WISCONSIN LEGISLATIVE COUNCIL
ACT MEMO

2017 Wisconsin Act 67 [2017 Assembly Bill 479]	Various Changes Relating to Zoning and Land Use

2017 Wisconsin Act 67 makes various changes, described below, relating to zoning, local government authority with respect to property, and the display of the United States flag.

ZONING

Conditional Use Permits

Under **prior law**, retained by the Act, 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.[1]

The Act 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 or imposed by the relevant zoning board. Any such conditions must be related to the purpose of the ordinance and based on substantial evidence.[2] In addition, the Act requires those requirements and conditions to be reasonable and, to the extent practicable, measurable.

[1] 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.

[2] The Act defines "substantial evidence" to mean facts and information, other than merely personal preference 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.

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The Act 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 Act 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.

The Act 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 or by the relevant zoning board.

The Act requires a public hearing to be held on a conditional use permit application and authorizes a person whose conditional use permit application is denied to appeal the decision in circuit court.

Nonconforming Structures

Prior law, generally retained by the Act, prohibits local zoning ordinances from prohibiting, or limiting based on cost, repair, maintenance, renovation, or remodeling of a nonconforming structure.[3] [ss. 59.69 (10e) (b) and 62.23 (7) (1k) (a) 2., Stats.]

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

With respect to county zoning ordinances, the Act 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 Act 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 Act 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.

Variances

Under **prior law**, generally unchanged by the Act, 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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[3] For this purpose, "nonconforming structure" means a dwelling or other building that existed lawfully before the prior zoning ordinance was enacted or amended, but that does not conform with one or more provisions in the prior 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.]

T**he Act** 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,[4] 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,[5] that strict compliance with a zoning ordinance would leave the property owner with no reasonable use of the property in absence of a variance.

USE AND CONVEYANCE OF SUBSTANDARD LOTS

Prior law did not specifically prohibit restrictions relating to building on lots that are smaller than a prior minimum lot size requirement.[6]

Notwithstanding any other law or rule, or any action or common law proceeding, **the Act** 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.[7]
- 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

Prior law did not specifically limit local authority regarding the merger of commonly owned lots.

The Act 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.

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[4] The Act 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.

[5] The Act defines "use variance" to mean a variance granted for the use of land for a purpose that is prohibited or not otherwise allowed.

[6] 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.

[7] The Act 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.

DISPLAY OF THE UNITED STATES FLAG IN A HOUSING COOPERATIVE OR HOMEOWNERS' ASSOCIATION

Prior law, unaffected by the Act, 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.] Prior law did not impose a similar restriction on housing cooperatives or home owners' associations.

The Act 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 Act 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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