

Aldermen Should not Abdicate Their Duties - A Case Study Featuring Alderman Brey

No doubt about it: the Manitowoc Common Council has the right to grant a Conditional Use Permit

- **If** the use proposed by an applicant is among those listed in the City's Code of Ordinances as a conditional use in the particular zoning category

And

- **if** the applicant has met its burden of proving, by substantial evidence, that it can meet the requirements established by the Common Council,

And

- **if**, pursuant to Section 15.370(27)(c) of Manitowoc's Municipal Code, "the Common Council has considered whether the requested use:
 - A. is reasonably necessary for the convenience and welfare of the public.
 - B. Is in harmony with the character of the surrounding area.
 - C. Will have a minimal effect or no effect on the surrounding property values . . ."

The council has that right, without question.

However . . .

In 2023, Lotus Recovery Homes (Lotus) applied for a conditional use permit for its Lake Street operation, which it had run without a permit for approximately two years. Following a well-attended public hearing, the council began deliberations, starting with Alderman Brey. Mr. Brey recited a rendition of Wisconsin's "Act 67", discussed his preference that local residents and officials be free to make decisions without the requirements of Act 67, and then said:

"But we have to follow the law. One of my big concerns is that if we deny this conditional use permit tonight, and it is failed, I'm not encouraging Lotus or anyone for that matter, but there's an opportunity to sue to get this conditional use permit put into place and I'll all but guarantee that it will be put in place by a circuit court. So, with that, I am going to support this tonight."

With this position, Mr. Brey showed a thorough ignorance of the options available to him that evening as a council member. Mr. Brey's hands were not tied by Act 67. He tied his own hands with his interpretation of those parts of the law he chose to pay attention to. He abdicated his duties. Had Mr. Brey correctly interpreted Act 67, he would have realized that it gave him power because it required that Lotus first meet its burden of proving it would comply with the council's requirements.

Below is a small sampling of *other* positions and actions Mr. Brey could have taken as a member of the Common Council -- instead of

we must approve or we will get sued and lose.

- "The City Attorney is present tonight. I request we seek his guidance about our rights and obligations regarding this application. While I

feel I have a basic understanding of how Act 67 applies, I'm not a lawyer and I think it would benefit the council to use its resources and get advice from our City Attorney before we proceed further. If he doesn't feel prepared to provide a thorough analysis tonight, then I will move to postpone our consideration until we receive that analysis from him and have had a chance to consider it."

- "The council can't just grant whatever use it might wish. Our citizens and property owners have the right to expect that we will permit only those conditional uses expressly listed for the particular zoning category. When Lotus was asked to define the proposed use in its application, it just said "Lotus Recovery Homes," which is meaningless. But it does reveal that the principal purpose of the proposed use is substance abuse treatment support, *not housing*. I question whether a property owner in our zoning districts that allow "transitional housing," could ever have been on notice that their district would have numerous unlicensed operations called "recovery residences." So, I propose that this matter be postponed until the council has the benefit of an opinion from the City Attorney as to whether the circuit court would agree that the proposed use as a recovery residence is truly "Transitional Housing" -- as our code of ordinances defines that. We owe that to every property owner. If the City Attorney needs to investigate the actual use before issuing an opinion, that's fine. I expect Lotus will cooperate. Lotus has been there for two years and there should be records of all significant matters. We don't need to rush into a decision. We may wish to receive our legal counsel's opinion in closed session."
- "For me, the fact that Lotus has used this property illegally for two years is a disqualifier. And to now allow a 50% increase of this illegal

use seems to reward this conduct. Whether the illegality was intentional or just negligent, an operator in that business should know better. It's easy to say after the fact that the previous board messed up. If I must fit my position within the constraints of Act 67, then it is my position that, with its long-term illegal use, Lotus has failed to provide substantial evidence that it will meet the requirements of the CUP."

- "Several years ago, when I was on the council, CORE Treatment and Holy Family Memorial Hospital approached us for a CUP for its substance abuse facility near the hospital. We granted the permit but required, before CORE could use the property, that it become licensed with the State of Wisconsin Department of Health Services as a Community-based Residential Facility. That requirement has proven successful for that location. It has allowed the City, which has no regulations regarding "recovery residences," to use the expertise, authority and resources of experts and devoted employees at the State of Wisconsin to monitor and regulate the operations – all without cost to the city. This is for the benefit of *both* the facility's residents and the neighboring property owners. I will move that we add this same CBRF requirement to Lotus' Lake Street CUP. Lotus can accept it or not."
- "It's my understanding that, under Act 67, the applicant for a CUP has the burden of proving, by 'substantial evidence,' that it can meet the requirements of the CUP. The applicant must clear this hurdle before any obligation shifts to the council to provide 'substantial evidence' to support a denial. Perhaps the City Attorney can give us some input as to whether my understanding is correct. But even our code says so. Section 15.370 says:

“The applicant must demonstrate by substantial evidence that the application and all requirements and conditions established by the city are or shall be satisfied.”

To meet that burden, Lotus has provided us with a single paragraph about its proposed use. We really have very little idea what will go on there. Consider our very first requirement: that the facility must be staffed with someone from Lotus at all times when residents are present. Lotus has given us absolutely no information about how it plans to meet this requirement. Where’s the substantial evidence? When The Crossing came to us for its Park Street facility, they assured us, in writing, that they were prepared to devote two full-time employees. One would work four 24-hour shifts consecutively and the other would work three 24-hour shifts. The Crossing also assured us that, if neither of such employees could be present, The Crossing would use “another qualified and trained staff person” to monitor and guide the residents. To me, Lotus’ failure to even mention its staffing plans shows they have failed to provide substantial evidence they can meet the CUP requirements. *This isn’t good for the residents themselves.* The Crossing said that its devoted employee would “provide safety, structure and stability as she facilitates daily life and operations.” So, I will vote to oppose this application due to its lack of substantial evidence that the very first requirement will be met.”

- “Lotus’ proposed use is a change of use under our zoning code. This had been a 3-family residence and it will no longer be that. Under §15.430 of the Code of Ordinances, the proposed change of use requires compliance with the City’s off-street parking requirements. I

have no idea why, although such a requirement was put in place for Lotus' Park Street and Marshall Street facilities, no such requirement was suggested here by the City Planner. In any case, it seems that other property owners have the right to expect that our zoning code regarding parking space requirements will be enforced by the Common Council; everyone else has to live with it. If, in this location, doing so would be a hardship on Lotus, then Lotus can apply for a variance and allow that process to conclude before we allow Lotus to re-commence its use of Lake Street. So I will move to add an off-street parking requirement to the CUP, requiring the number of legal off-street parking spaces called for under code section 15.430. If Lotus needs a variance to comply with the code, then let Lotus obtain the variance."

- "To me, Lotus' illegal operation at Lake Street for two years is disturbing. They should have known better. Section 15.630, subsection 2 of our zoning code says:

Violation of any provision of this chapter, including failure to comply with any regulatory measures or conditions of the Plan Commission, Board of Appeals, or other governmental body or official exercising authority under this chapter, shall be subject to a forfeiture not to exceed \$2,000. Each day such violation continues shall be deemed a separate offense.

I think that \$2,000 per day would be an unduly harsh penalty. But I think it's important to send a clear message that, unless a use is an expressly permitted use under a zoning category, a property owner must first obtain a conditional use permit. I will move that we add a

requirement to the CUP that Lotus must pay a forfeiture of \$2,000 before it re-commences use of Lake Street.”

- “From the little I can glean from Lotus’ submission, it seems that its proposed use presents several public safety issues. Lotus indicates that they obtain random urine screenings for illicit drugs and that their residents are at a stage of addiction treatment. We have information that there have been several police visits to the site during Lotus’ illegal operation of it. The City Planner indicates that Lotus works with the County’s Drug Court, which means that at least some of the residents have recently been convicted of crimes but haven’t been sentenced yet. I personally think Drug Court is a benefit to our community. But that’s not the issue here. I will move that we postpone this decision and refer the matter to our Public Safety Committee and ask them to further investigate this. They should be asked to determine whether the City or Drug Court has a need for 15 more beds and, if so, whether Lotus is the best operator the City can find. The Public Safety Committee can then report back to us with suggestions for CUP requirements that would assure a high level of public safety.”