



## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

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| <b>2017 Assembly Bill 479</b>           | <b>Assembly Substitute<br/>Amendment 1</b>   |
| <i>Memo published:</i> October 30, 2017 | <i>Contact:</i> Anna Henning, Senior Staff Attorney<br>Scott Grosz, Principal Attorney |

### **2017 ASSEMBLY BILL 479**

2017 Assembly Bill 479 makes various changes relating to zoning, navigable waters, eminent domain, local government authority with respect to property, and the display of the United States flag.

#### **Zoning**

##### **Conditional Use Permits**

Under **current law**, conditional use permits are typically required to be approved by the relevant zoning authority in a city, village, town, or county before a person may use property in a manner that is designated as a conditional use within a given zoning district. In *AllEnergy Corporation v. Trempealeau County Environment and Land Use Committee*, 2017 WI 52, a majority of Wisconsin Supreme Court justices rejected an argument that, in that particular case, a land use committee acted outside the scope of its authority because it denied a conditional use permit application based in part on general concerns raised by the public.

**The bill** requires a city, village, town, or county to grant a conditional use permit if an applicant meets, or agrees to meet, all of the requirements and conditions specified in the relevant ordinance. In addition, the bill requires those requirements and conditions to be reasonable and measurable.

The bill requires an applicant for a conditional use permit to demonstrate, with substantial evidence, that an application and all requirements and conditions relating to the conditional use are, or will be, satisfied. The bill then requires a city, village, town, or county to demonstrate that its decision to approve or deny the permit application is supported by

substantial evidence.<sup>1</sup> The bill specifies that public testimony alone is not substantial evidence and cannot be the sole basis for a decision to deny a conditional use permit application.

The bill specifies that a conditional use permit may remain in effect as long as the conditions upon which the permit was issued are followed, except that a city, village, town, or county may impose conditions relating to the permit's duration, and the ability of the applicant to transfer or renew the permit, as well as any other additional, reasonable conditions specified in the relevant zoning ordinance.

### **Nonconforming Structures**

**Current law** prohibits local zoning ordinances from prohibiting, or limiting based on cost, the repair, maintenance, renovation, or remodeling of a nonconforming structure.<sup>2</sup> [ss. 59.69 (10e) (b) and 62.23 (7) (1k) (a) 2., Stats.]

**The bill** removes references that limit the application of that prohibition to ordinances enacted under general municipal zoning authority.

With respect to county zoning ordinances, the bill also expands the prohibition regarding the regulation of nonconforming structures by specifying that, in addition to the actions described above, a county may not prohibit the rebuilding of a nonconforming structure, or limit such rebuilding based on cost. In addition, the bill specifies that the prohibition for county ordinances applies to **any part of a nonconforming structure**.

Finally, also only with respect to county zoning ordinances, the bill specifies that a county ordinance may not require a **variance** for the repair, maintenance, renovation, rebuilding, or remodeling of a nonconforming structure or any part of a nonconforming structure.

### **Variations**

Under **current law**, a zoning board of appeals has the discretion to grant a variance from a requirement under a zoning ordinance for a specific property if the variance will not be contrary to the public interest and, owing to special conditions, a literal enforcement 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. [ss. 59.694 (7) (c) and 62.23 (7) (hb) 2., Stats.]

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<sup>1</sup> The bill defines "substantial evidence" to mean evidence of such convincing power that reasonable persons would accept it in support of a conclusion. The bill specifies that "substantial evidence" does not include public comment based solely on personal opinion, uncorroborated hearsay, or speculation.

<sup>2</sup> For this purpose, "nonconforming structure" means a dwelling or other building that existed lawfully before the current zoning ordinance was enacted or amended, but that does not conform with one or more provisions in the current zoning ordinance applicable to elements including setback, height, lot coverage, and side yard. [ss. 59.69 (10e) (a) and 62.23 (7) (hb) 1., Stats.]

The **bill** specifies that a property owner bears the burden of proving “unnecessary hardship” for such variances by demonstrating the following, based on conditions unique to the property that were not caused by the property owner:

- For an area variance,<sup>3</sup> 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 that strict compliance would render conformity with the zoning ordinance unnecessarily burdensome.
- For a use variance,<sup>4</sup> that strict compliance with a zoning ordinance would leave the property owner with no reasonable use of the property in absence of a variance.

## Navigable Waters

### **Removal of Material from Certain Small Lakes**

**Current law** generally prohibits a person from removing material from a lake or stream unless the person has obtained an individual permit or the activity is authorized under a statewide general permit. Current law exempts the removal of material from certain farm drainage ditches and removal done by hand or in an amount necessary to place certain authorized structures. [s. 30.20 (1) and (1g), Stats.]

However, current law authorizes the Department of Natural Resources (DNR) to decide to require a person engaged in an exempt activity to nevertheless apply to obtain a permit if the DNR has conducted an investigation and visited the site and determined that conditions specific to the site require restrictions on the activity to prevent any of the following situations:

- Significant adverse impacts to the public rights and interests.
- Environmental pollution.
- Material injury to the riparian rights of any riparian owner.

s. 30.20 (1m), Stats.]

The **bill** creates a new exemption from the general requirement to obtain a permit to remove material from the bed of a lake. The exemption under the bill applies if all of the following criteria are satisfied with respect to a pond:<sup>5</sup>

- It has an area of five acres or less.

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<sup>3</sup> The bill defines “area variance” to mean a variance granted for a modification to a dimensional, physical, or locational requirement, such as a setback, frontage, height, bulk, or density restriction for a structure.

<sup>4</sup> The bill defines “use variance” to mean a variance granted for the use of land for a purpose that is prohibited or not otherwise allowed.

<sup>5</sup> Wisconsin law does not distinguish between a pond and a lake.

- It is not hydrologically connected to a natural navigable waterway or discharge into a natural navigable waterway, except as a result of storm events.
- It has no public access.
- It is entirely surrounded by land privately owned by the same person.

The bill retains the DNR's authority to nevertheless require that a person obtain a permit to remove material from a pond that satisfies the above criteria if the DNR's investigation and site visit result in a determination that a permit is necessary to prevent any of the situations, listed above, that apply under current law.

### **Shoreland Zoning**

**Current law** requires counties to adopt shoreland zoning ordinances for their unincorporated areas to effect the purposes of s. 281.31, Stats.,<sup>6</sup> and promote the public health, safety, and general welfare. [s. 59.692 (1m), Stats.] A county's shoreland zoning ordinance may not regulate a matter more restrictively than the matter is regulated by statewide shoreland zoning standards. [s. 59.692 (1) (1d), Stats.]

**The bill** exempts the same ponds that are exempt from general permitting requirements for removing material from a lake, described above, from regulation under county shoreland zoning ordinances.

### **Eminent Domain**

#### **Unit of Analysis for Takings Cases**

Under **current law**, in the case of a partial taking of property other than an easement, a court must determine just compensation by deducting the fair market value of the whole property after the taking from the fair market value of the property before the taking. [s. 32.06, Stats.] In addition, in condemnation cases, Wisconsin courts generally apply the "unit rule," which prohibits valuing individual property interests or aspects separately from the property as a whole.

**The bill** specifies that, in cases involving a taking of property through condemnation, the value of the property taken shall be evaluated based on each individual tax parcel taken, in

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<sup>6</sup> Section 281.31, Stats., the state's "navigable waters protection law," states: "to aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty."

whole or in part, regardless of whether the tax parcel is under contiguous, common ownership with other tax parcels.

### **Inverse Condemnation Claims for Regulatory Takings**

Under **current law**, if an entity authorized to exercise eminent domain occupies property without following statutory condemnation procedures, the property owner may bring an “inverse condemnation” action in circuit court. The Wisconsin Supreme Court has held that, to succeed on a statutory inverse condemnation claim, a person must show either that the property has been physically occupied or that the condemnation authority has imposed a restriction on the use of the property that deprives the property owner of all, or substantially all, of the beneficial use of the property.<sup>7</sup> [*E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58.]

**The bill** expands the scope of the inverse condemnation statute to authorize inverse condemnation actions by persons whose property is “taken by a restriction imposed by” an entity with the power of eminent domain. For purposes of the statute, the bill defines “taking” to mean: (1) an occupation of property by a person possessing the power of condemnation; or (2) any restriction imposed by a governmental unit that deprives an owner of all or substantially all practical use of the owner’s property.

When evaluating whether a government action deprived an owner of all or substantially all practical use of the property, the bill directs courts to consider the following factors:

- The nature and character of the government action.
- The severity of the economic impact of the restriction on the property owner.
- The extent to which the restriction interferes with the plaintiff’s investment-backed expectations in the property.

The bill also specifies remedies that courts may award in cases involving the deprivation of all or substantially all practical use of property.

### **Use and Conveyance of Substandard Lots**

**Current law** does not specifically prohibit restrictions relating to building on lots that are smaller than a current minimum lot size requirement. An example of such a restriction is the St. Croix County ordinance at issue in *Murr v. Wisconsin*, 582 U.S. \_\_ (2017). That ordinance, which was required under administrative rules promulgated by the DNR to implement the National Wild and Scenic Rivers Act, restricts the density of lots within the Lower St. Croix National Scenic Riverway, subject to a grandfather clause exception.

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<sup>7</sup> Article I, Section 13 of the Wisconsin Constitution and the takings clause of the Fifth Amendment to the U.S. Constitution are alternative bases for challenging the taking of property without just compensation. Different standards and remedies apply to constitutional takings cases.

Notwithstanding any other law or rule, or any action or common law proceeding, **the bill** prohibits a city, village, town, or county from prohibiting a property owner from taking either of the following actions:

- Conveying an ownership interest in a substandard lot.<sup>8</sup>
- Using a substandard lot as a building site, if both of the following criteria apply:
  - The substandard lot or parcel has never been developed with one or more of its structures placed partly upon an adjacent lot or parcel.
  - The substandard lot or parcel is developed to comply with all other ordinances of the city, village, town, or county.

### **Preemption of Lot Merger Provisions**

**Current law** does not specifically limit local authority regarding the merger of commonly owned lots.

**The bill** prohibits a city, village, town, or county from enacting 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.

### **Display of the United States Flag in a Housing Cooperative or Homeowners' Association**

**Current law** prohibits condominium bylaws and rules from prohibiting a condominium unit owner from respectfully displaying the United States flag. Condominium bylaws and rules may regulate the size and location of flags and flagpoles. [s. 703.105, Stats.] State law does not currently impose a similar restriction on housing cooperatives or home owners' associations.

**The bill** prohibits homeowners' associations and housing cooperatives from adopting or enforcing covenants, conditions, or restrictions, or entering into agreements, that restrict or prevent a member of a homeowners' association or housing cooperative from displaying the United States flag on property in which the member has a property interest (for homeowners' associations) or a right to exclusive use (for housing cooperatives). However, the bill authorizes a homeowners' association or housing cooperative to do either of the following:

- Require that the display conform with a rule or custom set forth under specified provisions of federal law.
- Provide a reasonable restriction on the time, place, or manner of displaying the flag that is necessary to protect a substantial interest of the homeowners' association or housing cooperative.

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<sup>8</sup> The bill 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.

## ASSEMBLY SUBSTITUTE AMENDMENT 1

As compared to 2017 Assembly Bill 479, Assembly Substitute Amendment 1 removes all provisions of the bill relating to eminent domain; modifies provisions relating to conditional use permits; and retains all other provisions of the bill.

With respect to conditional use permits, the substitute amendment modifies the bill as follows:

- Revises the provision requiring a city, village, town, or county to grant a conditional use permit if an applicant meets, or agrees to meet, all requirements and conditions in the relevant ordinance. Under the substitute amendment, the requirement applies only if the applicant meets or agrees to meet all requirements and conditions specified in the relevant ordinance **or those imposed by the relevant zoning board**, and it specifies that any conditions imposed on an applicant must be related to the purpose of the ordinance and based on substantial evidence.
- Replaces the definition of “substantial evidence” to mean “facts and information, other than merely personal preferences of speculation, directly pertaining to the requirements and conditions an application must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion,” and removes a provision stating that public testimony above is not substantial evidence and cannot be the sole basis on which a city, village, town, or county denies a conditional use permit.
- Revises the requirement that requirements and conditions imposed in a conditional use permit must be “reasonable and measurable” with a requirement that such requirements and conditions must be “reasonable, and, **to the extent practicable, measurable.**”
- Revises a restriction regarding changes to a conditional use permit once granted to allow conditions **imposed by the relevant zoning board** in addition to conditions specified in the zoning ordinance and to remove a reference to the reasonableness of such conditions.

## BILL HISTORY

Representative Jarchow offered Assembly Substitute Amendment 1 on October 19, 2017. On October 26, 2017, the Assembly Committee on Housing and Real Estate voted to recommend adoption of the substitute amendment on a vote of Ayes, 8; Noes, 0. On the same day, the committee voted to recommend passage of the bill, as amended, on a vote of Ayes, 5; Noes, 3.

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