditional use permit. Doing so will avoid or minimize any need to prove by substantial evidence that the standard conditions are required in every case.

5. *General Conditional Use Standards.* In the *AllEnergy* case, the Applicant expressed significant frustration with the general standards of the ordinance. General standards are requirements such as "protection of the public interest" and "preservation of property values" and the like. AllEnergy contended that such standards are too subjective, and too difficult to prove. The Legislature did not remove your ability to have such general standards, however. I recommend that you review your Zoning Code and ensure that you have appropriate general standards that will apply for the issuance of all conditional use permits, as a catch-all to protect the municipal interests. One place to start, is to look at the statutory standards for the grant of a variance, which require preserving the public interest, preserving the spirit of the ordinance, and securing public safety and welfare.[13] As the AllEnergy Corporation correctly noted, it will be difficult to prove general standards, both for and against, by substantial evidence. The same can be said of the standards that apply for the grant of a variance, however, and the Zoning Board of Appeals manages to function appropriately. For the same reasons that you do so with variances, you want to be able to consider general standards for every conditional use permit. They are not statutory

[13] "… 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." Wis Stats. 62.23(7)(e)7.b.

general standards in this case, however, so draft some carefully considered general standards and add them to your code.

6. *Quasi-Judicial Role.* The governing bodies that participate in conditional use approvals must ensure that they act like judges, not like legislators. That means:

   - *Unbiased.* The members must be impartial. They cannot come to the hearing biased, or if they are they must recuse themselves.

   - *No ex parte communication.* Decision makers must avoid ex parte communication, meaning that they should not investigate the case or receive information about the case outside of the hearing and the public meetings.

7. *Which Governing Body?* Many municipalities have a two-step process for the issuance of conditional use permits, which begins with a recommendation from the Plan Commission and ends with a decision of the governing body. You may want to revisit that two-step process in light of this new legislation. There is no legislative decision to be made, it is all a quasi-judicial decision now. This quasi-judicial body will now function more like the Zoning Board of Appeals, or Board of Adjustment, or your Board of Review, each of which hears the evidence and makes the final decision. A one-step process may be more consistent with the type of action contemplated by the new laws.

   The larger issue at work on this question is not new, but it is worth revisiting from a historical perspective.

   a) Originally, CU's were in the purview of the Board of Appeals. The Uniform, Standard Zoning Act, Section 7, stated the following:

      > "[T]he...board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules contained therein."

      The term "special exception" was another way of referring to a conditional use at that time. Similar language remains in Wisconsin Statutes Section 62.23(7)(e)7.b., today.

   b) *Skelly Oil Case*. The Wisconsin Supreme Court concluded in 1973 that the power to grant conditional uses was a power that was vested solely in the board of appeals, and municipalities had no authority to adopt ordinances to allow the plan commission or the municipal governing body to grant conditional use permits:

> "We think that Sec.62.23(7)(e), Stats. vests exclusive authority in the board of zoning appeals to pass upon conditional uses or special exceptions.
>
> In making our ruling, we are mindful of the fact that while the retention of this authority by the city plan commission and the common council was in direct derogation of state law, it may well be that such procedure might be better suited to the complicated task of providing for effective city planning." (State ex rel. Skelly Oil co. v. City of Delafield, 58 Wis.2d 695, 703, 207 N.W.2d 585 (1973).)

c) *Statutory Correction*. The state legislature immediately changed our state laws in 1973, to arguably allow municipal governing bodies the authority to decide who issues conditional use permits:

> "The council ... shall by ordinance provide for the appointment of a board of appeals, and shall provide in such regulations that said board of appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. *Nothing in this subdivision shall preclude the granting of special exceptions by the city plan commission or the common council in accordance with the zoning regulations adopted pursuant to this section which were in effect on July 7, 1973 or adopted after that date*. "(Section 62.23(7)(e)1., emphasis added.)

d) *Appeal of Conditional Use actions to ZBA*. There is a complicated body of law in this State, regarding when conditional use decisions can be appealed to the Zoning Board of Appeals/Adjustment (ZBA). This is relevant in this context, because if an appeal can be made to the ZBA, it could be argued that the ZBA has the ultimate authority over conditional uses.

(1) <u>Early Answer: Yes, ZBA Decides Appeals</u>. This analysis begins with a 1983 case, in which our Supreme Court concluded that conditional use decisions can be appealed to the ZBA

> An aggrieved person has a right, under the statutes, to appeal to the board of adjustment from the zoning committee's decision to grant conditional use permits. (League of Women Voters, et al v. Outagamie County, 1 13 Wis.2d 131, 326, 2334 N.W.2d 887, 893, 1983.)

(2) <u>But. Not if Governing Body Decides or Code Says Otherwise</u>. Municipalities have been successful in contending that decisions on conditional uses cannot be appealed to the ZBA, if the zoning code does not allow for that. For example, ability to appeal to the board of

appeals was denied in the case of Town of Hudson v. Hudson Board of Adjustment, 158 Wis.2nd, 263, 461 N.W.2d 827 (Ct App. 1990); also in the case of Magnolia v. Town of Magnolia:

> We conclude there is no statutory authority for a town board of adjustment to hear appeals from decision of town boards granting or denying CUPs. (Magnolia v. Town of Magnolia, 284 Wis.2d 361, 384, 701 N.W.2d 60, 71 (2005).)

The legal theory of that case might confine the issue to situations when the governing body issues the permit, because the governing body does not have an administrative role. The court's focus on the text of the ordinance, though, suggests that clarifying the appeal provisions may prevent the appeal to the ZBA if that is the intent.

(3) When the ZBA Gets to Decide. they Can Decide De Novo. In 2005, the Wisconsin Supreme Court, without citing to any of the foregoing cases, declared the following:

> When reviewing the decision to grant or deny a conditional use permit, a county board of adjustment has the authority to conduct a de novo review of the record and substitute its judgment for the county zoning committee's judgment. Moreover, under the applicable state statute, a board has authority to take new evidence. (Osterhues v. Board of Adjustment for Washburn County, 382 Wis.2d 228, 231, 698 N.W.2d 701, 702 (2005).)

(4) 2017 Act 67 limited clarification. The new law provides an appeal to Circuit court, but only if the application is denied. This is not described in the statute as an exclusive method of appeal, moreover. The statute says:

> "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."

The referenced appeal provision, which previously related only to actions of the board of appeals, provides:

> "Any person or persons, jointly or severally aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board of appeals, commence an action seeking the remedy available by certiorari. The court

shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board of appeals and on due cause shown, grant a restraining order. The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review."

(5) Conclusion. From the foregoing, it appears that the authority to grant conditional use permits lies, in the first instance, with the zoning committee, or plan commission, or governing body, as designated within your zoning code. If the ultimate authority for conditional use decisions, per the zoning code, is the governing body, the governing body's decision cannot be appealed to the ZBA. There is also some reason to believe that the zoning code can specify the entity that has the ultimate authority, and specifically prohibit appeal to the ZBA. The new statutory appeal provision concerns *the denial* of a conditional use permit, which "may" go to circuit court, but the statute does not say that this is the exclusive means for appeal, and it does not provide an appeal mechanism for *the grant* of a conditional use permit. In circumstances where your zoning code allows an appeal to the ZBA, Osterhues, supra, holds that the ZBA can hear not only the question of whether the permit was erroneously granted or denied, but has de novo authority to take evidence and to grant or deny the permit independently of the action that was previously taken. Given the various disparate pieces of this puzzle, I recommend that you clarify the appeal provisions that apply to the grant or denial of conditional use permits in your code.

8. *Query: Expand variance authority?* If conditional uses are no longer flexible zoning authority, but variance authority remains, can the variance authority become a more robust flexibility tool to fill this void? Can we use different nomenclature to that is crafted to provide leniency, like a variance, such as waivers or modifications, and rely on our variance authority to do so? (Remember Fabyan, supra: "The decisive difference between these forms of relief is that a variance is "authority extended to a property owner to use his property in a manner forbidden by the zoning enactment" while an exception "allows him to put his property to use which enactment expressly permits."). If we prohibit uses that were previously conditional uses, can we find ways to allow those uses through variances (or waivers or modifications) that reach a

similar result to past practices? Any such attempts must be carefully considered, in light of the expansive definition given to the term "conditional use" in the statute.

9. *Query: Site Plan and Plan of Operation Approval*? Many Zoning Codes require separate approval of site plans and plans of operation before commencement of a use. An argument could be made that this constitutes an "other special zoning permission" under the statute and therefore invokes the obligations for notice and hearing and decisions based upon substantial evidence. I recommend that this issue be closely considered in your code. In situations where the site plan and plan of operation approval arises out of a conditional use, the notice and hearing can occur in conjunction with the conditional use process. In situations where a site plan and plan of operation is required and there is no companion process involving notice and hearing, we will need to closely consider whether this is a special zoning permission issue in the context of your code, and if so, notice and hearing will be required.

10. *Caution is Warranted.* Significant penalties can apply for the abuse of conditional use authority. Claims for damages under 42 U.S.C.A. Section 1983 can be brought against municipal authorities who grant or deny conditional use permits, and these claims do not need to arise within an ordinary certiorari appeal process. (Hanlon v. Town of Milton, 234 Wis2d 597, 612 N.W.2d 44 (2000).)

Part IV: Conclusion.

In many municipalities, conditional uses are not the tool that they were originally designed to be. They were once intended to allow individual consideration of issues that, due to their complexity and unique impacts, could not be particularly described in the code. In the past, the thought was: Maybe the use would be allowed, maybe it would not, based upon the particular proposal received and the conditions imposed. That flexibility is gone. The term "conditional use" has a new meaning, which makes it a form of permitted use: It is allowed if the standards are met. Municipalities need to amend their ordinances and their practices to adjust to this new concept of zoning in Wisconsin.

Exhibit A

(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 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.

Exhibit B

Decision Sheet
SAMPLE COMMUNITY
Self-Storage Facility Conditional Use

The State of Wisconsin has preempted municipal authority regarding conditional use permits in a number of respects, effective November 29, 2017. Decisions concerning conditional use permits now must be based upon "substantial evidence," which is defined as follows:

> "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."[14]

Note two additional requirements of the new laws:

- If an applicant for a conditional use permit meets or agrees to meet all requirements and conditions specified in the ordinance, the conditional use permit must be granted.

- Any condition imposed must relate to the purpose of the ordinance and be based on substantial evidence.

This decision sheet is provided as a tool to work through the decision-making process in light of the new statutory requirements and applicable SAMPLE COMMUNITY ordinances. As this is the first time the SAMPLE COMMUNITY has operated under the new conditional use laws, we will reserve the ability to proceed differently than outlined in this decision sheet if we find it is appropriate to do so.

Eric J. Larson

[14] §§60.62(4e)(a) 2. and 62.23(7)(de) 1. b., Wisconsin Statutes

Criteria	Applicant Provided Substantial Evidence[15]		Opponents Provided Substantial Evidence[16]		PC finds Standard is met[17]	
Section 4.01, SAMPLE COMMUNITY Zoning Ordinance: "The SAMPLE COMMUNITY Plan Commission may authorize the issuance of a Conditional Use Permit for conditional uses after Public Hearing and review, provided that such conditional uses and structures are in accordance with the purpose and intent of this ordinance and are found to be not hazardous, harmful, offensive, or otherwise adverse to the environment or the value of the neighborhood or the community." **Also, per Section 4.04 A. of the SAMPLE COMMUNITY Zoning Ordinance:** "The Plan Commission shall evaluate the effect of the proposed use upon: 1. The maintenance of safe and healthful conditions. 2. Existing topography, drainage, and vegetative cover. 3. The compatibility of the use with other uses on adjacent properties. 4. Existing and proposed traffic generation and circulation. 5. The adequacy of existing and proposed parking areas and driveway locations. 6. The adequacy of existing and proposed public services"	Yes	No	Yes	No	Yes	No

If Plan Commission answers "no" to the last of the questions, above, the CU permit must be denied. Otherwise, proceed to the next question.

[15] The Plan Commission finds that the applicant has provided substantial evidence to show that the applicant meets or agrees to meet this standard.
[16] Opponents of the issuance of the conditional use have shown substantial evidence that the applicant will not meet this standard.
[17] The SAMPLE COMMUNITY Commission finds, based upon substantial evidence presented, that the applicant meets or has agreed to meet this standard.

Criteria	Applicant Provided Substantial Evidence[18]		Opponents Provided Substantial Evidence[19]		PC finds Standard is met[20]	
Section 4.02 E., SAMPLE COMMUNITY Zoning Ordinance Standard: "Therefore, self-storage facilities should be located on sites which have locational characteristics which may be adverse to accommodating higher quality land uses. To accomplish this objective, the Planning Commission shall review each request and make a finding that some of the following criteria are met before any such use is approved:"						
"1. Historic lack of other higher quality development opportunities."	Yes	No	Yes	No	Yes	No
"2. Lack of existing or future sanitary sewer or potable water service."	Yes	No	Yes	No	Yes	No
"3. Poor soil conditions not conductive to supporting larger buildings such as low bearing capacity or high groundwater, or contaminated soils."	Yes	No	Yes	No	Yes	No
"4. Poor visibility from adjacent or nearby roadways"	Yes	No	Yes	No	Yes	No
"5. Poor vehicular access to adjacent roadways"	Yes	No	Yes	No	Yes	No
"6. High traffic noise or other adverse environmental conditions."	Yes	No	Yes	No	Yes	No
"7. Sites where such uses would be an appropriate buffer or transition between different land uses."	Yes	No	Yes	No	Yes	No

If the Plan Commission finds that fewer than two of the criteria described above are met, the conditional use permit must be denied. If the Plan Commission finds that two or more of the criteria are met, proceed to the next question.

[18] The Plan Commission finds that the applicant has provided substantial evidence to show that the applicant meets or agrees to meet this standard.
[19] Opponents of the issuance of the conditional use have shown substantial evidence that the applicant will not meet this standard.
[20] The SAMPLE COMMUNITY Plan Commission finds, based upon substantial evidence presented, that the applicant meets or has agreed to meet this standard.

Criteria	Applicant Provided Substantial Evidence[21]		Opponents Provided Substantial Evidence[22]		PC finds Standard is met[23]	
Section 4.04 C., SAMPLE COMMUNITY Zoning Ordinance Standard: "Compliance with all other provisions of this ordinance, such as lot width and area, yards, height, parking, loading, traffic, and highway access shall be required of all conditional uses."	Yes	No	Yes	No	Yes	No

If Plan Commission answers "no" to the last of the questions, above, the CU permit must be denied. Otherwise, proceed to the conditions of approval.

[21] The Plan Commission finds that the applicant has provided substantial evidence to show that the applicant meets or agrees to meet this standard.
[22] Opponents of the issuance of the conditional use have shown substantial evidence that the applicant will not meet this standard.
[23] The SAMPLE COMMUNITY Plan Commission finds, based upon substantial evidence presented, that the applicant meets or has agreed to meet this standard.

Approval Conditions.

Section 4.04(B) of the SAMPLE COMMUNITY Zoning Code states the following regarding conditions that may be imposed by the Plan Commission

> "Conditions such as landscaping, architectural design, type of construction, floodproofing, anchoring of structures, construction commencement and completion dates, sureties, lighting, fencing, planting screens, operational control, hours of operations, improved traffic circulation, deed restrictions, highway access restrictions, increased yards or parking requirements may be required by the SAMPLE COMMUNITY Plan Commission upon its finding that these are necessary to fulfill the purpose and intent of this ordinance."

Section 4.04(E) expands on this authority for self-storage facilities as follows:

> "ADDITIONAL CONDITIONS: In the process of considering a request for self-storage facilities, additional conditions may be required by the Planning Commission. Such conditions may include condominium property use restrictions and/or deed restrictions that would describe or limit uses or activities which could occur on the premises, architectural design features, or landscaping treatments, and specific security measures such as fencing and lighting."

a. Are the conditions proposed by the SAMPLE COMMUNITY Planner related to the purpose of the ordinance and based on substantial evidence?

YES	NO

If the answer is "no", conditions that fail this test must be removed or revised to satisfy the test.

b. Are the conditions proposed by the SAMPLE COMMUNITY Planner reasonable and to the extent practicable, measurable?

YES	NO

If the answer is "no", conditions that fail this test must be removed or revised to satisfy the test.

c. Should additional conditions be imposed related to the purpose of the ordinance, based on substantial evidence, that are reasonable and to the extent practicable measurable or conditions be added concerning the permit's duration, transfer or renewal?

YES	NO

If yes, name the additional conditions:

_____

_____

_____

_____

_____

_____

_____

_____

Has the applicant agreed to meet all of the requirements and conditions specified by the SAMPLE COMMUNITY Plan Commission?

YES	NO

If the Plan Commission answer is “yes” proceed to the next section. If the Plan Commission answer is “no” the conditional use must be denied.

Proposed motions:

A. **Motion to Approve:** I move to grant the conditional use order for self-storage facilities in the form presented by the SAMPLE COMMUNITY Planner, subject to the following: [Mark all that apply.]

- ☐ The conditions stated within the conditional use order shall be modified in the manner described in the SAMPLE COMMUNITY Plan Commission's discussion.
- ☐ The SAMPLE COMMUNITY Attorney (alternatively: _____) is directed to modify the draft conditional use order and place it in final form consistent with the discussion of the SAMPLE COMMUNITY Plan Commission.
- ☐ The modified conditional use order shall be circulated to the members of the Plan Commission who will confirm in writing whether they find the final form to be as decided by the Plan Commission, and if there is any doubt in the mind of any member of the Plan Commission in that regard, the matter shall be brought back to a subsequent Plan Commission meeting for further consideration of the final form of the conditional use order.
- ☐ This matter shall be placed upon an upcoming agenda to consider the final form of the conditional use order, and for final action in the matter.

B. **Motion to Deny:** I move to deny the conditional use application as the applicant has failed to show by substantial evidence that the applicant meets or agrees to meet all of the requirements and conditions specified in the SAMPLE COMMUNITY Zoning Ordinance or those imposed by the SAMPLE COMMUNITY Plan Commission, and substantial evidence in the matter supports the decision to deny, subject to the following: [Mark all that apply.]

- ☐ The SAMPLE COMMUNITY Attorney (alternatively: _____) is directed to draft a written decision for denial and place it in final form consistent with the discussion of the SAMPLE COMMUNITY Plan Commission.
- ☐ The written decision shall be circulated to the members of the Plan Commission who will confirm in writing whether they find the final form to be as decided by the Plan Commission, and if there is any doubt in the mind of any member of the Plan Commission in that regard, the matter shall be brought back to a subsequent Plan Commission meeting for further consideration of the final form of the written denial.
- ☐ This matter shall be placed upon an upcoming agenda to consider the final form of the written denial, and for final action in the matter.