

Zoning Changes May Terminate Conditional Use Permits

Landowners and businesses operating under a conditional use permit will need to more closely monitor changes to the underlying zoning on their properties following a recent Wisconsin Court of Appeals decision. A conditional use permit (CUP) is a land use device by which a use of land is permitted subject to specific conditions established for that particular use. Typically, CUPs are used when a use has the potential to adversely impact a neighborhood such that it should not be a permitted use, but the use is not so detrimental that it must be prohibited. CUPs are generally viewed as running with the land such that they do not expire or come to an end except under the terms of the CUP or when there is a material violation of the permit's conditions. The May 25 decision in *Hussein v. Village of Germantown Bd. of Zoning Appeals*, (2011 WI App 96) establishes that if a zoning code amendment eliminates the use under which a conditional use permit has been granted, the CUP is void and the use is treated as a legal nonconforming use.

In 1973, the Village of Germantown granted a CUP to Germantown Auto Sales allowing a repair shop, service station and auto sales with parking limited to 25 cars. In 1988, a zoning code amendment eliminated auto sales as a conditional use in the applicable zoning district. Hussein acquired Germantown Auto Sales in 2002. In 2009, Hussein requested that the zoning district be changed to one that would allow auto sales as a conditional use and further requested an increase in parking capacity to 110 cars. The Village denied both requests and demanded that Hussein comply with the 1973 CUP. Hussein challenged the Village's decision before the Board of Zoning Appeals which found that the 1973 CUP was still valid. Hussein filed a certiorari appeal.

The circuit court ruled that Hussein's use became a legal nonconforming use as a result of the 1988 code amendment. The court of appeals concurred. The decision notes that the village may only grant a conditional use permit for a use that is specified as a conditional use in the zoning code. When the 1988 amendment eliminated auto sales as a conditional use, there was no authority upon which to grant the CUP and it was voided. Thereafter, the use of the property was governed not by the CUP, but rather as a legal nonconforming use.

The consequence to the village is the loss of the 25-car parking restriction. Once

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the zoning code was amended to eliminate the specified conditional use, the village lost its ability to enforce the conditions contained in the CUP. The consequence to Hussein is the perilous task of operating his business within the parameters of a legal nonconforming use. Although Hussein's business is no longer subject to the conditions of the original CUP, his business is now evaluated under the principles of a nonconforming use. Wisconsin law disfavors nonconforming uses and attempts to eliminate the use as soon as possible, without compromising the property rights of the landowner. As a legal nonconforming use, Hussein may not expand or enlarge his business by an identifiable change in the use. An improper expansion, enlargement or change in the nonconforming use results in a land use "death penalty"—the nonconforming use will no longer be permitted and that use must terminate.

But if expansion is simply the result of an increase in the historically allowed use, this will be allowed, albeit subject to other regulatory provisions. The village's removal of auto sales as a conditional use meant the end of the parking restriction originally placed in the CUP and changed the circumstances to the pitfalls of nonconformity.

Although conditional uses and nonconforming uses present complicated issues for a landowner, these issues are analyzed every day by [Reinhart's real estate attorneys](#). Contact your Reinhart attorney if you have questions concerning these crucial topics.

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