



## WISCONSIN TOWNS ASSOCIATION

Empowering Town Officials

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### **Conditional Use Permits After Act 67: Frequently Asked Questions**

Recently, Wisconsin enacted legislation that impacted conditional use permits (CUP). 2017 Wisconsin Act 67 (the Act) created a statutory framework that local governments must follow in passing CUP ordinances and granting or denying CUPs. The legislation has prompted numerous questions for local governments and in the planning and legal professions. To help local governments navigate this legal landscape, the Wisconsin Towns Association (WTA) created this Frequently Asked Questions document to communicate the legal impacts and place them in the proper context. We have also authored a more detailed legal analysis entitled “Act 67 CUP Analysis.”

#### **What is a Conditional Use Permit?**

The Act created a definition for conditional use. It is defined as a “*use allowed under a conditional use permit, special exception, or other special zoning permission...but does not include a variance.*” There was not a statutory definition for a CUP prior to Act 67; however, this definition is consistent with how CUPs were previously used and implemented. The Act simply codified how local governments were already handling CUPs.

#### **What is the procedure for issuing CUPs under Act 67?**

The procedure for issuing CUPs under the Act is fairly straightforward. Once the local government receives an application for a CUP it must hold a public hearing on the application. The local government must provide a class 2 notice under chapter 985 of the Wisconsin statutes (meaning publishing the notice in the newspaper twice or posting in 3 places for 2 weeks). After the public hearing the local government must either approve or deny the permit application.

#### **Did Act 67 Invalidate My Zoning Ordinance?**

The Act did not invalidate zoning ordinances. Zoning ordinances stem from the police power, or the ability to pass ordinances in furtherance of the public health, safety, or general welfare. They identify what land uses are allowed by right or conditional in a “zone”. If they are neither allowed nor conditional they are presumed prohibited. The Act simply added statutory requirements for the CUP review process that primarily existed in case law. While the applicable standards existed in case law, given this codification, it may be useful for local governments to review the CUP related portions of their zoning ordinances to make certain they are consistent with statutes.

### **What was codified?**

In addition to adding a definition of CUP to the statutes, Act 67 codified prior law in regards to the 1) substantial evidence test, or in other words the standards local governments apply in their decision making, and 2) the scope of ordinance requirements and permit conditions.

### **What is this substantial evidence test?**

Act 67 requires local governments to base their CUP determinations upon “substantial evidence”. This was a requirement prior to Act 67, so this is not a law change. The Act defines substantial evidence as “facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.” Although this definition sounds like a high bar, it is in fact deferential to local governments. Evidence presented at a public hearing could support approval and denial, and the courts will generally defer to the local decision in those instances. The evidence does not even need to show that it is more likely than not that the local requirements cannot be met. It is simply whether a reasonable person could reach the same conclusion as the local body. As long as the local decision relied upon probative and credible evidence, the decision will be upheld by courts.

### **Is it true that Act 67 eliminated the ability to use public comment?**

This is a question many people have asked about Act 67. This Act did not eliminate the role of public comment. In fact the role of public comment is unchanged from prior law. Local governments are required to hold public hearings on CUPs under Act 67. The substantial evidence standard is linked to the public testimony at these hearings. Included in the Act’s definition of substantial evidence is a prohibition from considering “merely personal preference or speculation” as evidence. This was the case prior to Act 67 because substantial evidence has always been a requirement for approval or denial of a permit. Prior to Act 67 uncorroborated hearsay could not be the sole reason for a denial prior to Act 67 either. There was always a requirement that facts and information be provided. As long as the public is providing facts and information related to the application or ordinance criteria, the board can consider it if it rises above speculation or personal preference. In other words, the weight given to public comment has not changed.

### **Act 67 states our ordinance requirements and permit conditions must be “to the extent practicable, measurable”. What does “to the extent practicable, measurable” mean?**

Act 67 codified prior case law regarding the scope of CUP ordinance requirements and conditions. The Act requires that ordinance requirements and conditions imposed by the zoning body must be “reasonable, and to the extent practicable, measurable”. This is not as restrictive as it appears. An ordinance requirement or condition is reasonable if it relates to the police power, meaning it is in furtherance of the public health, safety, or general welfare. The “to the extent practicable, measurable language” does not eliminate subjective ordinance requirements. CUP

ordinances can still have subjective factors, such as the public health, safety, and general welfare. This is because the legislature did not put an absolute requirement that all requirements and conditions must be measurable or objective. It only put the qualifier that the requirements and conditions must be measurable if practicable. Since the legislature did not put an absolute requirement for objectivity, local governments will continue to have flexibility with their ordinance criteria and permit conditions. With that said, the conditions imposed by the zoning board should be measurable, if possible.

### **Can We Still Place Conditions on CUPs?**

Conditions attached to a permit are still allowed and important tools for CUPs. Any CUP approved by the local government can have conditions attached to it related to the purpose of the ordinance and based on substantial evidence. This is a broad grant of authority to impose conditions. Further, the local body may impose conditions for the permit's duration, transfer or renewal.

### **Does Act 67 guarantee an applicant a CUP?**

A critical requirement under the Act is that the burden is on the CUP applicant to show with substantial evidence that it will comply with the ordinance requirements and permit conditions. The Act does state that if the applicant meets, or agrees to meet, all ordinance requirements and permit conditions the local government must issue the permit. But again, the substantial evidence standard comes into play because the applicant must have evidence to support it will comply with all requirements.

### **What do we do with our CUP provisions in our zoning ordinance?**

Local governments will need to critically evaluate their CUP ordinances after passage of the Act. The WTA still highly recommends using CUPs. They are a valuable planning tool and are great for managing uses that may have negative externalities. Oftentimes local governments will state that a conditional use exists in every zone that has a specific permitted use. For example a conditional use might exist in all agricultural zones. After Act 67 it may behoove local governments to analyze whether that is the best planning system. Local governments should look at every district and decide if it truly wants conditional uses allowed in those zones. For example, if there is an area that is important to tourism for its scenic beauty, the local government may not want to have a conditional use for mining around that location. This will also require analyzing the comprehensive plan.

### **This is all very confusing, why don't we just stop using CUPs altogether?**

Ultimately, local governments will have to weigh the advantages and risks of the many zoning options available to them. The WTA believes CUPs are still a valuable zoning tool that should not be abandoned because Act 67 mirrors prior law in many respects. Some local governments may decide to reduce the number of conditional uses permitted within their jurisdiction and shift to conducting rezones. This is another strategy that also carries with it some advantages and

disadvantages. Conducting rezones will lead to more procedural requirements that must be fulfilled. Comprehensive plans may need to be updated with rezoning of properties. Utilizing this strategy could also reduce the control local governments have over the property since it is illegal to “contract zone”. In other words the local government cannot contract away its legislative function, or sign an agreement based on a rezoning. Rezoning is a legislative decision, however, which means these types of decisions receive even more deference from courts. Local governments will have to weigh these risks when choosing how to implement its community/development plans.