

# Can a City Base Its Land Use Decision on the Identity of the End User?

Anecdotes we've heard on the street:

A zoning official requires, as part of the application, that the applicant identify the end user.

A plan commissioner tells an applicant: "You've got a great track record in this city, and that's the only reason we're rezoning your land. We wouldn't have done this for an outsider."

A plan commissioner states that she'll support a rezoning petition if it the occupant is a locally based store, but not if it's a national chain.

Can municipal officials base their land use decisions on such criteria? In Wisconsin, the answer is a resounding NO. The reason? Land use decisions must be based on the land use, not the land owner. The theories underlying this rule are:

Basing a land use decision on the identity of the end user violates the constitutional right of due process by using a classification that is unrelated to any public purpose.

A city that intentionally and arbitrarily treats an applicant differently from others similarly situated violates the constitutional right of equal protection.

Basing a land use decision on the identity of the end user is outside the scope of the city's authority.

The Wisconsin court of appeals has prohibited consideration of the applicant's past, even where the applicant was a demonstrably bad actor. In *Staege v. Town of Norway*, the Wisconsin court of appeals barred consideration of the applicant's past business practices and reputation even where the applicant had illegally moved junk onto his property and had a long history of past zoning violations (including, even, some jail time).

The court of appeals has even held consideration of good character to be a no-no. In *Keen et al. v. Dane County Board of Supervisors*, the court held that a member of

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the Dane County Zoning and Natural Resources Committee created an impermissibly high risk of bias when he wrote a letter to the Committee stating that the applicant "has always stood out above the rest in their efforts and caretaker of the land."

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