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New Statute Governing Conditional Use Permits, Variances, and Substandard Lots

On November 27, 2017, Governor Scott Walker signed several new laws. One of these laws, Act 67, contains provisions of particular importance to zoned municipalities. Act 67 became effective on November 29, 2017, which means that the new mandates and prohibitions outlined below, including prohibitions against enforcing existing ordinances, are now in full force and effect.

Conditional Uses

While there is considerable case law governing issuance of conditional use permits ("CUPs"), under prior zoning law, there was no specific statutory language regulating such permits. In fact, Wis. Stat. § 62.23 mentioned CUPs only within the context of regulating community-based residential facilities. There were no requirements governing notice or public hearings for CUPs and no statutory criteria for the grant or denial of a CUP. Unsurprisingly, zoning ordinances vary widely on these requirements.

Act 67 creates a definition and establishes a number of requirements for the issuance or denial of a CUP. Under newly created Wis. Stat. § 62.23(7)(de), "conditional use" is defined as "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."[1]

Upon receipt of an application for a CUP, a municipality must hold a public hearing following publication or posting of a Class 2 notice. The new law does not specifically identify the body that must conduct the public hearing. In some municipalities, the public hearing is held by the plan commission and, in others, by the common council or village board.

Similarly, in a number of municipalities, plan commissions are authorized to grant or deny conditional use permits as well as establish any specific conditions while in others, the plan commission makes a recommendation to the governing body, which then makes these decisions.

The new statute incorporates case law holding that decisions granting or denying CUPs need to be based on "substantial evidence," defined as

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"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."

In addition to basing its decision on "substantial evidence," any requirements or conditions established by the governing body must be related to the purpose of the ordinance and, to the extent practicable, must be measurable. Conditions may include the permit's duration, transfer, or renewal. If an applicant agrees to meet all the requirements and conditions specified in the municipality's ordinances or imposed by the municipality, the municipality must grant the permit, although the applicant must be able to show, by substantial evidence, that the requirements and conditions have either been satisfied or will be satisfied.

If a municipality denies an applicant's CUP application, the applicant may now appeal the denial directly to circuit court. Most municipal ordinances currently provide for an intermediate, administrative appeal to a zoning board of appeals or board of adjustment.

Variances

New definitions and statutory requirements related to variances were also enacted. While these new provisions reflect existing case law pertaining to variances, they are worth noting.

Wis. Stat. § 62.23 (7)(e)7.a. incorporates existing case law defining an "area variance" as "a modification to a dimensional, physical, or locational requirement such as a setback, frontage, height, bulk, or density restriction for a structure" and a "use variance" as "an authorization… for the use of land for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance."

Wis. Stat. § 62.23(7)(e)7.d. also incorporates existing case law providing that property owners bear the burden of proving "unnecessary hardship." For an area variance, the property owner must demonstrate 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." For a use variance, the property owner must show 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 cases, the 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.

Substandard Lots

The new law also contains the legislative response to *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). In *Murr*, the U.S. Supreme Court held that an ordinance that merged two substandard lots when the lots were held under common ownership did not constitute a taking of private property requiring compensation under the Fifth Amendment. Under that decision, property owners owning two adjacent, substandard lots along the Lower St. Croix River were barred from selling one lot separately.

Almost all zoning ordinances contain prohibitions or limitations on the use of substandard lots.[2] Some ordinances, like the ordinance at issue in *Murr*, require that a substandard lot that is held in common ownership with an adjoining lot be combined with the adjoining lot if the owner wishes to construct a building on the adjoining lot. Others prohibit or limit the construction of any structures or buildings on substandard lots irrespective of ownership. Still others require a conditional use permit or a variance before a substandard lot can be developed.

Under newly-enacted Wis. Stat. § 66.10015[3], the legislature significantly curtails the authority of local government to impose limitations on the development of substandard lots.

Wis. Stat. § 66.10015(1)(e) first defines "substandard lot" to mean "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(2)(e) then bars a municipality, under any circumstances, from prohibiting or limiting either (1) conveying an ownership interest in a substandard lot or (2) using a substandard lot as a building site if both 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.

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Limitations on Collecting Attorney Fees for Prosecution of Ordinance Violations

Forfeiture actions are quasi-criminal proceedings classified by statute as civil actions. *See* Wis. Stat. §§ 778.01 and 800.02; *see also City of Janesville v. Wiskia*, 97 Wis. 2d 473, 483-84, 293 N.W.2d 522, 527 (1980). Municipalities that prevail in civil actions for prosecution of ordinance violations are able to recover limited costs of the prosecution. Wis. Stat. §§ 800.19(1b) and 800.10(1). For a typical civil action not seeking forfeitures, statutory attorney fees are an item of cost. *See e.g.,* Wis. Stat. § 814.04(1).

However, attorney fees are not recoverable in actions seeking forfeitures for violation of municipal ordinances. With some exceptions, a municipal court has exclusive jurisdiction over all actions seeking to impose a forfeiture for a violation of an ordinance of the municipality that operates the court. Wis. Stat. § 755.045(1). A municipal court cannot impose and collect attorney fees. Wis. Stat. § 814.65(3). When a municipal court's decision is appealed to the circuit court, attorney fees are not included in the definition of "full costs" awarded to a prevailing party, as they were not taxable in the original action. Wis. Stat. § 814.08(1).

When a municipality has not established a municipal court, forfeiture actions are commenced in circuit court under Wis. Stat. ch. 778. Under § 778.20, the municipality must bear the costs of prosecution, including attorney fees, but, unlike ch. 800, a circuit court's award of statutory attorney fees to a prevailing defendant has been upheld. *Town of Perry v. DSG Evergreen F.L.P.*, 2003 WI App 201, ¶¶ 11-13, 267 Wis. 2d 280, 670 N.W.2d 558, 2003 WL 22093607, at *2 (unpublished).

The reasons for the prohibition on the recovery of attorney fees are laid out in *Town of Mt. Pleasant v. Werlein*, 119 Wis. 2d 90, 349 N.W.2d 102 (Ct. App. 1984). In *Mt. Pleasant*, the Town requested actual attorney fees, which the court denied for several reasons: 1) attorney fees must be authorized by statute or contract and no statute authorizes actual attorney fees in forfeiture actions; 2) a municipal court cannot impose or collect attorney fees and the action originated in municipal court; 3) the magnitude of the actual attorney fees requested compared to the forfeiture; and, 4) the chilling effect on the right of citizens to appeal forfeitures from municipal court if attorney fees are awarded. *Id.* at 92-94. Due to the quasi-criminal nature of forfeiture actions, and absent explicit statutory allowances, uniform non-allowance of attorney fees to a prosecuting municipality should prevail, whether the action is before a municipal court or a circuit court. *See e.g., City of Sheboygan v. Hou-Seye*, 171 Wis. 2d 771, n. 4, 495 N.W.2d 103, 1992 WL 430216, at *4 (Ct. App. 1992) (unpublished).

— Jared Walker Smith

New Statute Governing Conditional Use Permits

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

Finally, Wis. Stat. § 66.10015(4) of the statutes prohibits a municipality from enacting or enforcing an ordinance 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. Notably, this provision applies not only to substandard lots; it applies to any attempt to mandate the merger of lots of any size through the enactment or enforcement of an ordinance purporting to do so.

Takeaways

These new provisions will almost certainly require amendments to most existing zoning, land use and land division ordinances. Until municipalities are able to amend these ordinances to conform with the new laws, zoning administrators, plan commissions, boards of zoning appeals and governing bodies should be careful to comply with these new requirements.

— Eileen A. Brownlee & Julia K. Potter

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1 Wis. Stat. § 61.35 makes the new provisions applicable to villages and § 60.61(4e) makes them applicable to towns.

2 These prohibitions and limitations may also be found in some subdivision or land development ordinances as well as zoning ordinances.

3 Wis. Stat. § 66.10015 was originally enacted several years ago to limit "down zoning."

Court Rules that Fence Law Applies to Cities and Villages

In a recent decision, *White v. City of Watertown*, 2016AP2259 (Wis. Ct. App. Oct. 1, 2017), the Wisconsin Court of Appeals made clear that Wis. Stat. Ch. 90, Wisconsin's agricultural fence law, applies not only to towns, but also to cities and villages. Chapter 90 regulates partition fences between property owners on land used for farming and grazing purposes. Among other issues, it governs fencing specifications, cost-sharing between adjoining landowners, and dispute-resolution procedures. The primary method of resolving disputes under Chapter 90 is to have "fence viewers" from the local municipality issue a binding decision that is filed with the municipal clerk.

The case arose out of a dispute between the Whites, who owned farm land in the City of Watertown, and their neighbors. Because the Whites used their land for farming and grazing purposes, Wis. Stat. § 90.03 required them to maintain a partition fence between their land and neighboring properties. The Whites and their neighbors could not come to an agreement about the cost and maintenance of the fence, so the Whites contacted the City and asked that it provide fence viewers to resolve the dispute and compel their neighbors to contribute financially toward the cost of maintaining the fence. The City took the position that the provisions in Chapter 90 dealing with enforcement and administration of the fence law applied only to towns, not to cities and villages, and refused to resolve the dispute. The Whites sued the City and asked the court to decide whether the City was obligated to enforce and administer the fence law for land located within City boundaries.

The Court held that Chapter 90 does indeed apply to cities and villages, as well as towns. The Court acknowledged that the language in Chapter 90 was ambiguous. While the definition of fence viewers mentions that city alderpersons and village trustees may be fence viewers, the vast majority of provisions in Chapter 90 expressly refer only to *town* fence viewers and refer only to town administration and enforcement. For example, Wis. Stat. § 90.07(2) provides that "application may be made to two or more fence viewers *of the town where the lands lie*" and Wis. Stat. § 90.09(2) requires that "fence viewers . . . file their determination in the office of the *town clerk*, who shall record the determination." (emphasis added).

"When land used for farming or grazing is located within a city or village, that city or village must administer and enforce the fence law."

Because the statute was ambiguous, the court looked at the facts and circumstances surrounding the enactment of relevant provisions the fence law to determine what the legislature intended the law to mean. Prior to 1875, the fence law clearly applied only to towns and contained no reference whatsoever to cities and villages. But in 1875, the legislature added a new section to the law that changed the definition of fence viewers to include city and village officials, and required those fence viewers to undertake the same duties in their jurisdictions as town fence viewers do in theirs. However, when the next published version of the statutes was released in 1878, the language requiring city and village fence viewers to assume the same duties as town fence viewers was omitted. The court reviewed the notes of the committee that published the statutes and determined that this omission was, essentially, inadvertent and that the legislature did not intend to change its mind and undo the 1875 statute that made the fence law apply to cities and villages, as well as towns. Thus, the Court held that, when land used for farming or grazing is located within a city or village, that city or village must administer and enforce the fence law.

This case provides needed clarity for city and village officials with respect to their obligations under the fence law. Although most farmland is located within towns, cities and villages that contain land used for farming or grazing should be prepared to provide fence viewers, keep records of partition fence agreements and decisions, and exercise all other powers under Chapter 90.

— Julia K. Potter

Upper Midwest Municipals Move Forward with Major New Solar Project

Citing long term energy savings and immediate term capacity value, members of the Upper Midwest Municipal Energy Group ("UMMEG") have finalized and approved purchase agreements to develop up to 25 MW of solar power in partnership with Organic Valley and OneEnergy Renewables. The deal would result in the installation of local solar generation facilities ranging from between 500 kW and 5 MW in nameplate capacity in UMMEG member communities located in Wisconsin, Minnesota and Iowa.

UMMEG is a Wisconsin municipal electric company with sixteen members, all of which are wholesale customers of Dairyland Power Cooperative, Inc. UMMEG's other power supply projects include the Rugby wind project and the Cashton Greens Wind Facility, which was also developed in partnership with an energy cooperative led by Organic Valley. Organic Valley has headquarters located in two UMMEG member communities (LaFarge and Cashton), with member cooperative farms located in numerous other UMMEG member communities.

The new solar venture is known as the "Butter Solar" project. When completed in mid-2019, it will be one of the largest solar projects in the region. Thirteen UMMEG members are participating in the project; ten will have solar installations interconnected behind the meter.

The project represents the culmination of a unique public private partnership in which UMMEG and its member communities purchase solar output from the solar facilities developed by OneEnergy and its partners, while Organic Valley purchases the renewable attributes, which has the effect of lowering the overall cost of the solar output. UMMEG and its members achieve power supply cost savings and Organic Valley obtains a long term supply of renewable energy credits that enable it to meet the company's long-term goals of reducing its carbon footprint. By aggregating equipment purchases for the UMMEG project participants, OneEnergy lowers the cost of procurement and allows for optimum solar production efficiency from the various installations.

The Butter Solar project is the latest in a series of large scale solar generation projects that have been announced in Wisconsin and neighboring states. Earlier this year, WPPI Energy announced a 100 MW solar project being developed in partnership with NextEra Energy at the Point Beach nuclear power plant site near Two Rivers. WE Energy has announced a commitment to build up to 350 MW of solar generation by 2020. And in the first ten months of 2017, solar capacity in Minnesota increased by more than 350 MW, largely driven by new community solar gardens being constructed by Xcel Energy.

— Richard A. Heinemann

Boardman & Clark LLP Welcomes Attorney Jared Walker Smith

Boardman & Clark is pleased to announce Jared Walker Smith has joined the firm. Jared, an experienced municipal and transactional attorney, will work primarily with the firm's municipal, business, and labor and employment practice groups. His broad municipal practice includes land use and zoning, tax increment financing development, policy and ordinance drafting and implementation, contract drafting, and conflict resolution. Jared serves as general counsel for the Village of Deerfield and the Town of Roxbury and has provided assistant representation to numerous other Wisconsin municipalities. He has experience in environmental law, in particular with respect to WPDES permits. Jared received his J.D. from the University of Wisconsin Law School.

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