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Conditional Use Permits and the “Substantial Evidence” Standard

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What is meant by the term “substantial evidence”? [2017 Wisconsin Act 67](#), enacted in November 2017, applies a “substantial evidence” standard for three aspects of conditional use permit (CUP) practice:

- 1.) local government decisions to approve or deny a CUP must be supported by substantial evidence;
- 2.) any condition imposed must be based on substantial evidence; and
- 3.) the applicant for the CUP must provide substantial evidence that the application and all requirements and conditions established by the local government relating to the conditional use are or shall be satisfied.

Act 67 defines “substantial evidence” to mean “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.”

Applying a “substantial evidence” standard to actions involving CUPs is not new. The following section explores some of the guidance provided by the courts interpreting the substantial evidence standard in cases involving conditional use permits.

The Court’s View of Substantial Evidence

While there are no court decisions interpreting Act 67 yet, pre-Act 67 Wisconsin Supreme Court decisions involving CUPs provide some guidance for

understanding the “substantial evidence” standard in Act 67. In [AllEnergy Corp. v. Trempealeau County Environment & Land Use Committee](#), 2017 WI 52, the case that motivated the effort to include the CUP language in Act 67, the lead opinion states that substantial evidence is the appropriate evidence standard for CUP decisions and defines “substantial evidence” as “evidence of such convincing power that reasonable persons could reach the same decision as the local governmental entity, even if there is substantial evidence to support the opposite decision.”

Another Wisconsin Supreme Court case, decided two years earlier, provides further insights into the meaning of substantial evidence. The case [Oneida Seven Generations Corp. v. City of Green Bay](#), 2015 WI 50, involved a challenge to the City of Green Bay Common Council’s decision to rescind a CUP issued to Oneida Seven Generations for a proposed waste to energy facility. The Common Council initially voted to grant the permit but citizens concerned about the environmental impact of the facility subsequently convinced the Common Council to rescind the CUP on the grounds that Oneida Seven Generations misrepresented the environmental impact of the facility. Following a review of the record, the Wisconsin Supreme Court concluded that the City’s decision to rescind the CUP was not based on substantial evidence. The Court’s decision affirmed a similar conclusion by the Wisconsin Court of Appeals reversing the City’s decision to rescind the CUP.

The City's planning staff report to the Plan Commission recommended approving the conditional use permit. The Plan Commission voted unanimously to recommend approval of the CUP. The Common Council then voted ten to one to approve the CUP. In accordance with the conditions of the permit, Seven Generations applied for various city, state, and federal permits needed for the project. The City's Division of Safety and Buildings found the project in conformance with applicable regulations and issued a building permit. The Wisconsin Department of Natural Resources (DNR) reviewed the project for compliance with air quality regulations and approved Seven Generations' application for an air permit. The U.S. Department of Energy also reviewed the project and determined it would not significantly affect the quality of the human environment.

Members of the public then raised several concerns with the Common Council. The concerns focused on stack and emissions referenced in the building permit. The citizens argued that the CUP had been obtained by misrepresentation since in the earlier presentations to the City, Seven Generations had said there would be no smokestacks nor emissions from the project. The citizens also took issue with statements made by Seven Generations that the technology of the facility was not new. The Common Council voted to direct the Plan Commission to hold a hearing to determine whether the CUP had been obtained by misrepresentation. At the hearing the plan Commission reviewed the testimony made by Seven Generations during the earlier proceeding and heard from individuals speaking in favor and against the project. Following the hearing, the Plan Commission unanimously agreed that they had adequate information to reach a decision on the CUP, that they had not been misled, and that Seven Generations had not made misrepresentations. The Plan Commission relayed its findings to the Common Council. The Common Council, however, disagreed. The Council found that Seven Generations had made false statements and voted seven to five to rescind the CUP.

Following a review of the record (which involved listening to hours of audio tapes of the various proceedings before the City), the Wisconsin Supreme Court held that the City's decision to rescind the CUP was not based on substantial evidence. The Court could not find any statement made by Seven Generations that

the facility would have no emissions. Rather, the record revealed that Seven Generations made statements that there would be emissions. The Court also found that the statement that there would be "no smokestacks" was taken out of context. Seven Generations stated the facility would not have the tall, massive smokestacks "associated with coal power plants." The use of the term "stacks" was a technical term used by DNR to refer to devices like the exhaust pipes for the proposed facility that would rise only three feet above the roofline. The Plan Commission acknowledged it was aware the facility would have these vents. Finally, the Court found that the statement that the technology is not new or experimental was also not misleading. While the facility would be the first for Wisconsin, the technology is used elsewhere in the U.S. and the world.

In the *Oneida Seven Generations* decision, the Wisconsin Supreme Court reviewed earlier court cases discussing the substantial evidence standard and provided an overview of the substantial evidence standard as summarized in the box below. This overview provides an insight into how the courts might interpret the substantial evidence language in Act 67.

An Overview of the Substantial Evidence Standard

- ◆ *A local government's decision is presumed to be valid.*
- ◆ *Although substantial evidence is less than a preponderance of the evidence, it is "more than 'a mere scintilla' of evidence and more than 'conjecture and speculation.'" Further, "mere uncorroborated hearsay ... does not constitute substantial evidence."*
- ◆ *"Substantial evidence" is evidence of such convincing power that reasonable persons could reach the same decision as the board.*
- ◆ *"Substantial evidence" means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision.*
- ◆ *The weight to accord the evidence lies within the discretion of the local government.*
- ◆ *In determining whether the substantial evidence test is met, a court conducting a certiorari review should*

take into account all the evidence in the record. In other words, a reviewing court should consider the context of the evidence when determining whether it supports a local government's action.

◆ *A written decision is not required as long as the local government's reasoning is clear from the transcript of the proceedings.*

◆ *A detailed or explicit explanation of the local government's reasoning is not necessary. The decision need only contain enough information for the reviewing court to discern the basis of the local government's decision.*

Applying the Substantial Evidence Standard

As noted by the Court in the *Oneida Seven Generations* decision, the determination of whether something constitutes "substantial evidence" depends on the context of the evidence. What may provide substantial evidence to support one CUP decision may not provide substantial evidence in another CUP decision because of a different context.

While substantial evidence requires more than speculative information, substantial evidence does not require absolute certainty. For example, the Wisconsin Court of Appeals decision *O'Connor v. Buffalo County Board of Adjustment*, 2014 WI App 60, involved a citizen's challenge to the County's granting of a CUP for a frac sand mine operation. One of the concerns raised was that the many trucks leaving the mine on a daily basis would decrease traffic safety on the roads. At the request of the County, the Wisconsin Department of Transportation (DOT) conducted a Traffic Safety Impact Assessment. A DOT representative testified that while the DOT could not say the road will be absolutely safe or absolutely unsafe, the Assessment found that the road could handle the increased traffic volumes and that the truck traffic would not move the roads into a different statistical range for crashes or safety. The Court of Appeals upheld the granting of the CUP. While the Assessment cannot guarantee the roads will be safe, it provides information that reasonable persons would accept in support of a conclusion.

The application of the substantial evidence standard may be difficult. An applicant for a CUP may present

substantial evidence supporting the proposed CUP while neighboring property owners might present contrary evidence. The local government has discretion in how it weighs the competing evidence.

For example, a local government might have the following as one standard for approving a CUP: "The uses, values and enjoyment of neighboring property will not be substantially impaired or diminished in any foreseeable manner." The owner of an undeveloped parcel applies for a CUP so they can develop the parcel. A neighboring property owner fears that the proposed CUP will diminish the value of their property and presents a letter from a realtor stating that if the conditional use permit is granted, the value of the adjacent property will be decreased.

Even though the letter might constitute "evidence" the local government has discretion in terms of how much weight it gives that evidence. For example, how much will the value of the adjacent parcel decrease? The committee might find that a 10% decrease in value is not significant but a 50% decrease is significant.

The amount of weight given by the committee to the letter might also depend on whether the committee thinks the evidence offered by the letter is too speculative. Act 67 states that substantial evidence should not be based on speculation. As a realtor, the letter writer most likely has some training in how to value real estate. Some realtors may also be licensed real estate appraisers. Reasonable minds, however, can differ. The person proposing the conditional use might present a letter from a different realtor that concludes that the proposed conditional use will *not* have an adverse impact on the value of the neighboring property. The committee needs to weigh this competing evidence in order to make their decision. When weighing the evidence, the local government needs to remember that prior case law held that the burden is on the party seeking a CUP to establish that it has met the conditions in the ordinance. See, e.g., *Earney v. Buffalo County Board of Adjustment*, 2016 WI App 66. Act 67 likewise requires that the applicant for a CUP provide substantial evidence that the application and all requirements and conditions established by the local government relating to the conditional use are or shall be satisfied.

Other contexts might also come into play. Act 67 states that requirements and conditions imposed on a conditional use permit must be reasonable. Is it reasonable to expect that there will be no decrease in the value of the adjacent parcel? The local government's comprehensive plan may also provide a helpful context. If the local government's comprehensive plan promotes infill development in the area of the proposed conditional use, is it reasonable to expect that the parcel in the above example will remain undeveloped?

Finally, it is important to remember that Act 67 emphasizes requirements and conditions for the permit. If there is concern about the potential impact of the proposed conditional use on adjacent property, are there conditions that can be included in the permit

(increased setback requirements, landscaping requirements, etc.) that minimize the potential impact on the adjacent parcel? Whatever decision the local government makes on the application for a CUP, the decision makers need to be able to articulate the reasons for the decision in the record.

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